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

Report of the Panel

The report of the Panel on *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* is being circulated to all Members, pursuant to the *DSU*. The report is being circulated as an unrestricted document from 7 March 2003 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Members are reminded that in accordance with the *DSU* only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. INTRODUCTION

1.1 On 21 December 2000, Brazil requested consultations with the European Communities pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), Article XXIII of the *General Agreement on Tariffs and Trade 1994* (the "*GATT 1994*") and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") concerning the EC anti-dumping measures imposed in respect of imports of malleable cast iron tube or pipe fittings from Brazil.[1] The European Communities and Brazil held consultations on 7 February 2001, but failed to settle the dispute.

1.2 On 7 June 2001, Brazil requested the establishment of a panel pursuant to Article XXIII of the *GATT 1994*, Article 17 of the *Anti-Dumping Agreement* and Article 6 of the *DSU*.[2]

1.3 At its meeting on 24 July 2001, the Dispute Settlement Body (the "DSB") established a Panel in accordance with Article 6 of the *DSU* to examine the matter referred to the DSB by Brazil in document WT/DS219/2. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS219/2, the matter referred to the DSB by Brazil in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 On 5 September 2001, the parties agreed to the following composition of the Panel[3]:

Chairman:	Mr. Maamoun Abdel-Fattah
Members:	Ms. Deborah Milstein
	Mr. G. Bruce Cullen

1.5 Chile, Japan, Mexico and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.6 The Panel met with the parties on 4-5 December 2001 and 11-12 June 2002. It met with the third parties on 5 December 2001.

1.7 The Panel submitted its interim report to the parties on 7 October 2002. The Panel submitted its final report to the parties on 10 December 2002.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition by the European Communities of anti-dumping measures on imports of malleable cast iron tube or pipe fittings from Brazil.

2.2 Following the filing in April 1999 of an application for an anti-dumping investigation by the Defence Committee of Malleable Cast Iron Pipe Fittings Industry of the European Union[4], the

[1] WT/DS219/1.
[2] WT/DS219/2.
[3] WT/DS219/3.
[4] Exhibit BRL-1. The EC producers on whose behalf the application was made – indicated as representing 100 per cent of the EC industry -- are: Georg Fischer Fittings Gmbh. of Austria; R. Woeste Co. Gmbh & Co. KG. of Germany; Ferriere e Fonderie di Dongo SPA. and Raccordi Pozzi Spoleto S.P.A. of Italy; Accesorios de Tuberia, S.A. of Spain; and Crane Fluid Systems of the United Kingdom.

European Communities published, on 29 May 1999, a Notice of Initiation in its Official Journal[5], initiating an investigation on malleable cast iron tube or pipe fittings originating in: Brazil, China, Croatia, the Czech Republic, the Federal Republic of Yugoslavia, Japan, South Korea and Thailand.[6] Industria de Fundicao Tupy Ltda. ("Tupy") was the only Brazilian exporting producer investigated. Imports from certain third countries, including Bulgaria, Poland and Turkey, were not included in the investigation.[7]

2.3 The investigation of dumping and injury covered the period from 1 April 1998 to 31 March 1999 ("Investigation Period"). The EC examination of "trends" in the context of the injury analysis covered the period from 1 January 1995 to 31 March 1999 ("Injury Investigation Period").[8]

2.4 A 42 per cent devaluation of the Brazilian Real occurred in January 1999.

2.5 Numerous communications and exchanges, including the questionnaire and hearings, occurred between the European Communities and Tupy and/or Tupy's legal counsel in the course of the investigation.[9] A verification visit occurred at the premises of Tupy in September 1999.[10] Communications also occurred between government officials of the European Communities and Brazil relating to aspects of the investigation.[11]

2.6 On 28 February 2000, the European Communities imposed provisional anti-dumping duties on imports of malleable cast iron tube or pipe fittings from, *inter alia*, Brazil as reflected in the Provisional Regulation.[12]

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[5] O.J. C 151/21, 29 May 1999. Exhibit BRL-2.

[6] The proceeding against Croatia and the Federal Republic of Yugoslavia was terminated. See Commission Regulation (EC) No. 449/2000, O.J. L 55, 29.02.2000 (the "Provisional Regulation"), Exhibit BRL-12, para. 7.2.2; Council Regulation (EC) No. 1784/2000, O.J. L 208, 18.08.2000 (the "Definitive Regulation"), Exhibit BRL-19, para. K.2. Turkey was listed in the application, but the European Communities decided to exclude it from the investigation as its market share was considered *de minimis* pursuant to Article 5(7) of the Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community. O.J. L 56/6, 6 March 1996 (the "EC basic Regulation"). See Notice of Initiation, *supra*, note 5.

[7] Definitive Regulation, Exhibit BRL-19, paras. 7 and 8.

[8] Provisional Regulation, Exhibit BRL-12, para. 6.

[9] These included the following that have been submitted in these Panel proceedings as forming part of the record of the EC investigation (in chronological order): 15 July 1999: first submission of Tupy in the EC investigation, Exhibit BRL-5, and Tupy's questionnaire response, Exhibit BRL-4; 9 August 1999: EC deficiency letter to Tupy, Exhibit BRL-6; 20 August 1999; Tupy's reply to deficiency letter, Exhibit BRL-7; 22 November 1999: second submission of Tupy in the EC investigation, Exhibit BRL-9.; 7 December 1999: hearing and third submission of Tupy in the EC investigation, Exhibit BRL-10; 28 February 2000: EC Disclosure Preceding the Provisional Regulation, Exhibit BRL-11; 30 March 2000; fourth submission of Tupy, Exhibit BRL-13; 29 May 2000: hearing, Exhibit BRL-14; 30 May 2000: Tupy's post-hearing document, Exhibit, BRL-15; 31 May 2000: EC Disclosure Preceding the Definitive Regulation, Exhibit BRL-16; 13 June 2000: fifth submission of Tupy in the EC investigation, Exhibit BRL-17; 20 July 2000: EC transparency letter, Exhibit BRL-18.

[10] An EC letter dated 7 September 1999 to Tupy's legal counsel concerning the verification was submitted in these Panel proceedings as Exhibit BRL-8.

[11] These included: meetings between EC and Brazilian officials that occurred on: 23 March 2000 (including the EC Trade Commissioner, Mr. Lamy, and a Brazilian delegation that included Brazil's Minister of Development, Industry and Trade and the Executive Secretary of the Brazilian Foreign Trade Chamber, reflected in Exhibit EC-6); 9 May 2000 (preparatory meeting, reflected in Exhibit EC-2); and 25-26 May 2000 (the European Community-Brazil Joint Committee, reflected in Exhibit EC-4) and written communications from Brazil's Ambassador in Brussels to EC officials dated 10 December 1999, 29 January 2000 and 23 February 2000 (Exhibits EC-27-29).

[12] Provisional Regulation, Exhibit BRL-12.

2.7 On 11 August 2000, the European Communities adopted the Definitive Regulation imposing, *inter alia*, definitive anti-dumping duties of 34.8% on imports of malleable cast iron tube or pipe fittings from Brazil.[13]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. BRAZIL

3.1 Brazil requests that the Panel:

(a) find that the European Communities acted inconsistently with Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*, summarised as follows:[14]

- that the initiation of the proceeding against imports of malleable cast iron tube or pipe fittings originating in Brazil was inconsistent with Article 5.2, 5.3, 5.8 and 6.2 of the *Anti-Dumping Agreement*;[15]
- that the imposition of anti-dumping measures by the European Communities on Brazilian imports is inconsistent with Article VI of *GATT 1994* and Article 1 or Articles 11.1 and 11.2, and Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement*;
- that the imposition of anti-dumping measures by the European Communities on Brazilian imports is inconsistent with Article VI of *GATT 1994* (particularly Articles VI:1 and VI:4) and Articles 2.2, 2.4, 2.4.1, 2.4.2, 6.4, 9.3, 12.2 and 12.2.2 of the *Anti-Dumping Agreement*;[16]
- that the imposition of the anti-dumping measures by the European Communities on the Brazilian imports is inconsistent with Article VI of GATT and Articles 3.1, 3.2, 3.3, 3.4, 3.5, 6.2, 6.4, 6.6, 6.9, 12.2 and 12.2.2 of the *Anti-Dumping Agreement*; and
- that the imposition of anti-dumping measures by the European Communities on the Brazilian imports is inconsistent with Article 15 of the *Anti-Dumping Agreement*.

(b) recommend that the European Communities bring its measures into conformity with Article VI of *GATT 1994* and the *Anti-Dumping Agreement*.

(c) suggest that the European Communities repeal its anti-dumping duty order and reimburse all anti-dumping duties collected thereunder.

(d) reject for being unfounded the European Communities' request for a preliminary ruling alleging that certain claims in Brazil's first written submission have not been properly covered by its request for the establishment of a Panel and reject for being unfounded the European Communities' request for a preliminary ruling alleging that certain claims in Brazil's first written submission are vague. Alternatively, if the Panel were to find that some of the EC requests might have some merit, Brazil requests that any final decision to be taken by the Panel regarding the European Communities' requests would only be made once the full scope, substance and all the merits of this dispute have been properly and conclusively assessed.

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[13] Definitive Regulation, Exhibit BRL-19.

[14] Brazil first written submission, para. 938.

[15] Brazil subsequently withdrew its claims related to the application and initiation of the investigation under Article 5.2, 5.3, 5.8 and 6.2 of the *Anti-dumping Agreement* (referred to by Brazil as "Issue 2"). Brazil second written submission, para. 24.

[16] Brazil subsequently withdrew its claims related to advertisement and promotional expenses under Article 2.4 (referred to by Brazil as "Issue 7"). Brazil second written submission, para. 75.

(e) reject the European Communities request that the Panel rule that certain Exhibits submitted by Brazil are inadmissible.[17]

(f) make a preliminary ruling that the European Communities amend the text of the European Communities' first written submission so that references therein to Brazil's first written submission be made to the actual text of Brazil's first written submission as originally submitted by Brazil.[18]

(g) rule that Exhibit EC-12 is not part of the record of the EC investigation and is not properly before the Panel.[19]

B. THE EUROPEAN COMMUNITIES

3.2 The European Communities:

(a) maintains that its submissions comprehensively refute Brazil's claims and requests the Panel to make appropriate rulings.

(b) believes that it would not be appropriate for the Panel, should Brazil successfully establish one or more of its claims, to make suggestions regarding the repeal of the anti-dumping order and the reimbursement of all anti-dumping duties.[20]

(c) requests that the Panel make preliminary rulings dismissing certain claims of Brazil as either overly vague, outside the Panel's terms of reference, or both.[21]

(d) requests that the Panel make a preliminary ruling that certain Exhibits submitted by Brazil are inadmissible as Article 17.5(ii) of the *Anti-Dumping Agreement* provides that the Panel must examine the matter based upon the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.[22]

(e) requests that the Panel reject Brazil's request for a preliminary ruling to amend the text of the European Communities' first written submission.[23]

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[17] Additional oral statement of Brazil regarding Exhibits BRL-47-52 - First Meeting, Annex D-4.

[18] Brazil request for preliminary ruling, Annex A-3.

[19] Brazil second written submission, paras. 226-233 and 252; Comments of Brazil on EC responses to Panel question 114 following the first Panel meeting, Annex E-6.

[20] EC first written submission, paras. 570-571. The European Communities subsequently submits that should the Panel find infringements arising only from the claims under Issues 9 (concerning currency conversion), 10 (concerning PIS/COFINS indirect taxes) and 11 (concerning "zeroing"), no finding of nullification or impairment would be appropriate. See EC second oral statement, paras. 162-165; Executive summary of EC oral statement – second meeting, Annex D-9, para. 32. The European Communities also requests that, if the Panel were to find that the European Communities acted in breach of its WTO obligations by applying zeroing in the calculation of Tupy's anti-dumping margin, or by not re-examining Tupy's margin of dumping following the devaluation, the Panel should make no recommendation in respect of these findings as the European Communities would already have done what was necessary to remedy the situation by initiating a review in December 2001 in respect of the anti-dumping measures imposed by the Definitive Regulation (Exhibit EC-26). See EC second oral statement, para. 168 and EC answer to Panel question 144; Executive summary of EC oral statement – second meeting, Annex D-9, paras. 33 and 34.

[21] EC first submission, paras 19-24. Executive summary of EC first written submission, Annex A-2, paras. 5 and 6. EC second oral statement, para. 9.

[22] See executive summary of EC oral statement, first meeting, Annex D-2, para. 28.

[23] EC reply to Brazil's request for preliminary ruling, Annex A-4.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as submitted or as summarised in their executive summaries as submitted to the Panel, are attached as Annexes (see List of Annexes, page vi).

4.2 The parties' answers to the Panel's questions and their comments on each other's answers are also attached as Annexes (see List of Annexes, page vii).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of those third parties which have made submissions to the Panel, i.e. Chile, Japan, and the United States, are attached to this Report as Annexes. The US responses as third party to the Panel's questions are also attached as Annexes (see List of Annexes, pages ii and iii).

VI. INTERIM REVIEW

6.1 On 7 October 2002, we submitted our interim report to the parties. On 15 October 2002, Brazil submitted a written request for review of precise aspects of the interim report. On 22 October 2002, the European Communities submitted written comments on Brazil's request for interim review.

6.2 We have modified aspects of our report in light of the parties' comments where we deemed it appropriate. Those modifications limited to arguments made by Brazil are dealt with in section A.1 below. Those modifications involving our findings are dealt with in section A.2 below.

6.3 We have also made certain necessary technical corrections.

6.4 For greater clarity with respect to our terms of reference, we have appended Brazil's Panel request to our report.

A. REQUEST OF BRAZIL

1. Panel's treatment of certain of Brazil's arguments

6.5 **Brazil** requested that we modify our summary of its arguments in several places to more fully and/or accurately reflect Brazil's arguments.

6.6 The **European Communities**' view is that the Panel has properly represented those arguments, and that few changes would be justified.

6.7 In light of the parties' comments, the **Panel** has made modifications to our summary of Brazil's arguments in paragraphs 7.80, 7.121, 7.234, 7.298, 7.325, 7.339 and 7.343. We have also made the technical revision suggested by Brazil in footnote 167.

6.8 With respect to Brazil's suggested modification of its argument in paragraph 7.309 to reflect Brazil's argument that Brazil denies that an alleged examination, which is only implicitly (if at all) deductible from the other injury factors examined, can be considered a well-reasoned and meaningful analysis in view of the Appellate Body's findings in *US – Hot-Rolled Steel*,[24] our analysis treats separately the issue of whether the European Communities addressed each Article 3.4 factor and the adequacy of the EC examination of Article 3.4 factors. We therefore decline to make the suggested

[24] Brazil cites Brazil second written submission, para. 230.

modification in this paragraph. We assess the adequacy of the EC's implicit evaluation of "growth" in conjunction with our assessment of the EC's evaluation of other Article 3.4 factors.

2. Panel's treatment of certain aspects of its findings

(a) Terms of reference: Brazil's "claims" under Article 6.9

6.9 **Brazil** submits that the Panel's ruling that Article 6.9 is outside our terms of reference makes no reference and takes no account of Brazil's argument that Article 6.9 was raised with the European Communities during consultations and that Brazil's hand-written notes of the consultations meeting, which were offered to the Panel but to which Brazil alleges we did not react, clearly demonstrate that this was indeed the case.[25]

6.10 The **Panel** has modified and supplemented paragraph 7.15 in light of Brazil's comments.

(b) Exhibits BRL-47-52

6.11 In respect of our ruling that Exhibits BRL 47-52 are inadmissible in these Panel proceedings (paras. 7.28 *ff*), **Brazil** asserts that we "completely ignore" Brazil's reasoning for putting forward these Exhibits. Brazil argues that these did not relate at all to any substantive claim (as wrongly assumed by the Panel) and were thus not concerned by Article 17.5(ii) at all. Brazil recalls that it had submitted these Exhibits in order to: refute the EC's contention in its first written submission on Brazil's "wild allegations" (Brazil submits that, in this respect, these Exhibits demonstrated that Brazil's claims were factually correct); and demonstrate to the Panel that the EC's refusal to investigate the same claims which had been made by Tupy during the EC investigation clearly indicated the failures of the EC's investigating authority to conduct a comprehensive investigation and examination of facts presented to it by the Brazilian exporter and by other interested parties.

6.12 With respect to the reason for which Brazil submitted the Exhibits in question, the **Panel** refers to Brazil's argumentation. For example, in its additional oral statement regarding Exhibits BRL-47 through 52 at the first Panel meeting[26], Brazil indicates that it was uncertain as to whether this information existed "in the same way" during the EC investigation, that the European Communities was asked to examine certain information in the course of the investigation, but that Brazil could find no indication that the EC had conducted an adequate examination. We find support in Brazil's argumentation in these proceedings for our understanding that Brazil submitted these Exhibits with a view to having us examine the EC injury and causation determinations on the basis of facts other than those made available in accordance with appropriate domestic procedures of the European Communities. In light of these considerations, we do not believe that we have ignored Brazil's reasons for putting forth these Exhibits. We have, however, clarified our view in paragraph 7.35.

(c) Issue 3: currency devaluation

6.13 In respect of paragraph 7.104, **Brazil** states that it has never suggested that the European Communities should have focused exclusively on data from the end of the investigation period.

6.14 The **Panel** recalls Brazil's argument that the European Communities imposed measures in the present case "regardless of its findings for the last months of the investigation where the actual situation did not require counter-measures."[27] We further recall that, in response to Panel questioning concerning the time period to which Brazil's claim relates, Brazil clarified that it viewed the "dividing line" as the date of devaluation. Brazil continued: "As of that date and in view of the lasting effect of

[25] Brazil refers to statements made by Brazil during the first meeting with the Panel.
[26] Annex D-4.
[27] See Brazil second written submission, para. 28 and Brazil first written submission, paras. 162-203.

the devaluation, any proper imposition of anti-dumping measures, or a decision to maintain such measures had to be assessed, as the case may be, against the need to offset or counteract dumping."[28]

6.15 We therefore understand Brazil to suggest that the European Communities should have focused exclusively or particularly on the situation following the devaluation – that is, the latter part of the investigation period -- in considering whether to impose AD measures. We have slightly modified this paragraph in light of Brazil's comments.

(d) Claims 12 and 15: import volume trends and cumulation

6.16 In respect of our finding in paragraph 7.265, **Brazil** submits that it has *not* argued that the investigating authority's determinations under Article 2.4 are relevant under Article 3.3. Brazil states that it has argued that, on the basis of its determination under Article 2.4, the European Communities was fully aware of the Brazilian exporter's distribution channels on the EC market and, thus, of the fact that almost one third of the sales were made to OEM-customers.[29] In view of the EC's statement quoted in paragraph 280 that "[a]ll of the countries concerned operate within the *same or similar* channels of distribution" (emphasis added), Brazil argues that it logically follows that either the EC's conclusion is incorrect or (at least) some exports from all of the other countries concerned were made at the OEM-level of trade. Brazil submits that given that the European Communities has not even argued that the latter factual situation prevails, the Panel does not discuss this important part of Brazil's argument at all.

6.17 The **Panel** notes that the EC determination cites the following as confirmation for its statement that all the countries concerned operate within the same or similar channels of distribution: "some traders imported or purchased the product under consideration from both various countries concerned and the Community producers".[30] Given that there is, as we have stated, no explicit requirement in Article 3.3(b) to examine levels of trade as a component of the "conditions of competition" examination and thus that there is no guidance as to the manner in which such an examination is to be conducted, and that the OEM sales in question did not pertain to all (or most) of the sales of the product concerned in the EC market, we do not believe that these EC statements are, in themselves, inherently contradictory. We believe that we have adequately addressed Brazil's argument in this connection. We therefore make no modification.

(e) Issue 13: price undercutting

6.18 In respect of paragraph 7.283, **Brazil** submits that the Panel refers to the EC's assertion that the practical result of "zeroing" in the EC's price undercutting analysis in this case was *de minimis* (0.01%). However, according to Brazil, the Panel is not reflecting the fact that neither Brazil nor the Brazilian exporter were able to comment on the accuracy of the EC's assessment (*i.e.* whether the practical result was *de minimis* or not), as the European Communities did not disclose its calculations with regard to the "negative" undercutting margins.[31]

6.19 The **European Communities** contends that, as it made clear in its second oral statement,[32] the information necessary for calculating the EC's use of 'zeroing' in this context was available to Tupy in data provided in the Provisional disclosure (Exhibit BRL-11) document, Annex III, part 4.

[28] See Brazil's response to Panel Question 22 following the first Panel meeting, Annex E-1.

[29] According to Brazil, this is the only reason why Brazil refers to the determination of dumping in paragraph 214 of its second written submission.

[30] Definitive Regulation, Exhibit BRL-19, recital 73.

[31] Brazil refers to Brazil second written submission, paragraphs 146 and 147.

[32] The European Communities refers to EC second statement, paragraph 95.

According to the European Communities, Brazil has made no attempt to refute this statement, nor has it indicated, even if its allegation were true, how its claim would be affected.

6.20 The **Panel** recalls that due to our finding that the European Communities has not violated its obligations under Articles 3.1 and 3.2, we did not consider it necessary to address the practical result of zeroing in the EC consideration of undercutting in this case. It is consequently not necessary for us to address Brazil's arguments concerning alleged non-disclosure of certain data, which, in any event, would seem to relate more to disclosure and transparency, for example, under Article 6, than to the substance of the EC undercutting calculation under Article 3. We do not understand Brazil to have made any such allegations in this context. For these reasons, we decline to make any modifications in this respect.

(f) Issue 16: injury

6.21 In respect of para. 7.327, **Brazil** submits that the Panel does not take into account Brazil's argument contained in paragraph 237 of Brazil's second written submission, which states that: "Brazil recalls that Article 3.6 provides that the effect of the dumped imports 'shall be assessed in relation to the domestic production of the like product'. According to Brazil, the European Communities has never claimed that 'separate identification of that production was not possible' and, in view of the other injury factors specifically pertaining to the like product, was not even able to do so."

6.22 The **Panel** has modified this paragraph to expressly reflect and more fully address Brazil's argument.

6.23 In respect of paragraph 7.332, **Brazil** asserts that the sentence referring to investments "Brazil observes that the absolute value of the EC producers' investments decreased by 7% between 1995 and the IP" is from Brazil's point of view meaningless and should be replaced by certain language in paragraph 282 of its second written submission.

6.24 The **Panel** has not deleted the former statement which is taken from paragraph 713 of Brazil's first written submission, but has added certain language to reflect Brazil's argument made in paragraph 282 of its second written submission.

6.25 **Brazil** also asserts that, with respect the issue of data discrepancies, Brazil's argumentation has not been properly presented and requests that we insert certain language. Firstly, Brazil pointed out in its first written submission that the data related to inventories and discernible from the EC producers' non-confidential questionnaire responses was contradictory.[33] Given that the European Communities provided during the dispute settlement processing the domestic industry's exports allowing Brazil to check the general consistency of the EC data, Brazil recalls that it provided a reconciliation in its second written submission:[34] Brazil states that in relation to figures provided for 1998, the said discrepancy represents 3.4% of the EC consumption (2,120/62,232 tonnes), 4.3% of the domestic production (2,120/49,875 tonnes), 5.5% of the EC producers' domestic sales (2,120/38,670 tonnes), 12.1% of the imports under investigation (2,120/17,581 tonnes) and 39.3% of the other third

[33] Brazil refers to paragraphs 716 to 724 of Brazil's first written submission.

[34] Brazil refers to its second written submission, para 286. Brazil asserts that it is important to note that this test is used to verify the general consistency of the EC's data and not only data related to the stocks. Indeed, according to Brazil, any discrepancy between ''input' (*i.e.* opening stock, production and purchases) and 'output' (*i.e.* domestic sales, exports and closing stocks) indicates that the figures related to **either** input **or** output (**or** both) are inaccurate. Stocks are used as a threshold against which the general consistency is measured.

country imports (2,120/5,388 tonnes).[35] Therefore, according to Brazil, paragraph 348 is misleading and reflects one-sidedly the EC's explanations.[36]

6.26 The **European Communities** objects to Brazil's misuse of this stage of the proceedings to introduce arguments that could have been made during its submissions to the Panel. According to the European Communities, Brazil appears to assume that presenting data in various relationships, so as to produce nominally higher and higher percentages, is itself a persuasive argument. The European Communities rejects this approach as empty rhetoric. The figures given by the European Communities in its second oral statement, and quoted by the Panel, refer to the discrepancies regarding stocks as a percentage of production levels. Of course, if they were compared to reported stocks they would be much higher. The European Communities argues that it presented the data in this way because, as it explained, and as the Panel reports, it believed that the discrepancy was due to the inclusion of scrap in the gross production figures. While the amount of scrap has an obvious direct relationship with production levels, it has no meaningful connection with existing stock levels. Brazil's arguments, even now, completely ignore this explanation. In view of Brazil's allegations that in 1998 the discrepancy would have amounted to 13% of production, the European Communities has reviewed the calculations. The precise figures are the following: 1996 - 1.3981%; 1997 - 1.4401% and 1998 - 4.2506 %. There is, therefore, a small difference with respect to the percentages originally reported by the EC for 1996 (1%) and 1998 (4%), which is probably due to the fact that only the percentages for those two years were rounded to one figure. On the other hand, the European Communities fails to understand how Brazil arrives at the percentage of 13 % for 1998. The correct figure for production in 1998 is 49.875 tonnes and not 16.300 tonnes. Indeed, Brazil itself states elsewhere that the percentage is 4.3%.

6.27 The **Panel** has made certain modifications in this paragraph to more fully reflect Brazil's arguments made in its second written submission. The record of the investigation indicates that the 1998 figure for production is 49 875 tonnes (and not 16 300 as Brazil seems to argue); the relevant figure is therefore 4% (and not 13% as Brazil seems to argue).

6.28 **Brazil** submits that a sentence should be added indicating that Brazil contested the EC's conclusions that the market for malleable fittings is "highly price sensitive", although the prices of imported fittings had demonstrably not affected the prices of the EC industry.

6.29 The **Panel** has modified paragraph 7.336 in light of these comments.

(g) Issue 17: causation

6.30 **Brazil** asserts that its arguments concerning the impact of data discrepancies concerning stocks on the EC's assessment of the consequential effects of the dumped imports on the EC industry were not fully reflected, and requests that we reflect its arguments made in paragraph 317 of its second written submission, as follows: "Moreover, Brazil observes that the EC correctly attributes the injury to one injury factor, *i.e.* the increase in stocks. However, given that the data used by the EC was manifestly inaccurate, Brazil submits the consequential effects of the dumped imports on the EC

[35] Brazil states that it is also to be noted that the domestic producers were also importers of the product concerned. Therefore, Brazil submits, Brazil's reconciliation, where the unknown volume of the EC producers' own imports is not included to the equation, is a very conservative (under) estimate of the discrepancy in the EC's data; Brazil refers to footnote 315 of Brazil's second written submission.

[36] Brazil submits that according to the EC assertion reprinted in paragraph 348 of the Interim Report (although without any reference to the source), the discrepancy "amount to 1% in 1996, 1.4% in 1997 and 4% in 1998". Brazil submits that, the EC's calculation for 1998 is incorrect: not 4% but 13% (2,120/16,300 tonnes).

industry were not properly established on the basis of positive evidence"; see Brazil's Second Submission, para 317."[37]

6.31 The **Panel** has inserted footnote 320 in order to reflect more fully Brazil's arguments made in paragraphs 316 and 317 of its second written submission and to clarify our findings.

6.32 **Brazil** alleges that paragraph 7.380 did not reflect its argumentation and suggests that we amend it, either by deleting a certain phrase , or by indicating the source of this phrase.

6.33 The **Panel** has modified our findings in paragraph 7.380 in response to Brazil's request that we indicate the source of our statement that we do not understand that Brazil has invoked Article 6.5 of the *Anti-Dumping Agreement*.

6.34 **Brazil** submits, in respect of paragraph 7.385, that the Panel combines two different sets of arguments into one. However, Brazil contests the EC's conclusion that the imports from Poland had *not* caused any injury to the EC industry, although the import volume from Poland increased significantly, Polish unit prices were undercutting the EC producers' prices and the EC classified the product as "highly price sensitive". Thus, according to Brazil, the Panel has not reflected Brazil's argumentation provided in paragraph 324 of its second written submission at all.

6.35 The **Panel** has modified paragraph 7.385 in order to more fully reflect Brazil's argument, and have expanded upon our findings in paragraphs 7.387-7.388.

6.36 **Brazil** argues that paragraph 7.409 did not reflect Brazil's arguments concerning the rate of decrease in consumption and requests that we amend it. Brazil further submits that this suggested amendment pointing out the EC's contradictory argumentation may also help to resolve the Panel's confusion which Brazil argues is indicated in paragraph 7.412, which Brazil suggests that we clarify by deleting a certain sentence.

6.37 The **Panel** has added certain language in paragraph 7.409 to reflect Brazil's argument concerning the rate of decrease in consumption from 1995-IP and we have clarified our findings in paragraph 7.412.

VII. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

7.1 In light of the claims and arguments made by the parties in the course of these Panel proceedings[38], we recall, at the outset of our examination, the standard of review we must apply to the matter before us.

7.2 Article 11 of the *DSU*[39], in isolation, sets forth the appropriate standard of review for panels for all covered agreements except the *Anti-Dumping Agreement*. Article 11 imposes upon panels a

[37] Brazil second written submission, paragraph 317.

[38] For example, EC first written submission, paras. 25-28; EC first oral statement, paras. 8-20.

[39] Article 11 of the *DSU*, entitled "Function of Panels", states: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…"

comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.3 Article 17.6 of the *Anti-Dumping Agreement* sets forth the special standard of review applicable to anti-dumping disputes. Certain elements of Article 17.6 of the *Anti-Dumping Agreement* complement -- or supplement -- the standard contained in Article 11 of the *DSU*. In particular, with regard to factual issues, Article 17.6(i) provides:

> "(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;"

7.4 With respect to legal questions of the interpretation of the *Anti-Dumping Agreement*, Article 17.6(ii) provides:

> "(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.5 Thus, together, Article 11 of the *DSU* and Article 17.6 of the *Anti-Dumping Agreement* set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[40]

7.6 In light of this standard of review, in examining the matter referred to us, we must evaluate whether the determination made by the European Communities is consistent with relevant provisions of the *Anti-Dumping Agreement*. We may and must find that it is consistent if we find that the European Communities investigating authority has properly established the facts and evaluated the facts in an unbiased and objective manner, *and* that the determination rests upon a "permissible" interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying anti-dumping investigation, nor to substitute our judgment for that of the EC investigating authority even though we may have arrived at a different determination were we examining the record ourselves.

2. Burden of Proof

7.7 We recall that the general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim.[41] In these Panel proceedings, we thus observe that it is for Brazil, which has challenged the consistency of the European Communities' measure, to bear the burden of demonstrating that the measure is not consistent with the relevant provisions of the Agreement. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[42] In this respect, therefore, it is also for the European

[40] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US-Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, paras. 54-62.

[41] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (*"US – Wool Shirts and Blouses"),* WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 337.

[42] *Ibid*.

Communities to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. In addition, we consider that both parties generally have a duty to cooperate in the proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.[43] We must draw inferences on the basis of all of the relevant facts of record, including, for example, where a party refuses to provide relevant information.[44]

B. PRELIMINARY AND PROCEDURAL ISSUES

1. Introduction

7.8 The parties each made requests for rulings on preliminary or procedural matters in this dispute. We turn first to the preliminary rulings requested by the European Communities. We then address the preliminary and procedural issues raised by Brazil.

2. Requests by the European Communities

(a) Alleged vagueness of Brazil's claims and scope of the Panel's terms of reference

7.9 The European Communities requests that we make preliminary rulings dismissing certain claims of Brazil as either overly vague or outside our terms of reference, or both.

(i) Alleged vagueness of certain claims by Brazil

7.10 At the first substantive meeting with the parties, we issued the following ruling in response to the EC request[45] relating to the alleged vagueness of certain claims by Brazil:

> 1. The **European Communities** has requested the Panel to refuse to consider certain of Brazil's claims[1] on the grounds that these claims are "defective"[2] in that they are "vaguely defined"[3] in Brazil's first written submission. In the view of the European Communities, admission of these claims would constitute an infringement of the EC's rights of defence and a departure from the good faith standard in Article 3.10 *DSU* and from the due process requirement that underlies the *DSU*.

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[43] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 190.

[44] *Ibid*., para. 203; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, paras. 173-174.

[45] In particular, this EC request involved the following claims or arguments: allegation under Article 6.2 relating to alleged differences between the scope of the product referred to in the Application and subject to the investigation; allegation under Article 11.2 relating to the EC alleged failure to self-initiate a review immediately upon imposition of the AD measures; allegation under Article 2.4.1 because the EC allegedly did not make the currency conversions required under Article 2.4 for the purpose of making a fair comparison between the export price and the normal value; allegation of violation as the EC allegedly failed to satisfy itself as to the accuracy of information submitted by Tupy relating to imports of the product concerned under other CN codes; allegation of violation of Article 3.3 relating to channels of distribution and levels of trade; allegation of violation of Article 3.4 that it was incumbent on the EC to rely on more indicators and evidence of injury; allegation of violation relating to Articles 6.6 and 3.5 that the EC allegedly did not take proper account of positive evidence relating to alleged differences in the cost of production and market perception concerning black and white heart variants of the product concerned; and all claims under Article 12.

2. **Brazil** asserts that the Panel should reject the EC's request as "unfounded".[4] According to Brazil, its first written submission clearly identifies the legal basis for Brazil's complaint and eliminates any risk of "vagueness" with regard to Brazil's claims. Brazil submits that the claims concerned fall within the Panel's terms of reference and are therefore properly before the Panel. In Brazil's view, it is for the Panel to decide, in the course of its substantive analysis, whether or not the claims are too vague to be accepted. In response to the EC request, Brazil has also submitted specific clarifications with respect to each allegation identified by the European Communities.[5]

3. The **Panel** understands this EC request to pertain to the alleged vagueness of Brazil's claims as presented in Brazil's first written submission, and not to how these claims have been set out in Brazil's request for the establishment of a Panel. The European Communities has made this clear to us in its first written submission[6] and at the Panel's first substantive meeting with the parties.[7]

4. We understand that it is the request for establishment of the Panel[8] in this dispute that establishes the scope of our terms of reference. This document dictates the scope of this dispute and our mandate and jurisdiction. We do not understand the European Communities to be alleging that any "vagueness" in Brazil's claims would have the effect, in and of itself, of *removing* these claims from the Panel's terms of reference as set out in the Panel request.

5. We have therefore decided, at this early stage of the proceedings, to deny the EC request that we refuse to consider Brazil's claims on the basis of their alleged vagueness. These claims fall within our terms of reference and therefore form part of the matter referred to us by the DSB.

6. To the extent the European Communities is arguing that the first submission is determinative for the clarity of the claims for the purpose of the entire proceeding -- in the sense that if a claim is not clearly stated there, no further opportunity exists for clarification over any of the remaining portion of the proceedings -- we cannot accept this argument. In our view, it is in the nature of the Panel process that the claims made by a party may be progressively clarified and refined throughout the proceeding.[9] This may occur through the submission of supporting evidence and argumentation by the parties, commencing with their first written submission, and followed by a round of rebuttal submissions, supplemented by oral statements and answers to questions. It is, of course, clear that this process of progressive clarification would not allow a party to add additional claims (which were not included in the request for establishment of the Panel) during the course of the proceedings. The fundamental due process rights of the parties are thereby preserved.

7. In the case before us, we consider that even if we were to agree with the European Communities that, at this stage, some of the allegations it identified in Brazil's first submission may be vague, the opportunity would still exist for Brazil to provide further supporting evidence and argumentation in its subsequent submissions with a view to clarifying those allegations in the course of the Panel proceedings (recalling, of course, that the working procedures we have adopted for these panel proceedings provide that the parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions or answers to questions).[10] In this regard we note, for example, that Brazil has already submitted, in response to the EC request, clarifications with regard to each of the claims identified by the European

Communities as being "overly vague".[11] Through the Panel process, the claims that the European Communities now considers to be vague may therefore become clear at a subsequent stage in these proceedings, including through submissions and through responses by Brazil to questions that the Panel and the European Communities may pose. However, if, subsequently in the course of these proceedings, the European Communities considers that Brazil's claims remain insufficiently clear or that these claims have finally become clear at such a late stage that the European Communities considers that it has not had an opportunity properly to respond, it may bring this situation to the attention of the Panel. The Panel will then consider the situation, keeping in mind the due process rights of the European Communities.

8. We find support for our ruling in the statement by the Appellate Body in its report on *US – FSC* that the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".[12]

9. We underline that our decision not to reject some of Brazil's "claims" that have been alleged as being vague by the European Communities does not prejudge the question of whether or not Brazil may ultimately succeed in clarifying or substantiating its claims of violation of the provisions in question.[13]

10. If necessary, we may supplement our reasoning here in our final report.

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[1] EC first written submission, paras 19-24. Executive summary of EC first written submission, Annex A-2, paras. 5 and 6.
[2] EC first written submission, para. 22.
[3] EC first written submission, para. 19.
[4] Brazil's response to the EC's request for a preliminary ruling, para. 74.
[5] See Brazil's response to the EC's request for a preliminary ruling, paras. 26-36.
[6] EC first written submission, para. 19.
[7] E.g., EC reply to Brazil's response to the preliminary rulings requested by the EC, paras. 12-15.
[8] WT/DS219/2.
[9] We recall the statement by the Appellate Body that "there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the *DSU*, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties". Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141.
[10] Panel's Working Procedures, para. 14.
[11] See Brazil's response to the EC's request for a preliminary ruling, paras. 26-36.
[12] Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations" ("US – FSC")*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.
[13] We draw support for our view from Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.43.

7.11 We do not consider it is necessary to supplement our ruling with respect to this matter.

(ii) Scope of Panel's terms of reference

a. Brazil's "claims" alleged by the EC to be outside our terms of reference

7.12 In its first written submission, the **European Communities** requested that we make a preliminary ruling that certain of Brazil's claims are not within our terms of reference. In particular, the European Communities alleges that the following claims of Brazil are not within our terms of reference:[46]

- Claims of breach of Article 9.3 in connection with Issues 4, 5, 6, 9 and 10.
- Claim of infringement of Article 2.2.2 because of use of different criteria for the calculation of SG&A costs and of profits.
- Claim of breach of Article 6.13 because of a failure to provide Tupy with "any assistance practicable" in connection with Issue 8.
- Claim of infringement of Article 3.2 because the consideration of significant undercutting was confined to products that had matching EC products.
- Claims under Articles 6.2 and 6.9 in connection with Issues 16 and 17.
- Claims regarding the examination of specific injury factors listed in Article 3.4, including in particular the claim of inadequate consideration of 'factors affecting domestic prices' in breach of Article 3.4.
- Claim of violation of Article 3.5 based on the 'comparative advantage' of Tupy.
- Claim of violation of Article 6.6 because the authorities refused to investigate properly Tupy's assertion that imports from Poland had occurred in greater amounts and at lower prices than the European Communities had concluded on the basis of Eurostat information.
- Claim of breach of Article 3.5 based on the differences between 'black heart' and 'white heart' fittings.
- Claims of breach of Articles 12.2 and 12.2.2 in connection with Issues 1, 3, 5, 13 and 16.
- Claims of failure to provide information under Article 12.1.

7.13 We examine the EC request with respect to each of these "claims" below.

b. Claims under Articles 6.9, 6.13, 9.3 and 12.1

7.14 At the first substantive meeting with the parties, we issued the following ruling in response to the request by the European Communities relating to the scope of the Panel's terms of reference concerning Articles 6.9, 6.13, 9.3 and 12.1 of the *Anti-Dumping Agreement :*

> 1. The **European Communities** has requested that we issue a preliminary ruling to the effect that certain of Brazil's claims are not within our terms of reference. According to the European

[46] EC first written submission, para. 24. This EC request for a ruling pertained originally to certain claims made by Brazil in connection with Issue 2 in respect of the application and initiation of the investigation. In the course of these Panel proceedings, Brazil withdrew its claims under Issue 2. Brazil second written submission, para. 24. We therefore do not examine the request by the European Communities for a ruling on the scope of our terms of reference pertaining to Brazil's "claims" on the application and initiation of the investigation under Issue 2, in particular: claim of breach of Article 5.2 on the basis that products covered in the investigation must be identical with those described in the application; claim of breach of Article 5.2 on the grounds that the application did not include a complete list of known importers; and claim that the EC authorities failed to satisfy themselves as to the accuracy of information in the application.

Communities, there is a well-established principle in WTO jurisprudence that claims that are not raised or are inadequately defined in the complainant Member's panel request will fall outside the panel's terms of reference and will therefore not be considered.[1]

2. **Brazil** asserts that the Panel should reject the EC's request as "unfounded".[2] While Brazil agrees that a panel's terms of reference are critical, it disagrees that Article 6.2 of the *DSU* imposes an obligation to set out every element of each obligation it intends to invoke. Brazil asserts that its Panel request is indicative of the claims it would invoke. Brazil submits that where certain allegations are "dependent" upon other claims, they must necessarily fall within the Panel's terms of reference.

3. The **Panel**, in considering the EC's request[3], recalls that Article 6.2 of the *DSU* provides, in relevant part, that:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4. Article 6.2 of the *DSU* requires that there must be sufficient clarity in the panel request with respect to the legal basis of the complaint.

5. We consider that the treaty provision claimed to have been violated is a fundamental aspect of the "legal basis of the complaint" within the meaning of Article 6.2 of the *DSU*.[4] Therefore, there must be sufficient clarity in the request for establishment of the panel with respect to this aspect of the legal basis of the complaint. We view identification in the request for establishment of the panel of the specific treaty provisions claimed to have been violated by the respondent as a necessary element in complying with this aspect of the minimum standard of clarity required under Article 6.2 of the *DSU*.[5]

6. In considering the request by the European Communities and in order to resolve the issue before us, we have carefully reviewed Brazil's request for the establishment of the panel[6] in this dispute. We have found that four provisions of the *Anti-Dumping Agreement*, cited in Brazil's first written submission, do not appear in the list of provisions in the request for establishment of the Panel, nor are they referred to in the ensuing description of allegations in that document. These provisions are: Articles 6.9; 6.13; 9.3 and 12.1 of the *Anti-Dumping Agreement*. We therefore consider that these treaty provisions have not been identified in Brazil's request for the establishment of the Panel. Brazil's claims under these provisions are therefore not within our terms of reference.

7. We note that the Panel request refers generally to the Articles of the *Anti-Dumping Agreement* in question (i.e. Articles 6, 9 and 12) and contains the phrase "especially (but not exclusively)" when enumerating selective provisions (not including the provisions

concerned here) under these Articles. However, we do not view such a general reference as sufficiently clear to identify the specific provisions at issue. This is particularly so in view of the fact that Articles 6, 9 and 12 of the *Anti-Dumping Agreement* contain multiple and diverse obligations, which relate to different subject-matters than the obligations contained in the specific provisions that are cited in the Panel request.[7] The phrase "especially, but not exclusively" may be convenient, but is inadequate to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the *DSU*. Furthermore, even assuming *arguendo* that the obligations in these provisions may be "inter-linked" with or "dependent" upon a provision that is identified in the Panel request, we do not consider that this consideration is relevant here. The mere fact that a claim may be legally dependent upon another claim does not mean that it is subsumed within, or encompassed by, that claim. If a claim is not identified in the Panel request, the fact that it may be "inter-linked" with an identified claim is not determinative.

8. For these reasons, we conclude that Brazil failed to state claims under Articles 6.9, 6.13, 9.3 and 12.1 of the *Anti-Dumping Agreement* in its request for establishment of the Panel in this dispute. Therefore, claims presented under those provisions in Brazil's first submission fall outside our terms of reference, and we are precluded from examining those claims.

9. We have yet to rule on the remaining claims identified by the EC in its preliminary ruling request as being outside our terms of reference. If necessary, we may also supplement our reasoning here with respect to Article 6.9, 6.13, 9.3 and 12.1 of the *Anti-Dumping Agreement* in our final report.

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[1] EC first written submission, para. 23.

[2] Brazil's response to the EC's request for a preliminary ruling, para. 74.

[3] We note that "…when a "matter" is referred to the DSB by a complaining party under Article 17.4 of the *Anti-Dumping Agreement*, the panel request must meet the requirements of Articles 17.4 and 17.5 of the *Anti-Dumping Agreement* as well as Article 6.2 of the *DSU*". See Appellate Body Report, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala - Cement")*, WT/DS60/AB/R, adopted 25 November 1998, para. 75. In this regard, we note that Brazil has identified a definitive anti-dumping duty in its panel request as part of the matter referred to the DSB pursuant to Article 17.4 and Article 6.2. We further note that the EC has not asserted that there are any deficiencies under Article 17.5 of the *Anti-Dumping Agreement* with respect to the Panel request in this dispute.

[4] We find support for this approach in Appellate Body Report, *Guatemala - Cement*, *supra*, note 3, para. 69: "…Article 6.2 of the *DSU* requires that *both* the "measure at issue" and the "legal basis for the complaint" (or the "claims") be identified in a request for the establishment of a panel".

[5] We find support for our view that identification of the treaty provision in question is a critical precondition for presenting the legal basis of the complaint for the purposes of Article 6.2 *DSU* in the Appellate Body report in *Korea – Dairy*. In that case the Appellate Body stated:

> "Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all."
> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, para. 124.
> [6] WT/DS219/2.
> [7] For example, Article 12 of the *Anti-Dumping Agreement* relates to "Public Notice and Explanation of Determinations". It contains multiple and diverse requirements with respect to various public notices relating to an anti-dumping investigation. While Article 12.2 relates to *preliminary and final determinations*, Article 12.1 contains obligations pertaining to the public notice and notification of the *initiation* of the investigation.

7.15 We consider that our earlier ruling with respect to the EC request concerning the claims by Brazil under Articles 6.9, 6.13, 9.3 and 12.1 remains sufficient. For greater clarity, we would point out that our decision that Brazil's "claims" under Article 6.9 do not fall within our terms of reference was based upon our finding that this treaty provision was not identified at all in Brazil's Panel request and that the Panel request therefore did not meet the *minimum* requirement of Article 6.2 of the *DSU* in this respect. Whether or not Brazil raised allegations under Article 6.9 in consultations was not the focus of our inquiry. Even assuming *arguendo* that Brazil had raised this issue in consultations, this would not cure the deficiency in the Panel request as to the lack of any explicit textual identification of the legal basis of Brazil's complaint in this respect. It remains for us to consider, however, the EC request with respect to the claims not covered by this early ruling.

c. "Claims" under Articles 2.2.2, 3.2, 3.4, 3.5, 6.2, 6.6, 12.2 and 12.2.2 of the *Anti-Dumping Agreement*

7.16 We now examine the EC request for us to dismiss certain of Brazil's "claims" under Articles 2.2.2, 3.2, 3.4, 3.5, 6.2, 6.6, 12.2 and 12.2.2 of the *Anti-Dumping Agreement*. Article 6.2 of the *DSU* provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It shall …identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly…"

7.17 The issue before us is whether Brazil's Panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and therefore satisfies the standard set out in Article 6.2 of the *DSU* with respect to Brazil's claims under these provisions of the *Anti-Dumping Agreement*.

7.18 We must closely scrutinize the Panel request to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*.[47] In examining the sufficiency of the Panel request under Article 6.2 of the *DSU*, we must consider the text of the Panel request itself.[48] Second, we take into account

[47] We find support for this approach in Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities - Bananas*"), WT/DS27/AB/R, adopted 25 September 1997, para. 142.

[48] Each of the treaty provisions we examine here is cited in the Panel request and therefore meets at least that minimum standard.

whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by any alleged lack of specificity in the text of the Panel request.[49]

7.19 We first recall that while *claims* must be specified in the Panel request, *arguments* in support of claims need not be set out in the panel request but may rather be progressively clarified and refined in the first submission, followed by the round of rebuttal submissions to the Panel.

7.20 On this basis, we turn first to a consideration of whether the text of the Panel request is sufficient for the purposes of Article 6.2 of the *DSU* with respect to the allegations identified by Brazil.

7.21 We recall the following allegations of Brazil at issue here:

- "claim" of infringement of Article 2.2.2 because of use of different criteria for the calculation of SG & A costs, on the one hand, and for profits, on the other hand, where only one test appears to be expressly mandated by Article 2.2.2;
- "claim" of infringement of Article 3.2 because the consideration of significant undercutting was confined to products that had matching products;
- "claims" regarding the examination of specific injury factors listed in Article 3.4 including in particular the claim of inadequate consideration of "factors affecting domestic prices" in breach of Article 3.4;
- "claim" of violations of Article 3.5 based on the "comparative advantage" of Tupy" and on the differences between "black heart" and "white heart" fittings";
- "claims" of breach of Articles 12, 12.2 and 12.2.2 concerning Brazil's allegation relating to Article 15 (in connection with Issue 1, that is, exploration of possibilities of constructive remedies; and Brazil's allegation relating to the injury determination (in connection with Issue 16), that is, by allegedly not disclosing the figures related to the EC producers' own purchases (imports) and exports of the product concerned over the Injury Investigation Period.[50]
- Brazil's "claim" of infringement of Article 6.6 due to an alleged refusal by the European Communities to investigate properly Tupy's assertion that imports from Poland had occurred

[49] We find support for this approach in Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000.

[50] In its second written submission, para. 361, Brazil maintains certain of its allegations of inconsistency with Articles 12 and 12.2, including certain of relevance here, i.e. in connection with: Issue 1 (not making public findings and conclusions with regard to the exploration of possibilities of constructive remedies under Article 15); Issue 16 (not making public findings and conclusions with regard to EC producers' export performance). As the second submission is a more recent iteration of Brazil's allegations, we understand that Brazil has limited itself to those allegations under Article 12 that are identified in its second written submission. In this regard, we take note of the following statement by Brazil: "Brazil is aware that claims made under Article 12.1 of the *Anti-dumping Agreement* are not within the Panel's terms of reference. Some of the claims under Article 12.2 of the *Anti-dumping Agreement* can however be upheld, contrary to the EC's opinion that these claims must also be dismissed." Brazil second written submission, para. 361. We therefore do not consider the EC's preliminary ruling request with respect to Brazil's initial allegations concerning: allegedly no disclosure showing that the EC had properly considered the effect that the devaluation of Brazil's currency in January 1999 had on the question whether measures should have at all been imposed (in connection with Issue 3); constructed normal value and Article 2.2.2 (failing to sufficiently explain why and how it applied Article 2.2.2 of the *Anti-dumping Agreement* when it refused to make due allowances for differences in physical characteristics affecting price comparability, in connection with Issue 5); the EC's alleged failure to sufficiently explain why and how it applied Article 2.2.2 of the *Anti-dumping Agreement* when it refused to make due allowances for differences in physical characteristics affecting price comparability in its consideration of price undercutting; Brazil's allegation that the EC has not properly explained why it deleted the last position from the product control number (in connection with Issue 13).

> in greater amounts and at lower prices than the European Communities had concluded on the basis of Eurostat information, and Brazil's allegation of violation of Article 6.2 in not disclosing the European Communities producers' purchases and exports of the product concerned which precluded Tupy from being able to properly defend its interests.

7.22 We consider that it is not necessary for us to rule on whether these allegations constitute "claims" or "arguments". If they are arguments, there would be no need for them to be set out in the Panel request. Even assuming that all of the allegations identified above are "claims" in respect of which the text of the Panel request may be somewhat deficient in describing the nature of the complaint, the European Communities has failed in any event to demonstrate to us any prejudice to its interests throughout the course of these Panel proceedings by the way these "claims" appeared in the Panel request. We asked the European Communities to indicate any prejudice that it had sustained. The European Communities responded as follows:

> "The EC takes the view that in all the cases in which it has raised this objection its interests have been prejudiced by the lack of adequate notice of the issues. The scope of the claims that are explicitly made in Brazil's panel request is already exceptionally broad. The EC is entitled to the period that elapses between the establishment of the panel and the presentation of the complainant's first written Submission to prepare its defence. Such preparation is only possible if the complainant adequately specifies its claims in its panel request for incorporation into the terms of reference."[51]

7.23 However, it was evident to us from the participation of the European Communities in asserting its views in various phases of these Panel proceedings, including in its first written submission and in the first Panel meeting and in the exchanges between the parties preceding the first Panel meeting on preliminary issues, that the EC's ability to defend itself had not been prejudiced over the course of these Panel proceedings.

7.24 We therefore consider that the text of the Panel request adequately indicates the nature of the problem addressed by Brazil's claims and deny the EC request to dismiss these allegations made by Brazil.

d. Allegations identified by the European Communities in its second oral statement as outside the Panel's terms of reference

7.25 The European Communities subsequently asserted that[52] certain additional allegations made by Brazil in Brazil's second written submission fell outside our terms of reference. According to the European Communities, Brazil had "misused" its rebuttal submission to extend the claims made in its first submission and to introduce wholly new ones. In the EC's view, such manoeuvres constitute "an abuse of the dispute settlement process" and the European Communities requested that we rule that these claims are inadmissible.[53] The allegations concerned fell under Issues 1, 6 and 16.

7.26 Under Issue 1, the allegations that the European Communities alleged to fall outside our terms of reference were: first, Brazil's assertion that "the first sentence of Article 15 refers to a general obligation to pay particular attention to the special situation of developing country members"[54]; and second, Brazil's allegation that, "by failing to raise the possibility of an undertaking *before* the imposition of the provisional measure, the European Communities breached the second sentence of Article 15 of the *Anti-Dumping Agreement*" (emphasis in the original). Brazil submits that the Panel

[51] EC response to Panel question 27 following the second Panel meeting, Annex E-8.
[52] EC second oral statement, para. 9.
[53] EC second oral statement, para. 5.
[54] Brazil second written submission, para. 4.

request lists Article 15 and provides a description as to the nature of the claim and that consequently the terms of reference cover the first and second sentences of Article 15 as well as the issue of exploration of constructive remedies.[55] We note that these allegations may have been encouraged by questioning from the Panel[56] in our attempt to clarify certain facts as well as the legal argumentation by the parties and we are conscious that we may neither overstep our terms of reference nor relieve Brazil of its task of establishing the inconsistency of the EC anti-dumping measure with the relevant provisions of the *Anti-Dumping Agreement* . In particular, we are aware that, in our questions posed to the parties, we must not "overstep the bounds of legitimate management or guidance of the proceedings … in the interest of efficiency and dispatch."[57]

7.27 With respect to these allegations and with respect to: (a) Brazil's allegation under Issue 6 that the European Communities breached Article 2.4 by not indicating to the Brazilian exporter what additional information with regard to the IPI Premium Credit was necessary to ensure a fair comparison;[58] and (b) Brazil's allegation of violation of Article 6.2 and 6.4 in connection with Issue 16[59] that the contents of Exhibit EC-12 relating to certain listed Article 3.4 factors were not disclosed during the investigation thereby denying Tupy a full opportunity to defend its interests or a timely opportunity to have access to all relevant evidence, we recall that a complaining party must specify its claims in its Panel request, but that its arguments may be clarified and refined in subsequent submissions. As we have already indicated above, even assuming *arguendo* that these allegations were claims insufficiently set out in the Panel request, the European Communities has failed to demonstrate that it suffered any prejudice to its interests over the course of these Panel proceedings.[60] We therefore deny the EC request to dismiss these allegations made by Brazil.

(iii) Alleged inadmissibility of Exhibits BRL-47 through 52 under Article 17.5(ii) of the Anti-Dumping Agreement

7.28 In conjunction with its oral statement at the first substantive meeting, Brazil submitted Exhibits BRL-47 through 52, in support of its argumentation regarding "relocation" and "outsourcing arrangements" of several EC producers. Exhibits BRL 47-50 consist of information and tables that Brazil states it drew from the website of the Bulgaria Economic Forum relating to the acquisition by a Community producer (Atusa) of shares in Berg Montana and the consolidation of Atusa's control over Berg Montana on 4 July 2000. Exhibits BRL 51-52 contain information that Brazil states that it drew from Infit SAE's website (and page containing link to Woeste) and from another website providing general and market information in relation to Infit SAE. The gist of Brazil's argumentation, made in connection with its claims concerning injury and causation under Articles 3.4 and 3.5 of the *Anti-Dumping Agreement*, is that the European Communities failed adequately to examine and to take into account information regarding outsourcing and relocation in reaching its injury and causation determinations. Indeed, according to Brazil, "[o]n the basis of the evidence provided by the Brazilian exporter, an unbiased and objective investigating authority evaluating that evidence *could not* have reached the conclusions that the EC investigating authorities reached under several provisions of the *Anti-Dumping Agreement*, primarily regarding injury indicators and causality."[61] (emphasis in the original; footnote omitted).

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[55] Brazil response to Panel question 25 following the second Panel meeting, Annex E-1.

[56] In particular, Panel questions 6 and 9 following the first Panel meeting.

[57] Appellate Body Report, *Korea-Dairy Safeguard*, *supra*, note 49, para. 149. We also find support for our view in Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.43.

[58] Brazil second written submission, paras. 69 – 73.

[59] Brazil second written submission, para. 251.

[60] See *supra*, paras.7.22 *ff*.

[61] Brazil first oral statement, para. 6.

7.29 Recalling that Article 17.5(ii) of the *Anti-Dumping Agreement* provides that a panel established by the DSB to consider claims made under the *Anti-Dumping Agreement* will examine the matter referred to it based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", the **European Communities** objects to the submission of these Exhibits by Brazil and requests us to make a preliminary ruling rejecting these exhibits as they did not form part of the record of the underlying investigation.

7.30 **Brazil** asks us to reject this EC request. Brazil submits that the information contained in the Exhibits in question is "the same" as information that Tupy, as well as other interested parties, presented to the EC authorities in the course of the investigation. Brazil invokes the panel report in *US-Hot-Rolled Steel*[62] to support its view that the Panel is entitled to admit these Exhibits in these Panel proceedings.

7.31 The **Panel** understands that the issue presented by this EC request for a preliminary ruling is whether we should exclude from our consideration in this dispute certain Exhibits submitted by Brazil in these Panel proceedings that were not submitted to the EC investigating authorities during the investigation. We recall that our Working Procedures provide that preliminary rulings must be requested not later than the first written submission, but that exceptions may be made upon showing of "good cause". As Brazil submitted these Exhibits in conjunction with its oral statement at the first meeting, which meant that the European Communities was not in a position to make a preliminary objection in its first written submission, good cause exists for us to consider the merits of the EC request for a preliminary ruling here.

7.32 Article 17.5(ii) of the *Anti-Dumping Agreement* – which the European Community identifies as the legal basis for its preliminary ruling request -- provides:

> "The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: …
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

7.33 This provision offers binding guidance directing our decision as to what evidence we are permitted to consider in examining a claim under the *Anti-Dumping Agreement*. This provision makes clear that, in an examination of a claim of violation of Article 3 of the *Anti-Dumping Agreement* in a particular investigation and determination, we may consider only facts or evidence going to the substance of the determination that had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation.[63]

7.34 Further, contextual, support stems from Article 17.6(i) of the *Anti-Dumping Agreement*, which sets out a specific standard of review for anti-dumping panels. This provision sets the parameters for the standard of our review of the determination of the investigating authority and clearly confirms that a *de novo* review is not contemplated by the *Anti-Dumping Agreement*. Thus, we must satisfy the requirement imposed by Article 11 of the *DSU* to conduct "an objective

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[62] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R.

[63] This evidence proffered by Brazil and challenged by the European Communities relates to the injury determination by the investigating authority and, in particular, to the substance of the EC analysis of the causal link between the injury and the dumped imports. Article 3.5 of the *Anti-dumping Agreement* also contains specific relevant language. It states, in pertinent part: "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*." (emphasis added)

assessment of the matter before [us]" in accordance with the parameters set by Article 17.5 (ii) and 17.6(i).[64]

7.35 Brazil argues that the information is "the same" as information contained in the record of the underlying investigation. Brazil asserts that the information may be "re-formatted", and is unable to confirm whether or not the information was available in this format or in the same way at the time of the investigation. However, Brazil concedes that this information, as contained in these Exhibits, was not submitted to the European Communities during the investigation.[65] We are therefore prevented by Article 17.5(ii) from considering these Exhibits in the context of our Article 3 examination and do not take them into account in our review of the EC determination. Brazil invoked the panel report in *US-Hot-Rolled Steel* to support its view that we would act with full authority in denying the EC request and admitting the Exhibits in question. However, that panel confronted different claims, additional to those dealing with the substance of the determination of the investigating authority under the provisions of the *Anti-Dumping Agreement*, including a claim under Article X:3 of the *GATT 1994*. That panel made it clear that the evidence to be considered in connection with the complaining party's Article X claim was not limited by the provisions of Article 17.5(ii) of the *Anti-Dumping Agreement*. By contrast, Brazil's claims (in this context) are limited to Articles 3.4 and 3.5 of the *Anti-Dumping Agreement*, and their factual basis is therefore delineated by Article 17.5(ii).

7.36 We thus exclude Exhibits BRL-47 through 52 from our consideration in these proceedings.

3. Requests by Brazil

(a) Exhibit EC-1

7.37 Brazil's first written submission, as originally submitted by Brazil on 10 October 2001 contained no paragraph or line numbering. The European Communities submitted, as Exhibit EC-1 to its first written submission, a version of Brazil's first written submission with line numbers superimposed upon it, and references in the European Communities first written submission to Brazil's first written submission were made on the basis of the line-numbered version in Exhibit EC-1.

7.38 **Brazil** requests that we make a preliminary ruling that the European Communities amend the text of the European Communities' first written submission so that references therein to Brazil's first written submission be made to the actual text of Brazil's first written submission as originally submitted by Brazil.[66]

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[64] We find support for this approach to the obligations of panels in anti-dumping disputes in Panel Report, *US-Hot-Rolled Steel*, *supra*, note 62, paras. 7.6-7.7, as well as in the reports of a number of panels that have applied similar principles in reviewing determinations of national authorities in the context of safeguards under the Agreement on Safeguards and special safeguards under Article 6 of the *Agreement on Textiles and Clothing*. There is no corollary to Article 17.5(ii) in those agreements. Nonetheless, these panels have concluded that a *de novo* review of the determinations would be inappropriate, and have undertaken an assessment of, *inter alia*, whether all relevant facts were considered by the authorities. Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("United States - Wheat Gluten")*, WT/DS166/R, para. 8.6, adopted as modified (WT/DS166/AB/R) 19 January 2001; Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49, para. 7.30, Panel Report, *Argentina – Safeguard Measures on Imports of Footwear ("Argentina - Footwear Safeguard")*, WT/DS121/R, para. 8.117, adopted as modified (WT/DS121/AB/R) 12 January 2000.

[65] Additional oral statement of Brazil regarding Exhibits BRL-47-52, Annex D-4, para. 2.

[66] Brazil request for a preliminary ruling, Annex A-3.

7.39 The **European Communities** asks that we reject this request, and further requests that we amend our Working Procedures in order to provide that the parties shall number the paragraphs or lines of all their subsequent submissions.[67]

7.40 At the first substantive meeting with the parties, the **Panel** made the following statement:

> Having heard both parties' views on this question, the Panel would like to clarify its understanding that Brazil's first submission, as originally submitted by Brazil, remains the official version of that submission for the purpose of the Panel record. We also understand that the EC makes references to its Exhibit EC-1 for the purposes of references in the *EC*'s first written submission. We therefore reject Brazil's request to ask the EC to amend the text of the EC's first written submission so that all references are made to the actual text of Brazil's first written submission as originally submitted by Brazil. We also reject the EC's request to make a formal amendment to our Working Procedures specifically requiring that parties shall number the paragraphs or the lines of their subsequent submissions. Having said this, we underline that we would appreciate efforts on the part of the parties to facilitate the task of the Panel in examining the matter referred to us by the DSB.
>
> With this in mind, we would invite Brazil to submit a paragraph numbered version of its first submission to facilitate referencing by the Panel and the parties. We would appreciate if the paragraph numbered version of Brazil's first submission could be made available by 14 December 2001. In the mean time, the parties are asked, to the extent possible, to refer to arguments in Brazil's first written submission by citing the page number, in addition to any other information which would facilitate our task of locating where those arguments have been made.

7.41 Brazil accordingly submitted a revised, paragraph-numbered version to the Panel of its first written submission on 14 December 2001.

(b) Exhibit EC-12

7.42 The European Communities submits an internal "note for the file" -- Exhibit EC-12 -- in support of its arguments relating to the EC examination of Article 3.4 injury factors. According to the European Communities,

> "The outcome of the EC authorities' investigation of individual factors is recorded in two Regulations, principally in the Provisional Regulation, in so far as the examination produced significant results. The examination of the remaining factors (with one exception) is explicitly recorded in an internal EC Commission "note for the file" of 14 April 2000 (Exhibit EC-12). As the Panel will observe, with the exception of the *[sic]* concerning "growth", this looks at each of the factors which Brazil accuses the EC of not considering."

7.43 **Brazil** submits that Exhibit EC-12 is not part of the record of the underlying investigation. According to Brazil, this document is not part of the non-confidential file and there are indications that it was not part of the confidential file either. In Brazil's view, it is therefore is not properly before the Panel. Indeed, Brazil states:

> "…the said exhibit, which is just an obvious attempt by the EC at curing the flaws of the investigation, should be completely disregarded by the Panel. Indeed, the

[67] EC reply to Brazil's request for a preliminary ruling, Annex A-4.

acceptance of Exhibit EC-12 would be a dangerous precedent with enormous systemic implications."[68]

7.44 The **European Communities** contends that Exhibit EC-12 legitimately forms part of the injury determination that the Panel must examine in its analysis of Brazil's Article 3.4 claim.[69] In response to Panel questioning, the European Communities confirmed that Exhibit EC-12 forms part of the record of the underlying investigation. The European Communities states that it "will accord the scurrilous assertions made by Brazil regarding the bona fides of this document the attention they deserve."[70]

7.45 The **Panel** notes that the information in Exhibit EC-12 was not disclosed in any form to the interested parties in the course of the investigation. We wish to emphasize that we deplore 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. It was apparently entirely unfamiliar to Brazil prior to the submission by the European Communities of Exhibit EC-12 in conjunction with the EC first written submission in these Panel proceedings. However, we understand that, in assessing the European Communities' compliance with Article 3, Articles 17.5 and 17.6(i) of the *Anti-Dumping Agreement* require us to examine the facts available to the investigating authority of the importing Member. These provisions do not prevent us from examining facts that were confidential and/or not disclosed to, or discernible by, the interested parties at the time of the final determination. We are therefore *required* by the Agreement to take into account all information upon which the investigating authority relied in order to reach its final determination, whether or not this information forms part of the non-confidential or disclosed record of the investigation or whether its consideration can be discerned from the published documents. This necessarily includes the information contained in Exhibit EC-12. We are guided by the Appellate Body Report in *Thailand-H-Beams.*[71] We consider that this Appellate Body Report thoroughly addresses and resolves the issue that arises here and that we are permitted, indeed *required*, to take the contents of Exhibit EC-12 into account in our examination of Brazil's claims concerning the EC injury analysis under Article 3.4.

7.46 We understand Brazil to insinuate that Exhibit EC-12 may be some sort of *post hoc* attempt by the European Communities to cure the flaws that it perceived to exist in its Article 3.4 analysis for the purposes of these Panel proceedings. In this respect, we must presume that WTO Members participate in good faith in dispute settlement proceedings. We asked the European Communities to indicate in the record of the investigation the sources of information and the methodology on which

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[68] Brazil second written submission, para. 252.

[69] For example, the European Communities states that, in its view, "the findings in the Provisional and Definitive Regulations and the explanations set out in Exhibit EC - 12 show the EC's authorities compliance with these requirements." EC second oral statement, para. 119.

[70] EC second oral statement, para. 120.

[71] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001, paras. 107, 111 and 118. The Appellate Body stated: "…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. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it" (para. 111); and "Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination" (para. 118).

the statements and information in Exhibit EC-12 are based.[72] 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.[73] 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.

7.47 We therefore decline Brazil's request for us to rule that Exhibit EC-12 is not properly before us.

(c) Request to append Brazil's full written submissions instead of executive summaries to the Panel Report

7.48 In its 31 July 2002 comments on the draft descriptive part of the Panel Report, **Brazil** requested that the complete text of its first and second submissions, rather than Brazil's executive summaries thereof, be included in Annexes A and C respectively. According to Brazil:

> "The executive summaries provided by Brazil were intended only to assist the Panel in drafting a concise arguments section of the report; they were not intended to replace submissions nor are they to be attached as annexes to the panel's report. This was Brazil's understanding at the time the executive summaries were provided. Moreover, given the high number of claims in the present case, Brazil believes that a 10-page executive summary could not possibly accommodate the main arguments related to each of those claims. As far as Brazil is informed, also in other disputes where a similar rule of procedure [paragraph 16 of the Working Procedures] requested executive summaries, the complete submissions were annexed to the panel report."

7.49 For the reasons that follow, the **Panel** cannot accede to Brazil's request that we attach the full text of Brazil's first and second written submission to our Report.

7.50 First, we recall that paragraph 16 of the Working Procedures that we adopted at the outset of these proceedings pursuant to Article 12.1 of the *DSU*, after hearing the parties' views, provide:

> "The parties shall provide the Panel with an executive summary of the claims and arguments contained in their written submissions and oral presentations. These executive summaries will be used by the Panel only for the purpose of assisting the Panel in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. The summaries of the first written submission and rebuttal written submission shall be limited to 10 pages and the summaries of the oral statements at the meeting will be limited to 5 pages. Summaries shall be submitted to the Secretariat within seven days of the original submission concerned."

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[72] See Panel question 110 and EC response thereto following the first Panel meeting, Annex E-3.

[73] See Panel question 20 and EC response thereto following the second Panel meeting, Annex E-8. We further asked (Panel question 19 following the second Panel meeting) whether there were any worksheets or investigation notes which formed the basis for Exhibit EC - 12 and asked the European Communities to provide them or to explain why these were not provided. The European Community replied that: "The conclusions recorded in Exhibit EC - 12 are based on worksheets, but these contain highly confidential business information relating to the performance of individual EC producers and the EC would prefer not to release them." See Annex E-8.

7.51 This paragraph makes it clear that we are to use the executive summaries only for the purpose of assisting us in drafting a concise arguments section of the Panel Report so as to facilitate timely translation and circulation of the Panel Report to the Members. The rationale of this paragraph is to facilitate our production of a concise and timely descriptive part and to not attach the entire written submissions and statements of the parties. We find no substantiation for Brazil's assertion that other panels that have adopted a similar paragraph in their working procedures have also nevertheless attached the parties' entire written submissions to their reports. Indeed, this would seem to us to defeat the purpose of adopting the "executive summary approach" in the first place.

7.52 Second, the attachment of executive summaries to our report also leaves the parties in control of the contents of the executive summaries and enables them to set forth their most important arguments as they wish to set these forth. Each party has the obligation and the discretion to ensure that its own executive summaries of its own submissions accurately reflects its claims and arguments. Neither party requested us to increase the page limits referred to in our Working Procedures.

7.53 Third, we adopted these Working Procedures after hearing the views of the parties, at which time Brazil expressed no objection to the formulation in paragraph 16 of the Working Procedures. We decided at the outset to follow the "executive summaries approach" for these Panel proceedings. Having adopted this approach at the outset, we do not consider that it would beneficial, at this rather advanced stage in the proceedings, to adopt Brazil's suggested approach of attaching its full first and second submissions. Our adoption of such an approach at this stage would result in significant further delays in issuing our Report, particularly in view of the lengthy nature of these submissions (totalling over 370 pages). This would impose a considerable translation burden, adding to the burden already being borne due to the operation of the WTO dispute settlement system generally. There would also be an incongruity if the full EC submissions were not also attached, which, if we were to address by taking the requisite procedural steps and then by annexing the EC submissions, would augment the translation burden. We find particularly salient, in this respect, Article 12.2 of the *DSU*, which provides:

> "Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, *while not unduly delaying the panel process*." (emphasis added)

7.54 Fourth, as our Working Procedures also make clear, in no way are the executive summaries to substitute for the parties' submissions. In the course of our examination of the parties' claims and arguments in these proceedings, we have read and analyzed with great care the full written and oral submissions of the parties and the exchanges of questions and answers relating thereto. Our findings and conclusions in this Panel Report are based upon these full written and oral submissions and questions and answers. They form an integral part of the record before the Panel in this case. We therefore believe that we have adhered to both the letter and spirit of our Working Procedures and do not believe that any prejudice has arisen to Brazil in the course of these proceedings from annexing executive summaries of its first and second written submissions.

7.55 Fifth, we recall that Article 18.2 of the *DSU*, as also reflected in paragraph 3 of our Working Procedures, states that nothing in the *DSU* shall preclude a party to a dispute from disclosing statements of its own positions to the public. There is therefore nothing precluding Brazil from making its full first and second submissions generally and publicly available (subject, of course, to the requirements of maintaining the confidentiality of the EC's submissions in Article 18.2 of the *DSU* and paragraph 3 of our Working Procedures).[74]

[74] Our Working Procedures state, in relevant part: "Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential and shall not disclose such information to individuals not involved in the dispute. Where a party to a dispute submits a

C. ISSUES RAISED IN THIS DISPUTE

1. Issue 1: "constructive remedies"

(a) Arguments of the parties

7.56 **Brazil** argues that both the first and second sentences of Article 15 impose legal obligations by which the European Communities failed to abide. In the alternative, Brazil asserts that if the European Communities did explore constructive remedies under Article 15, this was never communicated to representatives of the Government of Brazil or to company officials of Tupy.

7.57 Brazil argues that the first sentence of Article 15 refers to a general obligation to pay particular attention to the special situation of developing Members, while the second sentence concerns one possible way of fulfilling this obligation. Brazil submits that the European Communities failed to give special regard to the special situation of Brazil as a developing Member and conducted itself (in respect of the imposition of a "lesser duty") as it would have done when dealing with a developed Member. Brazil further asserts that the European Communities failed to give "special regard" as it did not take into account certain factors that were linked to Brazil's status as a developing Member, that is, the specificity of the Brazilian tax rebate system ("which cannot be compared to the sophisticated VAT systems that exist in the EC and in other developed countries")[75], and the devaluation of the Brazilian currency.

7.58 With respect to the second sentence of Article 15, Brazil "agrees with the EC that the obligation arising out of this sentence is an obligation to "explore" possibilities of constructive remedies rather than an obligation to enter into constructive remedies",[76] and further concurs with the European Communities that the *EC-Bed Linen* panel[77] properly analyzed the concept of "exploring the possibilities of constructive remedies". Brazil asserts that it was Brazil that raised the matter in bilateral government contacts, but that should the Panel consider that the European Communities actually raised the matter, the issue of which side raised it is irrelevant. Brazil argues that the obligation to explore the possibilities of constructive remedies --such as price undertakings -- is an obligation directed towards *exporters* rather than WTO Members, and that (regardless of any contact with the Brazilian government) the European Communities violated its obligation by failing to suggest or communicate the possibility of an undertaking to the Brazilian *exporter* directly. Brazil disagrees with the view of the *EC – Bed Linen* panel that Article 15 applies only to the imposition of definitive anti-dumping measures, arguing that the obligation to explore possibilities of constructive remedies also applies to the period preceding the imposition of provisional measures. According to Brazil, the European Communities breached the second sentence of Article 15 by failing to raise the possibility of an undertaking with the Brazilian exporter before the imposition of provisional measures.

7.59 Brazil disagrees with the EC assertion that the Article 15 is an exception to other obligations in the *Anti-Dumping Agreement* and that the burden of proof is on the Member invoking the exception.

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confidential version of its written submissions to the Panel, it shall also, upon request, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public, within ten days of its submission to the Panel."

[75] Brazil second written submission, para. 11; also, Brazil first written submission, para. 101.

[76] Brazil second written submission, para. 7 referring to EC first written submission, para. 35 and US third party submission, Annex B-2, para. 9.

[77] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R.

7.60 The **European Communities** asserts that the first sentence of Article 15 imposes no legal obligation on Members, but submits that even if the first sentence did impose an obligation, this obligation would be fulfilled upon compliance with the obligation in the second sentence. The European Communities endorses the *EC-Bed Linen* panel's approach concerning the second sentence of Article 15. The European Communities argues that it complied with Article 15. Price undertakings are a "constructive remedy" and the European Communities raised with Brazil the possibility of a price undertaking on three separate occasions (including at a high political level). The European Communities argues that "one of the unusual features about this investigation was the obvious close involvement of the Brazilian government on Tupy's behalf" and asserts that the European Communities "had every reason to believe that in speaking to government officials, the EC was speaking to Tupy".[78]

7.61 The European Communities does not dispute that Brazil is a developing Member, but does dispute that the imposition of anti-dumping duties on pipe fittings affects the "essential interests" of Brazil within the meaning of Article 15. The European Communities submits that since Article 15 is an exception to the rules of the *Anti-Dumping Agreement*, the onus lies on the developing Member concerned to prove that its invocation of the exception is justified.

7.62 The European Communities invokes the *EC-Bed Linen* panel report in support of the proposition that the provision applies only to the application of definitive anti-dumping measures.

(b) Arguments of third parties

7.63 The **United States** asserts that Article 15 of the *Anti-Dumping Agreement* addresses procedural issues and does not require a particular outcome. it argues that the first sentence of Article 15 does not contain a substantive obligation with respect to any particular outcome. There is no basis in the text of the first sentence on which to conclude that developed Members are required to apply distinct practices with respect to the methodologies used to determine whether dumping exists. The United States further argues that nothing in the second sentence of Article 15 requires that a developed Member "propose" constructive remedies, nor requires any particular outcome. Furthermore, the obligation to "explore" constructive remedies arises only when the application of antidumping duties would affect the "essential interests" of the developing Member. Accordingly, when a developing Member seeks the application of Article 15, it must demonstrate to the investigating authority that there are "essential interests" implicated in the case and that they *would* be affected by the application of anti-dumping duties. A panel, in turn, must first determine whether the developing Member has made these demonstrations. Any reading of the "essential interests" clause that does not reflect its limiting nature cannot be a permissible reading.

(c) Evaluation by the Panel

7.64 Article 15 of the *Anti-Dumping Agreement*, entitled "Developing Country Members", provides:

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

[78] EC second written submission, para. 6.

7.65 The divergences between the parties centre on the nature of the legal obligation(s) imposed by the two sentences of Article 15 of the *Anti-Dumping Agreement*, and the timing and scope of application of the obligation(s).

7.66 Accordingly, the **Panel** first examines the text of the first sentence of Article 15, followed by the text of the second sentence, in order to discern the nature of the legal obligation(s) imposed, as well as the timing and scope of application of the provision.

7.67 We address first the nature of the legal obligation, if any, imposed by the first sentence of Article 15. Brazil asserts that, while the first sentence does not create a substantive obligation with respect to any particular outcome, it refers to a general obligation to pay particular attention to the special situation of developing country Members, and the second sentence indicates one possible way of fulfilling this obligation.[79] For its part, the European Communities disagrees that the first sentence contains any obligation.[80]

7.68 We agree with Brazil that there is no requirement for any specific outcome set out in the first sentence of Article 15. We are furthermore of the view that, even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action. The second sentence serves to provide operational indications as to the nature of the specific action required.[81] Fulfilment of the obligations in the second sentence of Article 15 would therefore necessarily, in our view, constitute fulfilment of any general obligation that might arguably be contained in the first sentence. We do not see this as a "reduction" of the first sentence into the second sentence, as suggested to us by Brazil. Rather the second sentence articulates certain operational modalities of the first sentence.

7.69 We next consider the obligations imposed by the second sentence of Article 15. Our starting point is naturally the text of that sentence:

> "Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members."

7.70 With respect to the second sentence, while there is no dispute between the parties as to certain core aspects of the nature of the obligation to "explore" "possibilities of" constructive remedies, the parties' views diverge on the timing and scope of application of the provision as well as the nature of possible "constructive remedies" (including with whom and how such possibilities must be explored),

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[79] Brazil second written submission, para. 8.

[80] EC second oral statement, para. 14.

[81] In this regard, a previous panel found that "the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action." Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002., para. 7.110. We further recall that the *EEC-Cotton Yarn* GATT Panel, considering similar arguments in respect of Article 13 of the Tokyo Round Agreement (which is substantively identical to Article 15 of the *Anti-dumping Agreement*), stated:

> "582. … The Panel was of the view that Article 13 should be interpreted as a whole. In the view of the Panel, assuming arguendo that an obligation was imposed by the first sentence of Article 13, **its wording contained no operative language delineating the extent of the obligation**. Such language was only to be found in the second sentence of Article 13 whereby it is stipulated that "possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries"."

Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* ("*EEC – Cotton Yarn*"), adopted 30 October 1995, BISD 42S/17, para. 582 (emphasis added).

and the meaning and role of the phrase "shall affect the essential interests" of Brazil as the developing Member country in question in this dispute.

7.71 We examine the requirement in the second sentence of Article 15 to explore possibilities of "constructive remedies" provided for by the *Anti-Dumping Agreement*.[82] The term "remedy" can be defined as, *inter alia*, "a means of counteracting or removing something undesirable; redress, relief".[83] "Constructive" is defined as "tending to construct or build up something non-material; contributing helpfully, not destructive".[84] We thus understand the term "constructive remedies" as referring to helpful means of counteracting the effect of injurious dumping. The text of Article 15 explicitly limits the types of constructive remedies involved to constructive remedies "provided for [by] this Agreement". We find support for our approach in the panel reports in *EC-Bed Linen*[85] and *US-Steel Plate*.[86]

7.72 At this point in our analysis, it is sufficient for us to endorse the shared view of both parties that the imposition of a "lesser duty" or a price undertaking would constitute "constructive remedies" within the meaning of Article 15.[87] As to the meaning of the requirement to "explore" possibilities of constructive remedies, we also support the shared view of the parties that this obligation is affirmatively to "explore" the possibility of -- rather than affirmatively to "propose" – constructive remedies. We believe that the concept of "explore" cannot be understood to require any particular outcome with respect to the substantive decision that results from the exploration. We draw support for this point of view from the *EC-Bed Linen* panel report, which stated that:

> Article 15 does not require that "constructive remedies" must be explored, but rather that the "possibilities" of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.[92] It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.

> [92] We note that our interpretation of Article 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found:

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[82] While the first sentence of Article 15 imposes an obligation on developed countries to give "special regard" to the situation of developing country Members, the second sentence of Article 15 is not so limited.

[83] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993.

[84] *Ibid*.

[85] Panel Report, *EC – Bed Linen*, *supra*, note 77, para. 6.228.

[86] Panel Report, *US-Steel Plate*, *supra*, note 81, para. 7.112.

[87] Panel Report, *EC - Bed Linen*, *supra*, note 77, para. 6.229. The *EC – Bed Linen* panel was of the view that the imposition of a "lesser duty" or a price undertaking would constitute "constructive remedies" within the meaning of Article 15 and came to no conclusions as to what other actions might in addition be considered to constitute "constructive remedies" under Article 15, as none had been proposed to it.

> "The Panel noted that if the application of anti-dumping measures "would affect the essential interests of developing countries", the obligation that then arose was to explore the "possibilities" of "constructive remedies". **It was clear from the words "[p]ossibilities" and "explored" that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.**" *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, adopted 30 October 1995, para. 584 (emphasis added)."

7.73 We must therefore examine whether the EC authorities actively considered with an open mind the possibility of constructive remedies – that is, a price undertaking or the imposition of a lesser duty[88] -- prior to the imposition of final anti-dumping measures in this investigation.

7.74 Brazil confirms that neither Tupy nor Brazil actively communicated to the European Communities a desire to offer undertakings or to pursue any other kind of "constructive remedy", while asserting that the burden of actively undertaking the exploration -- proposal -- of constructive remedies lies on the developed Member.[89] The European Communities states that it raised the possibility of a price undertaking in bilateral government contacts between the European Communities and Brazil and submitted evidence in support.[90] According to the European Communities, Brazil did not show interest in this possibility. While the parties differ in their assertions as to who took the initiative to raise "the matter" and whether "the matter" referred to was the pipe fittings investigation in general or the possibility of a price undertaking in particular, we do not believe that these distinctions are relevant in this context. This flows from our understanding that there is no disagreement between the parties that the issue of a price undertaking was discussed in exchanges between EC and Brazilian officials.

7.75 We consider that Brazil's suggestion that the exploration of possibilities of constructive remedies must be conducted directly with a developing country *exporter* and Brazil's related assertions do not sit easily with the textual obligation in Article 15 to give special regard to the special situation of developing country Members, not individual companies. The reference in Article 15 is that special regard must be given "to the special situation of developing country Members". Moreover, particularly in the context of an investigation like this one, where Brazilian government officials were frequently involved – including attending bilateral meetings where issues relating to the investigation arose and communicating with EC officials in respect of issues in the investigation indicating a familiarity with certain details of the case,[91] it seems to us that discussing the possibility of price undertakings with such government officials would be an entirely reasonable way in which to explore the possibility of a constructive remedy in the form of a price undertaking with respect to the particular company involved.[92]

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[88] While the parties agree that the imposition of a "lesser duty" might constitute a constructive remedy under Article 15, we do not understand Brazil to contest that the EC did impose a lesser duty. Rather, Brazil asserts that the choice by the EC to impose a lesser duty is mandated by Article 7(2) and 9(4) of the Basic Regulation and is not a consequence of the obligations set out in Article 15 of the *Anti-Dumping Agreement*; the EC applies this rule regardless of whether the Member in which the exporter is located is a developing or developed Member. See Brazil response to Panel question 7 following the first Panel meeting, Annex E-1.

[89] Brazil response to Panel question 3 following the first Panel meeting, Annex E- 1.

[90] These included: meetings between EC and Brazilian officials that occurred on: 23 March 2000 (including the EC Trade Commissioner, Mr. Lamy, and a Brazilian delegation that included Brazil's Minister of Development, Industry and Trade and the Executive Secretary of the Brazilian Foreign Trade Chamber, reflected in Exhibit EC-6); 9 May 2000 (preparatory meeting, reflected in Exhibit EC - 2); and 25-26 May 2000 (the European Community-Brazil Joint Committee, reflected in Exhibit EC - 4).

[91] For example, written communications from Brazil's Ambassador in Brussels to EC officials dated 10 December 1999, 29 January 2000 and 23 February 2000 (Exhibits EC-27-29).

[92] In response to Panel questioning as to whether the Brazilian government transmitted to Tupy the possibility of pursuing a price undertaking to the European Communities as a result of the meetings between

7.76 As we have found that the European Communities adequately explored possibilities of constructive remedies in the form of a price undertaking, it is not necessary for us to consider also whether the European Communities adequately explored constructive remedies in the form of the imposition of a "lesser duty".

7.77 We next examine Brazil's argument that there may be constructive remedies within the meaning of Article 15 other than "lesser duty" and price undertakings. Brazil submits that the term "constructive remedies" embraces undertakings other than price undertakings (for example, undertakings limiting the quantities to be exported to the European Communities, which Brazil asserts that the European Communities in practice accepts). Brazil therefore asserts that the European Communities failed to explore all the possibilities of constructive remedies by not considering undertakings other than price commitments.[93] In the EC view, there is no need for the Panel to reach the issue of whether or not there may be other constructive remedies in addition to price undertakings or the application of the lesser duty rule. The European Communities asserts that exploring other types of undertakings (other than price undertakings) is not a "remedy" envisaged under the *Anti-Dumping Agreement*.

7.78 We do not agree with Brazil's assertion that the term "constructive remedies" also embraces undertakings other than price undertakings (for example, undertakings limiting the quantities to be exported to the European Communities, which Brazil asserts that the European Communities in practice accepts) nor that "any measure which would have a less restrictive impact than an anti-dumping duty should be allowed under Article 8".[94] In this context, we note that Article 8.1 also envisages the possibility that an exporter may undertake to "cease exports to the area in question at dumped prices". This provision refers specifically to an undertaking not to sell *at dumped prices*. It does not envisage a restraint on the quantity of the product exported. Furthermore, the title of Article 8 is "Price Undertakings", rather than "Undertakings", or "Price or Other Undertakings". These factors support our view that quantitative "undertakings" are not a remedy foreseen in the *Anti-Dumping Agreement*, and that Article 15 therefore does not impose any obligation to explore undertakings other than price undertakings in the case of developing country Members. Thus, we disagree with Brazil's argument that the *Anti-Dumping Agreement* "does not prevent" WTO Members from accepting quantitative undertakings, tariff quotas or price quotas.[95] We do not see such undertakings as remedies provided for by the Agreement and therefore do not consider that Article 15 *imposes an obligation* upon developed country Members to consider undertakings other than price undertakings.

7.79 Consequently, we are of the view that the European Communities did not fail to abide by its obligations under Article 15 by not exploring possibilities of undertakings other than price undertakings. We wish to make it clear that we reach no conclusions as to what other actions might be considered to constitute "constructive remedies" under the second sentence of Article 15, as the parties have not specifically pursued other possible such remedies before us.[96] It should also be noted

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Brazilian and EC government officials, Brazil responded that "The Government of Brazil has no record of any contacts maintained with the Brazilian exporter regarding the issue of undertakings. In fact, there was no need at all for Brazil to inform the Brazilian exporter of the possibility of a price undertaking….". Brazil response to Panel question 1 following the second Panel meeting, Annex E - 7.

[93] Brazil response to Panel question 4 following the second Panel meeting, Annex E - 7.

[94] See Brazil response to Panel questions 4 and 5 following the second Panel meeting, Annex E - 7.

[95] *Ibid.*

[96] Although Brazil stated that tariff quotas or price quotas might possibly constitute other kinds of constructive remedies, we do not understand Brazil to have made specific assertions concerning such instruments. Rather it asserted that it was up to the European Communities to devise and propose a constructive remedy. See Brazil response to Panel question 5 following the second Panel meeting, Annex E-7.

that Brazil confirms that neither it nor Tupy proposed any alternatives to a price undertaking (or any other kind of constructive remedy) during the investigation.[97]

7.80 Turning to the question of the timing and scope of application of Article 15, we recall Brazil's argument that the European Communities breached the second sentence of Article 15 by failing to raise the possibility of an undertaking to the Brazilian exporter *before* the imposition of provisional measures. Brazil disagrees with the view of the *EC – Bed Linen* panel that Article 15 applies only to the imposition of definitive anti-dumping measures, arguing that the obligation to explore possibilities of constructive remedies also applies to the period preceding the imposition of provisional measures. Brazil asserts that, were the *EC – Bed Linen* panel's reasoning to prevail, there would be no need to qualify the term 'duty' in the Agreement. Arguing that this is not what happens in the Agreement, however, Brazil draws our attention to Articles 12.2 and 12.2.2 which respectively read, in relevant part: '...and of the termination of a definitive anti-dumping duty", and "...the imposition of a definitive duty...". On the other hand, Brazil asserts, if the intention of the drafters were to give a uniform meaning to the term 'duty' throughout the text, they would have used, for instance, a footnote, as is the case for the term 'injury' (footnote 9 to Article 3)."[98] Brazil contends that the imposition of a provisional measure, irrespective of the form it takes, adversely affects the interests of the developing country Member concerned, for it restricts, since its very beginning, the access to the developed country market for the product concerned.[99]

7.81 For its part, the European Communities invokes the *EC-Bed Linen* panel report in support of the proposition that the provision applies only to the application of definitive anti-dumping measures.

7.82 We understand the phrase "before applying anti-dumping duties" in Article 15 to refer to the period preceding the application of definitive anti-dumping duties, and not the period preceding the imposition of any provisional measures. It is clear that the *Anti-Dumping Agreement* consistently uses the term "provisional measures" to refer to measures imposed prior to the completion of the investigation.[100] There is a distinction drawn in the text of the Agreement between provisional measures (which may take the form of a provisional duty or a security by cash deposit or bond) and anti-dumping duties, with the latter term referring consistently to definitive measures. Therefore, the ordinary meaning of the term "anti-dumping duties" in Article 15, particularly read in the context of the other provisions of the Agreement, refers to the imposition of definitive anti-dumping duties following the completion of the investigation process.[101] Read in this light, the term "before" in Article 15 refers to the period prior to the imposition of definitive duties (in any event, price undertakings cannot be sought or accepted prior to a preliminary affirmative determination (see Article 8.2)). This is entirely consistent with the statement in the first sentence of Article 15 that special regard must be given "when considering the application of anti-dumping measures".[102] Accordingly, we find that the European Communities did not fail to abide by its obligation under Article 15 by not exploring possibilities of constructive remedies *before* the imposition of the provisional measure.

7.83 Since we have found that the European Communities has explored possibilities of constructive remedies within the meaning of Article 15, we need not address the issues of whether the anti-dumping duties would "affect" the "essential interests" of Brazil in this case, within the meaning

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[97] Brazil response to Panel question 3 following the first Panel meeting, Annex E- 1.

[98] Brazil second written submission, paragraph 18.

[99] Brazil second written submission, paragraph 17.

[100] Article 1 of the *Anti-Dumping Agreement* specifies that: "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." (footnote omitted) Articles 8.1 and 10.1 refer to: "provisional measures" and "anti-dumping duties …". See also Articles 7, 9 and 17.4.

[101] We find support for our view in Panel Report, *EC-Bed Linen*, *supra*, note 77, paras. 6.231-6.232.

[102] In this regard, we note the Panel Report, *US-Steel Plate*, *supra*, note 81, para. 7.111.

of the second sentence of Article 15. To the extent Brazil's allegations relate to the contents of the Provisional and Definitive Regulations under Article 12, we examine these *infra*.

7.84 In light of all of these considerations, we find that the European Communities did not act inconsistently with Article 15 of the *Anti-Dumping Agreement*.

7.85 We note, in passing, that, at the Doha Ministerial Conference in November 2001, WTO Members adopted the Ministerial Decision on Implementation-Related Issues and Concerns, which states that Ministers recognize[103]:

> "that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision."

WTO Members are currently engaged in a process of discussions in response to this Ministerial Decision. It is not our task to presuppose the outcome of those discussions.

2. Issue 2: application and initiation of the investigation (claims withdrawn)

7.86 Brazil withdraws its claims regarding the application under Issue 2.[104] We therefore do not examine these claims.

3. Issue 3: currency devaluation

(a) Arguments of the parties

7.87 **Brazil** alleges that the European Communities acted inconsistently with Article 1 of the *Anti-Dumping Agreement* and Article VI of the *GATT 1994* in imposing an anti-dumping measure where no dumping existed due to the effects of the devaluation of the Brazilian currency on the prices of the Brazilian products exported to the European Communities. In Brazil's view, Article VI of the GATT 1994 -- as reflected in Article 1 of the *Anti-Dumping Agreement*, and in the context of Articles 7 and 11 of the *Anti-Dumping Agreement* -- allows "counter-measures only against and in order to offset *present* dumping".[105]

7.88 In the alternative, Brazil alleges that the European Communities violated Article 11.1 of the *Anti-Dumping Agreement* by maintaining the measure to the extent it was not necessary to counteract dumping; and Article 11.2 by failing, simultaneously with the imposition of the measure, to self-initiate a review of the need for the continued imposition of the duty in view of the currency devaluation. Brazil asserts that it was unable to request a review as EC law provides that a review may be initiated "provided a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure". The European Communities had an obligation to self-initiate a review "where warranted". The data made available to the European Communities with regard to the fourth quarter of the POI "should have provided it with a sufficient indication that the dumping margins it had found for the Brazilian exporter in the beginning of the IP has totally disappeared" at the end of the last quarter of the IP and "should have at least led the EC to initiate an immediate

[103] WT/MIN(01)/17, 20 November 2001, paragraph 7.2.
[104] Brazil's second written submission, para. 24.
[105] Brazil's second written submission, para. 27.

review to assess whether the phenomenon had continued".[106] Brazil asserts that: Tupy was "time-barred"[107] by the EC legislation from requesting a review within the year following the imposition of the definitive anti-dumping duties; Tupy has not requested any review at any time[108]; and the "review" initiated by the European Communities in December 2001 was limited to the issue of "zeroing" and is not part of the Panel's terms of reference.

7.89 The **European Communities** argues that, consistent with the *Anti-Dumping Agreement* and the practice of most Members, it calculated dumping margins for a period of twelve months ending prior to the date of initiation of the investigation. According to the European Communities, there is no legal obligation in the Agreement for a Member to consider whether the circumstances following the end of the investigation period but prior to the imposition of the measure still necessitate the imposition. For the European Communities, there is no evidence in this case that dumping ceased during the course of the investigation period. In any event, the devaluation of Brazil's currency occurred during the IP and its effects were reflected in the data used by the EC authorities.

7.90 With respect to Brazil's claims alternative claims under Articles 11.1 and 11.2, the European Communities submits that the implications of the devaluation for Tupy's dumping margin would depend on pricing decisions made by Tupy, and that it was "by no means a foregone conclusion" that the devaluation would result in a reduction of the dumping margin".[109] The EC authorities did not believe that the devaluation that occurred during the IP was an event warranting a review. For the European Communities, self-initiation is a residual category, appropriate for extreme or unusual circumstances. The European Communities also states that, at the request of another exporter, it has since initiated (in December 2001) a review of the duties that are the subject of this dispute,[110] covering the period 1 January to 30 September 2001, but that Tupy has not cooperated in this review.

(b) Arguments of third parties

7.91 **Chile** submits that Article VI.1 of the *GATT 1994* and Article 11.1 of the *Anti-Dumping Agreement* require that an antidumping duty must not exceed the margin of dumping and that the duty may remain in place only to the extent and for as long as necessary to counteract dumping. In establishing the dumping margin in this case, the European Communities failed to take into account a series of important factors, including the devaluation. The investigating authority must re-evaluate whether dumping still exists if the circumstances change so that the dumping margin as calculated no longer reflects the situation. The concepts of conditionality and proportionality referred to by the panel and Appellate Body in *Korea-Dairy Safeguards* are implicit in Article VI:1 of the *GATT 1994* and Article 11.1 of the *Anti-Dumping Agreement*.

7.92 The **United States** notes that the *Anti-Dumping Agreement* constitutes the agreed rules for determining how to implement Article VI:2 of the *GATT 1994* by identifying and countering injurious dumping. Article VI and the *Anti-Dumping Agreement* are meant to be read together. The US further argues that the *Anti-Dumping Agreement* provides for reviews under Article 11. Footnote 22 to Article 11 confirms that even a finding that no dumping occurred in a period subsequent to that examined in the original investigation does not by itself require authorities to terminate the definitive duty order. Furthermore, as the panel recognized in *US – DRAMS*.[111] Article 11.2 does not require the revocation of an order upon the finding of no dumping in a review on the grounds that duties are

[106] Brazil's second written submission, para. 39.
[107] See, for example, Brazil response to EC question 7 following the first Panel meeting, Annex E - 2.
[108] Brazil response to Panel question 6 following the first Panel meeting, Annex E-1.
[109] EC second written submission, para. 9.
[110] EC second written submission, para. 10. EC Official Journal, C/342/5, 5 December 2001, Exhibit EC-26.
[111] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* ("*US – DRAMS*"), WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, paras. 6.26- 6.29.

no longer "necessary." There is no basis for Brazil's argument in the text of the *Anti-Dumping Agreement* or in Article VI:2.

(c) Evaluation by the Panel

(i) Brazil's claim under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

7.93 We begin our examination of Brazil's claim under Article VI of the *GATT 1994* and Article 1 of the *Anti-Dumping Agreement* by recalling the text of these treaty provisions.

7.94 Article VI:2 of the *GATT 1994* provides that a Member may levy an anti-dumping duty "[i]n order to offset or prevent dumping".

7.95 Article 1 of the *Anti-Dumping Agreement* 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)

7.96 The specific relevant chronology of this case is as follows: The date of initiation of the investigation was 29 May 1999. The dumping IP in this investigation was from 1 April 1998 through 31 March 1999. The "injury investigation period" was from 1 January 1995 through 31 March 1999. A 42% devaluation of the Brazilian currency occurred in January 1999 (that is, at the beginning of the last quarter of IP). The date of the Provisional Regulation was 28 February 2000 and the date of the Definitive Regulation was 11 August 2000.

7.97 We understand the issue here to be whether an investigating authority, having established the existence of dumping on the basis of the period of investigation, is obligated, under Article 1 of the *Anti-Dumping Agreement* and Article VI of the *GATT 1994*, to re-assess this determination immediately prior to imposing definitive anti-dumping duties.

7.98 We understand that Brazil does not specifically contest, in this context, the findings of the EC investigating authorities during the IP[112] with respect to the margin of dumping. Rather, Brazil has clarified before us that its contention is that following the devaluation of the Brazilian currency, the EC's findings and determinations for the IP became "obsolete"[113].

7.99 In considering the issue before us, we believe that it is important to keep firmly in mind two elements: first, the temporal distinction between the "investigation period" and the subsequent periods before and after the imposition of the anti-dumping measure; and second, the nature of the methodology used with respect to the determination of dumping over the course of this investigation period. We examine Brazil's arguments in the light of these two elements.

7.100 With respect to the temporal distinction between the investigation period and the subsequent periods before and after the imposition of the measure, the *Anti-Dumping Agreement* refers to the concept of a "period of investigation".[114] The use of an investigation period is therefore contemplated in several provisions of the *Anti-Dumping Agreement.* Moreover, the ADP Committee has adopted a

[112] Brazil response to Panel question 22 following the first Panel meeting, Annex E-1.
[113] *Ibid.*
[114] See for example, Article 2.2.1, 2.2.1..1, 2.4.1 and 9.5.

"Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations"[115], which states, *inter alia*, 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; and that the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation.[116]

7.101 There are practical reasons for using an investigation period, the termination date of which precedes the date of initiation of the investigation. This ensures that the data that will form the basis for the eventual determination are not affected in any way by the initiation of the investigation and any subsequent actions of exporters/importers. The rationale is thus to acquire a finite data set unaffected by the process of the investigation. This can form the basis for an objective and unbiased determination by the investigating authority. The period of investigation terminates as close as possible to the date of initiation of the investigation in order to ensure that the data pertaining to the investigation period, while historical, nevertheless refers to the recent past. The use of a sufficiently long period of investigation is critical in order to ensure that any dumping identified is sustained rather than sporadic.

7.102 Brazil notes that Article VI of the *GATT 1994* addresses the phenomenon of dumping and authorizes the imposition of countermeasures "in the present tense".[117] Brazil supports its argument that the Agreement permits "counter-measures only against and in order to offset *present* dumping" with reference to the contextual elements of Articles 7 and 11 of the *Anti-Dumping Agreement*. However, we do not view these contextual elements as supporting Brazil's position. Article 7.1(iii) permits the application of provisional measures only if "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". Article 11.1 states: "[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." We agree with Brazil that, like Article VI of the *GATT 1994*, both of these provisions are in the present tense, and that the point is to offset present dumping. The issue is, however, how best to follow a consistent and reasonable methodology for determining present dumping. Read in the context of the provisions we have already cited, and on the basis of the necessity to follow a consistent and reasonable methodology, we are of the view that a finding that dumping exists during a recent past IP is a finding of "present" dumping for the purposes of the Agreement. This flows from our observation that the only mechanisms provided for in the Agreement for determining the necessity or propriety of anti-dumping measures are those concerning dumping, injury and causation. There are no additional mandatory procedures envisaged to establish, over and above this, the propriety of, or necessity for, the initial imposition of anti-dumping measures.

7.103 Brazil itself states that "it is in the very nature of anti-dumping investigations to assess a practice which has taken place in the past in order to determine whether to remedy the consequences of that past practice in the future."[118] However, Brazil continues, the basic rationale behind this approach – that the same or closely resembling circumstances as in the IP will, or are at least likely to, continue so that remedies would still play their predefined role once they are imposed –- is absent in circumstances as in this case, where the circumstances prior to the imposition of anti-dumping measures change dramatically. Brazil alleges that the EC's "mechanical approach"[119] failed to take

[115] G/ADP/6, adopted by the Committee on 5 May 2000.

[116] The concept of a set period of investigation to examine the existence of dumping has been present in the GATT system for over 40 years. Indeed, a 1960 Report by a Group of Exports concerning anti - dumping and countervailing duties considered the use of a "pre - selection system". See Group of Experts, *Second Report on Anti-dumping and Countervailing Duties*, adopted on 27 May 1960 (L/1141) BISD 9S, 194.

[117] Brazil second written submission, para. 27.

[118] Brazil second written submission, para. 29.

[119] Brazil second written submission, para. 31.

adequate note of the lasting effect of the currency devaluation that occurred in the last quarter of the investigation period.

7.104 In addressing these arguments by Brazil, we turn to the requirements of the Agreement with respect to the methodology used in the determination of dumping over the investigation period. Article 2.4.2 generally calls for "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-by transaction basis". 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 IP. To the extent that Brazil is suggesting that the EC authorities should have focused exclusively or particularly on data from the *end* of the investigation period (following the devaluation), we therefore reject Brazil's argument. We observe that the application of such a selective temporal methodology could indeed risk undermining the consistent and impartial application of the Agreement. The data taken into account pertaining to the entire investigation period will produce a margin of dumping for that period. That margin of dumping will reflect developments that occurred within the period of investigation. In this way, the effects of the currency devaluation for the three last three months of the IP in this case were already taken into account and reflected in the margin of dumping calculated by the EC investigating authority.

7.105 We find further contextual support for this view in the provision of the Agreement that explicitly addresses sustained movements in exchange rates during the IP, Article 2.4.1. This confirms to us that the Agreement contemplates the presence of a sustained movement of exchange rates and that the information pertaining to the entire IP continues to be relevant in determining whether a basis exists for the imposition of anti-dumping measures.

7.106 Brazil's argument seems to centre on the proposition that "[a]ny calculation or methodology, however compatible with the technical requirements of the *Anti-Dumping Agreement*, which would ultimately defeat the object and purpose of the *Anti-Dumping Agreement*, constitutes a violation of these rules".[120] Brazil refers to a "general obligation" under which the European Communities was bound not to impose, or at least to withhold, anti-dumping measures.[121] As we are bound to apply the "customary rules of interpretation of public international law"[122] to the provisions of the Agreement, it would be essential to have a textual basis that imposes an obligation of the kind suggested by Brazil.[123] Any departure from the requirement to apply the provisions of the Agreement in a precise and methodical way would have to be explicitly provided for. However, we see no foundation in the text of the Agreement for Brazil's argument that this provision does not apply "in the same way" in this case,[124] nor for a requirement that an investigating authority re-assess its own determination made on the basis of an examination of data pertaining to the IP prior to the imposition of an anti-dumping measure in the light of an event which occurred during the IP.[125] We decline to read such a provision

[120] Brazil second written submission, para. 33.

[121] Brazil response to Panel question 23 following the first Panel meeting, Annex E-1.

[122] *DSU*, Article 3.2.

[123] With our finding, we do not mean to entirely rule out the possibility that a currency devaluation that occurs during the course of an investigation period could eliminate any margin of dumping that might be found to exist at some point during that investigation period. In any event, we are of the view that the effects of any currency devaluation during an investigation period would ordinarily be reflected in the data used in properly conducted calculations comparing the normal value and the export price.

[124] Brazil second written submission, para. 32.

[125] We take note of Brazil's argumentation that the European Communities has a number of cases in its internal law that address circumstances arising following the IP (see, for example, Brazil first written submission, para. 168; Brazil response to Panel question 35 following the first Panel meeting, Annex E–1). Our

into the text. Moreover, 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 IP, for example, in Articles 9.3 (full or partial refund of duties paid) and 11 (review).

7.107 Thus, absent any such explicit caveat or conditionality, Article 1 of the *Anti-Dumping Agreement* does not require an investigating authority to re-assess its own determination made on the basis of an examination of data pertaining to the IP prior to the imposition of an anti-dumping measure in the light of an event that occurred during the IP.

7.108 We therefore find that Brazil has not established that the European Communities violated its obligations under Article 1 of the *Anti-Dumping Agreement* or under Article VI:2 of the *GATT 1994* in imposing an anti-dumping measure in this case following the devaluation of the Brazilian currency at the beginning of the fourth quarter of the IP.

(ii) Brazil's alternative claims under Article 11.1 and 11.2 of the Anti-Dumping Agreement

7.109 Brazil submits that the European Communities violated Article 11.1 by maintaining the imposition of the anti-dumping duty to the extent it was not necessary to counteract dumping, and that the European Communities violated Article 11.2 by not simultaneously reviewing, on its own initiative, the need for the continued imposition of the duty in view of the currency devaluation.

7.110 As always, we begin our examination of Brazil's claims by recalling the relevant text of the Agreement. Pursuant to Article 11.1,

> "[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".

7.111 Article 11.2 of the *Anti-Dumping Agreement* provides:

> "The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately." (footnote omitted)

7.112 Pursuant to Article 11.2, an investigating authority is therefore required, where "warranted", to review the need for the continued imposition of the duty. The ordinary dictionary meaning of the verb "warrant" is: "To furnish good and sufficient grounds for (a course of action); to render allowable, justify. b. To justify (a person *in* or *to* a course of action)."[126] We therefore understand the phrase "where warranted" in Article 11.2 to denote circumstances furnishing good and sufficient grounds for, or justifying, the self-initiation of a review. Where an investigating authority determines such circumstances to exist, an investigating authority must self-initiate a review. Such a review, once initiated, will examine whether continued imposition of the duty is necessary to offset dumping,

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task is to examine the matter on the basis of the covered agreements. We therefore make no pronouncement on the WTO-consistency of the EC's non-application of this EC methodology in this particular case.

[126] Oxford English Dictionary Online: http://dictionary.oed.com.

whether the dumping would be likely to continue or recur, or both. Article 11.2 therefore provides a review mechanism to ensure that Members comply with the rule contained in Article 11.1.[127]

7.113 In respect of Brazil's alternative claims concerning the obligation to assess the need to impose anti-dumping measures prior to their imposition or immediately to self-initiate a review, we consider that Article 11.1 does not set out an independent or additional obligation for Members. By virtue of Article 11.1 of the *Anti-Dumping Agreement* , an anti-dumping duty may only continue to be imposed if it remains "necessary" to counteract injurious dumping. Article 11.1 contains a general, unambiguous and mandatory requirement that anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping.[128] It furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article. On this basis, we examine Brazil's claims under Articles 11.1 and 11.2.

7.114 We understand Brazil to allege that the European Communities violated Article 11.1 by maintaining the imposition of the anti-dumping duty to the extent it was not necessary to counteract dumping, and that the European Communities violated Article 11.2 by not, simultaneously with the imposition of the measure, reviewing, on its own initiative, the need for the continued imposition of the duty in view of the currency devaluation. We further understand that the focus of Brazil's argument is upon the lasting effect of the currency devaluation, an event which occurred at the beginning of the last quarter of the IP. According to Brazil, the effects of the devaluation, which were known and verified by the European Communities, warranted an immediate self-initiated review and "there was no need for the Brazilian exporter to provide any additional information to the European Communities to trigger the review".[129] This was particularly so, in Brazil's view, as the EC's internal legislation provides for requested reviews after "a reasonable period of time of at least one year has elapsed since the imposition of the definitive measures".[130]

7.115 We disagree. The devaluation occurred in January 1999, three quarters of the way through the period of investigation, and Brazil does not contest the finding of dumping during the IP in this context.[131] While we cannot exclude the possibility that circumstances may warrant the simultaneous self-initiation of a review in certain circumstances, we find no basis in the Agreement for an obligation that the self-initiation of a review simultaneous with the imposition of the measure is *necessarily* warranted or that an authority *must* self-initiate a review immediately upon the imposition of measures on the basis of an affirmative dumping determination in respect of a recent past IP.[132]

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[127] The Appellate Body has examined the obligation contained in Article 21.1 and 21.2 of the *SCM Agreement* in Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot - Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601 concerning a Member's obligations once a review has been initiated. That decision does not deal with the issue of when the self-initiation of a review is "warranted". We nevertheless think that it is relevant with respect to the relationship between Articles 11.1 and 11.2.

[128] We find support for this approach in Panel Report, *US-DRAMS*, *supra*, note 111.

[129] Brazil response to Panel question 27 following the first Panel meeting, Annex E-1.

[130] Brazil cites Article 11.3 of the EC Basic Regulation, Exhibit BRL-24.

[131] Brazil response to Panel question 22 following the first Panel meeting, Annex E-1.

[132] The argument that Articles 11.1 and 11.2 necessarily *require* the withholding of imposition of measures and/or the self-initiation of an immediate review is irreconcilable with note 22 of the *Anti-dumping Agreement*. Note 22 states that, in cases where anti-dumping duties are levied on a retrospective basis, "a finding in the most recent assessment proceeding … that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty". If this view of Article 11.2 were to prevail, an investigating authority would be obligated under Article 11.2 perpetually to withhold the imposition of measures and/or to continuously assess the situation by repeatedly self-initiating a review, and note 22 would be rendered meaningless as there would never be duties imposed on which to conduct a re-assessment. This confirms our

The determination of whether or not good and sufficient grounds exist for the self-initiation of a review necessarily depends upon the factual situation in a given case and will necessarily vary from case to case.

7.116 It is therefore necessary for us to examine the surrounding relevant facts. In so doing, we consider that while the European Communities was by no means precluded from immediately initiating a review upon its own initiative under Article 11.2, we are of the view that, even assuming *arguendo* that the devaluation had resulted in a convergence of the normal value and the export price at the time of the imposition of the measures, it was not necessarily clear whether and to what extent such a situation would continue. This is particularly the case given that there was no clarity concerning the magnitude and direction of any subsequent movements in Brazil's currency nor concerning the pricing decisions that Tupy might take in the face of any such developments. It was therefore not clear that, even assuming *arguendo* a convergence of export price and normal value by the time of the imposition of the measures -- an issue that was not considered by the EC authorities and that we need not and do not consider here for the purposes of resolving the issue before us -- any "lasting effect" of the devaluation would be a convergence of normal value and export price.

7.117 To the extent that Brazil's argument is that the continued effect of the devaluation between the end of the IP and the imposition of the measure was such as to eliminate any dumping that was established to exist during the IP, we recall that the existence of a duty assessment mechanism under Article 9.3 is intended to address precisely a situation of that kind. This mechanism (which, in the case of the European Communities is a refund system) aims to ensure that the amount of anti-dumping duty actually collected does not exceed the actual margin of dumping, and refunds are to be granted in order to attain this objective. In light of the fact that the *Anti-Dumping Agreement* contemplates, *inter alia*, prospective duty collection, and that Article 9.3 contemplates a mechanism to refund duties in the event the actual margin of dumping is less than duties actually collected, it appears inherent in the structure of the Agreement that the data and calculations pertaining to the investigation period legitimately form the basis for the imposition of the measure.

7.118 The findings of the panel in *US – DRAMS*[133] are relevant here. In examining the nature of a review conducted under Article 11.2 AD, that panel rejected the view that Article 11.2 "requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is precluded *a priori* in any circumstances other than where there is present dumping." This reasoning would suggest to us that the *Anti-Dumping Agreement* does not require a decision to be made by the investigating authorities after the end of the IP not to impose duties, nor to review the imposition of a duty immediately after it is imposed based on events between the end of the IP and the time of imposition, much less on the basis of events occurring before the end of the IP.

7.119 We therefore find that Brazil has not established that the European Communities violated Article 11.1 or Article 11.2 of the *Anti-Dumping Agreement* by imposing definitive anti-dumping measures in this case or by not, simultaneously with that imposition, self-initiating a review following the devaluation of Brazil's currency that occurred at the beginning of the fourth quarter of the IP.

7.120 We understand Brazil's allegations of violation by the European Communities focus upon the failure to self-initiate a review, and not on any other aspect of Article 11.2 of the *Anti-Dumping Agreement*. In particular, pursuant to Article 11.2 a review may also be initiated at the request of a

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view that, once an investigating authority has established the existence of dumping during a recent past IP, an absence of dumping (assuming *arguendo* that there is such an absence, however its existence is established) at the time of the imposition does not, in and of itself -- and in the absence of a new or changed circumstance not present during the IP -- preclude the imposition of a measure or necessarily render a review "warranted" so as to require the self-initiation of a review pursuant to Article 11.2. Brazil does not argue that such a new or changed circumstance arose *following* the IP, but only that the devaluation had lasting effects.

[133] *Supra*, note 111.

party "provided that a reasonable period of time has elapsed" since the imposition of definitive AD duties. The EC Basic Regulation provides that a review may be initiated upon request of an interested party provided that a reasonable period of time of at least one year has elapsed since the imposition of the AD measure. However, as Brazil has argued that Tupy was legally precluded from requesting a review before the year lapsed, and Brazil has not argued that it ever requested such a review, and we note that Tupy declined to participate in a subsequent review of the measure, Exhibits BRL-55 and 56, including a review initiated in December 2001,[134] we do not examine this element of Article 11.2 here.

4. Issue 4: constructed normal value amounts used for profit and SG&A

(a) Arguments of the parties

7.121 **Brazil** alleges that the European Communities erred in the calculation of constructed normal value under Article 2.2 and 2.2.2. In particular, Brazil alleges that in constructing normal value, the European Communities used data associated with sales of certain product types that "[did] not permit a proper comparison" due to "low volume" under Article 2.2.[135] Brazil argued that, as the Agreement does not define the term “in the ordinary course of trade”, the chapeau of Article 2.2.2 is open to interpretation.[136] Brazil therefore submits that the European Communities violated Article 2.2.2, as Article 2.2.2, when read together with Article 2.2, requires that the amounts for SG&A and for profits should be based on the data of representative and profitable domestic sales. Where an investigating authority excludes data under Article 2.2, it follows “as a matter of construction” that the same data should be excluded under Article 2.2.2.[137] Brazil also invokes Article 2.4, alleging that, in using this same data in relation to profit margins, and not making an adjustment for the use of data relating to sales which do not permit a proper comparison, the European Communities breached the requirement to make a fair comparison between normal value and export price.

7.122 The **European Communities** admits that it used data relating to "low volume" sales in establishing the profit margins under the chapeau of Article 2.2.2. The European Communities argues that this approach is envisaged by the chapeau of Article 2.2.2, which requires (and permits) solely the exclusion of sales not made "in the ordinary course of trade" in establishing the amounts for profit and SG&A in constructing normal value. The European Communities contends that Tupy did not request an adjustment on this ground in the investigation, that the Article 2.4 claim is therefore inadmissible in these Panel proceedings and that no such adjustment would be warranted in any event.

(b) Arguments of third parties

7.123 Without taking a position on Brazil’s allegations under Articles 2.2 and 2.2.2, the **United States** disagrees with Brazil that an improper calculation of constructed normal value can constitute a breach of Article 2.4, or that a putative breach of Article 2.4 can be used to bolster a claim under Article 2.2 and 2.2.2. For the United States, Brazil’s arguments with respect to the calculation of

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[134] O.J. C 342 5, 2 December 2001, Exhibit EC-26.

[135] Brazil's original allegation was that the European Communities wrongly included "low volume" profit data in constructing normal value, and that the European Communities used different data from a different set of transactions for SG&A, on the one hand, and profit, on the other. However, Brazil does not reiterate in its second submission its allegation concerning the use of different data for SG&A and profits. Rather, we understand Brazil's argumentation to have developed to allege that the European Communities violated Article 2.2.2 by including amounts for both SG & A and profits pertaining to sales of product types for which domestic sales were "not representative" within the meaning of Article 2.2 and footnote 2 thereto (see Brazil second written submission, para. 49).

[136] Brazil second written submission, paragraph 45.

[137] Brazil second written submission, paras. 46-47.

constructed normal value, relate to the identification of normal value under Article 2.2 and 2.2.2, and not to its subsequent comparison with export price, under Article 2.4.

(c) Evaluation by the Panel

7.124 Our understanding of the factual situation that gave rise to this claim by Brazil is the following.

7.125 In the underlying investigation, the European Communities defined the product under consideration as: "threaded malleable cast-iron tube or pipe fittings … which are joined by a screwing joining system, falling within CN code ex 7307 19 10".[138] The European Communities also found that "malleable fittings produced by the Community industry and sold on the Community market as well as malleable fittings produced in the countries concerned and exported to the Community were like products, since there were no differences in the basic physical and technical characteristics and uses of the existing different types of malleable fittings".[139]

7.126 The European Communities determined that products with Tupy's internal product codes 12, 18, 68 and 69 were all within the "product concerned"/"like product" definition. Only types within two of these product codes – 12 and 18 -- were exported to the European Communities.[140]

7.127 The European Communities determined normal value for 1375 product types exported by Tupy. The European Communities constructed the normal value for 809 of these types.

7.128 In order to determine whether or not, based on a low volume of domestic sales, it should calculate a constructed normal value, the European Communities applied the 5% "test" referred to in footnote 2 to Article 2.2 of the *Anti-Dumping Agreement*-- i.e. sales in the domestic market being of such a low volume as to "not permit a proper comparison" -- first at the level of the total sales for each exporting producer[141]; and subsequently within "directly comparable"[142] "types" of the exported product for the exporting producer.[143]

[138] Provisional Regulation, recitals 9 - 12, confirmed in Definitive Regulation, recital 9.

[139] Provisional Regulation, recital 13, confirmed in Definitive Regulation, recitals 14 - 19.

[140] The following is a summary of these four different types (with Tupy internal product codes 12, 18 , 68 and 69) indicating basic characteristics and domestic and export sales to the EC:

Types of product concerned	Sold in domestic market (Brazil)	Exported for sale in EC market
12 (BSP threading)	yes	yes
18 (BSP threading)	no	yes
68 (NPT threading)	yes	no
69 (NPT threading)	yes	no

In the Provisional Regulation, the European Communities used the product control numbers proposed by Tupy in the questionnaire, and normal values based on domestic sales were based only on product types 12. In the Definitive Regulation, the EC altered its approach by using internal product numbers, taking into account also data for product types "68" and "69".

[141] The volume of domestic sales by Tupy was 22.8 million units, compared to 22.3 million exported to the EC. See EC response to Panel question 36 following the first Panel meeting, para. 36, Annex E-3. Definitive Disclosure, BRL - 16, Annex II, page 8, point 2.11; Provisional Disclosure, BRL-11, Annex II, page 1, point 1.1; Provisional Regulation, recital 20.

[142] *I.e.* whether for each of the product types exported, the quantity sold on the domestic market was at least 5% of the identical type exported to the EC.

[143] Provisional Disclosure, Exhibit BRL - 11, Annex 4; Definitive Disclosure, BRL-16, Annex II, Annex 4.

7.129 The European Communities then considered whether sales were in the "ordinary course of trade", first for the product as a whole and then, for each product type sold by Tupy in Brazil.[144]

7.130 For the product types where there was an insufficient level of sales (*i.e.* such a low volume as "not to permit a proper comparison") and/or sales were not within the ordinary course of trade, the European Communities constructed the normal value[145] [146]

7.131 The European Communities used SG&A and profit data from domestic sales made in the ordinary course of trade (regardless of whether these sales were considered to be of sufficient volume to permit a proper comparison within the meaning of Article 2.2).[147]

7.132 We understand that the issue before us is whether data associated with sales deemed "not to permit a proper comparison" within the meaning of Article 2.2 because of the low relative volume of domestic sales may nevertheless be used in determining profits in constructing normal value under the chapeau of Article 2.2.2. Our examination begins with the text of the relevant provisions.

7.133 Article 2.2 provides for the construction of normal value under certain identified circumstances. It states:

> 2.2 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.
>
> [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.

7.134 Article 2.2.2 governs the calculation of SG&A and profits for the purpose of constructing normal value under Article 2.2. Article 2.2.2 provides, in pertinent part:

> 2.2.2 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.

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[144] See Provisional Regulation, Exhibit BRL-12, recital 23.

[145] We do not understand Brazil to be challenging the fact that the EC applied certain tests at two different levels in its calculations, nor the EC's model-by-model analysis.

[146] Provisional Regulation, Exhibit BRL-12, recitals 26 and 27.

[147] Provisional Regulation, Exhibit BRL-12, paras. 20-27. When the sales to independent customers at prices equal to or above the cost of production represented at least 10% of the total of domestic sales volume of the product concerned by the company concerned. Where this criterion was not met, a weighted average profit margin of the other companies with sufficient sales in the ordinary course of trade in the country concerned was used. We do not understand that Brazil is alleging any inconsistency with the *Anti-Dumping Agreement* with respect to the EC's application of this 10% test.

7.135 The chapeau of Article 2.2.2 makes clear that data from sales not in the ordinary course of trade are to be excluded from the calculation of constructed normal value.[148]

7.136 However, this does not fully resolve the question before us. We must consider whether the "ordinary course of trade" test is the *sole* exclusionary test that an investigating authority is permitted to apply to profits in constructing normal value under the chapeau of Article 2.2.2, and, in particular, whether or not data from so-called "unrepresentative" sales – i.e. sales deemed "not to permit a proper comparison" because of low volume within the meaning of Article 2.2 -- must or may *also* be excluded under Article 2.2.2 (although they may be sales in the ordinary course of trade).

7.137 It is clear that the text of the chapeau of Article 2.2.2 refers to the use of "actual data pertaining to production and sales in the ordinary course of trade of the like product". It does not refer to any additional exceptions or qualifications. The "ordinary course of trade" test is the *only* test that the text of the provision explicitly identified for application by a Member to exclude data in establishing SG&A and profits under the chapeau methodology.

7.138 We understand that the explicit exclusion pertaining to sales not in the ordinary course of trade in this first sentence of the chapeau to mean that where there is no other such explicit exclusion with respect to sales "not permitting a proper comparison" due to "low volume" elsewhere in the same provision, no such exclusion should be implied. From this, we discern 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. In contrast to the Article 2.2 chapeau, there is no explicit exclusion, in the Article 2.2.2 chapeau, of data relating to sales the volume of which was so low as not to permit a proper comparison. On the other hand, the condition of "sales in the ordinary course of trade", mentioned in Article 2.2, is also explicitly included once again in the chapeau of Article 2.2.2. It is not our task to read into the text of the treaty words that are not there. The ordinary meaning of this phrase includes the SG&A actually incurred and the profits actually realized in the category of production and sales explicitly specified in the Agreement.

7.139 In light of these considerations, we find that Brazil has not established that the European Communities breached its obligations under Article 2.2.2 by including data relating to "low volume" sales in the construction of normal value.

7.140 Brazil also alleged that the European Communities breached the requirement to make a fair comparison between normal value and export price by using data from "low volume" sales and not making an adjustment for the use of such data under Article 2.4. However, we are of the view that Article 2.4 does not provide a legal basis for Brazil's allegation. Brazil's arguments with respect to the calculation of constructed normal value in this case relate to the identification of normal value under Article 2.2 and 2.2.2, rather than to the requirement subsequently to ensure a fair comparison with export price under Article 2.4. For this reason, we decline to consider Brazil's allegation under Article 2.4 in this context.

[148] Article 2.2.1 addresses when sales of the like product may be treated as not "in the ordinary course of trade". It is clear that data from sales not in the ordinary course of trade should be excluded under the chapeau methodology. We find support for this view in Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/AB/R, adopted 12 March 2001, para. 82.

5. Issue 5: constructed normal value -- product codes

(a) Arguments of the parties

7.141 **Brazil** asserts that Article 2.2.2, read together with Article 2.6, requires that where an identical product exists, sales data relating to the SG&A and profits of that identical product must be used exclusively in constructing normal value. Only in the absence of sales of such an identical product may data relating to sales of a product with closely resembling characteristics be used. Brazil therefore submits that the European Communities acted inconsistently with Article 2.2.2 in constructing the normal value for certain product types (with codes "12" and "18") by including data relating to domestic sales of "non-identical" product types (with codes "68" and "69").[149]

7.142 The **European Communities** contends that it correctly included the data in question in constructing normal value under Article 2.2.2. As the data were associated with sales of the like product, there was no reason to exclude them.

(b) Evaluation by the Panel

7.143 The **Panel** refers again to our understanding of the basic factual situation giving rise to Brazil's claim.[150] The European Communities determined normal value for 1375 product types exported by Tupy. The European Communities constructed the normal value for 809 of these types, which included (526) product types within code 12 (for which no identical types were sold domestically or were sold but in insufficient quantities and/or not in the ordinary course of trade); and (283) product types within code 18.[151]

7.144 In constructing the normal value of certain product types with Tupy internal product code "12" and "18" under the chapeau of Article 2.2.2 (i.e. using actual data for SG&A and profit from sales in the ordinary course of trade of the like product), the European Communities included data relating to sales of types in internal product codes 12, 68 and 69.

7.145 Brazil objects to the European Communities' use of data from sales of types with internal product codes "68" and "69", submitting that the only domestically-sold product types to which the EC should refer when identifying amounts for SG&A and profits under Article 2.2.2 for exported types with codes 12 and 18 are the product type with code 12 for which domestic sales are both representative and profitable. According to Brazil, the product type with code "12" is the identical product type to product type "18". Brazil asserts that types in codes "68" and "69" have differences which make them "non-comparable" with product types in code "18" and that the data from these sales should have been excluded in the calculations under Article 2.2.2. Brazil submits that Article 2.2.2, read together with Article 2.6, makes clear that where an identical product exists, data relating to its SG&A costs and profits shall be used. Only in the absence of such a product may data relating to a non-identical but similar or closely resembling product be used.

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[149] Brazil does not refer in its second written submission to its claim under Article 2.4 that, having included data from such sales, the European Communities violated Article 2.4 by refusing to make adjustments for differences in physical characteristics affecting price comparability. We take Brazil's response to Panel Question 45 and Brazil's second written submission to indicate that Brazil pursues this claim under Article 2.2.2, rather than Article 2.4. In any event, we recall our view *supra*, para. 7.140, that Brazil's arguments with respect to the calculation of constructed normal value here relate to the identification of normal value under Article 2.2 and 2.2.2, rather than to the requirement subsequently to ensure a fair comparison with export price under Article 2.4.

[150] *Supra*, paras. 7.124 *ff*.

[151] See Provisional Regulation, recitals 20-27, 35-37; EC response to Panel question 39 following the first Panel meeting, Annex E-3, para. 46 *ff*.

7.146 As always, the starting point for our examination of Brazil's claim is the text of the provision invoked by Brazil. We recall Article 2.2 of the *Anti-dumping Agreement*, cited in full *supra*.[152] Article 2.2.2 governs the calculation of SG&A and profits for the purpose of constructing normal value under Article 2.2. Article 2.2.2 provides, in pertinent part:

> 2.2.2 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.

7.147 Thus, Article 2.2.2 mandates the use of actual SG&A and profit data relating to certain sales of *the* "like product". It makes clear that data from sales of the like product not in the ordinary course of trade should be excluded from the calculation of constructed normal value. This is the only explicit indication given in the provision that data from certain sales should not be taken into account in the construction of normal value. No other data relating to sales of the "like product" are explicitly earmarked for such exclusion.

7.148 Article 2.6 of the *Anti-Dumping Agreement* contains a definition of the term "like product". It reads:

> 2.6 Throughout this Agreement the term "like product" ("product similar") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

7.149 The definition of "like product" in Article 2.6 governs how an investigating authority identifies the scope of the "like product" for the purposes of the investigation and of the Agreement. Once the investigating authority has identified the scope of the "like product", the scope of that definition remains consistent.

7.150 The chapeau of Article 2.2.2 requires the use of actual data from all relevant sales of the like product. Thus, by the express terms of Article 2.2.2 chapeau, actual data from relevant transactions relating to sales of the "like product" – as a whole – may be taken into account to construct normal value. There is no provision to the effect that constructed normal value is to be based only on a limited subset of data relating to sales of certain selective product types falling within the definition of like product, but excluding data relating to sales of other such types. It is not our task to read into the text of the treaty words that are not there.

7.151 We therefore find that Brazil has not established that the European Communities, having defined the "like product" as it did, acted inconsistently with Articles 2.2 and 2.2.2 by including data from sales of the product types of internal product codes 68 and 69, which fell within the definition of "like product", for the purposes of constructing normal value in order to reach a margin of dumping for the like product as a whole.

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[152] *Supra*, para. 7.133.

6. Issues 6 and 10: "fair comparison" with respect to taxation

(a) Issue 6: IPI Premium Credit

(i) Arguments of the parties

7.152 **Brazil** submits that Tupy obtained a 20% refund of the value of its exported fittings to the EC – the IPI Premium Credit -- to compensate for indirect taxes borne on the Brazilian market by inputs used to produce the exported product. Brazil alleges that the EC violated: Article VI:4 of the *GATT 1994* by not negating the effect of the IPI Premium Credit; and Article VI:1 of the *GATT 1994* and Article 2.4 of the *Anti-Dumping Agreement* (1) by failing to fulfil the requirement of a fair comparison between the normal value and the export price by denying allowances for differences in indirect taxation affecting the price comparability; (2) by not indicating to the Brazilian exporter what additional information with regard to the IPI Premium Credit was necessary to ensure a fair comparison; and (3) by imposing an unreasonable burden of proof upon the Brazilian exporter to demonstrate the justification of the Brazilian tax law concerned.

7.153 The **European Communities** submits that the it denied an allowance in respect of the IPI Premium Credit as Tupy did not demonstrate that this credit "compensated" for internal taxes "borne by the like product" when destined for domestic consumption within the meaning of Article VI:4 of the *GATT 1994*. Additional reasons for the rejection by the EC authorities of an adjustment to normal value for the IPI Premium Credit was that it was not consistently "booked", doubtful in value and wrongly calculated by Tupy.

(ii) Evaluation by the Panel

7.154 The **Panel** begins our examination of Brazil's claim in respect of the IPI Premium Credit with the text of the treaty provisions cited by Brazil. Article VI:1 of the *GATT 1994* provides that in the determination of dumping:

> "Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability."

7.155 Article VI:4 of the *GATT 1994* states:

> "4. No product of the territory of any Member imported into the territory of any other Member shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."

7.156 Article 2.4 of the *Anti-Dumping Agreement* reads, in pertinent part:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. … The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. (footnote omitted)

7.157 Article 2.4 imposes upon the investigating authority the obligation to make due allowance, in each case, on its merits, for differences which affect price comparability. Differences in taxation are explicitly listed as a factor that must be taken into account under Article 2.4 to the extent they may affect price comparability, and for which due allowance shall be made, in each case, on its merits. The last sentence of Article 2.4 provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison. The requirement to make due allowance for such differences, in each case on its merits, means that the authority must at least evaluate identified differences in taxation with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4 of the *Anti-Dumping Agreement*, and then to make an adjustment where it determines this to be necessary on the basis of this evaluation.[153] The issue of which specific "allowances" should be made in any case depends very much on the particular facts of the case. The last part of the last sentence of Article 2.4, that the authorities "shall not impose an unreasonable burden of proof" on interested parties, does not remove the burden from interested parties to substantiate their assertions concerning claimed adjustments. In a similar vein, an investigating authority in possession of the requisite information substantiating a claimed adjustment would not be justified in rejecting outright that claimed adjustment.

7.158 Thus, while it is incumbent upon the investigating authorities to ensure a fair comparison,[154] so also is it incumbent upon interested parties to substantiate their assertions concerning adjustments as constructively as possible. The duty of an investigating authority to ensure a fair comparison cannot, in our view, signify that an investigating authority must accept *any* claimed adjustment. Rather, the investigating authority must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited. On this basis, we examine Brazil's claim under Article 2.4.

7.159 While there is no disagreement between the parties that legitimate differences in taxation may be the subject of adjustment under Article 2.4, the parties disagree as to whether the IPI Premium Credit fulfils the necessary conditions for an allowance to have been granted in this particular case.

7.160 We therefore examine the particular circumstances surrounding this issue. We have closely scrutinized the record of the underlying investigation, including the communications between Tupy and the European Communities pertaining to the IPI Premium Credit. The European Communities indicated and requested relevant substantiated information in the questionnaire.[155] Tupy indicated in

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[153] We find support for our view in Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* ("*Argentina – Ceramic Tiles*"), WT/DS189/R, adopted 5 November 2001, para. 6.113.

[154] We recall the view of the Appellate Body that the obligation to ensure a fair comparison under Article 2.4 "lies on the investigating authorities" and not on exporters. Appellate Body Report, *US-Hot-Rolled Steel*, *supra*, note 40, para. 178.

[155] The questionnaire states, *inter alia*, "List all internal taxes imposed on the domestic market products, which were either rebated upon exportation or not collected on the products exported to the European Community.
For each tax listed above, provide English translations of statutes and regulations authorising the collection of the tax, including documents which explain the method of calculation, assessment, and payment of the tax.
For each tax listed above, separately provide information on the tax base or taxable price, the tax rate, the amount of taxes assessed, any deductions or offsets to the tax and the formula used to calculate the tax amount.
Indicate when you are legally obligated or liable for tax payment. Report when you actually paid taxes and whether you maintain separate accounts for these taxes.
Report in the transaction-by-transaction listing below (see points 11 and 12) the amount of such taxes applicable to each domestic sale.
Explain how you calculated this amount……

its questionnaire response that according to Brazilian law, "…the Brazilian government gave to Brazilian export companies a tax of 20% refund over the FOB value for indirect taxes paid."[156] At the provisional stage, the European Communities stated that it would "further investigate this issue in order to establish the exact amount of indirect taxes which was actually refunded on export sales made to the Community and at the same time borne by the like product concerned when consumed in Brazil".[157] Brazil submits that Tupy presumed from this statement that it would have had an opportunity to provide more information regarding the Brazilian legislation, if needed. Brazil submits that the European Communities did not, however, "further investigate" the issue and that any uncertainty that remained should be ascribed to the European Communities as a violation of its obligation in Article 2.4 in that the European Communities did not indicate to the Brazilian exporter what additional information with regard to the IPI Premium Credit was necessary to ensure a fair comparison, and imposed an unreasonable burden of proof upon the Brazilian exporter to demonstrate the justification of the Brazilian tax law concerned. Brazil submits that Tupy provided all the information at its disposal with regard to the IPI Premium Credit.

7.161 On the basis of the record, we do not consider Brazil's allegation that the European Communities "did not further investigate the issue" to be a valid one. Tupy's submissions even following the Provisional Regulation continued to contain assertions and information regarding this issue[158], and the European Communities indicated in the Definitive Disclosure that "it had further investigated the claim for an allowance for import charges and indirect taxes made by Tupy".

7.162 In its questionnaire response, Tupy submitted a legal instrument as a basis for its claim for adjustment for the IPI Premium Credit. The European Communities determined that the domestic sales prices relied upon by the EC were "net" of four taxes identified as charged on the sales invoices[159], thereby obviating any need for an adjustment to be made in respect of these particular taxes, and no other taxes were explicitly identified by Tupy as being compensated for by the IPI Premium Credit.

Prepare a listing named "DMALLUR" (computer file – for details see Section H6) of all adjustments you claim for direct sales to independent customers on the domestic market on a transaction-by-transaction basis."

[156] Tupy's questionnaire response, Exhibit BRL-4, section G-2. Edict 491, dated 5 March 1969 (submitted as Exhibit BRL-46 in these Panel proceedings) was attached to the questionnaire response, section G-2.2. See also first submission of Tupy in the EC investigation, Exhibit BRL-5, point 1.3.2. In its reply to the deficiency letter, Exhibit BRL-7, para. C.1.1 Tupy identified a "tax refund of 20%" in addition to a "credit PIS/COFINS of 5.37% over input". Brazil has referred in these Panel proceedings to legislation that was not on the record of the underlying investigation in connection with this claim: Resolution No. 2 of the Exportation Incentive Commission of 17 January 1979, which, Brazil asserts, establishes the rates applicable to exported products and established an IPI Credit of 20% for the product concerned (Brazil first written submission, para. 304; Brazil's response to Panel question 54 following the first Panel meeting, Annex E-1). Pursuant to Article 17.5(ii) of the *Anti-dumping Agreement*, we are precluded from considering factual evidence that was not on the record of the underlying EC investigation.

[157] Disclosure preceding the Provisional Regulation, Exhibit BRL-11, Annex II, pp. 7-8.

[158] e.g. Fourth submission of Tupy in the EC investigation; Exhibit BRL-13, Annex II, paras. 25 *ff*. Tupy's agenda for hearing on 29 May 2000, Exhibit BRL-14, para. 11.

[159] These taxes were identified as: PIS, COFINS, ICMS and IPI. The European Communities expressed this view in the Disclosure Preceding the Provisional Regulation Exhibit BRL-11, Annex II, pp. 7-8 and submits evidence from the record of the investigation (Exhibits EC-18 through 20) supporting this proposition. EC response to Panel question 55 following the first Panel meeting, Annex E-3. In response to Panel questioning, Brazil states that "…even in case the normal value was calculated net of the IPI tax, there could be basis for granting an adjustment on the grounds of IPI premium credit. The EC simply denied such an adjustment without indicating to the Brazilian exporter what additional information was necessary to justify the differences between the IPI Premium Credit and the IPI tax" (Brazil response to Panel question 10 following the second Panel meeting, Annex E-7). The record evidence contains no positive nor explicit identification of a tax for which the IPI Premium Credit might have compensated.

7.163 The European Communities remarked upon the complexity of the issue and questioned the basis for the specification of a 20% adjustment. In the light of the EC indication that more substantiation was required, Tupy still did not specifically identify any particular additional tax borne by the products under consideration and continued to assert that Brazilian internal law provided for such a Credit at a level of 20 per cent.

7.164 The European Communities was faced with the citation by Tupy of its legal right under Brazilian law to receive the 20% IPI Premium Credit. It was not in possession of substantiation of that level through the provision of a copy of the relevant legislation specifying that level nor explicit specific identification of any tax for which this Credit was granted in compensation. We do not consider that the obligation imposed by Article 2.4 would necessarily compel the EC investigating authority to grant the total claimed adjustment in this situation. It may be, for example, that this legal right had not been exercised in a given period by Tupy. In any event, it would be necessary to resort to Tupy's records to discern what had actually occurred. In this respect, moreover, the EC authorities examined the factual basis for Tupy's claim and their evaluation was that they considered, *inter alia*, that "the real value of this tax credit [is] doubtful"; it was not consistently booked and was wrongly calculated.[160] The record indicates that the EC made these views known to Tupy in the course of the investigation and Tupy had an opportunity to remedy these perceived deficiencies.

7.165 Furthermore, Article VI:4 of the *GATT 1994* requires that where the internal tax or duty concerned is a tax or duty borne by the like product sold on the domestic market and where such duties or taxes are refunded or where the exported product is exempted from bearing such taxes or duties, no anti-dumping duty shall be imposed in respect of such duties or taxes. It is clear that the "duties or taxes" in question must be "borne by the *like product* when destined for consumption in the country of origin or exportation" (emphasis added). The EC investigating authority was not satisfied that the credit in question fulfilled the requirements of Article VI of the *GATT 1994*. [161] Again, the record indicates that the European Communities made these views known to Tupy in the course of the investigation and Tupy had an opportunity to remedy these perceived deficiencies.

7.166 We do not consider that the conduct of the European Communities and its decision not to make any adjustment constitutes a failure to ensure a fair comparison within the meaning of Article 2.4.[162] A reasonable and objective investigating authority could have made an examination of this evidence and taken this decision on the basis of the record of this investigation.

7.167 On the basis of these considerations, and keeping firmly in mind the standard of review we are bound to apply to our examination of the matter before us, we find that Brazil has not established that the European Communities violated Article 2.4 or Article VI of the *GATT 1994* in not granting an adjustment in relation to the IPI Premium Credit.

(b) Issue 10: PIS/COFINS

(i) Arguments of the parties

7.168 **Brazil** argues that under Brazilian law, Tupy received a PIS/COFINS credit amounting to 5.37% over input of the exported final product. Brazil submits that the European Communities violated Article VI:1 of the *GATT 1994* and Article 2.4 of the *Anti-Dumping Agreement* by failing to make a fair comparison between the normal value and the export price by denying full allowances for resulting differences in indirect taxation affecting price comparability and by applying an arbitrary,

[160] Disclosure Preceding Provisional Regulation, Exhibit BRL-11, Annex II, p. 7; and Transparency Letter, Exhibit BRL-18, p. 5.

[161] *Ibid.*

[162] Appellate Body Report, *US-Hot Rolled Steel*, *supra*, note 40, para. 178.

manipulative and punitive "sampling" methodology in its assessment of the PIS/COFINS tax and credit that lacks any legal foundation.

7.169 The **European Communities** does not dispute that an allowance for the PIS/COFINS credit is appropriate.[163] It argues that the EC authorities took the initiative in calculating the adjustment as Tupy made no claim for adjustment relating to this credit in its questionnaire response. Tupy referred to an "estimated Credit PIS/COFINS of 5.37% over input" for the first time in replying to a deficiency letter, but did not request an adjustment or rectify incorrect data it had submitted in its questionnaire Response. The European Communities argues that its calculation of the adjustment on the basis of data from the 20 most exported types sold on the domestic market was a reasonable and appropriate methodology representative of the products sold.

(ii) Evaluation by the Panel

7.170 The **Panel** recalls that the chapeau of Article 2.4 requires that "a fair comparison shall be made between the export price and the normal value". As we have already stated, differences in taxation are explicitly listed as a factor that must be taken into account under Article 2.4 to the extent they may affect price comparability, and for which due allowance shall be made, in each case, on its merits. The last sentence of Article 2.4 provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison. The requirement to make due allowance for such differences, in each case on its merits, means that the authority must at least evaluate identified differences in taxation with a view to determining whether or not an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the *Anti-Dumping Agreement*, and then to make an adjustment where it determines this to be necessary on the basis of this evaluation.[164]

7.171 Differences in taxation are explicitly listed as a factor that should be taken into account under Article 2.4 to the extent they may affect price comparability. The divergence between the parties centres on the methodology applied by the European Communities in calculating this adjustment, which, according to Brazil, is inherently unfair and resulted in this case in an adjustment that Brazil alleges is less than the full amount required. We understand Brazil to allege that the EC failed to conduct a "fair comparison" within the meaning of Article 2.4 of the *Anti-Dumping Agreement* by calculating an adjustment for PIS/COFINS on the basis of a methodology involving data pertaining to transactions involving the twenty "most-exported" types of pipe fittings from Brazil that were also sold domestically, representing approximately 33% of the total quantity exported.

7.172 We see the issue we must decide as whether the obligation to conduct a "fair comparison" under Article 2.4 permits, or does not preclude, the use by an investigating authority of a representative subset of data relating to certain transactions in calculating adjustments, or whether an investigating authority has an obligation to take into account a comprehensive data set in calculating adjustments.[165]

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[163] See, for example, EC response to Panel Question 92 following the first Panel meeting, Annex E-3.

[164] We recall our views expressed *supra*, paras. 7.157-7.158.

[165] We do not understand Brazil to have challenged the use by the European Communities of model-by-model analysis *per se*. We wish to underline that this issue does not relate to the resort by the investigating authority to "facts available" under Article 6.8, nor to the issue of "sampling" under Article 6.10 of the *Anti-Dumping Agreement*. The European Communities states that its methodology does not relate to "sampling" in the sense in which that term is used in Article 6.10. See EC response to Panel Question 67 following the first Panel meeting, Annex E - 3. The European Communities asserts that the challenged methodology was used in order to allocate the total amount of PIS/COFINS refund among the different types of fittings with a view to adjusting the normal value for each type. EC first written submission, para. 236.

7.173 There is no dispute between the parties that the total amount of PIS/COFINS refunded to Tupy in the IP was 2,491,000 Real. The European Communities calculated the PIS/COFINS adjustment as follows: it divided that total amount by the value of total export sales and then multiplied this percentage by the ratio between the export prices and domestic sales of the product concerned.[166] It thereby granted an adjustment to normal value of 0.88%. The European Communities indicated that it considered that the difference between the adjustment originally requested by Brazil for indirect taxation and 0.88% was misleading and that the entire claimed adjustment could therefore be totally rejected. "Given the complexity of the issue", the European Communities nevertheless decided to grant the adjustment.[167] Tupy contested the accuracy of the EC calculation of the adjustment questioned the legal basis for this adjustment during the investigation.[168] [169]

7.174 The European Communities justifies its methodology, using data pertaining to the 20 most exported types, as being "representative of the products sold"[170], "necessary to allocate the total amount of the refund among the different types of fittings[171] and reasonable "given the practical constraints under which investigators act".[172] In response to questioning, the EC specified that its use of the methodology was not exclusively "because of personnel and time constraints",[173] but that, "[t]he judgement made by the EC investigators was that, in the circumstances of the investigation, given the data in question and the significance of the outcome of the calculation relative [to] the size of the dumping margin, the use of a key based on the 20 most-exported types was appropriate and reasonable."[174]The European Communities asserts that Brazil has not shown that a more expansive methodology would have been more advantageous to Tupy. Brazil now submits to us a calculation -- on the basis of 40 types -- which it argues would have resulted in a more favourable amount for Tupy. On this basis, Brazil contests the EC assertion that there is no indication that its methodology produced less favourable results than another methodology or the use of a complete data set.[175] We are conscious of the constraints placed upon us by Article 17.5(ii). Tupy submitted no such alternative methodology in the course of the underlying investigation.

7.176 We also asked the European Communities to identify the legal basis that permits or does not preclude the use by an investigating authority of data from a representative selection of transactions or the use of an "allocation key" for the purposes of calculating adjustments in an investigation (**not**

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[166] See, for example, transparency letter, Exhibit BRL - 18, p. 5.

[167] Disclosure preceding the Definitive Regulation, Exhibit BRL-16, Annex II, p. 7. In the questionnaire, Exhibit BRL-3, pp. 33-34, the European Communities asked for the following information: "List all internal taxes imposed on the domestic market products which were either rebated upon exportation or not collected on the products exported to the European Community." Tupy claimed no adjustment in its questionnaire response specifically and explicitly in respect of PIS/COFINS.

[168] E.g., Tupy's reply to the deficiency letter, Exhibit BRL-7, p. 3, C.1.1; Fifth submission of Tupy in the EC investigation, Exhibit BRL-17, points 2.7.2- 2.7.6.

[169] Brazil has referred in these Panel proceedings to legislation that was not on the record of the investigation in connection with this claim: Law 9363. Brazil has similarly provided a formulation relating to the quantification of PIS/COFINS. (Brazil confirms that this is the case in response to Question 63 from the Panel following the first Panel meeting, Annex E-1). Pursuant to Article 17.5(ii) of the *Anti-dumping Agreement*, we are precluded from considering factual evidence that was not on the record of the underlying investigation.

[170] EC response to Panel Question 57 following the first Panel meeting, Annex E-3.

[171] EC response to Panel Question 67 following the first Panel meeting, Annex E-3, para. 100.

[172] *Ibid.*

[173] EC response to Panel Question 8 following the second Panel meeting, Annex E-8.

[174] *Ibid.*

[175] Brazil second written submission, para. 101.

involving "facts available" or "sampling" within the meaning of the *Anti-Dumping Agreement).* The European Communities drew our attention to Article 6.14.[176]

7.177 Article 6.14 refers to the "procedures set out above", which we take as a reference to the procedures set out in Article 6 of the *Anti-Dumping Agreement.* As we understand that the EC is not specifically basing its methodology in this instance upon any provision of Article 6 (in particular, Articles 6.8 or 6.10) we do not believe that Article 6.14 is specifically applicable in this context.

7.178 An investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner. This obligation also applies where an investigating authority confronts practical difficulties and time constraints. We do not find, in Article 2.4, or in any other relevant provision in the Agreement, any specific rules governing the methodology to be applied by an investigating authority in calculating adjustments. In the absence of any precise textual guidance in the Agreement concerning how adjustments are to be calculated, and in the absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison, we consider that an unbiased and objective authority could have applied this methodology applied by the European Communities and calculated this adjustment on the basis of the actual data in the record of this investigation. Moreover, Tupy had an opportunity to substantiate its claimed adjustment.

7.179 Recalling that we are bound by our standard of review, we find that Brazil has not established that the European Communities has breached its obligation to ensure a fair comparison under Article 2.4 of the *Anti-Dumping Agreement* or its obligations under Article VI of the *GATT 1994* by the methodology it applied in calculating the PIS/COFINS adjustment.

7. Issue 7: advertising expenses (claims withdrawn)

7.180 Brazil withdraws its claims regarding advertising expenses under Issue 7.[177] We therefore do not examine these claims.

8. Issue 8: packing costs

(a) Arguments of the parties

7.181 **Brazil** asserts that Article 2.4 of the *Anti-Dumping Agreement* obligates the investigating authority, as opposed to the exporter, to ensure a fair comparison. Brazil alleges that, in breach of Article 2.4, the European Communities wrongly denied Tupy an adjustment relating to greater packing costs associated with domestic as compared to export sales: imposed an unreasonable burden of proof on the Brazilian exporter and did not indicate to the Brazilian exporter what information was necessary to ensure a fair comparison. According to Brazil, packing costs were allocated (essentially on the basis of labour) 25% for export sales and 75% for domestic sales, and this reasonable allocation key was provided to the EC investigating authorities, who could then have used the on-the-spot verification exercise to assess the physical conditions for packing at the company itself.

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[176] See EC response to Panel question 9 following the second Panel meeting, Annex E-8. Article 6.14 states:

> "6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement."

[177] Brazil's second written submission, para. 75.

7.182 The **European Communities** argues that, under Article 2.4, the primary responsibility for justifying adjustments is on those claiming them. According to the European Communities, no data were available in respect of Tupy either for packing materials or for working time that distinguished between domestic and export sales. Tupy was unable to produce an allocation key for packing expenses that it could show had been historically used for such expenses. The European Communities denies that its officials ever denied invitations to view relevant evidence, and asserts that -- in the questionnaire and in the verification letter -- it indicated the information that would be necessary to ensure a fair comparison. For the European Communities, verification is essentially a documentary exercise, and no documentary evidence supporting Tupy's request for an adjustment was provided.

(b) Evaluation by the Panel

7.183 The **Panel** recalls our earlier examination of the obligations imposed by Article 2.4.[178] In this respect, we underline that we agree with the view of a previous panel that the obligation in Article 2.4 to make due allowances for differences that affect price comparability is intended to neutralize differences in transactions that an exporter could be expected to have reflected in its pricing.[179] We further recall that the requirement to make due allowance for such differences, in each case on its merits, means that the authority must at least evaluate identified differences with a view to determining whether or not an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the *Anti-Dumping Agreement*, and to then to make an adjustment where it determines this to be necessary on the basis of this evaluation.

7.184 It is not disputed that packing costs may, in principle, be a difference affecting price comparability for which an allowance must be granted in order to ensure a fair comparison of export price and normal value under Article 2.4. Rather, the parties differ in their view of the nature of the evidence that should be submitted in support of a claim for such an adjustment and whether it is the investigating authority or the exporter that bears the burden of identifying and substantiating the claimed adjustment.

7.185 Because the details relating to the exchange of information between Tupy and the EC investigating authorities in the underlying investigation are critical to an understanding of Brazil's claim, we begin by outlining the relevant developments in the underlying investigation.

7.186 The EC questionnaire[180] sent to Tupy contained precise instructions as to the nature of the information requested in respect of packing costs in order to provide the basis for a fair comparison between normal value and export price. In particular, the questionnaire directed Tupy to specify the packing costs for the product concerned; to list material and labour costs separately; to describe packing materials and any special or extraordinary procedures used in preparing the product concerned for shipment to the European Communities; and to report the adjustment transaction-by-transaction. Furthermore, the European Communities sent a letter to Tupy prior to the verification[181], which stated, *inter alia*, "[y]ou are hereby requested to have all supporting documents available for the investigation, including all worksheets used to prepare the reply for the questionnaire…" and "[i]f you claimed in the reply to the questionnaire allowances…you should be prepared to justify these and to have all relevant substantiating evidence readily available."

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[178] *Supra*, paras. 7.157-7.158 .

[179] Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* ("*US – Stainless Steel*"), WT/DS179/R, adopted 1 February 2001, para. 6.77.

[180] Questionnaire intended for exporting producers in exporting country, Exhibit BRL-3, Section G-Allowances, Fair Comparison; G-1, Allowances on export sales and G-2 Allowances on domestic sales.

[181] EC letter to Tupy concerning verification, Exhibit BRL-8.

7.187 In its questionnaire response,[182] Tupy claimed an allowance in respect of the difference between the amounts of packing expenses between the Brazilian and the EC markets. In its submissions in the course of the EC investigation, Tupy asserted that its packaging costs in the domestic market were greater than in the export market and that an adjustment to the normal value was therefore needed to ensure a fair comparison.[183] In particular, Tupy asserted, at the verification visit, that packing costs were allocated (25%/75%) in respect of labour used, because packing orders for the domestic market required the use of three persons, whereas packing for export orders required only one person.[184] Further, Tupy asserted, the packing process for products to be sold on the domestic market involves the use of more boxes, of varying sizes. According to Tupy, these differences could and should have been verified at the warehouse during the verification visit and an adjustment should not be denied because the Commission abstained from verifying the packing process.[185]

7.188 The European Communities rejected Tupy's claim for adjustment for packing in the Provisional Regulation,[186] and subsequently. The European Communities indicated that the reason for the refusal was insufficient substantiating evidence for the cost estimate provided by Tupy, including during verification, and that Tupy had not previously raised the issue of different packing materials.[187] Tupy submitted further objections to the EC assertion that the European Communities had not been provided with sufficient information during the verification visit substantiating the claim for a packing adjustment.[188] The European Communities maintained its refusal to grant an allowance, on the basis of its view that Tupy had not provided sufficient evidence.[189]

7.189 Against this factual background, we turn to Brazil's allegation that the European Communities failed to indicate to Tupy what information was necessary in order to ensure a fair comparison within the meaning of Article 2.4. We find ample indication of the European Communities' requests for precise information and further objective substantiation in respect of the packing cost allowance claimed by Tupy in the questionnaire and in subsequent communications with Tupy and record documents.[190] On the basis of these indications in the record of the investigation, we do not find that the European Communities failed to indicate to Tupy the information that was necessary to ensure a fair comparison. The chief difficulty identified by the European Communities in the investigation was the lack of substantiation for the "allocation key" for packaging costs as submitted by Tupy. The European Communities indicated that it considered Tupy's allocation key was not supported by evidence[191], that further objective substantiation was required, and that the allocation key "was

[182] Exhibit BRL-4, G-2.6: "…Concerning … material we use direct materials applied on domestic and foreign sales. Salaries were splited [*sic*] according to work time spent. Those information [*sic*] are available in the accounting as "cost centre" of warehouse."

[183] e.g. First submission of Tupy in the EC investigation, Exhibit BRL-5, paragraph 1.3.4, page 5.

[184] Confidential Exhibit EC-17 indicates that during the verification visit, Tupy provided data that did not distinguish between domestic and foreign sales concerning labour (or packing) costs.

[185] Fourth submission of Tupy in the EC investigation, Exhibit BRL-13, page 38, para. 18.

[186] Provisional Regulation, recital 44. "The exporting producer claimed an adjustment to the normal value and to the export price for differences in packing costs. However, the company could not submit any evidence showing such a difference and the Commission could therefore not grant the adjustment claimed." See also the Disclosure preceding the Provisional Regulation, Exhibit BRL- 11, Annex II, page 5.

[187] Disclosure preceding the Definitive Regulation, Exhibit BRL-16, Annex II, p. 6.

[188] Fifth submission of Tupy in the EC investigation, Exhibit BRL-17, page 6., para. 2.6.1.

[189] Transparency letter, Exhibit BRL-18, page 5.

[190] *E.g.* questionnaire, Exhibit BRL-3; EC letter concerning verification, Exhibit BRL-7, Provisional Regulation, recital 44; Disclosure preceding the Provisional Regulation, Exhibit BRL- 11, Annex II, page 5; Disclosure preceding the Definitive Regulation, Exhibit BRL-16, Annex II, p. 6; Transparency letter, Exhibit BRL-18, page 5.

[191] Disclosure preceding the Definitive Regulation. See Brazil's second written submission, para. 77 and EC response to Panel Question 77, para. 109.

completely at odds with any figure that could be derived from the volumes of sales on the domestic and export markets".[192] This is an evaluation by the EC investigating authority with respect to the facts before it. The record reflects that the European Communities evaluated the claim for adjustment with a view to considering whether or not an adjustment was merited. We recall our standard of review, which precludes us from substituting our judgment for that of the investigating authority.

7.190 We understand Brazil to reproach the European Communities for not having accepted Tupy's "allocation key" and for not having attempted to verify the approach in the allocation key through physical (i.e. non-documentary) inspection during the verification visit at the premises of Tupy. We therefore examine whether the European Communities acted inconsistently with its obligations under Article 2.4 in not accepting, or in not verifying through non-documentary/physical means, the labour cost "allocation key" submitted by Tupy in support of its request for adjustment for packing costs and whether the European Communities imposed an unreasonable burden of proof upon Tupy.

7.191 We do not agree with Brazil's argument that Article 2.4 required the European Communities to base the adjustment on a visual/physical inspection of the working activities and practices in the packaging area at the company's premises. Rather, we view verification as an essentially "documentary" exercise that may be supplemented by an actual on-site visit. On-site verification is provided for, but not mandated by, the Agreement. Thus, it would seem incongruous to *require* the European Communities to use a methodology that would have *necessitated* substantiation through on-site verification.

7.192 An essentially documentary approach to verification -- which focuses upon documented support for claims for adjustment – seems to us to be entirely consistent with the nature of an anti-dumping investigation[193] and, is, indeed, critical for the purposes of dispute settlement and meaningful Panel review under the *DSU* and the *Anti-Dumping Agreement*. We recall that pursuant to the *DSU* and Article 17 of the *Anti-Dumping Agreement*, compliance by a Member with the obligations of the *Anti-Dumping Agreement* is subject to review by a panel and the Appellate Body.[194] A contemporaneous written record, including of evidence substantiating a claimed adjustment by an interested party, is essential as a basis for such multilateral review. Moreover, in this particular case, Tupy was given a clear indication of the EC intention to conduct a verification visit that was predominantly documentary in nature.[195] In these circumstances, in particular, in light of the specific information requested by the European Communities and the continued absence of any specific documentary evidence for adjustment for packing costs on the record of the investigation substantiating Tupy's claim for adjustment for packing costs forming part of the record of the underlying investigation – for example, audited and confirmed historical data clearly distinguishing between packing material or labour costs allocated to domestic and foreign sales -- we cannot find that the European Communities violated its Article 2.4 obligations by not having granted a packing cost adjustment or that it imposed an unreasonable burden of proof upon Tupy.

7.193 On the basis of these considerations, and recalling the standard of review we are bound to apply to our examination of the matter before us, we find that Brazil has not established that the

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[192] EC response to Panel question 83 following the first Panel meeting, Annex E-3, para. 113.

[193] Article 6.7 of the *Anti-dumping Agreement*, which deals with verification visits, states that "authorities shall make the results of any such investigations available, or shall provide disclosure thereof … to the firms to which they pertain and may make such results available to the applicants." This supports our view that the nature of verification exercise is primarily documentary.

[194] Article 3.2 of the *DSU* recognizes that: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law….". Article 17.5(ii) of the *Anti-dumping Agreement* requires us to examine the matter on the basis of the facts made available to the investigating authority.

[195] EC letter concerning verification, Exhibit BRL-8.

European Communities acted inconsistently with its obligations under Article 2.4 of the *Anti-Dumping Agreement* by denying an adjustment with respect to packing costs, by failing to indicate to Tupy what information is necessary to ensure a fair comparison or by imposing an unreasonable burden of proof on Tupy in respect of packing costs.

9. Issues 9 and 18: currency conversion and opportunities to see relevant information

(a) Issue 9: currency conversion for adjustments

(i) Arguments of the parties

7.194 **Brazil** alleges that the European Communities, in violation of Article 2.4.1 of the *Anti-Dumping Agreement*,, did not convert currencies using the rate of exchange on the date of sale in all cases. In particular, the European Communities used the exchange rates on the date of sale for the export invoice value but not for the allowances deducted from this value (for which monthly and daily rates were used). Brazil also alleges that the European Communities violated Article 2.4 by using the exchange rates selectively and increasing the nominal value of allowances deducted from export transactions. In response to questioning, Brazil subsequently clarified that its claim is limited to the exchange rates used in the currency conversions relating to adjustments.[196]

7.195 The **European Communities** responds that Brazil provides no evidence in support of its claim of violation of Article 2.4.1, but that Brazil instead argues that it never received an adequate explanation of the exchange rates used in the currency conversions. The European Communities states that, although it used monthly rates in the Provisional Regulation, in the Definitive Regulation it mainly used daily exchange rates supplied by Tupy itself. In response to Panel questioning, the European Communities clarifies that for the purpose of calculating most allowances (inland transport, freight, insurance, charges, packing and other (publicity expenses), the European Communities used the daily exchange rates used by Tupy for currency conversion. For three other allowances (credit costs, warranty and commission), the European Communities used monthly rates as had been suggested in the questionnaire.[197] According to the European Communities, the use of monthly conversion rates led to smaller adjustments to the export price than the conversion at Tupy's exchange rates, to Tupy's benefit.[198] The European Communities asserts that the obligation in Article 2.4.1 to perform currency conversions using the rate of exchange on the date of sale refers to export sales prices and not to conversions made for the purpose of adjustments.

(ii) Evaluation by the Panel

7.196 On the basis of the evolution in the parties' argumentation over the course of these proceedings and the evidence submitted in support, the **Panel** understands Brazil to claim a violation of Article 2.4.1 by the European Communities through the "selective" use of daily *and* monthly exchange rates in making adjustments. Brazil states that although the conversion of the export invoice values was based on daily exchange rates disclosed to Tupy, the conversion of allowances was not.[199]

7.197 We first consider whether Brazil has established that its claim falls within the scope of Article 2.4.1, that is, whether Article 2.4.1 necessarily applies to the calculation of *adjustments* to normal value and export price for the purposes of Article 2.4. Article 2.4.1 reads:

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[196] Brazil response to Panel question 12 following second Panel meeting, Annex E-7.
[197] EC response to Panel question 88 following the first Panel meeting, Annex E-3.
[198] EC response to Panel question 88 following the first Panel meeting, Annex E-3; and Exhibit EC-25.
[199] Brazil second written submission, para. 89.

> 2.4.1 *When the comparison under paragraph 4 requires a conversion of currencies*, such conversion should be made using the rate of exchange on the date of sale, provided that when a *sale* of foreign currency on forward markets is directly linked to the *export sale* involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their *export prices* to reflect sustained movements in exchange rates during the period of investigation. (emphasis added, footnote omitted)

7.198 The reference in Article 2.4.1 that the currency conversion rules therein apply only "when the comparison under paragraph 4 *requires* a conversion of currencies" (emphasis added) is to the comparison between the normal value and the export price is conducted under paragraph 4. The references to "sale", "export sale" and "export prices" are a clear textual indication that the provision refers to currency conversion in connection with the prices of export sales, rather than to any conversion that may occur in the calculation of specific adjustments to either the normal value or the export price.

7.199 Looking to the context of the provision, there is an explicit textual link to Article 2.4, which imposes the general obligation that a "fair comparison" be made between export price and normal value. This general obligation informs the other obligations in Article 2.[200] This supports our view that the obligations concerning currency conversions in Article 2.4.1 do not apply to *all* conversions made in order to calculate adjustments under Article 2.4.1—we can conceive of certain situations in which differences affecting price comparability that might lead to an adjustment under Article 2.4 might not correspond precisely with the date of the export sale (e.g. credit and warranty expenses), and where conversion of all currency data as at the date of export sale might therefore distort a fair comparison. It is only once an investigating authority has made all necessary adjustments that it progresses as necessary toward the "comparison" referred to in Article 2.4.1.

7.200 For these reasons, we find that Brazil has failed to establish that Article 2.4.1 provides a legal basis for its claim concerning the currency conversions for adjustments.[201] We therefore do not consider the merits of Brazil's claim under Article 2.4.1.

(b) Issue 18: opportunities to see relevant information

(i) Arguments of the parties

7.201 **Brazil** argues that the European Communities violated Article 6.4 by not providing, in the course of the investigation, all of the exchange rates used in the currency conversions used in the Definitive Regulation.[202] The exchange rate tables disclosed by the European Communities[203] did not provide a conversion rate for the precise date, and the currency conversion rates used by the European Communities insofar as they concerned conversions on certain pertinent dates as disclosed to Tupy did not enable Tupy to determine the methodology applied. Consequently the European Communities did not provide Tupy with timely opportunities to see all information that was relevant to the presentation of its case, in violation of Article 6.4. Brazil indicates that it would withdraw this claim if the European Communities admitted that all allowances were converted on the basis of monthly

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[200] Appellate Body Report, *EC – Bed Linen* , *supra*, note 148, para. 59.

[201] To the extent that Brazil's allegations with respect to currency conversions have more to do with allegedly inadequate *disclosure* by the European Communities of the *basis* of its currency conversion calculations in the course of the investigation, we examine this issue under Article 6.4, *infra*, Issue 18.

[202] Brazil clarified that its allegations relate only to the EC definitive measure. Thus, Article 17.4, which relates to provisional measures, is not relevant. See Brazil's responses to Panel questions 132 and 136 following the first Panel meeting, Annex E-1.

[203] Disclosure preceding the Definitive Regulation, Exhibit BRL-16.

rates (as the European Communities would presumably have used the monthly rates indicated in the questionnaire).

7.202 The **European Communities** argues that it never received a request from Tupy for the monthly rates used in the Provisional Regulation, nor did Tupy object to the accuracy of the monthly rates used. The table of daily exchange rates used in the Definitive Regulation was submitted by Tupy, so it was perplexing for the European Communities to be accused of not having provided it.

(c) Evaluation by the Panel

7.203 Article 6.4 of the *Anti-Dumping Agreement* reads:

> 6.4 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.

7.204 Article 6.4 therefore requires, whenever practicable, that investigating authorities provide timely opportunities for all interested parties to see all (non-confidential) information that is relevant to the presentation of their cases.

7.205 The European Communities used average monthly currency exchange rates in the Provisional Regulation.[204] Tupy objected to the EC approach as being "misleading and inaccurate".[205] For the Definitive Regulation, the European Communities revised its approach, indicating that it had, "…in view of the devaluation of the Brazilian real in January 1999, and in view of the alleged impact on the dumping margin, now used the daily exchange rates as collected during the on-the-spot verification".[206] Following Tupy's expression that it would have appreciated it "had the Commission provided it, in the context of the definitive disclosure, with a table of the daily exchange rates that it had 'collected during the on-the-spot verification'",[207] the European Communities attached to the transparency letter a copy of the daily exchange rate table used for currency conversions.

7.206 Brazil argued before us that there were certain discrepancies in the exchange rate tables disclosed by the European Communities, in particular concerning certain dates, and that the disclosed information did not permit Tupy to determine the methodology applied with respect to exchange rate conversion for those dates. In response to Panel questioning, the European Communities now clarifies that for the purpose of calculating most allowances (inland transport, freight, insurance, charges, packing and other (publicity expenses)), the European Communities used the daily exchange rates used by Tupy as collected during the on-the-spot verification. However, for three other allowances (credit costs, warranty and commission), the European Communities used monthly rates "as had been suggested in the [q]uestionnaire".[208]

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[204] The Disclosure preceding the Provisional Regulation, Exhibit BRL-11, Annex II, page 4, states "Tupy had used the exchange rates at the day of settlement to convert the currencies used for conversion into Brazilian Real. In accordance with Article 2(10)(j) and corresponding to its normal practice, the Commission Services re-converted the currencies used for export by using the exchange rates at the date of invoice (for practical reasons, average monthly rates were used)…"

[205] Fourth submission of Tupy in the EC investigation, Exhibit BRL- 13.

[206] Disclosure preceding the Definitive Regulation, Exhibit BRL-16, Annex II, p. 5.

[207] Fifth submission of Tupy in the EC investigation, Exhibit BRL- 17, p. 6, para. 2.5.6.

[208] EC response to Panel question 88 following the first Panel meeting, Annex E-3 and EC response to Panel question 13 following the second Panel meeting, Annex E-8. The European Communities explains that it resorted to monthly rates in the case of adjusting for credit costs, warranties and commissions *inter alia* as

7.207 The **Panel** understands Brazil's allegation of inconsistency with Article 6.4 is that the European Communities did not disclose, in connection with the conversion of currencies for adjustments in the Definitive Regulation, the "daily exchange rates as collected during the on-the-spot verification". As a result, Tupy apparently experienced confusion as to the exchange rates applied in the conversions for allowances, in part because at the stage of the Provisional Regulation, the European Communities applied average monthly exchange rates, did not disclose consistent information as to the currency conversions and did not provide the rates used nor the data source for the information.

7.208 It is incumbent upon an investigating authority, in line with its obligations under the Agreement, to achieve a certain required degree of transparency and certainty in an anti-dumping investigation. However, we do not view information that is already in the possession of an interested party and that has been submitted by an interested party to an investigating authority in the course of an anti-dumping proceeding as information that an investigating authority must provide opportunities for that same interested parties to see within the meaning of Article 6.4. This provision relates to information that would not initially be in the possession of an interested party and would therefore be unknown or unfamiliar to an interested party if it were not disclosed to that party in the course of an investigation. We therefore do not find that the European Communities has violated Article 6.4 by failing to provide timely opportunities for Tupy to see information relevant to the presentation of its case with respect to exchange rate conversion for adjustments.

10. Issue 11: "Zeroing"

(a) Arguments of the parties

7.209 **Brazil** alleges that the European Communities acted inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by "zeroing" negative dumping margins calculated for some product types of Brazilian origin exported to the European Communities. Brazil invokes the panel and Appellate Body reports in *EC-Bed Linen* in support of its claim. Brazil disagrees with, and considers irrelevant, the EC assertion that “zeroing” had a limited impact and is not significant in this case. For Brazil, this practice resulted in an increase not only of the likelihood of a dumping determination but also the magnitude of the margin of dumping. This application of an inherently unfair comparison methodology was a violation of Article 2.4.

7.210 The **European Communities** asserts that the Definitive Regulation was adopted prior to the adoption of the Appellate Body Report in *EC-Bed Linen* that upheld the panel's finding in that case that the practice of "zeroing" constitutes a breach of Article 2.4.2. The European Communities admits that it applied the practice of "zeroing" in the calculation of the dumping margin in this case. However, it states that this practice had a relatively limited impact on the result (a dumping margin of 34.82% as opposed to 32.09%).

(b) Arguments of third parties

7.211 **Chile** asserts that the European Communities violated Article 2.4.2 of the *Anti-Dumping Agreement* by zeroing negative dumping margins. Chile invokes the panel and Appellate Body reports in *EC-Bed Linen* in support.

7.212 **Japan** submits that the European Communities violated Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by zeroing negative dumping margins for certain products. Japan invokes the panel and Appellate Body reports in *EC-Bed Linen* in support. Japan submits that the European

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Tupy's accounts did not contain transaction-specific data on these costs, Tupy had made no requests concerning conversion rates for adjustments, the adjustments were relatively small and the use of monthly rates resulted a slightly more favourable outcome for Tupy.

Communities has accordingly violated Article VI of the *GATT 1994* and Article 1 of the *Anti-Dumping Agreement*.

(c) Evaluation by the Panel

7.213 The **Panel** examines Brazil's claim that the practice of zeroing applied by the European Communities in the investigation constitutes a violation of Article 2.4.2. 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. 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."

7.214 The European Communities has admitted that it applied "zeroing"[209] in this case and, while it submits that the practice had an insignificant impact on the dumping margin, it does not contest Brazil's assertion that this practice has been found in other WTO dispute settlement cases to be a violation of Article 2.4.2.[210]

7.215 In this investigation, the European Communities defined the product under consideration as: "threaded malleable cast-iron tube or pipe fittings, which are joined by a screwing joining system, falling within CN code ex 7307 19 10".[211] The European Communities also found that "malleable fittings produced by the Community industry and sold on the Community market as well as malleable fittings produced in the countries concerned and exported to the Community were like products, since there were no differences in the basic physical and technical characteristics and uses of the existing different types of malleable fittings.

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[209] The practice of zeroing has been described as follows (see, e.g. Appellate Body Report, *EC- Bed Linen*, *supra*, note 148): first, the European Communities identified with respect to the product under investigation, a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive* dumping margin" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a "*negative* dumping margin" for each model. Having made this calculation, the European Communities then added up the amounts it had calculated as "dumping margins" for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any "negative dumping margin" as zero – hence the use of the word "zeroing". Then, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

[210] Provisional Regulation, Exhibit BRL-12, recital 31, indicates that: "According to Article 2(11) of the basic Regulation, for each exporting producer, the weighted average normal value by type was compared with the weighted average export price". The European Communities therefore conducted a model-by-model analysis in its dumping calculation. We do not understand Brazil to be contesting the consistency of such an analysis *per se.*

[211] Definitive Regulation, Exhibit BRL-19, recital 9.

7.216 The European Communities did not fully take into account the actual values pertaining to certain export transactions in establishing the margin of dumping. We therefore find that the European Communities violated Article 2.4.2 of the *Anti-Dumping Agreement* by failing to consider the weighted average of "all comparable export transactions".

7.217 We find support for this finding in the *EC-Bed Linen* dispute, where the Appellate Body upheld the panel's finding in that case that the practice of "zeroing" does not fully take into account the prices of "all comparable transactions" as required by Article 2.4.2.[212]

7.218 We do not find relevant, for the purposes of examining whether a violation of Articles 2.4 and 2.4.2 occurred, the EC assertion that the practice of "zeroing" had limited impact on the dumping margin (2.73%) and is therefore of little significance. Regardless of the magnitude of its effects, "zeroing" constitutes a violation of the obligations imposed by Article 2.4.2 of the Agreement *per se*. To the extent that this EC argument relates to the issue of "nullification and impairment of benefits" we examine it *infra*.

7.219 Having made this finding, we do not believe it is necessary to consider whether this also constitutes a breach of the obligation to ensure a "fair comparison" under Article 2.4.

11. Issues 12 and 15: import volume trends and cumulation

(a) Arguments of the parties

7.220 **Brazil** argues that the European Communities violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* by failing to consider properly on the basis of "positive evidence" and after an "objective examination" whether there had been a significant increase in dumped imports from Brazil before proceeding to a cumulative analysis under Article 3.3. For Brazil, a positive injury determination requires that there is either a volume or price effect, or both.[213] Brazil submits that the volume analysis requires a consideration whether there has been an *increase* in the volume of imports and a consideration whether the increase is "significant". Brazil submits that the data before the EC authorities demonstrated that the volume of imports from Brazil actually *decreased* during the POI. For Brazil, as the European Communities did not satisfy the requirements of Article 3.2, it was prevented from making any findings under the subsequent paragraphs of Article 3.

7.221 With respect to the EC cumulative analysis, Brazil alleges that the European Communities acted inconsistently with its obligations under: "Articles 3.1 and 3.3 to determine, on the basis of "positive evidence" and after an "objective examination" that the cumulative assessment of the effects of the dumped imports was appropriate, as it reversed the burden of proof and assumed in favour of cumulative assessment; Articles 3.1 and 3.3 by not identifying, on the basis of "positive evidence" and after an "objective examination", that the dumped imports *per* each Member had the effects which it then may assess cumulatively; Articles 3.1 and 3.3 by reducing the conditions of competition determination to the like product determination under Article 2.6; Articles 3.1 and 3.3 by failing to address, on the basis of "positive evidence" and after an "objective examination", dissimilarities in the conditions of competition such as the differences in the product concerned, the trends of import volumes and prices, the level of trade and the segmentation of the market; and Articles 3.1 and 3.3 by failing to determine, on the basis of "positive evidence" and after an "objective examination" that the channels of distribution were "the same or similar."[214]

7.222 The **European Communities** argues that Article 3.2 does not require positive findings on both (or either) of the factors mentioned in Article 3.2 of the *Anti-Dumping Agreement* (significant

[212] Appellate Body Report, *EC - Bed Linen*, *supra*, note 148, para. 55.
[213] Brazil second written submission, para. 117.
[214] Brazil second written submission, para. 219.

volume increase and significant price undercutting, depression or suppression) before an injury determination can be made. Nor does it require that the investigating authorities actually record the results of their consideration as to whether there had been a significant increase. In the EC view, when the rules on cumulation in Article 3.3 have been properly invoked, the obligations in Article 3.2 apply to all cumulated imports taken together and there is no need to consider volume and price effects under Article 3.2 on a country-by-country basis. In any event, the European Communities submits that the EC authorities did effectively consider the issue of significant volume increase of imports from Brazil in isolation. The European Communities argues that the investigating authorities may cumulate imports when considering whether there has been significant price undercutting under Article 3.2, but that, in any event, the European Communities also considered whether there had been a significant increase in imports from Brazil in isolation. Moreover, the EC decision to cumulate was consistent with Article 3.3 in light of the "comparable" conditions of competition present between imports from Brazil and other third countries, as well as between imports from Brazil and the product concerned.

(b) Arguments of third parties

7.223 The **United States** agrees with the European Communities that it is not necessary for an individual authority to consider the significance of the volume and price effects of imports from each individual subject country before it may cumulate imports under Article 3.3.[215] The plain language of Article 3.3, which sets out specific criteria for conducting a cumulative analysis, contradicts Brazil's argument. Given the specific textual prerequisites for cumulation, there is no basis for Brazil's argument that Article 3.3 imposes other unmentioned prerequisites for cumulation. The United States agrees with the European Communities that Article 3.2 requires only that the investigating authorities consider the volume and price effects of the dumped imports. Since it is not even necessary to find significant volume and price effects in order to reach an overall affirmative injury determination, there is no basis in the Agreement for Brazil to argue that these findings *are* somehow necessary where an investigating authority is considering whether to undertake a cumulative assessment.

7.224 The United States disagrees with Brazil that the "conditions of competition" provision requires a similarity in significant import volume and price effects trends over the IP. Members have discretion under Article 3.3 to develop appropriate criteria and analytical frameworks for assessing whether cumulation is appropriate in light of the conditions of competition among imports and between imports and the domestic like product. However, those criteria and analyses must bear a reasonable relationship to the inquiry into whether the various products compete in the domestic market of the importing Member. Isolating one's focus on a comparison or identification of similarities in import and price trends falls short of addressing the competition inquiry.

(c) Evaluation by the Panel

(i) Article 3.1

7.225 The **Panel** first recalls that Article 3.1 sets forth an overarching obligation that informs the other paragraphs of Article 3 of the *Anti-Dumping Agreement*. Article 3.1 states:

> 3.1 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.

[215] US oral statement, Annex D-6, para. 12.

7.226 The term "positive evidence" relates to the quality of the evidence upon which the authorities may rely in making a determination. The word "positive" may be understood as meaning that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. We see the term "examination" as relating to the way in which the evidence is gathered, inquired into and, subsequently, evaluated. Thus, this term relates to the conduct of the investigation generally. The qualifying term, "objective", indicates that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness. We understand that an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognises that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. [216]

(ii) Article 3.2

7.227 We examine Brazil's claims with respect to "cumulation". In the underlying investigation, Tupy contested "cumulation" on the basis of differences in import pricing and import volume (both absolute and relative to domestic market share) between Brazilian imports and imports from other countries concerned, as well as between Brazilian imports and the EC product. The European Communities nevertheless cumulated the effect of imports from multiple countries (in particular, those from Brazil, Czech Republic, Japan, China, Korea and Thailand) in its injury analysis.[217]

7.228 We understand Brazil to argue that the requirements of Article 3.2 must be satisfied on a country-by-country basis as a precondition for cumulation. Brazil denies the propriety of "cumulation" in this case, arguing that an analysis of trends in the imports from Brazil in isolation shows that, in fact, imports from Brazil *decreased* during the IP. For Brazil, there was no "significant increase" in volume of imports from Brazil within the meaning of Article 3.2 and this precludes the possibility to cumulate under Article 3.3.

7.229 The European Communities, by contrast, stresses that provided the conditions of Article 3.3 are fulfilled, the investigating authority may conduct a cumulative analysis of volume and price effects under Article 3.2, and is not first required to conduct a country-by-country assessment under Article 3.2.

7.230 The parties therefore differ in their interpretation of the legal obligations in Article 3.2 (in particular, the interpretation of the obligation to "consider whether there has been a significant increase in dumped imports") and in their views of the legal relationship between this obligation under Article 3.2 and the possibility of conducting a cumulative assessment of the effects of imports

[216] We refer to Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 40, paras. 192-193.

[217] The relevant part of the Definitive Regulation reads: "…the investigation has confirmed that the conditions of cumulation, as set out in Article 3(4) of the basic Regulation, are met since for all the countries concerned dumping margins above the *de minimis* level and volume of the imports negligible have been found. Furthermore, as concerns the conditions of competition between, on the one hand, the imported products and, on the other hand, the imported products and the like Community product, these were found to be comparable. Indeed, the investigation showed that, in all cases, the imported products and those of the Community industry have the same physical and technical characteristics, that the pricing trends are similar, significantly undercutting the Community industry's prices, and that all imported products as well as the Community-produced products are sold through the same or similar channels of distribution. …"

of a product from more than one country that are simultaneously subject to anti-dumping investigations under Article 3.3. [218]

7.231 The threshold issue that we must address is how the obligations in Article 3.2 and 3.3 interrelate, and in particular, whether an investigating authority is permitted to conduct a cumulative assessment relating to the effect of dumped imports from different sources if it concludes that the requirements of Article 3.3 are fulfilled or must first conduct an assessment of imports from each individual source under Article 3.2 in order to determine whether it may conduct a cumulative assessment at all. Here, we observe that, if the requirements concerning the decision whether or not cumulate are contained exclusively in Article 3.3 (and Article 3.1), the European Communities would be under no obligation to consider *individual* countries' volume and price trends with respect to imports from Brazil in isolation prior to or in conjunction with its cumulative analysis. Rather, a cumulative analysis allows the consideration under Article 3.2 of the volume of *cumulated* imports under investigation, as opposed to individual countries' imports. Brazil's arguments concerning the need to examine trends of imports from individual countries would therefore have no legal relevance. Under this approach, the Article 3.2 analysis of price undercutting and price effects would effectively occur *subsequently* to the Article 3.3 cumulation determination. If the European Communities' finding that cumulation was appropriate and met the standards of Article 3.3, then it was consistent for the European Communities to consider the significance of price undercutting and other price effects for imports from all *cumulated* countries. This, of course, depends upon the interpretation of the criteria in Article 3.3. We must, therefore conduct an analysis of the elements in Article 3.3, recalling that Article 3.3 permits cumulation only under certain enumerated circumstances.

7.232 Our analysis of this issue begins with the language of the provision itself. Article 3.3. states:

> "3.3 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."

7.233 Article 3.3 provides for cumulative assessment of the effects of the dumped imports of a product from different sources and explicitly identifies the criteria that must be fulfilled in order to do so. Under this provision, an investigating authority may proceed to a cumulative analysis only if: 1. Dumping margins for each individual country are more than *de minimis*; 2. the volume of imports from each country is not negligible; and 3. 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.

7.234 Brazil argues that the price and volume considerations under Article 3.2 are essential to inform an investigating authority of the underlying conditions of competition under which the dumped imports are competing with each other and with the like domestic product.[219] We therefore

[218] We do not understand Brazil to contest that the conditions of 3.3(a) are fulfilled -- i.e. 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.

[219] Brazil second written submission, paragraph 190.

understand Brazil to argue that Article 3.3 requires an investigating authority to conduct the Article 3.2 analysis on an individual country-by-country basis in considering whether cumulation is justified under Article 3.3. We disagree. Article 3.3 indeed contains a condition requiring attention to the "volume" of imports. The obligatory condition contained in Article 3.3 with respect to the volume of imports from individual countries is that the volume of such imports must not be negligible. Thus, an investigating authority may not cumulate imports that are individually found to be of negligible volume (and, indeed, the provisions of Article 5.8 concerning termination would presumably apply). This is the only explicit reference to "volume" in the text of Article 3.3. We find no other express references relating to volume in Article 3.3 and decline to read into the treaty text terms that are not there. In particular, the text of this provision 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. Indeed, such a requirement would undermine the very concept of a cumulative analysis. We therefore consider that there are no other, additional, mandatory obligations relating to the assessment of import volumes in Article 3.3 flowing from the text of the provision.

7.235 We find contextual support for our view that, contrary to Brazil's argument, an Article 3.2 analysis of individual countries' volume and price is not necessary as a pre-condition for cumulation in other provisions of Article 3, and that the "effects" that may be considered cumulatively post-cumulation include the volume and price effects referred to in Article 3.2. Article 3.3 refers to circumstances under which an investigating authority may "cumulatively assess the *effects* of such imports…" (emphasis added) The provision therefore focuses upon the assessment of effects of imports. Article 3.2 refers to "the *effect* of the dumped imports on prices" (emphasis added). Article 3.2 does not utilise the term "effects" with regard to volume, nor does Article 3.1, which refers in paragraph (a) to volume and price effects of imports and, in paragraph (b), to the "consequent impact" of the volume and price effects of imports. However, Article 3.4 calls for an examination of "the impact of the dumped imports on the domestic industry". Read in the context of Article 3 as a whole, it is clear that the term "effects" as used in Article 3.3 refers to volume and price effects, as well as the impact of imports on the domestic industry. This interpretation is confirmed by reference to Article 3.5, which refers to the "*effects of dumping, as set forth in paragraphs 2 and 4*". (emphasis added) These considerations support our view that both the volume and price analyses required under Article 3.2 constitute consideration of the effects of dumped imports which could qualify under Article 3.3 for cumulative assessment.

7.236 Brazil's claim that the European Communities acted inconsistently with Article 3.3 by improperly cumulating the effects of dumped imports and its claim that the European Communities failed to consider under Article 3.2 whether there had been a significant increase in the volume of dumped imports from Brazil are inextricably linked. In particular, Brazil's claim under Article 3.2 is predicated on the assumption that the European Communities was obligated to examine the volume of dumped imports on a country-by-country basis. However, we have found that Brazil's claim with respect to cumulation of the effects of dumped imports did not prevail. Given our disposition of Brazil's claim concerning cumulation, we therefore do not consider it necessary to address Brazil's claim that the European Communities had failed to establish that there had been a significant increase in the volume of dumped imports from Brazil alone.

(iii) Article 3.3(b): "appropriate" in light of the "conditions of competition"

7.237 We examine the nature and scope of the requirement in Article 3.3(b) that 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.

7.238 One of the conditions in Article 3.3 is that an investigating authority may only conduct a cumulative assessment of the effects of imports if it "determine[s]" that such a cumulative assessment

is “appropriate" in light of the "conditions of competition". We examine each of these textual elements in turn.

7.239 The ordinary meaning of the word “determine” is to “find out or establish precisely” or to “decide or settle”.[220] We agree with Brazil that the requirement to make a “determination” that cumulation is appropriate precludes an investigating authority from simply assuming that the cumulative assessment is appropriate.[221] Rather, an investigating authority must consider the facts before it and make a reasoned finding that cumulation is appropriate on the basis of the particular circumstances. In this regard, we do not accept the argument of Brazil that the European Communities has simply presumed that cumulation is appropriate. We discern from the Provisional and Definitive Regulations that the European Communities has considered that facts before it and determined that cumulation is appropriate.[222]

7.240 The ordinary meaning of the term "appropriate" refers to something which is "especially suitable or fitting".[223] "Suitable", in turn, is defined as "fitted for or appropriate to a purpose, occasion…"[224] or "adapted to a use or purpose".[225] "Fitting" is defined as "of a kind appropriate to the situation".[226] Based on the plain meaning of the term, cumulation must be fitting in the particular case. While the term "appropriate" therefore requires that a decision be made that is adapted to -- and is indeed made in light of -- the precise situation in question and the facts on the record of the investigation before the investigating authority, it does not in and of itself say anything specifically about the exact conditions of competition that must exist in order to justify a decision to cumulate. Rather, the concept of "appropriateness" is used. The term is consistent with an intent not to prejudge what the circumstances might be in the context of a given case. It is necessary for such appropriateness to be judged on a case by case basis, particularly as the number of countries' imports subject to investigation may vary. There is an element of flexibility, in that there are no predetermined rigid factors, indices, levels or requirements.

7.241 Moreover, the language of the provision makes it clear to us that it is for the investigating authority to determine whether cumulation is "appropriate". In light of the general wording of the provision and the nature of the term "appropriate", an investigating authority enjoys a certain degree of discretion in making that determination on the basis of the record before it. However, it is clear to us that cumulation must be suitable or fitting in the particular circumstances of a given case in light of the particular conditions of competition extant in the marketplace.

7.242 We understand the phrase "conditions of competition" to refer to the dynamic relationship between products in the marketplace.[227] The phrase “conditions of competition” in Article 3.3 is not accompanied by any sort of qualifier (for example, “identical” or “similar”). The term is unqualified. While we note that a broadly parallel evolution and a broadly similar volume and price trend might well indicate that imports may appropriately be cumulated, we find no basis in the text of the

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[220] *Oxford English Encyclopaedic Dictionary* (1991).

[221] Brazil second written submission, para. 182.

[222] Provisional Regulation, Exhibit BRL-12, para. 144; Definitive Regulation, Exhibit BRL-19, para. 72.

[223] *Webster's New Encyclopaedic Dictionary* (1994). See *e.g.* Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* ("US – FSC (*Article 22.6 – US*)"), WT/DS108/ARB, 30 August 2002, paras. 5.9 *ff*.

[224] *The New Shorter Oxford English Dictionary* (1993).

[225] *Webster's New Encyclopaedic Dictionary* (1994).

[226] *Webster's New Encyclopaedic Dictionary* (1994).

[227] See, for example, Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:1, 3, para. 114.

Agreement for Brazil's assertion that "only a comparable evolution and a similarity of the significantly increased import volumes and/or the significant price effects…would indicate that these imports might have a joint impact on the situation of the domestic industry and may be assessed cumulatively". Moreover, the provision contains no express indicators by which to assess the "conditions of competition", much less any fixed rules dictating precisely and exhaustively the relative percentages or levels of such indicators that must be present. Unlike the lists of factors that guide an authority's examination under, for example, Articles 3.2, 3.4 and 3.5, Article 3.3 does not provide even an indicative list of factors that might be relevant in the assessment called for under that provision, in particular, the assessment of "conditions of competition".[228] We note that Article 3.2 explicitly concentrates on volume and price trends, and that Article 3.3 is neither specific nor limited in this way. Thus, while price and volume considerations may well be relevant in this context, we find no explicit reference thereto in Article 3.3(b). We further examine price and volume considerations in this specific case below.

7.243 The overarching obligation in Article 3.1 applies also to the determination made in Article 3.3, requiring an investigating authority to base its determination of appropriateness to cumulate on an "objective examination" of "positive evidence". On this basis, we proceed to our analysis of Brazil's claims with respect to the cumulative assessment conducted by the European Communities.

7.244 Brazil has focused its challenge concerning the "conditions of competition" in this dispute on four elements in the EC cumulation determination—the consideration of the imported and domestic product, volume, price and channels of distribution. In particular, Brazil alleges breaches by the European Communities of Articles 3.1 and 3.3 by reducing the conditions of competition determination to the like product determination under Article 2.6; Articles 3.1 and 3.3 by failing to address, on the basis of "positive evidence" and after an "objective examination", dissimilarities in the conditions of competition like the differences in the product concerned, the trends of import volumes and prices, the level of trade and the segmentation of the market; and Articles 3.1 and 3.3 by failing to determine, on the basis of "positive evidence" and after an "objective examination" that the channels of distribution were the same or similar."

a. Like product definition

7.245 Brazil asserts that the EC analysis of conditions of competition is a "tautology" and no more than a repetition of the EC "like product" analysis. For Brazil, the European Communities approach leads to the conclusion that Article 3.3(b) has no effect as the test required under the said article is only a repetition of the test under Article 2.6, and that this is against the principle of effective treaty interpretation. Brazil argues that the European Communities did not conduct an objective examination of the conditions of competition (such as the issues of different products (black heart vs. white heart), different pricing strategies and market segmentation).

7.246 Article 2.6 sets out the definition of "like product" for the purposes of the Agreement, as follows:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product

[228] In this regard, we take note of Exhibits EC-8 through 11 containing submissions made by certain Members as part of discussions in the Ad Hoc Group on Implementation within the ADP Committee, which we observe reflect somewhat divergent practices of Members. These discussions show, at a minimum, that price and volume are not accepted by all Members as appropriate indicators of the "conditions of competition" (as they arguably reflect the outcome of competition and not whether competition is occurring). It appears, therefore, that Members themselves have not yet arrived at a common understanding of the content of these terms. Indeed, we note that this is a topic which has been proposed for negotiations and it is not our task to presuppose the outcome of those negotiations.

which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

7.247 We emphasise that Article 2.6 establishes the like product for the purposes of the entire investigation. Thus, an investigating authority is required to keep the like product consistent in its dumping and injury determinations.

7.248 Article 3.3(b) explicitly requires an examination of the conditions of competition not only between the imported products from different sources but also between the imported products and the like domestic products. We understand that the reference in Article 2.6 to "the product under investigation" parallels the reference in Article 3.3(b) to "the imported products". It is therefore natural that an injury investigation would focus upon the like product and the relationship in the domestic marketplace between the like product and the imported product concerned. We therefore examine whether the European Communities maintained this consistency in its investigation.

7.249 In its assessment of the conditions of competition in the context of its cumulation determination, the European Communities submits to us that its practice, which it asserts it applied also in this case, is to examine the following criteria: like product finding; the significance of the import volume level; the development and level of the prices of imports and their undercutting or not of the Community industry; and similarity of sales channels.[229] The Definitive Regulation specifically addresses arguments made by Tupy in the investigation with respect to the "conditions of competition",[230] which refer to volume and price trends as well as channels of distribution and market perception. In confirming the provisional decision on cumulation, the general conclusion on cumulation in the Definitive Regulation, in the context of conditions of competition, states that the imported products and those of the Community industry have "the same physical and technical characteristics" that the pricing trends are "similar, significantly undercutting the Community industry's prices, and that all imported products as well as the Community-produced products are sold through the same or similar channels of distribution….". These passages indicate to us that the European Communities examined the relationship in the marketplace between the product produced by the Community industry and the imported product under consideration. This formed the basis of its investigation of conditions of competition.

7.250 Having defined the like product and the product concerned as it did for the purposes of this investigation, the European Communities was bound to conduct its injury investigation on this basis. This is not a question of redundancy or “tautology”, as suggested to us by Brazil, but rather one of required consistency for the purposes of the dumping and injury determination. In addition, the European Communities specifically examined Brazil's allegations with respect to the "variants of the product concerned", price and market considerations, and reached specific determinations on each of these factors.

7.251 On the basis of these considerations, we consider that Brazil has not established that the European Communities violated its obligations in relation to cumulation under Articles 3.3 and 3.1 in this manner.

b. Volume

7.252 Brazil's allegation with respect to import volume and cumulation focuses on dissimilarities in import volume trends, in both absolute and relative terms, between imports from Brazil and other countries concerned. Brazil asserts that the requirements of Article 3.2 must be satisfied on a country-by-country basis for the exporting countries as a pre-condition for cumulation, as Article 3.2

[229] EC first written submission, para. 314.
[230] Definitive Regulation, paras 72-75.

considerations are essential to inform an investigating authority of the manner in which dumped imports compete with each other and with the like domestic product. According to Brazil, the differing import volumes and market shares indicate that the imports concerned were not competing on the same or at least very similar terms. The European Communities contends that there is no requirement in the Agreement to give close attention to import volume trends when considering cumulation, and that its examination of import volumes was, in any case, sufficient to meet the requirements of Articles 3.3 and 3.1.

7.253 As we observed earlier, the text of Article 3.3 contains no specific mandatory factors that are *required* elements in the "conditions of competition" analysis. Given that the text of Article 3.3(b) contains no explicit reference to any particular factors or indicators by which to assess the conditions of competition, including, in particular, no explicit reference to import volume trends – let alone identical or similar import volume trends – we find no basis in the text for Brazil's argument and do not consider that an investigating authority is *required* to conduct a country-by-country import volume examination as a precondition for deciding whether or not a cumulative assessment is appropriate within the meaning of the "conditions of competition" element of Article 3.3(b). While a parallel increase or decrease in volume of imports from various sources may well indicate competition among these imports, it will not necessarily do so: products with non-parallel volume trends may also be competing in certain circumstances.

7.254 The facts on the record of the investigation indicate that the volume of imports from Brazil was 4,188 tonnes in the IP, corresponding to a 6.9% share of the market. The EC investigating authority qualified this as "substantial" and "far from negligible". Brazil argues that the European Communities based its decision with respect to volume on the appraisal that this was "far from being negligible".

7.255 This statement was not the only one pertaining to import volumes made by the EC investigating authority in the context of determining that cumulation was "appropriate". In examining the conditions of competition between Brazilian imports and imports from other countries concerned, the European Communities also examined the relative trends in the development and level of the volume of imports.[231] We discern from the determination that the EC investigating authority collected and examined import volume data in the context of its Article 3.3 determination and that it examined the trend of Brazilian imports relative to those of other countries, and observed certain divergences in those relative trends. However, as we have already stated, the Agreement does not impose a requirement of identity or similarity in import volume trends as a pre-condition for cumulation.

7.256 In light of the EC examination of import trends on the basis of the information on the record of the investigation, we do not find that the EC treatment of import volumes as part of its cumulation determination violates Article 3.3 or Article 3.1.

c. Price

7.257 Brazil's allegation with respect to pricing and cumulation focuses on dissimilarities in trends of import prices, in particular, from the Czech Republic and China, in relation to those of Brazil. Brazil submits that the European Communities improperly cumulated and that this was not on the basis of an objective examination of positive evidence.

7.258 We take note of Brazil's arguments that a cumulative assessment of price effects cannot reasonably be supposed to be appropriate where the price of imports from Brazil is 44% higher than from China and 22% higher than from the Czech Republic, particularly in light of the increase in the volume of imports from these countries over the IIP and the "aggressive" competition between these

[231] Provisional Regulation, Exhibit BRL-12, recitals 140-144; Definitive Regulation, Exhibit BRL-19, recitals 70-75, 85.

imports and the EC product. We further note Brazil's arguments that the European Communities failed to comply with the requirement of an objective examination by refraining from applying its finding of "price sensitivity" in the context of its cumulation determination; that the European Communities failed to conduct an objective examination as it only dealt with pricing trends in its disclosures in relation to the extent of price increases and decreases year on year and at no stage does it consider the "fundamental and highly significant" differences in pricing structure as between each of the countries concerned over the course of the IIP other than to say that "Brazilian prices, throughout the IIP, were above the prices of the Czech Republic, China, Korea and Thailand and below the prices found for Japan"; and that the European Communities has failed to examine the implications of Tupy's membership in EMAFIDA, the European malleable fittings association.

7.259 We recall our earlier statement that Article 3.3 contains no express indicators by which to assess the "conditions of competition", much less any fixed rules dictating precisely the relative percentages or levels of such indicators that must be present. The provision does not contain any guidance concerning whether or how pricing should or must be examined as part of the conditions of competition element of a cumulation determination, and does not set out any requirement that "price sensitivity" and differences in pricing structure are a required component of a conditions of competition analysis under Article 3.3. While a parallel increase or decrease in price of imports from various sources may well indicate competition among these imports, it will not necessarily do so: products with non-parallel price trends may also be competing in certain circumstances.

7.260 The European Communities addressed pricing in the Disclosure preceding the Definitive Regulation, finding that Brazilian prices, throughout the IIP, were above the prices of the Czech Republic, China, Korea and Thailand and below the prices found for Japan. The European Communities stated that the evolution of prices showed that between 1995 and 1996 all prices of imports from the countries concerned went up (except for Japan and China with a slight decline), that they slightly increased between 1996 and 1997 (except for the Czech Republic and Brazil which decreased), all prices again going down between 1997 and 1998, (except for China which remained stable) whereas between 1998 and the IP in some cases they increased (Brazil, Japan, and more considerably, Thailand), in one case slightly decreased (China) and in one case remained stable (Czech Republic). The European Communities found that Brazilian prices had, on the basis of the export transactions made during the IP, considerably undercut the prices of the Community industry during the IP by around 40%, whereas the undercutting found for the other countries concerned ranges from between around 16% (Japan) to 68% (China). On this basis, the European Communities concluded that, "although the prices of the Brazilian imports and of the imports from the other countries concerned were not in all cases identical during the IIP, which is not required by the Basic Regulation, the difference among them was not such as to justify a non cumulative assessment."

7.261 The data on the record of the investigation largely bears out the EC statement that between 1996 and the IP the prices of exports originating in Brazil "almost continually decreased". A 2% increase between 1998 and the IP, nor that average prices of imports from Brazil were 6% higher from 1996 to the IP than in 1995, renders the EC examination as reflected in this statement not objective and not based on positive evidence. An unbiased and objective authority could have made this finding on the basis of the evidence on the record.

7.262 On the basis of the above considerations, and in light of the explanations offered by the European Communities in its determination, we do not find that the European Communities violated its obligations under Article 3.3 or 3.1 in respect of its treatment of pricing or of price sensitivity in its conditions of competition determination.

d. Channels of distribution

7.263 Brazil alleges that the European Communities violated Article 3.3 and 3.1 in its treatment of channels of distribution in the context of its cumulation determination because its statement that all of the countries concerned operate within the same or similar channels of distribution is not based on an objective examination of positive evidence. Brazil observes that the record as disclosed to date does not demonstrate that the European Communities found what it alleges to have found concerning similarity in channels of distribution, in particular, in light of the fact that the European Communities granted, in the context of the dumping determination, an adjustment to normal value because OEM exports were made at a different level of trade.

7.264 The Definitive Regulation states:

> "All the countries concerned operate within the same or similar channels of distribution, as confirmed by the fact that some traders imported or purchased the product under consideration from both various countries concerned and the Community producers."[232]

7.265 Article 3.3 does not expressly require that "levels of trade" are a component of a conditions of competition analysis. Nor does it contain any guidance concerning *how* levels of trade should be examined as part of the conditions of competition element of a cumulation determination. This is in stark contrast to the provisions of Article 2 concerning the dumping determination and, in particular, to Article 2.4, which requires due allowance to be made for differences in level of trade in order to ensure a fair comparison between the normal value and export price. Furthermore, unlike a dumping determination that compares prices in the markets of the exporting and importing Member, an injury analysis focuses rather on how the importing and domestic products compete in the *importing* Member's market. Thus, the fact that the European Communities granted an allowance in the dumping determination would not necessarily mean that levels of trade need be taken into account in the same way in the conditions of competition aspect of a cumulation analysis.[233] An unbiased and objective authority could have made this finding on the basis of the evidence on the record.

7.266 In light of these considerations, we do not find that the European Communities violated its obligations under Article 3.3 or 3.1 in respect of its treatment of channels of distribution in its cumulation determination.

(iv) Conclusion concerning Article 3.3(b)

7.267 We have found that the phrase "conditions of competition" in Article 3.3 contains no express indicators by which to assess the "conditions of competition", much less any fixed rules dictating the relative percentages or levels of such indicators that must be present, or even any indicative guidelines.[234] Thus, there is, at a minimum, no express requirement in the phrase "conditions of competition" to examine volume and price effects. We have examined each of the four elements forming the foundation for the EC determination that a cumulative assessment was appropriate in this case and challenged by Brazil (like product definition; volume; price; channels of distribution).[235] While Brazil has clearly come to a different conclusion, we recall our standard of review and consider that an unbiased and reasonable authority could have determined that cumulation was appropriate in

[232] Definitive Regulation, BRL-19, recital 73.

[233] The Disclosure preceding the Definitive Regulation indicates that the European Communities granted an adjustment to normal value for differences in levels of trade with regard to sales made to an OEM EC purchaser, on the basis that "the company did not sell on its domestic market to OEM customers". Exhibit BRL-16, p. 7.

[234] We recall again that Members have not arrived at a common understanding of, and indeed are currently discussing, the nature of the obligations in Article 3.3(b). See *supra*, note 228.

[235] We refer to our findings *supra*, paras. 7.251, 7.256, 7.262 and 7.266.

the circumstances of this case. We therefore conclude that the European Communities has not violated its obligations under Article 3.3 with respect to cumulation.

12. Issue 13: no proper consideration of price undercutting

(a) Arguments of the parties

7.268 **Brazil** argues that the European Communities violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* as it failed properly to consider, on the basis of positive evidence, whether Brazilian imports had significantly undercut the prices of the like product in the European Communities. Brazil submits that the European Communities' consideration of price undercutting did not relate to the "dumped imports", in terms of Article 3.2, as the European Communities calculated the undercutting margin only in respect of "an unwarranted selection" of transactions where it found undercutting (and disregarding or "zeroing" negative undercutting margins) and where there was a corresponding product type produced in the European Communities. Moreover, Brazil asserts that as the "manipulative" EC methodology increases not only the likelihood of a determination of price undercutting, but also its magnitude, it is inherently unfair and does not constitute an "objective examination" under Article 3.1.[236]

7.269 The **European Communities** argues that Brazil's allegations would call for a mechanical application to Article 3.2 of the *Anti-dumping Agreement* of the interpretation of Article 2.4.2 made in *EC – Bed Linen*. However, in the EC view, there are significant differences in these provisions which militate against such a mechanical application. In any event, according to the European Communities, the practical result of "zeroing" in the price undercutting analysis in this case was *de minimis* (0.01%). The European Communities also submits that Brazil's allegation concerning the limitation of the calculation of undercutting to directly comparable types is groundless and was not made during the course of the investigation. Article 3 contains no precise obligations relating to how an investigating authority is to conduct a price undercutting analysis, and the EC analysis took into account over 60% of Tupy's exports to the European Communities by volume and over 70% by value.

(b) Arguments of the third parties

7.270 The **United States** agrees with the European Communities that the *Anti-Dumping Agreement* does not prescribe any particular methodology for addressing 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." In the absence of any such prescription, the investigating authorities may make price comparisons by any methodology that assures an unbiased and objective examination. In particular, nothing in Article 3.2 requires investigating authorities, in considering the significance of undercutting, to apply the methodology set out in Article 2 for determining dumping and dumping margins. The purposes and obligations addressed in each of these provisions are distinct and there is no basis in the text of the Agreement to treat them interchangeably.

(c) Evaluation by the Panel

7.271 Brazil bases its claim on Article 3.2 of the *Anti-Dumping Agreement* and the requirements of "objective examination" and "positive evidence" in Article 3.1. Our analysis of this claim begins with the text of Article 3.2. It states:

> "3.2 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

[236] Brazil response to Panel question 86 following the first Panel meeting, Annex E-1.

> 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."

7.272 It is clear to us that the European Communities has considered price undercutting by dumped imports from Brazil, in that it has examined the existence and extent of such price undercutting. It is apparent from the Provisional and Definitive Regulations that the EC investigating authority has given attention to and taken into account whether there has been significant price undercutting by the dumped imports.

7.273 Brazil's allegations, however, concern the *manner* in which the European Communities considered price undercutting, and the methodology applied. We therefore examine Brazil's allegation that the EC's consideration of price undercutting, applying a methodology involving a "zeroing" of sales at "non-undercutting" prices was not based on "positive evidence" and did not constitute an "objective examination" within the meaning of Article 3.1. We recall the text and our discussion of that provision, *supra*.

7.274 With respect to the requirement of positive evidence, the EC undercutting methodology compared, for each type of malleable fittings, the weighted average ex-works prices of the Community producers to the weighted average export prices of each exporting producer concerned. On this basis, "the undercutting margins found per country, expressed as a percentage of the Community industry prices, are all significantly above 20%".[237] With respect to the nature of the facts underpinning the undercutting analysis, the European Communities examined actual data concerning pricing, which by its nature was objective and verifiable character.

7.275 We understand Brazil to assert, with respect to "zeroing", that the EC methodology did not take into account the effect of the "dumped imports" as a whole and will more likely lead to a determination of price undercutting and increase the extent of injury determined to exist. In Brazil's view, the EC methodology is inherently prejudicial and unfair. Brazil asserts that "a generalised obligation of fairness is a logical benchmark for the injury determination under Article 3"[238] and that "all of the particular methodologies applied by the investigating authorities which operate against the basic principles of good faith and fairness are in violation of Article 3.1".[239]

7.276 The text of Article 3.2 refers to domestic "prices" (in the plural rather than singular). This textual element supports our view that there is no requirement under Article 3.2 to establish one single margin of undercutting on the basis of an examination of every transaction involving the product concerned and the like product. In addition, the text of Article 3.2 refers to the "dumped imports", that is, the imports of the product concerned from an exporting producer that has been determined to be dumping.[240] Thus, investigating authorities may treat any imports from producers/exporters for which an affirmative determination of dumping is made as "dumped imports" for purposes of injury analysis under Article 3. There is, however, no requirement to take each and every transaction involving the "dumped imports" into account, nor that the "dumped imports" examined under Article 3.2 are limited to those precise transactions subject to the dumping determination. This view is supported by the absence of a specific provision concerning time periods in the Agreement; an importing Member may investigate price effects of imports in an injury investigation period which

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[237] Provisional Regulation, Exhibit BRL-12, recital 149.
[238] Brazil second written submission, para. 135.
[239] Brazil response to Panel question 103 following the first Panel meeting, Annex E-1.
[240] See Panel Report, *EC-Bed Linen*, supra, note 77, para. 6.139.

may be different than the IP for dumping. These considerations do not, of course, diminish the obligation of an investigating authority to conduct an unbiased and even-handed price undercutting analysis.

7.277 We take note of the shared view of the parties that "the Panel should accord a considerable discretion to the investigating authorities to choose a methodology which produces a meaningful result while avoiding unfairness".[241] One purpose of a price undercutting analysis is to assist an investigating authority in determining whether dumped imports have, through the effects of dumping, caused material injury to a domestic industry. In this part of an anti-dumping investigation, an investigating authority is trying to discern whether the prices of dumped imports have had an impact on the domestic industry. The interaction of two variables would essentially determine the extent of impact of price undercutting on the domestic industry: the quantity of sales at undercutting prices; and the margin of undercutting of such sales. Sales at undercutting prices could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. The fact that certain sales may have occurred at "non-underselling prices" does not eradicate the effects in the importing market of sales that *were* made at underselling prices. Thus, a requirement that an investigating authority must base its price undercutting analysis on a methodology that offset undercutting prices with "overcutting" prices would have the result of requiring the investigating authority to conclude that no price undercutting existed when, in fact, there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry.

7.278 We recall Brazil's rejection of the EC statement that "the examination of price undercutting is not an end in itself",[242] recalling that in order to determine the level of anti-dumping measures to be imposed, the European Communities calculates two margins — one for dumping (in this case, 34.80%), and one for injury (an undercutting margin (39.78%), and an underselling margin (82.08%)). In this respect, we observe that whereas the dumping margin is alone determinative in a dumping determination, price undercutting is not alone determinative in an injury determination; rather, it forms part of the overall assessment of injury to the domestic industry and is conducted so as to provide guidance to the investigating authorities in the context of this assessment of injury and causation. While this certainly gives no basis or justification for an arbitrary or non-even-handed examination,[243] particularly in light of the fact that the Agreement contains no specific conditions or criteria or methodology, it permits an investigating authority a degree of discretion in carrying out the price undercutting assessment.

7.279 In our view, the application of a methodology that reflects the full impact of price undercutting on the domestic industry does not contravene Articles 3.1 or 3.2. Brazil asserts that the European Communities methodology will inevitably increase the likelihood of a price undercutting finding of a higher level of injury determination. We disagree. The EC methodology will not create undercutting where there is no single incidence of undercutting: rather, it will reflect the undercutting that occurs and the frequency and magnitude of that undercutting.

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[241] EC first written submission, para. 277; Brazil second written submission, para. 143.

[242] Brazil second written submission, para. 149.

[243] We recall in this connection the following statement made by the Appellate Body in *Hot-Rolled Steel, supra*, note 40 underlining the importance of an even-handed examination: "However, the investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an "objective examination". If an examination is to be "objective", the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured. "

7.280 We find relevant in this context the analysis of a previous (unadopted) panel report[244], under similar provisions of the *Tokyo Round Anti-Dumping Agreement*, which states:

> "…The Panel therefore considered whether as a result of the averaging methodology contested by Japan the EC had failed to conduct an objective examination with respect to price undercutting.
>
> The Panel observed that the consideration of the existence of significant price undercutting as envisioned by Articles 3:1 and 3:2 was not an abstract exercise, but rather related to the process of determining whether dumped imports had, through the effects of dumping, caused material injury to a domestic industry. In the view of the Panel, the extent to which price undercutting would have an impact on a domestic industry would be a function of two variables, the number of sales at undercutting prices, and the extent of the undercutting of such sales. The number of sales at undercutting prices was particularly important, because it would provide an indicator of the likely number of sales lost by the domestic industry. The margin of undercutting of such sales was relevant to the extent that in non-price sensitive products a small margin of undercutting might not play a decisive role in purchasers' decision-making. The Panel further observed that the calculation of an average margin of undercutting for all sales, whether or not at undercutting prices, might not be the most effective manner to assess the impact of price undercutting on a domestic industry, as it limited the ability of the investigating authority independently to examine these two variables. Nevertheless, average margins of undercutting could provide data of utility in considering the existence of significant price undercutting.
>
> Japan had not claimed that the calculation of average margins of undercutting was inconsistent with the Agreement. Rather, Japan's claim …was that the EC in this case should have used a weighted average to weighted average methodology, which did not "zero" sales at overcutting prices, for determining an average margin of undercutting. Put in the context of Japan's claim regarding the failure of the EC to conduct an "objective examination," Japan's argument could be that the EC failed to consider relevant evidence by disregarding the extent to which some sales were at prices in excess of those charged by the domestic industry. However, the Panel did not find this argument convincing. Specifically, the Panel considered that in the event that certain sales were at undercutting prices, such sales could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. Thus, to require an investigating authority to base its analysis of undercutting on weighted average margins of undercutting which offset undercutting prices with "overcutting" prices would require the investigating authority to conclude that no undercutting existed when in fact there might be substantial volumes of sales at undercutting prices which might contribute toward material injury suffered by a domestic industry…."

[244] We recall the following statement by the Appellate Body concerning unadopted Tokyo Round-era Panel reports: "we agree with the Panel's conclusion in that same paragraph of the Panel Report that unadopted panel reports "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members". Likewise, we agree that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant". Appellate Body Report, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14, DSR 1996:I, 97.

> For the reasons stated above, the Panel concluded that the EC's affirmative injury determination was not inconsistent with Articles 3:1 and 3:2 of the Agreement by reason of the methodology used by the EC to calculate an average margin of price undercutting".[245]

7.281 We disagree with Brazil's assertion that this unadopted panel report can provide no useful guidance because it preceded the Panel and Appellate Body reports in *EC-Bed Linen*. We note that the provision under consideration by the Panel and the Appellate Body in the *EC - Bed Linen* dispute was Article 2.4.2 of the *Anti-Dumping Agreement*, and that the part of the particular anti-dumping investigation in question was the calculation of the dumping margin. Therefore, those reports do not relate specifically to the matter before us here. By contrast, we deal here with a price undercutting analysis under Article 3.2 and 3.1 in the context of the "injury" stage of this anti-dumping investigation. Unlike Article 2 (in particular Article 2.4.2) of the *Anti-Dumping Agreement*, which contains specific requirements relating to the calculation of the dumping margin, Article 3.2 requires the investigating authorities to consider whether price undercutting is "significant" but does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration. In view of the stark contrast in the text, context, legal nature and rationale of the provisions, we are firmly of the view that the Panel and Appellate Body's reasoning in the *EC-Bed Linen* dispute cannot be directly transposed here.

7.282 We therefore find that the European Communities has not violated its obligations in Article 3.2 of the *Anti-Dumping Agreement* with respect to this aspect of its price undercutting methodology.

7.283 It remains for us to address Brazil's observation that if the European Communities' method violates Article 3.1, the European Communities' allegation of insignificance is meaningless. As we have found that the European Communities has not violated its obligations under Articles 3.1 and 3.2, we do not consider the EC assertion that the practical result of “zeroing” in its price undercutting analysis in this case was *de minimis* (0.01%) and that "the use of a methodology which did not affect the outcome of the examination under Article 3.2 in this investigation cannot be considered incompatible with that provision simply because the use of that methodology might affect the outcome in other investigations".

7.284 Our findings above are also relevant for Brazil’s allegation that the European Communities violated Article 3.2 by limiting its price undercutting examination to “matching” models. Article 3.2 contains no explicit required methodology for a price undercutting examination. Moreover, there is no obligation to establish one single margin of undercutting nor to examine each and every transaction involving the like product. The European Communities based its price undercutting analysis on certain transactions involving the like product. We do not find a breach with respect to this aspect of the EC price undercutting analysis. In light of our finding, we do not consider the relevance of Tupy allegedly not having raised this issue in the underlying anti-dumping investigation.

7.285 For these reasons, we find that the European Communities has not acted inconsistently with its obligations under Article 3.2 and 3.1 in its price undercutting examination.

13. Issue 14: no proper calculation of alleged undercutting margins

(a) Arguments of the parties

7.286 According to **Brazil**, the European Communities refused, in the context of price comparison under Article 3.2, an adjustment for differences in production methods between “white-” vs. “black-”heart varieties of the product at issue. Brazil argues that the finding by the European Communities

[245] Panel Report, *EC-Audio-Cassettes* (unadopted), ADP/136, para. 436-439.

of significant price undercutting is therefore inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* to make an "objective examination" on the basis of "positive evidence" of the price effect as: by manipulating product control numbers it "compelled" the product concerned and the like product to be comparable; by refusing to neutralise differences between the product concerned and the like product it did not ensure that the products were comparable; and because its conclusions with regard to cost of production and market perception are not supported by the facts.

7.287 The **European Communities** submits that the EC authorities acknowledged that the production costs of white and black heart fittings were not identical but nevertheless compared such products' prices. The European Communities submits that cost-of-production differences do not themselves prejudice price comparisons; interchangeability as evidenced by consumer perception is the deciding factor. The European Communities examined the cost differences and found that they are due only to higher energy use and that this was not significant. The European Communities found no significant difference in market perception.

(b) Arguments of the third parties

7.288 The **United States** submits that there is no legal requirement under the *Anti-Dumping Agreement* for an authority to adjust prices before comparing them for the purposes of addressing injury. On the contrary, Article 3.1 refers to the examination of prices *in the domestic market*. Thus, the Agreement instructs authorities to examine and compare the actual prices that the products sold for in the investigating Member's market; it does not permit a comparison of fictitious prices. A comparison as advocated by Brazil (of the prices of the imports from Brazil, which were all black heart fittings, with those of *exported* black heart fittings produced by the EC producers) would not have met the requirements of Article 3.

(c) Evaluation by the Panel

7.289 The **Panel** examines Brazil's allegation that the investigation and finding by the European Communities of significant price undercutting is inconsistent with Articles 3.2 and 3.1 of the *Anti-Dumping Agreement* as no adjustment was made for differences in production methods between "white-" vs. "black-" heart varieties of malleable fittings.

7.290 Brazil has clarified that this claim relating to alleged differences in production method/cost of production/selling price, market perception and physical characteristics of "black heart" and "white heart" grades of the product concerned is based on its view that, although Article 3 does not contain explicit provision for adjustment or allowances, "the basic principles of good faith and fundamental fairness mean that adjustments or allowances should be made if they are necessary to ensure price comparability.[246] Brazil refers to the context for Article 3.2 provided by Article 2.6 which obliges investigating authorities to compare products that are identical and asserts that, only in the absence of identical products, should authorities resort to a comparison of similar products. Brazil asserts that the comparison between the actual import price of a black heart fitting and the actual domestic industry price of a white heart fitting without any adjustments or allowances would not constitute an "objective examination" under Articles 3.2 and 3.1.

7.291 Article 3.1 requires the competent authorities to conduct an objective examination, of, *inter alia*, "the effect of the dumped imports on prices *in the domestic market* for like products." The Agreement thus directs the investigating authority to conduct a price comparison of the prices of sales of the like product and the imported product in the investigating Member's domestic market. This necessarily requires that the like products actually sold in the domestic market be compared.

[246] Brazil response to Panel question 103 following the first Panel meeting, Annex E-1.

7.292 Moreover, as we have observed, the Agreement contains no explicit legal requirement or required methodology for an Article 3.2 analysis. Unlike Article 2, in relation to dumping, Article 3 contains no specific guidance as to the methodology an investigating authority may use to consider price undercutting. We are conscious that the requirement in Article 3.1 to conduct an "objective examination" on the basis of "positive evidence" is that the investigating authorities examination conform to the dictates of the basic principles of good faith and fundamental fairness. The investigating authority must therefore ensure an even-handed treatment of the information and data on the record of the investigation. However, in view of the stark contrast in the text, context, legal nature and rationale of the provisions in Article 2 of the *Anti-Dumping Agreement* relating to the calculation of the dumping margin and Article 3 relating to the injury analysis, we decline to transpose wholesale the more detailed methodological obligations of Article 2 concerning dumping into the provisions of Article 3 concerning injury analysis.

7.293 Furthermore, because in the price undercutting analysis, the investigating authority is examining injury caused by dumped imports, to the extent a product competes with another product and affects domestic sales of that product, there might well be different bases for deciding whether or not to make an adjustment in the context of the dumping and price undercutting analyses. In a dumping determination, one focus of adjustments may be on differences in costs that a producer/exporter might reasonably be expected to reflect in his prices; by contrast, the focus in a price undercutting analysis may be on differences between the imported and domestic like product that have a perceived importance to customers.

7.294 The Definitive Regulation indicates that the EC investigating authority considered the arguments of Tupy that "adjustments should be made in the price comparison between imported products (black heart fittings) and the Community produced product (in general white heart fittings) on the grounds of different perception of the market and of the difference in the production process (in particular in the annealing process, since white heart malleable fittings have a higher cost of production because of the greater energy consumption than black heart malleable fittings), which was reflected in selling prices".[247] The Definitive Regulation further indicates that the European Communities rejected both of these arguments. The EC investigating authority found that no difference in market perception was discernible, in any event not in terms of pricing differences.[248]

7.295 The European Communities cites evidence in support of its statements in the Definitive Regulation that average energy costs as a percentage of total manufacturing costs for the black heart and white heart products are very low and differ very little.[249] The European Communities found no difference, or at least no significant difference, in market perception on the basis of its evaluation of the facts of record, which largely bear out its statements.

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[247] Definitive Regulation, Exhibit BRL-19, recital 86.

[248] Definitive Regulation, Exhibit BRL-19, recital 87, states: "…it has been found that …in those instances in which both black and white heart malleable fittings were sold by the same party, and therefore any distinction in market perception should have been observable, no such distinction was actually observed, in any event not in terms of pricing differences. As to the users of the product under consideration, the investigation has confirmed that they do not differentiate between white heart of black heart fittings…" The Definitive Regulation also states (para. 17): "…the investigation has shown that there is no difference in market perception distinguishing between white heart fittings and black heart fittings as in all respects other than carbon content they have closely resembling characteristics, the same end-uses and are thus interchangeable. This has been confirmed by the fact that the importers/traders which purchase both black heart malleable fittings from the countries concerned and white heart malleable fittings produced by the Community industry, sell them to users without making a distinction between the two grades of material. As to the users of the product under consideration, the investigation has confirmed that they do not differentiate between white heart or black heart fittings to any significant degree."

[249] Exhibit EC-13. See Definitive Regulation, Exhibit BRL-19, recitals 88 and 89.

7.296 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.

7.297 Conscious of our standard of review and given the EC investigating authority's establishment of the relevant facts and consideration of the issue on the basis of these facts leading to its finding that the market did not differentiate between black heart and white heart fittings and differences in cost of manufacture reflected in the evidence on the record of the investigation pertaining to relative proportion of energy cost in total production costs, we find that the European Communities did not violate Articles 3.2 and 3.1 in not granting an adjustment for price comparability in its comparison of prices of sales of black heart and white heart fittings in the context of its consideration of price undercutting.

14. Issue 16: injury

(a) Arguments of the parties

7.298 **Brazil** initially argued that the European Communities failed to evaluate all of the listed Article 3.4 factors; and only partially evaluated nine of the fifteen factors (which disclosed an insufficient basis for a positive finding of injury). Brazil also asserted that the European Communities failed to examine independently "growth", as this examination is only implicitly deductible from other injury factors. Following the submission by the European Communities of Exhibit EC-12 as part of the EC first written submission, Brazil alleged that the published or disclosed record of the investigation contained no evaluation of productivity; return on investments; cash flow; wages; margin of dumping; and ability to raise capital and that the European Communities' purported evaluation of these factors, as contained in Exhibit EC-12 was either inadmissible in these Panel proceedings, or, if admissible, then nevertheless inadequate for the purposes of Article 3.4. Brazil also submits that the European Communities failed to evaluate certain other relevant, non-listed factors having a bearing upon the state of the industry within the meaning of Article 3.4. Brazil disagrees with the EC analysis and conclusions concerning price sensitivity; profitability; investments; and inventories. Brazil also alleges that the European Communities failed to provide a "persuasive explanation" as to whether and how positive movements in certain injury factors were outweighed by negative movements in others. Moreover, the EC finding was not based on positive evidence, as the European Communities considered only the end points -- rather than the trends -- of those factors examined.

7.299 The **European Communities** argues that the outcome of the EC authorities' investigation of individual factors -- insofar as they produced significant results -- is recorded in the Provisional and Definitive Regulations. The European Communities submits Exhibit EC-12 -- an internal Commission "file note" -- that, it argues, explicitly demonstrates the European Communities also considered other Article 3.4 factors that Brazil alleges were ignored except for one: "actual and potential negative effects on … growth". The European Communities argues 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. With respect to Brazil's allegations concerning other non-listed factors, the European Communities asserts that Brazil blurs the distinction between the obligations under Article 3.4 (injury factors) and 3.5 (causation), and that "outsourcing" has no relevance under Article 3.4.[250] The European Communities submits that its injury determination was made following an objective examination on the basis of positive evidence and that it satisfies the requirements of Article 3.4 and 3.1.

[250] EC first written submission, para. 399.

(b) Arguments of third parties

7.300 **Chile** endorses Brazil's argument that, as panels and the Appellate Body have found on several occasions, most recently in *Thailand – H-Beams*, Article 3.4 requires an investigating authority to consider and evaluate all listed factors as well as other relevant factors, and requested clarification of Brazil's arguments with respect to "trends" in import volume.

7.301 **Japan** submits that the European Communities violated its obligations under Articles 3.1 and 3.4 as it failed to address all relevant injury factors and failed to fully evaluate those it did address. Further, these factors failed to provide a sufficient basis for a positive injury finding. Japan submits that the European Communities has accordingly also violated Article VI of the *GATT 1994* and Article 1 of the *Anti-Dumping Agreement*.

(c) Evaluation by the Panel

(i) Basis of Panel examination

7.302 The **Panel** begins its examination of Brazil's claims regarding the EC injury determination n with the text of the relevant treaty provisions. Article 3.4 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 utilisation 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."

7.303 The overarching obligations in Article 3.1 also apply. We recall the text and our discussion of that provision, *supra*.

7.304 We first recall and agree with the findings of previous panels[251] and the Appellate Body[252] that Article 3.4 contains a mandatory - rather than illustrative -- list of factors and that *all* of the factors explicitly listed in Article 3.4 must be addressed in every investigation. Neither party questions this understanding.[253]

7.305 Rather, the parties differ on the nature of the examination that is required in relation to each individual factor, and the exigencies of the obligation to conduct an "objective examination" on the basis of "positive evidence".

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[251] *See* e.g., Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, para. 7.36. Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (*"EC – Bed Linen"*), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para.6.159, and the Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (*"Mexico – Corn Syrup"*), WT/DS132/R and Corr.1, adopted 24 February 2000, para. 7.128.

[252] *See*, e.g., Appellate Body Report, *Thailand- H-Beams*, para.128.

[253] EC first written submission, para. 348. Brazil first written submission, p. 180.

(ii) Did the European Communities address each listed Article 3.4 factor?

7.306 We examine whether the EC investigating authority addressed each listed Article 3.4 factor in the record of the investigation. In so doing, we wish to recall our understanding, addressed earlier, that we are *required* by the Agreement to take into account confidential or non-disclosed information that an investigating authority relies upon in order to reach its final determination in assessing the European Communities' compliance with Article 3.4, including, in particular, the information submitted exclusively in these Panel proceedings in Exhibit EC-12. However, we would be remiss not to emphasise that we deplore 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. Most fundamentally, we find it extremely troubling that it is not discernible from the published Provisional and Definitive Regulations that the European Communities considered this information at the time it made its determination.[254]

7.307 We also wish to emphasise the difficulties for a WTO panel of having to review a Member's anti-dumping determination on the basis *inter alia* of a document for which there is no contemporaneous and verifiable written indication that it actually existed during the time of the investigation. We took steps to assure ourselves of the validity of this document and of the fact that it forms part of the contemporaneous written record of the EC investigation. We enquired as to the manner in which the statements in Exhibit EC-12 were derived from the information sources identified in Exhibit EC-12. 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.[255] 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.[256] The European Communities confirmed that this was the case. We also asked the European Communities whether there were any worksheets or investigation notes which formed the basis for Exhibit EC-12 and asked the European Communities to provide them or to explain why these were not provided. The European Communities replied that: "The conclusions recorded in Exhibit EC-12 are based on worksheets, but these contain highly confidential business information relating to the performance of individual EC producers and the EC would prefer not to release them."[257] In this respect, Article 18.2 of the *DSU* contains rules protecting the confidentiality of written submissions and information submitted to the Panel. These rules oblige Members to maintain the confidentiality of any submissions or information submitted, or received, in Panel proceedings.[258] We therefore do not consider the stated confidentiality of any such worksheets would have been undermined had the European Communities submitted them in these Panel

[254] This undermines the obligations in Article 12 concerning the published determination of an investigating authority. It further goes against the significance attached to the existence of a contemporaneous written indication of the existence of certain documents at the time of the investigation and of the final determination by the panels in Panel Report, *EC- Bed Linen*, *supra*, note 77; Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, paras. 7.136 *ff* and Panel Report, *Panel on Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* ("*Korea – Resins*"), adopted 27 April 1993, BISD 40S/205, in particular paras. 208-213 and 225-228.

[255] EC response to Panel question 109 following the first Panel meeting, Annex E-3.

[256] See Panel question 20 and EC response thereto following the second Panel meeting, Annex E-8. We further asked (Panel question 19 following the second Panel meeting) whether there were any worksheets or investigation notes which formed the basis for Exhibit EC-12 and asked the EC to provide them or to explain why these were not provided. The European Communities replied that: "The conclusions recorded in Exhibit EC-12 are based on worksheets, but these contain highly confidential business information relating to the performance of individual EC producers and the EC would prefer not to release them." See Annex E-8.

[257] EC response to Panel question 19 following the second Panel meeting, Annex E-8.

[258] See, for example, Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 147.

proceedings. Nevertheless, the European Communities assures us that these worksheets exist. In this respect, we presume that WTO Members participate in good faith in dispute settlement proceedings.

7.308 Having carefully considered all of these factors, we are compelled to include Exhibit EC-12 in our examination of Brazil's claims under Article 3.4. We wish to emphasise, however, that in our view, Members should make every effort to ensure that it can be discerned from their published notices or separate public reports that all required elements of analysis required under the *Anti-Dumping Agreement* were in fact considered. In this way, not only are the obligations of public notice more likely to be fulfilled, but the task of a reviewing panel, which, pursuant to Article 17.5 and 17.6, is limited to determining, based on the facts before the investigating authority at the time, whether its establishment of facts was proper and its evaluation of those facts was unbiased and objective, is facilitated.

7.309 The only listed Article 3.4 factor that Brazil alleges was not explicitly addressed at all by the European Communities during the investigation was "growth". We therefore consider whether the European Communities failed to abide by its Article 3.4 obligation by failing to include a separate and independent treatment of "growth" in the record of the investigation.

7.310 The Agreement requires that each listed Article 3.4 factor be addressed. As to the manner in which each factor must be addressed, it is clear that a formalistic "checklist" approach – which would require that each factor be explicitly and independently addressed in each determination on the basis of the precise terms used in the relevant provision -- would be highly desirable in that it would increase an investigating authority's (and a panel's) confidence that all factors were considered. However, we find no such obligation in text of the provision and consequently do not believe that this is a required approach to analysis under Article 3.4. The provision requires substantive, rather than purely formal, compliance. The requirements of this provision will be satisfied where it is at least apparent that a factor has been addressed, if only implicitly. No separate record was made of the "evaluation of actual and potential negative effects on … growth". The European Communities itself does not contest this.[259] However, the European Communities did address, in the course of the investigation, certain other listed factors, including sales, profits, output, market share, productivity, return on investment and capacity utilisation. For each of these factors, the European Communities traced developments from 1995 through the end of the IP. This examination touched upon the performance and relative diminution or expansion of the domestic industry. For 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 IP, while EC production capacity, sales volume, profitability and market share decreased. 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".

7.311 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.

(iii) Did the European Communities adequately evaluate the listed Article 3.4 factors?

a. approach to assessment of adequacy of the European Communities' evaluation

7.312 We examine next the adequacy of the analysis conducted by the European Communities of each of the listed factors. Brazil argues that the EC analysis of the Article 3.4 factors is partial and

[259] EC first written submission, para. 349.

inadequate and that, in particular with regard to the factors addressed exclusively in Exhibit-EC-12, the examination is not a well-reasoned and meaningful analysis of the state of the industry and therefore fails to satisfy Article 3.4. The European Communities submits that its evaluation of the factors is sufficient to comply with the requirements of Article 3.4.

7.313 The focus of this part of our examination is therefore whether the treatment of the listed Article 3.4 factors in the EC investigation and determination is sufficient to satisfy the requirements of Article 3.4 concerning the "evaluation" of the listed factors having a bearing on the state of the industry. Our starting point, is, as always, the relevant treaty text. Article 3.4 states, in pertinent part:

> "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… (emphasis added).

7.314 The term "evaluate" is defined as: "To work out the value of …; To reckon up, ascertain the amount of; to express in terms of the known;"[260] "To determine or fix the value of; To determine the significance, worth of condition of usually by careful appraisal or study."[261] These definitions reveal that an "evaluation" is a process of analysis and assessment requiring the exercise of judgement on the part of the investigating authority.[262] It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist.[263] As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. [264] The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor would not suffice.[265] Moreover, an evaluation of a factor, in our view, is not limited to a mere characterisation of its relevance or irrelevance.[266] Rather, we believe that an "evaluation" also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined.[267] [268]

7.315 We examine whether the European Communities' determination is consistent with the requirements of Article 3.4 to evaluate all listed factors and with Article 3.1.

b. time periods and "trend" analysis

7.316 We first recall the importance in the process of this evaluation of placing data relating to developments with respect to each injury factor in context, both in terms of their own individual development and vis-à-vis developments in other factors examined.[269] Thus, a meaningful

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[260] Shorter Oxford English Dictionary.
[261] Merriam-Webster's Collegiate Dictionary online: http://www.m-w.com.
[262] Panel Report, *Egypt – Rebar, supra* note 251 .
[263] We find support for our view in Appellate Body Report, *US-Lamb*, para. 104.
[264] Panel Report, *EC – Bed Linen* para. 6.162.
[265] *Ibid*., para. 6.168.
[266] We find support for this view in Panel Report, *Thailand-H-Beams.*
[267] Panel Report, *US-Hot-Rolled Steel*, *supra*, note 62, paras. 7.232, 7.233.
[268] Thus, we agree with the view of the Appellate Body that "Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry"." See Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 40, para 197.
[269] This approach is suggested by the Panel Report, *US - Hot-Rolled Steel*, *supra*, note 62.

investigation must also take into account the actual intervening trends in each of the injury factors and indices -- rather than just a comparison of "end-points". There must a streamlined, genuine and undistorted picture drawn from the facts before the investigating authority. Only on the basis of such a thorough and dynamic evaluation of data capturing the current state of the industry in the determination would a reviewing panel be able to assess whether the conclusions drawn from the examination are those of an unbiased and objective authority.

7.317 Brazil alleges that the European Communities failed to conduct an analysis of the intervening trends of certain injury factors (production capacity, capacity utilisation, sales volume, market share, inventory, profitability and employment), and instead merely analysed the "end-points" of these injury factors. Brazil observes that, in particular with respect to profitability, but also with respect to certain other factors, developments in 1996 and 1997 do not sustain the observation that there was a decline in the condition of the domestic industry.

7.318 The European Communities states that the "injury investigation period" was 1 January 1995- to the end of the IP, and that this period was devoted to "the examination of trends in the context of the injury analysis" and that it had made clear that developments and trends preceding the IP were used only "in order to have a better understanding of findings relating to the IP". Further, the European Communities submits that it is not limited to its own summary of its own data set out in the Provisional and Definitive Regulations, that the relevant year-by-year data had been disclosed to interested parties and that in all cases the mid-year figures showed a more or less steady movement from one end point to the other.

7.319 The IP established by the European Communities ran from April 1998 to March 1999. In the context of its injury analysis, the European Communities gathered and analysed data for the period 1995 through the end of the IP (this is referred to by the European Communities as the "Injury Investigation Period" or "IIP". We understand Brazil to allege variously that the European Communities concentrated its analysis of certain factors (for example, profitability) on the period beginning in 1996 (rather than 1995) and that, in some cases, placed excessive emphasis on developments in the period coinciding with the IP thereby providing a misleading picture of the state of the industry. Brazil also alleges that the EC evaluation of individual injury factors does not constitute positive evidence supporting an objective examination leading to an affirmative injury finding as they do not reveal a declining trend.

7.320 We have discussed above the use of the investigation period in an anti-dumping investigation.[270] We find reference in the text of the Agreement to the concept of an investigation period. However, we note that neither Article 3, nor any other provision of the *Anti-Dumping Agreement*, contains any specific rule as to the time periods to be covered by the injury or dumping investigations, nor any relationship between or overlap of those time periods. The only provisions we can discern that provide guidance as to how the effects on the domestic industry of the dumped imports are to be gauged are (as cross-referenced in Article 3.5), Articles 3.2 (volume and price effects of dumped imports), and Article 3.4 (impact of the dumped imports on the domestic industry). Neither of these provisions specifies particular time periods for these analyses.[271]

7.321 The *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*[272] states, *inter alia*, 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; and that the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed

[270] *Supra*, paras. 7.100 *ff*.
[271] We find support for our view in Panel Report, *Egypt-Rebar*, *supra,* note 251.
[272] G/ADP/6, adopted 5 May 2000 by the Committee on Anti-Dumping Practices.

for a lesser period, and should include the entirety of the period of data collection for the dumping investigation. From this, we take it that it is desirable that there be a substantial coincidence in the period of investigation for dumping and the period during which injury was found.

7.322 Given these considerations about time periods, we take note of the following statement in the Definitive Regulation:

> "(98) …it should be noted firstly, that dumping and the injury suffered by the Community industry must be found during the IP. In order to establish whether such injury exists, *inter alia*, the developments and trends found in the years preceding the IP are only used in order to have a better understanding of findings relating to the IP. In this current case, since the investigation period started in April 1998, it has been deemed appropriate, in order to obtain a meaningful picture of the evolution of the injury indicators, to take into account at least three calendar years (1995-1997) prior to the IP. Secondly, even if 1996 were taken as reference year, the result of the injury analysis would not change. On the contrary, the injury suffered by the Community industry would be even more evident in the development of certain injury indicators as profitability and stocks. The other injury indicators would have followed the same negative trend, with the exception of the investments, and of the production volume, the increase of which however resulted in higher stocks….
>
> (102) As a general remark it must be underlined that the injury suffered by the Community industry must be assessed by reference to the IP. As to the earlier years and the trends established over these years, they explain the background underlining the injury established."

7.323 In this case, the European Communities examined the situation of the domestic industry during the IP, as well as data for the years 1995-1998. There was thus a substantial coincidence in the period of investigation for dumping and the period during which injury was found. In particular, whether the European Communities refers to events at the outset of the IP by referring to either 1995 or 1996, the European Communities consistently appraises the interrelation of factors during the IP.

7.324 Moreover, we have examined the record data and the EC evaluation thereof on the record of the investigation in relation to the injury factors deemed relevant by the European Communities and therefore evaluated more comprehensively in their determination: production; production capacity; capacity utilisation; sales volume; market share; sales prices; stocks; profitability; employment; and investments. The European Communities has gathered data from 1995 through the end of the IP for all of these factors. We do not find that the EC approach of focusing its injury examination on the IP and emphasising that the injury suffered by the domestic industry had to be found during the IP provided a misleading "snapshot" of the EC producers' economic situation at the end of the Investigation Period that failed to place the IP situation in its temporal context. We also do not find that the EC evaluation of the developments with respect to certain injury factors is generally biased or not objective and not on the basis of positive evidence. We also do not believe that the European Communities did not pay attention to trends in its injury analysis. For example, data on the record of the investigation show that market share went from 70% in 1995 to 71% in 1996 and then to 62% in the IP.[273] The European Communities evaluation in the Provisional Regulation (recital 154) is as follows: "The Community industry's share on the Community market decreased from 70% in 1995 to around 62% in the IP, i.e. by around 8 percentage points. This downward trend started after 1996, in

[273] Provisional Regulation, recital 154.

which year the Community industry's market shares had reached a peak of around 71%." The European Communities therefore explicitly acknowledged the upward trend from 1995 to 1996 and then traced the downward trend of the data pertaining to this factor through the IP. We hold a similar view with respect to the other factors referred to by Brazil in this context.

c. certain data on which the European Communities based its injury evaluation

7.325 With respect to the factors examined in Exhibit EC-12, Brazil alleges that the factual basis for the injury determination is flawed. In particular, Brazil argues that the European Communities did not request the domestic industry to provide detailed "like product specific" information regarding return on investment, wages, cash flow and ability to raise capital and this precluded the European Communities from making an "objective examination" based on "positive evidence". Brazil also alleges that the European Communities' "simulations" in Exhibit EC-12 regarding, in particular, return on investments, cash flow and ability to raise capital, are "of no value" in analysing the EC producers' performance, "not because the issues of return on investments, cash flow and ability to raise capital were not relevant but because of the EC's oversimplified methodology".[274] The European Communities responds that the nature of the evidence used in Exhibit EC-12 was "no different in character" from that used in regard to the other Article 3.4 factors that the EC authorities carried out",[275] in that it consisted primarily of information obtained directly from EC producers, including their audited accounts.

7.326 We recall that an injury assessment under Article 3.4 deals with the state of the domestic industry as a whole. The *Anti-Dumping Agreement* provides that "injury" means "material injury to a *domestic industry*, threat of material injury to a *domestic industry* or material retardation of the establishment of *such an industry*".[276] (emphasis added) The focus of an injury determination is therefore the state of the "domestic industry".[277] The domestic industry consists of the producers of the "like product". Article 3.6 states:

> "The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided."

7.327 Brazil submits that Article 3.6 provides that the effect of the dumped imports 'shall be assessed in relation to the domestic production of the like product'. According to Brazil, the European Communities has never claimed that 'separate identification of that production was not possible' and, in view of the other injury factors specifically pertaining to the like product, was not able to do so. It is clear that, while data and information pertaining specifically to the "like product" is to be used to the extent possible, the Agreement also envisages resort to a broader spectrum of data where separate identification of like product specific data is not possible. It is therefore permissible for an investigating authority to assess the effects of the dumped imports by the examination of the production of a broader range of products, which includes the like product, for which the necessary information can be provided if like-product-specific information is not available. This is clear from the text of Article 3.6. Brazil observes that the European Communities states that Exhibit EC-12 asset data was "allocated on the basis of the turnover" from annual accounts, but that that the audited accounts

[274] Brazil second written submission, para. 236.
[275] EC second oral statement, para. 121.
[276] Footnote 9 to the *Anti-Dumping Agreement*.
[277] Appellate Body Report, *United States - Hot-Rolled Steel*, supra, note 40, paras. 189-190.

are used to provide the financial picture of a company on the final day of its financial year, which does not necessarily correspond with the end of the investigation period on 31 March 1999. Despite the lack of perfect coincidence, this would result in at least a 9-month overlap which would allow for simultaneity of analysis and the time periods used would largely coincide and give an indication of the state of the industry during the period.

7.328 In addition, while the investigating authority must consider all information submitted to it by interested parties in an investigation, it may also supplement such information, where necessary, in order to ensure that its investigation is comprehensive. While the questionnaire did not expressly identify the Article 3.4 factors in the precise terms used in the Agreement and did not request the submission of information from EC producers on these factors specifically, we understand the European Communities to have based its appraisal of the factors concerned largely on audited annual accounts of the EC producers. In the absence of "like product specific data" on the record of the investigation, we do not consider that the use by the European Communities of data derived from audited annual accounts of companies on the basis of turnover contaminates the factual basis on which the injury analysis is based. In light of these considerations, we do not consider that the European Communities has breached its obligations under Articles 3.1 and 3.4 to conduct an objective examination on the basis of positive evidence in this regard.

d. adequacy of EC evaluation of injury factors

7.329 We do not find in Article 3.4 a requirement that each and every injury factor, *in isolation*, must necessarily be indicative of injury. Rather, an examination of the impact of the dumped imports on the domestic industry under Article 3.4 includes an evaluation of all relevant economic factors having a bearing on the state of the industry to produce an overall impression of the state of the domestic industry. We therefore examine whether, in light of the *overall* development and interaction among injury indicators collectively, the record data overall would preclude a finding by an unbiased and objective investigating authority that the domestic industry was injured.

7.330 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.[278] Brazil asserts that capacity utilisation, which increased from 64% in 1995 to 67% in the IP does not indicate injury. *Taken in isolation*, we agree that this might not indicate injury. However, the European Communities conclusion on injury refers to the dependent relationship between the increase in capacity utilisation and the reduction in production capacity, which decreased by 14% between 1995 and the IP, from 85,000 to 73,000 tonnes. The European Communities pointed out that: "This development should be seen in the light of the fact that in 1996 a production plant in Germany ceased its activity." We disagree with Brazil's argument, made *inter alia* in connection with production and stocks, that once an investigating authority has evaluated *actual* injurious trends in these factors and this is sufficient for the purposes of reaching a finding of injury there would also be an obligation also to evaluate *potential* injurious trends.

7.331 The European Communities also stated that the Community industry suffered a "significant loss" of employment. The underlying data on the record of the investigation largely support the EC statements.[279] The lack of an explicit reference in this context to the 6% decline in consumption does not undermine this finding.

[278] Provisional Regulation, Exhibit BRL-12, recital 160.

[279] The information before the investigating authority regarding the numbers employed in the industry is as follows: 1995: 2,532; 1996: 2,399; 1997: 2,414; 1998: 2,393; IP 2,370. The Provisional Regulation contains the following evaluation: "Employment in the Community industry decreased from 2532 employees in 1995 to 2370 employees in the IP, a decrease of around 6%. This decline should be seen in the light of the attempts undertaken by the Community industry to restructure and reduce its costs. In fact, the investigation has

7.332 The European Communities also found a decline in investments, as well as an increase of stocks. Brazil criticises the EC treatment of investment – including the observation that "the Community industry suffered ... a decline in investments" -- as being biased and not based on positive evidence and suggests that the European Communities should have placed its analysis in a broader context, by associating it with turnover. Brazil submits that no matter how the issue of investments is measured, even the absolute figures indicated that the EC producers' investments increased from 1996 onwards. Brazil posits that normally an increase in investments indicates merely a commercial strategy of allocation of financial resources to the business.[280] Brazil also observes that the absolute value of the EC producers' investments decreased by 7% between 1995 and the IP.[281] The European Communities explained that this was caused by the restructuring of the industry in 1995. The European Communities identified certain benefits that flowed from this restructuring in 1996. A 37% increase in investment as a percentage of turnover between 1998 and the IP is not irreconcilable with this. The European Communities addressed in its determination the reasons for this.[282] With respect to the EC finding on an "increase of stocks"[283], on the basis of the EC producers' non-confidential responses to the questionnaire and confidential data provided in the course of these Panel proceedings, Brazil submits that the data on stocks contains discrepancies that undermine the EC claim to have made the injury determination on the basis of positive evidence.[284] The European Communities explains that these increases in stocks amount to approximately 1% in 1996, 1.4% in 1997 and 4% in 1998, and that the European Communities believes that these amounts are due to the inclusion of scrap in the gross production reported to the European Communities. We underline the importance for an investigating authority to base its determination on accurate information. However, we do not consider that discrepancies of this magnitude erode the factual basis for the EC evaluation of stocks in this case.

7.333 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. The overall record data with respect to those factors deemed relevant by the European Communities support the EC evaluation of these factors.

7.334 Brazil emphasises that the fact that domestic producers raised their prices over the IIP does not indicate injury. The information on the record concerning certain injury indicators, including

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shown that the production process of malleable fittings is highly labour intensive." Provisional Regulation, recital 158.

[280] Brazil second written submission, para. 282.

[281] Brazil first written submission, para. 713.

[282] Provisional Regulation, recital 159 states: "The Community industry decreased its investment from around ECU 20.4 million in 1995 to around ECU 17 million in the IP, i.e. by around 16%. Within this period, there are important differences. For instance, between 1998 and the IP, investments increased, from ECU 12.7 million to ECU 17 million. It is worth noting that the level of investments is rather significant during the whole IIP, in particular in 1995, coinciding with the restructuring efforts realised that year, as mentioned above. This shows that the Community industry is still viable and is not ready to abandon this segment of production, in particular as these investments were mostly destined to rationalise the production process."

[283] The Provisional Regulation, recital 156 also stated: "The closing stocks of the Community industry increased from around 16,300 tonnes a in 1995 to around 17,400 tonnes in the IP, i.e. by around 6%. The rise of the stock volume has been particularly strong as from 1996, in line with the increase of the Community industry's production and decreasing sales volume." The Provisional Disclosure indicated the following year-by-year data: 1995 16,330 tonnes ; 1996 : 14,647 tonnes : 1997 13,101 tonnes ; 1998 16,010 tonnes ; IP 17,376 tonnes.

[284] According to Brazil, the discrepancies based on stock reconciliation between "input" (opening stock, production and purchases) and "output" (i.e. domestic sales, exports and closing stocks) was 653 in 1996, 687 in 1997 and 2120 tonnes in 1998.

price,[285] *in isolation*, may not necessarily indicate an injurious situation. The European Communities conducted a price analysis.[286] However, it is apparent to us that the European Communities did not conclude that its domestic industry had reduced its prices over the IP, nor that prices, in and of themselves, were indicative of injury to the domestic industry. We note in this respect the relationship referred to by the European Communities in its determination between prices and market share[287] and sales volume.[288] We also note the impact on profitability of the developments in price and volume referred to by the European Communities in its determination.[289] We discern from the determination that the European Communities concluded that the price pressure of the imports concerned had an impact on the volume of the sales and on the market shares of the Community industry rather than on its price level.[290] The European Communities reasoned that "when faced with low-priced imports originating in the countries concerned, the Community industry had the possibility of either maintaining its prices with a risk of losing market shares, or following the low prices of the dumped imports with the aim of maintaining the sales volumes. It decided to maintain its prices, but the consequence on the sales volume had an impact on the profitability, which turned negative after 1996".

7.335 With respect to Brazil's assertion that the European Communities does not evaluate, in the context of "factors affecting domestic prices" whether the EC producers were tending to sell on a long-term rather than on-spot basis, whether there were any changes in the patterns of trade (e.g. outsourcing) in this respect and/or whether there were any changes in the cost structure of the EC industry, Article 3.4 requires an evaluation of "factors affecting domestic prices" (not "all" factors affecting domestic prices). We consider that this requirement is inextricably linked to the requirements of Articles 3.1 and 3.2 to conduct an objective examination of the effects of dumped imports on prices in the domestic market for like products, which must involve a consideration of whether there has been significant price undercutting or price depression or suppression. We derive

[285] The information before the investigating authority indicated that the domestic industry's prices, in indexed form, went from 100 in 1995 to 105 (1996 & 1997) to 108 (1999 & IP), whereas prices of imports from countries concerned went from 100 (1995) to 104 (1996) to 99 (1997 &1998) to 95 (IP), Annexes III to the Disclosures Preceding the Provisional and the Definitive Regulations. With respect to this factor, the Definitive Regulation, recital 103 states: "As regards more specifically the development of the Community industry's sales prices, the investigation has shown that the rise of 5 % between 1995 and the IP of the average sales price of the Community industry occurred in two phases, one between 1995 and 1996, when the whole market experienced a general price increase, and the second one between 1997 and 1998, when only the Community industry and other third countries raised their prices, while the prices of the countries concerned decreased significantly."

[286] Provisional Regulation, recitals 147 to 149, and 155; and Definitive Regulation, recitals 86 to 94.

[287] Data on the record of the investigation show that market share went from 70% in 1995 to 71% in 1996 and then to 62% in the IP. Provisional Regulation, recital 154. The EC evaluation was as follows: "The Community industry's share on the Community market decreased from 70% in 1995 to around 62% in the IP, i.e. by around 8 percentage points. This downward trend started after 1996, in which year the Community industry's market shares had reached a peak of around 71%."

[288] The record data indicate that between 1995 and 1996 the sales volume of the Community industry decreased by 8.7%. Between 1997 and 1998 the sales volume decreased by 7.6%. More exactly, the sales data on the record of the investigation are as follows: 1995: 45,456 tonnes; 1996: 41,486 tonnes; 1997: 41,866 tonnes; 1998: 38,670 tonnes; IP 37,722 tonnes. The Provisional Regulation, recital 153, states the following: "The sales volume of the Community industry decreased from around 45,500 tonnes in 1995 to around 37,700 tonnes in the IP, i.e. by around 17%. It should be pointed out that the Community industry's sales decreased in a time period during which the market contracted, while the countries concerned were able to expand their sales volume by around 32%."

[289] In this respect, the record data indicates the following concerning profits: 1995: -2.2; 1996: 1.4; 1997; -0.9; 1998: -0.2; IP: -0.9. The European Communities stated that profitability of the domestic industry decreased from 1.4% to –0.9% between 1996 and the IP. Provisional Regulation, recital 157. The record evidence largely reflects the EC appraisal, including the increase between 1995 and 1996, and is not irreconcilable with the EC observation that demand was lowest in 1996 which was "a year in which the whole sector suffered from difficult market conditions".

[290] Definitive Regulation, Exhibit-19, recital 103.

from this that an investigating authority must conduct a price analysis as required by Articles 3.1 and 3.2 (which contains no explicit requirement for an analysis of terms of sale, patterns of trade or cost structures). We see no basis in the text of the Agreement for Brazil's argument that would require an analysis of factors affecting domestic prices beyond an Article 3.2 price analysis, and observe that certain of the factors potentially affecting price may be more in the way of causal factors to be analysed under Article 3.5, rather than under 3.4. In our view, Article 3.4 focuses on factors *indicative* of the state of the industry, or of the *effects* on the industry, rather than factors *having an effect* thereon.[291] Thus, whether or not an evaluation of causal factors is adequate is matter to be examined under Article 3.5. We address Brazil's allegations concerning causation below.

7.336 Brazil objects to the EC finding that: "The market for malleable fittings is *highly price sensitive*, the price level being the crucial element of choice considered by the users, as has been confirmed by the co-operating importers and users" (emphasis added).[292] Brazil argues that the EC made this finding "in spite of the fact that the prices of imported fittings had not affected the prices in the EC industry".[293] We recall our earlier observation that the European Communities did not conclude that its domestic industry had reduced its prices over the IP, nor that prices, in and of themselves, were indicative of injury to the domestic industry. However, the European Communities placed price developments in the context of developments in other factors, that is, market share and profitability, in order to reach its affirmative injury finding.[294] We note that the information on the record of the underlying investigation indicates that each of the co-operating importers and one of the two co-operating users explicitly referred to "price" as a relevant determinant. The information on the record largely bears out the EC statements.

7.337 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.[295] 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.

7.338 We examine the adequacy of the EC evaluation of the remaining factors listed in Article 3.4: ability to raise capital, margin of dumping, productivity, return on investments, cash flow and wages.

7.339 Brazil alleges that the European Communities' examination of these factors reflected in Exhibit EC-12 is not "a well-reasoned and meaningful analysis" of the state of the EC industry persuasively explaining how the evaluation of certain relevant factors in Exhibit EC-12 led to the determination of injury. Brazil submits that Exhibit EC-12 informs the reader that an examination was conducted somewhere else (although where this examination was made is, according to Brazil, totally unclear) and that Exhibit EC-12 is presumably just a summary of that examination, if it did

[291] We find support for our view that Article 3.4 deals with *effects* rather than *causes* in Panel Report, *Egypt – Rebar*, *supra* note 251. See our more detailed examination of this *infra*.
[292] Provisional Regulation, recital 164.
[293] Brazil second written submission, para. 273.
[294] *Supra*, para. 7.334.
[295] Provisional Regulation, recital 160.

take place at all. Brazil also makes specific allegations with respect to each of the factors referred to in Exhibit EC-12.

7.340 The European Communities submits that the document explains the analysis that was carried out by the EC authorities. That explanation, in response to Brazil's questions and comments, has been "supplemented" in these proceedings. The document does not purport to be issued under Article 12, so the criteria of that Article are irrelevant. The European Communities states, in addition:

> "In the case of four of these factors (productivity, return on investments, cash flow and wages) the EC authorities' conclusion was that the developments during the IIP were in line with one or more of the other factors, so that there was no point in recording them independently in the Regulation. As regards "ability to raise capital" the verdict was that the industry was not suffering problems. Finally, on the margin of dumping, the note records that "given the volume and the prices of the imports, this impact cannot be considered negligible."[296]

7.341 We recall the last sentence of Article 3.4, which provides that: the list of factors in Article 3.4 "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". We observe that Exhibit EC-12 begins with the phrase: "After having examined all the injury factors, we came to the following conclusions as concerns the particular injury factors set out below…". It then contains brief observations on the following Article 3.4 factors: return on investments; wages; productivity; cash flow, ability to raise capital and magnitude of the actual margin of dumping and presents underlying data through tables and graphs relating to the developments in each of the individual factors. The document also identifies the sources of the data. The development of each factor is traced individually as well as in terms of its relationship to other evaluated factors. There is a statement indicating the reason why the European Communities did not attribute relevance or weight to each of the factor. The European Communities did not rely on these factors as a relevant basis for its injury determination, and has indicated that this is so. The last sentence of Article 3.4 envisages such a situation.

7.342 In light of the *overall* development and interaction among injury indicators *collectively*, the record data overall would not preclude a finding by a reasonable and objective investigating authority that the domestic industry was injured. We therefore consider that the European Communities did not violate its obligations under Articles 3.4 or 3.1 in its evaluation of injury factors.

(iv) Factors not listed in Article 3.4

7.343 The Article 3.4 obligation to evaluate factors having a bearing on the state of the domestic industry "is not confined to the listed factors, but extends to "all relevant economic factors".[297] In this context, we note that in its argumentation in support of its claim of violation of Article 3.4, Brazil has alleged that the European Communities paid inadequate attention in its injury determination to export performance and outsourcing as well as the relative cost structure of the domestic industry (including the substantial difference in cost of production between the product concerned produced and sold by the EC producers ('white heart fittings') and the product concerned imported from Brazil ('black heart fittings') being significantly higher in the manufacture of white heart fittings).[298].

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[296] EC second oral statement.

[297] Appellate Body Report, *US - Hot-Rolled Steel*, *supra*, note 40.

[298] Brazil first written submission, paras. 727-729. We understand that despite references by Brazil in its injury argumentation to certain other elements, such as the impact on profitability of investments and depreciation charges associated with rationalization (e.g. Brazil first written submission, para. 713), Brazil's allegations with respect to these elements are limited to its Article 3.5 claim on causation.

7.344 In this respect, a firm distinction must be drawn between the causation and injury elements of an investigation. The phrase "having a bearing on" in Article 3.4 can mean "relevant to or having to do with" the state of the domestic industry.[299] This is consistent with a view that the factors in Article 3.4 are *indicative* of the state of the industry, or of the *effects* on the industry, rather than factors *having an effect* thereon. Contextual considerations support this reading of the ordinary meaning of the text. In particular, the wording of the last group of factors in Article 3.4 is "actual and potential negative effects on cash flow, inventories…". In addition, Article 3.5 cross-refers to the "effects" of dumping as set forth in … [Article 3.4]". We thus disagree with Brazil's assertions[300] that the implications of outsourcing including imports from other third countries are indicators of the state of the domestic industry, as opposed to potential causal factors influencing or having an impact upon the state of the domestic industry. Whether or not an evaluation of causal factors is adequate is a matter to be examined under Article 3.5. We address Brazil's allegations concerning causation below.

7.345 For all of these reasons, we find that the European Communities has not violated its obligations under Articles 3.4 or 3.1.

(v) Claims under Articles 6.2 and 6.4 relating to the injury analysis

7.346 We recall the distinction between the substantive obligations of Article 3 and the "framework of procedural and due process obligations" established by Article 6 and Article 12.[301] To the extent that Brazil's allegations relate to the non-disclosure of injury information during the investigation, we examine these under Article 6.[302] We examine Brazil's claims concerning the alleged inadequacy of the EC published determinations under Article 12 (Issue 19, *infra*).

7.347 We understand Brazil to assert that the EC breached Articles 6.2 and 6.4 by not providing Tupy with a full opportunity to properly defend its interests under Article 6.2 nor timely opportunities to see all relevant information in violation of Article 6.4 with respect to those injury factors referred to only in Exhibit EC-12.

7.348 We begin our examination with the text of Articles 6.2 and 6.4. Article 6.2 requires that: "Throughout an anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests…" Article 6.4 requires that: "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 used by the authorities in an anti-dumping investigation". We recall 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) and that there was no "value added" to the substance of their investigation in the analysis of these factors. Therefore, this information was considered not relevant and was not specifically relied upon by the EC in reaching the anti-dumping determination. Tupy was therefore not deprived of timely opportunities to see information relevant to its case nor of an opportunity for defence of its interests.

7.349 For these reasons, we find that the European Communities has not violated Articles 6.2 or 6.4 with respect to the information on injury factors referred to exclusively in Exhibit EC-12.

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[299] See *Webster's New World Dictionary*. We find support for this view in Panel Report, *Egypt-Rebar*, *supra*, note 251, paras. 7.62-7.63.

[300] See, for example, Comments by Brazil on EC response to Panel Question 23 following the second Panel meeting.

[301] Appellate Body Report, *Thailand – H-Beams*, *supra*, note 81, paras. 107 *et seq*.

[302] We examine Brazil's claim with respect to non-disclosure of export performance information *infra*, under "Issue 17: causation".

15. Issue 17 - causation

(a) Arguments of the parties

7.350 **Brazil** submits that the European Communities violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* establishing causation of injury where no injury existed, by not adequately examining known factors other than dumped imports which were at the same time causing injury to the domestic industry and by not establishing whether injury caused by known factors other than allegedly dumped imports was not attributed to allegedly dumped imports. In addition to challenging the European Communities' causation methodology (the "significant contribution test"), Brazil also objects to the adequacy of the EC examination of certain specific factors, in particular, Brazil focuses in this regard on seven other "known" factors that it argues were raised in the investigation[303]: (i) margins analysis (relationship between dumping and undercutting margins, including Tupy's "competitive advantage" over EC producers which enabled it to sell at lower prices (as it produced "black heart fittings" with a different cost of production than the "white heart fittings" produced by EC producers); (ii) EC producers' poor export performance; (iii) imports from the countries not subject to the investigation; (iv) outsourcing; (v) rationalisation efforts; (vi) substitution of the product concerned; and (vii) the difference in the cost of production and the market perception between the two variants of the product concerned.

7.351 The **European Communities** stresses that it is not the Panel's task to conduct a *de novo* examination. The European Communities defends the consistency of its causation methodology with Article 3.5, asserting that the process of allocating injuries to causes need not be embarked upon in the case of a factor which made no significant contribution to injury.[304] The European Communities states that factors (i) and (vii) referred to by Brazil were not "known" factors as they were not raised by interested parties in the course of the underlying investigation. Further, the remaining factors referred to by Brazil were properly and adequately evaluated under Article 3.5 through an objective examination based on positive evidence under Article 3.1.

(b) Arguments of third parties

7.352 **Chile** endorses the view of the Appellate Body in *US-Hot-Rolled Steel*,[305] which Chile takes to mean that the obligation in Article 3.5 of the *Anti-Dumping Agreement* is for an investigating authority to evaluate the subject imports and any other factor causing injury to the domestic industry at the same time, distinguish among these effects and attribute to each factor its effects.

7.353 **Japan** submits that the European Communities violated Articles 3.1 and 3.5 because it failed to ensure that injury from factors other than imports was not attributed to imports. Japan submits that the European Communities has accordingly also violated Article VI of the *GATT 1994* and Article 1 of the *Anti-Dumping Agreement*.

(c) Evaluation by the Panel

7.354 As always, the **Panel** begins its analysis of Brazil's claims with the text of the relevant treaty provisions. Article 3.5 provides:

> "3.5 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

[303] See Brazil's response to Question 125 of the Panel following the first meeting, Annex E-1.

[304] EC response to Panel question 129 following the first Panel meeting, Annex E-3, para. 177, referring to recital 113 in the Definitive Regulation, which states: "any substitution effect cannot have significantly contributed to the injury suffered by the Community industry as evidenced by the relatively stable consumption established in the course of the present investigation."

[305] *Supra*, note 40, para. 228.

> 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."

7.355 The obligations of Article 3.1 also inform the requirements for the Article 3.5 evaluation. We recall the text of that provision and our understanding of the obligations imposed thereby, discussed above.[306]

7.356 Article 3.5 requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not *attributed* to the dumped imports.

7.357 We first consider whether the European Communities failed to consider "known" factors, other than imports, that were causing injury to the domestic industry at the same time. There is no difference of views between the parties that factors (ii) through (vi) above were "known". However, the EC argues that the onus under Article 3.5 lies on interested parties to raise issues during the course of the investigation. The EC thus asserts that "known" factors encompass those factors raised by interested parties in the course of the investigation and, contrary to Brazil's assertions, submits that Tupy did not raise certain of these factors in the investigation: "margins analysis" and "differences in the cost of production and market perception between white- and black-heart variants of the product concerned".

7.358 We therefore examine the nature of the Article 3.5 obligation in terms of the range of factors an investigating authority must examine under Article 3.5, and in particular, what constitutes a "known" factor within the meaning of this provision.

7.359 Article 3.5 requires that the demonstration of the 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", and that the authorities must also examine other "known" factors. The obligation imposed by Article 3.5 is therefore to examine any other *known* factors which at the same time are injuring the domestic industry. This provision makes clear that it is mandatory to consider "known" factors other than the dumped imports which at the same time are injuring the domestic industry and to ensure that any such injury is not attributed to those imports. The phrase "factors which *may* be relevant in this respect *include, inter alia*…" (emphasis added) further makes it clear that the list contained in the provision is indicative.[307] We understand that "known" factors under Article 3.5 include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an anti-dumping investigation.[308]

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[306] *Supra*, paras. 7.225 *ff*.

[307] See also Panel Report, *US - Hot-Rolled Steel*, *supra*, note 62.

[308] We find support for this approach in previous panel reports, in particular, Panel Report, *Thailand - H-Beams*.

7.360 In the light of these considerations, we consider whether the "margins analysis" and the differences in cost of production and market perception between black- and white-heart variants were "known" factors within the meaning of Article 3.5.

7.361 We understand Brazil to argue before us that Tupy had raised in the investigation the arguments that Tupy had a comparative advantage over EC producers in that the cost of production of "black heart" fittings (imported from Brazil) was less than that of "white heart " fittings (sold in the European Communities by EC producers) that this cost difference between these two variants of the product concerned was reflected in the subsequent selling prices due to the differing market perception. For Brazil, these elements form the basis for two allegedly "known" causal factors: first, the "margins analysis" relating to the relative competitiveness (cost efficiency) and comparative advantage of the Brazilian exporter over the EC producers based on a comparison of the injury and dumping margins; and second, the cost difference between the Brazilian exporter and the EC industry based on the comparison of prices.[309]

7.362 We asked Brazil to identify where in the record of the investigation – in the context of causation — Tupy had raised these arguments before the EC investigating authority. The portions of the record of the investigation cited by Brazil in response[310] to our questioning indicate that Tupy raised the differences between black heart and white heart variants of the product concerned in terms of the cost of production and in market perception in the course of the investigation in the context of injury (and dumping) – and, in particular, with respect to non-comparability or claimed adjustments for price comparability in the price undercutting analysis. The European Communities 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. 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.

7.363 We next examine whether the European Communities has ensured that injuries which are caused to the domestic industry by known factors other than dumped imports, are not *attributed* to the dumped imports. Brazil's allegations raise two general issues: first, Brazil alleges that the European Communities' causation methodology (which Brazil refers to as the "significant contribution test") is *per se* inconsistent with Article 3.5; second, Brazil alleges that the EC's specific examination of each of the other known factors is inadequate to fulfil the requirements of Article 3.5. We consider each of these in turn.

7.364 Brazil submits that irrespective of the other existing causes of injury, the European Communities determines the injury margin as a total difference between the price of the dumped imports and the EC producers’ actual or target price *without* eliminating the injurious effects of other known factors. Brazil alleges that the European Communities is not methodologically able to ensure that the injuries caused by those other known factors are not attributed to the dumped imports. The European Communities states that it adequately separated and distinguished between the effects of known causal factors.

7.365 We therefore examine the nature of the non-attribution requirement in Article 3.5, which applies in situations where dumped imports and other known factors are causing injury to the domestic industry "at the same time".

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[309] We sought clarification on these points from Brazil in Panel question 124 following the first Panel meeting. See Annex E-1.

[310] Brazil's response to Panel Question 125 following the first Panel meeting, Annex E-1.

7.366 Under Article 3.5, an investigating authority must examine whether a causal relationship exists between the dumped imports and the injury to the domestic industry, and, in so doing, the investigating authority must appropriately separate and distinguish the injurious effects of the other factors from the injurious effects of the dumped imports so as not to attribute the effects of the other factors to the dumped imports.[311] However, the Agreement sets out no particular required nor preferred methodology as to how such a causation analysis must be conducted. Therefore, WTO Members may apply any causation methodology, provided that it appropriately separates and distinguishes the injurious effects of dumped imports from the injurious effects of the other known causal factors and therefore satisfies the obligations in Article 3.[312]

7.367 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 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);[313] that it made "no significant contribution" (export performance) or that "no significant influence" could have resulted (own imports of the product concerned),[314] that it cannot have significantly contributed to injury (substitution),[315] 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").[316] 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.[317]

7.368 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.

7.369 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

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[311] We find support for our view in Appellate Body Report, *United States – Hot-Rolled Steel*, supra, note 40.

[312] We recall, in this respect, the statement of the Appellate Body in para. 224 of its Report in *United States – Hot-Rolled Steel*, supra, note 40: "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."

[313] Provisional Regulation, Exhibit BRL-12, recital 176.

[314] Provisional Regulation, Exhibit BRL-12, recital 174.

[315] Provisional Regulation, Exhibit BRL-12, recitals 175-176.

[316] Definitive Regulation, Exhibit BRL-19, recital 111

[317] Provisional Regulation, Exhibit BRL-12, recital 177.

to sever the link between dumped imports and injury.[318] However, the EC methodology -- which we understand to separate and distinguish between the effects of each of these causal factors and the dumped imports including through an examination as to whether the extent of the effects of each causal factor are such that it is necessary to separate and distinguish its effects -- does not leave the effects of those factors entirely lumped together and indistinguishable.

7.370 For these reasons, and given that Article 3.5 requires no particular methodology, we find that Brazil has not established that the causation methodology applied by the European Communities in this investigation constitutes, in and of itself, a violation of Article 3.5.

7.371 It remains for us to examine whether the European Communities met its obligations with respect to each of the "known" factors in the investigation in its causation determination identified by Brazil: export performance; imports from third countries and outsourcing; substitution and rationalisation.

(i) export performance

7.372 **Brazil** asserts that the European Communities violated Article 3.5 and 3.1 by failing to separate and distinguish the effects of EC producers' export performance and by failing to conduct an objective examination of this factor on the basis of positive evidence.[319] [320]

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[318] The panel in Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/R, paras. 8.136- 8.153, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R, found that a similar causation methodology that focused upon whether increased imports were a "substantial cause" was inconsistent with the requirements under Article 4.2 of the *Safeguards Agreement* with respect to causation. That panel reasoned that such a methodology weighed each other factor individually against imports to determine whether such factor was "a more important cause of injury" and then excluded that factor as a "cause of injury" when that factor did not alone satisfy that standard. For that panel, a demonstration that a given causal factor did not make an equal or greater contribution to serious injury than imports did not demonstrate that such factor made no contribution at all to serious injury. The Appellate Body overturned this finding, but did not squarely address the consistency of the causation *methodology* at issue in that case. Rather it found that the United States had failed adequately to evaluate the complexities of a particular causal factor (Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, paras. 60-92). Similarly, in Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002; and Appellate Body Report, *US-Hot-Rolled Steel*, *supra*, note 40 (dealing with a the consistency of a similar causation under Article 3.5 of the *Anti-dumping Agreement)* the Appellate Body either did not squarely address the consistency of the causation *methodology* at issue, or apparently implicitly condoned it by rather focusing on the adequacy of particular aspects of the investigating authority's causation analysis. The Appellate Body has observed that dispute settlement reports dealing with causation under the *Safeguards Agreement* can provide guidance with respect to causation under the *Anti-Dumping Agreement* and *vice versa (*Appellate Body Report, *US – Line Pipe*, para. 214).

[319] Before the European Communities submitted the EC producers' export figures in these Panel proceedings, Brazil initially asserted that given that the European Communities did not disclose the EC producers export figures and that the verified export volume of the EC industry deviates from the Eurostat, Brazil assumed that the European Communities' determination in this respect was not sufficiently based on positive evidence for the European Communities to have discharged its obligations further to Article 3.5. However, following submission by the European Communities in these Panel proceedings of the confidential export data, Brazil observed that the EC producers' export volume decreased by 17% between 1995 and the IP. Brazil also notes this decrease represents an absolute volume of 1,283 tonnes, *i.e.* around 3% of the EC producers' production, around 7% of the EC producers' stocks and around 6% of the imports from the countries concerned in the IP (Brazil second written submission, para. 320)

7.373 The **European Communities** denies both of these allegations. The European Communities submits in these Panel proceedings the confidential export-volume data for the years 1995 through 1998 and the IP that were before the EC investigating authority.

7.374 The **Panel** observes that Tupy brought to the attention of the EC investigating authority the impact that it perceived of the EC producers' decreased exports on inventories in the course of the investigation on the basis of Eurostat data (which Brazil argues showed, *inter alia*, that exports fell by 22% from 1995 to 1998).[321]

7.375 In the investigation, the European Communities addressed the arguments made by Tupy with respect to the export volume trends, including the divergences between Eurostat data (submitted by Tupy) and the data collected and verified by the European Communities in the course of the investigation.[322]

7.376 The confidential export volume data that formed part of the record of the underlying investigation and that were submitted by the European Communities in these Panel proceedings support the cited statements made by the European Communities in the investigation, including with respect to its relationship with Eurostat data. The European Communities identified the injury indicator most affected by export performance (stock levels) and reasoned that on the basis that of the proportion of sales outside the Community as compared to the sales on the EC market it could not be concluded that the decrease of sales outside the Community significantly contributed to increased stocks.

7.377 Concerning Brazil's allegation that the EC's conclusion regarding export performance is not based on positive evidence since the data supplied by EC producers, and verified by the EC authorities, show variances from Eurostat data, the European Communities reflected its preference to use verified data, where possible, in the Definitive Disclosure.[323]

7.378 In light of the confidential export performance data on the record of the investigation and the assessment based thereon as reflected in these statements, we do not find that the European Communities has violated its obligations to conduct an objective examination on the basis of positive

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[320] Brazil recalls (in paragraphs 316 and 317 of its second written submission) that Tupy had argued that poor export performance had contributed to the increase in stock levels. In response, the European Communities had replied as follows in the Transparency Letter (Exhibit BRL-18 at 6.4): "...firstly, the data on the sales outside the Community included in the questionnaire replies of the Community industry and verified by the Commission services, do not confirm the figures provided by Tupy, the decrease of those sales being lower and regarding lower volumes. Secondly, on the basis of the proportion of the sales outside the Community as compared to the sales on the Community market, it cannot be concluded that the decrease of the sales outside [t]he Community significantly contributed to the increase of stock levels." Brazil argues that the stock data used by the European Communities was inaccurate and thus the facts concerning the consequential effects of dumped imports on the EC domestic industry were not properly established on the basis of positive evidence. We recall our finding *supra*, that the EC stock data did not undermine the factual basis for the EC evaluation under Article 3.4. Our finding necessarily also holds for the purposes of our analysis here.

[321] See Fifth Submission of Tupy in the EC investigation, Exhibit BRL-17, para. 3.8.3.

[322] The relevant passage from the EC transparency letter reads as follows: "…reference is made to the trends of the export volumes of the Community industry between 1995 and 1998 in connection with the evolution of stocks. In this respect it has to be noted that, firstly, the data on the sales outside the Community included in the questionnaire replies of the Community industry and verified by the Commission services, do not confirm the figures provided by Tupy, the decrease of those sales being lower and regarding lower volumes. Secondly, on the basis of the proportion of sales outside the Community as compared to the sales on the Community market, it cannot be concluded that the decrease of the sales outside [t]he Community significantly contributed to the increase of the stock levels."

[323] Disclosure preceding the Provisional Regulation, Exhibit BRL-16.

evidence with respect to export performance as a causal factor, nor that the EC failed to separate and distinguish the effects of this causal factor.

7.379 Brazil has also made an allegation concerning non-disclosure of EC producers' exports and purchases of the product concerned over the Injury Investigation Period, which precluded Tupy from being able to properly defend its interests, in violation of Article 6.2 and from having timely opportunities to see all relevant information in violation of Article 6.4. The EC states that this information was confidential and therefore not disclosed to interested parties.

7.380 We begin with the text of the relevant legal provisions. Article 6.2 requires that: "Throughout the anti-dumping investigation all interested parties shall have a full opportunity for defence of their interests". The text of that provision also makes clear that this general obligation in Article 6.2 "must take account of the need to preserve confidentiality". Similarly, the text of Article 6.4 states that: "The authorities shall whenever practicable provide timely opportunities to see all information … *that is not confidential as defined in paragraph 5*…" (emphasis added). We note that this information had been considered as confidential within the meaning of Article 6.5 and, on the basis of Brazil's Panel request and argumentation in these Panel proceedings, we do not understand that Brazil has invoked Article 6.5 of the Agreement in this connection. We therefore do not find that the European Communities has breached Article 6.2 or 6.4 in this respect.

(ii) imports from third countries and "outsourcing"

7.381 **Brazil** submits that Tupy consistently argued during the investigation that there were exports from certain other third countries entering the EC in volumes no less than those of some of the Countries Concerned – in particular, Bulgaria, Poland and Turkey -- and at prices, which seemed to significantly undercut the prices of the EC producers (as well as Brazilian prices).[324] Brazil also argues that, in parallel with, and as a reason for, the increased imports from the other third countries, Tupy raised in the investigation that certain EC producers were in a process of outsourcing their production of the product concerned to other countries and then importing into the EC market from those countries. The domestic industry thereby caused injury to itself by giving away market share. In the opinion of Brazil, it was incumbent upon the EC further to its obligations under Article 6.6 to satisfy itself as to the accuracy of the information submitted to it by Tupy with regard the extent to which the EC producers were outsourcing their production of the like product to non-EC countries and therefore contributing to the declining sales and market share of the EC industry.

7.382 The **European Communities** contends that it appropriately examined imports from these countries and concluded that they were not a significant causal factor. The European Communities concluded that, although imports from third countries (including Turkey, Bulgaria and Poland) may have contributed to the material injury suffered by the EC industry, they were not such to have broken the causal link between the dumping and the injury found.[325]

7.383 The **Panel** notes that the Provisional Regulation[326] and the Definitive Regulation both contain statements in respect of volume and price of imports from other third countries not subject to the investigation. The Definitive Regulation states:[327]

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[324] E.g. First and Third submissions of Tupy in the EC investigation.

[325] Definitive Regulation, Exhibit BRL-19, recital 111.

[326] Provisional Regulation, Exhibit BRL-12, recitals 167 and 168:

"Some interested parties, based on Eurostat information, alleged that any injury suffered by the Community industry had been caused by imports from third countries not covered by the proceeding, in particular Turkey, Bulgaria and Poland.

According to this information, import volumes of malleable fittings from all other countries decreased from around 6,200 tonnes in 1995 to around 5,300 in the IP. i.e. by around 14%, while market shares were relatively stable throughout the period with a slightly decreasing trend,

> "According to Eurostat, during the IIP, imports from other third countries decreased in volume by around 14% while market shares decreased by around one percentage point. As to the prices, they increased on average by around 15% and were 17% higher than the average prices of the imports from the countries concerned."

7.384 The Provisional and Definitive Regulations also address individual developments pertaining to imports from Turkey, Bulgaria and Poland.

7.385 With respect to imports from **Poland**, Brazil observes that the volume of imports from Poland increased by 23% over the Injury Investigation Period and that its market share went from 3.8% to 5%, and that unit prices, although increasing by 11% over the same period, were significantly lower (42%) than the EC producers' prices. Brazil objects to the EC's characterisation of these trends. In particular, Brazil objects to the EC statement in these Panel proceedings that the EC investigating authority "has not attributed any injury to these imports (since there was none)".[328] In view of the EC conclusion on price sensitivity[329] (which Brazil however contests), Brazil submits that the EC's conclusion that the imports from Poland had not caused any injury could not have been based on an objective examination of positive evidence.[330]

7.386 Brazil also recalls that Tupy had emphasised:[331]

> "…that the Commission fails to note that most of the Polish imports comprise of galvanised fittings whereas most of the Brazil's imports do not. Galvanised fittings are more expensive to produce and are priced at considerable different levels, with galvanised fittings fetching much higher prices. Moreover, exporters sell to all levels of trade and especially lower levels whereas Tupy only sells to the highest level. When the impact of these differences is calculated, there can be no escape from concluding that the Polish imports are significantly cheaper than those of Brazil…"

7.387 The European Communities' evaluation of the developments relating to imports from Poland[332], as well as its evaluation of imports from third countries as a whole, were set out in the Provisional Regulation[333] and the Definitive Regulation. It is clear to us from the determination that the EC examined imports from Poland and considered the arguments made by Tupy in the course of the investigation. While the record evidence indicates an increase in imports from Poland from 1995 through the IP of 23%, it also indicates that they peaked in 1997 and then declined somewhat in 1998 and the IP. The unit price rose by 11% from 1995-IP.

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representing around 10% in 1995 and around 9% in the IP. As regards the weighted average prices of imports from other third countries, as reported by Eurostat, they increased from 1.93 ECU/kg to 2,22 ECU/kg. It is to be noted that they were significantly higher than the weighted average prices of the countries concerned during the whole IIP."

[327] Definitive Regulation, Exhibit BRL-19, recital 107.

[328] Brazil refers to EC first written submission, para. 361.

[329] Provisional Regulation, Exhibit BRL-12, recital 164.

[330] Brazil second written submission, para. 324.

[331] Fourth submission of Tupy in the EC investigation, Exhibit BRL-13.

[332] The data relied upon in the investigation indicated the following import volumes from Poland: 1995: 2,497; 1996: 2,993; 1997: 3,209; 1998: 3,137; IP 3,063; and the following price pattern: 1995: 2.03; 1996: 2.08; 1997: 2.18; 1998: 2.24; IP 2.26.

[333] Provisional Regulation, Exhibit BRL-12, recital 171: "Concerning imports from *Poland*, their market share remained relatively stable during the IIP at around 4-5%, although increasing in absolute terms from around 2.500 tonnes in 1995 to around 3.000 tonnes in the IP. However, in the IP, the unit price was significantly higher than the weighted average prices of the countries concerned."

7.388 An analysis of injury and causation does not necessarily concentrate on developments of factors *in isolation*. Rather, a factor is to be assessed in terms of its own evolution as well as placed in the context of developments in other factors, in order to produce an integrated evaluation of the state of the domestic industry as a whole and the causes of this state. Seen in their context, this data largely supports the EC statement that "market share remained relatively stable during the IIP at around 4-5%, although increasing in absolute terms from around 2,500 tonnes in 1995 to around 3,000 tonnes in the IP". Similarly, the record evidence confirms the EC statement concerning the price of imports from Poland (that is, in the IP, the unit price was significantly higher than the weighted average prices of the countries concerned). We recall that Poland was not under investigation for selling the product at dumped prices in the EC market. We further recall our discussion of the EC's finding of "high price sensitivity (*supra*. para. 7.336).

7.389 The EC authorities also took account of the alleged variance with respect to the product under examination, and explained to Tupy that "the allegation concerning the mix of malleable fittings originating in Poland is in fact not substantiated and not susceptible to be verified since Eurostat data do not have such a level of detail".[334] Under Article 6.6, the EC investigating authority is obligated during the course of the investigation to satisfy itself as to the accuracy of the information supplied by interested parties upon which their findings are based. The European Communities indicated that it had considered the allegation by Tupy, which the European Communities observed had not been substantiated, and that it relied on Eurostat data that its level of specificity also did not reflect Tupy's allegation. The European Communities' reliance on Eurostat data with respect to imports from Poland, a country not subject to the investigation for dumped imports, does not, in our view, constitute a violation of Article 3.5 or 3.1 nor 6.6 of the Agreement.

7.390 With respect to imports from **Bulgaria**, the Provisional[335] and Definitive[336] Regulations address developments in import volume and price. The Provisional Regulation also indicates that the European Communities examined evidence concerning imports from Bulgaria "in the framework of the analysis of the complaint prior to the Initiation of the proceeding". On the basis of this evidence, the European Communities found that "no dumping appeared to exist" with the consequence that no investigation concerning Bulgaria could be initiated.[337] While it is clear from the record evidence that there was a substantial increase in imports from Bulgaria in absolute terms (from 43 to 1109 tonnes, 1995-IP), the European Communities specifically referred to this and also placed this factor in context by noting the market share was 1.8% in the IP. The European Communities also evaluated the price developments, noting *inter alia* that the during the IIP their price increased by around 11% and, in the IP, price was 5% higher than the weighted average price of the imports concerned.[338] [339]

7.391 It was first and foremost for the EC authority to appraise and evaluate the evidence before it. Tupy had made available to the EC factual information in support of its allegations that certain Applicants (Georg Fischer, Atusa and Woeste) were "outsourcing" certain product types or segments of the product concerned from certain countries, including Bulgaria, in its submissions throughout the investigation, including after the Provisional Regulation The EC assessment was that it provided no significantly new evidence to cause it to revisit its initial assessment. This much is discernible from the determination.

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[334] Transparency Letter', Exhibit BRL-18, point 7.1.

[335] Provisional Regulation, Exhibit BRL-12, recital 170.

[336] Definitive Regulation, Exhibit BRL-19, recital 109.

[337] Provisional Regulation, Exhibit BRL-12, recitals 7-8.

[338] See fourth submission of Tupy in the EC investigation, Exhibit BRL-13, p.2, para. 3.

[339] The Provisional Regulation, recital 174, states: "…the investigation has shown that one Community producer did import the product concerned from one third country. However, since these volumes were very low and represented only a negligible pan [*sic*] of its sales in the Community, no significant influence on the situation of that Community producer could have resulted from these imports."

7.392 There is no indication on the record of the EC investigation as cited to us by Brazil[340] that Tupy raised imports specifically from Egypt in relation to imports of the product concerned. The record of indicates that Tupy raised the issue of imports from Egypt in connection with its opposition to the exclusion of unthreaded products from the definition of "like product" and thus from the scope of the investigation. In addition, the EC Provisional Regulation indicates that the EC investigated volumes and prices of imports from "all other third countries" not subject to the investigation.[341] None of them was found to have been a significant cause of injury.

7.393 As concerns imports from Turkey, the Provisional Regulation states:."… imports from Turkey were stable at almost negligible levels during the entire IIP. As regards import volumes, they were 553 tonnes in 1995 and 632 tonnes in the IP, while market shares were stable at around 1% during the whole IIP. Concerning the unit price, according to Eurostat it was higher than the imports concerned throughout the whole IIP".[342] The Definitive Regulation also addresses developments in import volume and price indicating that during the IP, the weighted average price of imports was around 10% higher than the weighted average price of the imports concerned and market share remained stable at around 1% of Community consumption. Moreover, the Definitive Regulation notes that the investigation confirmed that imports by certain Community producers had occurred, these were minimal by comparison with EC-produced sales of the EC producers concerned, and did not affect the status of such EC producers as part of the domestic industry. The Notice of Initiation indicates that, while Turkey was listed in the application, the EC decided to exclude it at the outset from the investigation as its market share was *de minimis*.[343] The record also indicates that Tupy raised the issue of imports from Turkey in connection with *inter alia* its opposition to the exclusion of unthreaded products from the definition of "like product" and thus from the scope of the investigation.

7.394 Brazil also argues that the European Communities' alleged non-reaction to the request made by Tupy that the EC request the Turkish authorities to confirm information relating to outsourcing arrangements between a Community producer (Georg Fischer) and a Turkish producer. is a failure to abide by the obligations of an objective and unbiased authority. We find no basis in the Agreement for Brazil's argument that the EC was *required* to pursue the issue of imports from Turkey (a country not subject to the investigation) in the particular manner requested by an interested party.[344]

7.395 The EC evaluation of the injurious effects of other factors, including imports from third countries, is in its general conclusion on causation.[345] In the Definitive Regulation, the European Communities made a finding specifically in respect of imports from third countries, concluding that such imports did not sever the causal link between dumped imports and injury.[346] We discern from the determination that the European Communities has considered this factor and its effects and concluded that it did not make a significant contribution to injury. Our view is not that the EC did not "investigate" the issue, but rather that it evaluated the evidence in light of the volume and price effects of these imports in the context of other developments affecting the domestic industry, in order to make its determination.

7.396 Brazil underlines that certain Community producers had a "controlling influence" over certain producers in other countries and therefore could dictate their commercial decisions. According to Brazil, the EC industry outsourced production and then inflicted injury upon itself.

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[340] Fourth submission of Tupy, Exhibit BRL-13, para. 3.
[341] Provisional Regulation, Exhibit BRL-12, recital 168.
[342] Provisional Regulation, Exhibit BRL-12, recital 169.
[343] Notice of Initiation, *supra*, note 5, recital 1.
[344] Brazil first oral statement, para. 14.
[345] Provisional Regulation, Exhibit BRL-12, recital 177.
[346] Provisional Regulation, Exhibit BRL-12, recital 111.

7.397 Article 4 of the *Anti-Dumping Agreement*, which governs the concept of "domestic industry" for the purposes of an anti-dumping investigation, calls for an examination of ownership and control relationships among companies, including relationships between producers and exporters or importers located in the territories of other countries, as well as an examination of producers who are also importers of the allegedly dumped product. The definition of "domestic industry" is a keystone of the anti-dumping investigation. In this case, the European Communities examined whether or not it was required or appropriate under Article 4(1) to exclude certain producers from the definition of domestic industry. The EC concluded that it was not.[347]

7.398 The consequence of outsourcing would be an increase in the volume of imports from third countries, and any loss of market share would flow from imports from the companies to whom production had been outsourced. The imports from the third countries in which these companies were located would include the production resulting from any "outsourcing". An examination of the effects of those imports would take into account any effects of elements subsumed within those imports. In any event, the EC also examined claims by interested parties of imports made by domestic producers themselves and came to the conclusion that, in light of their relatively small magnitude, these imports did not affect the status of EC producers, nor did they constitute a significant cause of injury.

7.399 In light of the data on the record of the investigation, in particular relating to the price and volume of imports from third countries not subject to the investigation – in particular Poland, Turkey and Bulgaria -- and the EC assessment based thereon, we do not find that the European Communities has violated its obligations to conduct an objective examination on the basis of positive evidence with respect to imports from other countries not subject to the investigation or "outsourcing" as a causal factor, nor that the European Communities failed to separate and distinguish the effects of this causal factor.

(iii) rationalisation

7.400 **Brazil** argues that the EC causation assessment was flawed as the evolution of production and production capacity, as well as the decrease of employment and the lack of profitability, were caused by the EC industry's "voluntary" decision to rationalise production at the beginning of and during the IP. Brazil asserts that the EC did not base its determination on positive evidence and failed to appropriately separate and distinguish the effects of this causal factor.

7.401 The **European Communities** contends that the investigating authority investigated and distinguished the effect of the rationalisation on the basis of an objective examination of positive evidence.

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[347] The Provisional Regulation states: "Furthermore, it was claimed by some interested parties that certain Community producers imported the product concerned from other third countries. The investigation has shown, as regards one producer, that they indeed made such imports. However, these imports were minimal by comparison with the Community produced sales on the Community market. Therefore, this company in its core activity clearly remained a producer in the Community. With respect to the others, the allegations have not been confirmed. " The European Communities indicated that it had investigated the nature of investments of the EC industry, but that Tupy's allegations had not been substantiated or confirmed (Exhibit BRL-18, para. 6.14). In the Disclosure preceding the Definitive Regulation, Exhibit BRL-18, para. 6.1, the European Communities indicates that it "did thoroughly investigate the sales structure of Atusa and of all the other Community producers as well" but that "[t]he result of this investigation did not however require any modification" of the EC findings. The questionnaires to EC producers indicate that the EC requested information on corporate structure and relationships, for example, of Atusa (Exhibit BRL-41) and of Georg Fischer (Exhibit BRL-39). While we do not mean to suggest that an Article 4 examination would necessarily be sufficient also for the purposes of the causation analysis required by Article 3.5, it sets the parameters of the investigation of "injury" caused by "dumped imports".

7.402 The **Panel** recalls that under Article 3.5, injury must not be attributed to other known factors causing injury to the domestic industry at the same time as dumped imports. We therefore examine Brazil's allegation about rationalisation in light of this obligation.

7.403 The European Communities expressly acknowledged in its determination the restructuring efforts of the industry in 1995 and, in response to Tupy's arguments made before it, also indicated its appraisal that this had a negative impact on production, employment and profitability and required significant investments in 1995.[348] The EC also indicated that the record data reflected rising production and profitability flowing from the restructuring in the following year, 1996. The determination then indicates that this positive trend, which the EC would have expected to continue in view of the rationalisation efforts, did not in fact continue. We understand Brazil to question numerous aspects of this evaluation, including: that although the EC stated that the "contraction of the sales of the Community industry entailed a rise of its stocks and a decline of its profitability, which, although rising between 1995 and 1996, then decreased by 2.3 percentage points between 1996 and the IP to [0.9%]" it did not draw the "obvious" causal connection with the price rises by the EC producers and their declining market share; that the EC made no attempt to ascertain why the EC producers' prices were increasing and whether or not those increases were related to costs associated with the rationalisation; and the alleged failure by the European Communities to discuss and identify what were the "further benefits which could reasonably have been expected to accrue to the Community industry" as a result of its rationalisation efforts to which the European Communities refers in the Definitive Regulation. In this latter respect, Brazil points out that the Community producers increased their prices over the IIP and submits that it is inappropriate "that anti-dumping duties be levied on exports to the EC originating in Brazil if they are to be used to protect a market from bearing the losses and costs associated with voluntary restructuring…" which are then transferred on to end users through escalating sales prices, in a market which by the EC's own analysis is "highly price sensitive".[349] We examine these allegations *seriatim.*

7.404 First, with respect to the alleged failure by the European Communities to acknowledge a causal link between rationalisation and the price increases and declining market share, we note that the European Communities stated that the "decrease of the production was particularly strong from 1995 to 1996".[350] It then mentions: "a plant manufacturing malleable fittings in Germany had to be closed", and that the development in production capacity "should be seen in the light of the fact that in 1996 a production plant in Germany ceased its activity"; and that the development of employment "should be seen in the light of the attempts undertaken by the Community industry to restructure and reduce its costs". We discern from the determination that the European Communities did evaluate the relationship between restructuring and production, production capacity and employment during the injury investigation period, and placed the developments in the IP within this context.

7.405 Brazil seems to argue that, in its causation analysis, the European Communities underplays or omits to state that the impact of rationalisation efforts. Provided that it is clear that a determination takes a given factor into account, it is immaterial where in the determination such attention is indicated. Where it is clear that an investigating authority evaluates a given causal factor in substance, it is not essential that this evaluation must, in form, appear in a section entitled "causation" in the determination. Provided that it is clear that there has been consideration of whether or not a decline in certain injury factors was attributable to a given causal factor rather than to dumped imports, an appropriate analysis separating and distinguishing between and among the effects of causal factors may still occur. In this case, the use by the European Communities of the terms "the *effects* of" and the "*results* of these restructuring efforts" (emphases added) indicates to us that the EC did consider this to be a factor influencing the state of the domestic industry, rather than solely a

[348] Definitive Regulation, Exhibit BRL-19, recital 101.
[349] Reference is made to Provisional Regulation, Exhibit BRL-12, recital 165.
[350] Provisional Regulation, Exhibit BRL-12, recitals 150, 151 and 158.

factor indicative of the state of the domestic industry. That the European Communities did not identify effects of rationalisation in the latter part of the IP is reconcilable with the view that the European Communities thought that this factor was not causing injury to the domestic industry at the same time as the dumped imports.

7.406 Second, with respect to alleged failure by the European Communities to ascertain the reason for the EC producers' price increases, the determination examines the rationale underlying the price increases, which occurred in conjunction with a loss in sales volume and market share.[351] We discern from the determination that the European Communities addressed the price increases made by the EC producers and offered its evaluation of the salient facts in this regard.

7.407 With respect to Brazil's allegation that the Definitive Regulation was misleading and not based on positive evidence in stating "as from 1996 … the Community industry began to suffer a continuous decline of its sales volume … throughout the rest of the IIP",[352] the record data show a drop in sales volume level from 1995 to 1996 and from 1997 through the IP.[353] We consider that the underlying data, overall, bear out the EC evaluation of this factor. We do not consider that the fact that there was a small increase in sales volume from 1996 to 1997 renders the EC evaluation of this factor as reflected in the statement in the Definitive Regulation misleading, particularly as the phrase "the rest of the IIP" appears to indicate a reference to the subsequent or later part of the IIP and thus particularly when considered in an evaluation of the declining trend in the part of the IIP most closely associated with the dumping IP.

7.408 Given these considerations, we do not consider that Brazil has established that the European Communities acted inconsistently with its obligations under Articles 3.5 and 3.1 in respect of its findings concerning rationalisation.

(iv) substitution

7.409 **Brazil** argues that Tupy consistently asserted in the underlying investigation that the main cause of any injury suffered by the Community industry was the substitution of fittings made of materials such as copper and plastic for those made of malleable cast iron and included substantiating evidence that even the EC industry considered this to be the case. However, Brazil alleges, by not properly examining the issue of substitution and by assuming that the decrease in consumption did not cause significant injury to the EC industry, the EC's examination was not "objective and not based on "positive evidence". Although it was demonstrated to the European Communities that even the EC industry itself considered substitution to be a major cause of their difficulties during the Injury Investigation Period, and has thus caused or contributed to the fall in consumption of 6% between 1995 and the IP, the EC took an opposite view and concluded in the Definitive Regulation that (i) consumption had not decreased (as it had been "relatively stable"), and (ii) being so, it "cannot have significantly contributed to the injury suffered by the Community industry". Accordingly, Brazil argues that the conclusion made by the European Communities regarding substitution was unreliable, erroneous and contradictory.

7.410 The **European Communities** responds that the EC authorities enquired into these issues and reported their findings in both the Provisional and the Definitive Regulations. The fact that the substitution of malleable fittings by copper or plastic fittings mainly took place in the 1980s (a fact generally known in the market) was communicated repeatedly, not only by producers, but also by certain users and importers, during the verification visits. In any case, the issue of substitution is of relevance only as a factor affecting demand, and the European Communities made an unchallenged

[351] Definitive Regulation, Exhibit BRL-19, recital 103.
[352] Definitive Regulation, Exhibit BRL-19, recital 102.
[353] The sales volume data on the record of the investigation are as follows: 1995: 45,456 t; 1996: 41,486 t; 1997: 41,866 t; 1998: 38,866 t; IP: 37,722 t.

factual finding, reflected in the Provisional Regulation that consumption decreased by 6% over the IIP and judged that this was not a significant cause of injury.

7.411 The **Panel** recalls that the non-attribution requirement of Article 3.5 applies only when another known factor is impacting upon the Community industry "at the same time" as the dumped imports. Tupy raised the issue of substitution as a cause of injury to the domestic industry on several occasions during the underlying investigation. The European Communities considered these submissions and addressed them in detail in its Provisional[354] and Definitive[355] Regulations, concluding that, *inter alia*, any injury caused by substitution had occurred previous to the IIP and that this factor was not injuring the domestic industry at the same time as the dumped imports.

7.412 These EC statements concerning the temporal non-coincidence of any injury caused by substitution and by the dumped imports were based on the EC investigating authority's assessment of the evidence before it. Furthermore, and in any event, any substitution would be reflected in developments in demand for/consumption of the product concerned. In this regard, we note the factual finding made by the European Communities that consumption decreased by 6% over the IIP[356], and its assessment that this was not such as to have contributed significantly to the injury sustained by the domestic industry.[357] We do not understand Brazil to dispute the linkage between the effects of any substitution and trends in consumption. Indeed, Brazil itself emphasises this linkage.[358] We recall our examination of the EC causation methodology itself *supra*.

7.413 Given these considerations, we do not consider that Brazil has established that the European Communities acted inconsistently with its obligations under Articles 3.5 and 3.1 in respect of its findings concerning substitution.

(d) Conclusion on non-attribution to other “known” factors under Article 3.5

7.414 We have taken careful note of the factors raised by Brazil as "other known factors" within the meaning of Article 3.5. We have also reviewed the analysis of these factors undertaken by the EC investigating authority, in the light of the relevant underlying record data. In this respect, we recall, in particular, the importance of the distinction between substantive obligations under Article 3.5 of the Agreement and the transparency obligations relating to the disclosure and publication of data and information under Articles 6 and 12 of the Agreement.[359]

7.415 As we indicate above, we have made factual findings that the European Communities did explicitly address in its determination the "other factors" identified by Brazil which had been raised by Tupy in the underlying investigation. Having examined the data on the record of the underlying investigation, and the EC’s evaluation of this data, in light of the text of the provisions of the

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[354] Provisional Regulation, Exhibit BRL-12, recitals 175-176.

[355] Definitive Regulation, Exhibit BRL-19, recital 113 states: "The issue has been further investigated and it has been confirmed that indeed the substitution of cast iron by different materials, such as copper and plastic, took place mainly in the 1980's. Afterwards, the substitution effect slowed down and the utilisation of malleable fittings remained stable, in particular for those uses where physical durability, resistance as well as a specific tensile strength and elongation are required. Therefore, any substitution effect cannot have significantly contributed to the injury suffered by the Community industry as evidenced by the relatively stable consumption established in the course of the present investigation.”

[356] Provisional Regulation, Exhibit BRL-12, recital 163.

[357] Definitive Regulation, Exhibit BRL-19, recital 113: "...any substitution effect cannot have significantly contributed to the injury suffered by the Community industry as evidenced by the relatively stable consumption established in the course of the present investigation."

[358] Brazil second written submission, para. 344.

[359] Appellate Body Report, *Thailand- H-Beams*, supra, note 81.

Agreement, we do not find that the European Communities' consideration of those factors, including its conclusions about them, were biased or not objective.

7.416 As we stated earlier,[360] we are bound by Articles 17.5 and 17.6 of the *Anti-Dumping Agreement* to consider, on the basis of the evidence that was before the investigating authority during the investigation, whether the establishment of the facts in respect of any factor was improper, and whether the evaluation of any factor was biased or non-objective. We are thus precluded from conducting our own *de novo* review of the record evidence, and from reaching our own conclusions about each factor and the existence of injury and causation overall and substituting those for the conclusions of the EC. We are, rather, to consider whether the conclusions reached in the investigation *could* have been reached by an objective and unbiased investigating authority on the basis of its analysis of the evidence of record at the time of the determination. For the reasons discussed above, we find that this standard has been met, and thus that Brazil has not established that the EC's evaluation of injuries caused by factors other than the dumped imports was inconsistent with Article 3.5.

16. Issue 19 –Information on matters of fact and law

(a) Information relating to the exploration of possibilities of constructive remedies (relating to Issue 1)

(i) Arguments of the parties

7.417 **Brazil** argues that the European Communities has acted inconsistently with Articles 12.2. and 12.2.2 by failing to include or sufficiently set forth in their published notices certain findings and conclusions reached on issues of fact and law. Brazil states that it agrees with the European Communities that the obligation in Article 12.2 relates only to the findings and conclusions reached on all issues of fact and law considered "material" by the investigating authorities and that the findings and conclusions do not include all underlying evidence. In particular, Brazil asserts that the European Communities violated Articles 12.2 and 12.2.2 by not making public its findings and conclusions with regard to the exploration of possibilities of constructive remedies under Article 15. Brazil asserts that the fact that there is no mention in the Definitive Regulation that the possibility of an undertaking had been explored with regard to the Brazilian exporter (in contrast to the references to Czech, Korea, Thai and Japanese exporters) demonstrates that the European Communities did not itself consider that it had discussed the possibility of price undertakings with Tupy.

7.418 The **European Communities** generally argues that the "findings and conclusions" as referred to in Article 12.2 do not include all the underlying evidence. Moreover, Article 12.2 only requires Members to address those issues which are "considered material by the investigating authorities". This criterion is affected by the investigating authorities' experience and the matters raised by a party during the investigation. The European Communities argues that it has complied with its obligations under Article 15 by pursuing a price undertaking through diplomatic channels and that the EC's policy not to publish details of negotiations or discussions on undertakings unless they are successful was reinforced by the nature of the diplomatic discussions which are confidential within the meaning of Article 6.5.

(ii) Evaluation by the Panel

7.419 The **Panel** begins with the text of the relevant provision. Article 12.2 reads:

> 12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to

[360] *Supra*, para. 7.6.

> Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

7.420 Article 12.2.2 reads:

> 12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

7.421 We examine whether or not the absence of any reference to any of the aspects relating to the exploration of possibilities of constructive remedies under Article 15 considered by Brazil to be "material" -- including the absence of any reference to Brazil in the section of the Definitive Regulation dealing with price undertakings -- constitutes a violation of Article 12.2.

7.422 Article 12.2 requires the publication of "findings and conclusions on all issues of fact and law considered material *by the investigating authorities*", so that it would seem that there is a degree of subjectivity and discretion on the part of the investigating authorities envisaged here. That being said, however, the Agreement imposes certain objective requirements that would necessarily require reflection in the published report of the investigation and thus consider whether we are dealing with such requirements here.

7.423 Article 12.2 provides that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material" by the investigating authority. The ordinary meaning of the term of "material" is "important, essential, relevant".[361]

7.424 We understand a "material" issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. While it would certainly be desirable for an investigating authority to set out steps it has taken with a view to exploring possibilities of constructive remedies, such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties. We believe that contextual considerations also support this interpretation since, the only matters referred to "in particular" in subparagraph 12.2.2 are, in addition

[361] Concise Oxford Dictionary.

to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for certain decisions.

7.425 While Article 15 is indeed an integral part of the Agreement, we do not view the elements of Article 15 as being of this nature. We therefore do not consider the European Communities erred by not treating these elements as "material " within the meaning of that term used in Article 12 and thus do not view it as having erred by not having included these in its published final determination.

7.426 Moreover, we note that the text of Article 12.2 covers, *inter alia*, "any preliminary and final determination" of dumping and injury, and specifically, "any decision to accept an undertaking pursuant to Article 8". In this regard, as the European Communities did not take a decision to accept (or reject) an undertaking, the specific obligation under Article 12.2 to explain that an undertaking had been accepted or rejected would also not apply in this case.

7.427 In addition, Article 12.2.2 explicitly mentions that the obligations it contains are subject to the requirement to maintain confidentiality. To the extent that any communications between the EC and Brazilian governments were not disclosed by the European Communities in its final published determination on the basis of confidentiality concerns, we can not find this to be a violation of Article 12.2.

7.428 For these reasons, we find that the European Communities did not violate its obligations under Article 12.2 in this regard.

(b) Information relating to Article 3.4 injury factors (relating to Issue 16)

(i) Arguments of the parties

7.429 **Brazil** alleges that the European Communities violated Article 12.2 and 12.2.2 by not making public its findings and conclusions with regard to all of the mandatory injury factors under Article 3.4.[362]

7.430 The **European Communities** argues that the Definitive Regulation generally addresses the evaluation of all Article 3.4 factors by stating that not all of these factors need to be analysed in the same way. In addition, the EC found that the factors concerned were generally in line with other Article 3.4 factors and did not therefore need to be mentioned in the public determination.

(ii) Arguments of third parties

7.431 **Japan** argues that: by failing to describe all elements that European Communities considered in its injury determination in the Definitive Regulation, the European Communities violated Article 12.2.2; the lack of any findings or conclusions regarding certain Article 3.4 factors in the public notices violates Article 12.2.2. Japan submits that the European Communities has accordingly also violated Article VI of the *GATT 1994* and Article 1 of the *Anti-Dumping Agreement*.

(iii) Evaluation by the Panel

7.432 Article 12.2 requires that the authorities set forth, in sufficient detail, the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. We have addressed the meaning of "material" above.[363] In addition, Article 12.2 contains a textual link to "paragraph 2.1" of Article 12. Among the items specified in Article 12.2.1 are "(iv) considerations relevant to the injury determination as set out in Article 3." We have found that

[362] Brazil, second written submission, para. 366.
[363] *Supra*, para. 7.424.

Article 3.4 requires that an investigating authority must assess the role, relevance and relative weight of each factor in a particular investigation, and must explain their conclusions as to the lack of relevance or significance of factors determined not to be relevant or of significant weight.[364] We therefore consider that Article 12.2, and the explicit textual link to paragraph 12.2.1 require that it must be discernible from the published determination that an investigating authority reflect this explanation as to the lack of relevance or significance.

7.433 In this case, it is not directly discernible from the published Provisional or Definitive Determination that the European Communities addressed or explained the lack of significance of the following factors in its injury determination: ability to raise capital; productivity, return on investments; cash flow and wages. The relative significance of these factors is addressed exclusively in the internal "note to file" Exhibit EC-12.

7.434 The Definitive Regulation indicates that Tupy "argued that the determination of the impact of the dumped imports was not valid since certain injury factors set out in Article 3.4" had not been examined. The European Communities rejected this line of reasoning on the basis that "the WTO Anti-Dumping Agreement and the basic Regulation do not require that each factor be analysed in exactly the same way" and that, in the specific case, "all the relevant factors considered as having a bearing on the state of the industry have been taken into account in the context of the injury assessment."[365] We do not consider this general reference by the European Communities to its perception of its obligations under the Agreement to reflect any explanation of the relative significance of the particular Article 3.4 factors concerned here.

7.435 We therefore find that the European Communities acted inconsistently with its obligations under Article 12.2 and Article 12.2.2 of the *Anti-Dumping Agreement* in that 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.

(c) Information relating to EC producers' export performance (relating to Issues 16 and 17)

(i) Arguments of the parties

7.436 **Brazil** submits that the European Communities violated Article 12.2 and 12.2.2 by not making public its findings and conclusions with regard to the EC producers' export performance.

7.437 The **European Communities** argues that Brazil's claim relates to disclosure rather than publication of information and therefore is not within the scope of Article 12.

(ii) Arguments of third parties

7.438 **Japan** argues that the European Communities' failure to provide an explanation of why it rejected Brazil's claim concerning poor export performance violates Article 12.2.2 Japan submits that the European Communities has accordingly also violated Article VI of the *GATT 1994* and Article 1 of the *Anti-Dumping Agreement*.

(iii) Evaluation by the Panel

7.439 We refer to our discussion of the relationship between Article 12.2 and Article 3.4 above. We have found that "export performance" was not a "relevant" factor within the meaning of Article 3.4. We therefore do not pursue Brazil's Article 3.4-related allegation under Article 12.2.

[364] See *supra*, para. 7.314.
[365] Definitive Regulation, Exhibit BRL-19, recitals 95-96.

7.440 With respect to Brazil's allegation that the European Communities failed to publish information relating to export performance in relation to its causation analysis under Article 3.5, we recall that the European Communities disclosed to Tupy during the investigation its finding that on the basis that of the proportion of sales outside the Community as compared to the sales on the EC market, it could not be concluded that the decrease of sales outside the Community significantly contributed to increased stocks.

7.441 We have discussed above the meaning of the term "material" in Article 12.2. The fact that the European Communities disclosed this finding to Tupy does not necessarily render it "material". Furthermore, the information disclosed to Tupy indicates that the European Communities did not consider this to be a significant causal factor and therefore not one necessarily relevant as a basis for its causation determination.

7.442 Members are certainly encouraged to include in their published determinations all considerations underlying their causation determination. However, the failure to do so with respect to an element that is not required to be addressed cannot be a violation.

7.443 In addition, Article 12.2.2 explicitly mentions that the obligations it contains are subject to the requirement to maintain confidentiality. To the extent that the European Communities did not publish actual export performance data on the basis of confidentiality concerns, we can not find this to be a violation of Article 12.2.

7.444 For these reasons, we do not find that the European Communities violated its obligations under Article 12.2 or 12.2.2 in respect of information relating to export performance.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSION

8.1 In light of our findings above, we conclude that:

(a) The European Communities has acted inconsistently with its obligations under:

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

(ii) Article 12.2 and 12.2.2 in that 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 injury factors listed in Article 3.4.

(b) The European Communities has not acted inconsistently with its obligations under:

(i) Article 15 of the *Anti-Dumping Agreement* by failing to explore possibilities of constructive remedies;

(ii) Article 1 of the *Anti-Dumping Agreement* or Article VI:2 of the *GATT 1994* in imposing an anti-dumping measure in this case following the devaluation of the Brazilian currency at the beginning of the fourth quarter of the IP; or Articles 11.1 or 11.2 of the *Anti-Dumping Agreement* by imposing definitive anti-dumping measures in this case or by not, simultaneously with that imposition, self-initiating a review following the devaluation of Brazil's currency that occurred at the beginning of the fourth quarter of the IP.

(iii) Article 2.2 or 2.2.2 of the *Anti-Dumping Agreement* by including data relating to "low volume" sales in the construction of normal value; nor by including data from sales of certain product types within the definition of "like product" in constructing normal value.

(iv) Article 2.4 of the *Anti-Dumping Agreement* or Article VI (in particular, paragraphs 2 and 4) of the *GATT 1994* in not granting an adjustment in relation to the IPI Premium Credit;

(v) Article 2.4 of the *Anti-Dumping Agreement* or Article VI (in particular, paragraphs 2 and 4) of the *GATT 1994* by the methodology it applied in calculating the PIS/COFINS adjustment;

(vi) Article 2.4 of the *Anti-Dumping Agreement* by denying an adjustment with respect to packing costs, by failing to indicate to Tupy what information was necessary to ensure a fair comparison or by imposing an unreasonable burden of proof on Tupy in respect of packing costs;

(vii) Article 2.4.1 of the *Anti-Dumping Agreement*, as Brazil has failed to establish that Article 2.4.1 provides a legal basis for its claim concerning the currency conversions for adjustments, or under Article 6.4 by failing to provide timely opportunities for Tupy to see information relevant to the presentation of its case with respect to exchange rate conversion for adjustments;

(viii) Articles 3.3 or 3.1 of the *Anti-Dumping Agreement* with respect to cumulation assessment, nor under Article 3.2 as Brazil's claim under Article 3.2 was predicated on the assumption that the European Communities was obligated to examine the volume of dumped imports on a country-by-country basis;

(ix) Articles 3.2 and 3.1 of the *Anti-Dumping Agreement* by "zeroing" negative undercutting margins and focusing on transactions relating to matching models in considering price undercutting;

(x) Articles 3.2 and 3.1 of the *Anti-Dumping Agreement* in not granting an adjustment for price comparability in its comparison of prices of sales of black heart and white heart fittings in the context of its consideration of price undercutting;

(xi) Articles 3.4 or 3.1 of the *Anti-Dumping Agreement* in its evaluation of injury factors as in light of the *overall* development and interaction among injury indicators *collectively*, the record data overall would not preclude a finding by a reasonable and objective investigating authority that the domestic industry was injured;

(xii) Articles 6.2 or 6.4 of the *Anti-Dumping Agreement* with respect to the information on injury factors referred to exclusively in Exhibit EC-12 as this information was considered not relevant and was not specifically relied upon by the EC in reaching the anti-dumping determination.

(xiii) Articles 3.5 or 3.1 of the *Anti-Dumping Agreement* in examining whether each factor constituted, individually, a significant cause of injury, nor in its assessment of the causal link between dumped imports and injury;

(xiv) Articles 6.2 or 6.4 of the *Anti-Dumping Agreement* in not disclosing confidential information relating to EC producers' exports and purchases of the product concerned;

(xv) Article 6.6 of the *Anti-Dumping Agreement* by relying on Eurostat data with respect to imports from Poland, a third country not under investigation for dumped imports of the product concerned; or

(xvi) Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* by not referring in the published determination to elements relating to the exploration of possibilities of constructive remedies under Article 15, including the absence of any reference to Brazil in the section of the Definitive Regulation dealing with price undertakings; nor in respect of information relating to EC producers' export performance.

B. NULLIFICATION AND IMPAIRMENT

8.2 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement.

8.3 The **European Communities** asserts that in respect of Brazil's claims under Issue 9 ("No proper currency conversion") and Issue 10 ("No proper basis to assess PIS/COFINS indirect taxes") it has shown that even were the European Communities found to have infringed the obligations invoked by Brazil, the implications for the anti-dumping duties imposed on Tupy were in the latter case imperceptible, and in the former actually slightly beneficial to Tupy. Furthermore, the European Communities continues, in relation to Issue 13, the results of applying "zeroing" to the calculation of undercutting margins were so slight that it is inconceivable that the use of this methodology could have affected the conclusion that injury had been caused by the dumped imports. As such, these infringements could not have nullified or impaired any benefit accruing to Brazil, directly or indirectly, under the Agreement. The European Communities therefore submits that, should we find infringements arising from these claims only, no finding of nullification or impairment would be appropriate.[366]

8.4 As we have not found violations of the obligations referred to in this context by the European Communities, we do not consider this issue any further.

8.5 Accordingly, we conclude that to the extent the European Communities has acted inconsistently with the provisions of the *Anti-Dumping Agreement*, it has nullified or impaired benefits accruing to Brazil under that Agreement.

C. RECOMMENDATION

8.6 The European Communities submits that, in initiating the review of the anti-dumping measures on malleable fittings which it initiated in December 2001[367], which review will, according to the European Communities, reflect the views of the Appellate Body on the zeroing of dumping margins, the European Communities also provided the opportunity for Tupy to demonstrate that its assertions regarding the consequences of devaluation were in fact correct. The European Communities submits that, even were the Panel to find that the European Communities had acted in breach of its WTO obligations by applying "zeroing" in the calculation of Tupy's dumping margin, or by not re-examining Tupy's margin of dumping following the devaluation, the European

[366] EC second oral statement, paras. 162-165.
[367] EC response to the Panel question 144, Annex E-3.

Communities would, by initiating this review, have done what was necessary to remedy this situation so that there would be no need for us to make recommendations in this regard. The European Communities refers to the distinction made by the panel in *India – Automotive Sector* between a panel's finding of infringement and its recommendation to the DSB.[368] The European Communities therefore requests the Panel to make no recommendation in respect of Tupy's claims in this regard, irrespective of its findings on the issue of infringement.

8.7 In light of our finding that the European Communities acted inconsistently with its obligations under Article 2.4.2 by applying "zeroing" in its dumping determination, we have carefully considered these arguments of the European Communities. The EC measure referred to in our terms of reference and that that we have found to be inconsistent with the EC obligations under the Agreement remains in force.

8.8 We therefore recommend that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.

8.9 Brazil requests that we exercise our discretion under Article 19.1 of the *DSU* to suggest ways in which the European Communities could implement our recommendation. Specifically, Brazil requests us to suggest that, the European Communities repeal its anti-dumping duty order and reimburse all anti-dumping duties collected thereunder.

8.10 Article 19.1 of the *DSU* provides that:

> "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

8.11 By virtue of Article 19.1 of the *DSU*, a panel has discretion to ("may") suggest ways in which a Member could implement the recommendation that the Member concerned bring the measure into conformity with the covered agreement in question. Clearly, however, a panel is by no means required to make a suggestion should it not deem it appropriate to do so. Thus, while we are free to suggest ways in which we believe the European Communities could appropriately implement our recommendation, we decide not to do so in this case.

[368] Panel Report, *India — Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted 5 May 2002, paras. 8.25 *et seq*.

IX. BRAZIL'S PANEL REQUEST

WORLD TRADE ORGANIZATION

WT/DS219/2
8 June 2001

(01-2945)

Original: English

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

Request for the Establishment of a Panel by Brazil

The following communication, dated 7 June 2001, from the Permanent Mission of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 21 December 2000, Brazil requested consultations with the European Communities (the EC) further to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article XXIII of the General Agreement on Tariffs and Trade 1994 (the GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement) concerning the anti-dumping measures prevailing in the EC in respect of imports of malleable cast iron tube or pipe fittings originating in Brazil, including the initiation of the anti-dumping investigation carried out by the EC which led to the imposition and collection of definitive and provisional anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil (the Investigation) and the imposition and collection of provisional and definitive duties.

The above request for consultations was notified to the Dispute Settlement Body and was subsequently circulated to WTO Members[369] and those consultations were held in Geneva on 7 February 2001. As consultations failed to achieve a mutually agreed solution and further to Article XXIII of the GATT 1994, Article 17 of the AD Agreement and Article 6 of the DSU Brazil respectfully requests the establishment of a panel to examine the matter.

The EC initiated the Investigation by publishing a notice of initiation on 29 May 1999 in the Official Journal of the European Communities[370] and provisional anti-dumping duties were imposed by the EC by way of Commission Regulation (EC) No 449/2000[371], dated 28 February 2000 (the

[369] European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil (WT/DS219/1).

[370] OJ C 151, 29.5.1999, p.21.

[371] Commission Regulation (EC) No 449/2000 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 of 28 February 2000 - OJ L 55, 29.2.2000, p.3.

Provisional Regulation). The imposition of definitive anti-dumping duties and the collection of provisional duties was affected by way of Council Regulation (EC) No 1784/2000[372], dated 11 August 2000 (the Definitive Regulation).

In the opinion of Brazil the EC has acted and is acting in a manner which is inconsistent with its obligations under the GATT 1994 and the AD Agreement in that benefits accruing to Brazil either directly or indirectly under the AD Agreement and the GATT 1994 have been nullified or impaired by the EC and/or the achievement of objectives of the AD Agreement and the GATT 1994 are being impeded by the EC.

The actions of the EC including but not limited to the initiation of the Investigation and the imposition and collection of provisional and definitive anti-dumping duties has significantly impacted upon Brazil's exports of malleable cast iron tube or pipe fittings to the EC.

Brazil believes that the initiation of the Investigation, and the imposition and collection of provisional and definitive anti-dumping duties referred to above by the EC are actions which are inconsistent with the following provisions of the AD Agreement and of the GATT 1994:

Provisions of the GATT 1994:

(i) Article I
(ii) Article VI

Provisions of AD Agreement:

(a) Article 1
(b) Article 2, especially (but not exclusively) Articles 2.1, 2.2, 2.4 and 2.6
(c) Article 3, especially (but not exclusively) Articles 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6
(d) Article 4.1(i)
(e) Article 5, especially (but not exclusively) Articles 5.1, 5.2, 5.3, 5.4, 5.5, 5.7 and 5.8
(f) Article 6, especially (but not exclusively) Articles 6.1, 6.2, 6.4, 6.6, 6.10 and 6.12
(g) Article 7, especially (but not exclusively) Articles 7.1 and 7.5
(h) Article 9, especially (but not exclusively) Articles 9.1 and 9.2
(i) Article 11, especially (but not exclusively) Article 11.1
(j) Article 12, especially (but not exclusively) Article 12.2
(k) Article 15

Brazil considers the following actions and/or determinations and/or omissions of the EC to be or to have been inconsistent with GATT 1994 and/or with the AD Agreement.

All references herein to "Tupy" are references to the Brazilian exporter Industria de Fundição Tupy Ltda and, unless otherwise specified, all references to "Articles" are references to articles of the AD Agreement unless otherwise stated.

PRELIMINARY ISSUES

1. The EC failed to comply with its obligations under Article VI of GATT 1994 and under the AD Agreement, particularly but not exclusively with Articles 1, 2, 3, 5 and 9 thereof in that it

[372] Council Regulation (EC) No 1784/2000 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 of 11 August 2000 – OJ L 208, 18.8.2000, p.8.

adopted the anti-dumping measures concerned against Brazil through the Provisional Regulation and the Definitive Regulation whereas, particularly following the devaluation of the Brazilian Real as of January 1999 there has been no justification whatsoever for the adoption of these measures. In view of the EC's own findings where properly assessed, following the devaluation no dumping nor injury could have been properly established with regard to the imports of the product concerned originating in Brazil.

2. At the time of the initiation of the Investigation there was no dumping of the product concerned originating in Brazil and therefore the application did not include evidence of dumping and therefore of a causal link between dumping and injury (Article 5.2). The application therefore did not include sufficient evidence of dumping (and therefore of a causal link between dumping and injury) for the purpose of the initiation of the Investigation (Article 5.3), particularly as the allegation of injury pertained to actual material injury being sustained by the domestic industry and not to the threat of material injury being sustained by the domestic industry.

3. The product originating in Brazil was determined to have been dumped by the EC in a manner which was not compatible with its obligations under Articles 2 and 3 as at the time of the relevant determinations of dumping and injury the export price of the product was not less than the price of the like product, in the ordinary course of trade, when destined for consumption in Brazil (Article 2.1) and it follows that there could not therefore have been a causal link between the product originating in Brazil and the injury said to be being sustained by the domestic industry (Article 3.5). The EC further failed to discharge its obligations under Article 9 in that it collected anti-dumping duties other than in respect of imports of the product concerned from Brazil which were dumped and causing injury (Article 7.5 and Article 9.2).

4. The EC has furthermore therefore failed to discharge its obligations under Article 1 insofar as it has levied anti-dumping measures other than in the circumstances provided for in Article VI of the GATT 1994 and pursuant to the Investigation, which was not conducted (for these among other reasons) in accordance with the provisions of the AD Agreement.

PROCEDURAL ISSUES

5. The EC did not discharge its obligations under Article 5 in that (for example) the application did not contain a complete description of the volume and value of domestic production of the like product accounted for by the applicants (Article 5.2(i)) and did not set out information (for instance) as to the wages, stocks and investments of the applicants, which information should have been more than reasonably available to them (Article 5.2(iv)). The EC also failed to satisfy itself as to the accuracy and adequacy of the evidence set out in the application with regard the imports of the product concerned from certain countries not ultimately subject to the Investigation (Article 5.3).

6. The EC did not consider evidence of both dumping and of injury simultaneously in its decision whether or not to initiate the Investigation and during the course of the Investigation as there was at no stage sufficient positive evidence of dumping and of injury to domestic EC producers before the EC (Article 5.7) and in any event the EC should have rejected the application submitted to it when it became evident that it contained insufficient positive evidence of injury, in particular, to justify proceeding with the case (Article 5.8).

7. The EC was not in a position to determine whether or not the application has been made by or on behalf of the domestic industry (Article 5.4) particularly owing to its failure to investigate the extent to which certain of the applicants were themselves importers of the product concerned (Article 4.1 and Article 6.6) and furthermore the EC had not received a properly

documented application and did not notify Brazil prior to proceeding to initiate the Investigation (Article 5.5).

8. The EC failed to discharge its obligations under Article 6 in that, *inter alia*, it failed to satisfy itself as to the accuracy of certain information submitted to it by Tupy in connection with the taxation credit adjustment, the packing allowance adjustment, the advertising and promotional expenses adjustment, the importation of the product concerned by domestic EC producers from countries not subject to the Investigation, the impact of substitution and the market perception of the distinction between so-called black heart and white heart variants of the product concerned (Article 6.6) and thereby also denied Tupy the full opportunity for the defence of its interests in these among other respects (Article 6.2)

9. The EC resorted to the sampling of product types for the purpose of deciding on the extent of the taxation credit adjustment where the sample chosen was neither statistically valid nor necessary owing to the impracticability of conducting an examination of all product types concerned and no attempt was made by the EC to decide upon what sample, if any, might be appropriate in this respect in consultation with and with the consent of Tupy (Article 6.10).

10. Tupy was not provided with timely opportunities to see all information that was relevant to the presentation of its case particularly in that the EC did not properly disclose its methodology and calculations with regard to the currency conversions made in the dumping determination (Article 6.4).

11. If the EC considered whether or not there had been a significant increase in allegedly dumped imports from Brazil onto the EC market such consideration was not apparent from the Definitive Regulation and if the EC examined all of the injury factors listed in Article 3.4 it did not make this apparent in the Provisional Regulation and in the Definitive Regulation or in any separate reports thereto (Article 12.2).

12. The EC failed to set out in the Definitive Regulation or otherwise make available in a separate report all relevant information on the matters of fact and law with regard to the injury caused to domestic EC producers by factors other than the dumped imports that were made known to it such as (for instance) with regard to imports of the product concerned from third countries not subject to the Investigation, the substitution of the product concerned with replacement products, imports of the product concerned into the EC under product code sub-headings other than 7307 1910 and the outsourcing initiatives, poor export performance and price increases of EC producers during the injury investigation period (Article 12.2).

13. The EC also failed to set out in the Definitive Regulation or otherwise make available in a separate report all relevant information on the matters of fact and law connected with the dumping, injury and causation determinations made in the light of the devaluation of the Brazilian Real in January of 1999 (Article 12.2).

14. The EC failed to set out in the Definitive Regulation or otherwise make available in a separate report all relevant information on the matters of fact and law connected with its decision to cumulate imports of the product concerned from Brazil with the imports of other countries subject to the Investigation, its assessment of the impact of factors of causation known to it, its decision to undertake sampling for the purpose of determining the extent of the taxation credit adjustment to be granted, its decision not to grant the taxation credit adjustment and other adjustments necessary for a fair comparison to be effected between the export price and the normal value, its decision to deploy the use of zeroing in the context of its assessment of the price effects of imports of the product concerned and the considerations relevant to the comparability of models in its underselling and undercutting calculations (Article 12.2).

15. The EC failed to give reasons for its acceptance or rejection of relevant arguments and claims made to it be Tupy, including but not limited to those made in relation to the taxation credit claim, its decision to exclude in particular Poland, Bulgaria and Turkey from the scope of the Investigation, its decision to limit the ambit of the Investigation to product code CN 7307 1910 only, its decision that there was no distinction in the market between so-called black heart and white heart variants of the product concerned, its decision that the interests of certain of the applicants in certain third countries and their imports of the allegedly dumped product should not affect the definition of the Community industry, its decision that cumulation was appropriate, and its decisions that substitution of the product concerned, imports of the product concerned from third countries and the outsourcing initiatives, poor export performance and price increases of EC producers during the injury investigation period had no impact upon causation (Article 12.2)

16. The EC did not provide timely opportunities for industrial users of the product under investigation and for representative consumer organisations to provide information which was relevant to the Investigation insofar as it did neither sought such information other than from two national gas companies (Article 6.2) nor accepted it when it was provided by Tupy with particular reference to the distinction in the market between so-called black heart and white heart variants of the product concerned (Article 6.6) and ample opportunity was not afforded to Tupy to submit in writing all the evidence that it considered relevant to the Investigation in this respect (Article 6.1).

DUMPING ISSUES

17. The EC determined that certain product types should have their normal values constructed as their sales volumes were unrepresentative and therefore did not permit a proper comparison further to Article 2.2 as sales on the domestic market of the like product did not constitute 5% or more of the sales of the product types concerned to the EC. Despite having itself established that data relating to such sales did not permit a proper comparison with the exported product type further to Article 2.2 the EC proceeded to use the profit margins associated with these same product types in the construction of a figure for selling, general and administrative costs and for profits did not make adjustments for differences which affected price comparability to ensure a fair comparison (Article 2.4).

18. The definition of the "like product" under Article 2.6 does not include product types which start with codes "68" and "69" which are sold on the domestic market in Brazil (owing to their differing physical characteristics and intended uses) as other products had characteristics more closely resembling those of the product under consideration. Data pertaining to sales of product types on the domestic market starting with such codes was unlawfully used by the EC in the construction of the selling, general and administrative expenses and the profit margin in respect of product types sold on the European market (Articles 2.2 and 2.4).

19. In omitting to verify whether the claim of Tupy with regard to the packing allowance was valid the EC did not discharge its obligations under Article 2 in that a fair comparison could not then be effected between the export price and the normal value as Tupy was denied an appropriate adjustment on account of the differing and heightened packing costs incurred by it in connection with its domestic sales as compared with its packing costs in the context of exports of the product concerned to the EC (Article 2.4).

20. The EC did not discharge its obligations under Article 2 in that it denied to Tupy an adjustment which was necessary for a fair comparison to be effected between the export price and the normal value in that it did not grant to Tupy an adjustment on account of its increased advertising and promotional expenses on the domestic Brazilian market as compared to its

comparatively low advertising and promotional expenses in connection with its exports to the EC (Article 2.4).

21. The EC did not make the currency conversions required under Article 2 for the purpose of effecting a fair comparison between the export price and the normal value in particular as it is clear that with regard to certain transactions no information was available to the EC as to the applicable currency conversion rates as at the dates on which the material terms of sale for the transaction(s) in question were established (Article 2.4).

22. The EC failed to make adjustments on account of the physical characteristics of the product concerned (and the distinction between its so-called black heart and white heart variants as issues impacting upon price comparability) and so failed to effect fair comparisons in these respects between the export price and the normal value (Article 2.4).

23. The EC resorted to the sampling of product types for the purpose of deciding on the extent of the adjustment to be made on account of the tax credit adjustment where the sample chosen was neither statistically valid or necessary owing to the impracticability of conducting an examination of all product types concerned and in so doing failed to effect a fair comparison further between the export price and the normal value (Article 2.4).

24. In violation of Article VI:4 of the GATT 1994 the product subject to the Investigation originating in Brazil has been subjected to anti-dumping duties on export to the EC by reason of the exemption of that product from duties or taxes borne by the like product when destined for consumption in Brazil and/or by reason of the refund of duties or taxes borne by the like product on the Brazilian market to Tupy in accordance with the prevailing domestic Brazilian legislation. The EC also denied Tupy an appropriate taxation credit adjustment in respect of duties and taxes borne by the like product when destined for consumption in Brazil (Article 2.4).

25. The EC "zeroed" negative dumping margins which had been calculated for some product types of Brazilian origin exported to the EC during the investigation period with the effect of such zeroing being that the EC did not offset the margins of dumping which were calculated to be negative as against those margins of dumping which it calculated to be positive. A fair comparison was not therefore made by the EC between the export price and the normal value and a distorted margin of dumping was calculated (Article 2.4).

INJURY AND CAUSATION ISSUES

26. The EC did not consider whether there had been a significant increase in dumped imports from Brazil either in absolute terms or relative to production or consumption in the EC. The EC considered that the volume (in absolute terms) of Brazilian imports of the product concerned on the EC market had always been significant it was unnecessary for the EC to consider whether or not there might be a significance in any increase in Brazilian imports during the injury investigation period. Although the EC considered in the Provisional Regulation whether there had been a significant increase in dumped imports either in absolute terms or relative to production or consumption in the EC for the countries which had been cumulated Article 3.3 does not mandate a cumulative assessment of the significance of the volume increases of imports from the countries subject to investigation under Article 3.2 and each country subject to an anti-dumping investigation must have the significance of the volume increase (if any) in its imports during the course of the injury investigation period individually considered (Article 3.2).

27. The EC did not discharge its obligations under Article 3.1 and Article 3.2 in that it did not, *inter alia*, consider (with a basis of positive evidence) the effect of the allegedly dumped imports on prices, whether there had been a significant price undercutting by the allegedly dumped imports as compared with the price of a like product in the EC, or whether the effect of such imports was to depress prices to a significant degree, or prevent price increases which would otherwise have occurred to a significant degree in that:

    (i) it calculated an underselling figure in respect of which the calculations it provided included only those transactions in which underselling was found (which amounts to the use of "zeroing") and therefore does not relate to the "dumped imports" as referred to in Article 3.2, and;

    (ii) it did not consider whether or not as a matter of fact there had been price suppression, and;

    (iii) it did not consider whether or not as a matter of fact the market perception of the distinctions between so-called black heart and white heart variants of the product might require the making of appropriate adjustments, and;

    (iv) no finding of price depression by the EC was possible as the prices charged by the domestic EC producers in fact increased over the same period as was referred to with regard the (cumulated) trend of the decreasing prices of the imports from Brazil, and;

    (v) with reference to the EC's determination of price undercutting this again was not made in relation to "the dumped imports" as a whole but rather with regard to a selection of product types displaying positive undercutting margins (see also Article 3.6).

28. The EC did not discharge its obligations under Article 3.1 and Article 3.3 in that (for instance) it cumulated the imports of the product concerned originating in Brazil with those of the other countries subject to the Investigation where a cumulative assessment of the effects of the imports from the other countries subject to the Investigation was not appropriate (and could not have been based on positive evidence) either in the light of the conditions of competition between imports of Brazilian origin and the other imported products subject to the Investigation, nor in the light of the conditions of competition between the imports of the product concerned from Brazil and the like Community product owing to significant disparities both in pricing structures and volumes of imports as between the countries subject to the Investigation, particularly bearing in mind the devaluation of the Brazilian Real in January of 1999.

29. The EC did not discharge its obligations under Article 3.1 and Article 3.4 and its finding of injury was not based on positive evidence in that (for instance) it did not examine all the non-exhaustive 15 individual factors and indices going to the issue of injury within the meaning of the AD Agreement in its analysis of the alleged injury caused to the domestic industry as it analysed only partially merely the following eight (8) factors in the list set out in Article 3.4:

    (i) actual and potential decline in sales (though no explicit mention is made of potential decline in sales and although no proper consideration has been given to the up-going trend of sales of outsourced products);

    (ii) profits (although no proper consideration has been given to the growing sales of outsourced products);

(iii) market share (although no proper consideration has been given to the growing market share supplied by outsourced products);

(iv) productivity (although no proper consideration has been given to the growing productivity in relation to outsourced products);

(v) utilization of capacity (although no consideration has been given to the growing utilisation of capacity used for outsourced products);

(vi) inventories (although no consideration has been given to the improved trend of inventories of outsourced products);

(vii) employment (although no consideration has been given to the positive employment data in the context of outsourced products).

30. The EC did not discharge its obligations under Article 3.1 and Article 3.5 in that (for instance) it attributed injury said to have been sustained by domestic EC producers to imports of the product concerned of Brazilian origin despite the fact that as of January 1999 the devaluation of the Brazilian Real had made it impossible for imports originating in Brazil to be causing injury to the domestic EC industry and despite the fact that injury sustained by the domestic EC industry was readily attributable to the rationalisation, outsourcing efforts and poor export performance of EC producers. The EC did not ensure that injury caused to the domestic EC industry by imports of the product concerned (in significant quantities and at prices significantly below those prevailing in respect of imports of the product concerned when of Brazilian origin) from countries including, *inter alia*, Turkey, Bulgaria and Poland, was not attributed to imports of the product concerned from Brazil.

31. The EC did not discharge its obligations under Article 3.1 and Article 3.5 in that (for instance) it did not ensure that injury caused to the domestic EC industry by substitution of the product concerned by replacement products, by imports made by domestic EC producers from other third countries not subject to the Investigation (and with which they have close relations) and by such factors as the poor export performance, and the outsourcing and rationalisation efforts of domestic EC producers throughout the injury investigation period, was not attributed to imports of the product concerned from Brazil.

32. Owing to its failure to satisfy itself as to the accuracy of information submitted to it by Tupy in connection with the importation of the product concerned by domestic EC producers from countries not subject to the Investigation (in violation of Article 6.6) the EC also failed to discharge its obligations under Article 4 in not removing the producers concerned from the definition of the domestic industry.

DEVELOPING COUNTRY ISSUES

33. The EC did not afford Brazil the requisite special regard as a developing country throughout the course of the Investigation in that, *inter alia*, it denied Tupy adjustments under Article 2.4 on account only of its inability to appropriately assess the merits of such adjustments – such as that relating to the tax credit adjustment claim (for reasons that demonstrated a lack of regard for the manner of the administration of the Brazilian taxation system) and continued to hold Brazilian imports responsible for causing injury to domestic EC producers despite a currency devaluation of the Real as of January 1999 that meant that even by the EC's (erroneous) calculations Tupy was no longer dumping on the EC market. The EC further decided to cumulate imports originating in Brazil with the imports of other countries subject to the Investigation despite the above-mentioned devaluation of the Real (Article 15).

34. Despite the concluding sentence of Article 9.1 the EC nonetheless decided to apply the full extent of the dumping duty determined rather than afford Brazil, as a developing country, consideration on account of the devaluation in its currency in January of 1999 (Article 15).

35. The EC neither explored nor communicated either to Brazil or to Tupy the possibility that it might pursue constructive remedies over and above the possibility of the imposition of anti-dumping duties (Article 15).

OTHER ISSUES

36. The EC did not discharge its obligations under Article 7 in that, *inter alia*, it did not judge the Provisional Regulation to be necessary for the prevention of injury during the course of the Investigation (Article 7.1) or if it did so it did not make this apparent from the Provisional Regulation (Article 12.2) and in any event any such determination would not have been unbiased and objective as at the time of the imposition of provisional measures the devaluation in the value of the Brazilian Real entailed that there was not dumping of the product concerned of Brazilian origin, nor was it foreseeable that there could be during the course of the Investigation.

37. The EC did not make any attempt, with a view to discharging its obligations under Article 9.1, to afford Brazil as a developing country the consideration of having the level of the duty applied to Tupy's exports dictated by the level of the injury caused to domestic EC producers by Tupy's exports rather than with reference to the (erroneously calculated) dumping margin and furthermore the EC collected duties in respect of imports of the product concerned originating in Brazil where it was clear that the product concerned was not being dumped (owing to devaluation) and therefore that it was unlawful to collect those duties (Articles 9.1 and 9.2.)

38. The EC did not discharge its obligations under Article 11 in that the EC had not established (based on positive evidence) that there was dumping and injury to domestic EC producers within the meaning of the AD Agreement being caused by exports of Brazilian origin. The EC was not therefore justified in imposing anti-dumping duties, nor in maintaining them to counteract imports of a product neither dumped nor causing injury (Article 11) and furthermore despite a submission requesting a review of the measures in question made by Tupy shortly after the Definitive Regulation on 13 July 2000 setting out the reasons why the maintenance of anti-dumping duties was inappropriate no such reviews has yet taken place (Article 11.2).

39. Brazil respectfully requests that this item be placed on the agenda for the next meeting of the Dispute Settlement Body, scheduled to be held on 20 June 2001, and that a panel be established with standards terms of reference as set out in Article 7 of the DSU.

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ANNEX A

First written submissions by the Parties and written submissions relating to Parties' requests for preliminary rulings

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF BRAZIL

1. On 7 June 2001 the Government of Brazil requested that a panel be established in the matter of, *inter alia*, the imposition by the EC of provisional and definitive anti-dumping duties on imports of certain malleable cast iron tube or pipe fittings originating in Brazil. A panel was established on 24 July 2001, composed on 5 September 2001 and the First Written Submission of Brazil was presented to the Panel on 10 October 2001. This document is a brief executive summary of the main issues raised in the First Submission of Brazil.

2. Brazil submits that the EC has acted and is acting in a manner which is inconsistent with the obligations incumbent on the EC under the WTO Agreements, including Article VI of the GATT 1994 and the Anti-Dumping Agreement ('AD Agreement') in that benefits accruing to Brazil have been nullified or impaired as a result of the anti-dumping measures which the EC has imposed on imports of malleable cast iron tube or pipe fittings from Brazil.

3. The EC did not give any special regard to Brazil's special situation as a developing country and, in violation of Article 15 of the AD Agreement, the EC neither explored nor communicated either to Brazil or to the Brazilian exporting producer that it might consider the possibility of constructive remedies over and above the possibility of the imposition of anti-dumping measures.

4. The Applicants withheld information as to the factors and indices listed in Article 3.4, which were reasonably available to them and which were manifestly relevant to the initiation of the investigation. As a consequence, the EC did not discharge its obligations under Article 5.8 by not rejecting the Application. Moreover, as the product definition in the Application was broader than the one applied in the investigation, the information provided in the Application was inaccurate and meaningless. Consequently, the Brazilian exporting producer was not able to properly defend its interests, as provided for in Article 6.2.

5. Given that the Brazilian currency was devaluated by 41.99 per cent in January 1999, there was no need whatsoever for the EC to impose measures on the Brazilian imports to offset dumping, which did not exist, and the imposition of anti-dumping measures in these circumstances constitute a violation by the EC of Article VI of the GATT 1994 and of Article 1 of the AD Agreement. Alternatively, the EC violated Article 11.1 of the AD Agreement as it has not, simultaneously with its order imposing the measures, also ordered the revocation of these measures in order to comply with the obligation of Article 11.1, namely, not to allow the duty to remain in force when it was no longer necessary to offset dumping. The EC also violated Article 11.2 as, further to its order to impose the measures , it has failed to self-initiate a review concerning the need for the continued imposition of the measures in view of the new situation after the devaluation of the Brazilian currency.

6. The manner in which the EC constructed normal values for certain types of the investigated product breached the requirements of the AD Agreement. Firstly, in its quantification of the SG&A and profit amounts to be added into the cost of production, the EC applied different tests for the SG&A costs and for profits where only one test is expressly mandated by Article 2.2.2. Alternatively, given that the constructed normal values were based on data pertaining to sales of product types, which did not permit a proper comparison, the EC did not make a fair comparison by refusing to grant relevant allowances in the form of an adjustment, and by doing so the EC also inflated the dumping margin. Secondly, regarding certain product types, the EC included in its calculation types of fittings that were not like products, in violation of Article 2.2. The EC also acted inconsistently with

Article 2.2.2 by adding the actual amounts for SG&A costs and for profits pertaining to production and sales in the ordinary course of trade types of the product concerned, which are not identical to the compared products. By refusing to make due merited allowances for differences in physical characteristics affecting price comparability, the EC violated Article 2.4. As a consequence, the EC also improperly inflated the dumping margin.

7. With regards to the comparison between the normal value and the export price, the following five claims are submitted. Firstly, by refusing to take into account the effect of internal taxation, the EC increased the price difference between the export price and the normal value and hence improperly increased the dumping margin, if any, found for the Brazilian exporting producer in violation of Article VI:4 of the GATT 1994. Secondly, the EC violated Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement by failing to fulfil the requirement of a fair comparison by denying an allowance for differences in indirect taxation, advertising and sales promotional expenses and packing costs affecting price comparison. Thirdly, the EC's method of currency conversion and its method of assessment of indirect taxes by sampling violated Article 2.4. Fourthly, by zeroing the negative dumping margins found for some product types of the Brazilian exporting producer the EC did not make a fair comparison between the export price and the normal value in violation of Article 2.4 and a distorted margin of dumping was calculated by the EC in violation of Article 2.4.2. Finally, the above violations resulted in an exaggerated and inflated dumping margin and, consequently, in the imposition of anti-dumping duties in excess of the actual margin of dumping, if any, in violation of Article 9.3.

8. The manner in which injury was determined by the EC also breached the requirements of the AD Agreement. Firstly, the EC violated Articles 3.1 and 3.2 as it did not properly consider whether there had been a significant increase in allegedly dumped imports from Brazil. As the EC failed to satisfy the requirements of Article 3.2 it was prevented from making any findings under the subsequent sub-sections of Article 3.

9. Secondly, the EC violated Articles 3.1 and 3.2 as it failed to properly consider whether the allegedly dumped Brazilian imports had significantly undercut the prices of the like product in the EC. In the context of price undercutting, the EC's consideration did not relate to the "*dumped imports*" as referred to in Article 3.2. In addition, by failing to consider the effect on prices of the "*dumped imports*" under Article 3.2, the EC's price undercutting calculation for the Brazilian exporting producer was not based on positive evidence and the EC's examination whether the export price of the product concerned from Brazil had significantly undercut the EC producers prices was not objective. Consequently, the EC's undercutting calculation resulted in an exaggerated and inflated undercutting margin.

10. Thirdly, by improperly and unjustifiably refusing to accept that the black heart Brazilian product was different from the white heart EC product and by refusing to recognize an adjustment in this respect or by refusing to make the price comparison on the basis of black heart fittings only, the EC failed to make an 'objective examination' of the facts of the matter on the basis of 'positive evidence' as required by Article 3.1 and also failed to make a proper price comparison in violation of Article 3.2. Consequently, the EC's undercutting calculation thus resulted in an exaggerated and inflated undercutting margin.

11. Moreover, the EC violated Article 3.2 and 3.3 by attributing the injury said to have been sustained by the EC cumulatively over imports from the countries concerned. The EC failed to take due account of the preliminary need to conduct a country-by-country analysis and to properly establish the relevant conditions of competition. The EC also violated Article 3.3 by cumulating imports from the countries concerned although the relevant requirements relating to the conditions of competition have not been satisfied by the EC's findings. Given the inconsistencies in its approach, the EC has failed to comply with the requirement of an 'objective examination' provided for in Article 3.1.

12. Furthermore, the EC did not discharge its obligations under Articles 3.1 and 3.4 as its finding of injury was not based on positive evidence. The EC did not in its injury analysis evaluate all of the non-exhaustive fifteen individual factors and indices going to the issue of injury within the meaning of the AD Agreement. The EC also violated Article 3.4 as the evaluated factors disclosed an insufficient basis for a positive finding of injury by an objective and unbiased investigating authority. In addition, the EC's injury finding was not based on positive evidence as the EC did not consider the trends of those factors and indices partially analysed but just compared the end points. By not disclosing the EC producers' purchases and exports the EC precluded the Brazilian exporter from verifying the consistency of the data used. This non-disclosure, which is a serious violation of Article 12.2.2, denied the Brazilian exporter the right of access to the essential facts being considered by the EC prior to the imposition of definitive anti-dumping duties, in violation of Article 6.9, and precluded it from properly defending its interests, in violation of Article 6.2.

13. Finally, the EC violated Articles 3.1 and 3.5 by attributing injury to the Brazilian imports despite the fact that no injury had been sustained by the EC producers in respect of which causation could then legitimately be established. The EC also violated Articles 3.1 and 3.5 by failing to ensure that the injury caused to the EC industry by factors other than the allegedly dumped imports – for example the EC producers' comparative disadvantage, failing export performance, outsourcing and rationalisation efforts, and/or imports from the other third countries, substitution of the product concerned and/or the difference in the cost of production and the market perception – were not attributed to the Brazilian imports. Also, by not disclosing certain essential information, like the EC producers' own purchases and exports, the EC precluded the Brazilian exporter from verifying the consistency of the EC's data in violation of Articles 6.2, 6.9 and 12.2.2.

14. By not disclosing its methodology and calculations with regard to the currency conversions made pursuant to the requirements of Article 2.4, the EC failed to provide to the Brazilian exporting producer timely opportunities to see all information that was relevant to the presentation of its case, in violation of Article 6.4. The EC also violated Articles 12.2 and 12.2.2 by not setting out in the Provisional Regulation and the Definitive Regulation or otherwise make available in separate reports all relevant information on the matters of fact and law.

15. Brazil respectfully requests that the Panel find that the EC acted inconsistently with Article VI of GATT 1994 and the AD Agreement, recommend that the EC brings its measures into conformity with Article VI of GATT 1994 and the AD Agreement, and suggest that the EC revoke its anti-dumping duty order and reimburse all anti-dumping duties collected thereunder.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES AND REQUEST FOR PRELIMINARY RULINGS

(21 November 2001)

The large number of claims in Brazil's Submission means that this summary can give only a cursory account of the arguments that the EC presents in its defence. Consequently, the omission of any argument from this summary should not be taken to indicate that the EC does not regard it as important.

I. INTRODUCTION

1. The dispute arises out of the imposition by the EC of anti-dumping duties on malleable cast iron fittings from Brazil and other countries. The EC makes a number of introductory points covering, for example, the problems created by the form of Brazil's Submission. (Paras. 1 to 12)

2. The EC stresses that the burden of proof lies on Brazil to establish at least a prima facie case in support of its claims. (Para. 13)

3. The EC designates certain of its documents as confidential. (Para. 14)

2. PRELIMINARY ISSUES

4. The EC denies that there is any evidence to support the allegations made by Brazil concerning the motives of the domestic industry in making their Application. (Paras. 15 to 18)

5. Many of Brazil's claims are formulated so vaguely that they should be rejected by the Panel. They fall below the good faith standard required by the DSU. To entertain them would be to infringe the EC's rights to a 'natural justice' and 'due process'. The EC requests a preliminary ruling dismissing on these grounds seven individual claims and all the claims made under Issue 19. For brevity's sake the individual requests are not repeated in the following account. (Paras. 19 to 22)

6. Brazil has made over twenty claims in its Submission which are new to this dispute, not having been mentioned in its Panel Request. Claims of this kind are outside of the Panel's terms of reference, and the EC requests a preliminary ruling dismissing them. For brevity's sake the individual requests are not repeated in the following account. (Paras. 23 to 24)

7. The standard of review to be applied by the Panel in this dispute is that laid down in Article 17.6(i) of the Anti-Dumping Agreement (the 'Agreement'). (Paras. 25 to 28)

3. ISSUES

3.1 Issue 1: ' No special regard to Brazil as a developing country, no constructive remedies explored'.

8. Brazil claims that the EC has infringed various aspects of Article 15 of the Agreement. No coherent claim under the first sentence is made, and this provision in any case creates no separate obligation. (Paras. 30 to 31, 44)

9. The EC denies that its anti-dumping measures affected the "essential interests" of Brazil. The importance of the malleable fittings business to either Tupy in particular or the Brazilian economy in general was minimal. (Para. 32)

10. The EC also denies that it failed to explore possibilities of "constructive remedies" as provided for in the Agreement. Contrary to Brazil's assertion's, several meetings were held between EC and Brazilian officials at which the EC indicated the possibility of an undertaking being accepted. (Paras. 33 to 43)

3.2 Issue 2 – 'Inappropriate Application'

11. The obligation in Article 5.2 is directed not to WTO Members but to parties who present applications. Any corresponding obligation on Members is to be found only in Article 5.3, and EC denies that it has infringed this provision. The criteria in Article 5.2 were satisfied, and the EC does not express a view on whether they are conditions precedent to initiation of an investigation. The propriety of the EC's decision must be judged on the facts available to it at the time. (Paras. 45 to 50)

3.2.1 Volume and value of domestic production; complete description of product

12. Contrary to Brazil's claim, there is no inconsistency between the scope of the application and that of the investigation. Both concerned "malleable cast iron fittings". CN codes were given in both cases as guidance. Although code CN 7307 19 90 does not cover such fittings it mentioned by the Applicants in order to catch any fittings that were being wrongly classified on import. The definition in the Notice of Initiation would also have covered such misclassified products because, although it gave the code CN 7307 19 10, it said that this was "given for information". No claim can lie under Article 5 for possible defects in the Provisional or Definitive Regulations. (Paras. 51 to 57)

13. The EC refutes Brazil's claim that the Application contained insufficient information on the volume and value of production of the like product accounted for by the Applicants. (Paras. 58 to 62)

3.2.2 List of importers

14. The list of importers provided in the Application satisfied the criteria listed in Article 5.2(ii) since the list required by that provision covers importers of allegedly dumped products only. In any event, in the circumstances of the EC authorities' assessment of the list presented in the Application satisfied the requirements of the Agreement. (Paras. 65 to 72)

3.2.3 Information on consequent impact

15. The Application met the criteria of Article 5.2(iv). The Agreement does not require that every injury factor listed in Article 3.4 be addressed in the Application. In fact, this Application contained information on all but a couple of these factors, as well as on several not listed there. Brazil has made no attempt to show that information on the other factors was relevant to substantiate the allegations of injury. (Paras. 73 to 83)

3.3 Issue 3 – 'Inappropriate measures'

16. Brazil claims that the EC should not have imposed anti-dumping duties because, owing to the devaluation that occurred towards the end of the investigation period, these exports were no longer being dumped and duties were therefore not "necessary". (Paras. 84 to 86)

17. Brazil's claim fails to understand the basis on which anti-dumping duties are calculated under the Agreement. In the case of most Members, this is by examining imports over a set 'investigation period' prior to the initiation of the investigation. This system has built-in mechanisms (review, refunds, undertakings) to take into account changes which may occur after the investigation period. (Paras. 87 to 91)

18. Brazil's argument would give national authorities the power to set anti-dumping duties on the basis of a qualitative assessment of events that cannot be objectively predicted. (Paras. 92 to 93).

19. Brazil provides no legal basis for its argument. The only criteria provided in the Agreement for judging whether measures are "necessary" are those for determining the dumping margin and the issues of causation and injury. (Paras. 94 to 99)

20. The fact that the EC has occasionally taken account of events following the investigation period is not relevant. Firstly, such decisions are discretionary, and secondly the devaluation took place within the period. Furthermore, devaluation does not by itself determine the pricing decisions of companies. (Paras. 100 to 103).

21. Brazil has presented no evidence to justify its apparent claim that the EC should have initiated a review of its measure. (Paras. 104 to 110).

3.4 Issue 4 – 'Improper normal value – inappropriate product types'

3.4.1 Constructing normal value

22. Brazil has objected to the fact that when constructing the normal value, in arriving at the profit margin, the EC included data relating to 'unrepresentative' domestic sales. (These sales were not used to establish the normal value based on prices because of the 'low volume' rule in Article 2.2). However, the EC did no more than apply the rule in the relevant provision, Article 2.2.2. (Paras. 111 to 119)

23. Brazil is mistaken in alleging that the EC used different methods for calculating SG&A and profit. Both figures were (totally in accordance with Article 2.2.2) based on sales in the ordinary course of trade of the like product by Tupy. (Paras. 112 to 127)

3.4.2 Allowances

24. Brazil claims that the EC, when comparing the normal value and export price, should have made an allowance to take account of the inclusion of data from 'unrepresentative sales' in the constructed normal value (see paragraph 22 above). However, no basis for making this allowance has been proposed either by Tupy or by Brazil. (Paras. 128 to 132)

3.5 Issue 5 – 'Improper normal value – inappropriate product codes'

25. Brazil claims that the EC based its calculation of the dumping margin on a comparison of non-like products (specifically product types '68' and '69'). However, Brazil has provided no evidence in support of this claim, which even Tupy admitted was not sustainable. (Paras. 133 to 142)

26. Brazil also claims an adjustment should be made in the comparison because of differences between the products, however no basis has been proposed on which such an adjustment could be made. (Paras. 143 to 145)

3.6 Issue 6 – 'No proper consideration of tax neutralisation'

27. Brazil claims that an allowance should have been made in respect of the 20 per cent tax credit – 'IPI Premium Credit' – scheme operated by the Brazilian government because it compensated for prior-stage indirect taxes.

28. The main reason for denying Tupy' request for this allowance was that it did not demonstrate that the credit compensated for internal taxes "borne" by the like product when destined for consumption on the Brazilian market.

29. The EC identified various taxes (IPI, ICMS, PIS, COFINS) for which specific adjustments were given where justified. The claimed allowance regarding IPI Premium Credit was based on the mere assertion in the relevant Brazilian law, and no evidence was provided of particular taxes that had imposed on inputs for which it was supposed to compensate. (Paras. 146 to 156)

30. The legal status of compensation for prior-stage cumulative taxes is explained in the SCM Agreement, which forms part of a common framework with GATT Article VI and the Anti-Dumping Agreement. The SCM Agreement emphasises that the burden is on the party concerned to establish clearly the link between the credit and the tax (on inputs) for which it is compensation. (Paras. 157 to 173)

31. Several other reasons were given to Tupy for refusing the allowance, and the EC endorses these. Consequently none of Brazil's claims are justified. (Paras. 174 to 178)

3.7 Issue 7 – 'No proper adjustment for advertising and sales promotional expenses'

32. Brazil claims that, in calculating the dumping margin, Tupy should have been given an adjustment for differences in advertising, etc., expenses. However, Tupy did not present the EC with evidence justifying such an adjustment. (Paras. 179 to 192).

33. In any event, the EC made adjustments for differences in 'level of trade' between Tupy's home and EC sales, and these subsumed any differences in advertising, etc. expenses. (Paras. 193 to 194).

3.8 Issue 8 – 'No proper adjustment for packing costs'

34. Brazil also claims that an adjustment should have been given for packaging costs. Such an adjustment was also refused by the EC because of lack of evidence to support it. (Paras. 195 to 212)

35. Contrary to Brazil's claim, the EC properly indicated what information was necessary to ensure a fair comparison, in particular by means of the Questionnaire, and gave Tupy practicable assistance in presenting its requests for adjustments. (Paras. 212 to 218)

3.9 Issue 9 – 'No proper currency conversions'

36. Brazil accuses the EC of not explaining the basis of the exchange rate used in currency conversions when comparing Tupy's home and EC prices. It claims a breach of Article 2.4.1, but that Article contains no relevant obligation. (Paras. 219 to 221)

37. In fact, Tupy had never requested an explanation, and did not need one because it had itself provided the EC with the table of rates used in the conversion. The rate used to convert transport costs had a special conversion rate, but in any case these accounted for only a tiny part of the total costs. (Paras. 222 to 230)

3.10 Issue 10 – 'No proper basis to assess PIS/COFINS indirect taxes'

38. Brazil accuses the EC of infringing Article 2.4 in the way in which it calculated the adjustment for PIS/COFINS indirect taxes. In fact, Tupy never put forward a coherent claim for this adjustment, and it was made by the EC itself on the basis of information obtained from Tupy. The calculation was made on the basis that the adjustment was to be made to the normal value, on the basis of actual amounts paid or received by Tupy. Furthermore, Brazil's claim is based on new evidence, contrary to Article 17.5(ii). (Paras. 231 to 238)

39. Brazil claims that the EC chose a punitive methodology for calculating the adjustment. In fact the EC adopted a practical method in the absence of any coherent request from Tupy, despite the clear indication that it had been given of what was required. (Paras. 239 to 248)

3.11 Issue 11 – 'No proper dumping margin findings ("zeroing")'

40. The EC is currently considering the implications of the Appellate Body report in the Bedlinen case. The effect of 'zeroing' in the calculation of the dumping margin in this case was to increase it by less than 3 per cent. (Paras. 249 to 250).

3.12 Issue 12 – 'No proper consideration of import volume trends'

41. Brazil's main claim under this heading is that the EC failed to comply with the obligation in Article 3.2 regarding significant volume increase. The claim fails to appreciate that Members are required to consider whether there has been such an increase. There is no need for a positive finding on the point, or of a recording of the outcome of the consideration.

42. In fact, the EC Regulations show that it considered the issue of significant increase both individually for Brazil, and cumulatively for all the 'countries concerned'. (Paras. 251 to 265)

3.13 Issue 13 – 'No proper consideration of alleged price undercutting'

43. Brazil accuses the EC of infringing Article 3.2 by improperly calculating the degree of undercutting by 'zeroing' negative margins. Brazil's use of the Bedlinen case as a precedent is unfounded because of the many differences between dumping margins and margins of undercutting. Mere comparison of average prices would conceal the real effect of undercutting. In any event, there is only 0.01 per cent difference, a *de minimis* amount, between the margins as calculated by the two methods. (Paras. 266 to 270)

44. Brazil accuses the EC of infringing the same provision by confining its calculation of undercutting to those product types that are exported to the EC. The claim is baseless since the methodology applied was entirely legal. Furthermore, Brazil's claim is based on new evidence, contrary to Article 17.5(ii). (Paras. 271 to 279)

3.14 Issue 14 – 'No proper calculation of alleged price undercutting margins'

45. Brazil makes several unjustified claims that the EC's estimation of the margin of undercutting infringed Articles 3.1 and 3.2. Firstly, Brazil's mistakenly argues that differences in cost of production should be taken into account (although it could not even demonstrate that such differences existed). (Paras. 280 to 286)

46. Nor could Brazil establish that market perceptions of the products were different. (Paras. 287 to 290)

3.15 Issue 15 – 'No proper cumulation of imports'

47. As regards cumulation of dumped imports in the investigation of injury the EC law and practice, applied in this case, follows the requirements of Article 3.3. (Paras. 291 to 299)

48. Both the text of Article 3.2 and its context indicate that the rule regarding consideration of the increased volume of dumped imports applies to the cumulated volume, where cumulation is justified. This provision does not set a 'competition' requirement in addition to the one contained in Article 3.3. (Paras. 300 to 306)

49. WTO law, as reflected in national practice, allows considerable discretion to Members in the application of the notion of "conditions of competition" in Article 3.3(b). The EC practice is to take account of volume trends, but only in extreme cases will the analysis of volume trends result in a decision not to cumulate. (Paras. 307 to 315)

50. The various specific challenges raised by Brazil are groundless. Firstly, the issue of 'like products' has no relevance in this context. Secondly, there is no obligation to refuse cumulation because of differences in volume trends. Thirdly, the EC's consideration of prices was quite consistent with its conclusion to cumulate. Fourthly, the issue of channels of distribution was properly considered by the EC. (Paras. 316 to 341).

3.16 Issue 16 – 'Inappropriate consideration of injury indicators'

51. Brazil's main claim concerns Article 3.4. Contrary to Brazil's assertion, the EC did comply with the requirement to examine each of the injury factors that are listed in that Article. For most of the factors this consideration is reported in detail in the Regulations. For a small number, which the examination showed did not have a separate significance or did not indicate injury, the conclusions were elaborated in an internal record. The factor 'growth' was addressed as part of the investigation of other listed factors. (Paras. 342 to 349)

52. Brazil fails to recognise that Articles 3.4 and 3.5 deal, respectively, with the state of the domestic industry, and with the causes of any injury that is being suffered. The EC's Regulations reflect this division. Brazil's claims regarding 'potential' effects are misplaced since this provision is relevant only in claims of threat of injury or review requests. Brazil's claim regarding 'endpoint-to-endpoint' analysis are also misplaced since it is based on the summaries made in the Regulations regarding the Article 3.4 analysis, and does not to reflect the actual examination made by the EC. (Paras. 350 to 370)

53. Regarding the consideration of individual factors in Article 3.4, the phrase 'factors affecting domestic prices' refers to the price factors in Article 3.2, principally undercutting, which were fully examined by the EC. In particular, Brazil's denial of the importance of price sensitivity is not justified. (Paras. 371 to 385)

54. Contrary to Brazil's claims, the EC properly examined the 'utilisation of capacity', 'output', 'sales' and 'market share'. (Paras. 386 to 402)

55. Brazil's criticisms of the EC's examination of 'profits' are based on a misunderstanding of the nature of the injury investigation which, unlike that in safeguards cases, is focused on the one-year investigation period for which dumping has been determined. The EC also refutes Brazils criticisms

of its examination of 'employment', 'investments' and 'stocks'. Brazil's arguments concerning export performance are misplaced. (Paras. 403 to 424)

3.17 Issue 17 – 'Inappropriate establishment of causation'

56. This issue concerns the matters covered by Article 3.5, in particular the obligation not to attribute to dumped imports any injuries that are caused by other factors. An important feature of this paragraph is that, in contrast to Article 3.4, the onus lies on interested parties to raise 'other factors' during the investigation. (Paras. 427 to 429)

57. Several of Brazil's claims are inadmissible because they concern factors that were not raised during the investigation. Its claims also fail on substantive grounds. The alleged comparative advantage of Tupy is irrelevant to the issue of causation. Regarding EC export sales, the EC properly determined that they had no significant contribution to injury. Furthermore, the EC properly used the various sources of data that were available. Imports from third countries were thoroughly examined, and, where found to exist, their effects on the EC industry were separately identified. This was the case in particular as regards imports from Bulgaria. (Paras. 430 to 464)

58. Brazil's claim regarding outsourcing of production by EC producers is irrelevant since any consequences would be seen in the imports from third countries and this factor is specifically examined. Contrary to Brazil's accusation, the EC fully investigated (and reported in the Regulations) the consequences of the rationalisation carried out by the domestic industry at the beginning of the injury investigation period , and the issue of rising prices in the EC market. Furthermore, the EC's examination of sales volume and market share were quite proper. (Paras. 465 to 488)

59. The EC did investigate the issue of substitution by plastic fittings, and found that this has problem had arisen in the 1980s. Furthermore, the relevant issue is not 'substitution' but 'demand' (upon which substitution would have its effect, if any), and the EC properly investigated that factor. (Paras. 489 to 497)

60. Brazil's claims regarding the alleged differences between black and white heart fittings are not relevant to the issue of causation since there are no significant cost differences between them and consequently no scope for injury to the EC from such a factor. (Paras. 498 to 502)

3.18 Issue 18 – 'No timely opportunities given to see all relevant information'

61. Brazil adopts a distorted reading of the EC Regulations in order to claim that the details of currency conversions made by the EC were not disclosed. The claim is against the Provisional Regulation and does not satisfy the requirements for such claims. In any case the meaning of the Regulations is obvious, and merely requires a distinction to be made between the rate applied on a particular day, and the period (month or day) from which that rate is derived. (Paras. 503 to 509)

62. Brazil gives a misleading account of the source of the table of conversion rates used in the dumping margin calculation. This source was Tupy rather than the EC, and Tupy also provided the explanation. (Paras. 510 to 513)

3.19 Issue 19 – 'No proper information on matters of fact and law'

63. Under Issue 19 Brazil makes about twenty-five individual claims that the EC infringed Article 12. All of these claims are irredeemably vague and should be rejected by the Panel.

64. Several of these claims are also misplaced because they refer to matters which, for proper reasons (such as confidentiality), would never be included by the EC in its published instruments, and which Article 12 does not require should be included.

65. Some of the claims refer to non-existent obligations in Article 12.1. Others are in effect criticisms of the EC for accurately reporting the decisions it has taken when Brazil is also challenging those decisions. In so far as the claims touch on matters properly within the scope of Article 12 the EC has fully discharged its obligations in the texts of the Regulations. (Paras. 514 to 566)

4. CONCLUSIONS, REMEDIES AND REQUESTS

66. The EC refutes the claims made by Brazil. It also objects to the remedies sought by Brazil, and denies that any suggestion by the Panel would be appropriate. (Paras. 567 to 571).

ANNEX A-3

REQUEST OF BRAZIL FOR A PRELIMINARY RULING

(20 November 2001)

1. On 14 November 2001 the EC presented its First Written Submission in the above referenced case and made a Request for a Preliminary Ruling.

2. In the second line of Paragraph Nº 11 on Page 6 of the EC's 1st Submission, the EC refers to what it views as "considerable practical problems" allegedly relating to the presentation of Brazil's First Submission. The EC went as far as to state that in order to "enable members of the Panel to quickly identify the part of that document" (i.e. Brazil's First Submission) "to which this Submission" (i.e. the EC's 1st Submission) is referring", the EC has produced a version of Brazil's Submission that includes line numbers (Exhibit EC-1). References to this will be made in the style 'BFS line 275'".

3. The EC has thus taken a most unusual step of producing its own "version" of Brazil's First Submission and in fact sought to compel the Panel and the parties to this dispute to make use of that "version" instead of the only official text of Brazil's First Submission.

4. Whatever the motives behind this seemingly unprecedented EC step to modify Brazil's document and to attempt to replace it with the EC's own "version", Brazil submits that this must not be allowed. Such modifications of an opposing party's material in the framework of legal proceedings of the present nature, whether this is acknowledged by the EC or not, is fundamentally wrong and is patently unacceptable in most if not all the legal systems of WTO Members. Further, Brazil notes that nothing in the Working Procedures adopted by this Panel or in other relevant WTO rules requires line numbering or other similar forms of presentation in documents such as Brazil's First Submission. Remarkably, the EC does not provide for such line numbers in its own 1st Submission.

5. The EC authorities have no right and must not be allowed to physically alter Brazil's document, change its presentation, renumber its pages or otherwise modify it in the way in which the EC authorities have taken the liberty to do on this occasion. Further, the EC authorities have no right and must not be allowed to compel the Panel and/or any party to this proceeding to rely or to make any use of the EC's "version" of Brazil's First Submission in the way which the EC authorities seek to do in this case.

6. Brazil has willingly agreed to the EC authorities' request to be granted additional time, well above and beyond the deadline prescribed by Paragraph 12 of the Working procedures of Appendix 3 of the DSU, to prepare and present the EC's 1st Submission. The EC had five weeks since it received Brazil's First Written Submission to ask the Brazilian authorities to number paragraphs in that document, which Brazil could have, and would have, done in due time. Instead of doing so, the EC preferred to resort to an unusual and unacceptable meddling with the Brazilian text.

7. Moreover, Brazil's First Submission is clearly presented with each numbered page plainly divided into well-defined paragraphs which, although not specifically numbered, are nonetheless unmistakably distinguished and separated from each other. The EC could simply have referred to page numbers and to paragraphs in their descending order in each page, such as "Brazil observes on *Page 63, 4th Paragraph* that…"

8. In any event, Brazil reaffirms its understanding that for all purposes the only official version of the Brazilian First Written Submission is the one handed in by the Permanent Mission of Brazil in Geneva on 10 October 2001, in accordance with the timeframe set out for this case. In fact, Brazil cannot confirm that the EC's version of Brazil's First Submission is accurate. Further, contrary to the EC's claims, this unusual EC approach, if it were to be accepted, would in all likelihood add considerable confusion to the entire proceeding. The Panel and parties would constantly have to refer simultaneously to three documents rather than to two, namely to the EC's 1st Submission, to Brazil's First Submission and to the EC's "version" of Brazil's First Submission.

9. Brazil therefore respectfully requests that the EC be called, by way of a preliminary ruling pursuant to paragraph 13 of this Panel's Working Procedures, to amend the text of the EC's 1st Submission so that all references therein to Brazil's First Submission be made to the actual text of Brazil's First Submission as originally submitted by Brazil. Such new EC references may be made, for example in the manner proposed in paragraph 7 (above). Brazil respectfully further requests that the preliminary ruling require the EC to make the relevant amendments and present its new submission within a short period of time which would not lead to any delays to these proceedings.

10. In view of the exceptional nature of the EC's approach and its timing, Brazil makes this request by way of an exception to the general rule of paragraph 13 of this Panel's Working Procedures and respectfully requests that the Panel accept Brazil's above mentioned reasoning as showing good cause for the submission of this request at this stage.

ANNEX A-4

REPLY OF THE EUROPEAN COMMUNITIES TO BRAZIL'S REQUEST FOR A PRELIMINARY RULING

(26 November 2001)

1. In its letter of 20 November 2001, Brazil has requested that the EC "be called by way of preliminary ruling pursuant to paragraph 13 of this Panel's Working Procedures, to amend the text of the EC's 1st Submission so that all references therein to Brazil's First Submission be made to the actual text of Brazil's First Submission as originally submitted by Brazil".

2. The EC rejects the Complainant's unsupported allegations that the EC has somehow "modified", "changed", "altered" or "meddled with" Brazil's First Submission. There is no difference between the text of the document contained in Exhibit EC – 1 and what the Complainant calls the "actual text" of its submission, except the addition of line numbers. Thus, the amendments requested by the Complainant would be totally unnecessary because all the references made in the EC's First Submission to Brazil's First Submission are already to the "actual text" of that submission.

3. Furthermore, the EC has never requested that the Panel "replace" Brazil's First Submission by the numbered version included in Exhibit EC – 1. The EC has provided that version to the Panel exclusively in order to facilitate the reading of its own First Submission. The EC could have omitted that exhibit and leave to the Panel the task of numbering by itself the lines of Brazil's submission.

4. As noted by the Complainant, nothing in the Working Procedures adopted by this Panel requires line numbering or other form of presentation. However, by the same token, nothing in the Working Procedures requires that the EC refer to Brazil's First Submission in any particular form, let alone in a form chosen by Brazil. More specifically, nothing in the Working Procedures prevents the EC from identifying a passage in Brazil's First Submission by citing the number of the line in which it is found. The request made by the Complainant, if granted, would impose a new obligation upon the EC which it did not have at the time when it made its First Submission.

5. Admittedly, the method followed by the EC is "unprecedented". But so was the submission by the Complainant of a document with more than 250 pages without numbered paragraphs or lines. An examination of those Panel reports where parties submissions' have been reproduced (including submissions by Brazil) shows that the use of numbering is universal.

6. The omission of numbering cannot have been unintentional. Previous submissions by the Complainant (the Panel Request and Request for Consultations) and by Tupy (which were drafted by the same law firm) have included numbered paragraphs. The same is true of the Complainant's Executive Summary and its request for a preliminary ruling of 20 November 2001.

7. It was completely foreseeable that the omission of numbering would cause great inconvenience to both the Panel and other parties to the dispute in identifying elements in the Complainant's Submission. The method of citation suggested by the Complainant (e.g. "seventh paragraph of the page 236") is quite impracticable, and it is not used even by the Complainant itself

(e.g. BFS line 5826: "Although the EC's price undercutting methodology has been provided otherwise of this document (see Issue 13 above),". 'Issue 13' covers 13 pages of the submission.).

8. Finding itself in a detrimental situation the EC reacted in a pragmatic way by adopting a non-intrusive method of identifying passages in the Complainant's Submission. This approach was actually more appropriate than paragraph numbering given the style of the Complainant's Submission, and could be done without affecting its structure. (Such a system is not appropriate to the EC's submission where the average length of paragraphs is only seven lines.)

9. Having behaved at the very least negligently in placing the EC in this situation the Complainant should not now be allowed to mandate retroactively the way in which the EC could react. Still less should the Panel and the other parties be compelled to live with the difficulties gratuitously placed on them by the Complainant.

10. For the above reasons, the EC asks the Panel to reject Brazil's request. The EC further requests that, in order to avoid the repetition of similar incidents, the Panel amend its Working Procedures in order to provide that the parties shall number the paragraphs or the lines of all their subsequent submissions.

ANNEX A-5

RESPONSE OF BRAZIL TO THE PRELIMINARY RULINGS REQUESTED BY THE EUROPEAN COMMUNITIES

(26 November 2001)

On 14 November 2001 the EC presented the First Written Submission of the EC and made a Request for a Preliminary Ruling (the EC's Request for a Preliminary Ruling).

The following is the Response of Brazil to the EC's Request for a Preliminary Ruling.

A. THE EC'S REQUEST FOR A PRELIMINARY RULING

1. The EC makes its request for preliminary rulings on the basis of a claim that the request for the establishment of a panel submitted by Brazil (WT/DS219/2, BRL-22) does not meet the requirements of Article 6.2 of the DSU. The EC alleges that a number of claims made in the First Submission of Brazil "are not raised or are inadequately defined" in the panel request and cannot therefore be considered as falling within the panel's terms of reference.[1] Moreover, the EC authorities further allege that certain claims in the First Submission of Brazil are "so vaguely defined that the EC's fundamental rights would be seriously prejudiced if they were to be entertained by the Panel".

B. WITH REGARD TO THE TERMS OF REFERENCE

2. Brazil agrees with the EC that the panel's terms of reference are important for two major reasons. First, the terms of reference establish the jurisdiction of the panel. Second, they fulfil an important due process objective.[2] That is why the DSB has insisted that terms of reference should meet a certain standard of clarity.

3. However, considering the list of claims alleged to fall outside the panel's terms of reference[3], the EC appears to believe that Article 6.2 DSU imposes an obligation on the Applicant to set out, in the panel request, every element of each obligation it intends to invoke to make its case.

4. Brazil submits that the EC's interpretation is not only at odds with the letter of Article 6.2 of the DSU but is also incompatible with the spirit and purpose of Article 6.2 DSU.[4]

5. Brazil recalls that in *Korea - Dairy Safeguards* the Appellate Body held that the **mere listing of the articles** of the agreement on which the complaint is based may, "in the light of the attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the

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[1] The EC's First Written Submission, hereafter *ECFS*, para. 23.

[2] *EC - Regime for the Importation, Sale and Distribution, of Bananas*, Appellate Body Report ('EC – Bananas AB Report'), WT/DS 27/AB/R, adopted 25 September 1997, para 142.

[3] ECFS, para. 24.

[4] In *United States – Tax treatment for "Foreign Sales Corporations"*, Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, para 166, the AB found that "the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes"; see also *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ('Thailand – H-Beams AB Report'), WT/DS122/AB/R, adopted 12 March 2001, para 97.

complaint".[5] In other words, the Appellate Body did not say that a "mere listing" would *necessarily* be insufficient under Article 6.2 DSU.

6. Brazil's panel request indisputably meets at least the minimum standard of clarity under Article 6.2 DSU. In fact, Brazil began its request by listing the provisions of the AD Agreement it believes the EC had violated (Articles 1 to 7, 9, 11, 12 and 15). By identifying the EC measure in cause and the WTO provisions, which it considers that the EC had violated, Brazil had made a clear statement of the "problem" in question and duly fulfilled thereby the "minimum standards" requirement of specificity as established in DSU.[6]

7. Brazil then went on to describe more precisely some of its arguments relating to the EC's initiation and conduct of the investigation, the determination of dumping and injury, the causal link between dumping and injury, the developing country status, the imposition and collection of anti-dumping duties, as well as the public notice and explanations.

8. In that part of its panel request, Brazil also refers to numerous sub-paragraphs of the Articles it believes the EC has violated. In addition, Brazil provides examples of the arguments it would put forward in its First Submission. This appears clearly, for example, in paragraph 5 of the panel request where the expressions "for example" and "for instance" are used. Brazil therefore submits that its panel request goes far beyond the mere listing of the articles of the AD Agreement which in Brazil's view have been violated by the EC.

9. Regarding certain claims allegedly not referred to in the panel request, Brazil refers *Argentina - Footwear*, where the Panel decided that a "legal act not explicitly listed in panel request but which has a direct relationship to a measure that is specifically described therein can properly be considered by the panel".[7]

10. In other words, the requirements of Article 6.2 DSU are met if a "measure" is **subsidiary or so closely related to** a measure specifically identified, and the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the Applicant.

11. Brazil submits that the EC seems to confuse Brazil's elaboration of certain arguments in the panel request with the concrete claims which Brazil makes there. A good example is that of Article 9.3 of the AD Agreement which, according to the EC, would fall outside the terms of reference. However, the EC itself acknowledges in its First Written Submission that the Article 9.3 claim is "entirely dependent on other claims".[8] The EC does not contest that these "other claims" are within the terms of reference. It is therefore indisputable that the Article 9.3 claim must also fall and indeed falls within the terms of reference.

12. Moreover, Brazil contends that the EC confused the distinction between claims and arguments. As made clear by the Appellate Body,

> "... there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out

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[5] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Report ('Korea – Dairy AB Report'), WT/DS98/AB/R, adopted 12 January 2000, para. 124.

[6] *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, the Report of the Panel, WT/DS27/R/USA, adopted 22 May 1997, para 7.29.

[7] *Argentina – Safeguard Measures on Imports of Footwear*, ('Argentina – Footwear'), WT/DS/121/R, adopted 25 June 1999; para 8.35; see also *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS/44/R, adopted on 22 April 1998, para. 10.8.

[8] ECFS, para. 132.

> and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties." [9] (emphasis in the original)

Hence, while *claims* had to be "specified sufficiently in the request for the establishment of a panel in order to allow the defending party ... to know the legal basis of the complaint"[10], the *arguments* in support of those claims should be set out and be refined in the course of the proceeding.

13. It is only as a matter of example that Brazil had set out some of the arguments in the panel request. There is no obligation on Brazil to lay down exhaustively all the arguments underpinning its claims as the EC seems to imply.

14. Finally, Brazil asserts that the issue of the sufficiency of a panel request depends on whether the respondent, in view of "attendant circumstances", has been misled as to what claims were in fact being asserted against it in a manner actually prejudicing its ability to defend itself.[11] Brazil has never intended to mislead the EC and can indeed see no valid basis for any suggestion that it has misled the EC in the way, which appears to be implied by the EC.

15. In any event, the existence of prejudice must be determined in light of the overall circumstances and considerations, "given the actual course of the panel proceedings", *i.e.* a respondent must have experienced actual prejudice in its ability to defend its interests before a mere listing or provisions would be found to be insufficient under Article 6.2 DSU.

16. Brazil submits that the EC has not demonstrated, based on supporting evidence that it has suffered any prejudice as a result of the alleged imprecision of Brazil's panel request.

17. Moreover, Brazil notes that the EC has not requested any clarification of the claims raised in the panel request prior to its claims in the EC's First Written Submission. In *Thailand - H Beams AB Report*, the Appellate Body made clear that such a request can be made by the defending party and that a line of argument according to which the respondent's rights of defence have been prejudiced must not be abused. Moreover, the Appellate Body further instructed to keep in mind that WTO Members should engage in dispute settlement procedures "in good faith in an effort to resolve the dispute".[12]

18. It is also submitted and reminded that Brazil's claims had already been raised in its request for consultations[13] and all of them were aired during the actual consultations. The EC was therefore fully aware of Brazil's contentions and did not try to seek further explanations. Therefore, Brazil submits that the EC did not establish in any way that the alleged deficiency in the panel request prejudiced its rights of defence.[14]

C. WITH REGARD TO THE EC'S CLAIMS OF ALLEGED "VAGUENESS"

19. Regarding the proposal that certain claims made by Brazil are "vague", Brazil observes first that the summaries it has provided in its First Submission clearly indicate the sense of the claims (and the arguments) which it made in that Submission and these summaries in fact eliminated any risk of any "vagueness" with regard to Brazil's claims. Nonetheless, the EC seems to suggest that its right to a fair hearing "would be seriously prejudiced" if the claims were to be entertained by the Panel.[15]

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[9] *EC - Bananas*, para 141.
[10] Ibid. 142.
[11] *Korea – Dairy Products AB Report*, para 127.
[12] Thailand – H-Beams AB Report, para. 97.
[13] Document WT/DS219/1 of 9 January 2001.
[14] *Korea – Dairy Products AB Report*, para 131.
[15] ECFS, para. 19 *et seq*.

20. Brazil cannot accept this interpretation and submits that it is plainly unfounded. Brazil submits that, in any event, allegations such as that the claims in parties' *written submissions* are inaccurate, imprecise and/or vague, would have to be analysed by the Panel when the Panel deals with the substance of the dispute and, in general, such claims cannot be fully assessed, let alone dismissed in the framework of a preliminary ruling.

21. As already stated, Brazil agrees with the EC that the request for the establishment of a panel does have to meet a certain standard of clarity as set out in Article 6.2 of the DSU. However, claims which have been recognised as falling *within* a panel's terms of reference and are therefore properly before a panel, Brazil submits that it is for the Panel to decide, in its substantive analysis of the matter, whether the claims are or are not too vague to be accepted.[16]

22. As stated above, Brazil notes that it is common practice in WTO proceedings to request clarification of unclear matters from the other party. In *Thailand – H Beams AB Report* the Appellate Body held that "nothing in the DSU prevents a defending party from requesting further clarification" on the claims raised by the complaining party.[17] According to the Appellate Body, one must keep in mind that Members of the WTO should engage in dispute settlement procedures "in good faith and in an effort to resolve the dispute". Brazil notes that the EC has not attempted in any way to have any clarification of the allegedly defective claims.

23. Even if the Panel were to accept the EC's basic assumption that a preliminary ruling can be requested on the basis of such "vagueness", Brazil recalls that it is for the EC to prove that its fundamental rights would be "seriously prejudiced" were the allegedly "vague" claims to be entertained by the Panel.

24. Finally, Brazil concurs with the EC's assertion that "the defending Member should not itself have to **identify** the provisions which it is accused of infringing".[18] However, Brazil believes that the obligations, which in its view the EC has infringed, are clearly "identified" in the First Submission of Brazil. Thus, considering the EC's definition of vagueness, which basically relates to non-identification of the legal basis of the complaint, Brazil's claims cannot be considered vague as it has clearly identified that legal basis in its First Written Submission.

25. In any event, Brazil submits that allegations relating to the alleged vagueness of the claims raised in the First Submission are to be dealt with in the substantive analysis conducted in the Panel Report rather than at the preliminary stage. If the panel were to decide otherwise, Brazil believes that its claims cannot be considered vague and that it is for the EC to prove that its rights of defence would be prejudiced were these allegedly vague claims to be entertained by the panel.

D. SPECIFIC COMMENTS WITH REGARD TO THE EC'S SPECIFIC POINTS RAISED IN ITS REQUEST FOR A PRELIMINARY RULING

(a) With regard to the alleged vagueness

26. With regard to the alleged vagueness of some of Brazil's claims, Brazil would like to respond, while also bearing in mind paragraph 13 of the Working Procedures of the Panel, as follows:

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[16] See, e.g., *United States – Measures Treating Exports Restraints as Subsidies*, Report of the Panel, WT/DS194/R, adopted 29 June 2001, para. 8.120 *et seq.*; *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Panel, WT/DS70/R, adopted 14 April 1999, para. 9.247 *et seq.*; *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Panel, WT/DS24/R, adopted 8 November 1996, para. 7.38 *et seq.*

[17] *Thailand –H-Beams AB Report*, para. 97.

[18] ECFS, para. 20.

27. The EC seems to suggest that,

(i) "[c]laim at BFS line 1226, discussed at paragraph 63 below";

(ii) "[c]laim at BFS line 1737, discussed at paragraph 106 below";

(iii) "[c]laim at BFS line 3840, discussed at paragraph 221 below";

(iv) "[c]laim at BFS line 4750, discussed at paragraph 253 below";

(v) "[c]laim at BFS line 7160, discussed at paragraph 339 below";

(vi) "[c]laim at BFS line 9762, discussed at paragraph 489 below";

(vii) "[c]laim at BFS line 9922, discussed at paragraph 499 below"; and

(viii) "[a]ll the claims made under Issue 19, discussed at paragraph 515 below" are defectively vague and should be dismissed.

28. Brazil strongly disagrees in all of these instances with the EC's allegations that the claims are vague. Regarding the "Application" (the EC's 1st claim),[19] Brazil submits, in essence, that, as the product definition in the Application was broader than the one applied in the investigation, the information provided in the Application in accordance with Article 5.2 was inaccurate and meaningless, and, hence, the Brazilian exporting producer was not able to properly defend its interests, as provided for in Article 6.2. It is to be noted that the Application and the Notice of Initiation were the only sources of information available to the Brazilian exporter until the Disclosure Preceding the Provisional Regulation. Brazil recalls that these claims were clearly presented in Brazil's First Submission at pages 22-35.

29. Regarding the "*ex-officio* review" (the EC's 2nd claim), Brazil is, in sum, claiming that the EC violated Article 11.2 as it has failed to self-initiate a review concerning the need for the continued imposition of the measures although, in view of the new situation after the devaluation of the Brazilian currency, such a review was warranted. Brazil recalls that this claim was clearly presented in Brazil's First Submission at pages 35-46.

30. Regarding the "conversion of currencies" (the EC's 3rd claim), Brazil submitted in the First Submission that the EC infringed Article 2.4.1 by not converting currencies using the rate of exchange on the date of sale. Brazil recalls that this claim was clearly presented in Brazil's First Submission at pages 93-97.

31. Regarding the "other CN codes" (the EC's 4th claim), Brazil is, in essence, claiming that the EC has failed to comply with the requirement of an 'objective examination' under Article 3.1 as it refused to investigate Tupy's claim that the product concerned is imported under other CN codes than CN code 7307 19 10. The legal base of Brazils' claim is clearly stated at page 115 of the First Submission.

32. Regarding the "channels of distribution" (the EC's 5th claim), Brazil is, in essence, claiming that the EC has failed to comply with the requirement of an 'objective examination' provided for in Article 3.1 by stating but not examining whether the conditions of competition were similar. The legal base of Brazils' claim is clearly stated at pages 170-171 of the First Submission.

[19] Brazil notes that the EC refers to BFS line 1185.

33. Regarding the substitution (the EC's 6th claim), the legal base of this claim is clearly provided at pages 170-171 of the First Submission.

34. Regarding the difference between two variants of the product concerned (the EC's 7th claim), the legal base of this claim is clearly stated at page 235 of the First Submission.

35. Regarding the "public notice claims" (the EC's 8th claim), Brazil agrees with the EC that "these provisions are many lines in length, and contain many clauses and subclauses".[20] However, Brazil submits that the basic obligation, which is common to all these provisions and subclauses, is linked to one simple requirement, which is that of transparency. As held by the Panel in *EC – Bed Linen* in the same circumstances, that the requirements in Article 12.2 "all provide for transparency with respect to the decisions of which notice is being given".[21]

36. Brazil further recalls the general statement in page 240 of its First Submission that "[a]s a corollary of the substantive violation claims, Brazil also submits that the EC infringed the transparency requirements under Article 12.2 by failing adequately to explain its decisions". Moreover, it was also stated there that the EC's "public notices or separate reports do not set forth the EC's reasoning as to why it applied the relevant provisions of the AD Agreement (*via* the EC's Basic Regulation) in the way it did". Brazil also argued that "contrary to its obligations under Article 12 the EC failed to explain its choices of methodology, analysis, and conclusions on questions of fact, and failed to explain why it rejected arguments by the Brazilian exporting producer concerned." As all of Brazil's separate claims regarding Article 12 are reflecting the fact that the EC infringed the transparency obligation by not providing as the basis for the imposition of anti-dumping duties in this case duly motivated public decisions, the EC's allegation should fail.

(b) With regard to the EC's claims of dismissal

Article 9.3

37. The EC seems to suggest that "*[c]laim (BFS line 1760) of breach of Article 9.3 (paragraph 132 below)*", "*[c]laim (BFS line 2350) of breach of Article 9.3 (paragraph 134 below)*", "*[c]laim (BFS line 2685) of breach of Article 9.3 (paragraph 178 below)*", "*[c]laim (BFS line 3845) of breach of Article 9.3 (paragraph 230 below)*" and "*[c]laim (BFS line 3970) of breach of Article 9.3 (paragraph 248 below)*" were not covered by the panel request.

38. Brazil rejects the EC's suggestion that these claims were not covered by the panel request and that they should be dismissed. Brazil listed, *inter alia*, Article 9 ('*Imposition and Collection of Anti-Dumping Duties*') on the basis of which Brazil contested the EC's actions. Brazil has, thus, by identifying the WTO provision which it claims that the EC had violated (Article 9), constituted a clear statement of the "problem" in question. Moreover, as also held for example by the Panel (*Thailand – H-Beams*), "the nature and underlying AD investigation that led to the imposition of the challenged measures, make certain paragraphs" of the provision of the AD Agreement concerned (which has not been specified in the panel request) "logically and necessarily"[22] relevant or applicable (or, as the case may be, irrelevant or inapplicable in the dispute). This is particularly so where, as further discussed below, the AD Agreement's provision in question in fact follows automatically from the application of other AD Agreement's provisions which are specifically mentioned in the panel request.

39. In addition, Article 9.3 is a general provision obliging Members not to impose anti-dumping measures above the margin of dumping "as established under Article 2". As pointed out in

[20] ECFS, para 515.

[21] *European Communities – Anti-dumping duties on imports of cotton-type bed linen from India*, WT/DS141/R, adopted on 30 October 2000, para 6.260.

[22] All citations refer to para 7.21 in that Panel Report.

paragraph 11 above, the EC itself acknowledges (paragraphs 132, 134, 178, 230 and 248) that Brazil's claims based on Article 9.3 are "entirely dependant on other claims" and the EC does not contest that these other claims are within the terms of reference. As a finding of violation of Article 9.3 *automatically* follows from the inconsistencies with the other Articles of the AD Agreement, Brazil submits that there cannot be any additional obligation whatsoever to mention the said article specifically in the panel request.

40. Brazil, therefore, submits that the EC's request should be rejected.

Article 5.2

41. The EC suggests that "*[c]laim (BFS line 1185) of breach of Article 5.2 on the basis that products covered in the investigation must be identical with those described in the application (paragraph 52 below)*" and "*[c]laim (BFS line 1228) of breach of Article 5.2 on the grounds that the Application did not include a complete list of known importers (paragraph 69 below)*" should be dismissed.

42. Regarding the latter claim, Brazil observes that the EC is cross-referring to "paragraph 67 below". Although the EC stated in paragraph 20 of the ECFS that "the defending Member should not itself have to identify the provisions which it is accused of infringing", Brazil has, in a spirit of co-operation, identified that the correct reference might be paragraph 66.

43. Brazil rejects the EC's suggestion that Brazil has failed to clearly identify these "claims" under Article 5 of the panel request. The opening part of the panel request states, *inter alia*, that "Brazil believes that the initiation of the Investigation, … by the EC are actions which are inconsistent with the following provisions of the AD Agreement and of the GATT 1994". Brazil also indicated that its claims of violation of Article 5 concerned "especially (but not exclusively)" Article 5.2. Brazil also briefly summarised in paragraph 5 that the EC "did not discharge its obligations under Article 5 in that (for example) the application did not contain a complete description of the volume and value of domestic production of the like product accounted for by the applicants (Article 5.2(i))". The expression 'for example' shows that Brazil did not intend to be exhaustive but rather to exemplify certain aspects of the Application and, on the basis of that Application, the subsequent initiation of the investigation by the EC, was not in line with the requirements of Article 5. Moreover, the issue of the initiation of the investigation was raised during the consultations between Brazil and the EC.

44. As in its First Submission, Brazil indicated that its claims of violation of Article 5 of the AD Agreement fell under Articles 5.2 and 5.3 and given that not only both Articles were mentioned but also "a brief summary of the legal basis was provided" in the panel request, Brazil, therefore, submits that the panel request goes far beyond the mere listing of Article 5 alleged to have been violated by the EC.

Article 6.2

45. The EC proposes that "*[c]laim (BFS line 1226) that the supposed difference between the product scope of the Application and of the investigation precluded Tupy from being able to properly defend its interests in violation of Article 6.2 (paragraph 67 below)*" are out of the terms of reference.

46. Brazil notes, in a spirit of co-operation, that the correct reference is probably paragraph 63.

47. Brazil does not agree to exclude this claim. In the panel request, Brazil refers not only to Article 6 but also to the specific sub-paragraph 6.2 under which its claims of violation fall. Brazil also pointed out in paragraph 8 of its panel request that the EC "failed to discharge its obligations under Article 6 in that, *inter alia*, it failed to satisfy…and thereby also denied Tupy the full opportunity for the defence of its interests in these <u>among other respects</u> (Article 6.2)" (emphasis

added). Moreover, Brazil submits that Articles 5.2 and 6.2 are inherently inter-linked, i.e. if the product definition in the Application was broader than the one applied in the investigation, the information provided in the Application was inaccurate and meaningless and, consequently, the Brazilian exporting producer was not able to properly defend its interests, as provided for in Article 6.2. Finally, the issue of the initiation of the investigation and the issue of evidence were raised during the consultations between Brazil and the EC.

48. As in its First Submission, Brazil indicated that the EC's course of action precluded Tupy from being able to properly defend its interest in violation of Article 6.2 and given that Article 6.2 and "a brief summary of the legal basis" were provided in the panel request, Brazil, submits that the panel request goes far beyond the mere listing of Article 6 alleged to have been violated by the EC.

Article 2.2.2

49. The EC advocates that "*[c] laim (BFS line 2233) of infringement of Article 2.2.2 because of use of different criteria for the calculation of SG&A costs and of profits (paragraph 121 below)*" should be dismissed.

50. Brazil does not agree with the EC. Article 2 and the specific sub-paragraph 2.2 under which Brazil's claims of violation fall, were listed in the panel request. Brazil also briefly pointed out in paragraph 17 of its panel request the manner in which the EC constructed normal values for certain types of the investigated product breached the requirements of Article 2.2. As the issue of 'construction of normal values' was specified, also the issue raised by the EC, which *automatically* follows from the inconsistencies with Article 2.2, was covered. Moreover, the issue of the initiation of the investigation was raised during the consultations between Brazil and the EC.

51. Consequently, Brazil has by identifying the above made a clear statement of the "problem" in question.

Article 6.13

52. The EC suggests that "*[c]laim (BFS line 3821) of breach of Article 6.13 (paragraph 220 below)*" was not covered by the panel request.

53. In the said paragraph 220 the EC is suggesting that "Brazil presents no evidence in support of this claim". However, given that the EC's claim is "untimely" at this stage of the dispute proceeding, and <u>not</u> related to whether Brazil's claim was covered by the panel request, Brazil requests the Panel to dismiss the EC's suggestion.

The Accuracy of information

54. The EC proposes that "*[c]laim (BFS line 4750) that the EC authorities failed to satisfy themselves as to the accuracy of information in the Application (paragraph 253 below)*" is outside the panel request.

55. Under this claim the EC is referring to "paragraph 253 below". However, in that paragraph the EC states that "Brazil also argues (BFS line 4750) that the volume of imports was not properly established because the EC authorities failed to satisfy themselves as to the accuracy of the information submitted by Tupy regarding imports under other CN codes. This is a new claim not mentioned in the Panel Request and should be rejected by the Panel as outside its terms of reference (paragraph 23 above)."

56. Although Brazil has, in a spirit of co-operation, tried to understand, how the EC's claim of dismissal and the reasons stated in paragraph 253 are interlinked, Brazil is unable to see any relation

between that claim and the reasoning. Consequently, Brazil requests the Panel to dismiss the EC's proposal.

57. However, for the sake of transparency, Brazil would like to point out that both Articles 3 and the specific sub-paragraphs 3.1 and 3.2 under which its claim of violation fell were listed in the panel request. Moreover, in paragraph 26 of the panel request Brazil argued that "[t]he EC did not consider whether there had been a significant increase in dumped imports from Brazil either in absolute terms or relative to production or consumption in the EC". Given that Brazil's claim, which the EC would like to have dismissed, relates to 'the volume of imports', the claim is covered by paragraph 26 of the panel request.

Article 3.2

58. The EC argues that "*[c]laim (BFS line 5294) of infringement of Article 3.2 because the consideration of significant undercutting was confined to products that had matching EC products (paragraph 272 below)*" is not covered by Brazil's panel request.

59. Brazil disagrees. The panel request refers not only to Article 3 but also to the specific sub-paragraph 3.2 under which its claims of violation fall in the panel request. Brazil also pointed out in paragraph 27 of its panel request that "[t]he EC did not discharge its obligations under Article 3.1 and 3.2 in that it did not, *inter alia*, consider (with a basis of positive evidence) the effect of the allegedly dumped imports on prices, …" (emphasis added). Brazil is arguing that the EC's consideration in the context of price undercutting under Article 3.2 did not relate to the "*dumped imports*". Consequently, Brazil submits that all aspects of the price undercutting and underselling determinations, whether 'zeroing' or 'matching' were covered by the panel request. Brazil also submits that the stated "claim" is in fact an argument supporting the claim relating to the notion of "the price effect". Finally, the expression '*inter alia*' shows that Brazil does not aim at being exhaustive but rather exemplifying that certain aspects of the price comparison were not in line with Article 3.

Articles 6.2 and 6.9

60. The EC alleges that "*[c]laims (BFS line 7210) under Articles 6.2 and 6.9 in connection with Issue 16 (paragraph 347 below)*" and "*[c]laim (BFS line 9160) regarding Articles 6.2 and 6.9 (paragraph 446 below)*" were not covered by the panel request.

61. Regarding the first claim, Brazil submits that in paragraph 347 the EC provides argumentation, which is totally unconnected to Articles 6.2 and 6.9. Also here, Brazil has, in a spirit of co-operation, identified that the correct reference is probably paragraph 343.

62. Brazil strongly disagrees with the demand to exclude this claim. In essence, Brazil submits that by not disclosing the EC producers' purchases and exports the EC precluded the Brazilian exporter from being able to verify the consistency of the data used in violation of, *inter alia*, Articles 6.2 and 6.9.

63. As stated above, Brazil refers in the panel request not only to Article 6 but also to the specific sub-paragraph 6.2 under which its claims of violation fall. Brazil also pointed out that in paragraph 8 of the panel request that the EC "failed to discharge its obligations under Article 6 in that, inter alia, it failed to satisfy…and thereby also denied Tupy the full opportunity for the defence of its interests in these among other respects (Article 6.2)" (emphasis added). Moreover, Brazil submits that Articles 6.2 and 6.9 are inter-linked, namely the first sentence of the former provides an important due process obligation and the latter is an important application of this obligation in the context of final determination. In essence, how would interested parties have a full opportunity for the defence of their interests if an investigative authority were not disclosing the essential facts under consideration

before the imposition of the definitive measures? Consequently, Brazil submits that both of the Articles were covered by the panel request and the EC's proposal of dismissal should be rejected.

Article 3.4

64. The EC suggests that "*[c]laims regarding the examination of specific injury factors listed in Article 3.4 (paragraph 350 below), including in particular the claim (BFS line 7909) of inadequate consideration of 'factors affecting domestic prices' in breach of Article 3.4 (paragraph 371 below)*" should be dismissed. Regarding the latter claim, Brazil notes that the correct reference is probably paragraph 372.

65. Brazil rejects the EC's suggestion. Brazil refers in the panel request to Articles 3 and 3.1 as well as Article 3.4. Moreover, the claims were clearly covered by paragraph 29 of the panel request. Brazil also submits that the stated "claim" is one of several arguments interpreting the obligation of the examination of injury factors listed in Article 3.4. Brazil submits, thus, that the EC's proposal should be rejected.

Article 3.5

66. The EC suggests that "*[c]laim (BFS line 9008) of violation of Article 3.5 based on the 'comparative advantage' of Tupy (paragraph 432 below)*" and also that "*[c]laim (BFS line 9922) of breach of Article 3.5 based on the differences between 'black heart' and 'white heart' fittings (paragraph 500 below)*" were not identified in the panel request and should be dismissed.

67. Brazil rejects the EC's suggestion that these claims should be dismissed. Firstly, Brazil identified both Articles 3, 3.1 and 3.5 under which its claims of violations fall in the panel request. Moreover, paragraph 30 of the panel request clearly mentions that "[t]he EC did not ensure that injury caused to the domestic EC industry…was not attributed to imports of the product concerned from Brazil". Consequently, by claiming that the EC violated Articles 3.1 and 3.5 by attributing the injury caused by factors other than the allegedly dumped imports to the allegedly dumped imports, is just a reformulation of paragraph 30 of the panel request. Moreover, the issue of difference in the cost of production was raised before the EC by the Brazilian exporter in the actual course of the anti-dumping investigation. Brazil also submits that the stated "claims" are in fact arguments supporting the claim relating to the notion of causation. Therefore, the EC's request should fail.

Article 6.6

68. The EC suggests that "*[c]laim (BFS line 9338) regarding Article 6.6 (paragraph 448 below)*" should be dismissed.

69. Brazil strongly disagrees and requests the Panel reject the EC's suggestion. As Articles 6 and 6.6 were listed in the panel request, Brazil has made a clear statement of the "problem" in question. Moreover, Brazil stated in paragraph 8 of its panel request that "[t]he EC failed to discharge its obligations under Article 6 in that, *inter alia*, it failed to satisfy itself as to the accuracy of certain information submitted to it by Tupy in connection with … the importation of the product concerned by domestic EC producers from countries not subject to the Investigation… (Article 6.6)". Consequently, the imports from Poland were covered by the panel request. Finally, as the EC states, the issue of imports from Poland was raised before the EC by the Brazilian exporter in the actual course of the underlying anti-dumping investigation.

Article 12

70. Finally, the EC alleges that "*[c]laim (BFS line 10158) of breach of Articles 12.2 and 12.2.2 (paragraph 520 below)*", "*[c]laims (BFS line 10165) of failure to provide information under*

Article 12.1 (paragraph 522 below)", "*[c]laim (BFS line 10235) regarding disclosure and Article 12 (paragraph 529 below)*", "*[c]laim (BFS line 10265) of breach of Articles 12.2 and 12.2.2 (paragraph 532 below)*", "*[c]laim (BFS line 10414) of breach of Articles 12.2 and 12.2.2 (paragraph 544 below)*" and "*[c]laim (BFS line 10470) of breach of Articles 12.2 and 12.2.2 (paragraph 550 below)*" were out of the panel request.

71. Brazil rejects the suggestion of the EC that Brazil has failed clearly to identify "claims" under Article 12 in the panel request. By identifying Article 12 ('Public Notice and Explanation of Determination') and the specific sub-paragraph 12.2 under which certain claims of violations fall in the panel request, Brazil has made a clear statement of the "problems" in question. For the sake of transparency, Brazil also emphasises that the problems were summarised in paragraphs 11 to 15 and 36 of the panel request.

72. In addition, Brazil submits that Article 12.1 is a general provision laying down notification and public notice requirements of an initiation of an investigation. More specifically, Article 12.1.1 requires that "[a] public notice of the initiation of an investigation shall contain, …adequate information of the following: (i)…the product involved;…(iv) a summary of the factors on which the allegation of injury is based;…". As Brazil is claiming that the initiation of the investigation by the EC infringes Article 5, a finding of violation of Article 12.1 follows from those inconsistencies with Article 5.2. Consequently, Brazil submits that there cannot be any additional obligation whatsoever to mention the said sub-paragraph specifically in the panel request.

73. Finally, Brazil observes that the EC has not shown in any way if, and if so how the EC interests were prejudiced in this case by any of the "omissions" the EC attributes to Brazil. In the absence of such prejudice Brazil considers that the EC claims are without merit and must therefore be rejected.

E. BRAZIL'S REQUEST

74. In view of the foregoing, Brazil respectfully requests that the Panel,

(i) reject for being unfounded the EC's request for a preliminary ruling alleging that claims in Brazil's First Written Submission have not been properly covered by its request for the establishment of a panel (WT/DS219/2, BRL-22);

(ii) reject for being unfounded the EC's request for a preliminary ruling alleging that claims in Brazil's First Written Submission are vague.

Alternatively, in case the Panel would consider that any of the above-mentioned requests might have some merit, Brazil would request that any final decision on that would only be made once the full scope, substance and all the merits of this dispute have been properly and conclusively assessed.

ANNEX B

Third Party Submissions

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ANNEX B-1

THIRD PARTY SUBMISSION OF JAPAN

I. INTRODUCTION

1. Japan has joined this proceeding as a Third Party to highlight certain systematic violations of WTO obligations that the European Communities (EC) appears to have committed in imposing anti-dumping (AD) duties on malleable cast iron tube or pipe fittings (pipe fittings).[1] While Japan takes no position on factual issues, Japan requests that the Panel carefully review EC's measures to determine whether they violated Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 1, 2.4, 2.4.2, 3.1, 3.4, 3.5, 12.2.1(iv) and 12.2.2 of the Agreement on Implementation of Article VI of GATT 1994.

2. Specifically, Japan advances the following four claims:

- by "zeroing" negative dumping margins calculated for certain products, the EC violated Articles 2.4 and 2.4.2 of the AD Agreement;

- by failing to examine each of the injury factors listed at Article 3.4 of the AD Agreement and each of the other relevant factors, the EC violated Articles 3.1, 3.4, 12.2.1(iv) and 12.2.2 of the AD Agreement;

- the EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to ensure that injury from factors other than imports was not attributed to imports; and

- by acting in the manner set out in the three claims above, the EC violated Article 1 of the AD Agreement and Article VI of GATT 1994 because it failed to conduct its anti-dumping investigation or apply its anti-dumping measure in accordance with the provisions of the AD Agreement.

3. WTO dispute settlement decisions already have resolved most of the issues presented in this Third Party Submission. In particular, the EC's zeroing practice already has been declared inconsistent with the EC's obligations under Article 2.4 of the AD Agreement.[2] Also, panels and the Appellate Body have declared, time and again, that Article 3.4 of the AD Agreement requires an authority to assess each of the 15 listed injury factors, as well as any other relevant factors, and to present the assessments in the public injury determination or in another public document.[3] The EC

[1] Since the Government of Japan was not party to the anti-dumping proceeding, it has no independent knowledge of the facts. Japan's allegations of WTO violations are based on the public notices of determinations made by the EC authorities and by the factual recitation made by Brazil, the complaining Member, in its submission to the Panel.

[2] *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (1 March 2001) (*Bed Linen*) at para. 66 ("the practice of 'zeroing' when establishing 'the existence of margins of dumping', as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*").

[3] *See, e.g., Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (12 March 2001) (*H-Beams*) at paras. 125-128.

did not do this and, further, fell short of its "non-attribution" obligation under Articles 3.1 and 3.5 of the AD Agreement.[4]

II. ARGUMENT

A. BY "ZEROING" NEGATIVE DUMPING MARGINS CALCULATED FOR CERTAIN PRODUCTS, THE EC VIOLATED ARTICLES 2.4 AND 2.4.2 OF THE AD AGREEMENT

4. The EC "zeroed" the negative dumping margins it calculated for some product types exported to the EC during the period of investigation in violation of Articles 2.4 and 2.4.2 of the AD Agreement. The EC then failed to offset the margins of dumping which were calculated to be negative against those margins of dumping which it calculated to be positive. Thus, the EC failed to make a fair comparison between export price and normal value, in violation of Article 2.4, and calculated a distorted margin of dumping, in violation of Article 2.4.2. If the EC had met its obligations under Articles 2.4 and 2.4.2, the normal value and, thus, any dumping margins would have been lower.

5. According to the first sentence of Article 2.4, "A fair comparison shall be made between the export price and the normal value". Article 2.4.2 further specifies that:

> 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.

6. In *Bed Linen*, the Panel concluded that Articles 2.4 and 2.4.2 prohibit a Member (in that case, as here, the EC) from "establishing the existence of margins of dumping on the basis of a methodology which include[s] zeroing negative price differences . . . .".[5] The Appellate Body upheld this conclusion on appeal:

> [w]hen "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value … despite the fact that it was, in reality, higher than the weighted average normal value." By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not*

[4] *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001) (*Hot-Rolled Steel*) at paras. 222-234.

[5] *Bed Linen*, WT/DS141/R (30 October 2000) at para. 6.119.

> a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[6]

7. Thus, Article 2.4 applies when an authority is comparing weighted average export prices and weighted average normal values. When the authority aggregates the results of the individual type comparisons to calculate a dumping margin, the authority must include – and must not treat as zero – any "negative dumping".

8. The EC applied its now-prohibited zeroing methodology in determining the *Pipe Fittings* case, as described in detail in Brazil's First Submission (10 October 2000) at 110-112.

9. Thus, the EC violated Article 2.4.2 by calculating a distorted dumping margin for the product concerned. Also, the EC violated Articles 2.4 and 2.4.2 by failing to make a fair comparison between the export price and the normal value. Had the EC adhered to its obligations under Articles 2.4 and 2.4.2, the normal value would have been lower, which in turn would have reduced the overall dumping margin, if any.

B. BY FAILING TO EXAMINE EACH OF THE RELEVANT INJURY FACTORS AND EACH OF THE FACTORS LISTED AT ARTICLE 3.4 OF THE AD AGREEMENT, THE EC VIOLATED ARTICLES 3.1, 3.4, 12.2.1(IV) AND 12.2.2 OF THE AD AGREEMENT

1. An Authority Must Examine Each of the Injury Factors Listed in Article 3.4 and That Evaluation Must Be Apparent from the Final Determination

10. The EC violated its obligations under Article 3.1 and Article 3.4 of the AD Agreement, as alleged in Brazil's First Submission (10 October 2001) at 174-208. The EC also violated Articles 12.2.1(iv) and 12.2.2 of the AD Agreement. The EC's finding of injury was not based on positive evidence: the EC failed to evaluate all 15 of the injury factors specified in Article 3.4, and failed to fully address those which it did evaluate. Moreover the factors which the EC did evaluate do not provide a sufficient basis for the EC's positive finding of injury. Finally, by failing to describe all elements that EC considered in its injury determination in the Provisional Regulation and the Definitive Regulation[7], the EC violated Articles 12.2.1(iv) and 12.2.2 of the AD Agreement.

11. Article 3.1 requires that a finding of injury be based on "positive evidence" and involve an "objective examination" of the factors mentioned therein. Article 3.4 of the AD Agreement sets out a non-exhaustive list of factors which an authority must consider in investigating injury. According to Article 3.4:

> 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.

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[6] *Bed Linen*, WT/DS141/AB/R (1 March 2001) at para. 55 (footnote omitted).

[7] Council Regulation (EC) No 1784/2000 (11 August 2000), published in the *Official Journal* L 208 (18 August 2000); Council Regulation (EC) No 449/2000 (28 February 2000), published in the *Official Journal* L 055 (29 February 2000).

12. Article 3.4 has been interpreted in several dispute settlement proceedings. For example, in the recent *H-Beams* proceeding, the Panel interpreted Article 3.4 as follows:

> 7.229 We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and mandatory in this regard. . . .
>
> * * *
>
> 7.231 On the basis of this textual analysis of Article 3.4, we are therefore of the view that each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities. . . .
>
> * * *
>
> 7.236 We are of the view that the "evaluation of all relevant factors" required under Article 3.4 must be read in conjunction with the overarching requirements imposed by Article 3.1 of "positive evidence" and "objective examination" in determining the existence of injury. . . . Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of "relevance or irrelevance" of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.
>
> 7.237 Consistent with our approach outlined above, we are of the view that the evaluation of the mandatory factors must be apparent in the documents forming the basis of our review. . . .[8]

13. The Appellate Body upheld the Panel's decision in *H-Beams*, concluding that:

> 125. . . . We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the *Anti-Dumping Agreement.*
>
> * * *
>
> 128. We conclude that the Panel was correct in its interpretation that Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision . . . .[9]

14. Article 12.2.1 requires issuance of a public notice of the imposition of provisional measures in every anti-dumping investigation. This notice:

> . . . shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and

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[8] *H-Beams*, WT/DS122/R (28 September 2000) at paras. 7.224-7.237 (emphases added) (footnotes omitted).

[9] *H-Beams*, WT/DS122/AB/R (12 March 2001) at paras. 125-128. *See also Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (*Mexico—HFCS*), WT/DS132/R (28 January 2000) at paras. 7.127-7.142; *Bed Linen*, WT/DS141/R (30 October 2000) at paras. 6.154-6.162.

> shall refer to the matters of fact and law which have led to arguments being accepted or rejected.[10]

Among the matters that, according to Article 12.2.1(iv), must be contained in the notice are:

> (iv) considerations relevant to the injury determination as set out in Article 3.

15. Article 12.2.2 requires issuance of a public notice of a final affirmative determination providing for the imposition of a definitive anti-dumping duty. This notice:

> . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . .. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . ..[11]

16. In *Mexico—HFCS*, the Panel ruled that because Mexico did not provide an explanation of the facts and conclusions underlying a decision by its authorities, Mexico violated Article 12.2.2. Specifically, the Panel said:

> We have decided above that Mexico's decision to retroactively apply the final anti-dumping duty was inconsistent with the substantive requirements of Article 10.2. In so doing, we found that there was no explanation of the facts and conclusions underlying Mexico's decision in this regard in the final notice. Article 12.3 specifically provides "The provisions of [Article 12] shall apply *mutatis mutandis* to . . . decisions under Article 10 to apply duties retroactively". Consequently, the lack of any findings or conclusions on this issue is inconsistent with Mexico's obligations under Article 12.2 and Article 12.2.2.[12]

Although not at issue in *Mexico—HFCS*, this ruling regarding public notice of a final affirmative determination also is applicable to the requirements of Article 12.2.1(iv) regarding public notice of a provisional measure.

17. In sum:

- an authority must evaluate or assess the relevance or materiality of each of the injury factors listed at Article 3.4 and of others that are particularly relevant; and

- the authority's evaluation of each of the injury factors must be apparent from the final determination.

2. The EC Failed to Evaluate Each of the Injury Factors Specified in Articles 3.4 and to Include Them in Its Provisional and Final Determinations

18. A review of the Provisional Regulation and the Definitive Regulation indicates that the EC focused (to some extent, at least) on only nine of the 15 factors set out in Article 3.4. The factors the EC did consider are: (i) sales; (ii) profits; (iii) output; (iv) market share; (v) factors affecting domestic

[10] AD Agreement, Article 12.2.1.
[11] AD Agreement, Article 12.2.2.
[12] *Mexico—HFCS*, WT/DS132/R (28 January 2000) at para. 7.198.

prices; (vi) utilization of capacity; (vii) inventories; (viii) employment; and (ix) investments.[13] Thus the EC failed to assess the following factors: (i) actual and potential decline in productivity; (ii) actual and potential decline in return on investments; (iii) actual and potential negative effects on cash flow; (iv) actual and potential negative effects on wages; (v) actual and potential negative effects on growth; (vi) actual and potential negative effects on ability to raise capital; and (vii) the magnitude of the margin of dumping.

19. As noted at paragraph12, above, the Panel in *H-Beams* ruled that "the evaluation of the mandatory factors must be apparent in the documents forming the basis of our review".[14] Since the documents forming the basis of the review in this dispute do not include any mention of the seven factors identified in the previous paragraph, the EC has not met the obligations of Article 3.4, as interpreted by the *H-Beams* Panel.

20. In addition, as was the case in *Mexico—HFCS* (cited at paragraph 16, above), the lack of any findings or conclusions regarding the seven factors identified above in the public notices of the EC's Provisional and Definitive Regulations also violates the obligations set out in Articles 12.2.1(iv) and 12.2.2.

3. The EC's Evaluation of Those Factors It Did Address Was Insufficient

21. Japan requests that the Panel carefully review whether the EC's analysis of the following factors which it did consider – production capacity, capacity utilization, sales volume, market share, inventories, profitability and employment in the EC industry – was inadequate. The EC's analysis of these factors appears to have focused on a comparison of end points. It appears that the EC gave inadequate attention to the intervening trends of those factors. As a result of this failure, the EC did not provide "a well-reasoned and meaningful analysis of the state of the industry", which the *H-Beams* Panel ruled is required by Article 3.4.[15]

4. The EC Failed to Address All Relevant Factors

22. The list in Article 3.4 is not exhaustive.[16] Where an authority rejects the relevance of a non-listed factor raised by a respondent, it must thoroughly explain why the claimed factor is not relevant. Further, the explanation must be reflected in the text of the provisional or final determination or in other documents in the record of the proceeding, as required by Articles 12.2.1(iv) and 12.2.2 of the AD Agreement.

23. For example, Brazil claimed that Tupy (a Brazilian respondent) contended during the injury investigation that the EC producers' increasingly poor export performance between 1995 and 1998 was a factor which contributed significantly to increasing inventories throughout the period of investigation. Brazil further claimed that the EC never disclosed the figures related to the EC producers' export volumes and values of the product concerned and, therefore, did not adequately present its analysis (if any actually occurred) of this factor in violation of Article 3.4.

24. The failure of the EC to provide a "well-reasoned and meaningful analysis" of this claim violates Article 3.4 (as interpreted by the *H-Beams* Panel)[17]; the EC's failure to provide an

[13] The last cited factor is "ability to raise capital or investments." The EC did refer to investments in its Regulations, but it did not address effects on ability to raise capital.

[14] *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.237.

[15] *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.236.

[16] *Id.*

[17] *Id.*

explanation of why it rejected Brazil's claim violates Articles 12.2.1(iv) and 12.2.2 (as interpreted by the *Mexico—HFCS* Panel).[18]

C. THE EC VIOLATED ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT BECAUSE IT FAILED TO ENSURE THAT INJURY FROM FACTORS OTHER THAN IMPORTS WAS NOT ATTRIBUTED TO IMPORTS

25. Japan requests that the Panel carefully review whether the EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to demonstrate that it did not attribute to imports injury to the EC industry caused by other factors. Brazil alleges that the EC failed to consider effects of the following factors: (i) comparative advantage of foreign producers over the EC producers; (ii) export performance of the EC producers; (iii) imports from other third countries; (iv) outsourcing efforts of the EC producers; (iv) rationalization efforts of the EC producers; and (vi) substitution of the product concerned by replacement products. These and other related arguments are presented in detail in Brazil's First Submission (10 October 2001) at 208-238.

26. According to Article 3.1:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of . . . the consequent impact of these imports on domestic producers of such products.

27. Article 3.5 further specifies the obligation of Article 3.1 and provides that:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4 [of Article 3], 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.

28. Previous panels and the Appellate Body have interpreted the "non-attribution" requirement of Articles 3.1 and 3.5. For example, in *H-Beams*, the Panel interpreted these provisions as follows:

> Article 3.5 therefore mandates the investigating authorities to examine other known factors and gives an illustrative list of such factors. In addition, <u>it mandates the authority not to attribute to dumped imports injury caused by such other factors</u>. In accordance with our approach outlined above, we consider that the examination of such other factors must be apparent in the documents forming the basis for our review.[19]

29. The Appellate Body in *Hot-Rolled Steel* (reversing the Panel below) held that:

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[18] *Mexico—HFCS*, WT/DS132/R (28 January 2000) at para. 7.198.
[19] *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.275 (footnote omitted).

> 222. This provision [Article 3.5] requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." (emphasis added)
>
> 223. . . . 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, <u>such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports</u>. 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, <u>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</u> which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[20]

30. Thus, the non-attribution language of Article 3.5 requires that an authority explicitly separate and distinguish the injurious effects of other injury factors from the injurious effects of the dumped imports.

31. Japan requests that the Panel carefully review whether the EC failed to demonstrate that imports were, through the effects of dumping as set forth in Articles 3.2 and 3.4, causing injury within the meaning of the AD Agreement without attributing injurious effects of other factors in violation of Article 3.5, as claimed by Brazil in detail at pages 216-238 of its Submission.

D. BY FAILING TO CONDUCT ITS INVESTIGATION IN ACCORDANCE WITH THE PROVISIONS OF THE AD AGREEMENT, THE EC VIOLATED ARTICLE VI OF GATT 1994 AND ARTICLE 1 OF THE AD AGREEMENT

32. Article 1 of the AD Agreement mandates that:

> 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. (Footnote omitted.)

33. In conducting the tube or pipe fittings investigation and applying the anti-dumping measure in that investigation, the EC did not act in accordance with the provisions of GATT Article VI and the AD Agreement. As set forth in the previous sections of this Third Party Submission:

by "zeroing" negative dumping margins calculated for certain products, the EC violated Articles 2.4 and 2.4.2 of the AD Agreement;

- by failing to examine each of the injury factors listed at Article 3.4 of the AD Agreement and each of the other relevant factors, the EC violated Articles 3.1, 3.4, 12.2.1(iv) and 12.2.2 of the AD Agreement; and

[20] *Hot-Rolled Steel*, WT/DS184/AB/R (24 July 2001) at paras. 222-223 (emphasis added).

- the EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to ensure that injury from factors other than imports was not attributed to imports.

34. Accordingly, the EC violated Article VI of GATT 1994 and Article 1 of the AD Agreement.[21]

III. CONCLUSION

35. For the reasons set forth above, Japan asks the Panel to carefully review whether the EC has violated its WTO obligations under Article VI of GATT 1994 and Articles 1, 2.4, 2.4.2, 3.1, 3.4, 3.5, 12.2.1(iv) and 12.2.2 of the AD Agreement.

[21] *See, e.g., United States—Antidumping Act of 1916*, WT/DS162/R (29 May 2000) at paras. 6.240 and 6.264.

ANNEX B-2

THIRD-PARTY SUBMISSION OF THE UNITED STATES

21 November 2001

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I. INTRODUCTION

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the AD Agreement") that are relevant to this dispute. Without prejudice to other issues the United States may wish to raise in the third party meeting with the Panel, the United States will address the following two issues in this written submission: (1) the proper interpretation of Article 15; and (2) the proper interpretation of the relationship between Article 2.2 and Article 2.4. The United States recognizes that many of the issues raised in this dispute are solely or primarily factual. The United States takes no view as to whether, under the facts of this case, the measure at issue is consistent with the Agreement.

II. ARTICLE 15 OF THE ANTIDUMPING AGREEMENT ADDRESSES PROCEDURAL ISSUES AND DOES NOT REQUIRE A PARTICULAR OUTCOME

2. Brazil claims that the EC violated Article 15 of the Antidumping Agreement[1] by failing to give "special regard" to Brazil's "special situation" as a developing country Member, and that it failed

[1] Article 15 of the AD Agreement states that:

to explore the possibility of constructive remedies where the anti-dumping duties would affect Brazil's essential interests.[2] Brazil's complaint appears to be primarily that the EC made no affirmative proposal to explore remedies other than anti-dumping duties and secondarily that the EC was unwilling to understand Brazil's "less developed" tax rebate system.[3] Brazil's argument, however, is based on a misinterpretation of Article 15.

A. THE FIRST SENTENCE OF ARTICLE 15 DOES NOT REQUIRE A PARTICULAR OUTCOME

3. The two sentences of Article 15 are separate and distinct. The first sentence states that developed country Members must give special "regard" (*i.e.*, "attention, care or consideration")[4] to the situation of developing country Members in applying anti-dumping measures. However, the first sentence does not create a substantive obligation with respect to any particular outcome. For example, it does not require developed country Members to elect undertakings in lieu of anti-dumping duties or to impose anti-dumping duties at less than the full extent at which dumping is occurring.

4. The "special regard" called for in the first sentence of Article 15 establishes the context in which a developed country Member considers "the application of anti-dumping measures" to a developing country (emphasis added). There is no basis in the text of the first sentence of Article 15 to conclude that developed country Members are required to apply distinct "developing country" practices with respect to the methodologies used to determine whether and to what extent dumping exists (as Brazil suggests with its reference to the VAT tax methodology used by the EC as violating this provision).[5]

B. THE SECOND SENTENCE OF ARTICLE 15 ALSO DOES NOT REQUIRE A PARTICULAR OUTCOME

5. Brazil suggests that the EC violated Article 15 by failing to "propose"constructive remedies.[6] Its argument is based on a false premise, however, because nothing in the second sentence of Article 15 requires that the developed country Member propose a particular remedy. Instead, the only obligation it imposes is that, under certain conditions, Member countries shall "explore" constructive remedies before applying anti-dumping duties.[7]

6. Where the WTO Agreements establish specific obligations for differential treatment of developing country Members, such treatment is laid out explicitly. For example, Article 27.2 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) provides that the countries listed in Annex VII of the SCM Agreement are not subject to the prohibition on export subsidies that is applicable to other WTO Members; Articles 27.10 and 27.11 provide higher *de minimis* levels for

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> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

[2] Brazil's First Written Submission at 19-21.
[3] *Id*. at 21.
[4] II The New Shorter Oxford English Dictionary 2526 (1993).
[5] Brazil's First Written Submission at 21.
[6] *Id*. at 20.
[7] The term "explore" means, *inter alia*, "investigate, examine, scrutinize". I The New Shorter Oxford English Dictionary 889 (1993). As the panel recognized in *European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen From India*, WT/DS141/R, 30 October 2000 (*"EC – Bed Linens*"), "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires the consideration of the possibility of constructive remedies. *See Bed Linens* at para. 6.233.

Annex VII countries; and Article 27.2(a) provides that certain developing country Members are allowed to phase out their export subsidies over a period of eight years, subject to specified conditions. Article 15 of the AD Agreement contains no specific obligation beyond requiring to "explore" possibilities in specified circumstances, and there is no basis for reading one into the text.

7. In the GATT panel report on *Cotton Yarn from Brazil*[8], the panel construed the second sentence of Article 13 of the GATT, a provision very similar to Article 15[9], and found that:

> If the application of anti-dumping measures "would affect the essential interests of developing countries," the obligation that then arose was to explore the "possibilities" of "constructive remedies". It was clear from the words "possibilities" and "explored" that the investigating authorities were not required to adopt the constructive remedies merely because they were proposed.[10]

The *Cotton Yarn* panel also found that "there was no obligation to enter into the constructive remedies, merely to consider the possibility of entering into constructive remedies".[11] Thus, the factual determination to be made by the panel in the instant case is whether Brazil has established that the EC failed to "explore" the possibility of constructive remedies.

8. Recently, the Ministerial Conference meeting at Doha recognized that, although Article 15 is a "mandatory provision," the "modalities for its application" are not clear.[12] Thus, until such time as the Members of the WTO choose to clarify the provision or create additional obligations, there is simply no basis to conclude that the EC violated Article 15 if the facts establish that the EC explored possibilities for constructive remedies.

9. Finally, as Article 15 plainly states, the obligation to "explore" constructive remedies arises only when the application of anti-dumping duties "would affect the essential interests of the developing country Member[]".[13] The United States is not familiar with the investigative record of the proceeding before the EC authorities, and thus is not in a position to opine on whether Brazil successfully demonstrated during those proceedings that the application of anti-dumping duties in this particular case would, in fact, have affected its essential interests.[14] If the record demonstrates that it failed to do so, however, then there is no basis to conclude that the EC violated Article 15.

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[8] *EC–Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, 4 July 1995 (hereinafter "*Cotton Yarn*").

[9] Article 13 of GATT Anti-Dumping Code provided:

> It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where these would affect the essential interests of developing countries.

[10] *Cotton Yarn* at para. 584.

[11] *Id*., para. 589.

[12] Implementation-Related Issues and Concerns, WT/MIN(01)/W/10, 14 November 2001 (01-57868), at para. 7.2.

[13] The payment of anti-dumping duties will always have some negative effect on one or more producer/exporters in a Member country. Thus, a situation which would affect the "essential" interests of the Member country itself must mean something significantly more than this. Decisions on whether a Member's essential interests would be affected by a proposed measure will depend on the facts, and might be approached in multiple permissible ways.

[14] The term "essential" implies a very high standard for the level of national interest which the developing country (as the party in possession of the facts in this respect) must demonstrate would be affected by the anti-dumping duties. This strict limitation – to situations in which it has been demonstrated that applying antidumping duties would affect a country's "essential" interests – must be taken into account in weighing whether the second sentence of Article 15 applies at all in a given case. A proper interpretation of Article 15

III. THE EC'S EXCLUSION OF CERTAIN SALES FROM NORMAL VALUE IN ACCORDANCE WITH ARTICLE 2.2 DOES NOT IMPLICATE ARTICLE 2.4

10. Brazil has alleged that, in calculating constructed normal value for certain types of products, the EC violated Articles 2.2 and 2.2.2 by not excluding, from its home market database used to calculate selling, general and administrative ("SG&A") expenses and profit, data from sales which were deemed "not comparable" either because the home market was not deemed a "viable market" for the model at issue or the sales did not pass the EC's "sales below cost" test.[15]

11. Brazil has further alleged that, as a result, the EC violated the first and third sentences of Article 2.4 by not making appropriate adjustments to differences which affected price comparability, and thus by failing to effectuate a "fair comparison."[16] The United States takes no position with respect to Brazil's claim under Articles 2.2 and 2.2.2. Brazil's Article 2.4 argument, however, is based on an incorrect interpretation of that article. Issues arising under Article 2.2 do not implicate Article 2.4, which serves a different function within the Agreement. To the extent that Brazil has raised a legitimate claim under Article 2.4, this claim must be judged solely on the merits of whether Brazil has met its burden of proof with respect to the requirements of Article 2.4 itself.

12. Articles 2.2 and 2.2.2 relate to the proper establishment of normal value, by permitting the elimination of sales below cost from normal value under certain circumstances, and by providing for the use of constructed normal value as the basis for normal value under certain circumstances. Brazil has raised its concerns with respect to the establishment of normal value in the context of those articles.

13. In addition to its Articles 2.2 and 2.2.2 arguments, Brazil has also raised an argument, under the first and third sentences of Article 2.4, ostensibly seeking "adjustments for differences which affected price comparability," based on the same facts.[17]

14. Article 2.4 addresses the comparisons and adjustments Members must make after identifying the proper basis for normal value and export price and prior to calculating the margins of dumping. Article 2.4 provides, in full (with the sentences at issue highlighted):

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance

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cannot ignore the strict limiting language, a critical part of the negotiated balance of rights and obligations underlying the provision.

[15] Brazil's First Written Submission at 46-59. The EC declined to use Brazilian home market prices for those models for which home market sales were less than 5 per cent of the volume of sales of the same model to the EC. *Id*. at 49, citing the EC's Provisional Regulation at para. 22. The EC's "below cost" test for matching purposes is a model-specific test establishing the proportion of profitable sales to unaffiliated customers for each model. *Id*., citing the EC's Provisional Regulation at para. 23. If at least 80 per cent (by weighted average) of the sales of a model are profitable, normal value for that model is based on the weighted average of all home market sales of that model, whether profitable or not. *Id.* If 10-79 per cent of the sales of the model are profitable, the normal value is based only on the margins for the profitable sales of that model. *Id*. at 49-50, citing the EC's Provisional Regulations at para. 23. If less than 10 per cent of the sales of the model are profitable, none of the sales of that model are used for matching purposes. *Id*. at 50, citing the EC's Provisional Regulation at para. 23. The EC applied both the below-cost test and the market viability test for purposes of Article 2.2.2, but did so at the company-specific, rather than model-specific, level. *Id*. at 50, citing the EC's Provisional Regulation at paras. 24 and 27.

[16] Brazil's First Written Submission at 46, 48.

[17] *Id*. at 46.

> shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. (Emphasis added).

15. Brazil's arguments with respect to the calculation of constructed value relate to the *identification* of normal value under Article 2.2 and 2.2.2, and not to its subsequent *comparison* with export price under Article 2.4. As can be seen from the language quoted above, Article 2.4 presupposes that export price and normal value have already been identified.

16. Thus, the United States disagrees with Brazil that an improper calculation of constructed normal value[18] can constitute a breach of Article 2.4. The United States also disagrees that a putative breach of Article 2.4 can be used to bolster a claim under Articles 2.2 or 2.2.2. The language of Article 2.4, which relates solely to the comparison of normal value to export price, should not be taken out of context and applied to other issues related to calculation of dumping margins. Article 31 of the *Vienna Convention* states that a treaty shall be interpreted in accordance with "the ordinary meaning to be given to the terms of the treaty in their context . . . ". (emphasis supplied).[19] The Panel should not adopt Brazil's proposed interpretive approach, which takes the general language of the first sentence of Article 2.4 out of context and uses it to override the detailed rules negotiated in other parts of the Agreement.

17. In addressing the issues of calculation of cost of production and constructed normal value, therefore, the Panel should limit its analysis to whether Brazil has established a breach of Articles 2.2 and 2.2.2. To the extent the Panel is required to address arguments under Article 2.4, the Panel should find that Brazil has failed to satisfy its burden of proof.

IV. CONCLUSION

18. The United States appreciates the opportunity to provide its views in this dispute and hopes its comments will be useful to the Panel in its deliberations.

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[18] As noted above, the United States takes no position on whether the calculation of cost of production or constructed value in this case was, in fact, improper.

[19] The rules reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* have attained the status of customary rules of international law. See *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 at 23; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 at 12; *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126) - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, 14 January 2000 at para. 6.25.

ANNEX C

Second Submissions by the Parties

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ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF BRAZIL

1. This document is a brief executive summary of the main claims and arguments raised in Brazil's Second Submission, in line with the Working Procedures for the Panel.

2. Brazil reaffirms its previous statements regarding the background to this case, which is an integral part of Brazil's claims concerning the EC's establishment and evaluation of the facts of this case.

3. Brazil submits that the EC acted inconsistently with its obligations under the first sentence of Article 15 of the AD Agreement by failing to give special regard to the special situation of Brazil as a developing country Member. Furthermore, the EC's authorities could not have complied with its obligations under the second sentence of Article 15 unless they had given the Brazilian exporting producer notice or information concerning the possibility of an undertaking. As the EC has never 'suggested or tried to engage in any negotiations or discussions' concerning a possible undertaking with the Brazilian exporter, the EC failed to explore the possibilities of constructive remedies and, thereby, infringed the second sentence of Article 15.

4. The EC provided with its First Submission a copy of the confidential version of the Application. Given that Brazil's claims were based on the non-confidential version, Brazil withdraws its claims regarding the Application.

5. The Brazilian currency was significantly devalued in January 1999. As there was no need to impose measures on the Brazilian imports to offset dumping, which did not exist after the devaluation, the EC imposed an anti-dumping duty under circumstances *other* than those provided in Article VI:1 of the GATT 1994 and Article 1 of the AD Agreement. Alternatively, the EC violated its obligations under Article 11.1 of the AD Agreement by maintaining the duty at the time and to the extent where it was not necessary to counteract present dumping. The EC also failed to abide by Article 11.2 of the AD Agreement by failing to self-initiate an immediate review after the imposition of the measure to assess the need for the anti-dumping duty in view of the new situation after the devaluation of the Brazilian currency.

6. The manner in which the EC constructed normal values for certain types of the product concerned breached the requirements of the AD Agreement. The exact wording of Article 2.2.2 read together with Article 2.6 makes it clear that where an identical product exists, data relating to its SG&A costs and profits shall be used. Only 'in the absence of such a product', an interpretation that is supported by the word '*or*'' in Article 2.6, may data relating to SG&A costs and profits of a product with closely resembling characteristics be used. This interpretation also applies in cases where the investigating authority *subdivides* the product concerned into product types. Moreover, in case the investigating authority excludes the data under Article 2.2, it follows as a matter of construction that the same data should be excluded under Article 2.2.2. Consequently, although identical product types of the like product exist, the EC violated Article 2.2.2 by including actual data relating to SG&A costs and profits of non-identical product types.

7. Moreover, the EC infringed Article 2.2.2 by including in the amounts for SG&A and for profits used in the establishment of constructed normal values actual data pertaining to production and

sales of product types of the like product, for which domestic sales were *not* representative within the meaning of Article 2.2 and footnote 2 thereto. The EC also failed to ensure a fair comparison, as no adjustment was made for the use of data relating to sales, which do not permit a proper comparison, therefore infringing Article 2.4.

8. Regarding a fair comparison between the normal value and the export price, the following claims are submitted. Firstly, the EC acted inconsistently with its obligations under Article VI:4 of the GATT 1994 by not neutralising or not neutralising fully the identified differences in indirect taxation, *i.e.* the effects of the IPI Premium Credit and PIS/COFINS respectively. Brazil also denies any reduction of the AD Agreement to the SCM Agreement. Secondly, Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement oblige an *investigating authority* to ensure that a fair comparison between the normal value and the export price of the product concerned is undertaken. Consequently, the EC violated Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement by failing to fulfil the requirement of a fair comparison between the normal value and the export price by denying allowances or a full allowance for differences in *indirect taxation* (the IPI Premium Credit and PIS/COFINS) and in *packing costs* between domestic and export sales although these differences affected price comparability.

9. Moreover, the EC's quantification of the allowance for PIS/COFINS was arbitrary, manipulative and punitive in violation of Article 2.4. The EC also acted inconsistently with its obligations under Article 2.4 by not indicating to the Brazilian exporter what additional information with regard to the IPI Premium Credit and packing costs were necessary to ensure a fair comparison. Finally, the EC violated Article 2.4 by imposing an unreasonable burden of proof upon the Brazilian exporter to demonstrate the justification of the Brazilian tax law concerned and the direct allocation of packing materials and the working time spent for both domestic and exported fittings.

10. As the EC has in its First Submission provided information that the domestic price level used to determine normal values does not include advertising expenses, Brazil withdraws its claims regarding advertisement and promotional expenses under Article 2.4.

11. The EC violated Article 2.4.1 by using the exchange rates on the date of sale for the export transaction values but not for the allowances deducted from the export price. The EC also failed to abide by its obligations under Article 2.4 by using the exchange rates selectively and by increasing the nominal values of allowances deducted from the export prices.

12. The EC acted inconsistently with Article 2.4.2 in establishing the existence of margins of dumping by "zeroing" the negative dumping margins. The EC's method of comparison was also inherently unfair in violation of Article 2.4.

13. The EC's import volume consideration under Article 3.2 did not involve an "objective examination" and was not based on "positive evidence". Indeed, the EC just stated that the Brazilian import volumes were "always significant" and the market share was "far from negligible" but did not consider whether the dumped imports from Brazil had increased significantly.

14. With regard to the price comparison between the export prices and the domestic prices under Article 3.2, the EC's consideration did not involve an "objective examination" and was not based on "positive evidence" as it disregarded the "negative" undercutting margins from the calculation (*i.e.* "zeroing"). In addition, the calculation was not based on the "dumped imports", but just on some types of the product concerned (*i.e.* "matching models"). The EC's methodology amounts to manipulation of the prices of the Brazilian exported product types and thus the EC's price effect consideration was not based on "positive evidence". The price comparison was also manipulative given that the EC artificially "compelled" the product concerned and the like product to be comparable. Moreover, the EC had an opportunity to compare the Brazilian product types identical to

those produced and sold in the domestic market by the EC producers. However, the EC opted to conduct a price comparison of 'black with white', without making the warranted adjustments in order to ensure price comparability. Finally, the EC's conclusions that "the only differences [between black and white heart fittings] are due to higher energy use" and that this difference is "not significant" as well as that "there is no difference in market perception distinguishing between white heart fittings and black heart fittings" were not supported by the facts and thus were not based on "positive evidence".

15. The manner in which the EC addressed the issue of cumulation in this case breaches the requirements of Articles 3.1 and 3.3. Firstly, the EC by reversing the burden of proof and by assuming in favour of cumulative assessment acted inconsistently with its obligations under Articles 3.1 and 3.3 to determine, on the basis of "positive evidence" and after an "objective examination", that the cumulative assessment of the effects of the dumped imports was appropriate. Secondly the EC did not identify, on the basis of "positive evidence" and after an "objective examination", that the dumped imports *per* each importing Member under investigation had the effects, which it then may assess cumulatively. Indeed, the EC's approach is not a cumulative assessment of the effects of the dumped imports as required by Article 3.3 but just a cumulation of imports. Thirdly, the EC's determination of the conditions of competition under Article 3.3 is meaningless as the focus of the EC's determination is on the similarities (and not on the dissimilarities) of the conditions of competition between the dumped imports themselves and between the dumped imports and the like domestic product. However, these similarities are just logical consequences of the EC's definitions of "the product concerned" and "the like product", which are by definition in some kind of competition with each other. Fourthly, the EC failed to address, on the basis of "positive evidence" and after an "objective examination", dissimilarities in the conditions of competition like the differences in the product concerned, the trends of import volumes, the price trends, the level of trade and the market segmentation. Finally, although the EC stated that "both the Community product and the product imported from the countries concerned have been found to have common or similar channels of distribution", there are strong indications that the EC's conclusion was not based on "positive evidence".

16. The EC's injury examination is not consistent with the requirements in the AD Agreement. The EC provided new documentation (Exhibit EC-12) in the course of a dispute settlement proceeding suggesting that it had examined all of the injury factors with the exception of "growth". However, this document is not part of the non-confidential file and there are mutually supportive indications that neither was it part of the confidential file. Exhibit EC-12 is, therefore, not part of the EC's record and should not be considered by the Panel. Indeed, the consequences of the EC's approach, if accepted, would entirely undermine the due process and transparency obligations of the AD Agreement and lead to proliferation of disputes under the DSU. Consequently, as Exhibit EC-12 is not properly before the Panel, the EC failed to analyse all of the fifteen mandatory injury factors under Article 3.4. In any case, the EC did not examine "factors affecting domestic prices" and the issue of "growth".

17. With regard to the content of Exhibit EC-12, the domestic industry was not requested to provide information regarding 'return on investments', 'wages', 'cash flow' and 'ability to raise capital' and the like product specific data was not available to the EC. Consequently, the EC's alleged examination of these mandatory injury factors was not based on positive evidence. Furthermore, the alleged examination is not a well-reasoned and meaningful analysis of the state of the domestic industry and does not provide a persuasive explanation of how the evaluation led to the determination of injury. Finally, as the EC neither disclosed nor published its examination regarding all of the fifteen injury factors, the Brazilian exporter did not have an opportunity to respond, in violation of Article 6.2, or timely opportunities to see all relevant information, in violation of Article 6.4.

18. Regarding the injury examination disclosed *before* the dispute settlement proceeding, the EC's injury findings were demonstratively based on manifestly incorrect data and, thus, the facts concerning the consequential impact of the dumped imports on the EC industry were not based on "positive evidence". Secondly, as the injury factors show divergent trends, the EC violated Article 3.4 by failing to provide a thorough and persuasive explanation as to whether and how "positive movements" of certain injury indicators were outweighed by other injury factors moving allegedly in opposite directions. Thirdly, as the examination of certain injury factors was an end-point-to-end-point analysis, the EC failed to put the data in context and to assess such data regarding their internal evolution and *vis-à-vis* other factors analysed. Fourthly, the EC did not properly examine the issue of outsourcing and did not examine at all the domestic industry's export performance, a relevant economic factor having a bearing on the state of the EC industry. Moreover, the EC's conclusions regarding price sensitivity, profitability, investments and inventories were not based on "positive evidence" and the examination was not even-handed (*i.e.* "objective"). Finally, by not disclosing the figures related to the EC producers' exports, the EC did not provide the Brazilian exporter either a full opportunity to defend itself, in violation of Article 6.2, or timely opportunities to see all relevant information, in violation of Article 6.4.

19. With regard to causation, the EC infringed the non-attribution requirement in Article 3.5 by allocating the total injury over the allegedly dumped imports although at least part of this injury was caused by the effects of the other known factors (the decreased consumption and substitution; the EC producers' own imports and outsourcing, including from related foreign suppliers; poor export performance; and imports from countries not subject to the investigation). The EC violated Article 3.5 by just *assuming* that these other known factors did not "break the causal link" between the dumped imports and the injury allegedly suffered by the domestic industry. The EC also failed to separate and distinguish the effects of the competitive advantage of the Brazilian exporter, the injurious effects of the EC industry's known price increases and the issue of the cost difference between the two variants of the product concerned. Thus, the injury caused by these known factors was attributed to the dumped imports in violation of Article 3.5. Moreover, the following conclusions of the EC were not based on "positive evidence": (i) the imports from Poland had not caused any injury to the domestic industry; (ii) the EC industry "began to suffer a continuous decline of its sales volume" between 1996 and the IP; and (iii) the EC industry's profitability "turned negative after 1996". Finally, by not properly examining the issues of self-inflicted injury, substitution and the cost difference and the difference in market perception between the two variants of the product concerned, the EC's examination was not "objective" and its conclusions were not based on "positive evidence". Indeed, the EC just lumped the injurious effects of the allegedly dumped imports and the injurious effects of these other known factors together in violation of Article 3.5.

20. Although the EC explicitly referred to the exchange rates as "the daily exchange rates as collected during the on-the-spot verification", the EC's conversion of currencies with regard to allowances was not based on these tables. Therefore, the Brazilian exporter was deprived of an opportunity of having sight of the evidential basis behind the conversion rates applied by the EC in violation of Article 6.4

21. By not making public its findings and conclusions with regard to the exploration of possibilities of constructive remedies under Article 15, to all of the mandatory injury factors under Article 3.4 and to the EC producers' export performance, the EC violated Articles 12.2 and 12.2.2.

22. Brazil respectfully requests that the Panel find that the EC acted inconsistently with Article VI of the GATT 1994 and the AD Agreement, recommend that the EC brings its measures into conformity with Article VI of the GATT 1994 and the AD Agreement, and suggest that the EC immediately repeal the Decision imposing definitive anti-dumping duties and refund anti-dumping duties collected thus far.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

14 May 2002

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1. Introduction

1. The European Communities (hereafter 'the EC') welcomes this opportunity to make a second written Submission in the case brought by Brazil against the imposition of definitive anti-dumping measures by the EC on imports of malleable cast iron tube or pipe fittings originating in Brazil.

2. The primary purpose of this Submission is to refute the claims and arguments that Brazil has made in its Oral Statement to the Panel in so far as they go beyond the scope of Brazil's First Submission.

3. For the purposes of the EC's defence certain documents are presented which contain information that for one reason or another is confidential. The relevant documents are marked as such in the Annex at the end of this Submission, and the EC designates them as confidential in accordance with Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter 'the DSU') and Paragraph 3 of the Working Procedures of the Panel.

2. General

2.1 Article 15

4. In its First Submission Brazil claimed that the EC had infringed the obligation in the second sentence of Article 15 and as a consequence had failed to give special regard to the special situation of a developing country Member, as specified in the first sentence. In its Oral Statement Brazil seems to

go a step further by claiming that 'There is nothing in the records of this case that suggests that the EC did anything special or out of the ordinary for Brazil as a developing country Member that it would not have done to any other WTO Member'.[1] For a legal analysis of Article 15 the EC refers the Panel to the answer given by the EC to the first of the Questions addressed to parties by the Panel. As to the facts, the EC has also explained in its first Submission the considerable steps that it took to raise the possibility of Tupy giving an undertaking.[2] These steps went well beyond the EC's normal practice in anti-dumping investigations. Consequently, even if the first sentence imposes an obligation on Members, which the EC contests, the EC has fully respected it.

5. Brazil has again denied that the EC explored the possibilities of 'constructive remedies', as specified in the second sentence of Article 15.[3] As the EC has shown in its First Submission[4], in the course of discussions with Brazilian officials the EC several times raised the possibility of Tupy offering an undertaking. In its Oral Statement[5] Brazil chose to pretend that when the EC said that it had 'pursued the matter vigorously' the 'matter' in question was the anti-dumping action against Tupy. As the context makes quite clear, the 'matter' to which the EC was referring in its Submission was the possibility of Tupy offering an undertaking as a way of bringing the anti-dumping investigation to a mutually satisfactory conclusion. That it was the EC and not Brazil that raised this matter, and on several occasions, cannot be doubted.

6. Brazil argues that, in order to satisfy Article 15, the possibility of undertakings should have been raised directly with Tupy.[6] However, one of the unusual features of this investigation was the obvious close involvement of the Brazilian government on Tupy's behalf. A Brazilian official was present throughout the on-the-spot verification in September 1999. Furthermore, Brazilian officials and diplomatic representatives in Brussels actively promoted Tupy's interests. In December 1999 the Brazilian Ambassador sent to Mr Lamy, the EC Commissioner, a copy of the submission that Tupy had recently presented to the investigators.[7] Further letters to Commission officials followed this in January and February 2000, and it is evident that Brazil's diplomatic representatives had a detailed appreciation of issues in the investigation.[8] A Brazilian official was present at the hearing given to Tupy by Commission officials in Brussels in December 1999. Thus the EC had every reason to believe that in speaking to these officials it was speaking to Tupy.

7. Also in the context of Article 15, Brazil asserts that the EC is not entitled to determine what is an essential interest of Brazil, and in effect claims that right for itself.[9] However, to interpret the provision so as to give either party the right to determine unilaterally and conclusively whether the condition had been fulfilled would be to render it redundant. Brazil argues that the fact that the investigation was raised in high-level discussions itself indicates that it concerned an essential interest, but to accept that would also be to render the assessment purely subjective. An exporting Member could convert any issue into an essential interest merely by making a fuss. Nor does it appear that Brazil actually made such a claim during the discussions.

8. Brazil presents little in the way of objective criteria to support its contention. Firstly, it states that the 'steel, metals and machinery sectors form part of its essential interests'. Secondly, it claims

[1] Brazil Oral Statement, para. 20.
[2] EC first Submission, paras. 38 et seq.
[3] Brazil Oral Statement, paras. 21 et seq.
[4] Paras. 38 et seq.
[5] Para. 23.
[6] Brazil Oral Statement, para. 25.
[7] Exhibit EC-27.
[8] Letter from Ambassador to DG Trade, 29 Jan. 2000, Exhibit EC-28; Letter from Ambassador to DG Trade, 23 February 2000, Exhibit EC-29.
[9] Brazil Oral Statement, at para. 29.

that 'Tupy is the only fittings producer in Brazil, and by far the largest in South America'. The first statement is bald assertion, the second is both *ex post facto* and irrelevant. Anti-dumping investigations necessarily cover all the exporters of the product in the exporting country, however many there are, and in many cases these will constitute all the producers in the country. That fact cannot in itself convert those producers into an essential interest. Nor can the fact that a producer is the largest in the continent.

2.2 Devaluation

9. Contrary to Brazil's assertion[10], the EC authorities' decisions have never been based on the view that Brazil's devaluation was 'a mere currency fluctuation'. Rather, the EC has taken the view[11] that the implications of the devaluation for Tupy's dumping margin would depend on pricing decisions made by Tupy. It was by no means a foregone conclusion that the devaluation would result in a reduction of the dumping margin. Tupy could have taken advantage of the devaluation by lowering its export prices (in foreign currency terms), so that, without reducing its proceeds per unit sale (in home currency terms), it could attract additional buyers. Alternatively, it could have maintained the same export prices and thereby increased its proceeds per sale. Or Tupy could have adopted a pricing strategy that lay between these extremes. The EC had no way of knowing which strategy Tupy might adopt, and of course that strategy might change. Brazil refers[12] to the data from the post-devaluation part of the investigation period which were already in the EC's hands. However, prices in this period could be expected to reflect price-lists and quotations made some time previously, and could not be taken as an indication of Tupy's long-term reaction to the devaluation.

10. Brazil raises the question of a review.[13] As explained in its answers to the Panel's questions[14], at the request of another exporter, the EC has opened a review of the anti-dumping duties that are the subject of this dispute[15]. Since the review covers the period 1 January 2001 to 30 September 2001, it would have provided an opportunity for Tupy to substantiate its claims that dumping ceased as a result of the devaluation. Significantly, however, Tupy has decided not to co-operate in the review.

2.3 Dumping

11. While referring to its previous claims regarding dumping Brazil speaks of 'the overall pattern of bias displayed by the authorities in the investigation'. This is not an accusation that Brazil has previously made regarding the EC investigation. No evidence is provided to support it, and the EC strongly refutes it.

2.4 'Outsourcing' and related issues

12. Brazil has placed considerable reliance on claims relating to 'outsourcing' of production by EC producers. In other words, rather than produce themselves, it is alleged that they arranged to have fittings manufactured in third countries and exported to the EC. The EC has explained how these relationships were investigated and found to amount to little consequence. Brazil has evidently persuaded itself of the contrary, and seeks by repetition to persuade the Panel, in the apparent belief that repeated assertion is itself a form of evidence.

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[10] Brazil Oral Statement, para. 36.
[11] EC first Submission, para. 102.
[12] Brazil Oral Statement, para. 40.
[13] Brazil Oral Statement, para. 38
[14] Questions 143, 144.
[15] EC Official Journal, C/342/5, 5, 5 December 2001, Exhibit EC – 26.

13. In its Oral Statement Brazil makes various observations about the relationship between a Community producer and an exporter in Bulgaria. The EC investigators looked at this relationship in the course of their enquiries. Their conclusions were published in the Provisional Regulation, and the relevant provisions are quoted in the EC's First Submission.[16] The names of the firms involved were not mentioned for reasons of confidentiality. The new documents now presented by Brazil are both inadmissible (because of Article 17.5(i) AD), and pointless (since they merely confirm a relationship which was already well-known to the EC). They leave unaffected the EC's conclusion as to the significance (or lack of it) of imports from Bulgaria.

14. Brazil again alleges[17] that other EC producers had significant outsourcing arrangements and accuses the EC of failing to investigate them. The EC did investigate these allegations and the results of its enquiries are reported in the Provisional and Definitive Regulations.[18]

15. Such is Brazil's concentration on 'outsourcing' and the links between domestic firms and producers in third countries that one would think that the topic constituted a distinct element of the definition of injurious dumping. Brazil speaks of 'a proper comprehension of the market situation, of the positioning of the different competitors in the market concerned, and of the evolving nature of the EC industry and of the EC market'.[19]

16. However, the Anti-Dumping Agreement is drawn in much more precise terms, and it is in these terms that Brazil must prove its case. In its first Submission, if not in the Oral Statement, Brazil pursued these matters in order to challenge the EC's findings regarding the causes of injury to the domestic industry. However, it has nowhere explained how, even had they existed, such outsourcing arrangements could of themselves have affected the findings on causation.

17. Tupy's argument seems not to have concerned the investment implications of such outsourcing, but the EC in any case examined the level of investment in the EC industry and found this to be rather significant during the whole IIP, showing that the Community industry was still viable and not ready to abandon this segment of production.[20] Rather, the essence of Tupy's complaint was that the domestic industry arranged for products to be manufactured abroad and imported into the EC. Thus, the arrangements on which Tupy, and now Brazil, have laid so much stress are of no significance unless they were associated with imports into the EC. Furthermore, the question of which, if any, imports into the EC were causing injury was central to the investigation, regardless of the legal arrangements giving rise to such imports. Consequently, although the EC did investigate, and report on, the relationships that existed between producers in and outside the EC, its primary focus was on imports, in particular their volume and prices.

18. Thus, Brazil complains that the EC did not pursue investigations regarding arrangements between EC and Turkish producers along the precise lines that Tupy proposed, i.e. by questions to the Turkish authorities.[21] However, in the first place, there is no obligation in the Agreement for national authorities to adopt investigative methodologies merely because they are suggested by an interested party. Secondly, the EC did investigate imports from Turkey. It was found that a Community producer did import the product under consideration from Turkey, but in such minimal quantities that those imports were considered not to affect its status of Community producer.[22] Moreover, as concerns the general assessment on Turkish imports, it was found 'that imports from Turkey were

[16] Paras. 467 and 468.
[17] Oral Statement, para. 13.
[18] Provisional Regulation recitals 134 and 174; Definitive Regulation recitals 65 to 68, 106 to 111.
[19] Oral Statement, para. 6.
[20] Provisional Regulation recital 159.
[21] Ibid., para. 14.
[22] Definitive Regulation, recital 67.

stable at almost negligible levels during the entire IIP'.[23] This finding would have been sufficient to make the possible existence of 'outsourcing' arrangements irrelevant.

3. Conclusion

19. Taken with its answers to the Panel's Questions the EC maintains that this Submission comprehensively refutes Brazil's claims, as further elaborated in its Oral Statement, and requests the Panel to make appropriate rulings.

[23] Provisional Regulation, recital 169. This conclusion was confirmed in the Definitive Regulation, recitals 67, 108.

EXHIBITS

Exhibit EC-27	Confidential: Letter of Brazilian Ambassador, 10 December 1999.
Exhibit EC-28	Confidential: Letter of Brazilian Ambassador, 29 January 2000.
Exhibit EC-29	Confidential: Letter of Brazilian Ambassador, 23 February 2000.

ANNEX D

Oral Statements, First and Second Panel meetings

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ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF BRAZIL - FIRST MEETING

(4-5 December 2001)

INTRODUCTION

1. In the following statement Brazil will merely point out to some of the core issues of the case. This is without prejudice to other important questions that, either because of their complexity or of their relationship with other related aspects of the case, will be better dealt with in the forthcoming Second Written Submission of Brazil to this Panel.`

BACKGROUND OF THE CASE

2. The policy decision taken for structural reasons since the mid-1990s by a large part of the EC industry to outsource, and in some cases to relocate their production to countries outside the EC territory, is of paramount importance to this case. The EC's refusal to correctly assess this new structural reality contributed to its improper establishment and evaluation of the facts in this case.

3. The EC has never properly investigated the claims repeatedly raised by Brazil and previously by the Brazilian exporter (and by others).[1] Although it was given ample indications and leads to obtain information and evidence to verify the Brazilian exporter's claims, the EC merely affirmed that it could not verify the accuracy of that evidence.[2]

4. In essence, the Application had as its main purpose the ousting of Brazilian and other countries' imports from the EC market in order to make room for the EC industry's own outsourced products.[3] In some cases production of the product concerned in the EC has been significantly reduced or even stopped altogether. The EC's labelling of these contentions as "wild allegations" is unwarranted.

5. A report which Brazil found on the website of the Bulgaria Economic Forum[4] confirms that already in 1996 Atusa (an applicant) had acquired a controlling share of Berg Montana, a Bulgarian producer, and that in July 2000, Atusa had further acquired additional shares and strengthened its control over that Bulgarian producer.[5] This was already anticipated in a report published in September 1999.[6] Moreover, tables published on the Bulgarian Foreign Investment Authority's website clearly show Atusa's acquisition of control over Berg Montana in 1996 and 1997[7] and its

[1] Tupy's First Submission, 2.1.7, 4th paragraph; Tupy's Second Submission, p. 2; Tupy's Fourth Submission, pages 23-24 (Brazil's First Submission page 119, 4th paragraph; page 222, 2nd paragraph; page 224, 2nd paragraph). References to statements and documents produced by Tupy during the investigation can be found in the Brazilian First Submission, *inter alia*, under 'B. History of precedents and their relevance to this case, on page 10 *et seq*. and under '*d) Imports from other Third Countries*' on page 217 *et seq*., particularly on page 222 *et seq*.

[2] Idem.

[3] Idem.

[4] Biforum, www.biforum.org.

[5] BRL-47

[6] BRL-48

[7] BRL-49

consolidation on 4 July 2000.[8] The above leaves no room for doubt that the acquisition was made by Atusa itself.

6. Similar information was given by the Brazilian exporter to the EC regarding Woeste, another leading applicant in the investigation and other outsourcing arrangements that characterise the new situation of the EC industry[9] (including the relations between the Swiss-Austrian applicant Georg Fischer (GF), and a Turkish producer). The EC sustains that "having been engaged in a close examination of the EC industry as part of this investigation, it has found no evidence to support Brazil's allegations".[10] In failing to ascertain the accuracy of the information provided the EC also failed properly to establish the facts and to conduct an objective examination based on positive evidence.

BRAZIL AS A DEVELOPING COUNTRY

7. The EC has infringed various aspects of Article 15 of the AD Agreement:

8. (a) *Special regard to special situation of developing country Member*. The first sentence of Article 15 requires the developed country Member to give special regard to the special situation of developing country Members when considering the application of anti-dumping measures. That "special regard" must be reflected in facts. That was not the case of the measure before this Panel.

9. The second sentence of Article 15 sets forth two obligation, (*b) an obligation to explore possibilities of constructive remedies* whereby "the 'exploration' of possibilities [of constructive remedies] must be actively undertaken by the developed country … with a willingness to reach a positive outcome".[11] A meaningful and integral compliance with this obligation means giving the exporters notice on the opportunities to explore constructive remedies. In the present case, neither did the EC actively undertake such exploration nor was Tupy informed of such possibility.

10. The EC has never even mentioned the possibility of an undertaking to the Brazilian exporter during the investigation. It should be noted that – in accordance with the EC's domestic law – the EC is entitled to suggest undertakings to the exporters concerned.[12] By the very nature of a price undertaking, the possibility of a constructive remedy cannot be properly explored unless the EC suggests this option to the exporter. This they did not do. This has not been raised with Brazil either. As the EC's Exhibits show, the "matter" was always "raised" by the Brazilian side, not the other way around. In any event, as the Bed-Linen Panel instructs, "pure passivity is not sufficient to satisfy the obligation to 'explore' possibilities of constructive remedies".[13]

11. *(c) Essential interests of a developing country Member*. It is not for the EC to determine what is an essential interest of Brazil. Secondly, as the EC anti-dumping investigation was an issue on the Brazilian agenda for high-level meetings between the Brazilian Government and the EC Commission, this clearly demonstrates that this matter was essential to Brazil's interests.

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[8] BRL-50

[9] Tupy's First Submission, 2.1.7, 4th paragraph; Tupy's Second Submission, p. 2; Tupy's Fourth Submission, pages 23-24 (Brazil's First Submission page 119, 4th paragraph; page 222, 2nd paragraph; page 224, 2nd paragraph).

[10] EC's First Submission, para. 18.

[11] European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, Report of the Panel (WT/DS141/R, 30 Oct 2000), para. 6.233.

[12] Article 8 of the Council Regulation (EC) n. 384/96 of 22 December 1995 on protection against imports from countries not members of the European Communities (Exhibit BRL-24).

[13] European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, Report of the Panel (WT/DS141/R, 30 Oct 2000), para. 6.238.

APPLICATION

12. The EC failed to comply with the obligation of Article 5.3 to examine that the information provided in the Application was accurate and that all of the listed items in Article 5.2 were covered or were properly left out.

13. Given the fact that Brazil only received the confidential version of the Application together with the EC's First Submission, Brazil considers it necessary to examine this issue in more detail and reserves the right to make further comments on it in its next Written Submission to the Panel.

THE DEVALUATION IMPACT

14. The EC violated Article VI of GATT 1994 and Article 1 of the AD Agreement insofar as, following the devaluation of the Brazilian currency of 41.99 per cent in January 1999, no dumping could be found to exist so that the imposition of anti-dumping measures was unwarranted. Alternatively, the EC infringed Article 11.1 by permitting the measures to remain in force while they were no longer necessary to offset dumping. The EC also breached Article 11.2 of the AD Agreement by failing to review, on its own initiative, the need for the continued imposition of the measures given the new situation post devaluation.

15. EC AD rules do not give an exporter the right to request the initiation of a review within the first year after the imposition of duties. The Brazilian exporter cannot be blamed for failing to request a review during that year.

DUMPING

16. Brazil refers here only to two main aspects of this matter. First, in its analysis and calculation of PIS/COFINS, the EC resorted to *de facto* punitive sampling. Second, regarding "zeroing", the EC fails to address the implications of its methodology, although the zeroing and the infringement of article 2.4.2 are important elements in the overall pattern of the EC's bias in this investigation.

INJURY

17. **No proper consideration of alleged price undercutting -** The EC violated Articles 3.1 and 3.2 when examining the Brazilian imports' undercutting of the prices of the domestic industry as they failed to base their determination "on positive evidence and involve an objective examination". The EC, when "establishing the facts", "zeroed" the negative undercutting margins in violation of established WTO jurisprudence. This *de facto* "manipulation" of the export prices is inherently biased, as it (i) increases the likelihood of a determination of price undercutting; and (ii) increases the magnitude of that margin.

18. The EC flaws are further aggravated by the EC's refusal to take into account the significant differences between black and white heart fittings; an investigative authority must ensure that the prices it examines are comparable. Moreover, the EC failed to compare the Brazilian product types with black heart products of one EC producer or alternatively to make warranted adjustments.

19. **No proper cumulation** - the cumulation of the Brazilian exports with those of other exporting countries covered was inappropriate as the conditions allowing this under Article 3.3, and given Articles 3.1 and 3.2, have not been satisfied.

20. Article 3.3 deals with the possibility that the investigating authorities "cumulatively assess the effects" of the dumped imports. This clearly requires that (i) the authorities identify the effects; and

only after this identification could they proceed to step (ii): the cumulative assessment. Yet, the EC collapses these two steps into one. This does not reflect the concept of "successive addition".[14]

21. Second, these procedures "may" be used "only" if the two conditions set out in Article 3.3 are met. The first set of conditions offers enough guidance to the investigating authorities. But with regard to the "conditions of competition", Brazil has serious reservations as to the sufficiency of the criteria followed by the EC, an issue that will be further pursued in Brazil's Second Written Submission. At this point it is noted that the imports from Brazil fit none of the required criteria.

22. Moreover, it is clear that the regular procedure for the EC authorities is to cumulate the imports. The burden of proving that the imports must not be cumulated is on the foreign exporter. Nevertheless, Article 3.3 is a clear exception to the normal procedure of determining injury in a non-cumulative way. Cumulation is permitted "only" when the conditions specified in Article 3.3 are fulfilled. In dubious situations, the authorities cannot engage in a cumulative assessment of the effects of the imports.

23. **Failure to evaluate all mandatory injury factors -** the EC did not evaluate all of the non-exhaustive fifteen injury factors of Article 3.4 for its determination of the state of the EC industry. The EC thus acted inconsistently with Article 3.4.

CAUSATION

24. The EC violated Article 3.5 by not *demonstrating* that the Brazilian imports are causing injury. The effects of the alternative causes of injury to the EC industry have wrongfully been attributed to the Brazilian imports. The EC conducted a perfunctory analysis of known causes such as: the impact of declined consumption and poor export performance of the EC industry, comparative advantage of the Brazilian exporter over the EC producers, outsourcing and rationalisation efforts of the EC industry, imports from the other third countries, substitution of the product concerned and difference in the market perception between the two variants of the product concerned. Moreover, the claimed factors regarding Brazilian imports were not established on the basis of positive evidence, which was contradicted by record evidence. The EC dismissed Brazil's arguments, without "a reasoned explanation for the determination" and without "establish[ing] an adequate factual basis for the determination". However, the non-attribution language of Article 3.5 obliges an investigative authority to *separate and distinguish* the injurious effects of the other factors from the injurious effects of the dumped imports. Without it, the authorities will be unable to ensure that a determination made concerning the injurious effects of dumped imports relate to those dumped imports and not to other factors.

[14] The Shorter Oxford Dictionary, Third Edition.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES – FIRST MEETING

I. INTRODUCTION

1. Brazil has made a large number of claims. We have given a detailed and comprehensive refutation of these claims in our Submission. Rather than simply rehearse the arguments we have made there, in this Statement we wish to concentrate on a few issues of a more general nature.

II. CONDUCT OF THE INVESTIGATION

2. Brazil has made a number of false allegations about the conduct of the EC officials who carried out the investigation. For example, Brazil alleges, without providing any evidence, that the investigators cut short their on-the-spot verification of Tupy, and refused its requests for a warehouse to be visited. Brazil also accuses the EC of not providing Tupy with details of the exchange rates that were used in the dumping margin calculation. Anyone reading these allegations would be left with the impression that the investigators treated Tupy unfairly, and in an off-hand or even dismissive manner. The truth is quite opposite to this.

3. Tupy's cooperation was far from satisfactory. Its responses to the Questionnaires were inadequate. That of Tupy (Europe) was inaccurate, incomplete and misleading. In Tupy's own response the allowances regarding both export and domestic sales were wrongly calculated, figures were given in the wrong currency, and data for turnover were contradictory. The EC's attempts during the on-the-spot verification to get Tupy to correct these mistakes met with only limited success. The verification itself was needlessly extended because of the failure of Tupy to cooperate.

4. These problems were not caused by Tupy's lack of familiarity with anti-dumping matters – Tupy had been the subject of EC anti-dumping investigations on two separate occasions in the 1980s, and it has been involved in similar investigations in other countries. Nor were they the result of inadequate resources. Tupy is a large company with experienced management and professional accounting standards. Furthermore, Tupy was assisted in this investigation by expert legal counsel.

5. The EC has procedural rules designed to ensure the proper implementation of investigations. They are based on the requirements of the Agreement and the recommendations of the Anti-Dumping Committee. In accordance with the EC Commission's usual practice, Tupy benefited from a flexible and generous application of those rules. For example, an extra week was allowed for answering the Questionnaire; Tupy was granted two hearings by EC officials in Brussels; and it was permitted to submit corrections to essential information even after the on-the-spot verification had been completed. When Tupy presented confusing and contradictory information on export tax credits the EC officials themselves took the initiative in establishing price adjustments. After provisional measures had been adopted the EC took the initiative at the highest level to suggest that Tupy offer a price undertaking rather than have duties imposed.

6. Thus, despite the lack of cooperation, the EC authorities did their best to see that Tupy's interests were respected. In sum, the EC refutes all allegations, express or implied, that its officials acted in accordance with any but the highest standards.

7. In its Oral Statement, Brazil has made yet another suggestion that the EC authorities acted in bad faith in this case. Specifically, at paragraph 174, Brazil alleges that "the zeroing methodology and the infringement of Article 2.4.2 are important elements in the overall pattern of bias displayed by the authorities in the course of this investigation". The EC would like to recall that the fittings investigation was completed, and definitive measures imposed, before the Appellate Body issued its report in the Bed Linen case. Before that report, the EC authorities had used the same averaging methodology in all investigations. Therefore, the EC rejects Brazil's allegations. The EC authorities may have applied an incorrect averaging methodology in this case, but they displayed no bias against Tupy.

III. STANDARD OF REVIEW

8. The Panel will not need to be reminded that in these proceedings the appropriate standard of review regarding findings of fact is set out explicitly in Article 17.6(i) of the Anti-Dumping Agreement. However, we would like to use this opportunity to look more closely at this important provision and its correct interpretation.

9. The subject matter of Article 17.6(i) is the establishment and the evaluation of facts by the investigating authorities. I will deal with each of these in turn.

10. The establishment of facts covers the gathering of raw data, such as the profit levels of a business in particular years. According to Article 17.6(i), the establishment of facts must be 'proper'. In *Thailand – H-Beams* the Appellate Body said that "the ordinary meaning of 'proper' suggests 'accurate' or 'correct'". However, it seems that the Appellate Body did not intend to give a definitive interpretation of this term. Rather, the purpose of the Appellate Body was to distinguish the obligation to make a 'proper establishment of the facts' from the obligation to disclose those facts to the parties.

11. The dictionary used by the Appellate Body (the New Shorter Oxford) gives another definition of the word 'proper' which seems even more relevant in this context. This reads: 'Of requisite standard or type; fit, suitable, appropriate; fitting, right.' One strong reason for preferring a meaning such as 'suitable' or 'appropriate' is that the phrase 'establishment of the facts' seems more naturally to relate to a *process* rather than to a *result*. In other words, it is the way that the authorities go about establishing the facts that must be proper. One panel has said that the question is whether the authorities collected relevant and reliable information. Whether or not the result is accurate is something that panels are generally not equipped to judge since they do not have the means to challenge the investigators' conclusions (in fact, Article 17.5(ii) prevents them from having the means). However, the notion of correctness (or accuracy) is nevertheless relevant because the 'suitability' of the authorities' establishment of the facts will be judged, *inter alia*, on the likelihood that it will produce correct accounts of the facts.

12. The second of the operations addressed by Article 17.6(i) is the 'evaluation' of facts. Like 'establishment', 'evaluation' is as much a process as it is an outcome. Furthermore, it is a process that is likely to take place several times in the course of an investigation. Evaluations may also be cumulative. For example, in the context of Article 3.4, annual data regarding a particular factor could be evaluated and lead to the conclusion that, say, profits had deteriorated over the investigation period. This conclusion could then be evaluated along with others and lead to authorities to the further conclusion that the domestic industry was suffering injury.

13. The questions that panels have to consider when examining the authorities' 'evaluation' of the facts are whether it was 'unbiased' and whether it was 'objective'. Bias is probably the easier of these concepts to define, but it seems not to be significant element in the present dispute since Brazil has not invoked it as a separate basis for complaint.

14. The notion of 'objective' evaluation is evidently a complex one, for which dictionary definitions provide little help. Perhaps the most pertinent group of meanings is 'Dealing with or laying stress on what is external to the mind; concerned with outward things or events; presenting facts uncoloured by feelings, opinions, or personal bias; disinterested.' Here 'objective' is being used to mean the opposite of 'subjective'. An objective evaluation would be one that was governed by general considerations rather than ones that were special to the particular case. However, various reasons suggest that this interpretation is too narrow.

15. In the first place, a similarly worded obligation in Article 3.1 has been given a broader interpretation by the Appellate Body. Article 3.1 obliges national authorities to base determinations of injury on an 'objective examination'. The Appellate Body has said that 'The word "objective", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness.'

16. Secondly, several panels established under the Tokyo Round Codes have applied a standard of « reasonableness » in order to asses the evaluation of facts by the authorities. For example, in the context of Article 3.1 one Code panel said that its task was to examine 'whether the investigating authorities had examined all relevant facts … and whether a reasonable explanation had been provided of how the facts as a whole supported the determination made by the investigating authorities.'

17. 'Reasonableness' is far from being a precise standard. Nevertheless, it is worth stressing that reasonableness is not to be equated with perfection. The Code decisions where this standard was applied accepted that decisions could be reasonable despite the presence of 'manifest deficiencies' of analysis on the part of the national authorities.

18. Panels applying the WTO Anti-Dumping Agreement have, for the most part, avoided discussion of the meaning of the word 'objective', and have limited themselves to saying whether or not this criterion has been met. Sometimes panels have focussed on the *process* of the evaluation. In the context of Article 3.4 one panel said "An evaluation of a factor implies putting data in context and assessing such data both in their internal evolution and vis-à-vis other factors examined." This implies that the authorities will provide an explanation of their reasoning. The panel in *Thailand – H-Beams* spoke of a 'persuasive explanation', but this begs the question of how persuasive it should be. If the explanation has to be of such cogency that *anyone* would be persuaded by it, then there would be little if any scope for the qualification in Article 17.6(i) that 'even though the panel might have reached a different conclusion, the evaluation shall not be overturned'. A better formulation would be that the explanation should be *capable* of persuading a reasonable person. It is noteworthy that, as was recognised under the Codes, evaluations that were less than perfect have nevertheless been found to be 'objective'.

19. Rather than look at the process of evaluating facts, panels sometimes examine its *outcome*, and ask whether, given the data available to the authorities, their conclusions can be justified. The notion of reasonableness has been explicitly invoked in this context.

20. Whether panels look at the process or at the outcome of the factual evaluations made by national authorities, it is evident that Article 17.6(i) does not set a precise boundary. Nevertheless, the specific reference to the possibility of those authorities reaching a 'different conclusion' from the panel indicates that the Agreement intends that national authorities should be accorded a significant area of discretion.

IV. INJURY AND CAUSATION

21. I would like now to say a few words about some aspects of injury and causation which we fear may otherwise give rise to difficulties in this case.

22. Brazil's Submission has created considerable confusion by failing to draw a proper distinction between the matters covered by Article 3.4 and by Article 3.5 of the Agreement. The point is made in our Submission, but some further explanation may be necessary.

23. Article 3.4 and Article 3.5 concern two distinct, albeit related, topics. The subject matter of paragraph 4 is the 'state' of the domestic industry, in particular whether it has been suffering material injury. In contrast, the principal concern of paragraph 5 is to identify the cause of that injury.

24. Paragraph 4 identifies a number of criteria for measuring what might be described as the 'state of health' of the domestic industry. If particular criteria indicate that the industry is unhealthy it may also be possible to establish a causal link between some of these criteria and the dumped imports. However, nothing in Article 3 requires such links to be established. The only causal link that needs to be established is that between the dumped imports and the 'injury' (singular, not plural) to the domestic industry. In other words, it is the overall injured state of the industry that matters when the focus is on causation.

25. It was for this reason that the EC, having identified several individual criteria where the domestic industry was doing badly, reached an overall conclusion that 'the Community industry suffered material injury'.

26. This finding was made in respect of the investigation period. This is the period of one year which was also used for determining the dumping margin. The individual criteria listed in Article 3.4 were examined over a longer 'injury investigation period', of about four years. However, as was explained in the Definitive Regulation, 'the developments and trends found in the years preceding the IP are only used in order to have a better understanding of findings relating to the IP'.

27. The Appellate Body has emphasised the parallels between the Anti-Dumping and Safeguard Agreements as regards the analysis of injury and the importance of considering trends and not relying on mere end-point-to-end-point analysis. As a general principle this is no doubt true. Trends are important in both types of investigations, but the implications of particular trends may differ. Under the Safeguards Agreement the causation of injury can commence at any point in the 'injury investigation period'. Thus in *Argentina – Footwear Safeguards* the panel said that if imports were causing injury it would expect to see an increase in imports coincide with a decline in injury factors. However, in an anti-dumping investigation, such a development throughout the injury investigation period would have to be treated more guardedly, since it might even indicate that injury was due to some other long-term factor and not to dumping.

V. NEW EXHIBITS – REQUEST FOR A PRELIMINARY RULING

28. We note that, in support of its oral statement, Brazil has submitted a series of new exhibits which, at first sight, do not seem to have been made available to the investigating authorities in the course of the investigation. We recall that Article 17.5 (ii) of the Anti-Dumping Agreement provides that the Panel must examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". The EC, therefore, objects to the submission of those exhibits by Brazil. Further, the EC requests the Panel to make a preliminary ruling rejecting to that effect. We are conscious that Rule 13 of the Working Procedures provides that preliminary rulings must be requested not later than the first submission. Nevertheless, that rule envisages that the Panel can grant exemptions upon good cause being shown.

ANNEX D-3

EXECUTIVE SUMMARY OF THE REPLY OF THE EUROPEAN COMMUNITIES TO THE RESPONSE OF BRAZIL TO THE PRELIMINARY RULINGS REQUESTED BY THE EUROPEAN COMMUNITIES – FIRST MEETING

(4–5 December 2001)

1. Terms of Reference

1. Brazil argues (RB para. 5) that a mere listing of articles need not necessarily be insufficient. The Appellate Body in *Korea - Dairy Safeguards*, which Brazil cites, emphasised the importance of examining each case on its merits, and of the question whether the ability of the respondent to defend itself was prejudiced. In the present case Brazil attempts to justify the inclusion of its claims in part on the basis of a substantial list articles and paragraphs of the Anti-Dumping Agreement contained on page 2 of its Panel Request. This list follows a reference to the EC Provisional and Definitive Regulations. There is no attempt to link particular provisions of the Agreement that are mentioned in the list to particular aspects of the two EC measures. Given the number of provisions invoked (which included most of those in the Agreement that impose obligations on Members) and the length and complexity of the two EC measures the EC maintains that the list as such was quite inadequate as a means of properly informing the EC of the case that it was going to have to answer. As a result, the EC would be prejudiced if the list were to be accepted as providing adequate notice of the WTO provisions that Brazil was invoking.

2. The inadequacy of the list was tacitly recognised by Brazil because the bulk of the Panel Request consisted of 38 paragraphs, covering seven pages, detailing individual claims against the EC. Brazil attempts (RB para. 8) to pass these paragraphs off as mere examples of the provisions covered by the list. However, although perfunctory expressions (such as 'for example') are included in an effort to keep open Brazil's freedom of action, these paragraphs constitute a set of claims against the EC that exist quite independently of the earlier list. In fact, the list includes several provisions that are not mentioned in the individual paragraphs. It is as though Brazil had simply announced that it was accusing the EC of infringing every obligation in the Agreement.

3. Regarding the argument made (RB para. 9) on the basis of *Argentina – Footwear*, there appears to be no indication of the 'certain claims' to which Brazil refers. Several panels have supported the principle that a measure that is subsidiary and closely related to a measure specified in the terms of reference will also be included in the panel's jurisdiction. This concerns a feature of the *domestic legal system* of the Member whose actions are being challenged. Even if not mentioned in the panel request, one national *measure* may fall within the panel's terms of reference if it is subsidiary to another *measure*. Brazil (RB para. 10) seeks to apply this rule in a quite different context – that of the WTO provisions invoked in the claims.

4. The EC has argued that certain provisions of *WTO agreements* are related to other provisions, so that breach of one provision would lead automatically to breach of another provision. Whether this relationship exists is of course one of the issues which would come before the Panel only if the second provision fell within the terms of reference of the Panel. The rule concerning the relationship between national *measures* has nothing to do with this issue.

5. Brazil's argument based on the difference between 'claims' and 'arguments' (RB para. 12) is correct in principle, but has no relevance in the present context. In the first place, Brazil does not specify how it is to be applied. It does not say which of its propositions are claims and which are arguments. Secondly, Article 6.2 requires that the panel request should include a 'brief summary of the legal basis of the complaint', and this must consist, at least, of a reference to the provision that is being invoked.

6. Brazil also implies (RB para. 14) that the EC has said that a degree of intention to mislead must exist. The EC makes no such argument. In the present case a very large number of claims have been made by Brazil. The EC is entitled to have notice of these claims from the point at which the terms of reference are adopted so that it can adequately prepare its defence. Brazil notes (RB para. 17) that the EC did not request clarification of the Panel Request. However, the EC had every reason to be believe that the substance of the Request consisted of the substantive paragraphs containing specific claims. It is only now that Brazil invokes the list of provisions in support of its claims. The EC does not accept that the discussion of matters in consultations (RB para. 18) constitutes adequate notice of claims. This conclusion can be inferred from the Appellate Body' decision in *Thailand – H Beams* because third parties may not have participated in these consultations.

2. Vagueness of Claims

7. Brazil has cited (RB para. 22) the view of the Appellate Body in *Thailand – H-Beams* regarding the possibility of the defending Member requesting clarification on the claims made by the complainant. However, the Appellate Body was speaking of claims in the panel request, not in the submission. It is the complainant's responsibility to present proper claims in its first submission. The defending Member's rights would be seriously prejudiced if the complainant were to be permitted to formulate them over the course of the proceedings.

8. Brazil uses its Response (RB paras. 28 to 36) as a means of making good the inadequacies of its Submission, a technique that the Panel should reject for the reasons given in paragraph 7 above. The sole substantive argument that Brazil presents is in relation to the last of the EC's points, that concerning claims made in Issue 19 of Brazil's Submission. However, it is not sufficient for Brazil to observe (RB para. 35) that the claims are linked by the overall requirement of providing transparency. A claim based simply on a breach of an obligation of 'transparency' would be as irredeemably vague as one based simply on a reference to Article 12.

9. The quotations made (RB para. 36) from Brazil's Submission are taken from an introductory paragraph (BFS line 10105) and are of a general character. The Submission makes no attempt to link these remarks to the individual claims made by Brazil at BFS lines 10158 and following.

3. Specific Points regarding Terms of Reference

3.1 Article 9.3

10. Brazil argues (RB para. 37) that by listing Article 9 in the panel request it thereby brings Article 9.3 within the terms of reference. The EC has already explained why such a list is inadequate. Brazil's Panel Request includes an initial list of provisions alleged to be infringed, which includes 'Article 9, especially (but not exclusively) Articles 9.1 and 9.2.' Later paragraphs contain claims of infringement of 'Article 9.1', 'Article 9.2', and in one case 'Article 9', linking them to particular aspects of the EC's anti-dumping measures. Thus at no point does the Request either mention Article 9.3 or indicate even indirectly how Article 9.3 might have been infringed.

11. Article 9 contains some 900 words, and covers over two pages of the published text of the WTO Agreements. A better example of a 'mere list' that prejudices the interests of the defendant

Member would be difficult to imagine. Brazil cites the panel in *Thailand – H-Beams* in support of its argument, but the passage in question merely refers to provisions of an Article that are 'logically and necessarily inapplicable or irrelevant' to the dispute, and not those that might be 'applicable or relevant' as Brazil implies.

12. Brazil's argument (RB para. 39) based on the EC's point that Article 9.3 claims are entirely dependant on other claims suffers from the logical weakness described in paragraph 0 above. In any case, the EC is entitled to make substantive arguments as well as procedural, and cannot be denied its right to the protection provided by Article 6.2 because, *ex abundante cautela*, it answers the substantive point as well.

3.2 Article 5.2

13. Contrary to Brazil's argument (RB paras. 43-44), the Panel Request was insufficiently precise in indicating the way in which the EC was alleged to have infringed Article 5.2. The initial list in the Panel Request effectively referred to the whole of Article 5 since it speaks of 'Article 5, especially (but not exclusively) Articles 5.1, 5.2, 5.3, 5.4, 5.5, 5.7 and 5.8'. Paragraph 5 of the Panel Request merely referred to 'Article 5' of the Agreement, and then gave two specific examples. Article 5 is a lengthy provision, extending over more than two pages of the text of the Agreement. Furthermore, the fact that a matter has been raised in consultations cannot be taken as sufficient notice of its inclusion in the terms of reference since many matters may be discussed between the parties which are not pursued in the proceedings. Contrary to Brazil's assertion (RB para. 45), the Panel Request did not provide a 'brief summary' of the legal basis.

3.3 Article 6.2

14. Brazil fails to show (RB para. 47) how the Panel Request gave sufficient notice of the claims regarding Article 6.2 that the EC has challenged. The phrase 'among other respects' in paragraph 8 of the Request is so vague as to be meaningless in this context. The notion that Articles 5.2 and 6.2 are 'inherently inter-linked' would have the effect of justifying a claim under Article 6.2 when virtually any other provision of the Agreement had been mentioned in the Panel Requests. It is consequently too broad. The argument concerning consultations has already been answered (paragraph 0 above).

3.4 Article 2.2.2

15. Brazil does not succeed in demonstrating (RB para. 50) that the Panel Request contains an adequate reference to Article 2.2.2. In effect it claims that any reference to Article 2.2 and constructed normal values is sufficient, whereas these provisions are very detailed and include numerous rules. In order to be able to defend its interests properly the EC was entitled to have more precise indication of its supposed errors.

3.5 Article 6.13

16. The EC's request regarding Brazil's claim under Article 6.13 should have referred to paragraph 216 rather than 220 of the EC Submission.

3.6 The accuracy of information

17. Brazil now (RB para. 57) explains that its claim (at BFS line 4750) regarding the EC's supposed failure 'to satisfy themselves regarding the accuracy of the information submitted' was made under Article 3. This matter was not apparent in Brazil's Submission.

3.7 Article 3.2

18. The EC rejects Brazil's claim (RB para. 59) that, in effect, any issue of undercutting is adequately raised by a mere reference to Article 3.2 of the Agreement. In paragraph 27 of its Panel Request Brazil identifies a number of specific grounds on which the EC is alleged to have infringed Article 3.2. Given the numerous possible ways in which infringement might occur in relation to undercutting the EC was entitled to regard the list given by Brazil as definitive.

3.8 Articles 6.2 and 6.9

19. Brazil again invokes (RB para. 63) the vague phrase 'among other respects' in paragraph 8 of its Panel Request. All of the accusations made against the EC in that paragraph concern the suggestion that the EC 'failed to satisfy its itself as to the accuracy of certain information …'. In contrast to this the claims at BFS lines 7210 and 9160 accuse the EC of not *disclosing* information. Thus, as regards the disclosure of information, paragraph 8 adds nothing to the mere listing of Article 6.2 that Brazil makes at the outset of its Panel Request. Furthermore, Brazil's use of the notion of 'inter-linking' implies that by mentioning one element of Article 6 (Article 6.2) it can therefore claim to have raised the other individual elements of that Article, including paragraph 9, when it did not even include that paragraph in the list at the start of its Request.

3.9 Article 3.4

20. In its Panel Request (paragraph 29) Brazil accuses the EC of failing to evaluate eight factors and of giving no proper consideration to "outsourced products". Its Submission went beyond this claim and therefore beyond the terms of reference of the panel because Brazil now alleges in general terms that the EC inaccurately examined *all* factors in Article 3.4. Brazil cannot escape by presenting (RB para. 65) the words of its Submission (BFS line 7909) as 'one of several arguments interpreting the obligation of the examination of injury factors listed in Article 3.4'. The Submission stated that 'Brazil submits that the Provisional and the Definitive Regulations do not contain an evaluation of factors affecting the prices of the EC industry that is either comprehensible or based on positive evidence.' The context confirms that Brazil is referring to Articles 3.1 and 3.4 of the Agreement. This statement is clearly a claim (among several others) that the EC had infringed these provisions.

3.10 Article 3.5

21. Brazil makes (RB para. 67) no serious attempt to justify the inclusion of claims regarding Article 3.5 referred to at paragraphs 432 and 500 of the EC's Submission. In the first place Brazil offers merely a listing of Article 3.5 along with numerous other provisions of the Agreement. Secondly, paragraph 30 of its Panel Request, apart from giving specific instances of alleged failures by the EC, is no more than a reference to the subject matter of Article 3.5. Contrary to Brazil's assertion, the fact that an issue was raised in the course of the investigation does not bring it within the terms of reference of the Panel. Brazil also attempts to present the statements (BFS lines 9008 and 9922) as arguments rather than claims. The EC refutes this proposition since the statements form individual claims within a series of claims. Because they all relate to Article 3 they are not reduced to mere 'arguments'.

3.11 Article 6.6

22. Brazil argues (RB para. 69) that its claim (BFS line 9338) of breach of Article 6.6 in respect of imports from Poland had been raised in paragraph 8 of the Panel Request. However, that paragraph referred to importations by domestic producers, whereas in fact the only such imports came from Bulgaria. Consequently, no claim under Article 6.6 had been made in respect of Polish imports. Brazil's suggestion that it was sufficient if the matter had been raised during the investigation is an argument that has already been disposed of.

3.12 Article 12

23. Brazil is vague (RB para. 71) as to how it identified claims under Article 12 in its Panel Request. Apart from the mere listing of 'Article 12, especially (but not exclusively) Article 12.2', Brazil made a number of specific claims in respect of Article 12.2. Brazil seeks (RB para. 72) to use the obvious relationship of Article 12.1 with Article 5.2 to argue that separate mention of Article 12.1 in the Panel Request is not necessary. However, this argument fails to respect the distinction between the substantive obligations of the Agreement and the procedural obligations of Article 12. The point has been made by the Appellate Body in regard to the terms-of-reference issue, and generally. The EC does not agree, as implied by Brazil (RB para. 73) that it must show that it has suffered prejudice. However, were such evidence necessary it is apparent in the difficulties created for the EC in knowing how best to present its defence against Brazil in the absence of adequate disclosure of what Brazil's claims will be.

ANNEX D-4

ADDITIONAL ORAL STATEMENT OF BRAZIL REGARDING EXHIBITS 47-52 – FIRST MEETING

(5 December 2001)

Mr Chairman and Members of the Panel

1. During our meeting/hearing yesterday morning we presented to you some information in our oral statement together with BRL-47 to BRL-52 regarding the relocation and outsourcing arrangements of several leading EC producers. These also included strategic long-term investments in such foreign pipefitting producers. This information is the same that Tupy, as well as other parties in the EC investigations, have presented to the EC authorities during the anti-dumping investigation.[1]

2. As we said yesterday, we do not know if that information which is now available on the Internet was already available in the same way during the EC investigation. We have also mentioned, nonetheless, that this, in our view, is not the issue. For us, the main issue relies on the fact that solid information, indications and leads pointing out to these relations was given to the EC on several occasions during the anti-dumping. The EC was asked to examine that information and its full bearing on the EC's findings in the investigation. This was not limited to the immediate aspects of imports and injury determination only but also to the EC producers' long-term strategic investments in foreign markets and their implications.[2] Similar information regarding EC imports from Egypt had also been raised during the EC investigation proceedings.[3]

3. Despite the persuasive, or even convincing, nature of the above-mentioned information, we see nothing in the EC records before us that shows that the EC has made any inquiry or findings regarding the imports and the new realities in the EC market. Yesterday we heard the EC admitting for the first that they were aware of certain imports made by Atusa. Nothing more. We now understand that the reference to "one Community producer (who) did import the product concerned from one third country" (rec. 174 of the Provisional Regulation) in fact referred to Atusa.

4. Until yesterday, Tupy basically ruled out in its guesswork of the EC's language that this EC producer could be Atusa. In the first place, Tupy knew that it could concern one of the several arrangements that Tupy had raised with the EC (regarding 3 out of the 5 EC producers, i.e. either Woeste, Georg Fischer or Atusa). Secondly, the EC dictum merely concerned "imports" and said nothing on investments in foreign countries. With regard to Atusa for example, the information that Tupy provided to the EC included evidence in the form of several letters from Atusa to customers in the EC which invited them to buy fittings produced by Atusa in Bulgaria. One such letter specifically mentioned products made in "our plant" in Bulgaria.[4] Thirdly, in the same recital, the EC mentioned that the volumes of these imports were "very low". Thus, the EC's own data for the investigation clearly showed that the volume of imports from Bulgaria (and there is only one producer there) amounted to 1,109 tonnes in the IP, which incidentally constituted an increase of 2,585 per cent in the IIP !

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[1] See references, for example in Brazil's First Submission, under d) on page 217 et seq. and under e) on page 223 et seq., particularly on page 225.

[2] See Annex 2, Annex 3 and Annex 6 of Tupy's 4th Submission (BRL-13).

[3] See page 2 of Tupy's 4th Submission (BRL-13).

[4] See page 2 of Tupy's 4th Submission (BRL-13).

5. As we have mentioned, 1,109 tonnes are more than one quarter of the volume exported by Tupy in the same period (4,188 tonnes). It also represents a share of 6.3 per cent of the total imports, well above the *de minimis* threshold in that investigation. As an illustration, we point out that Japan, with a lower volume of 1,020 and much higher prices than Bulgaria's was included in the investigation. Imports from South Korea, which has also been included in the investigation, amounted to 1,360 tonnes in the IP. The truth of the matter is, **Mr Chairman**, that with the kind of information which the EC made available in its above-mentioned announcements, there was no way for the parties concerned to conclude with any degree of certainty whatsoever, which Community producer the EC had in mind when it made such open-ended statements, although the information available to the EC at that time should have allowed it to state more clearly the identity of the EC producer concerned. In fact, given the language of the recital, Tupy could assume that the imports in question were coming from any of the other companies, but Bulgaria.

6. As we have said, yesterday's information was simply information that the EC authorities had all along. The facts to which it pertains are not new and have been part of the EC files in this matter ever since the days of the anti-dumping investigation. They were made available to the EC authorities, as mentioned, in compliance with the EC anti-dumping procedures. Nothing in the provisions of Article 17.5(ii) could therefore properly be construed to limit Brazil in presenting that information in its oral statement yesterday.

7. **Mr Chairman and Members of the Panel**, we have looked for precedents regarding this issue of Article 17.5(ii) in the DSB. Rather interestingly we found one similar set of circumstances that has been dealt with recently by another Panel (*US-Japan HR Steel AD Measures Panel Report (DS184)* of 28 February 2001). It must be noted that in that case the information included "web-site information" (Paragraph 7.11), as well as newspapers articles and affidavits. There, the US, very similarly to the EC yesterday, contended that,

> (t)he scope of the Panel's review is limited by Article 17.5(ii) of the AD Agreement to the facts that were before the investigating authority when it made its determination, *i.e*. the evidence contained in the administrative record. (Paragraph 7.25)

8. On the other hand, Japan argued that,

> Members must be permitted to submit evidence that explains or demonstrates how the authority's investigating procedures or determinations were unfair, unreasonable or biased. (Paragraph 7.4).

9. The Panel referred to Article 17.5 (ii) but nonetheless allowed the presentation of information in exhibits which specifically concerned the anti-dumping aspects of the dispute. The Panel concluded that,

> (t)here is, however, a significant distinction between questions concerning the admissibility of evidence, and the weight to be accorded to the evidence in making our decisions. That we have concluded that it is not appropriate to exclude from this proceeding at the outset evidence put forward by Japan has no necessary implications concerning the relevance or weight of that evidence in our ultimate determinations on the substantive claims before us (Paragraph 7.12).

It follows, that this Panel would act with full authority in denying the EC's request for preliminary ruling.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF JAPAN

1. Mr. Chairman, Members of the Panel, Japan appreciates this opportunity to highlight three systematic violations of WTO obligations that the European Communities (EC) appear to have committed in imposing anti-dumping duties on malleable cast iron tube or pipe fittings (pipe fittings).[1]

2. Since we have already submitted our main arguments in our written submission, we would refrain from repeating them at length in this statement, but only touch upon the four main points that we believe are worthy of the Panel's attention. Our arguments concern zeroing, relevant factors for injury determination, non-attribution standard in injury determination, and violation of Article VI of GATT 1994 and Article 1 of the Anti-Dumping Agreement.

3. Japan's first claim is that, by "zeroing" negative dumping margins calculated for certain products, the EC violated Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

4. The EC "zeroed" the negative dumping margins it calculated for some product types exported to the EC during the period of investigation. The EC then failed to offset the margins of dumping which were calculated to be negative against those margins of dumping which it calculated to be positive.

5. Japan notes that at paragraph 249 of its First Written Submission, the EC states that its authorities are examining its practice of "zeroing" in light of the Appellate Body decision in the *Bed Linen*. Japan sincerely hopes that, even before the decision of the Panel in this dispute, the EC will formally end its WTO-inconsistent practice of "zeroing".

6. Japan's second claim is that, by failing to examine each of the relevant injury factors and each of the factors listed at Article 3.4 of the Anti-Dumping Agreement, the EC violated Articles 3.1, 3.4, 12.2.1(iv) and 12.2.2 of the Agreement.

7. The EC failed to evaluate all 15 of the injury factors specified in Article 3.4 of the Anti-Dumping Agreement, and failed to fully address those factors which it did evaluate. Moreover, the factors which the EC did evaluate do not provide a sufficient basis for the EC's finding of injury. In addition, the EC failed to describe in the Provisional Regulation and the Definitive Regulation[2] all elements that it considered in its injury determination.

8. In addition, the lack of any findings or conclusions regarding the seven factors identified above in the public notices of the EC's Provisional and Definitive Regulations also violates the obligations of the EC set out in Articles 12.2.1(iv) and 12.2.2. This obligation was reviewed in the dispute *Mexico—HFCS*, where the Panel ruled that because Mexico did not provide in its anti-

[1] Since the Government of Japan was not a party to the anti-dumping proceeding, it has no independent knowledge of the facts. Japan's allegations of WTO violations are based on the public notices of determinations made by the EC authorities and by the factual recitation made by Brazil, the complaining Member, in its submission to the Panel.

[2] Council Regulation (EC) No 1784/2000 (11 August 2000), published in the *Official Journal* L 208 (18 August 2000); Council Regulation (EC) No 449/2000 (28 February 2000), published in the *Official Journal* L 055 (29 February 2000).

dumping determinations an explanation of the facts and conclusions underlying a decision by its authorities, Mexico violated Article 12.2.2.[3]

9. The EC attempts to justify its claim that it examined all fifteen factors on the basis of an "internal EC Commission note for the file".[4] Regardless of the contents of the note, this attempt fails since, by definition, an internal note is not publicly available.

10. Japan also requests that the Panel carefully review whether the EC's analysis of the factors which it did consider was adequate. The EC appears to have focused on a comparison of end points, ignoring the intervening trends of those factors. As a result of this failure, the EC did not provide "a well-reasoned and meaningful analysis of the state of the industry", which the *H-Beams* Panel ruled is required by Article 3.4 of the Anti-Dumping Agreement.[5]

11. Japan's third claim is that the EC violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because it failed to ensure that injury from factors other than imports was not attributed to imports.

12. Japan requests that the Panel carefully review whether the EC failed to demonstrate that imports were, through the effects of dumping as set forth in Articles 3.2 and 3.4 of the Anti-Dumping Agreement, causing injury within the meaning of the Agreement without attributing injurious effects of other factors in violation of Article 3.5.

13. Japan's final point is that, by failing to conduct its investigation in accordance with the provisions of the Anti-Dumping Agreement, the EC violated Article VI of GATT 1994 and Article 1 of the Anti-Dumping Agreement.

* * *

14. We hope our view is taken fully into consideration in this proceeding. Thank you.

[3] *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (28 January 2000) (*Mexico—HFCS*) at para. 7.198.

[4] First Submission of the EC (14 November 2001) at para. 346.

[5] *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.236.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

5 December 2001

I. INTRODUCTION

1. Thank you Mr. Chairman, members of the Panel. The United States appreciates this opportunity to appear before you today to present our views in this proceeding. I will begin my discussion today by addressing the proper interpretation of Article 15 of the Anti-Dumping Agreement, and will then briefly discuss the relationship between Articles 2.2 and 2.4 of the Agreement and the imposition of anti-dumping duties following a devaluation. Finally, I will discuss three issues relating to injury.

II. GENERAL AND ANTI-DUMPING ISSUES

A. ARTICLE 15 OF THE AD AGREEMENT

2. Mr. Chairman, as we noted in our written submission, nothing in Article 15 of the Anti-Dumping Agreement requires developed country Members to either offer or accept a particular remedy when investigating an allegation of dumping by a developing country Member. Article 15 is a process-based provision.

3. For example, the requirement in the first sentence of Article 15 that special "regard" be given to the situation of developing country Members does not create a substantive obligation either to elect undertakings in lieu of anti-dumping duties or to impose such duties at less than the full extent of dumping. Nor does it create an obligation to use different methodologies in determining the extent of dumping, based on whether the imports at issue originate in a developed or a developing country.

4. Similarly, the requirement in the second sentence of Article 15 to "explore" the "possibilities" of constructive remedies cannot properly be read to require the developed country Member to ultimately offer either an undertaking or a lesser duty to the developing country Member.

5. Even the requirement to consider such possibilities arises only when the application of anti-dumping duties would affect the "essential interests" of the developing country Member. Accordingly, when a developing country Member seeks the application of Article 15, it must demonstrate to the investigating authority that there are "essential interests" implicated in the case and that they would be affected by the application of anti-dumping duties. A reviewing Panel, in turn, must first determine whether the developing country Member has made these demonstrations. Any reading of the "essential interests" clause that does not reflect its limiting nature cannot be a permissible reading.

B. THE RELATIONSHIP OF ARTICLES 2.2 AND 2.4

6. I will now turn briefly to the relationship of Articles 2.2 and 2.4 of the Anti-Dumping Agreement. As we noted in our written submission, it is important to recognize the separate and distinct functions of Article 2.2 (which deals with the identification of normal value) and Article 2.4 (which deals with the subsequent comparison, including any adjustments, between normal value and

export price). Brazil's claims that the EC violated Article 2.2 should be evaluated on their own merits, and should not be addressed in terms of Article 2.4.

C. THE IMPOSITION OF ANTI-DUMPING DUTIES FOLLOWING A DEVALUATION

7. With respect to the imposition of anti-dumping duties following a devaluation, Brazil claims that when circumstances are alleged to have changed significantly between the period of investigation and the imposition of an order, an investigating authority must conduct one investigation to meet the terms of the Anti-Dumping Agreement and a second investigation to meet the general terms of Article VI:2 of GATT 1994. As an initial point, we note that the Anti-Dumping Agreement constitutes the agreed rules for determining how to implement Article VI:2 by identifying and countering injurious dumping. Thus, Article VI and the AD Agreement are meant to be read together, as described in the *Desicated Coconut* Appellate Body report at page 16.

8. With respect to the particulars of Brazil's claim, the Anti-Dumping Agreement provides for reviews under Article 11. Footnote 22 to Article 11 confirms that even a finding that no dumping occurred in a period subsequent to that examined in the original investigation does not by itself require authorities to terminate the definitive duty order. Furthermore, as the panel recognized in *Korea – DRAMS* at paragraphs 6.26 to 6.29 of its report, Article 11.2 does not require the revocation of an order upon the finding of no dumping in a review on the grounds that duties are no longer "necessary". There is simply no basis for Brazil's argument in the text of the Anti-Dumping Agreement or in Article VI:2.

III. INJURY ISSUES

9. I would now like to address three of the injury issues that this case presents. I will first discuss the general prerequisites for cumulation under Article 3.3. I will then address the "conditions of competition" that an authority must examine before cumulating under Article 3.3. I will conclude by discussing the consideration of whether there has been significant price undercutting under Article 3.2.

A. CUMULATION UNDER ARTICLE 3.3

10. Turning first to the issue of cumulation, as a general matter, the United States agrees with the EC that it is not necessary for an authority to consider the significance of the volume and price effects of imports from each individual subject country before it may cumulate imports under Article 3.3. We agree in particular with the EC's arguments in paragraphs 302-307 of its First Written Submission.

11. Brazil argues that an investigating authority wishing to cumulate imports under Article 3.3 must first determine that the volume and price effects of imports from individual countries are significant. The plain language of Article 3.3, which sets out specific criteria for conducting a cumulative analysis, contradicts its argument. Under Article 3.3, an investigating authority may cumulate imports only if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate in light of the conditions of competition both between the imported products and between the imported products and the like domestic product. Given these specific textual prerequisites for cumulation, there is no basis for Brazil's argument that Article 3.3 imposes other unmentioned prerequisites for cumulation.

12. If Article 3.2 were meant to be grafted onto the prerequisites for cumulation, Article 3.3 would include the significance of volume as a required criterion. But the only reference to volume in

Article 3.3 is the requirement that investigating authorities not cumulate imports that are individually found to be negligible. There are no other obligations relating to volume in Article 3.3.

13. Brazil's argument suffers from another flaw as well, because it would require investigating authorities to conduct the Article 3.2 analysis before considering whether to cumulate under Article 3.3. This would turn the Agreement on its head. As the EC has noted, Article 3.3 explicitly establishes a test applied before investigating authorities may cumulatively assess the effects of aggregate imports from sources under investigation. In other words, the investigating authorities must first determine whether cumulation is appropriate before they can consider the effects of those cumulated imports.

14. Read in the context of Article 3 as a whole, it is clear that the term "effects" as used in Article 3.3 refers to volume and price effects, as well as the impact of imports on the domestic industry. This interpretation is confirmed by reference to Article 3.5, which refers to the "*effects of dumping, as set forth in paragraphs 2 and 4*". Paragraph 3.2, in turn, addresses the volume (in relative or absolute terms) and price effects of dumped imports. Thus, the "effects" that may be considered cumulatively after application of the Article 3.3 cumulation test include the volume and price effects discussed in Article 3.2.

15. Brazil argues that, aside from meeting the criteria of Article 3.3, cumulation is permitted only if the contribution to injury from each country is significant. That interpretation would render Article 3.3 meaningless, contrary to established tenets of treaty interpretation. If the contribution to injury from each country is significant, there is no need to cumulate the imports to determine whether their cumulative effects contribute to the injury.

16. Finally, the United States agrees with the EC that Article 3.2 requires only that the investigating authorities consider the volume and price effects of the dumped imports. The investigating authorities do not have to find either significant volume or price effects in order to find that the dumped imports are having an injurious impact on the industry. Brazil's interpretation incorrectly presumes that such findings are necessary in any instance. Since it is not even necessary to find significant volume and price effects in order to reach an overall affirmative injury determination, there is no basis in the Agreement for Brazil to argue that these findings are somehow necessary where an investigating authority is considering a cumulative assessment.

B. THE "CONDITIONS OF COMPETITION" REQUIREMENTS FOR CUMULATION

17. I will turn now to the parties' arguments relating to the "conditions of competition" provision in Article 3.3. Just as the volume and price considerations of Article 3.2 cannot be grafted onto the overall cumulation requirements of Article 3.3, they also cannot be read as requirements for addressing "conditions of competition" under Article 3.3. If the significance of import volume and price effects were required subjects for determining whether the conditions of competition supported cumulation, that would mean that Articles 3.2 and 3.3 contain redundant considerations. Therefore, Brazil is incorrect in arguing that the "conditions of competition" provision requires a similarity in significant import volume and price effects trends over the period of investigation.

18. The EC's interpretation of the "conditions of competition" provision in Article 3.3 is also flawed. As the EC has noted, the proper interpretation of how to evaluate "conditions of competition" for purposes of cumulation under Article 3.3 is an issue that an Ad-Hoc group of the Anti-Dumping Committee continues to debate. The Members of the WTO are not in agreement on this issue. The United States in particular has concerns about the EC's general practice of focusing on similarities in import and price trends as the primary indication of competition supporting cumulation. The fact that increases or decreases in the volume of imports from one country parallel increases or decreases in the volume of imports from other countries does not necessarily answer the question of whether they compete.

19. Moreover, the EC's approach regarding "the conditions of competition" provision of Article 3.3 is inconsistent with its position concerning the overall relationship between the Article 3.2 considerations and Article 3.3. The EC correctly states in its First Written Submission (at para. 305) that "there is no reason in principle why products with opposite volume trends may not be competing, and such development may even provide proof of competition". It is difficult to reconcile this reasoned analysis with the EC's reliance on trends as a main criterion for determining whether imports compete with one another.

20. The same analysis also applies to the value of comparing price trends and the extent of price undercutting. The fact that imports from one country decline or undercut the prices of the domestic product while imports from another country remain steady is not necessarily indicative of whether the various imports are competing. It may simply mean that the imports from one country that maintained prices were successful in their competition, while the imports from the other were not.

21. In sum, the United States agrees that Members have discretion under Article 3.3 to develop appropriate criteria and analytical frameworks for assessing whether cumulation is appropriate in light of the conditions of competition among imports and between imports and the domestic like product. However, those criteria and analyses must bear a reasonable relationship to the inquiry into whether the various products compete in the domestic market of the importing Member. Isolating one's focus on a comparison of import trends falls short of addressing the competition inquiry.

C. PRICE UNDERCUTTING UNDER ARTICLE 3.2

22. Finally, I will briefly address the issue of an investigating authority's consideration of price undercutting pursuant to Article 3.2. The United States agrees with the EC that the Anti-Dumping Agreement does not prescribe any particular methodology for addressing 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". In the absence of any such prescription, the investigating authorities may make price comparisons by any methodology that assures an unbiased and objective examination.

23. In particular, nothing in Article 3.2 requires investigating authorities, in considering the significance of undercutting, to apply the methodology set out in Article 2 for determining dumping and dumping margins. Indeed, Article 2 of the Agreement specifically applies to the "Determination of Dumping", whereas Article 3 applies to the "Determination of Injury". The purposes and obligations addressed in each of these articles are distinct and there is no basis in the text of the Agreement to treat them interchangeably.

24. Again, the United States takes no position with respect to the application of the required legal framework to the specific facts in this investigation. However, we do have several observations with respect to the objections that Brazil has raised concerning the method that the EC used in comparing prices. To the extent Brazil is arguing that its product was of higher quality and reliability than other imports and was sold in a different market segment than other subject imports, it is raising a factual question under Article 3.3 concerning whether "a cumulative assessment of the effects of imports is appropriate in light of the conditions of competition between the imported products". As discussed above, the Article 3.2 analysis of price undercutting and price effects occurs subsequently to the Article 3.3 cumulation determination. If the EC's finding that cumulation was appropriate met the standards of Article 3.3, then it was consistent for the EC to consider the significance of price undercutting and other price effects for imports from all cumulated countries.

25. Brazil also faults the EC for failure to adjust the respective prices of the domestic and Brazilian product to account for differences in production costs. However, there is no legal requirement under the Anti-Dumping Agreement for an authority to adjust prices before comparing them for the purposes of addressing injury. On the contrary, Article 3.1 refers to the examination of

prices *in the domestic market*. Thus, the Agreement instructs authorities to examine and compare the actual prices that the products sold for in the investigating Member's market; it does not permit a comparison of fictitious prices.

26. Finally, Brazil argues in the alternative that the EC should have compared the prices of the imports from Brazil, which were all black heart fittings, with those of exported black heart fittings produced by the EC producers. A comparison of this sort would not have met the requirements of Article 3. As we discussed above, Article 3.1 requires the competent authorities to conduct an objective examination, of, *inter alia*, "the effect of the dumped imports on prices *in the domestic market* for like products".

IV. CONCLUSION

27. Mr. Chairman, this concludes our statement today. Thank you for your attention.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF CHILE

1. Chile would like to thank the Panel for this opportunity to submit its views on this dispute. Although we have no direct trade interest in the case, we are exercising our right under Article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in the belief that the issue before this Panel is important for the proper functioning of the multilateral trading system. Chile has noted with concern the increasing use of anti-dumping measures not as an instrument to correct trade distortions between Members, but as trade barriers against legitimate imports and as a means of protecting, in many cases, industries that are not very competitive. Chile, whose economic development is based on an export model, considers anti-dumping duties to be legitimate measures of an exceptional nature, to be applied only under the specific and strict circumstances expressly provided for in Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), as established in Panel and Appellate Body precedent.

2. Thus, both the investigation by the European Communities of imports of malleable cast iron tube or pipe fittings from a series of countries and the application of anti-dumping duties are questionable from various points of view. However, in this submission, Chile would like to confine itself to the four following points: the need for the measure to remedy the injury; zeroing; Article 3.4 of the Anti-Dumping Agreement; and causation and non-attribution.

Application of the anti-dumping duty only to the extent necessary

3. Article VI.2 of the GATT 1994 states that:

> "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." (Emphasis added)

4. Article 11.1 of the Anti-Dumping Agreement states that:

> "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." (Emphasis added)

5. Both provisions make it clear that the investigating authority cannot apply an anti-dumping duty in excess of the margin of dumping calculated, and that the duty shall remain in force as long as and to the extent necessary to counteract the dumping which is taking place. In the case at issue, the European Communities appear to have determined a margin of dumping without taking account of a number of important factors, such as the devaluation of the Brazilian currency, and this led it to apply an anti-dumping duty in circumstances in which it was not necessary to counteract the alleged injury that the Brazilian industry could have been causing.

6. If the circumstances change in such a way that the margin of dumping calculated is not representative, either because the dumping situation has ceased to exist – which is the case made by Brazil – or because the margin is higher than necessary, then the investigating authorities must re-evaluate the dumping situation.

7. Anti-dumping duties, like safeguard measures, are instruments, clearly and specifically enshrined in the GATT 1994 and in the relevant agreements, to which Members may resort in very particular circumstances. As such, they must be applied to the extent necessary and for the time

necessary to prevent or counteract injury. Brazil rightly recalls that both the Panel and the Appellate Body in *Korea – Dairy Products* concluded that the measure (safeguard) must be no more restrictive than is necessary to prevent or remedy the serious injury …, or that it must be commensurate with the goals of preventing or remedying the injury. In Chile's view this evidence of conditionality and proportionality is also implicit in Article VI.1 of the GATT and Article 11.1 of the Anti-Dumping Agreement.

Zeroing

8. The meeting of the Dispute Settlement Body of 12 March 2001 saw the adoption of the reports of the Panel and the Appellate Body in the dispute *European Communities – Bed Linen.* Article 86.1 of the Appellate Body Report upholds the finding of the Panel that the practice of "zeroing" of negative dumping margins applied by the European Communities when establishing the existence of margins of dumping is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. At the said DSB meeting, the European Communities stated that it would promptly comply with the relevant recommendations and rulings.[1] Moreover, the representative of the European Communities stated that the method that was declared inconsistent with the WTO was also applied by other Members, and that it expected that those Members would bring their practices in line with the Anti-Dumping Agreement. It is up to the European Communities to practice what it preaches and to amend this practice.

9. In view of this clear precedent and the express recognition by the European Communities, the Panel cannot but repeat the inconsistency of the EC's practice of zeroing negative dumping margins when establishing the existence of margins of dumping. This would confirm the true meaning and scope of Article 2.4.2 of the Anti-Dumping Agreement.

Evaluation of all factors

10. Chile considers that, as stated in Brazil's first written submission[2], Article 3.4 of the Anti-Dumping Agreement establishes a strict, but not exhaustive, list of the economic factors and indices that the investigating authority must necessarily examine to determine the effects of dumped imports on the domestic industry in question. It is strict in that it requires the investigating authority to consider and evaluate each and every one of the factors and indices indicated therein; but it is not exhaustive in that the investigating authority may consider and evaluate other factors as it deems necessary, provided it has also evaluated those indicated in Article 3.4. This was confirmed in various Panel and Appellate Body reports, most recently in *Thailand – H-Beams*[3], adopted on 18 June 2002.

11. Without prejudice to the above considerations, Chile would like to stress that in its analysis of this issue, Brazil refers to the reports of the Panel and the Appellate Body in *Argentina – Footwear*, pointing specifically to the mention, in the findings of each report (paragraphs 8.276 and 129 respectively), of "trends" in imports, without making it clear how this ties in with its argument on Article 3.4 of the Anti-Dumping Agreement.

Causation and attribution

12. In Chile's view, Article 3.5 of the Anti-Dumping Agreement is clear: the investigating authority must examine not only the impact of the dumped imports on the domestic industry concerned, but also, all of the other known factors which are injuring the said industry as well; and, the injury caused by these other factors must not be attributed to the dumped imports. Here, we agree entirely with the finding of the Appellate Body in *United States – Hot-Rolled Steel* that "[i]f the

[1] WT/DSB/M/101, paragraph 77.
[2] Part VIII, Issue 16.
[3] WT/DS122/AB/R.

injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors".[4]

13. In other words, Article 3.5 requires the investigating authority to evaluate the allegedly dumped imports and any other factor that could be causing injury to the domestic industry at the same time, to distinguish the effects of those imports from the other factors that could be causing injury to the industry, and to attribute to each set of factors the effects due to it. That is, the investigating authority must ensure that the injury caused to the domestic industry by the other factors is not attributed to the dumped imports.

Conclusions

14. Strict observation of the disciplines of the WTO Agreements, in particular the Anti-Dumping Agreement, is essential to ensure that their implementation is not discriminatory and does not constitute a barrier to legitimate trade. The investigation conducted by the European Communities in this case inspires considerable doubt as to its consistency, and the consistency of the measure applied, with those Agreements. Consequently, it is essential that the Panel should repeat, in its findings, the principles of transparency and equity on which the WTO Agreements are based.

[4] WT/DS184/AB/R, paragraph 228.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ORAL STATEMENT MADE BY BRAZIL – SECOND MEETING

(11 June 2002)

1. Brazil's position with regard to the various points and issues raised in this proceeding has been clearly made throughout the different procedural stages. In this Statement, Brazil only takes up some of the points that should be further explored and stressed.

2. In particular, an important aspect of this case is that of the Standards of Review by which the measure should be assessed. Brazil submits that it is in line with these Standards, as laid down in Article 17.6 of the AD Agreement that the EC's investigation must be evaluated. The Standards of Review instruct panels not to overturn the establishment and evaluation of facts by any given investigating authority, as long as that establishment was proper and the evaluation was unbiased and objective.

3. In this respect, Brazil submits that the EC's establishment of the essential facts of this case was clearly ***improper*** and its evaluation of those facts suffered from a serious ***lack of objectivity***. The EC's evaluation of those facts was plainly ***biased***

.

Preliminary Observations

4. An interesting illustration of this is the EC's reaction to the Brazilian exporter's repeated submissions that the EC assess the implications of ownership and outsourcing relations that exist and have existed between leading EC Applicants and producers of the product concerned in certain third countries. The EC authorities have never addressed this issue directly, or at least there is no record of such mention at any point during the investigation. Yet, the EC states that it has examined this point and provides references which nowhere address head-on the ownership related claims.

5. Moreover, the EC suggests that "the question of which, if any, imports into the EC were causing injury was central to the investigation, regardless of the legal arrangements giving rise to such imports". Brazil submits that this statement by the EC demonstrates the fatal failures of its establishment and evaluation of the relevant facts, particularly with regard to the EC's finding and determinations on injury under Articles 3.4 (injury indicators) and 3.5 (causation).

6. The EC seems to admit, at least with regard to one EC producer (Atusa), that such ownership relation existed and that it was well known to the EC. The EC was very well aware, on the basis of the information made available to it during the investigation, of (i) the efforts made by the Spanish producer to export its Bulgarian products into the EC; (ii) that the Bulgarian share of the EC market increased by 1,800% and its share of total imports rose by 2,500 per cent during the IIP; and (iii) that Atusa has continued its effort to increase market share even further by offering its Bulgarian product at prices well below market level and below those of the Brazilian exporter.

7. In its provisional findings on causation, referring to the imports by the Spanish producer, the EC stated that "since these volumes were very low and represented only a negligible pa[rt] of its sales in the Community, no significant influence on the situation of that Community producer could have resulted from these imports". Brazil does not know to which imports the EC had specifically referred

in this passage. The record suggests that the EC had in fact examined the Spanish producer's own purchases for its own purposes and/or for resale only. Nothing on the records indicates that the EC authorities evaluated the impact of these imports nor that these effects were duly separated from the other causes of injury to ensure that they are not attributed to the dumped imports, as required for example by Article 3.5.

8. Similarly, the EC admits that, with regard to "purchases/imports from other sources (in volume and value), the Spanish producer Atusa, as well as the "Austrian" producer GF provided that information during the investigation. This seems to suggest that the EC was at best unaware of these considerations at the time it had processed the EC industry's Application in order to assess "the adequacy and accuracy of the evidence provided" therein, as required under Article 5.3. Thus, by failing to give information on their own "contribution" to the alleged injury to the EC industry, these EC producers failed to provide adequate information as required under that provision, the accuracy and adequacy of which the EC was under an obligation to examine.

9. Moreover, Brazil believes that, in a parallel way to that described with regard to the Spanish producer, the EC has not examined the effects of the self-inflicted injury that the imports from Turkey, by the "Austrian" producer (GF), have caused to that producer (and to its co-Applicants). This establishment and evaluation of the relevant facts, or rather the lack of both, have thus suffered from similar fatal failures to those described in relation to Atusa.

10. Further, Brazil recalls that the Brazilian exporter submitted to the EC during the investigation that GF has imported the product concerned not only from Turkey but also from Poland. Although the EC looked into imports from Poland in general under its causation analysis, it has nonetheless never addressed this own-import aspect of the Brazilian exporter's claims with regard to GF at any point on record. As the EC has not indicated whether it has made any examination at all at group level at GF Switzerland or anywhere else outside the EC, Brazil must conclude that such an examination has not taken place.

11. In Brazil's view, the EC's very partial examination of the facts regarding GF's own imports from both Poland and Turkey does not meet the requirements of Article 3.4. Moreover, as already mentioned, these EC failures also infringed Article 3.5, by attributing to the "dumped imports" the injurious effects of these own "non-injurious" imports from Bulgaria, Turkey and Poland.

Brazil as a Developing Country

12. Brazil is surprised by the EC's defence whereby they have thought that by raising the possibility of an undertaking with the Brazilian authorities they were in fact dealing directly with Tupy. Undertakings are in fact a contract and contracts are negotiated and concluded by the parties thereto. Brazil could in no way be such a party; the undertaking should have been negotiated with Tupy directly. The EC's attempts to find an excuse for its failure to comply with Article 15 should fail.

13. The EC has tried to show how diligent it nonetheless was to express its "special regard" in this respect. However, records show that (a) the EC was not the first to raise this issue; and (b) Brazil always took the initiative to discuss it.

Dumping

14. Brazil would like to give a few blatant examples of the EC's improper establishment of the facts concerning the determination of dumping. First, Brazil recalls that the EC explicitly and exclusively stated that the conversion of currencies was based on daily rates. However, before the Panel, the EC admitted that the conversion of *transport* costs and *credit costs*, *warranty* and

commissions was based on monthly rates. Brazil therefore submits that the EC's *selective use of the exchange rates* cannot be in accordance with Articles 2.4.1 and 2.4, let alone meet the applicable Standard of Review.

15. Brazil notes further the EC's new Exhibit EC-25 named "Data on Tupy's export sales showing effect of conversion rates". The meaning of the related table is unclear. Consequently, the EC's conclusion that "Tupy benefited from the use of the EC's monthly exchange rates" is inadequate or at least not supported by sufficient or available evidence.

16. Regarding PIS/COFINS indirect taxes, the EC seems to believe that administrative convenience takes precedence over the obligation to properly establish the facts and to make fair comparisons. Indeed, the EC's analysis was limited, without any proper justification, to a mere 20 most exported models. Brazil submits that this kind of careless and arbitrary conduct does not constitute a proper establishment or evaluation of the relevant facts.

Injury

17. Turning now to the determination of injury, we would like to refer briefly to Brazil's Article 3 claims, which are one of the main issues in this proceeding.

A. The EC's determination of injury was not based on "positive evidence" and did not involve an "objective examination" of the facts, in violation of Article 3.1

18. Brazil believes that the requirements of Article 3.1 are well settled and unambiguous. At a minimum the "positive evidence" requirement precludes an investigating authority from basing its findings on *incorrect* or *inaccurate* facts. The "objective examination" obligation means that the process of examination must conform to the basic principles of good faith and fundamental fairness.

19. In this respect, Brazil would highlight five aspects. Firstly, Brazil has demonstrated, especially with regard to the outsourcing issue, that the EC's factual basis for its injury determination was, at the very least, *incorrect*.

20. Secondly, Brazil observes that the EC's examination and evaluation of the factual basis for its findings and determinations regarding the cumulation of the effects of the Brazilian imports with those of the other imports concerned failed to satisfy the basic requirements of Article 3.3. The EC confuses the "conditions of competition" test with the "like product test". Compounding this error, the EC cumulates <u>imports</u>, not the "<u>effects of such imports</u>" as required by the language of Article 3.3.

21. Thirdly, Brazil notes that the EC did not examine all injury factors of Article 3.4 . Exhibit EC-12 must not be admitted by this panel and even if it were, it does not cure the complete lack of an "objective examination" "based on positive evidence".

22. Fourthly, the EC did not provide an adequate explanation as to whether and how *"positive movements"* of certain injury indicators were outweighed by certain injury factors moving in a *"negative direction"*. Furthermore, an unbiased and objective investigating authority could *not* have on the basis of "positive evidence" in this case concluded that "the trends of profits is obviously a deteriorating one" as the EC concluded. Finally, the EC admits that the volume of the domestic producers' stocks was the only indicator suggesting that some sort of injury might have happened. However, Brazil has demonstrated that all these facts were manifestly incorrect.

23. Finally, when comparing prices under Article 3.2 the EC applied a practice of "zeroing" where the Brazilian exporter's prices were equal to or higher than the domestic industry's prices. The effect of "zeroing" was exacerbated by the EC's decision to limit the examination to the *identical*

types of the product concerned exported from Brazil and sold domestically by the domestic industry. Finally, as the EC did not compare the exported "black" heart fittings with the domestic "black" heart fittings, Brazil does not believe that a comparison between the prices of "black" and "white" heart fittings without any adjustments constituted an "objective examination".

B. The EC failed to evaluate all mandatory injury factors, in violation of Article 3.4

24. To Brazil, Exhibit EC-12 should be *completely disregarded* and not be considered as being properly before the Panel. There are many indications showing that Exhibit EC-12 is just an EC attempt to cure the flaws of its investigation. Its acceptance would undermine the due process and transparency obligations of the AD Agreement. Brazil also has serious reservations with regard to the substance of that EC's alleged examination.

C. The EC failed to establish a causal link between the dumped imports and injury to the domestic industry, in violation of Article 3.5

25. Assuming that the EC had properly established that its domestic industry had suffered injury, which it did not, the EC was still required under Article 3.5 to establish that such injury was caused by the allegedly dumped imports.

26. Brazil submits that the EC's "*no-significant contribution"*- test does not fulfil the requirements of Article 3.5. Indeed, the EC concluded that the effects of the other known injurious factors were "*not* such to break the causal link" between the material injury and the dumped imports. In particular, this kind of statements relate to (i) the declining consumption and the domestic industry's exports, (ii) the Applicant's own imports, (iii) imports from other third countries; and (iv) substitution. However, Brazil submits that the EC has never provided any clear, unambiguous and straightforward explanation as to *how* it separated and distinguished the effects of the above-mentioned factors from the effects of the dumped imports.

27. As the EC did not establish any explicit non-attribution explanation, it is logical to conclude that the EC's conclusion of "no-significant-contribution" was based on an *assumption* that the injury caused by those other known factors was insignificant. However, assumptions cannot establish a "genuine and substantial relationship of cause and effect" as required under Article 3.5.

28. Moreover, the public documentation contains several indications that the EC's conclusions on causation were not based on "positive evidence" and did not involve an "objective examination". Firstly, the EC has *not* examined at all the injurious effects of the Brazilian exporters comparative advantage. Moreover, the EC did not properly examine the issues of outsourcing and substitution. Secondly, the EC's conclusion that the imports from Poland had not caused any injury to the domestic industry must be factually incorrect in view of the EC's price sensitivity findings, combined with the quantity and price effects of those Polish imports. Similarly, the EC's conclusions regarding the domestic industry's "continuous decline of sales" and "deteriorating profitability" allegedly due to the dumped imports were <u>factually</u> incorrect.

Conclusion

29. Brazil submits that this dispute involves a relatively large number of important aspects of the AD Agreement. A number of claims we made were not mentioned in this statement.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES – SECOND MEETING

(18 June 2002)

1. In the EC's view Brazil has introduced in its second submission new claims with regard to Article 15 (breach of obligation of first sentence, exploration of constructive remedies *before* the imposition of provisional measures) and Article 2.4 (obligation to indicate necessary information) which should be declared inadmissible because they were not raised previously. Moreover, the EC reiterates the requests that it made in its First Submission for the Panel to disregard certain of Brazil's claims because they are vague or not covered by the terms of reference.

2. The EC notes that Brazil is basically seeking a *de novo* rehearing which is contrary to Article 17.6(i) of the Agreement, and infringes the notion of a fair hearing that is contained in WTO law. If by presenting new evidence Brazil could show that the EC authorities had reached a conclusion on the basis of a factual finding that was now proved to have been erroneous, that conclusion would be undermined. This is the very process that Article 17.5(ii) is designed to prevent.

1. Issues raised by Brazil

1.1 Issue 1 "No special regard to Brazil as a developing country"

3. The EC rejects Brazil's allegation of a breach of the first sentence of Article 15 as this provisions does not contain a separate obligation, and Brazil has not shown how issues such as the IPI Premium credit or devaluation have any relevance. Article 15 first sentence does not relate to just any aspect of an anti-dumping investigation but applies specifically when a Member is "considering the *application* of anti-dumping measures". In any event, the investigators did give proper consideration to this issue and the EC by satisfying the obligation in the second sentence, also satisfied whatever obligation might be imposed by the first. Brazil allegations regarding a violation of Article 15 second sentence have already been answered by the EC.

1.2 Issue 2 "Inappropriate Application"

4. Because of Brazil's withdrawal of this complaint the EC makes no further comment.

1.3 Issue 3 "Inappropriate Measures"

5. The EC maintains that Brazil distorts the meaning of the Appellate Body report in the *Carbon Steel* case by selective quotation. The Appellate Body was simply pointing out that, if the practice in question is not a subsidy, countervailing duties are not justified.

6. The EC reaffirms that Brazil's assertions about the consequences of devaluation are baseless, and that it is not true that the data indicated that the chances of dumping occurring after the investigation had been totally eradicated.

7. In regard to Brazil's claim under to paragraph 1 of Article 11 the EC notes that if the claims are appropriate to paragraphs 2 and/or 3, then by satisfying the appropriate paragraph the Member will also be satisfying the requirements of paragraph 1. The assertions made by Brazil are entirely

within the framework provided by paragraph 2, and since the EC has satisfied the requirements of that paragraph it has also satisfied those of paragraph 1.

8. In some circumstances a Member might be obliged to self-initiate a review in accordance with Article 11.2. Yet, as is evident from the terms of Article 11.2 these circumstances must be different from, and most probably more demanding than, those which would normally justify a review (after the reasonable period). Brazil has not attempted to argue what factors may be relevant in this regard. Still less has it shown that such factors actually pertained or pertain in the present case.

9. Neither Tupy nor Brazil has made an application for a review, despite the fact that they were invited by the EC to do so if they could show that the dumping margin had been reduced since the original investigation period. Furthermore, Tupy has declined to participate in the review initiated by the EC, although this would have examined the situation that Brazil alleges has changed as a result of devaluation.

1.4 Issue 4 "Improper normal value – inappropriate product types"

10. The categorization adopted by the EC in any dumping investigation is designed to facilitate the identification of comparable and like products. It is made at the outset of the investigation but it may expand during the proceedings. Investigators will where possible adopt the same product categorization that is employed by the exporter.

11. The EC rejects Brazil's language of "a finding of 'unreliability' under Article 2.2". as inconsistent with the respective provision. Regarding Brazil's argument on the exclusion of profit margins of 'unrepresentative' sales the EC notes that the methodology set out in Article 2 for constructing normal values is essentially one of averaging profit and SG&A data from a range of (profitable) sales, and is as such calculated to produce the fairest result. In any case, the consequence in this investigation of excluding data from the so-called 'unrepresentative' sales would have been to lower the profit margin by 0.01 per cent.

1.5 Issue 5 "Improper normal value – inappropriate product codes"

12. Brazil's interpretation of Article 2.2.2 is flawed. For every type where normal value needs to be constructed, there are by definition no representative sales of the identical type made in the ordinary course of trade. Otherwise, normal value could and should be based on the domestic sales prices of that type. Thus, SG&A and profit always have to be based on types sold domestically which are not identical to the types exported. The consequences of Brazil's thesis would be inconsistent if applied to the definition of domestic industry (Article 4.1), and to the domestic production to be considered for injury purposes (Article 3.6), both of which would then differ for each exporter. Since, the definition of like product applies throughout the Agreement, an interpretation that is impossible in any particular context of the Agreement has to be rejected for the entire Agreement. In any event, Brazil's application of its thesis to malleable fittings lacks consistency.

1.6 Issue 6 "No proper consideration of tax neutralisation"

13. The EC has already explained the way it considered indirect taxes such as IPI, ICMS, PIS/COFINS for the calculation of the normal value. No adjustment was necessary for the IPI Premium Credit as no such tax was identified during the investigation. The panel report *United States – Steel Plate, Sheet and Strip* does not support Brazil's argument in this regard. On the contrary, the Appellate Body in *United States – Hot Rolled Steel* and the panel *Argentina – Tiles* both confirm that the Agreement puts the burden of proof on the interested party, while requiring the authorities to make a fair comparison and not to impose an unreasonable burden of proof on the parties. Tupy did not meet this standard.

1.7 Issue 7 "No proper adjustment for advertising and sales promotional expenses"

14. Because of Brazil's withdrawal of this complaint the EC makes no further comment.

1.8 Issue 8 "No proper adjustment for packing costs"

15. The EC rejects Brazil misinterpretation of its position in this regard. Tupy has not adequately demonstrated any justification for an adjustment.

1.9 Issue 9 "No proper currency conversion"

16. The EC has given a precise explanation of the details of the various rates that were used. The issue of conversion rates for allowances is one of *de minimis* significance since the consequences for the dumping margin would be a change of a fractional amount. Moreover, compared to the conversion rates proposed by Tupy, the effect of those adopted by the EC was, if anything, to *lower* dumping margins.

1.10 Issue 10 "No proper basis to assess PIS/COFINS indirect taxes"

17. The EC has already explained the methodology it adopted in arriving at the adjustment figure and the circumstances of its adoption. In this respect, the EC notes that Tupy had been rather obstructive during the investigations. Even if Brazil's approach by using 40 instead of 20 models were to be accepted the result demonstrates that the EC used a very reasonable allocation keys as the difference in adjustments amounts to merely 0.03 per cent.

1.11 Issue 11 "No proper dumping margin finding ('zeroing')"

18. The EC has no further comments to make on this Issue.

1.12 Issue 12 "No proper consideration of import volume trends

19. Regarding whether either of the factors mentioned in Article 3.2 (volume, and price effects) must be established, Brazil is at odds with this provision because if one or other factor must be present this would give a factor decisive guidance on the question of injury. The EC further rejects Brazil's attempt to twist the words of the EC's Submission to give a false impression of what was intended.

1.13 Issue 13 "No proper consideration of alleged price undercutting"

20. The EC notes that the effect of using zeroing in this investigation was to increase Tupy's undercutting margin by 0.01 per cent. Regarding the EC use of a methodology based on matching of products Brazil had characterised that methodology as unfair, but it has no better alternative to propose.

1.14 Issue 14 "No proper calculation of alleged price undercutting margins"

21. Brazil makes various misleading or inaccurate statements about the EC's criteria for classifying malleable fittings. These centre on the question whether the differences between white and black heart fittings were significant. The EC has already addressed this argument. Brazil is unable to refute the EC' assessment that the distinction between black and white heart fittings was irrelevant.

1.15 Issue 15 "No proper cumulation of imports"

22. The EC agrees with Brazil that the authorities must justify the use of cumulation, and has never pretended otherwise. However, Brazil's claims that 'the investigating authority should identify the effects of the dumped imports from each country' has no basis under Article 3.3. The same is true of Brazil's proposal that a Member may not cumulate 'where it becomes apparent under Article 3.2 that there are differences in the way in which products of exporting Members compete among themselves or with the like domestic product'.

23. The EC has listed in the Definitive Regulation the factors that it considered regarding the conditions of competition, and it refutes Brazil's accusations of not being exhaustive. In this context, the difference between white and black heart fittings has no relevance. The EC has already rejected Brazil attempts to confuse an already complex issue by raising and introducing specific new aspects and interpretations. This relates in particular to its reference to EMAFIDA, markets segments and the channels of trade.

1.16 Issue 16 "Inappropriate consideration of injury factors"

24. The EC warns against exaggerated interpretations of the *H-Beam* panel's views of the proper role of panels in reviewing national decisions on injury. This section of the panel's report was not considered by the Appellate Body.

25. As to the EC's argument on "growth", this factor is inevitably associated with other factors and in so far as the authorities properly consider the growth aspects of those factors they will also be properly considering growth. There is nothing in the rulings of the Appellate Body that says that the findings on a particular factor cannot be implicit. In fact, the *Bedlinen* panel, which was applying the criteria laid down by the Appellate Body, said that the test was whether a reviewing panel is able to determine whether the authorities complied with the requirements of Article 3.4. In the EC's view the findings in the Provisional and Definitive Regulations and the explanations set out in Exhibit EC-12 show the EC authorities' compliance with these requirements.

26. Brazil claims of a breach of Article 6.2 is not within the Panel's terms of reference and in any case the accusation is baseless. The same goes for the claim under Article 6.4, which has not been made before in this context, and which is therefore also outside the terms of reference. The EC has already noted the tendency of Brazil to confuse the obligations in Article 3.4 with those in Article 6, an error against which the Appellate Body has warned.

27. Brazil presents further a series of arguments regarding the allegedly flawed determination of injury to which the EC has already responded. This relates in particular to "outsourcing", factors affecting domestic prices, price sensitivity, profitability, stocks and export performance. As to stocks, the EC rejects Brazil claims that the EC has infringed Article 6.2 and 6.4 of the Agreement by not disclosing to Tupy information on EC producers' purchases and exports because these claims are new, and consequently outside the Panel's terms of reference.

1.17 Issue 17 "Inappropriate establishment of causation"

28. The EC notes that if a particular factor constitutes no significant cause of injury to the EC industry then there are no injurious effects of that factor which can be separated and distinguished. In the light of this logic, Brazil's criticism of the EC's methodology is misplaced. The EC rejects Brazil's argument regarding 'margins analysis', 'export performance', 'imports from other third countries', 'rationalisation efforts' and 'outsourcing'. Regarding the last of these, the EC properly examined any loss of market share that could have come about through imports from the firms to whom production had been outsourced.

1.18 Issue 18 "No timely opportunities given to see all relevant information"

29. It appears that this claim is now solely concerned with information on the currency conversion rates used in relation to allowances in the dumping calculation. The EC has given a complete explanation of the rates that were used at the various phases of the investigation.

1.19 Issue 19 "No proper information on matters of fact or law"

30. The EC has complied with its obligations under Article 15 by pursuing, through diplomatic channels, the possibility of a price undertaking. In both cases the EC regards the confidentiality rule in Article 6.5 as applicable.

31. As to Exhibit EC-12, the EC found that for the factors mentioned in this document developments during the IIP were in line with one or more of the other factors. As a consequence it saw no point in recording them individually in the Regulation; this general observation constituted "sufficient detail", which is the criterion applicable to both Article 12.2 and 12.2.2.

2. Concluding remarks

32. In respect of Brazil's claims under Issue 9, Issue 10 and Issue 13 the EC has shown that any implications for the anti-dumping duties imposed on Tupy were *de minimis*. As such, these infringements could not have nullified or impaired any benefit accruing to Brazil, directly or indirectly, under the Agreement.

33. Even were the Panel to find that the EC had violated its WTO obligations in regard to 'zeroing' and 'devaluation', the EC would, by initiating a review, have done what was necessary to remedy this situation. The EC refers in this respect to the distinction made by the panel in *India – Automotive Sector* between a panel's finding of infringement and its recommendation to the DSB.

34. The EC therefore requests the Panel to make no recommendation in respect of Tupy's claims in this regard, irrespective of its findings on the issue of infringement.

ANNEX E

Questions and Answers

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ANNEX E-1

REPLIES FROM BRAZIL TO QUESTIONS FROM THE PANEL FIRST SUBSTANTIVE MEETING

ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

To the EC:

1. With respect to Brazil's allegations under Article 15 AD, would the European Communities have conducted itself in the same manner in an anti-dumping investigation involving a developed country Member? Is this relevant here? If not, what is the meaning and legal significance of the phrase "special regard" in the first sentence of Article 15.

To Brazil
:

2. Could Brazil comment on the European Communities statements in paragraphs 38-41 of its first written submission -- and supporting documents submitted by the European Communities -- that the European Communities raised the possibility of a price undertaking, but that Tupy/Brazil did not appear to be interested in pursuing this as a possibility? How do these statements relate to Brazil's assertion on p. 21 of its first written submission that "…at no time has the EC suggested or tried to engage in any negotiations or discussions whatsoever with regard to any proposition or initiative to prefer any sort of constructive remedies other than the imposition of the anti-dumping measures concerned"?

Brazil points out that:

(a) as the EC's reports themselves recognise, it was the Brazilian authorities who put the matter on the agenda of those meetings; and

(b) at that time, the EC's authorities made nothing but to suggest to the Brazilian authorities that Tupy could offer a price undertaking.

The EC's approach does not cope with the requirement established by the *EC – Bed Linen* Panel whereby "the 'exploration' of possibilities [of constructive remedies] must be actively undertaken by the developed country with a willingness to reach a positive outcome".[1]

In any event, the EC's authorities could not have complied with its obligations under the second sentence of Article 15 unless they had given the Brazilian exporting producer notice or information concerning the possibility of an undertaking. By the very nature of a price undertaking, the possibility of such a constructive remedy cannot be properly explored unless the authorities suggest this option to the exporter.

However, the EC has never 'suggested or tried to engage in any negotiations or discussions' concerning a possible undertaking with Tupy.

This conclusion is further supported by the fact that, no public notice was issued detailing any examination by the EC of the 'possibilities of constructive remedies' with regard to Tupy, as required

[1] *EC – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, Panel Report, WT/DS141/R, *'EC – Bed Linen'*, para. 6.233.

by Article 12.2 of the AD Agreement. By implication this means that the EC did not consider the exploration of 'possibilities of constructive remedies' as 'material' within the meaning of Article 12.2. In addition, the fact that the EC did not mention in either the Definitive or the Provisional Regulation (or other related documents) that the possibility of an undertaking had been explored with regard to the Brazilian exporter (whereas this was mentioned in relation to the Czech and Japanese exporters in the same case) clearly demonstrates that the EC itself did not consider that it had made any effort in this respect with regard to the Brazilian exporter.

3. In the course of the investigation, did Tupy/Brazil actively communicate to the European Communities a desire to offer undertakings or to pursue any other kind of "constructive remedy"? If so, submit supporting documentation or indicate the relevant parts of the record.

No. However, Brazil recalls that the burden of actively undertaking the exploration of constructive remedies lies on the developed country Member. In this context, Brazil notes that the EC has never mentioned to the Brazilian government that it considered a concrete price undertaking or any other kind of constructive remedy. Furthermore, the EC investigators have never raised this issue in any way with Tupy. Consequently, the EC has never indicated to Tupy that a constructive remedy was a concrete possibility that could be discussed with the EC.

4. Does Brazil believe that the European Communities explored the possibility of imposing a "lesser duty"? If so, on what basis? In Brazil's view, what else could/should the European Communities have done to fulfill its obligation under Article 15 in this context? Did Brazil suggest any alternative to a price undertaking at any time in the proceedings? If so, indicate the relevant part of the record.

Brazil admits that the EC did consider the possibility of imposing a lesser duty. However, this is not something that they would have done as a direct consequence of Brazil's status as a developing country. Indeed, as a matter of general practice and as legally required by the Basic Regulation, the EC will always impose a lesser duty in an anti-dumping investigation, regardless of whether the country under consideration is developed or developing.

Brazil notes that the *EC – Bed Linen* Panel did not come to any conclusion as to what actions other than "lesser duty" and "price undertaking" might be considered to constitute "constructive remedies" under Article 15.[2] The Panel's statement implies that there might be other constructive remedies under Article 15 to be explored by the developed country Member. Brazil is of the opinion that in this respect the notion of 'constructive remedies' is similar to that of 'undertakings'. In this context, Brazil points out that, in practice, the EC accepts undertakings other than price undertakings. For example, the EC has on several occasions considered it more appropriate to accept an undertaking that limits the quantities to be exported to the Community.[3] Brazil therefore contends that the EC also

[2] *Idem*, para 6.229.

[3] *See*, e.g., Commission Decision N° 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti- subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, OJ L 221, 1993, p.28; Commission Decision No 303/96/ECSC of 19 February 1996 imposing a definitive anti-dumping duty on imports into the Community of certain grain oriented electrical sheets originating in Russia, collecting definitively the provisional duty imposed and accepting an undertaking offered in connection with such imports, OJ L 42, 1996, p. 7; Commission Decision No 790/97/EC of 24 October 1997 accepting an undertaking in connection with the anti-dumping proceedings concerning imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, the Czech Republic, Romania and the Slovak Republic, OJ L 322, 1997 p. 63.

failed to explore all the possibilities of constructive remedies by not considering undertakings other than price commitments. Brazil did not suggest any alternative to a price undertaking at any time in the proceedings.

5. Would Brazil elaborate upon the specific relevance of its statement on page 21 of its first written submission that "…the EC has even found it appropriate to increase significantly the level of the anti-dumping duty that it has imposed on the Brazilian imports from the provisional stage (duty imposed at the level of 26.1 per cent) to the definitive stage (where the definitive duty was imposed at the level of 34.8 per cent)"? Explain the relevance of this to Brazil's allegations under Article 15 AD.

Brazil made this statement in order to illustrate the way that the EC did not take account of the special situation of Brazil as a developing country, where the system of indirect taxation is more cumbersome than in developing countries. Brazil expected the EC to be more considerate and understanding in this respect. The reversal of the EC's approach at the definitive stage demonstrates, in Brazil's view, that the EC showed no such deference or 'special regard' to the special situation of Brazil as a developing country.

To both parties:

6. What legal obligations does Article 15 *AD* impose? Could Brazil comment on the European Communities statement in paragraph 31 of its first written submission that "…the first sentence [of Article 15] imposes no legal obligation"? If there is more than one obligation in Article 15, what is the relationship, if any, between these obligations i.e. are they separate, independent obligations, or are they interrelated and dependent? Explain your response, with reference to the customary rules of interpretation of public international law and any relevant material.

The first sentence of Article 15 obliges the developed country Members to give special regard to the special situation of developing country Members when considering the application of anti-dumping measures, while the second sentence of this provision lays down an obligation of exploring constructive remedies before applying anti-dumping duties where they would affect the essential interests of developing country Members.

Brazil disagrees with the EC statement that the first sentence of Article 15 "imposes no legal obligation". Brazil is aware of the passage in the *EC – Cotton Yarn* panel report[4] quoted by the EC[5] that "assuming (…) arguendo that an obligation was imposed by the first sentence of Article 13 [GATT Anti-Dumping Code], its wording contained no operative language delineating the extent of the obligation" (emphasis added). However, Brazil cannot accept the EC's interpretation of this quotation, namely that the first sentence imposes no legal obligation. This excerpt in fact confirms that there is an obligation. It is the extent of this obligation that is not determined by 'operative language'. Brazil further points out that[6], if an obligation did not arise from the first sentence of Article 15, it would be dead letter. It would therefore be difficult to understand why such a sentence was included in the AD Agreement at all. Moreover, it is a basic rule of interpretation that a treaty must be construed in the light of its object and purpose.[7] The preamble to the *Agreement establishing the World Trade Organisation* reads: "recognising further that there is need for positive efforts to ensure that developing countries, and especially the least developed among them, secure a share in the

[4] *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, of 30 October 1995, 'EC – Cotton Yarn', para. 582.

[5] ECFS, para 31, footnote 14.

[6] The passages below largely parallel the discussion in Brazil's Second Submission, particularly in paras.3 to 12.

[7] Vienna Convention on the Law of Treaties, 1969, Article 31(1).

growth in international trade commensurate with the needs of their economic development". As the WTO Agreements form a package, when taking actions under the different Agreements Members must respect this principle. Therefore, the first sentence of Article 15 of the AD Agreement must be interpreted in the light of this statement. Brazil infers from the foregoing that the first sentence of Article 15 of the Anti-Dumping cannot be interpreted in a way that renders it meaningless.

Brazil contends that the first sentence of Article 15 sets out an obligation of a general nature, while the second sentence lays down one possible way of fulfilling this obligation.

7. Is our understanding correct that the European Communities found that the level of dumping margins were in all cases lower than the injury threshold and that the level of duty was thus set at the level of the dumping margins found? Comment, with reference to the obligation(s) in Article 15 *AD* and the relevant portions of the record.

Yes, the Panel's understanding is correct. According to Articles 7(2) and 9(4) of the Basic Regulation, the EC is bound to impose a duty at a level equal either to the margin of dumping or to the amount necessary to remove injury sustained by the Community industry, whichever is lower.[8] The EC applies this rule whatever the status - developing or developed - of the Member in which the exporter is located. In conclusion, the choice by the EC to impose a duty at the level of dumping margins is not a consequence of the obligations set out in Article 15 of the AD Agreement.

8. Under Article 15 *AD*, is it for the Member imposing the measure to "*propose*" constructive remedies"? Provide the basis for your response. How, if at all, does this relate to the obligations in Article 8 (and any other provisions) of the *AD Agreement*? How, by whom and when should a price undertaking be sought/accepted for the purposes of Article 15 AD?

The obligation arising out of the second sentence of Article 15 of the AD Agreement is an obligation to 'explore' possibilities of constructive remedies rather than an obligation to enter into constructive remedies as stated in the *EC – Bed Linen* panel report which reads in the relevant part: "[t]aken in its context, …, and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome".[9] Thus, Brazil submits that an actively undertaken exploration (investigation, examination, scrutiny)[10] should involve the proposition of possibilities of constructive remedies.

Brazil is of the view that Article 15 does constitute an exception to Article 8 of the AD Agreement in the sense that, under Article 15, authorities have to propose constructive remedies whereas this is not the case under Article 8 of the AD Agreement.[11]

9. Do the parties agree that the obligation(s) in Article 15 *AD* arise(s) only with reference to the imposition of definitive anti-dumping measures at the *end* of the investigative process? Refer to any relevant material in responding.

Brazil contends that the obligation to 'explore' possibilities of constructive remedies can arise before the imposition of Provisional measures. Indeed, it is noted that this happened in the present case with regard to the Czech exporter.[12] Brazil submits that the imposition of a provisional measure, irrespective of the form of it takes, adversely affects the interests of the developing country Member concerned, for it restricts, since its very beginning, the access to the developed country market for the

[8] See Articles 7.2, 8.1 and 9.4 of the Basic Regulation (BRL-24).
[9] *'EC – Bed Linen'*, para 6.233
[10] *Ibid.*
[11] Article 8.5 of the AD Agreement reads: 'Price undertakings may be suggested by the authorities of the importing country (…)'.
[12] See recital 195 of the Provisional Regulation (BRL-12).

product concerned. For instance, importers will likely to replace the investigated supplier by another one in view of the uncertainties introduced by the provisional measures.

Brazil is aware of the Panel's statement in the *EC – Bed Linen* report that "the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures".[13] Brazil cannot agree with this interpretation. Were the Panel's reasoning prevail, there would be no need to qualify the term "duty" in the AD Agreement. However, that is not what happens in the Agreement. Brazil draws the Panel's attention to Articles 12.2 and 12.2.2, which representatively read in the relevant part "…and of the termination of a definitive anti-dumping duty" and "…the imposition of a definitive anti-dumping duty" (emphasis added). On the other hand, if the intention of the draftsmen of the AD Agreement were to give a uniform meaning to the term "duty" throughout the text, they would have used, for instance, a footnote, as in the case of the term "injury" (footnote 9 to Article 3).

10. What do the parties understand to constitute "constructive remedies" within the meaning of Article 15 of the *AD Agreement*? Please refer to any relevant material.

Brazil notes that the *EC – Bed Linen* Panel did not come to any conclusion as to what actions other than "lesser duty" and "price undertaking" might be considered to constitute "constructive remedies" under Article 15.[14] The Panel's statement implies that there might be other constructive remedies under Article 15 to be explored by the developed country Member. In this context, Brazil points out that, in practice, the EC accepts undertakings other than price undertakings. For example, the EC has, in particular circumstances, considered it more appropriate to accept an undertaking that limits the quantities to be exported to the Community.[15]

11. Is there an obligation under Article 15 *AD* to "communicate" to developing country Members that an investigating authority is exploring possibilities of constructive remedies?

No, there is not. However, Brazil recalls that, in the present case, the EC failed to abide by its obligations under the second sentence of Article 15 since no notice nor information regarding the exploration, if any, of the possibility of a price undertaking was given by the EC to the Brazilian exporting producer. By the very nature of a price undertaking, the possibility of such a constructive remedy cannot be properly explored unless the authorities suggest this option to the exporter.

In addition, Brazil submits that the exploration of possibilities of constructive remedies by virtue of Article 15 of the AD Agreement is a 'material' issue within the meaning of Article 12.2 of the AD Agreement. Indeed it is essential for a developing country to have the possibility of measures other than anti-dumping duties examined by the investigating authorities. A public notice therefore should be issued disclosing the investigating authorities' findings and conclusions with regard to the exploration of possibilities of constructive remedies.

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[13] *'EC – Bed Linen'*, para 6.231.

[14] *Idem*, para 6.229.

[15] *See*, e.g., Commission Decision N° 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti- subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, OJ L 221, 1993, p.28; Commission Decision No 303/96/ECSC of 19 February 1996 imposing a definitive anti-dumping duty on imports into the Community of certain grain oriented electrical sheets originating in Russia, collecting definitively the provisional duty imposed and accepting an undertaking offered in connection with such imports, OJ L 42, 1996, p. 7; Commission Decision No 790/97/EC of 24 October 1997 accepting an undertaking in connection with the anti-dumping proceedings concerning imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, the Czech Republic, Romania and the Slovak Republic, OJ L 322, 1997 p. 63.

12. What factors should guide a panel's consideration as to whether the imposition of anti-dumping measures would affect Brazil's "essential interests" within the meaning of Article 15 AD? Do the parties agree with the statement of the United States in its third party written submission (para. 14) that the term "essential" implies a very high standard for the level of national interest which the developing country must demonstrate would be affected by anti-dumping duties?

In Brazil's view, it is for the developing country Member to assess whether its essential interests are being affected. As regards the statement by the United States, Brazil believes that this too is an issue for the developing country Member to address. Therefore, from Brazil's point of view the factors to be taken into account in determining whether Brazil's essential interests have been affected include the following:

(a) Tupy is the largest foundry in South America;

(b) Tupy is one of the largest companies in the Brazilian metal industry, employing a workforce of more than 4500 people;

(c) Brazilian authorities put the matter concerning the EC's anti-dumping investigation on Tupy's exports of malleable cast iron tubes and pipe fittings on the agenda of high-level bilateral meetings; and

(d) Importance of exports in view of the external financial commitments of Brazil.

13. We note the section on "Undertakings" in the Definitive Regulation does not refer to Tupy/Brazil. Comment.

Brazil reiterates that the possibility of an undertaking has not been raised by the EC investigators with Tupy. Moreover, Brazil recalls the fact that the EC did not mention in the Provisional and/or the Definitive Regulations that the possibility of an undertaking had been explored with regard to the Brazilian exporter, although this was mentioned in relation to the Czech, the Korean, the Thai and the Japanese exporters, i.e. all the other exporters other than the Chinese.[16] This clearly demonstrates that the EC itself did not consider that (i) it had made any effort in this respect with regard to the Brazilian exporter, and (ii) that it viewed this issue as "material" within the meaning of Article 12.2 of the AD Agreement.

[16] See the Provisional Duty Regulation (BRL-12 at para 195) with regard to the undertaking accepted by the Czech exporter and see the Definitive Duty Regulation (BRL-19, at paras 124 and 125) in relation to the Czech, the Korean, the Thai and Japanese exporters. It should be noted in this respect that the EC authorities have not, as a matter of policy at the relevant time, been accepting undertakings from Chinese exporters. The Chinese and the Brazilian exporters are the only exporters in this case in relation to which the EC makes no mention of an undertaking.

14. Could Brazil elaborate upon its assertion on p. 32 of its first written submission that:

> **"…the Application did not contain a description of the volume and value of production of the like product accounted for by the Applicants" and that "[t]he Applicants provided information in respect of which the volume and value of production of the like product accounted for by them only insofar as the same could be broadly and rather inaccurately deduced from figures provided in respect of total consumption, price undercutting calculations and the volume of imports as a whole entering the EC."**

Brazil made this assertion on the basis of the non-confidential information it had in its possession in this respect. Brazil now withdraws its related claim.

15. Could the European Communities comment on this argument as it currently stands?

ISSUE 2: "INAPPROPRIATE APPLICATION"

To the EC:

16. Brazil states: "…the evidence provided by the Applicant did not comply with the requirements of Article 5.3" (Brazil's oral statement at the first Panel meeting, para. 31). Comment.

To both parties

17. What is the relationship between: (i) Articles 5.2 and 5.3; (ii) Articles 5.2 and 5.8; (iii) Articles 5.2 and 6.2 -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.

Given that Brazil's claims were based on the non-confidential version of the Application, Brazil withdraws its claims regarding the Application under Issue 2.

18. What is the relationship between: (i) Articles 5.3 and 5.8; (ii) 5.3 and 6.2 -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.

As stated in answer to question 17, Brazil withdraws its claims regarding the Application under Issue 2.

19. Issue 3: "No need to impose measures"

To the EC:

20. According to Brazil, the first "explicit consideration" by the European Communities of the currency devaluation was on 20 July 2000 in the Disclosure Preceding the Definitive Regulation. Does the European Communities agree? Is this relevant? Why or why not?

To Brazil:

21. How, if at all, does the alleged non-disclosure of "detailed information" "showing dumping margins after the devaluation took place" -- "ECSALUR file on the CD-ROM" that the EC Commission states that it supplied to Tupy (but Tupy states that it received 10 pages out of the 97) relate to a violation of Article VI of the *GATT 1994* and Article 1 *AD*?

Brazil referred to this matter under Issue 3 as in Brazil's view the circumstances described in the Panel's question must relate to the EC's failure to attribute adequate importance to the massive devaluation of the Brazilian currency. The implications of this structural change in the Brazilian economy, which the EC recorded, verified and admitted, should have demonstrated to the EC that circumstances had changed to such an extent that there was no need to impose measures to counteract dumping, as it no longer existed. The first alternative claim made by Brazil under Issue 3 concerned the EC's attitude to this. This attitude resulted in an inappropriate imposition of anti-dumping measures where dumping did not exist in the market. Brazil claims that this constitutes a violation by the EC of Article VI of the *GATT 1994* and Article 1 of the AD Agreement.

22. In precisely what way (if at all) did the European Communities "fail… adequately to evaluate the full impact of [the] devaluation" during the IP. (see p. 43, Brazil's first written submission)? Does Brazil agree that the data examined by the European Communities pertaining to the IP established that dumping occurred during the IP? Do Brazil's allegations pertain exclusively to the period *following the end* of the IP, including the period between the end of the IP and the imposition of the measures?

The above statement (BFS para 191) relates to two main considerations dealt with by Brazil in its First Submission. The first concerned Brazil's contention whereby following the devaluation of the Brazilian currency the EC's findings and determinations for the investigation period became obsolete. (As we are not contesting the findings with regard to the POI, this issue is dealt with here). Secondly, as the devaluation took place towards the end of the investigation period and, as verified by the EC, had a lasting effect for a period of more than two months, there were clear consequences, with regard to the need to impose anti-dumping measures where no dumping had taken place, which needed to be counteracted or offset. This relates to the same claim as referred to in Brazil's answer to question 21 above.

As stated above and in Brazil's First Submission (para 158), and also further elaborated on in Brazil's Second Submission (para 26 *et seq*.), Brazil does not deny that the general rule under Article VI of the GATT 1994 and the AD Agreement is that the investigating authority acts in compliance with these principles where the basis for its findings and determination relates to the IP. Nonetheless, Brazil confirms its position whereby, even where the authorities of an importing Member conclude, following a proper anti-dumping investigation, that the formal conditions of the AD Agreement have been met so that anti-dumping measures may properly be imposed, the authorities concerned must still consider whether the circumstances at the time prior to the imposition make that imposition necessary. As stated, it is Brazil's view that in this case, the results of the EC's investigation during the IP became obsolete as a result of the Brazilian devaluation so that measures should not have been adopted on that basis.

With regard to the timing considerations in the Panel's question, Brazil's dividing line is the date of the devaluation. As of that date and in view of the lasting effect of that devaluation, any proper imposition of anti-dumping measures, or a decision to maintain such measures had to be assessed, as the case may be, against the need to offset or counteract dumping.

23. What is the basis for Brazil's argument that the European Communities had an obligation to examine data after the end of the investigation period?

As further elaborated under Issue 3 in Brazil's Second Submission (paras 24 *et seq*.), the obligation to examine such post-IP data arises as a result of the need to assess the situation given two basic requirements that Brazil identifies in this respect. Firstly, in line with Brazil's answer to question 22 above, as there was no need to impose any anti-dumping measures to counteract injurious dumping as this was non-existent after the IP, the EC was under a general obligation not to impose, or at least to withhold measures, in this case. Secondly, as Brazil has observed, the EC has developed its own methodology to deal with situations where exceptional circumstances call for a reconsideration

of measures that could have otherwise been adopted in view of the general findings for the IP (see also BFS paras 165 to 168 and see also Brazil's answer to the Panel's question 35). Thus, in line with the EC's own methodology, in order to assess a post-IP situation, related post-IP data must be examined. The EC failed to apply this methodology with regard to the Brazilian exporter.

24. What is the supporting documentation for the statement that "…the devaluation has made the normal value of the product concerned significantly lower than the export price" (and your statement that dumping had ceased by the end of the IP) in Brazil's first written submission, p. 44. To what time-period does this statement refer?

This statement (BFS 193) is supported by the electronic version of the Brazilian exporter's reply to the EC's Questionnaire ("ECSALUR file on the CD-ROM") which Brazil submitted to the EC and which the EC then used for its subsequent calculations, as also referred to in the Panel's question 21 above.

As has been mentioned, the Brazilian exporter received only 10 pages of the paper version of the EC's treated electronic file, which reportedly contains 97 pages. Neither the Brazilian exporter nor Brazil could therefore verify the EC's full conclusions regarding possible occurrences of dumping after the devaluation on 15 January 1999. Furthermore, Brazil does not know whether these EC findings concerned the full last quarter of the IP i.e. 1 January to 31 March 1999, which would then also cover about two weeks of transactions at pre-devaluation terms, or whether they related to the two and a half months of the post-devaluation period only.

However, an effort to simulate the EC's methodology, as reflected in the 10 available pages of that file (without zeroing dumping margins) and then applying it to the original electronic file which Brazil had kept, has resulted in the conclusions which allowed for the statements referred to in the Panel's Question. The two statements relate to the post-devaluation period *i.e.* from 15 January 1999 to the end of the IP.

By way of general indication, and as the EC calculated the dumping margin in the exporting country's currency, Brazil notes that the average exchange rate established on the basis of EC data for the entire IP, including two and half weeks post-devaluation in the last quarter of the IP, was 1.5, whilst it was 1.3 for 1998, which covered the first three quarters of the IP (see monthly data BFS 173). However, the average exchange rate for the last three months of the IP was 2.1.[17] Official exchange rate data communicated by the Brazilian Central Bank shows a rate of 1.9 by the end of 1999, 1.8 by the end of 2000 and 2.1 by the end of 2001. The devaluation of 41.99 per cent has more than entirely absorbed the dumping margin of 34.8 per cent that the EC established for Brazil.

25. When did Tupy first raise the issue of the devaluation in the course of the investigation -- was it before the verification in September 1999? Cite the relevant portions of the record of the investigation and your submission.

The massive devaluation of the Brazilian currency was at the forefront of the anti-dumping investigation from the very beginning. Indeed, it was the EC who first dealt with the issue. The significance of the Brazilian devaluation was clearly reflected in the detailed exchange rates listing which the EC had sent to Tupy together with its Questionnaire at the time of initiation on 29 May 1999 (BRL-3). Tupy's reply to the Questionnaire, which was delivered to the EC on 8 July 1999 (BRL-4), provided information based on daily exchange rates (which differed from the EC's monthly averages) to mirror the concerns relating to the devaluation. The differences between the EC and Tupy's respective positions were finally settled during the verification visit. This has been confirmed by the EC, for example in its Disclosure Preceding the Definitive Regulation (BRL-16).

[17] See Annex II of the Questionnaire (BRL-3).

ARTICLES 11.1 AND 11.2 AD

To the EC:

26. Does the European Communities believe that the price comparison at the *end* of the IP revealed no, or declining, differences between export price and normal value at the *end* of the period? Explain the significance this has for the establishment of the margin of dumping in the IP as a whole. Provide the legal basis for your response, citing any relevant material.

To Brazil:

27. Is Brazil arguing that the circumstances it describes in its first submission qualify as circumstances where a self-initiated review by the European Communities was "warranted" within the meaning of Article 11.2 *AD*? For what reason(s)?

Yes. Brazil considers that the data, which the EC collected for the Brazilian exporter in relation to more than two months following the massive devaluation of the Brazilian currency, was of a nature which "warranted" such a self-initiated review.

The rationale of the Appellate Body ruling in *US-Carbon Steel*[18] which concerned similar circumstances to those discussed here but with regard to a review of countervailing duties under the SCM Agreement (Articles 21.1 and 21.2), can be transposed, *mutatis mutandis*, to this case. The requirements for a review of countervailing duties are defined in these SCM provisions in similar terms to those which are stipulated in the parallel provisions in the anti-dumping context (Articles 11.1 and 11.2 of the AD Agreement).

According to the Appellate Body (in para 53), "[p]ursuant to [Article 21.1 SCM which parallels Article 11.1 of the AD Agreement], the authorities of a Member applying a … duty must, where warranted, 'review the need for the continued imposition of the duty'. In carrying out such a review the authorities must 'examine whether the continued imposition of the duty is necessary to offset subsidization' and/or 'whether the injury would be likely to continue or recur if the duty were removed or varied'. Article 21.2 provides a review mechanism to ensure that Members comply with the rule set out in Article 21.1."

As held by the Appellate Body (in para 61), "[o]n the basis of its assessment of the information presented to it by interested parties, as well as of other evidence before it …, the investigating authority must determine whether there is continuing need for the application of countervailing duties. The investigating authority is not free to ignore such information. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose." In other words, a review is "warranted" where the information before the investigating authority would suggest, as in this case, that the continuing need for the application of the duty should be re-assessed.

This "triggering" information should be of a "positive" nature, of the kind so as to "substant[iate] the need for a review" (in the sense of Article 11.2 AD) and it should constitute more than a "mere assertion" (in the sense of Article 5.2 AD) so that it would have a similar persuasive value to that required from an "application" under Article 5.2. The information which the EC had before it, given its findings for the two and a half months after the devaluation, was certainly of such a nature.

[18] *US-Carbon Steel Products Originating in the UK, Appellate Body Report*, WT/DS138/AB/R of 10 May 2000, *'US – Carbon Steel AB Report.'*

In Brazil's view the EC "was not free to ignore such information" and has therefore been put under a clear obligation to self-initiate a review. In other words, that information certainly "warranted" a self-initiated review. Moreover, particularly in the circumstances of this case, there was no need for the Brazilian exporter to provide any additional information to the EC to trigger that review.

28. Does Brazil argue that the continued effects of the devaluation upon the European Communities calculations establishing the margin of dumping would be similar or identical after the end of the IP? On what basis?

Brazil confirms that in it's view, the continued effects of the devaluation upon the European Community's calculations establishing the margin of dumping would have been similar after the end of the IP, at least substantially different from the IP. As stated and elaborated in Brazil's reply to the Panel's question 24, and in view of the data collected and verified by the EC for the last 2.5 months of the IP, the effect of the devaluation which more than absorbed the dumping margin which the EC had established for Brazil, continued in practice after the imposition of the definitive duties.

29. Even if the price comparison at the *end* of the IP revealed no, or declining, differences between export price and normal value at the *end* of the period, what significance does this have for the establishment of the margin of dumping in the IP as a whole? Provide the legal basis for your response, citing any relevant GATT/WTO panel or Appellate Body reports. How does your view reconcile, for example, with the requirement in Article 2.4.2 *AD* to perform a weighted average to weighted average comparison?

As stated in Brazil's First Submission (para 158) and also further elaborated in Brazil's Second Submission (para 26 *et seq.*), Brazil does not deny that the general rule under Article VI of GATT the 1994 and of the AD Agreement is that the investigating authority is acting in conformity with the methodologies set out in the AD Agreement. Nonetheless, as further elaborated under Issue 3 in Brazil's Second Submission, the imposition of anti-dumping measures must not be the result of a mechanical action as these may only be imposed in order to counteract and offset dumping in the market.

30. Comment on the EC assertion that there was no certainty whether and how Tupy would reflect the devaluation in its export price.

Brazil does not believe that that statement is well founded. As further elaborated in Brazil's Second Submission (para 34), Brazil would have in fact expected the EC to make an opposite statement. The EC has had before it concrete data provided by the Brazilian exporter in relation to the two and a half months following the devaluation. The EC verified that information, which clearly demonstrates that the Brazilian exporter has not changed its pricing policies as a result of the devaluation.

31. Can Brazil clarify its statement that Tupy requested a "review" after the devaluation and did not get any response from the Commission? Was this request made *after* the imposition of the definitive anti-dumping duties? If the request was made *before* imposition of the definitive anti-dumping duties, does Brazil believe that this would constitute a "review" under Article 11 of the *AD Agreement*?

Tupy has never requested a review. Brazil asked the EC not to impose anti-dumping duties with regard to Brazil as there had been no dumping following the Brazilian currency's devaluation. As further elaborated in its Second Submission (para 36 *et seq.*), Tupy was not in a position to request a review at that stage as the EC's anti-dumping rules do not give exporters a legal right to request such a review. Brazil recalls that that right is available to exporters in the EC only where "a

reasonable period of time of at least one year has elapsed since the imposition of the definitive measure…" (see Article 11.3 of the Basic Regulation, BRL-24).

32. Has Tupy requested a "refund" of the anti-dumping duties following their imposition in light of the alleged impact of the devaluation? If not, why not?

No. Tupy has not imported the product concerned into the EC and may therefore not request a refund of anti-dumping duties. Tupy is not aware whether any of its EC importers requested a refund.

To both parties:

33. What is the meaning of the phrase "*where warranted*" in Article 11.2 *AD*? Provide the legal basis for your answer. Assuming *arguendo* that initiation of a review is "warranted", is there a legal *obligation* to self-initiate a review?

In Brazil's view, the phrase "where warranted" in Article 11.2 of the AD Agreement refers to a situation where the investigating authority has in its possession sufficient information to justify and to give it authority[19] to order the initiation of a review "of the need for the continued imposition of the duty…" Under Article 11.2 such a review is a matter of obligation on the Member concerned (according to Article 11.2, "[t]he authorities shall review…"; emphasis added) where such information is presented to the Member in support of a request for a review or is otherwise available to it. In the present case, such information was made available to the EC through the data which Tupy provided to the EC in the course of the investigation and in view of the EC's verification of that data.

34. Is there any relevant material the Panel might be guided by in its examination of the EC allegations under Article 11.2 *AD*?

Brazil believes that the EC has such relevant material in its possession. This will be the result of its examination of the information that Tupy provided in the course of the investigation, possibly also including the data to which the Panel refers in Question 21 ("ECSALUR file on the CD-ROM").

35. What, if any, is the relevance and role in these proceedings of the EC case-law and practice concerning "changed circumstances" cited by Brazil on pp. 38 *et seq*. of its first written submission?

Brazil believes that the EC case-law and practice concerning "changed circumstances" cited by Brazil in its First Submission (BFS 166-169) is of particular relevance and importance to these proceedings as these demonstrate what the EC can do in such circumstances but chose not do in this case.

[19] The Concise Oxford Dictionary defines "warrant" as "justification or authority", "justify or necessitate."

ISSUES 4 AND 5: "IMPROPER NORMAL VALUE" - "INAPPROPRIATE PRODUCT TYPES"; "INAPPROPRIATE PRODUCT CODES"

To the EC:

36. Could the European Communities thoroughly outline the precise steps it took in calculating normal value, including constructed normal value, in this investigation, citing the relevant parts of the record of the investigation. In responding, could the European Communities clarify what is the "representativeness" test referred to in para. 27 of the Provisional Regulation? Does it correspond to the test foreseen in Article 2.2 and footnote 2 of the *AD Agreement*? If not, where is the basis in the *AD Agreement*?

37. Did the European Communities include data from sales not permitting a proper comparison to calculate SG&A costs? To what extent, if at all, would this be a relevant consideration under Articles 2.2 and 2.2.2 *AD*?

38. Were there any sales to related parties? If so, how were they treated in the application of the methodology under Article 2.2.2 chapeau?

39. Is the Panel correct in understanding that the European Communities constructed the normal value of products with Tupy internal product code "18" by using the methodology set out in the chapeau of Article 2.2.2 (i.e. actual data from sales in the ordinary course of trade for SG&A and profit of types within internal product codes 12, 68 and 69)? If so, how does this relate to the following European Communities statement: "the normal value was constructed based on the cost of manufacture of the exported types so that also for those types no further physical differences existed and therefore no further adjustment was warranted." (Definitive Regulation, para. 43)

40. Comment on Brazil's allegation of the inconsistency between your statement in the Disclosure Preceding the Provisional Regulation:

"- On the domestic market, products starting with a 12, 68, 69 and 79 code were sold. Products starting with 68 and 69 had a different thread (NPT instead of BSP), while 79 products were not threaded. Products with code 68 were also made for higher pressure than other products. *The costs of manufacturing of these products appeared to be different, and most of these products had also market values which were very different.*

- On the EC market, Tupy sold products starting with a 12 code (own brand) and products starting with an 18 code (Nefit brand). Again, *these products appeared to have sometimes very different costs of manufacturing*." (footnotes omitted, emphasis added)

and the position taken in the investigation not to grant adjustments as envisaged by Article 2.4

41. Comment on Brazil's statements on page 60 of its first written submission:

"Consequently, the words "throughout this Agreement" in Article 2.6 when read together with the wording of Article 2.2.2 obliges the investigating authorities to use the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products which are identical, i.e. alike in all respects, to the product under consideration. Only in the absence of such identical products can the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products, which are, although not alike in all respects, having characteristics closely resembling those of the product under consideration. However, in the latter case the investigative authority is obliged to make due allowances in each case, on its merits, for differences in physical characteristics affecting price comparability….."

To Brazil:

42. Comment on the statement by the European Communities at para. 129 of its first written submission that the onus for proposing adjustments falls on the exporter and that since Tupy did not, in the investigation, request an adjustments under Article 2.4 concerning the exclusion of unrepresentative sales in the calculation of the profit margin, the claim is therefore inadmissible.

Brazil disagrees with the EC's interpretation. Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement oblige an *investigating authority* to ensure that a fair comparison between the normal value and the export price of the product concerned is undertaken. This obligation is borne out by the unqualified word 'shall' in Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement. Indeed, the Appellate Body emphasised in *United States – Hot Rolled Steel* that "under Article 2.4, the obligation to ensure a "fair comparison" lies on the investigating authorities, and not the exporters"[20] (emphasis added). Consequently, the question, whether an interested party has identified a difference affecting price comparability or whether an investigating authority has made it, is of no importance as the investigating authority has in any case a positive obligation to ensure that the price comparison fulfils the requirement of fairness. Brazil submits that the EC's claim of inadmissibility should fail.

43. Could Brazil comment on the European Communities statement in para. 141 of its first written submission that Brazil provides no support for its contention that the products in question are not "like", and is indeed prevented from submitting such evidence by Article 17.5(ii)? Did Tupy challenge the findings in the Provisional Regulation, paras. 14-16? Cite to the relevant parts of the record of the investigation.

Brazil submits that Articles 2.6 and 2.2.2 must be given mutually consistent interpretation, particularly in the light of the opening clause of Article 2.6 ("[t]hroughout this Agreement…"). Brazil submits that the exact wording of Article 2.2.2 read together with Article 2.6 makes it clear that where an identical product exists, data relating to its SG&A costs and profits shall be used. Only 'in the absence of such a product' an interpretation that is supported by the word '*or*'' in Article 2.6, may data relating to SG&A costs and profits of a product with closely resembling characteristics be used. The above interpretation applies also in cases where the investigating authority *subdivides* the product concerned into product types, as the EC made in this case. Accordingly Article 2.2.2 oblige the investigating authority to use the actual data for SG&A and for profits pertaining to *identical product types*. Only in the absence of such identical product types, the investigating authority has a right to use the actual data pertaining to *non-identical product types with closely resembling characteristics.*

Given that the product types under internal product code '12' were not identical to those under '68' and '69', Brazil notes that the Brazilian exporter had requested an allowance for the differences in costs and market values.[21] Moreover, due to the significant differences in physical characteristics and in market values between sales of '12', on the one hand, and sales of '68' and '69' on the other, the Brazilian exporter has also requested that the latter codes should be excluded from the data used in the construction. [22] Finally, Brazil recalls that the Brazilian exporter stated that "such product types ['68' and '69'] may constitute", and not that they constitute, the "like product".[23]

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[20] See *United States– Anti-dumping measures on certain hot-rolled steel products from Japan*, WT/DS184/AB/R of 24 July 2001, 'United States – Hot-Rolled Steel AB Report', para 178.

[21] See Tupy's Questionnaire Response (BRL-4); see also Tupy's Reply to the Deficiency Letter (BRL-7). Brazil recalls that the Brazilian exporter sold product types starting with internal product codes '12', '68' and '69' on the domestic market and exported to the EC products with codes '12' and '18'.

[22] See the Fourth Submission of Tupy (BRL-13), pages 34-35.

[23] See the Fifth Submission of Tupy (BRL-17), page 4.

44. Could Brazil comment on the EC statement in para. 141 of its first written submission that "Article 2.4 presupposes that two like products may not be sufficiently similar to be comparable"? Refer to any relevant material in your response.

Brazil disagrees. The term "like product" in Article 2.6, a concept that applies "[t]hroughout this Agreement", refers to either identical products *or*, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. The EC seems to indicate that two different products, which are not even "alike" under Article 2.6, may be used for the purpose of a dumping determination. Brazil, however, submits that the issue of "comparability" under Article 2.4 does not arise in this kind of situation, *i.e.* if two products are neither identical nor have characteristics closely resembling and, thus, as there are two distinct "like" products, there should be two different proceedings under the AD Agreement.

45. Does Brazil believe that the European Communities took cost-based physical differences between the product types in issue into account in constructing normal value? If so, what would the legal basis be for the European Communities to grant additional adjustments for such physical differences under Article 2.4?

Regarding the first sentence of the Panel's question, Brazil does not totally believe so. Although Brazil believes that the constructed normal values for certain product types were based on the cost of production per each product type, Brazil submits that the amounts for SG&A costs and for profits used by the EC in the construction relate not only to the non-identical product types (i.e. the product types starting with internal codes 68 and 69) but also to the product types, which domestic sales were unrepresentative (*i.e.* below 5 per cent of the export sales of the same product type). Consequently, Brazil's claims as developed below (see answers to the questions 46 to 50 and 52) are *not* related to adjustments for physical differences under Article 2.4 but to the amounts for SG&A costs and for profits added to the cost of manufacturing under Article 2.2.2.

Regarding the second sentence of the Panel's question, please see answer to question 42.

46. Could Brazil comment on the EC statement in para. 144 of its first written submission that Brazil has proposed no basis for adjustment other than one that contradicts Article 2.2.2 AD by removing data that have been properly included?

Brazil disagrees with the EC's basic logic. Brazil submits that the only domestically sold product types that the EC should refer to when identifying the amounts for SG&A costs and for profits under Article 2.2.2 for the exported product types '12' and '18' are 566 product types starting with internal product codes '12', which domestic sales were both representative and profitable.[24] Consequently, Brazil disagrees with the EC that the removal of domestic sales of unrepresentative product types from the data used in the construction contradicts Article 2.2.2.

To both parties:

47. What is the relationship between Article 2.2 and the chapeau of Article 2.2.2 *AD*?

[24] For clarification, Brazil recalls that the Brazilian exporter sold product types starting with internal product codes '12', '68' and '69' on the domestic market and exported to the EC products with codes '12' and '18'. The Brazilian exporter had repeatedly claimed the exclusion of data related to product unrepresentative product codes from the construction: see the Fourth Submission of Tupy (BRL-13), pages 34-35; in particular see the Post Hearing Document (BRL-15); and the Fifth Submission of Tupy (BRL-17) page 4.

Article 2.2 permits the calculation of normal values on the basis of, *inter alia*, constructed normal values if the domestic selling prices have been found to be unreliable (*i.e.* "do not permit a proper comparison"). Brazil submits that Article 2.2 is an *overarching provision* informing the more detailed obligations in succeeding paragraphs concerning construction. Therefore, the finding of 'unreliability' under Article 2.2 restricts the investigating authority's subsequent identification of the amounts for SG&A and for profit to product types for which domestic sales do permit a proper comparison. Indeed, Brazil recalls the Panel's findings in *EC-Cotton Yarn* that "there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison"[25] and submits that low volume *affects* the domestic sales themselves in such a way that they would not permit a proper comparison in succeeding paragraphs concerning constructed normal values.

Brazil notes that the AD Agreement does not define the term "in the ordinary course of trade"[26]. Consequently the chapeau of Article 2.2.2 providing that the amounts for SG&A costs and for profits are to be determined on the basis of "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" is open to interpretation. Brazil also notes that Article 2.2.2 makes no explicit reference to any notion of 'representativity' within the meaning of Article 2.2 and footnote 2 thereto. However, Brazil submits that in case the investigating authority excludes the data under Article 2.2, it follows as a matter of construction that the same data should be excluded under Article 2.2.2.

Indeed, the intention of the drafters of the AD Agreement cannot have been to allow a situation where the investigating authority decides to construct the normal values in respect of sales of product types, which do no permit a proper comparison, and to use data, which do not permit a proper comparison, to construct the normal values for sales of the same product types. Therefore, to avoid unnecessary, inconsistent and incoherent situation whereby the data relating to sales not permitting a proper comparison are used to construct a normal value permitting a proper comparison, Article 2.2.2 (when read together with Article 2.2) requires that the amounts for SG&A and for profits should be based on the data of *representative* and *profitable* domestic sales. Brazil observes that also the EC accepts this interpretation.[27]

The above interpretation is also supported by the rationale underlying "construction". The constructed normal value is to serve, as *a substitute* for the use of domestic prices, in other words, what it would be if the product under investigation or a type of such a product *had been sold* in the domestic market in the ordinary course of trade. Given that the profit margins associated with low volume domestic sales for which product types are normally produced on the basis of atypical specifications are unrepresentatively high, the inclusion of these margins in the data to be used in the construction would be against the idea of construction or "substitution".

Therefore, Brazil submits that the EC violated Article 2.2.2 by including to the amounts for SG&A and for profits used in the determination of constructed normal values actual data pertaining to production and sales of product types, for which domestic sales were *not* representative within the meaning of Article 2.2 and footnote 2 thereto. Indeed, the only domestically sold product types that

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[25] *'EC – Cotton Yarn'*, para 478.

[26] See *'US-Hot-Rolled Steel AB Report'*, para 139 where the Appellate Body explicitly stated that the AD Agreement "does not define the term "in the ordinary course of trade"".

[27] See the EC's statement in '*EC – Bed Linen*' that "India assumes … that the EC authorities, when requiring that the data used in applying Article 2.2.2(ii) should be subject to the "ordinary course of trade" principle, is relying on the chapeau to Article 2.2.2. It is true that the chapeau reflects this principle, but the basic principle is expressed in Article 2.2. In fact, it is a two-part principle: data associated with sales that are *unprofitable* , or are *unrepresentative*, are not reliable. For reasons of consistency, this principle applies to all the provisions coming within Article 2.2, including Article 2.2.2(ii)"; see the First Submission and Request for Preliminary Rulings of The European Communities (27 March 2000), para 152; see also the Panel report in '*EC – Bed Linen*', para 6.79.

the EC should refer to when properly constructing normal values under Article 2.2.2 for the exported product types '12' and '18', are 566 product types starting with internal product codes '12', for which domestic sales were both representative and profitable.

48. Is the meaning of "proper comparison" in Article 2.2 *AD* the same as "fair comparison" in Article 2.4 *AD*? Provide the legal basis and substantiation for your response, with reference to all relevant provisions in the *AD* (and, if necessary, other) Agreement.

No, they are two different c oncepts. While "proper" relates to the "quality" of the data to be gathered in order to compose the set of comparable elements, "fair" regards the necessary equity on the part of the investigating authorities to compare the elements once they are properly gathered.

49. What is the nature of the reference in Article 2.2 *AD* concerning "sales [that] do not permit a proper comparison"? Is it merely a threshold to guide the decision whether or not to proceed to constructed normal value, or is it also a consideration to be taken into account in constructing normal value? What is the basis for your response, using the customary rules of interpretation of public international law?

Looking first at the text, Brazil notes that Article 2.2 allows the investigating authorities to use either constructed normal value or third country sales as the basis of the normal value where normal value cannot be established on the basis of domestic selling prices. The latter situation would arise where the available domestic sales had taken place in the ordinary course of trade but do not permit a proper comparison. In view of the Panel's findings in *EC-Cotton Yarn* that "there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison"[28], Brazil submits that low volume *affects* the domestic sales themselves in such a way that they would not permit a proper comparison. Consequently, Brazil submits that Article 2.2 is not just a *threshold* to guide the decision whether or not to proceed to construct normal values but an *overarching provision* informing the more detailed obligations in succeeding paragraphs concerning constructed normal values. Indeed, Article 2.2 obliges the investigating authority not to use data denoting to unrepresentative domestic sales under Article 2.2.2.

50. Would the removal of sales of such a low volume as to not permit a proper comparison within the meaning of Article 2.2 *AD* contradict Article 2.2.2 *AD* by removing a category that should properly have been included in the calculation?

Yes. As stated in answer 47 above, Brazil submits that Article 2.2.2 (in light of Article 2.2) requires the investigating authority to base the amounts for SG&A and for profits in the construction of normal values on the data of *representative* and *profitable* domestic sales of the identical product types, if available. Indeed, Brazil submits that Article 2.2 *precludes* the use under Article 2.2.2 of data denoting to the domestic sales not permitting a proper comparison. Consequently, if the investigating authority excludes the data under Article 2.2, it follows as a matter of construction that the same data should be excluded under Article 2.2.2.

51. Does the definition of "like product" apply among types falling within the scope of the like product? Provide the basis for your reasoning.

Yes. Looking first at the text, Brazil notes that "the like product" in Article 2.6, a concept which applies "[t]hroughout this Agreement", refers to "a product which is identical, …or in the absence of such a product, another product which,… has characteristics closely resembling those of the product under consideration" (emphasis added). Brazil disagrees with the EC, which suggests that two different products, which are neither identical nor have even characteristics closely resembling,

[28] See '*EC – Cotton Yarn'*, para 478.

may still be sufficiently similar to be comparable for the purpose of a dumping determination. Brazil submits that in that case there should also be two different proceedings under the AD Agreement.

Conversely, in cases where the investigating authority sub-divides the like product into product types for dumping determination purposes, a practice which is not contested by Brazil, the AD Agreement provides only one concept for "the like product". As stated in answer to question 43, the wording in Article 2.2.2, when read together with the wording in Article 2.6, implies that a hierarchy exists between the type of data that can be used to construct normal values for different product types. Accordingly Articles 2.2.2 and 2.6 oblige the investigating authority to use the actual data for SG&A and for profits pertaining to *identical product types*. Only in the absence of such identical product types, the investigating authority has a right to use the actual data pertaining to *non-identical product types with closely resembling characteristics*.

52. How do the parties respond to the US statement in its written third party submission that an improper calculation of constructed normal value cannot constitute a breach of Article 2.4 *AD*, and that a putative breach of Article 2.4 *AD* cannot be used to bolster a claim under Articles 2.2 and 2.2.2 *AD*?

Brazil does not agree with the US statement. As stated in answer to question 47 above, Brazil submits that the EC violated Article 2.2.2 by including to the amounts for SG&A and for profits used in the determination of constructed normal values actual data pertaining to production and sales of product types, which domestic sales were *not* representative within the meaning of Article 2.2 and footnote 2 thereto. However, in case the amounts for SG&A costs and profits under Article 2.2.2 pertain to production and sales of non-representative product types then Brazil cannot see how the investigating authority could make a fair comparison using data considered not to permit a proper comparison.

53. Comment on the statement by the European Communities at para. 127 of its first written submission that "…both SG&A and profit were based on the 1260 types of the like product sold on the domestic market".

This statement confirms that the EC violated Article 2.2.2 as the EC recognises that, in the construction of normal values, it used profit margins and SG&A costs associated with not only product types, which were not identical, but also product types found by the EC's investigating authorities not to permit a proper comparison.

ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"

To the EC:

54. Does the European Communities believe that the IPI Premium rates applicable to exported products were established by Resolution no. 2 of 17 January 1979 of the *Exportation Incentive Commission* ('Resolution no. 2') attached to the Ministry of the Inland Revenue and that Resolution no. 2 established an IPI Premium Credit of 20 per cent for fittings under which the definition of the like product in this investigation falls? (Brazil first written submission, p. 78).

[To both parties]:

Was this legislation on the record of the underlying *AD* investigation?

Resolution No 2 of 17 January 1979 was not part of the record. However, the Brazilian law-edict No 491 dated 5 March 1969, translated into English, was provided to the EC in Tupy's Questionnaire Response.[29]

Brazil recalls the EC's statement that it would "further investigate this issue in order to establish the exact amount of indirect taxes which was actually refunded on export sales made to the Community and at the same time borne by the like product concerned when consumed in Brazil".[30]

In view of the above, the Brazilian exporter presumed that the EC would "further investigate" the issue of internal taxes and presumed that it would have an opportunity to provide more information regarding the Brazilian legislation, if needed. Brazil recalls that the definition given in the Concise Oxford Dictionary for "investigate" is "to make a careful study of (a thing) in order to discover the facts about it". However, in the Disclosure Preceding the Definitive Regulation, without making any further investigation, the EC confirmed the rejection of the IPI Premium Credit.[31]

To the EC:

55. With reference to the record of the investigation, can the European Communities substantiate its statement in para. 153 of its first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary?

56. How does the European Communities reconcile the statements in paras. 153-156 of the EC's first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary, but that the EC investigating authorities denied an allowance in respect of the IPI Premium Credit as Tupy did not demonstrate that this credit "compensated" for internal taxes "borne by the like product "when destined for consumption" on the Brazilian market within the meaning of Article VI:4 of the *GATT 1994*.

57. On what basis does the European Communities justify the use of data relating to the 20 "most exported types" of the product concerned in calculating the adjustment for PIS/COFINS?

58. Can the EC direct the Panel to where in its first written submission it describes the methodology used to calculate the PIS/COFINS adjustment? Is this methodology outlined in paras. 237-239 of its first submission? Is the relevant Deficiency Letter sent to Tupy during investigation in Exhibits BRL-6 and 7?

To Brazil:

59. Why does Brazil / Tupy believe that the method used by the European Communities (the use of data relating to the 20 "most exported types" of the product concerned) was unreasonable or inconsistent with the *AD Agreement*? Is it because it was only pertaining to approximately 33 per cent of total quantity exported, or to the 20 most exported types, or…?

Brazil submits that the EC's approach was inconsistent with the AD Agreement. Brazil recalls that the Brazilian exporter had provided in the Questionnaire Response listings of all sales transactions of the product concerned on the domestic market and to the EC in the IP. Thus, the information needed for a full and complete analysis was available to the EC but the examination was

[29] See Tupy's Questionnaire Response (BRL-4), Section G 2.2.

[30] Disclosure Preceding the Provisional Regulation (BRL-11), pages 7-8; see also Provisional Regulation (BRL-12), recital 47.

[31] Disclosure Preceding the Definitive Regulation (BRL-16), page 7, the Definitive Regulation (BRL-19), recital 46 and the Transparency Letter (BRL-18), pages 4-5.

limited to the 20 "most exported types". Brazil submits that this limitation is inconsistent with the AD Agreement and effectively amounts to a *punitive* methodology.

Brazil claims that the EC's approach lacks any legal support in the AD Agreement. Firstly, it is within the rights of an investigating authority under Article 6.8 to disregard the information provided by an interested party and base its calculations "on the facts available". However, Brazil recalls the EC's statement that "[a]lthough it could be argued that a claim of 20 per cent compared to a justified claims of 0.88 per cent is misleading in the sense of Article 18(1) of the Basic Regulation [Article 6.8 of the AD Agreement] and could therefore be totally rejected, the Commission services have decided, given the complexity of the issue, to grant nevertheless an adjustment corresponding to 0.88 per cent of the domestic sales prices".[32] Consequently, Article 6.8 is for all intents and purposes irrelevant as the EC itself expressly held that that the 'facts available' method has not been applied.

Secondly, Brazil notes that Article 6.10 contains specific provisions that explicitly address the use of sampling techniques in anti-dumping investigations, that is, where the investigating authorities have limited their investigation to a selective group of, *inter alia*, types of products. Brazil, however, submits that that the EC has never invoked Article 6.10 as a legal basis for its approach.

With regard to "allocation", Brazil notes that the ordinary meaning of "allocation" is "to allot": *inter alia* "to distribute officially". Given that all of the determinations should be based on the relevant substantive provisions of the AD Agreement, the only Article, which might provide the legal basis for the EC's approach "to distribute officially", is Article 2.2.1.1. In general, Brazil notes that the issue of "allocation" only normally arises in a situation where it is not possible to identify "a discrete item of cost with a cost centre and it is necessary to split a cost over several cost centres on some agreed basis".[33] However, although Article 2.2.1.1 provides rules for the allocation of costs, where the issue of allocation might be relevant, Brazil submits that Article 2.2.1.1 does not provide any legal base for the allocation of prices.

Consequently, Brazil submits that the investigating authorities might deviate from the data submitted on the basis of Articles 6.8 and/or 6.10. However, given that the EC's methodology is not based on these provisions and, irrespective of the fact of whether the data used pertains "to approximately 33 per cent of total quantity exported, or to the 20 most exported types", the EC's approach of quantifying the price difference and of limiting the allowance of PIS/COFINS to 0.88 per cent lacks any legal support in the AD Agreement.

60. Could Brazil comment on the EC statements in para. 148 (and 162) of its first written submission that "…Article VI and the Agreement form an inseparable package of rights and obligations" and consequently "the rules laid down in Article 2.4, notably those regarding burden of proof also extend to Article VI?

Brazil agrees. Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement oblige an investigating authority to ensure that a fair comparison between the normal value and the export price of the product under investigation is undertaken. This obligation is borne out by the unqualified word 'shall' in Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement.

The chapeau of Article 2.4 states that "[a] fair comparison shall be made between the export price and the normal value". Brazil recalls the Appellate Body's dictum in *United States – Hot Rolled Steel* that "[w]e would … emphasize that, under Article 2.4, the obligation to ensure a "fair comparison" lies on the *investigating authorities*, and not the exporters".[34] Moreover, Brazil recalls

[32] See the Disclosure Preceding the Definitive Regulation (BRL-16), page 7

[33] See Lucey, Costing, 5th edition, 1996, page 12.

[34] *'United States – Hot-Rolled Steel'*, para 178.

the Panel's findings in '*Argentina – Tiles*' that the obligation of fairness "means at a minimum that the authority has to evaluate identified differences in … to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement".[35] Consequently, the question, whether an interested party has identified a difference affecting price comparability or whether an investigating authority has made it, is of no importance as the investigating authority has in any case a positive obligation to ensure that the price comparison fulfils the requirement of fairness.

Given that the first sentence of Article 2.4 creates a fair comparison obligation independent of the other requirements in Article 2.4, Brazil submits that the last sentence of Article 2.4 ("burden of proof") must be read against the backdrop of this basic principle. Moreover, the issue of whether specific allowances should be made depends in any case very much on the factual circumstances surrounding the case. However, as the non-neutralised differences in taxation would automatically create a distorted dumping margin, Brazil submits that it was fundamentally unfair to penalise the Brazilian exporter for an event that is beyond its control, such as taxation.

61. Could Brazil comment on the statement in para. 175 of the EC first written submission concerning the difference of 8,721,250 real being booked as a reserve for losses?

With regard to the issue of the difference in booking of the amounts of R$31.812.500 and R$23.541.250, the EC claims that the difference of R$8.271.250 was "booked as a reserve for losses".[36] This is a mistake made by the EC. Brazil stated in its First Submission that the said difference is to be understood "in the context of the delays incurred by the inspection of the fiscal authorities and also with regard to expenses involved with those proceedings".[37] Indeed, the difference of R$8.271.250, which was related to the expenses of tax proceedings, was transferred to the reserve. These expenses occurred but were not formally reported in 1998 and were expected to be reported after the close of 1998.

62. Could Brazil comment on the EC statement in para. 232 of the EC first written submission that "…Brazil is assuming that insofar as investigating authorities infringe Article 6 in regard to the process of comparing export prices and normal value they will have failed to make a proper comparison between the two and will therefore have acted inconsistently with Article 2.4." What is Brazil's view of the legal relationship between the cited provisions of Article 6 and Article 2.4?

Brazil submits that an infringement of a procedural rule does not necessarily constitute an infringement of a substantive rule, and *vice versa*.

63. Did Law 9363 and the formula referred to by Brazil at p. 83 of its first written submission form part of the record of the underlying *AD* investigation? Cite to the relevant parts of the record. Comment on the statement in para. 238 of the EC's first written submission that they are therefore "inadmissible in accordance with Article 17.5(ii)" of the *AD Agreement*. Cite any relevant material in your response.

Law 9363 and the said formula, which relate to the quantification of PIS/COFINS, were *not* provided to the EC during the course of the investigation. However, the issue is without relevance as the EC identified that the amount of PIS/COFINS refunded to the Brazilian exporter was R$2,491,000 in the IP. [38]

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[35] See *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R of 28 September 2001, 'Argentina – Tiles', para 6.113

[36] ECFS, para 175.

[37] BFS, para 316.

[38] See the Disclosure Preceding the Provisional Regulation, Annex II, page 7 (BRL-11), the Disclosure

64. Could Brazil comment on the statement in EC' s first written submission para. 244: "…there is no reason to believe that the result was less favourable than one resulting from the use of complete data."

Brazil disagrees. Brazil submits that the EC's approach effectively amounts to a punitive methodology. Brazil recalls that the EC's findings that the Brazilian exporter "received on a total amount of 159.335.000 real exported 2.491.000 real returned PIS/COFINS taxes paid on materials used for the production of exported goods".[39] The EC also found that this amount "represents 1.56 per cent of the value of total export sales". However, referring to the price difference between the domestic and export prices, the EC decided that "the amount of the PIS/COFINS tax refund would be limited to 0.88% of the domestic sales values".[40] The price difference was a result of the EC's calculation that "the export prices to the Community were on average 43.5 per cent lower than the domestic sales prices (based on the 20 most exported types, see annex 7)".[41]

By following the EC's methodology exactly, Brazil calculated that the price difference between the domestic prices and the export prices based on the 40 most exported types is not 43.5 per cent, but 41.4 per cent. Consequently, there are indications that the EC's statement that "…there is no reason to believe that the result was less favourable than one resulting from the use of complete data" is factually incorrect. Moreover, Brazil submits that all of the methods used by the investigating authority in its determinations should be reasonable, logical and not be based on chance. Indeed, the method used by the EC was inherently unfair as it created fundamental uncertainty and unpredictability.

65. **Could Brazil explain how and on what basis Tupy arrived at the estimated credit PIS/COFINS of 5.35 per cent?**

Brazil submits that the Brazilian exporter received under the Brazilian legislation a refund of PIS/COFINS amounting to 5.37 per cent over input, *i.e.* raw materials, packaging and other process materials, of the exported final product. This refund is based on Law no. 9363, edited on 13 December 1996 which in the relevant part provides that "[t]he fiscal credit will be the result of the application of the percentage of 5.37 per cent to the calculation basis defined in this article". This refund was also indicated by the Brazilian exporter in its Reply to the Deficiency Letter.[42]

To both parties:

66. What considerations could guide a panel's examination of type by type analysis under the *AD Agreement* and the EC's use of the 20 "most exported types" in calculating the adjustment for the PIS/COFINS credit? Refer also to any other relevant material. Address the legal relevance, if any, of footnote 1 to the *SCM Agreement* to this issue.

In general Brazil is not opposed to a "type-by-type" analysis. Indeed, depending very much on the facts surrounding the case, such an analysis might be appropriate. However, Brazil submits that following the definition of the product, an investigating authority is bound to treat that product consistently thereafter, in accordance with that definition.

Preceding the Definitive Regulation, Annex II, page 7 (BRL-16) and the Transparency Letter, pages 4-5 (BRL-18).

[39] See the Disclosure Preceding the Provisional Regulation (BRL-11), page 7.
[40] See the Disclosure Preceding the Definitive Regulation (BRL-16), page 7.
[41] See the Disclosure Preceding the Provisional Regulation (BRL-11), page 7.
[42] BFS, para 328.

Secondly, as stated in answer to question 59 above, the EC's method of using the 20 "most exported types" in calculating the adjustment for the PIS/COFINS credit lacks any legal basis in the AD Agreement. Brazil recalls that the Brazilian exporter had provided in the Questionnaire Response listings of all sales transactions of the product concerned on the domestic market and to the EC in the IP. The EC disregarded this data. Regarding the legal basis of this approach, Brazil submits that Article 6.8 is irrelevant as the EC itself expressly held that that the facts available have not being applied. Moreover, the EC has never invoked Article 6.10 as a legal basis for its approach. Finally, Brazil denies that Article 2.2.1.1 provides any legal base for the allocation of *prices*.

With regard to footnote 1 to Article 1 of the SCM Agreement, Brazil agrees with the EC that indirect taxes compensated "in excess of those, which have been accrued" may be a subsidy. However, Brazil denies the relevance of footnote 1 to the SCM Agreement under the AD Agreement. Firstly, Article VI:4 of the GATT 1994 and Article 2.4 of the AD Agreement contain a requirement that the comparison between the normal value and the export price is tax neutral. Secondly, although the SCM Agreement and the AD Agreement are part of an "inseparable package of rights and obligations" of the WTO, the AD Agreement should not be reduced to the SCM Agreement in a way that would deprive either Article VI or the AD Agreement of their own meaning. Thirdly, although both of the aforementioned Agreements are part of the WTO package, the obligations under these Agreements are distinct. Had the Members intended to merge these Agreements, they would have done so. Consequently, the EC's *argumentum e silentio* – type suggestion that if something is "only briefly mentioned in the AD Agreement" but "receives considerable attention in the SCM Agreement"[43], obligations in the former should be interpreted or even replaced by the latter, is without any legal basis and should be rejected.

67. In respect of Issues 6 & 10, to what extent does the EC method of calculating adjustments relate to the concept of "sampling"? Is this more an issue of "allocation"? Please explain, referring to any relevant provisions of the *AD Agreement.*

Brazil's answer is the same as to question 59 above. In essence, Brazil recalls that the EC had at its disposal the full sales data provided by the Brazilian exporter.[44] Neither did the EC invoke Article 6.8 (the "best information available") or Article 6.10 ("sampling") as a legal basis for its approach. Furthermore, Article 2.2.1.1 does not provide any legal basis for the allocation of prices.

Consequently, Brazil submits that the EC's approach to quantify the difference between the domestic and the export prices on the basis of the 20 most exported types and to limit the allowance of PIS/COFIN to 0.88 per cent, lacks any legal basis in the AD Agreement.

68. Comment on the statement in the disclosure preceeding the provisional regulation (Annex II , pp(7&8) that " … only 23.541.250 Real was booked , because the credit will not be used in the next few years due to the fact that the company is still entitled to tax credits foe losses carried forward."

As stated in answer to question 61, with regard to the issue of the difference in booking of the amounts of R$ 31.812.500 Real and R$ 23.541.250, the EC claims that the difference of R$ 8.271.250 was "booked as a reserve for losses".[45] This is a mistake made by the EC. Brazil stated in its First Submission that the said difference is to be understood "in the context of the delays incurred by the inspection of the fiscal authorities and also with regard to expenses involved with those

[43] ECFS, para 164.

[44] See the Disclosure Preceding the Provisional Regulation (BRL-11), page 7.

[45] ECFS, para 175.

proceedings".[46] Indeed, the difference of R$ 8.271.250, which was related to the expenses of tax-related proceedings, was transferred to the reserve. These expenses occurred but were not formally reported in 1998 and were expected to be reported after the close of 1998.

ISSUE 7: "NO PROPER ADJUSTMENT FOR ADVERTISING AND SALES PROMOTING EXPENSES"

To the EC:

69. What supporting documentation underlies the statement: "Similar commissions were paid for similar purposes to Tupy Europe for export transactions with other clients" (in the Disclosure Preceding Definitive Regulation)?

70. Did the advertising expenses at issue relate to export transactions of Tupy specifically involving pipe fittings?

71. Does the European Communities agree that advertising expenses might form the basis for an adjustment under Article 2.4 AD? Refer to any relevant material.

To Brazil:

72. Could Brazil comment on the EC statement that "Tupy Brazil paid 15 per cent commission to Tupy Europe on invoice NR 11113 for sales to JANNONE Italy." (Disclosure Preceding Definitive Regulation) Does Brazil believe that certain commissions were paid to Tupy Europe in relation to sales to unrelated clients and that these included costs relating to advertizing and promotion of Tupy on the EC market? Were Tupy's export sales of pipe fittings to the European Communities affected by these advertising expenses? How, if at all, did Tupy demonstrate this to the European Communities in the course of the investigation?

Given the information that the EC has now provided, that the domestic price level used to determine normal values does not include advertising expenses, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

73. On pp. 88-89 of Brazil' s first written submission, Brazil state that "advertising and sales promoting costs were reflected in the domestic sales price while they were not in practice reflected in the EC sales price….". What is Brazil's basis for this statement, and how was this brought to the attention of the European Communities in the course of the investigation? Cite to the relevant portions of the record and submit, if necessary, any additional relevant information on the record of the investigation that is not currently before the Panel.

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

74. In Tupy's questionnaire response, does the phrase "calculation for adjustment in the transaction by transaction was done by the ratio total expenses/total quantity" refer specifically to expenses and quantity associated with sales of *pipe fittings* or with all products produced by the company?

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

75. Could Brazil comment on the EC statements in para. 190 of its first written submission that:

[46] BFS, para 316.

> "although Tupy acknowledged that part of the payments to Tupy Europe were for promotional and advertizing activities, it implied that the EC investigators should calculate the extent of those payments. This is to reverse the responsibilities that are established in the AD Agreement…"?
>
> and (at para. 208 of the EC first written submission): "the burden of proof in the application of Article 2.4 lies on the party requesting the allowance".

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

76. Could Brazil comment on the EC argument in para. 193 of its first written submission that even if Tupy had properly claimed and justified an allowance for advertising expenses, such an adjustment would not have been permitted under Article 2.4, as it would have effectively duplicated the adjustment granted for level-of-trade differences?

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

ISSUE 8: "NO PROPER ADJUSTMENT FOR PACKING COSTS"

To the EC:

77. In the Disclosure Preceding the Definitive Regulation, the European Communities stated "…the estimation of labour costs was not supported by evidence, although evidence was asked during the on-the-spot verification…" Can the European Communities provide evidence of this request for evidence during verification ? Cite to the relevant portions of the record of the investigation.

To Brazil:

78. How does Tupy determine and handle which products will go to domestic sales as opposed to export sales *before* a sale is made? Is there any differentiation in handling or treatment (i.e. for a product that is sold on both the domestic and foreign markets (i.e. "12"))?

Regarding the domestic market, the Brazilian exporter's production is driven by production schedules and is *not* based on orders.[47] Packaging of domestically sold products takes place in two stages. Firstly, the product concerned is placed loosely in open boxes and stored in a warehouse. When an order is received, the amount of fittings (of each type) that are required are picked from the warehouse and re-packaged for the customer (the second stage). Given that export sales to the EC were driven by individual orders and no stocks were kept[48], the only packing stage that is relevant is the second stage. Consequently, the costs (materials, labelling and labour etc.) of the first packing stage do not apply to the exported product.

[47] See Tupy's Questionnaire Response (BRL-4), Section D-E, subsection 5 where the Brazilian exporter states that "[p]roduction starts pursuant to a normal production schedule of the company, based upon information received from the market"; see also Section G-2, subsection 10.2 where it states that "[t]he sales for the DM [domestic market] is based on available stock".

[48] See Tupy's Questionnaire Response (BRL-4), Section D-1 where the Brazilian exporter states that "4th step – when customer confirm the proforma we start the production"; see also Section G-1, subsection 8.2 where it states that "[t]he sales for the EC countries is against order confirmation" and that "[t]his means there is no stock kept for the foreign orders registered for production" and Section D-1.5.

79. Does Brazil believe that what it describes as the "first packaging stage" on p. 89 of its first written submission occurs prior to the sale of (or "receipt of an order for") the product? Does Tupy only maintain an in-warehouse "inventory" for domestic sales? If there is a difference in this respect in the way that Tupy treats its domestic and foreign sales, why is the same procedure not followed for foreign sales?

As stated in answer to question 78, packaging of domestically sold products covered two stages. Firstly, the product concerned is placed loosely in open boxes and stored in a warehouse. When an order is received, the amount of fittings (of each type) that are required are picked from the warehouse and re-packaged for the customer (the second stage).

Given that export sales to the EC were driven by individual orders and no stocks were kept[49], the only packing stage that is relevant is the second stage. Consequently, the costs (materials, labelling and labour etc.) of the first packing stage do not apply to the exported product. Consequently, the "first packaging stage" described on p. 89 of BFS occurs prior to the sale of the product. Given that domestic sales are *not* order driven and that production was driven by production schedules, the Brazilian exporter kept stocks of the product concerned for its domestic sales. [50]

With regard to the second part of the question, the answer is yes. As domestic sales are not order but schedules driven, the Brazilian exporter maintained stocks of the product concerned for its domestic sales.

As for the third part of the question, exports sales to the EC were driven by individual orders and no stocks were kept. Thus, the only packaging stage which is relevant is the second and the costs, like materials, labelling and labour of the first packaging stage do not concern the exported product.[51]

80. To what does the phrase "other important cost data" refer in the "Fifth Submission of Tupy"?

Brazil recalls that in the EC refused to allow for differences in packaging costs. This is because it claimed that the Brazilian exporter did not have evidence (or "any evidence") to support its assertions as to how packing costs were allocated ,[52] *i.e.* the Brazilian exporter asserted that it used an "allocation key" whereby 75 per cent of total packing costs were apportioned for domestic sales and 25 per cent for export sales.[53]

Importantly, companies like the Brazilian exporter rarely allocate their costs directly on the basis of the market on which the products have been sold and thus indirect costs should be allocated to the product concerned through the use of a proper allocation key. Cost allocation, even in accounting in general, is a convention. The choice of an appropriate basis for making the allocation is a matter of judgement. The basis that is chosen should ensure that the costs are apportioned fairly and equitably. Indeed, given the *ad hoc* nature of anti-dumping proceedings, in order to respond to the anti-dumping questionnaire, the parties must apportion the costs reasonably, but this will inevitably be done in *ad hoc* –way.

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[49] *Ibid*.

[50] *Supra*, note 47.

[51] *Supra*, note 48.

[52] See the Disclosure Preceding the Provisional Regulation (BRL-11), Annex II, page 5; recital 44 of the Provisional Regulation (BRL-12); the Disclosure Preceding the Definitive Regulation (BRL-11), Annex II, page 6; and the Transparency Letter (BRL-18), page 5.

[53] The Brazilian exporter explained its packing expenses on domestic sales in Tupy's Questionnaire Response (BRL-4), section G.1; the First Submission (BRL-5), paragraph 1.3.4, page 5; the Fourth Submission (BRL-13), page 38; and the Fifth Submission (BRL-17), page 6.

In view of the above, it is important to note that the supporting evidence that the Brazilian exporter had of the use of the allocation key came from the visual inspection of the working activities and practices in the packaging area at the company's premises and the related company documents showing the number of employees in the packaging department. The visual inspection would have made it clear to the EC officials that the packaging process for domestic sales was and is considerably different and more involved than it is for export sales. It would then have been able to judge for itself whether the admittedly estimated 75/25 per cent allocation key had a proper factual basis.

81. Comment on the EC statement in para. 201 of its first written submission that "no data were available either for packing materials, or for working time, that distinguished between foreign and domestic sales." Do Tupy's accounting data permit the separate identification of the cost of labour used for packing export (as opposed to domestic) sales? If so, in what way, and how was this communicated to the European Communities?

Brazil submits that the EC imposed unrealistic pre-conditions for the granting of a relevant allowance. Brazil recalls that the Brazilian exporter had provided in the Questionnaire Response explanations concerning its general accounting system and policy.[54] Moreover, regarding general production processes and costs of production the Brazilian exporter explained that costs relating to "direct manpower" were "apportioned due to the standard "time/man", through cost centre, valued by the timetable rate for each cost centre".[55] However, the Brazilian exporter's accounting data did *not* permit the separate identification of the cost of labour used for packing. The Brazilian exporter did not allocate its costs directly on the basis of the market on which the product concerned was sold and thus indirect costs were allocated for the product concerned by the use of a proper allocation key. In general and as stated in answer to question 80 above, the choice of an appropriate allocation basis is a matter of judgement. The allocation key should ensure that the costs are apportioned fairly and equitably. Indeed, given the *ad hoc* nature of anti-dumping proceedings, in order to respond to the anti-dumping questionnaire, the parties must apportion the costs reasonably but this will inevitably be done in *ad hoc* way. The Brazilian exporter provided the EC with its general accounting principles and also evidence in support of its allocation key in its Questionnaire Response.

82. Brazil also appears on pp. 90-91 of its first written submission to allege that, contrary to Article 12.2 AD, the European Communities failed to make any reasoning clear concerning its unwillingness to accept the 75 per cent/25 per cent allocation for packing costs, but then does not appear to refer to this allegation subsequently under "Issue 19". Does Brazil maintain this allegation?

Brazil withdraws this claim.

To both parties:

83. Would an adjustment under Article 2.4 AD be justified for general costs incurred by a company in maintaining inventory? Does Article 2.4 AD relate to indirect (i.e. "pre-sale") and direct (i.e. "post-sale") packing expenses? Why does Brazil/Tupy believe this method used by the European Communities was unreasonable or inconsistent with Article 2.4 ?

Brazil believes that all of the costs relating to the commercialisation of the product concerned are covered i.e. Article 2.4 does not make a distinction between indirect and direct costs. With regard to the second part of the question, Brazil submits that, the ordinary meaning of the term "any other differences which are also demonstrated to affect price comparability" in. Article 2.4 does not make a distinction between indirect and direct costs. Indeed, Article 2.4 implies that all differences, whether direct or indirect, could affect the price comparability.

[54] See Tupy's Questionnaire Response (BRL-4), Section F.1.
[55] See Tupy's Questionnaire Response (BRL-4), Section F.2, subsection 4a).

The Brazilian exporter did not allocate its costs directly on the basis of the market on which the products were sold and, thus, indirect costs were allocated for the product concerned by the use of a proper allocation key. The choice of an allocation basis is a matter of judgement. The allocation key should ensure that the costs are apportioned fairly and equitably. Indeed, given the *ad hoc* nature of anti-dumping proceedings, in order to respond to the anti-dumping questionnaire, the parties must apply apportion the costs reasonably but this will inevitably be done in *ad hoc* –way. Consequently, Brazil submits that the EC's threshold of "the direct allocation" does not comply with the obligation under Article 2.4 "not to impose an unreasonable burden of proof" on the Brazilian exporter. Moreover, Brazil submits that the EC, by failing to indicate to the Brazilian exporter what information was necessary to ensure a fair comparison, failed to ensure that the price comparability fulfilled the requirement of fairness under Article 2.4.

84. Was the verification visit in this investigation "essentially documentary"? Is an "essentially documentary" verification consistent with the *AD Agreement*? Why or why not?

Brazil, submits that the verification visit in this investigation was exclusively "essentially documentary". From a general point of view, Brazil submits that to respond to an anti-dumping questionnaire is not within companies' normal activity. Given the *ad hoc* nature of anti-dumping proceedings, reasonable *ad hoc* – costing must be applied in order to respond to the anti-dumping questionnaire. There are numerous instances where companies are not able to "demonstrate" or provide "documentation". It might be normal for a company producing many products not to allocate their full costs with regard to, for example, product types. Consequently, Brazil submits that the EC's refusal to accept an "allocation key" ensuring a fair and equitable apportionment of costs was unreasonable. Moreover, Brazil submits that the EC, by failing to indicate to the Brazilian exporter what information was necessary to ensure a fair comparison, failed to ensure that the price comparability fulfilled the requirement of fairness under Article 2.4.

ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"

To the EC:

85. Can the European Communities clarify the meaning of each of the headings of the columns referred to by Brazil in its first written submission (p.96)?

86. Does converting the transport cost figures from the European currency reported by Tupy to Brazilian Reals on the same monthly rate basis as Tupy converted those amounts from Reals to the European currency make any difference to the result of the calculation?

87. Is it the usual practice of the EC to compare the prices used to compare the dumping margin on the basis of the exporter's currency?

88. Was the conversion of the amounts reported by Tupy from the European currency to Reals done only in the case of transport costs?

To Brazil:

89. Why did Tupy convert the amounts reported for transport cost to European currencies?

The Brazilian exporter's export sales of the product under investigation were made and expressed in a currency as agreed between it and the customer concerned. Therefore, normally all of the sales to Italy were made in ITL, to Finland, Sweden, Belgium and the Netherlands in DEM, to the United Kingdom in GPB, to Spain in PTA and to France in FRF. Given that the agreed terms of

delivery with regard to the Brazilian exporter's export sales were 'CIF'[56], all of the items ("cost, insurance and freight") between *ex-factory* (the Brazilian exporter) and the agreed port in the EC were indicated in the currency of the purchase agreement. Consequently, Brazil disagrees with the EC that the Brazilian exporter made unnecessary currency conversions. Brazil also notes that the EC's deficiency letter contains no reference to the alleged unnecessary currency conversions.[57]

90. Does Brazil believe that the amounts resulting from the currency conversion performed by the EC are the same as those that were reported by Tupy before it performed its own conversion?

Brazil's claim with regard to the issue of currency conversions is related to the fact that although the export turnover of each transaction is converted on the basis of the daily conversion rates, as stated by the EC, the allowances reported by the Brazilian exporter in the Questionnaire Response and deducted from export transaction values were not converted on the same basis. Brazil recalls the EC's explicit statement that "daily rates were used for the definitive dumping calculations".[58] However, the EC's conversion of currencies with regard to the allowances (i.e. transport, freight, insurance, charges, credit, warranty, commission) were not based on the table of the daily exchange rates that was collected during the on-the-spot verification. Given that the Brazilian exporter used the exchange rates that prevailed on the day the foreign exchange transaction was settled, on the basis of the Brazilian Central Bank's rates, the currency conversions made by the Brazilian exporter and the EC could not lead to the same amounts.

91. Does Brazil object to the ultimate use by the European Communities of daily exchange rates using the date of the invoice? If so, where is this specific objection evident in the record of the investigation? Can Brazil clarify the meaning of "the date of settlement of the foreign exchange transaction", used by Tupy in its Questionnaire Response?

Brazil is not objecting to the EC's decision to convert currencies into Brazilian Reais by using the daily rates. Regarding the phrase "the date of settlement of the foreign exchange transaction" Brazil recalls that the Brazilian exporter used the exchange rates that prevailed on the day the foreign exchange transaction was settled, on the basis of the Brazilian Central Bank's rates.[59] Given that the Brazilian accountancy rules take the day of settlement as the date for calculating the amount received by the company and the high currency movements during the period considered, the Brazilian exporter reported its export transactions accordingly.[60]

92. Under "Issue 9", is Brazil's objection the allegedly inadequate disclosure by the European Communities of the basis of its currency conversion calculations? If so, on what basis does Brazil believe that this claim involves Article 2.4.1?

Brazil clarifies as follows. Given that the currency conversions were required in order to make a fair comparison between the export price and the normal value under Article 2.4, Brazil is not objecting to the EC's decision to convert currencies into Brazilian Reais but to the manner in which the conversion was carried out for the Brazilian exporter's export transactions. Article 2.4.1 sets forth rules with respect to the conversion of currencies to be applied "[w]hen the comparison under paragraph 4 requires a conversion of currencies" and that "such conversion should be made using the rate of exchange of the date of sale". However, the EC's conversion of currencies with regard to the

[56] This information is part of the record of the investigation; see Tupy's Questionnaire Response (BRL-4), Section H-3.1.

[57] See the Deficiency Letter (BRL-6).

[58] See recital 52 of the Definitive Regulation (BRL-19).

[59] See Tupy's Questionnaire Response (BRL-4), Section G.1.7; see also the First Submission of Tupy (BRL-5), Section 1.3.6.

[60] See the Fourth Submission of Tupy (BRL-13), page 36, para 13.

allowances (*i.e.* transport, freight, insurance, charges, credit, warranty, commission) was not based on the tables of the daily exchange rates that were collected during the on-the-spot verification as stated by the EC. Consequently, as the EC's benchmark to convert currencies related to the invoice values and to the export expenses was not the same, the selective use of the exchange rates cannot be in accordance with Article 2.4.1. In any case the comparison between the adjusted export prices and the adjusted normal values under Article 2.4 was not fair.

93. Did Brazil receive a comprehensive copy of the table it refers to on p. 96 of its first written submission? Comment on the EC statement in the Transparency Letter that the exchange rate could be calculated by dividing the "turnover in real" by the "net invoice value"? Can the relevant date for the exchange rate used be deduced by referring to the exchange rate of the date of the invoice referred to in the third column of the table?

The Brazilian exporter *did* receive a copy of the tables of the daily exchange rates allegedly used by the EC.[61] Brazil submits that the EC's response to the Brazilian exporter's question was improper. Brazil agrees with the EC that a simple division of the column 'Turnover in real' by the column 'Net invoice value', as instructed by the EC, gives an exchange rate used in the conversion of invoice values of the export sales. However, the said response was not proper given that the Brazilian exporter had requested a disclosure of the exchange rates used in conversion by the EC. As stated in answer to question 90 above, this question related to the allowances, which the EC, depending on its findings, deducted from the export transaction prices of the Brazilian exporter and where the currency conversion is not in line with the table of daily rates provided.

94. Could Brazil comment on the EC explanation concerning the exchange rate on a certain date in the EC's first written submission, para. 222?

Brazil agrees with the EC that the turnover of each transaction was converted on the basis of the tables of exchange rates disclosed. However, Brazil submits under Issue 9 that the currency conversions of allowances granted by the EC were not based on the tables disclosed. Brazil observes that the EC tries to downplay Brazil's argument by lengthy explanations. However, Brazil submits that the claim under Issue 9 is not related to one date of exchange rate or one transaction, but the problem underlying the claim which is generic in nature.

ISSUE 11: "NO PROPER DUMPING MARGIN FINDINGS"("ZEROING")

To Brazil:

95. The European Communities calculates the impact of the application of zeroing in this investigation to be 2.73 per cent (i.e. a dumping margin of 34.82 per cent as opposed to 32.09 per cent). Does Brazil believe that this is a "relatively limited impact"? (see EC first written submission, para. 250)

The EC tries to down play the infringement of Article 2.4.2 by alleging that the impact of the zeroing methodology in the present case is not significant. Brazil disagrees with this assessment given that the EC's methodology increases not only the likelihood of a determination of dumping but also the magnitude of the dumping margin that will be concluded. Brazil also points out that the practice of zeroing and the infringement of Article 2.4.2 are inherently unfair and do not allow a fair comparison to be made within the meaning of Article 2.4.

In view of the difference between 32.09 per cent and 34.82 per cent and assuming that the volume and the price of imports from the Brazilian exporter would have remained the same as during

[61] These tables were annexed to the Disclosure Preceding the Definitive Regulation (BRL-16).

the IP and unchanged after the imposition of the definitive anti-dumping duties, the EC importers would have paid 25.154 Euro more each year.

To both parties:

How would this consideration be relevant here?

As the EC has failed to show that the zeroing methodology ensures a fair comparison between the normal value and export price, Brazil believes that the EC's statement of "relatively limited impact" is not relevant here.

ISSUE 12: "NO PROPER CONSIDERATION OF IMPORT VOLUME TRENDS"

To Brazil:

96. Could Brazil comment on the EC statement in paragraph 252 of its first written submission concerning Article 3.1? Does Article 3.1 impose obligations that are additional to those imposed by paragraphs 3.2-3.5 AD? If so, what are those obligations? Would a violation of any of paragraphs 3.2-3.5 *ipso facto* lead to a violation of Article 3.1, or vice versa? Cite any relevant material in your response.

With regard to the EC's argument, Brazil refers to the Appellate Body's findings in *Thailand – H-Beams* that Article 3.1 is "an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination and that this general obligation "informs the more detailed obligations" in the remainder of Article 3.[62] Brazil also recalls that the panel in *Mexico – HFCS* described the relationship between Article 3.1 and Articles 3.2-3.5 by stating that "Article 3.1 is a general provision" and that "[t]he succeeding sections of Article 3.1 provide more specific guidance in the determination of injury". The Panel also stated that "Article 3.2 sets forth factors to be considered with regard to the volume and price effects of imports which Article 3.1 requires to be examined …Article 3.3 establishes the requirements for cumulative analysis… Article 3.4 sets forth factors to be considered in examining the impact of dumped imports on the domestic industry, as required by Article 3.1…Article 3.5 establishes requirements for the analysis of the causal link." (emphasis added).[63]

Brazil understands that Article 3.1 requires the investigating authority's determination to be based on "positive evidence" and involve an "objective examination", which obligation covers also the investigating authorities' examinations under the subsequent sections of Article 3.

Regarding "positive evidence", the Appellate Body in the *United States – Hot-Rolled Steel* case identified that the term relates to "the quality of the evidence that authorities may rely upon in making a determination" where "positive" means that "the evidence must be of an affirmative, objective and verifiable character, and that it must be credible". Consequently, the focus for "positive evidence" is on the facts underpinning and justifying the injury determination.[64] With regard to "objective examination" the same Appellate Body defined that the word "examination" relates "to the way in which the evidence is gathered, inquired into and, subsequently, evaluated" and that the word "objective" indicates essentially that the process of examining "must conform to the dictates of the basic principles of good faith and fundamental fairness". In particular, the Appellate Body specified that an objective examination "requires that the domestic industry, and the effects of dumped imports,

[62] *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, 'Thailand – H-Beams AB Report', paras 90 and 106.

[63] *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, paras 7.118-7.119.

[64] '*United States – Hot-Rolled Steel AB Report*', para 192.

be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation"[65] and that "investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[66]

In the present case, for example, the EC has zeroed the "negative" undercutting margins when calculating an average margin of undercutting. Regarding this EC's practice of zeroing, Brazil submits that the EC's price effect determination under Article 3.2 was not based on "positive evidence" as obliged by Article 3.1. The EC's practice of zeroing the "negative" undercutting margins effectively means that the EC reduces the prices of the exported product types in those comparisons. Specifically, when zeroing, the weighted average price for exported product types is counted as being *equal* to the weighted average price for the EC product types, irrespective of the fact that, in reality, the former is *higher* than the latter. Consequently, the EC's methodology means that it is manipulating the prices of Brazilian exported product types.

Moreover, Article 3.2 directs an investigative authority to consider whether there has been "a significant price undercutting by the dumped imports", *i.e.* whether the actual import prices of the dumped imports have been significantly lower than the actual prices of the domestic industry. As the EC, however, has not used actual but artificial import prices fixed at the level of the domestic industry, the EC's consideration under Article 3.2 was not based on "positive evidence".

Furthermore, the EC's methodology for price effect determination leads to an unacceptable situation, in which an exported product type, which matches the EC product type, will always be equal to the EC industry's prices. Given that this methodology, which increases not only the likelihood of a determination of price undercutting but also the magnitude of the price undercutting, always works to the prejudice of the exporter. Therefore, the EC's methodology is inherently unfair, as condemned by the Appellate Body in *United States – Hot-Rolled Steel*, and does not constitute an "objective examination" under Article 3.1.

As the EC's methodology leads inevitably to the affirmative final determination of price undercutting, the consideration of the effect of the dumped imports on prices in the EC market under Article 3.2 was not based on "positive evidence" and did not involve an "objective examination" as obliged by Article 3.1. Therefore, Brazil opines that the EC has acted inconsistently with both Articles 3.1 and 3.2.

To both parties:

97. How, if at all, do the obligations in Articles 3.2 and 3.3 AD interrelate? Could Brazil comment on the EC statement in paragraph 263 of its first written submission that "…Brazil denies … that cumulation applies in the operation of Article 3.2"?

Article 3.2 requires the investigating authorities to "consider" two factors on a country per country basis while determining injury, *i.e.*, the volume trend of the dumped imports and the effect of the dumped imports on prices (whether there has been a significant price undercutting, price depression or price suppression).

Article 3.3, however, concerns an exceptional case where the investigating authorities may cumulatively assess the effects of the dumped imports "only if" they could satisfy three criteria:, (i) the margin of dumping from each country is more than *de minimis*; (ii) the volume of imports from each country is not negligible; and (iii) a cumulative assessment of such effects is appropriate in light of the "conditions of competition".

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[65] *'United States – Hot-Rolled Steel AB Report'*, para 193.
[66] *Ibid*, para 196.

Firstly, Brazil would like to point out that Article 3.3 (b) refers to "the conditions of competition" and not to "competition", as the EC seems to advocate.[67] The ordinary meaning of "conditions of competition" is "something essential to the appearance or occurrence of the act or process of competing".[68] Brazil thus submits that Article 3.3 directs the investigative authorities to evaluate all relevant economic factors that are specific to the market concerned, such as substitutability, price and non-price factors as well as channels of distribution among which the volume trend of the dumped imports from each country subject to the investigation is, as a function of other determinants of demand, one of the most important factors.

Brazil submits that considerations under Article 3.2, in particular the volume trend of the dumped imports, are essential to inform an investigating authority of the manner in which the dumped imports are competing with each other and with the domestic like product and, although indirectly, of the underlying conditions of competition. In case the volume trends of various imports as considered by an investigative authority under Article 3.2 are pointing in different directions, these dissimilarities are also indications that the conditions of competition for these imports are not the same or similar.

In this respect, given that Article 3.3 obliged the EC not only "to consider" but also "to determine", the EC's statement that it "has demonstrated that it did, in fact, consider the issue of significant volume increase for exports from Brazil considered in isolation"[69] is indicative of the EC's lightweight approach. With regard to the term "determination" (and not "consideration") in Article 3.3, instead of citing the Latin tag *expressio unius est exclusio alterius* the EC should have cited another Latin tag *ut res magis valeat quam prereat* whereby "all provisions of a treaty must be, to the extent possible, given their full meaning so that parties to such a treaty can enforce their rights and obligations effectively".[70]

Indeed, Brazil claims that "if exports from one country are significantly increasing while those from another country are stable or decreasing then they are "competing to different extents and in different ways" and cumulation would not be justified" as quoted by the EC. In view of Brazil's overall position as stated above, dissimilarities in the import volumes are inevitable indications that the conditions of competition of those imports are not the same or similar.

In this context, Brazil disagrees with the United States that "it is not necessary for an authority to consider the significance of the volume and price effects of imports from each individual subject country before it may cumulate imports under Article 3.3".[71] Brazil opines that although Article 3.3 does not explicitly include Article 3.2 as a prerequisite for cumulation, the "conditions of competition" criterion under Article 3.3 (b), which is a prerequisite for cumulation, does cover a broad range of elements to be determined before the cumulative assessment, including the factors that are mentioned under Article 3.2.

Therefore, by failing to determine the volume trend of the dumped imports on a country by country basis, the EC did not satisfy the "conditions of competition" requirement under Article 3.3(b). Consequently, the EC should not apply cumulation to the Brazilian imports.

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[67] ECFS, para 305.

[68] The ordinary meaning of the word "competition" implies the notion of "the act or process of competing" and the word "condition" is "something essential to the appearance or occurrence of something else"; see the Concise Oxford Dictionary.

[69] ECFS, para 301 which is cress referring to para 264.

[70] '*Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R of 31 May 1999; para 9.96 and footnote 327 where the Panel stated that "[t]he principle of effective interpretation or "l'effet utile" or in Latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty".

[71] Oral Statement of the United States, para, 12.

98. Does the data before an investigating authority have to demonstrate that a significant increase in imports from a particular source has occurred during the IP in order to satisfy Article 3.2? What is the significance – if any -- of the term "whether" (rather than "that") in the phrase "consider whether there has been a significant increase in dumped imports" in Article 3.2 AD?

With regard to the first part of the question, Brazil agrees that in order to satisfy Article 3.2, an investigating authority does *not* need to "demonstrate", but has the obligation to "consider", whether a significant increase in imports from a particular source has occurred during the investigating period.

In its First Submission the EC argued that "Article 3.2 has procedural and substantive aspects" and, as regards procedure, that Article 3.2 "requires the investigating authorities to 'consider' the volume and price factors".[72] In other words, the EC argued that Article 3.2 only requires the investigating authority to consider the volume of the dumped imports and not to consider "whether there has been a significant increase in dumped imports".[73] It seems that the EC is confused between Articles 3.2 ("the investigating authorities shall consider whether there has been a significant increase in dumped imports") and 3.1 ("shall be based on positive evidence and involve an objective examination…the volume of the dumped imports…").

Brazil understands that Article 3.1 requires the investigating authorities to examine both volume and price factors which determination should be based on "positive evidence" and involve an "objective examination." With regard to the volume factor under 3.2, the element that the investigating authority should consider is "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member".

Therefore, the fact that the investigating authorities have considered just the volume of the dumped imports is not enough to satisfy the requirements under Article 3.2. They should consider whether there has been a significant increase in the import volume, where Brazil interprets the term "significantly" to refer to the amount of increase in dumped imports. This interpretation is supported, for example, by the findings in the *Thailand – H-Beams* where the Panel stated that "our task is to examine whether the Thai authorities properly established the facts concerning the existence of an increase in dumped imports and evaluated those facts in an unbiased and objective manner"[74] (emphasis added). Brazil submits that the EC did not consider at all whether the dumped imports from Brazil had significantly increased, but assumed that this was unnecessary because imports from Brazil had always been significant.[75]

With regard to the question as to what type of record could show that the investigating authorities have considered whether there has been a significant increase in dumped imports, in absolute or relative terms, the panel in the *Thailand – H-Beams* case has given some examples. This includes the statement made by the Thai authorities in the final determination that the volume of the dumped imports from Poland has "continuously increased" and the non-confidential disclosure tables which show a 10 per cent increase in volume from 1995 to the investigation period as well as other examples.[76]

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[72] ECFS, para 256.

[73] See also Brazilian Oral Statement para 23.

[74] See *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, *'Thailand – H-Beams'*, para. 7.157.

[75] See recital 140 of the Provisional Regulation (BRL-12) and recital 71 of the Definitive Regulation (BRL-19); see also BFS Part VIII and Brazilian Oral Statement para 22.

[76] See *'Thailand – H-Beams'* paras 7.164 - 7.170.

However, in the present case, the EC's statement that the Brazilian imports "were always significant" and "far from being negligible" can only show that the EC has considered the *volume* of imports from Brazil. It cannot demonstrate that the EC has considered whether there has been a significant increase in dumped imports, in absolute or relative terms. Therefore, the EC's practice has violated Article 3.2.

As for the second part of the question, concerning the significance of the term "whether" (rather than "that") in Article 3.2, Brazil notes that there is a difference between the ordinary meanings of the terms "whether" and "that". According to the Concise Oxford Dictionary, "whether" introduces an alternative possibility, whereas "that" gives a more affirmative sense which does not introduce such an alternative possibility. In the context of Article 3.2, the sentence "whether there has been a significant increase in dumped imports" can be translated into "*either* there has been a significant increase in dumped imports *or* there has not been a significant increase in dumped imports". If "whether" is replaced by "that" in Article 3.2, the sentence "consider that there has been a significant increase in dumped imports" would seem to require the investigating authority to establish that a significant increase in imports has occurred.

However, Brazil believes that the term "whether" further enhances the word "consider" in the context of Article 3.2. Namely, the investigating authorities are obliged to "take into account" or "pay attention to" the matter in question. The result of their consideration may be positive or negative. However, in the current case, the key issue is not whether the EC has the obligation to find that there has been a significant increase in dumped imports. The key issue instead is whether the EC has the obligation to give consideration to the question of whether there has been a significant increase in dumped imports.

99. For the purposes of an injury analysis under Articles 3.2 and 3.3 *AD*, is it necessary for a Member to establish that a significant increase in the volume of dumped imports has occurred with respect to imports from exporting countries individually before and/or after proceeding to a cumulative analysis? Why or why not? Comment, including with reference to paragraph 12 of the US oral statement.

As stated in answer to question 97 above, Brazil submits that Article 3.2 requires the investigating authority to "consider" the volume and the price effects on a country by country basis.

Article 3.3, however, raises an exceptional case where the investigating authorities may cumulatively assess the effects of the dumped imports "only if" they could satisfy the dumping, volume and conditions of competition thresholds.

Brazil points out that Article 3.3 (b) refers to "the conditions of competition" and not to "competition".[77] The ordinary meaning of "conditions of competition" is "something essential to the appearance or occurrence of the act or process of competing".[78] Brazil, thus, submits that Article 3.3 directs the investigating authorities to evaluate all relevant economic factors that are specific to the market concerned, such as substitutability, price and non-price factors as well as channels of distribution among which the volume trend of the dumped imports from each country subject to the investigation is as a function of other determinants of demand one of the most important indicators.

Brazil recalls that the Appellate Body's defined in '*Korea – Alcoholic Beverages*' that the phrase "conditions of competition" describes "a particular type of relationship between two products, one imported and the other domestic" and that "[t]he context of the competitive relationship is

[77] ECFS, para 305.

[78] *Supra* note 58.

necessarily the marketplace since this is the forum where consumers choose between different products" and that competition in the market place is "a dynamic, evolving process".[79]

Brazil submits that considerations under Article 3.2, in particular the volume trend of the dumped imports, are essential to inform an investigating authority of the manner in which the dumped imports are competing with each other and with the domestic like product, if any, and, indirectly, of the underlying conditions of competition. Indeed, differing volume trends indicates that the conditions of competition for these imports could not be the same or even similar.

Indeed, Brazil claims that "if exports from one country are significantly increasing while those from another country are stable or decreasing then they are "competing to different extents and in different ways" and cumulation would not be justified", i.e. dissimilarities in the import volumes are inevitable indications that the conditions of competition of those imports are not the same or similar.

Thus, Brazil disagrees with the United States that "it is not necessary for an authority to consider the significance of the volume and price effects of imports from each individual subject country before it may cumulate imports under Article 3.3".[80] Brazil opines that, the "conditions of competition" criterion under Article 3.3 (b), which is a prerequisite for cumulation, does cover a broad range of elements to be determined before the cumulative assessment, including the factors that are mentioned under Article 3.2.

ISSUE 13: "NO PROPER CONSIDERATION OF ALLEGED UNDERCUTTING"

To both parties :

100. What is the significance, if any, of the reference in Article 3.2 AD to "a" (rather than "the") like product? And to domestic "prices" (in the plural rather than singular)?

An investigating authority might find that the "product under investigation" corresponds to more than one like products produced by the domestic industry. For example, it may define imports subject to an investigation as "black heart malleable cast iron tube and pipe fittings" which correspond to two like products produced by the domestic industry: "black" and "white" heart malleable cast iron tube and pipe fittings. In such cases, the term "like product" refers to a like product of "white heart" and a like product of "black heart" malleable cast iron tube and pipe fittings.

In the context of the price effect examination, Article 3.1 refers to "the effect of the dumped imports on price**s** in the domestic market for like product**s**". In this respect Article 3.2 specifies that the investigative authorities shall consider whether there has been significant price undercutting of the dumped imports ("black heart") in comparison with the price of a like product of "black" heart fitting or a like product of "white" heart fitting or, under certain conditions, both.

However, Brazil submits that the wording "throughout this Agreement" in Article 2.6, when read in conjunction with the wording in Article 3.2, obliges the investigating authorities to compare products which are identical, *i.e.* alike in all respects to the product under investigation. Only in the absence of such identical products can the investigating authorities resort to a comparison between products, which have, although not alike in all respects, characteristics closely resembling those of the product under investigation. Consequently, an investigating authority has an obligation to compare "black with black" and only in the absence of such identical products to compare "black with white".

[79] See '*Korea – Beverages AB Report*', para 114.

[80] Paragraph 12 of the Oral Statement of the United States.

In the latter case the investigating authority has an obligation to ensure that the prices of the products are comparable, *i.e.* to neutralise the differences affecting price comparability.

101. **What is the significance, if any, of the reference to " the dumped imports" in Article 3.2 *AD*?**

The wording in Articles 3.1 and 3.2 indicates that a price undercutting must be established for the dumped imports, *i.e.* for the totality of the imports concerned. Firstly, Brazil notes the Panel's finding in '*EC – Audio Cassettes*' that "[t]he number of sales at undercutting prices was particularly important, because it would provide an indicator of the likely number of sales lost by the domestic industry".[81] However, this 'transaction-to-transaction' approach is principally the same as that advocated by India in '*EC – Bed-Linen*' that the volume effect, price effect and consequent impact considerations under Article 3 were related only to those transactions for which a positive dumping margin was calculated.[82] However, the panel disapproved and stated that "investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as "dumped imports" for purposes of injury analysis under Article 3".[83] Consequently, Brazil submits that the phrase "dumped imports" comprises all imports of the product from an exporting producer about whom an investigative authority has made an affirmative determination of dumping.

102. What is the significance, if any, of the EC assertion that the practical result of "zeroing" in the consideration of whether there was significant price undercutting in this case was *de minimis* (0.01 per cent)?

Neither the Brazilian exporter or Brazil are able to verify the accuracy and the adequacy of the EC's calculation. This is because the EC did not disclose any information with regard to the EC producer's prices per product type in cases where the undercutting margin was *negative*, *i.e.* where the Brazilian import price per matching product type was *equal to or higher* than the weighted average price of the comparable EC product type. Indeed, Brazil notes that the EC's price undercutting and underselling calculation, as disclosed, consists of 775 lines corresponding to the same number of matching PCN-codes (product types). Indeed, Brazil notes that out of these 775 types the undercutting margin was "negative" for 247 product types, which represents 32 per cent of the total product types used in the comparison. Finally, Brazil notes that the EC used only "matching types" leaving 40 per cent (in terms of volume) or 30 per cent (in terms of value) of Brazilian exports out of the calculations, but is unable to comment what the numbers would be had the EC used all the types in its calculations.

103. Unlike Article 2 of the *AD Agreement* in relation to dumping, Article 3 contains no specific guidance as to the methodology an investigator may use to consider price undercutting. Comment.

Brazil agrees. However, Brazil submits that all of the particular methodologies applied by the investigating authorities which operate against the basic principles of good faith and fairness are in violation of Article 3.1. The requirement in Article 3.1 to conduct an "objective investigation" on the basis of "positive evidence" obliges the investigating authority, *inter alia*, to conduct a fair comparison between the product under investigation and the like product. It follows that, although Article 3 does not contain an explicit provision for adjustments or allowances, such adjustments or allowances should be made if they are necessary to ensure price comparability. For example, the product concerned may be defined by an investigating authority as a 'passenger car'. Brazil does not believe that a comparison between the actual import price of a four door passenger car (the only

[81] See *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, not adopted, 'EC – Audio Cassettes', para 437; quotes in the EC's First Submission, para 269.
[82] See *EC – Bed Linen*, para 6.121-6.123.
[83] See *EC – Bed Linen*, para 6.139.

imported model) and the actual domestic industry's price of a two doors passenger car (the only domestically produced model) without any adjustments or allowances would constitute an "objective examination". Moreover, irrespective of the fact that Article 3.2 does not explicitly prescribe a particular methodology for a price comparison between the imported product and the domestic product, it is clear that such a comparison, for example at a different level of trade, would not constitute an "objective examination".

ISSUE 14: "NO PROPER CALCULATION OF ALLEGED UNDERCUTTING MARGINS"

To Brazil:

104. Under Issue 14, it seems that Brazil is alleging that by not granting an adjustment under Article 2.4 for the alleged differences in the cost of production of "black heart" and "white heart" fittings, the European Communities consequently necessarily violated Article 3.2 AD? If not, could Brazil explain its allegation?

Brazil regrets the misunderstanding and clarifies that its claim is not related to Article 2.4 but to Article 3.2. As stated in answer to question 103, Brazil submits that, although Article 3 does not contain explicit provision for adjustment or allowances, the basic principles of good faith and fundamental fairness mean that adjustments or allowances should be made if they are necessary to ensure price comparability. Brazil recalls that Article 3.2, when read in conjunction with the wording in Article 2.6, obliges the investigating authorities to compare products which are identical. Only in the absence of such identical products should the authorities resort to a comparison between products, which have characteristics closely resembling those of the product under investigation. Consequently, the EC had a positive obligation to compare "black with black" and only in the absence of such identical products to compare "black with white". However, in the latter case the EC was obliged to account for differences in the quality of the products, which were reflected on the market and affected price comparability, as an adjustment in the price effect examinations. Brazil does not believe that a comparison between the actual import price of a *black* heart fitting and the actual domestic industry's price of a *white* heart fitting without any adjustments or allowances, would constitute an "objective examination".

To both parties:

105. Is there a requirement under the *AD Agreement,* whether in Article 3.2 or elsewhere, to adjust prices before comparison in the context of injury?

Yes. As stated in answer to question 103, Brazil submits that all of the particular methods applied by the investigating authorities under Article 3.2 operating against the basic principles of good faith and fairness are in violation of Article 3.1. The requirement in Article 3.1 to conduct an objective investigation on the basis of positive evidence obliges the investigating authority, *inter alia*, to conduct a fair comparison between the product under investigation and the like product. It follows that, although Article 3 does not contain an explicit provision for adjustment or allowances, such adjustments or allowances should be made if they are necessary to ensure price comparability. Assume that the investigating authority defined the product concerned as a 'passenger car'. Brazil does not believe that a comparison between the actual import price of a four door passenger car (the only imported model) and the actual domestic industry's price of a two door passenger car (the only domestic produced model) without any adjustments or allowances, would constitute an "objective examination". Consequently, irrespective of the fact that Article 3.2 does not explicitly prescribe a particular methodology for a price comparison between the imported product and the domestic product, such a comparison, for example at a different level of trade, would not constitute an "objective examination".

106. Article 3.1 *AD* refers to "prices on the domestic market". Comment, in relation to the nature of the consideration required under Article 3.2 *AD*.

As stated in answer to question 100, an investigating authority might find that the "product under investigation" corresponds to more than one like products produced by the domestic industries. For example, it may define imports subject to an investigation as "black heart malleable cast iron tube and pipe fittings" which correspond to two like products produced by the domestic industry: "black" and "white" heart malleable cast iron tube and pipe fittings. In such cases, the term "like product" refers to a like product of "white heart" and a like product of "black heart" malleable cast iron tube and pipe fittings. In the context of the price effect examination, Article 3.1 refers to "the effect of the dumped imports on price**s** in the domestic market for like product**s**". In this respect Article 3.2 specifies that the investigating authorities shall consider whether there has been significant price undercutting of the dumped imports ("black heart") in comparison with the price of a like product (either "black" or "white" or, in certain conditions, both) of the importing Member.

However, as stated in answer to question 104, Brazil submits that the wording "throughout this Agreement" in Article 2.6, when read in conjunction with the wording in Article 3.2, obliges the investigating authorities to compare products which are identical, *i.e.* alike in all respects to the product under investigation. Only in the absence of such identical products can the investigating authorities resort to a comparison between products, which, although not alike in all respects, have characteristics closely resembling those of the product under investigation. Consequently, an investigating authority has an obligation to compare "black with black" and only in the absence of such identical products to compare "black with white". In the latter case the investigating authority has an obligation to ensure that the prices of the products are comparable, *i.e.* to neutralise the differences affecting price comparability.

ISSUE 15: "NO PROPER CUMULATION OF IMPORTS"

To both parties:

107. What is the meaning of cumulatively assessing the "effects" under Article 3.3 of the AD Agreement? What are the "effects" that can be cumulated and where are these referred to in the other provisions of Article 3? Comment including with reference to para. 14 of the US oral statement (to the extent it is relevant).

Brazil submits that Article 3.3 clearly requires a two stage approach: first, the investigating authority should identify the effects of the dumped imports; only after this identification can the authority proceed to a cumulative assessment. In the first phase the investigating authority should identify the effects of the dumped imports from each country, and it is only after this identification that the cumulative assessment takes place. Cumulation as such means that the investigating authority may depart, under strict conditions, from the normal procedures to conduct the injury and causation determination on a country by country basis.

It must be noted that Article 3.3 relates to the situation where the investigating authorities "may cumulatively assess the **effects** of [the] imports" (emphasis added) rather than the imports, or import volumes, as such. A similar approach is also taken in Article 3.1, which makes a distinction between the examination of "the volume of the dumped imports" and "the effect of the dumped imports" on domestic prices (Article 3.1a)), as well as the "consequent impact of these imports on" the domestic producers (Article 3.1b)). Similarly, Article 3.2 separates between the "increase in dumped imports" and the "effect of the dumped imports on prices." On its part, Article 3.4 merely concentrates on the effects of the dumped imports as it outlines the fifteen injury factors that should be examined in this regard. Thus, the cumulative assessment authorised by Article 3.3 must indeed refer to the cumulative assessment of these fifteen injury factors, which should give a complete

picture of the injury caused by the dumped imports. On the other hand, a cumulative assessment of the volumes of the dumped imports would serve no purpose in this respect.

Moreover it also follows, in view of the wording of Article 3.2, that the preliminary injury indicators of "significant increase in dumped imports" and/or "significant price effect" must be present in order to justify a cumulative assessment of the effects of these dumped imports. Thus, only where injury seems to have been caused (i.e. satisfying the preliminary conditions of Article 3.2) the concrete scope of the injurious effects, as defined in Article 3.4 and their causal link to those effects, as measured under Article 3.5 may be cumulatively assessed, subject to the conditions of Article 3.3.

108. With reference to paragraph 341 of the EC first written submission, would a breach of Article 6.2 *AD* be possible where no breach of Articles 3.2 or 3.3 *AD* was found?

This may be the case if the investigating authority did not disclose material information under Articles 3.2 and 3.3 during the normal course of the proceeding, for example not until a dispute settlement proceeding . This practice may preclude an interested party from having the full opportunity to defend its interests, in violation of Article 6.2.

ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"

To the EC:

109. Is the European Communities arguing that its evaluation of "growth" is implicitly apparent in the final determination? If so, on what basis?

To Brazil:

110. Could Brazil comment on the EC statement in paragraph 356 of its first written submission that many of Brazil's claims "are based on a misapprehension of the structure of Article 3 as regards the respective roles of paragraphs 4 and 5? In particular, what is Brazil's view of the relationship between the factors enumerated and referred to in Article 3.4 and those enumerated and referred to in Article 3.5?

Articles 3.4 and 3.5 have a different focus. Article 3.4 focuses on an evaluation of the state of the industry concerned. This means that an evaluation of "all relevant factors and indices having a bearing on the state of the industry" should provide a description, (a picture) based on positive evidence of the economic situation of the domestic industry. Only after this examination takes place might an investigating authority conclude that the domestic industry has suffered injury as defined in footnote 9 to Article 3. However, in case there is an affirmative determination of injury, the focus of the determination of causation under Article 3.5 is to demonstrate why the domestic industry has suffered injury, *i.e.* what caused the injury. However, Brazil does note the "combined" concepts of "factors affecting domestic prices", "the magnitude of the margin of dumping" and "negative effects on cash flow" listed in Article 3.4. An examination of these factors not only relates to whether the domestic industry might be injured ("a static analysis") but also to a more dynamic, causal-like examination, *i.e.* why the domestic industry might be injured. Finally, Brazil submits that the EC's approach is hypocritical as it is normal for investigating authorities, like the EC, to explain why the domestic industry has suffered injury when examining the injury indicators.[84]

[84] See, for example, recital 150 ("[t]he decrease of the production was particularly strong from 1995 to 1996 for two main reasons: firstly, a plant manufacturing malleable fittings in Germany had to be closed and, secondly, a contraction of consumption had taken place on the Community market"), recital 153 ("that the Community industry's sales decreased in a time period during which the market contracted, while the countries concerned were able to expand their sales volume", recital 156 ("[t]he rise of the stock volume has been particularly strong as from 1996, in line with the increase of the Community industry's production and

111. **Comment on the EC arguments concerning the examination of potential *and* actual decline under Article 3.4 (see EC first written submission, paras. 362-363).**

Brazil disagrees with the EC and regrets the tone of the EC's approach. Firstly, although Article 3.4 does not prescribe any specific methodology for examination, the investigating authority is obliged to evaluate certain injury factors not only from "actual" but also from "potential" perspective. Secondly, in line with the Appellate Body's finding in '*United States – Hot Rolled Steel*' Brazil submits that Articles 3.1 and 3.4 require that *the investigating authorities* "must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it".[85] Consequently, the obligations in Article 3.4 lie on the investigating authorities, and not on the Brazilian exporter or, in the course of the dispute settlement, on Brazil to instruct the EC with regard to the methods and approaches it might choose to carry out the process of examination under Article 3.4. However, Brazil notes, for example, that the issue of "potential growth" may be related to planned and/or made R&D expenses and investments.

112. Comment on the EC statement in paragraph 349 of its first written submission that has also fulfilled the Article 3.4 obligation with respect to "growth".

Brazil recalls the Appellate Body's finding in '*United States – Hot Rolled Steel*' that "Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it" and that in every investigation "this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry".[86] Consequently, Brazil denies that the EC's alleged examination of growth, which is only <u>implicitly</u> (if at all) inferred from its consideration of the other injury factors examined under Article 3.4, can be considered as a well-reasoned and meaningful analysis of the said factor.

113. How, if at all, does the alleged non-disclosure by the European Communities of data concerning export performance -- also allegedly leading to inconsistencies with Articles 12.2.2 and 6.2 *AD* -- constitute a "failure to evaluate" under Article 3.4?

Brazil submits that the said non-disclosure does not *per se* constitute a breach of Article 3.4, but the EC's non-examination does.

To the EC:

114. 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. In particular:

- How was the statement in Exhibit EC-12 on "ability to raise capital" derived from the information given in "questionnaires and annual accounts"?
- How was the statement in Exhibit EC-12 on "wages" derived from the information given in " annual accounts"? Explain the meaning of "allocation on the basis of turn over"?
- How was the statement in Exhibit EC-12 on "productivity" derived from the information given in "questionnaires"?

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decreasing sales volume") and recital 157 ("the year 1995 and the negative profitability level found on average for the Community industry reflect costs associated with the plant closure which occurred in 1995") of the Provisional Regulation (BRL-12).

[85] '*United States – Hot-Rolled Steel AB Report*', para 197.

[86] *Ibid*, para 197.

- How was the statement in Exhibit EC-12 on "return on investments" derived from the information given in "questionnaires and annual accounts"?
- How was the statement in Exhibit EC-12 on "cash flow" derived from the information given in "questionnaires and annual accounts"?
- How and on what basis was the statement in Exhibit EC-12 on "magnitude of margin of dumping" derived?

115. We note the questionnaire to domestic producers (Exhibit BRL-37 ff.) requests information in section D2 concerning quantities and values of purchases/ imports of the product concerned. Does this pertain only to the product originating in the countries listed on the first page of the questionnaire, or to all imports of the product concerned from all sources?

116. Does each questionnaire response by the domestic industry provide information on each of the factors identified in the questionnaire? Provide a detailed response with reference to the relevant provisions of the record of the investigation.

To both parties:

117. Would a breach of Article 3.4 AD necessarily also lead to a breach of Article VI of the GATT 1994?

Yes. Article VI of the GATT 1994 condemns dumping and authorises Members to apply duties only *if* "it [dumping] causes or threatens material injury… or materially retards the establishment of a domestic industry". With regard to the AD Agreement, Article 1 provides that "an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement". The substantive elements of the examination of the impact of the dumped imports on the domestic industry are provided in Article 3.4. Given that Article VI of the GATT 1994 does not condemn dumping as such but only injurious dumping, Brazil submits that defected injury determination under Article 3.4 of the AD Agreement infringes also Article VI, *i.e.* the measures imposed would be based on circumstances other than provided for in Article VI of the GATT.

118. Does Brazil's allegation concerning cumulation and injury on page 205 of its first written submission relate to the obligations under Article 3.4 or 3.5? Substantiate your response.

Article 3.3 provides an essential substantive requirement governing the cumulative assessment of the effects of the dumped imports. Brazil submits that a breach of Article 3.3 is irreparable and, thus, both the subsequent determinations of injury under Article 3.4 and causation under Article 3.5 would inevitably be defective. In other words, the requirements of Article 3.3 could not be "cured" through the subsequent determinations. Moreover, any anti-dumping duty imposed on the basis of an investigation not conducted in accordance with the provisions of the AD Agreement would also infringe Article 1 of the AD Agreement and the measures imposed would be based on circumstances other than those provided for in Article VI of the GATT.

119. Could information requested by the European Communities in the questionnaires to domestic producers relating to the "effect of continued imports" support an investigating authority's evaluation of the magnitude of the margin of dumping within the meaning of Article 3.4 *AD* ? Did it in this case?

No. Brazil denies any interrelation between these concepts. The concept of "the margin of dumping" relates, in general, to exporters' quantified price differentiation between domestic and export markets. Thus, "the magnitude of the margin of dumping" relates to the size ('magnitude') of

that price difference. However, the margin of dumping (or the size of that margin) is in *no* way indicative of foreign suppliers' competitive position in the market of the *importing* Member. For example, irrespective of the dumping margin or its magnitude, an actual price level applied by an exporter on the importing market may be higher than that of the domestic industry. Thus, the domestic producers' forward looking guess relating to the "effect of continued imports" (on the *importing* Member's market) could not form a positive basis for the investigating authority's evaluation of the issue of the magnitude of the dumping margin.

120. How can the Panel verify whether and to what extent the European Communities investigating authorities examined the issue of outsourcing and ownership links of the domestic industry with producers located in countries not subject to the investigation? Please indicate the relevant parts of the record of the investigation.

Brazil cannot see how it would be possible to prove the negative. What counts is the record of the investigation, which in this case does not give any detail of such an examination, if any.

Brazil recalls that the Brazilian exporter had repeatedly requested the EC to take account of the ownership of the sole Bulgarian fittings producer Berg Montana by Accesorios Tuberia SA (Atusa). Moreover, Brazil further recalls that the Brazilian exporter had also provided information regarding the two other Applicants, namely R.Woeste Co GmbH&Co and Georg Fischer Fittings GmbH, and their relations with Egyptian and Turkish producers respectively.[87] Given that the EC did not elaborate on the examination it claims it had undertaken, other than admitting rather flatly that it could not find anything except that "one Community producer did import the product concerned from one third country"[88], Brazil is obviously unable to comment on the factual basis of that seemingly hollow statement.

Nonetheless, Brazil submits that the EC's statement does not seem to reflect any real effort by the EC genuinely to examine the concrete information provided to it by the Brazilian exporter and by others.[89] In any event, bearing in mind the concrete and detailed nature of the information that the Brazilian exporter made available to the EC throughout the original investigation, as well as the information supporting the Brazilian exporter's claims which was made available to the EC by other interested parties[90], Brazil cannot help but infer from this and from the EC's blank assertion that it could find "no evidence to support Brazil's allegations"[91] that the EC's examination, was clearly fundamentally insufficient and inadequate. Moreover, Brazil submits that its Exhibits 47 to 52 support its conviction that the EC failed to properly investigate the Brazilian exporter's repeated submissions. Brazil is of the view that in the present context, it is incumbent on the EC to demonstrate and to convince the Panel, and Brazil, that its authorities had in fact properly examined these submissions. However, nothing on the record of these proceedings, other than the EC's mere unsubstantiated assertions, can show that the EC conducted itself, in this instance, as any responsible authority would have been expected to conducted itself.

121. Indicate the relevant parts of the record of the investigation dealing with sales outside the European Communities.

Brazil recalls that the Brazilian exporter had raised the issue of export performance as a factor contributing to the EC producers' increased stocks.[92] However, the EC responded to this submission

[87] See the First Submission of Tupy (BRL-5), page 9; the Second Submission of Tupy (BRL-9), page 2; the Third Submission of Tupy (BRL-10), pages 10-11; and the Fourth Submission of Tupy (BRL-13), para 14.
[88] See recitals 127 and 174 of the Provisional Regulation (BRL-11).
[89] See also answers to questions 145 to 147 below.
[90] As also admitted by the EC in recital 174 of the Provisional Regulation.
[91] ECFS, para 18.
[92] See the Fifth Submission of Tupy, BRL-17, para 3.8.2.

only indirectly in the Transparency Letter by stating that "it cannot be concluded that the decrease in sales outside the Community significantly contributed to the increase of the stock level".[93]

ISSUE 17: "INAPPROPRIATE ESTABLISHMENT OF CAUSATION"

To Brazil:

122. Could Brazil comment on the EC statement in paragraph 433 of its first written submission that: "The reasons why Tupy is able to charge such prices … have no significance in a dumping investigation"?

Brazil disagrees with this statement. Indeed, an anti-dumping analysis focuses on the extent to which dumping causes injury to the competing domestic industry in the importing market. As regards the injury determination, the underlying conditions in the exporter's domestic market are *not* considered. However, the non-attribution obligation in Article 3.5 requires the investigating authority to examine any known factors other than the dumped imports causing injury at the same time to the domestic industry. In this case the EC calculated the following margins for the Brazilian exporter: dumping 34.80 per cent, undercutting 39.78 per cent and underselling 82.06 per cent.[94] Given that the quantified injury was *higher* than the dumping margin, the EC *knew* that the injury suffered by the EC industry was also caused by factors other than the dumped imports. In essence, even after neutralising the dumping margin of 34.8 per cent, the Brazilian exporter was still able to charge prices lower by 4.98 per cent than the EC industry and make a profit. In other words, the Brazilian producer was more competitive (cost effective) than the EC industry. Therefore, Tupy's competitive advantage over the EC industry did have an important significance in the investigation, which the EC failed to recognise. Moreover, by failing to separate and distinguish the injurious effects of this known factor (i.e. the injury caused to the EC industry by the Brazilian exporter's relative competitiveness) the EC infringed its non-attribution obligation under Article 3.5.

123. How, if at all, does the alleged non-disclosure by the European Communities of data concerning export performance -- also allegedly leading to inconsistencies with Articles 12.2.2 and 6.2 *AD* -- constitute a breach of Article 3.5?

Brazil submits that the said non-disclosure does not *per se* constitute a breach of Article 3.5, but the EC's non-examination does.

124. Differentiate between the references to the different cost of production between "white heart" and "black heart" fittings in points b) and h) of your analysis under Article 3.5 in your first written submission.

The margin analysis under point **b)** relates to the relative competitiveness (cost efficiency) of the Brazilian exporter over the EC producers. In particular, it refers to the fact that out of the injury suffered by the EC producers, as quantified by the EC, the figure of 4.98 percentage points (an injury margin of 39.78 per cent *minus* a dumping margin of 34.8 per cent = 4.98 per cent) is the quantified injury caused by factors other than the dumped imports.

The analysis under point **h)**, on the other hand, relates directly to the cost difference between the Brazilian exporter and the EC industry. As a part of its injury quantification, the EC calculated the *target price* as that at which the EC industry is able to cover its full costs and make a profit of 7 per cent. By comparing the Brazilian exporter's price with the target price, the EC found a difference of 82.06 per cent. Consequently, the EC industry's break-even point (*i.e.* the point where price

[93] See the Transparency Letter, BRL-18.

[94] See the Disclosure Preceding the Provisional Regulation, Annex III (BRL-11) and the Disclosure Preceding the Definitive Regulation, Annex III (BRL-16).

equates to costs) is 75.06 per cent (82.06 per cent-7.0 per cent). Given that the Brazilian exporters' sales in the EC were not made at a loss, the cost difference between the Brazilian exporter and the EC industry was at least 75.06 per cent.

125. Could Brazil indicate the relevant portions of the record of the investigation where it raised -- in the context of causation -- each factor it now refers to in relation to Issue 17.

Brazil's arguments focus on seven other factors known by the EC:

(i) margin analysis (the EC producers' competitive disadvantage) - *the First Submission of Tupy (BRL-5), para 2.1.7; the Third Submission of Tupy (BRL-10), para 4.5; the Fourth Submission of Tupy (BRL-13), para 6 and 7*);

(ii) poor export performance (*the Fifth Submission of Tupy (BRL-17), para 3.8.3*);

(iii) imports from the countries not subject to this investigation (*the First Submission of Tupy (BRL-5), page 20; the Third Submission of Tupy (BRL-10), para 2.5; the Fourth Submission of Tupy (BRL-13), pages 23-25; the Fifth Submission of Tupy (BRL-17), pages 15-16*);

(iv) outsourcing (*the First Submission of Tupy (BRL-5), page 9; the Second Submission of Tupy (BRL-9), page 2; the Third Submission of Tupy (BRL-10), pages 10-11; the Fourth Submission of Tupy (BRL-13), para 14*);

(v) rationalisation efforts *(the Fourth Submission of Tupy (BRL-13), para 30; the Fifth Submission of Tupy (BRL-17), page 14);*

(vi) substitution of the product concerned (*the First Submission of Tupy (BRL-5), pages 19-20; the Third Submission of Tupy (BRL-10), page 8; the Fourth Submission of Tupy (BRL-13), pages 26-27); and*

(vii) the difference in the cost of production and the market perception between the two variants of the product concerned *(the First Submission of Tupy (BRL-5), para 2.1.7; the Third Submission of Tupy (BRL-10), para 4.5; the Fourth Submission of Tupy (BRL-13), para 6).*

To both parties:

126. What relevant material may guide a panel's consideration concerning the issue of "attribution" under Article 3.5 *AD*?

Firstly, Brazil recalls the Appellate Body's findings in '*United States – Hot Rolled Steel'* where it stated that the non-attribution language in Article 3.5 requires an investigating authority appropriately to assess the injurious effects of the other injurious factors than the dumped imports. The said "appropriate assessment" must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports as in the absence of such separation and distinction the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing injury justifying the imposition of anti-dumping duties.[95] In the same appeal the Appellate Body also specified that Article 3.5 requires an identification of "the nature and extent of the injurious effects of the other known factors" as well as "a satisfactory explanation of the

[95] '*United States – Hot Rolled Steel AB Report'*, paras 222 and 223.

nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports".[96]

Brazil recalls also that the Appellate Body instructed that "adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *AD Agreement"*.[97]

Consequently, the Panel might be inspired by the Appellate Body's findings in *United States - Lamb Safeguards* where it clarified that "the effects of the increased imports, as separated and distinguished from the effects of other factors, must be examined to determine whether the effects of those imports establish a 'genuine and substantial relationship of cause and effect' between the increased imports and serious injury" and that an investigating authority "assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports".[98] Brazil also recalls the Appellate Body's findings in *United States – Line Pipes* where it specified that the investigating authority must "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased [dumped] imports is not attributed to increased [dumped] imports" and that "[t]his explanation must be clear and unambiguous", it "must not merely imply or suggest an explanation" and that it "must be a straightforward explanation in express terms".[99]

127. What type of economic analysis would an investigating authority actually need to perform to "separate" and "distinguish" between each distinct causal factor?

Brazil submits that all of the particular methodologies applied by the investigating authorities, which operate against the basic principles of good faith and fairness, are in violation of Article 3.1 (an "objective examination") and, thus, also in breach of Article 3.5. With regard to economic analysis, the obligation in Article 3.1 is that the causality determination must be based on "positive evidence" and involve an "objective examination". Given the strict non-attribution obligation under Article 3.5, (i.e. the requirements to "separate" and "distinguish" in order to establish a 'genuine and substantial relationship of cause and effect'), Brazil submits that the non-attribution should, as far as possible, be based on quantifiable methods.

128. If a product is "dumped" does the reason for that dumping (e.g. a possible comparative advantage) matter?

No. However, as stated in answer to question 122, Brazil submits that the Brazilian exporter's relative competitiveness over the EC producers was a factor *other* than the dumped imports causing injury to the EC industry and known by the EC. By failing to separate and distinguish the injurious effects of this known "other" factor, the EC infringed its non-attribution obligation under Article 3.5.

129. How, if at all, do the standards of "significant contribution" (e.g. Definitive Regulation, para. 113) and "not such to have broken the causal link" (e.g. Definitive Regulation, para. 111) relate to a genuine and substantial relationship of cause and effect?

The EC's standards are not related to "a genuine and substantial relationship of cause and effect".

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[96] *Ibid*, para 227.

[97] *Ibid*, para 230.

[98] *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, paras 168 and 179.

[99] *United States - Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea*, WT/DS202/AB/R, para 217.

Brazil observes the EC's recognition that the other factors, like decline in consumption and exports, the EC producers' own imports, imports from the other third countries and substitution, were having injurious effects on the EC industry.[100] Brazil names this approach as the test of "significant contribution".

However, it is not apparent from the EC's analysis how, if at all, it separated and distinguished the injurious effects of these other factors from the injurious effects of the dumped imports. Moreover, the EC's "significant contribution" test provides no insight into the nature and extent of the injury caused by these other known factors. Brazil contests that the EC's characterisations do not establish any clear, unambiguous and straightforward explanation. Instead, Brazil submits that the EC, by just stating that there was "no significant contribution", effectively assumed that those factors did not cause the injury attributed to the dumped imports, which assumption is not consistent with Article 3.5.

130. What does it mean for a factor to be "known" in the sense of Article 3.5 *AD*? Comment on the phrase "all relevant evidence before the authorities" in the sense of Article 3.5 *AD*.

In view of the Panel's findings in *Thailand – H-Beams*, Brazil submits that known factors other than dumped imports in Article 3.5 include not only factors raised before the investigating authority but also other factors of which the investigating authority was aware.[101] Consequently the phrase "all relevant evidence before the authorities" refers to the totality of such evidence, namely all of the known factors that are simultaneously causing injury to the domestic industry.

131. The European Communities has relied on information that differs from Eurostat data. How could an interested party verify the accuracy of the information relied on? Comment, with reference to paras. 434-446 and 447-464 of the EC's first written submission.

Brazil submits that, in general an interested party is not able to verify the correctness of the data used by the investigating authority if an administrative system such as that applied by the EC is used. The EC's confidentiality system precludes interested parties from having access to factual information classified as confidential, affecting the fundamental rules of due process. In particular, Brazil notes that, for example, the apparent consumption as well as the import volumes and values from countries other than those under the investigation were based on the EC's official import statistics (Eurostat). However, it is still unclear to what extent and why for example, the information about export volume provided by the EC producers in their questionnaire responses, as verified by the EC, should have deviated from Eurostat. Moreover, as the export data has now been provided, Brazil submits that even a conservative estimate of consistency of the data used by the EC (*i.e.* a stock reconciliation) demonstrates that it was manifestly inaccurate. Furthermore, Brazil is of the view that

[100] The EC concluded that the decline in *consumption* "is not such as to have contributed in any significant way to the material injury suffered by the Community industry"; see recital 176 of the Provisional Regulation (BRL-12). Similar statements are also found regarding the EC producers *export performance* ("it cannot be concluded that the decrease of the sales outside the Community significantly contributed to the increase of the stock levels"; see the Transparency Letter, BRL-18) and *own imports of the product concerned* ("one Community producer did import the product concerned from one third country" and "no significant influence on the situation of that Community producer could have resulted from these imports"; see recital 174 of the Provisional Regulation, BRL-12), *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", see recital 111 of the Definitive Regulation, BRL-19) and *substitution* ("any substitution effect cannot have significantly contributed to the injury suffered by the Community industry", see recital 113 of the Definitive Regulation, BRL-19.). In general, the EC concludes that the factors other than the dumped imports were ""not such to have broken the causal link" (see recital 177 of the Provisional Regulation, BRL-12).

[101] See *Thailand – H-Beams*, para 7.273.

the EC authorities' reliance on data (e.g. the EC producers' export performance), which the Brazilian exporter could not see and verify, constituted a serious violation of the exporter's basic right to defend its interests, such as that covered by the first sentence of Article 6.2, Article 6.4 and Article 12, in particular Article 12.2 of the AD Agreement. Although the EC has now provided information regarding the EC industry's export figures[102], this can in no way compensate for the EC's failure to provide such information at the time of the investigation.

ISSUE 18: "NO TIMELY OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION"

To Brazil:

132. Regarding Brazil's claim of not being given timely opportunities to see the information on currency conversions used in the Provisional Regulation, does Brazil consider that it is making a claim concerning the provisional measure applied by the European Communities?

Although the information on currency conversions used by the EC relates to both the Provisional and the Definitive Regulation, Brazil's claim concerns the EC's definitive measures only.

133. On page 235 of its first submission, Brazil refers to certain currency conversion tables provided by the European Communities in the Transparency Letter. However, the copy of the Transparency Letter that has been provided to the Panel (Exhibit BRL-18) contains no such table. Is Brazil's reference to this document correct?

Brazil apologises: the correct reference to the currency conversion table is Exhibit BRL-16

134. On page 238, Brazil states that "the exchange rate tables disclosed by the EC are not providing a conversion rate for the precise date. Moreover, the currency conversion rates used by the EC insofar as they concerned conversions on certain pertinent dates as disclosed to Tupy did not enable Tupy to determine the methodology applied by the EC as on those dates no currency conversion rates were stated". Could Brazil clarify which tables and which precise dates it is referring to in its statement?

The EC disclosed to the Brazilian exporter export sales included in the dumping calculations.[103] The EC also stated that it had used daily rates for the definitive calculations[104], these rates provided by the Brazilian exporter during the on-spot verification.[105]

The reference to 'tables' is to the EC's Table "Export sales included in the dumping calculations".[106] These figures come from the Brazilian exporter's Tables "the Brazilian exporter's sales to the EC to independent customers" named "ECSALUR"[107] and "the Brazilian exporter's allowances on sales to the EC to independent customers" named "ECALLUR".[108] For the example

[102] ECFS para 440.

[103] See the Disclosure Preceding the Definitive Regulation (BRL-16), the company specific findings concerning dumping (Annex II), sub-annex 1).

[104] See the Definitive Regulation (BRL-19), recital 52.

[105] See the Transparency Letter (BRL-18), page 4; with regard to the daily rates see the Disclosure Preceding the Definitive Regulation (BRL-16).

[106] See the Disclosure Preceding the Provisional Regulation; Annex II, sub-annex 5 (BRL-11), page 1 of 400, 1st transaction from above; it is to be noted that the figures regarding allowances granted by the EC are the same also in the Disclosure Preceding the Definitive Regulation (BRL-16).

[107] See Tupy's Questionnaire Response (BRL-4), Table H.3.1; page number as indicated 1, 1st transaction from above.

[108] See Tupy's Questionnaire Response (BRL-4); page number as indicated 1, 1st transaction from above.

provided in the First Submission of Brazil the date of invoice was 9 April 1998. Finally, the exchange rates allegedly used by the EC are enclosed in the Disclosure Preceding the Definitive Regulation.[109]

Brazil notes that the full paper versions of the EC's Table "Export sales included in the dumping calculations" and the Brazilian exporter's Tables "ECSALUR" and "ECALLUR" are part of the records (in electronic format) of the case. It is to be noted that the EC's inconsistent methodology is not related to specific dates or transactions because it is horizontal in nature and covers all of the allowances granted by the EC to the Brazilian exporter. As a practical solution, Brazil provides three examples, which are related to transactions reflected in Brazil's Exhibits[110].

135. Could Brazil comment on the statements in para. 510 of the EC first written submission. Was the table of daily exchange rates provided by Tupy during the verification? Does Brazil believe that the information provided by Tupy in the currency exchange rate tables was used by the investigating authorities in their currency conversions? If this information was the same that was provided by Tupy, should that information have been disclosed to Tupy under Article 6.4? What other information regarding currency conversions does Brazil believe should have been disclosed under Article 6.4?

Yes, the table of daily exchange rates was used by the Brazilian exporter and was provided to the EC during the on-spot verification. As the EC calculated the dumping margin in the exporting country's currency, Brazil believes that the EC's conversion of each transaction's turnover into Brazilian Real was based on the currency exchange rate tables. However, Brazil submits that the conversion of currencies with regard to allowances was not based on the said tables. Consequently, this information was only partially the same as provided by the Brazilian exporter to the EC. The missing part should have been disclosed to the Brazilian exporter under Article 6.4.

To both parties :

136. How, if at all, might Article 17.4 *AD* be relevant here? Provide reasoning.

Given that the specific measure at issue in this dispute is the *definitive* anti-dumping measures imposed and applied by the EC, Article 17.4, second sentence, is not relevant.

ISSUE 19: "NO PROPER INFORMATION ON MATTERS OF FACT AND LAW"

To Brazil:

137. Does Brazil agree that the information it asserts should have been published under Article 12.2 and 12.2.2 regarding Issues 3 and 9 is information regarded as confidential to Tupy?

Brazil submits that if the information was confidential, a non-confidential summary should have been published, and if it is not confidential, it should have been published.

To both parties:

138. What is the relationship between the substantive provisions regarding the determination on dumping, injury and causation (Articles 2 and 3) and the transparency obligations under Article 12? Would a violation of the substantive provisions automatically constitute a violation of the Article 12?

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[109] See the Disclosure Preceding the Provisional Regulation (BRL-16).

[110] See BRL-53

Brazil contends that the substantive provisions, regarding the determination of dumping, injury and causation, and the more procedural ones, concerning the transparency obligation in Article 12 of the AD Agreement, are independent provisions. This means that there can be a violation of Article 12 without any infringement of a substantive provision. Similarly, a violation of the substantive provisions does not automatically constitutes a violation of Article 12. On the contrary, a violation of a substantive provision would render recourse to Article 12 pointless. Indeed, as the Panel in the *EC – Bed Linen* report puts it: 'a notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless'.[111]

139. What is the scope of Article 12.2 and 12.2.2? Do these provisions cover only the public notices preliminary and final determinations, or do they also cover other documents in the investigation, *i.e.* disclosure documents and transparency letters? Can the disclosure documents and transparency letters be considered as a "separate report" under Article 12.2 and 12.2.2?

Brazil is of the view that Articles 12.2 and 12.2.2 of the AD Agreement only cover the public notices of preliminary and final determinations. However, it is conceivable that these public notices refer to other documents in the investigation that can be considered 'separate reports' within the meaning of Article 12. Nevertheless, footnote 23 is clear on a document that can be described as a 'separate report'. A separate report has to be 'readily available to the public'. Both disclosure documents and transparency letters are documents submitted to parties only. They are not available to the public. In conclusion, disclosure documents and transparency letters cannot be considered 'separate reports'.

140. Do the parties believe that clerical errors in the public notices of preliminary or final determinations may constitute grounds for a violation of Article 12.2 and 12.2.2?

Generally, Brazil does not believe that clerical errors in themselves constitute adequate grounds for a violation of Articles 12.2 and 12.2.2 of the AD Agreement. However, where such errors prevent interested parties from properly being able to defend their rights, a violation of Articles 12.2 and/or 12.2.2 should be recognised.

141. What is the relationship between Articles 12.2 and 12.2.2 and the provisions concerning the protection of confidential information in Article 6.5?

According to Article 6.5 of the AD Agreement, confidential information 'shall not be disclosed without permission of the party submitting it'. Considering that Article 6 applies to evidence submitted throughout the whole investigation process, Brazil considers that Article 6 also applies to information used by the investigating authorities to reach a provisional or final determination. Consequently, when issuing a public notice of final determination or making a separate report available to the public under Article 12.2 of the AD Agreement, investigating authorities have to respect requests for confidentiality made by the defending party in conformity with Article 6.5 of the AD Agreement. This is confirmed by the *Argentina – Floor Tiles* report in which the Panel stated: 'the transparency requirement which obligates the authority to explain its determination in a public notice is subject to the need to have regard to the requirement for the protection of confidential information of Article 6.5 of the AD Agreement. Confidentiality of the information submitted therefore limits the manner in which the authority explains its decision and supports its determination in a public notice'.[112]

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[111] See '*EC –Bed Linen*, para 6.259.

[112] '*Argentina – Tiles*, para 6.36.

142. What criteria may be relevant in deciding which issues of fact and law can be considered "material by the investigating authorities" under Article 12.2?

Brazil believes that, in order to determine the criteria relevant in deciding which issues of fact and law can be considered 'material', the dictionary definition should serve as a starting point. 'Material' is defined by the Concise Oxford Dictionary as 'important, essential, relevant'. Consequently, 'material' issues are, at the very least, issues important for the other party and for the public to understand how the investigating authorities made the preliminary or final determination.

OTHER

To the EC:

143. Cold the EC clarify the meaning of the Article 11.3 of the EC Basic Regulation on whether the exporter has the right to <u>have</u> a review or has the right to <u>request</u> a review?

144. Can the EC confirm that if Tupy has requested a review within the year following the imposition of the anti-dumping duties the Commission would have exercised discretion on the granting of such a request? Also, if the request had been made after the year following the imposition of the anti-dumping duty would the Commission have automatically granted the request?

To Brazil:

145. Could Brazil comment on whether the Panel would be creating a "precedent" by admitting Exhibits BRL-47-52 containing information that the EC alleges was not in the record of the underlying AD investigation?

Brazil understands this question in the context of Article 17.5(ii) of the AD Agreement, which requires a panel to examine the matter before it upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Brazil comments that the Panel would certainly not be creating a "precedent" by admitting Exhibits BRL-47 to 52. Brazil observes that although these Exhibits have not been presented as such to the EC at the time of the anti-dumping investigation (Brazil does not even know whether such Internet information was available in that form at all at the time), nonetheless, the facts contained in these Exhibits have clearly been made available by the Brazilian exporter and by others, on several occasions, to the EC during the investigation.

Brazil recalls the *Bed linen Panel Report* and the confirmation made there whereby "the form of the document … does not preclude [the Panel] from considering its substance, which comprises facts made available to the investigating authority during the investigation."[113]

Brazil observes that it is not asking the Panel to conduct a *de novo* review of the EC's own investigation. Rather, the primary purpose of the new Exhibits in this respect is to support Brazil's request that the Panel assesses whether the EC has properly examined all the relevant facts which the EC had before it at the time of the anti-dumping investigation, and whether the EC had provided an adequate explanation as to how the facts as a whole support the determination it had made. It would then be for the Panel to further establish whether that determination was consistent with the obligations on the EC[114], primarily those which result from Article VI of the GATT 1994 and the AD Agreement (Brazil refers in particular to the EC's obligations under Articles 3.1, 3.4 and 3.5).

[113] See *'EC – Bed Linen'*, para 6.43.

[114] In line with *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R of 8 November 1996, para.7.

Brazil confirms that this Panel is not requested to consider the new Exhibits for any purpose other than in order to determine whether, on the basis of the facts made available to it during the investigation, the EC has properly discharged its obligations under the above-mentioned provisions of the GATT 1994 and the AD Agreement. How can the Panel properly assess whether the facts made available to (and ignored by) the EC at the time of the anti-dumping investigation were indeed correct and have truly reflected the description made by the Brazilian exporter without being able to see other sources of information regarding the same facts which prove (or disprove) it? Brazil notes that "the Panel's function should be to assess objectively the review conducted by the national investigating authority…"[115] The Panel's role is "to review the consistency of a determination by the national investigating authority imposing a restriction under the relevant provision of the relevant WTO legal instrument."[116] The Panel should therefore allow Exhibits 47 to 52 to be considered in order to make that assessment.

146. If the information in Brazil Exhibits BRL-47-52 had been before the investigating authority, would it have had the effect of altering the determination of the EC authorities?

Brazil cannot see how the new Exhibits, which are mere Web Page printouts, would have altered the EC authorities' relevant determinations, whereas the concrete evidence and other solid leads (i.e. the facts) which Tupy made available to the EC during the investigation[117] have not yielded such results. Brazil's view in this regard is that the EC authorities were most probably uninterested in considering any kind of information, notwithstanding its source, nature or probative value, which could have made them change their predetermined position.

147. If Brazil is of the view that the information submitted by Tupy in the course of the investigation concerning outsourcing and links the EC industry may have with producers located in countries not subject to the investigation was "sufficient", why does Brazil consider that it is necessary to submit Exhibits BRL-47-52 in these Panel proceedings?

Brazil recalls the answer it gave to the Panel's question 145 above. Brazil notes that by presenting the new Exhibits it was not seeking to add any facts to that which the EC already had before it. The Panel is not requested to consider the new Exhibits for any purpose other than in order to inform itself of those facts provided to the EC in the course of the investigation. This should allow the Panel to determine whether, on the basis of the facts made available to the EC during the investigation, the EC had properly discharged its obligations under Article VI of the GATT 1994 and the AD Agreement, particularly under Articles 3.1, 3.4 and 3.5 so as to make its injury determination on the basis of "positive evidence" and following "an objective examination" of the relevant facts. Moreover, this should also allow the Panel to determine whether the EC's establishment of the facts was proper and its evaluation of these facts was unbiased and objective as required by Article 17.6(i).

Brazil observes that the factual information contained in the new Exhibits confirm that the EC could have easily verified the factual information that Tupy (and others) made available to it at the time.[118] For example, how could the EC not find in the accounts of the EC producers concerned

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[115] See '*US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Panel Report*', WT/DS184/R of 28 February 2001, para. 7.6 (unchanged by 'US-Hot-Rolled Steel AB Report', on the relation between Article 11 DSU and Article 17.6 AD see paras 50 to 62 in the Appellate Body Report).

[116] *Ibid*.

[117] For a description of and references to statements and documents made available by Tupy to the EC during the investigation see BFS, *inter alia*, under '*d) Imports from other Third Countries*' and '*e) Outsourcing*', at paras 765 to 801. Brazil recalls, for example, that these documents also included concrete evidence in the form of copies of official circular letters by which Atusa offered the product concerned for sale to customers in the EC while explicitly stating that it was produced by its own plant (Berg Montana) in Bulgaria (see these copies in Annex II and Annex III to Tupy's Fourth Submission, BRL-13).

[118] See BFS para 68 and more generally also paras 61 to 67 and 69 to 71.

(Atusa, Woeste and Georg Fischer), which it was under a duty to verify in the investigation, any link to their investments in and/or preferred purchases from the foreign producers specifically named by Tupy? Why did the EC authorities not require these producers to answer the kind of questions put to the EC by the Brazilian exporter? Have the EC authorities for example, sought to obtain sworn statements from these EC producers to refute Tupy's contentions? Did the EC seek to obtain information from the Bulgarian authorities[119] on possible investments by Atusa in Bulgaria? Did the EC try to obtain information from its own Services dealing with investment promotion in Bulgaria (e.g. under the EU's 'Phare' programme) or in Egypt (e.g. under the EU's 'Meda' programme) regarding the investments by EC producers in the pipe-fittings sectors in these two non-EC countries?[120] Brazil recalls that none of these simple steps have been mentioned on the record before the Panel as steps taken by the EC.

148. With respect to Issues 6, 7, 8 and 10, which adjustments were clearly requested by Tupy in its Questionnaire Response? Which adjustments were identified first by the EC investigating authorities? Indicate the relevant parts of the record of the investigation.

With regard to export sales, the Brazilian exporter requested allowances for differences in transportation, insurance, handling, loading and ancillary costs; in the cost of any credit granted for the sales; in the direct costs of providing warranties and guarantees; and in commissions paid.[121] Regarding domestic sales it requested allowances for the differences in physical characteristics; in import charges or indirect taxes (i.e. the IPI Premium Credit); in the level of trade; in packaging costs; in the direct costs of providing warranties, guarantees, technical assistance and services (after-sales costs); in commissions paid; and other factors (promotion and advertising as well as financial costs for keeping stock).[122] Moreover, the Brazilian exporter, although not claiming a separate adjustment, identified in its Reply to the Deficiency Letter the issue of "PIS/COFINS of 5.37 per cent over input".[123]

To both parties:

149. Are WTO dispute settlement consultations relevant in determining whether or not a claim falls within a panel's terms of reference? Why or why not? In general, is there any kind of verifiable record kept of WTO dispute settlement consultations? Is there any such record of the consultations in this dispute? Please cite any relevant material in responding.

Brazil emphasises the importance of consultations as part of the WTO dispute settlement system under Article 4 of the DSU and believes that consultations are relevant in determining whether or not a claim falls within a panel's terms of reference. Brazil recalls the findings in '*Korea – Alcoholic Beverages'* where the Panel stated that "it would seriously hamper the dispute settlement process if the information acquired during the consultations could not subsequently be used by any party in the ensuing proceedings".[124]

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[119] For example, from the Bulgarian investment and/or privatisation agencies, from which websites the information in Exhibits BRL 49 and 50 was taken.

[120] It is worth noting that Exhibits 47 and 48 which provide that information for Bulgaria emanate from a semi-official Website (Bulgarian Economic Forum) with close links to the Phare Programme. Exhibit 52 which provides that information with regard to Egypt, states that the project is promoted by the 'Euro-Mediterranean Partnership,' which is sponsored by the EC and of which the EC is a party).

[121] See Tupy's Questionnaire Response (BRL-4), Section G-1.

[122] See Tupy's Questionnaire Response (BRL-4), Section G-2; see also the First Submission of Tupy (BRL-5), para 1.3.

[123] See Tupy's Reply to the Deficiency Letter (BRL-7).

[124] *Korea – Taxes on Alcoholic Beverages*, Panel Report, WT/DS75/R, WT/DS84/R, , 'Korea – Alcoholic Beverages', para 10.23.

As stated by the Appellate Body in '*EC – Bananas'*[125], the panel's terms of reference are important for two reasons. Firstly, the terms of reference establish the jurisdiction of the panel. Secondly, they fulfil an important due process objective. It is precisely this second reason which enables Brazil to claim that consultations are relevant in the determination of the scope of the panel's terms of reference. Brazil notes that what matters in this respect is that the defending party receives adequate notice of claims made by the complainant. This interpretation is also supported by the Appellate Body's findings in *Korea – Dairy Safeguards* with regard to "attendant circumstances".[126]

However, Brazil admits that, in general, there is indeed no formal requirement for an official record of dispute settlement consultations. There is no such record in the present dispute, although Brazil does have its own record of the consultation meeting with the EC in the present case and has offered to disclose it if the Panel deems necessary.

150. In this case, was the information relating to the examination by the EC authorities of the issue of outsourcing and links the EC industry may have with producers located in countries not subject to the investigation "confidential" for the purposes of the EC investigation?

No. Although contract terms and prices/quantities may have been deemed confidential, there is no reason why the links themselves should be characterised as such. Brazil wonders why such factual information, which was widely known in the market and also made available to the EC during the anti-dumping investigation could be viewed as "confidential". In any event, Brazil notes that it is unaware of any non-confidential summary of that information which was made available to other parties in the original investigation or at any time thereafter.

151. Assume that the complaining party points to information that it submitted in the investigation and that is on the record of the investigation. The complaining party alleges that it does not have access to any additional information on the issue, nor to any indication that the investigating authority examined this information or sought additional information. How can the complaining party (and the Panel) assess whether and to what extent the investigating authority examined the information?

It is difficult for Brazil to assess whether and if so to what extent the investigating authority really examined the issue of outsourcing and the links EC producers have with producers in other countries. However, as Brazil stated during the first oral hearing, the EC files contained all the basic factual information on issues relating to outsourcing and those links which Tupy and other parties made available to the EC during the investigation. Moreover, Brazil managed to find extra information on the Internet very easily which also confirms that the EC could have had easy access to sources, including EC's own sources and sources linked to the EC[127], had the EC really wanted properly to examine the above-mentioned factual information which had been made available to it. In spite of this information, Brazil does not see anything in the records[128] that shows that the EC has made any meaningful inquiry concerning these issues.

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[125] *EC – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, para. 142.

[126] See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, paras 123-124.

[127] See Brazil's answer to the Panel's question 147 including footnotes 119, 120 and 120 there.

[128] Not even in a summarised form if the information is to be considered confidential.

ANNEX E-2

REPLIES OF BRAZIL TO QUESTIONS OF THE EUROPEAN COMMUNITIES – FIRST MEETING

Issue 1

1. Could Brazil confirm whether EC officials raised the possibility of an undertaking during the meetings with Brazilian trade representatives described in paragraphs 38 and 39 of the EC's First Submission?

The possibility of a price undertaking was raised in the course of a meeting between Mr Lamy and a Brazilian governmental delegation. However, Brazil observes that this case was a matter which the Brazilian side had put on the agenda for the meeting.

2. In particular, could Brazil confirm that at the meeting of 23 March 2000 Commissioner Lamy indicated that the best solution would be a price undertaking?

This possibility was never discussed in concrete terms. In particular, had the EC been ready to effectively examine the possibility of an undertaking, it would have addressed the Brazilian exporter directly. Indeed, Brazil is of the view that the obligation to 'explore the possibilities of constructive remedies' is an obligation relating to a conduct which should be directed towards exporters rather than towards WTO Members, especially with regard to price undertaking.

3. What was the response of the Brazilian authorities to the suggestions regarding the possibility of an undertaking made by Commissioner Lamy and other EC officials during the above mentioned meetings?

Brazil has no detailed reports of the conversations on this matter.

4. Was Tupy interested in an undertaking? If so, why did Tupy not offer an undertaking?

The EC would have known had it contacted Tupy on a possibility of a price undertaking.

Brazil refers to its answer to the Panel's question Nº 8, where it submitted that Article 15 basically reverses the general order in Article 8 so that, where the exporting country is a developing country it is for the authorities in the importing country to take the initiative and approach the exporter. Brazil further recalls that in any event, Article 8.5 of the AD Agreement makes clear that "the fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case". Anyhow, Brazil recalls that the EC has never made such an invitation to Tupy.

Issue 2[1]

5. Assume that on January 1999 the Real had depreciated vis-à-vis the Euro by 42 per cent,

[1] To avoid any doubt, Brazil assumes that the EC's questions 5 to 7 in fact relate to matters covered by **Issue 3** in Brazil's First Written Submission.

(a) would the EC authorities have been entitled to calculate Tupy's dumping margin on the basis of data for the portion of the period-of-investigation (POI) after the re-evaluation?

Brazil notes the hypothetical nature of the EC's question and observes that such situations should be examined on a case-by-case basis in view of the prevailing facts and circumstances.

(b) *quid* if the re-evaluation had taken place after the end of the POI but before the imposition of measures? Could the EC have lowered the weighted average export price in Reals for the POI by 42 per cent in order to calculate Tupy's dumping margin?

Brazil refers the EC to Brazil's answer to the previous question.

6. How did the Brazilian anti-dumping authorities address the effects of the January 1999 devaluation in its own investigations? Specifically,

(a) in the case of investigations where the POI included January 1999, were the effects of the dumped imports on the prices of the domestic industry assessed exclusively on the basis of data for the period after the devaluation?

(b) in the case of ongoing investigations where the POI ended before January 1999, but the measures were imposed after that date, was the injury determination based on data not included in the POI?

(c) have the Brazilian authorities reviewed ex officio all anti-dumping measures imposed prior to January 1999 in order to establish whether imports are still causing injury?

With regard to all the EC's questions above, Brazil reminds the EC of the fundamental difference between the Brazilian law's approaches to reviews, as foreseen by Article 11 of the AD Agreement, and that of the EC's, which differs from that of Article 11. Unlike the position under the EC's Basic Regulation, the Brazilian rules do not impose any time limit to bar interested parties from requesting the authorities to initiate a review and to examine whether the continued imposition of the duty is necessary to offset dumping and/or whether the injury would be likely to continue or recur if the duty were removed or varied.

Unlike the EC, Brazil will always review the need for the continued imposition of the duty where warranted, i.e. where positive information substantiating the need for a review is being brought to the Brazilian authorities' attention. Whether such information is presented to the Brazilian authorities by an interested party or is otherwise made available, the Brazilian authorities will always initiate a review as long as it is warranted. Unlike the legal position in the EC, no other condition regarding timing or otherwise will be put by the Brazilian authorities to allow for such a review.

Finally, Brazil draws the EC's attention to the fact that no interested party has so far requested the Brazilian authorities to initiate a review on the ground of changed circumstances (Article 11.2 AD) in relation to the devaluation of the Brazilian currency.

7. Is Tupy interested in a review? If so, why has Tupy not asked for a review?

Brazil understands that Tupy would have indeed been very keen on having a review of the need for the continued imposition of the duty imposed by the EC, as a 'second-best' solution to its main argument against the duty as such, in line with the third alternative option that should have been used by the EC as stated in Brazil's First Submission under Issue 3.

In any event, however, Brazil understands that should a review been an option open to it under EC law, Brazil assumes that Tupy would have welcomed an EC review which would have looked into all the aspects of the original investigation, i.e. dumping, injury and causality. Brazil understands that, Tupy's position even during the EC investigation has been that the EC industry has suffered no injury at all and obviously not as a result of Tupy's imports.

With regard to the second part of the EC's question, Brazil respectfully refers the EC further to Brazil's Second Submission, where it reiterated that Tupy has not asked for a review as it was legally time-barred from doing that. Brazil recalls Article 11.3 of the EC's Basic Regulation, which does not give exporters the right to request a review unless "a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure".

ANNEX E-3

REPLIES OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL - FIRST MEETING

14 May 2002

Issue 1: "No special regard to Brazil as a developing country", "no constructive remedies explored"

Question 1

With respect to Brazil's allegations under Article 15 AD, would the European Communities have conducted itself in the same manner in an anti-dumping investigation involving a developed country Member? Is this relevant here? If not, what is the meaning and legal significance of the phrase "special regard" in the first sentence of Article 15?

1. As a general rule, the EC authorities would not act in the same manner in the application of anti-dumping measures involving a developed country Member. Indeed, no similar steps were taken in regard to Japan, the sole undeniably-developed country concerned by the same proceedings.

2. The Panel will be aware of the argument that the first sentence of Article 15 imposes no legal obligation on Members (see paragraph 31 of the EC's First Submission). The EC is of the view that, even if there was a legal obligation, it would be satisfied by complying with the obligation in the second sentence. Firstly, the period envisaged by the phrase '*before* applying anti-dumping duties' falls within that covered by the phrase 'when considering the application of anti-dumping duties'. Secondly, exploring possibilities of 'constructive remedies' is a way of giving 'special regard' to the special situation of developing country Members. Both these interpretations accord with the ordinary meaning of the terms of the Anti-Dumping Agreement. Nor is there anything in the context of these provisions, or of the Agreement's object and purpose (as far as that can be ascertained), to indicate any other meaning. The EC believes that this limited statement of the 'meaning and legal significance of the phrase "special regard" is all that is required to decide the present case, and is reluctant to venture a more general definition.

Question 6

What legal obligations does Article 15 AD impose? Could Brazil comment on the European Communities statement in paragraph 31 of its first written submission that "…the first sentence [of Article 15] imposes no legal obligation"? If there is more than one obligation in Article 15, what is the relationship, if any, between these obligations-- i.e. are they separate, independent obligations, or are they interrelated and dependent? Explain your response, with reference to the customary rules of interpretation of public international law and any relevant material.

3. In its answer to Question 1 the EC has argued that in complying with the obligation in the second sentence of Article 15 a Member will also comply with any obligation that arises from the first. This interpretation was justified in accordance with the rules stated in the Vienna Convention.

Question 7

Is our understanding correct that the European Communities found that the level of dumping margins were in all cases lower than the injury threshold and that the level of duty was thus set at the level of the dumping margins found? Comment, with reference to the obligation(s) in Article 15 AD and the relevant portions of the record.

4. The EC applies the 'lesser duty' rule whereby anti-dumping duties are set at whichever is lower of the levels of the dumping margin and the injury margin.

5. Applying this principle, the duties that were imposed in the malleable fittings proceedings were set on the basis of the dumping margin in the case of all exporting countries except Japan.

Question 8

Under Article 15 AD, is it for the Member imposing the measure to "propose" constructive remedies"? Provide the basis for your response. How, if at all, does this relate to the obligations in Article 8 (and any other provisions) of the AD Agreement? How, by whom and when should a price undertaking be sought/accepted for the purposes of Article 15 AD?

6. The EC has examined the obligations in Article 15 at paragraph 34 of its First Submission. The second sentence of Article 15 says that 'Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties …'. Brazil has said that this imposes an obligation to 'propose' constructive remedies. However, this word is not used in the Anti-Dumping Agreement, and the ordinary meanings of the terms 'propose' and 'explore the possibilities of' constructive remedies are certainly not identical. Whereas a proposal of an undertaking, for example, might amount to 'exploring the possibilities etc., one can envisage various ways in which a Member might do the latter without making a proposal. The panel in the *Bed Linen* case said that '"exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome', but that 'Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.'[1] emphasised the need for positive action, but never suggested that the Member must propose an undertaking or any other particular course of action.

7. Moreover, Article 8.2 of the Anti-Dumping Agreement speaks of undertakings being 'sought or accepted from exporters', which is language that envisages that proposals of undertakings are made by exporters rather than by importing Members. On the other hand, this provision also envisages that Members may *seek* undertakings. Article 8 places no obligation on them to do so, but to seek an undertaking would, in the ordinary meaning of the words, constitute a way of exploring the possibilities of constructive remedies. In the present case the EC on several occasions indicated that it saw an undertaking as the best outcome of the proceedings. Its actions can reasonably be described as seeking an undertaking.

Question 9

Do the parties agree that the obligation(s) in Article 15 AD arise(s) only with reference to the imposition of definitive anti-dumping measures at the end of the investigative process? Refer to any relevant material in responding.

[1] Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India ("European Communities – Bedlinen"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.233.

8. The EC endorses the following views expressed by the panel in the *Bed Linen* case[2] on this issue:

> 6.231 In this regard, we note Article 1 of the AD Agreement, which provides that:
>
> "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." (footnote omitted).
>
> In our view, this implies that the phrase "before applying anti-dumping duties" in Article 15 means before the application of definitive anti-dumping measures. Looking at the whole of the AD Agreement, we consider that the term "provisional measures" is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Indeed, in our view, the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. We find no instance in the Agreement where the term "anti-dumping duties" is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, in our view, the ordinary meaning of the term "anti-dumping duties" in Article 15 is clear - it refers to the imposition of definitive anti-dumping measures at the end of the investigative process.
>
> 6.232 Consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it is certainly permitted, and may be in a foreign producer's or exporter's interest to offer or enter into an undertaking at this stage of the proceeding, we do not consider that Article 15 can be understood to **require** developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a "provisional" price undertaking could not be retroactively revised. We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required.

Question 10

What do the parties understand to constitute "constructive remedies" within the meaning of Article 15 of the AD Agreement? Please refer to any relevant material.

9. The *Bed Linen* panel came to the conclusion that 'constructive remedies' include price undertakings and reductions in duty levels[3] The EC agrees with that conclusion. The EC authorities complied with the requirements of Article 15 by exploring the possibilities of a price undertaking. In view of that, this Panel need not reach the issue of whether there may be other constructive remedies in addition to those identified by the *Bed Linen* panel

[2] Ibid.
[3] Ibid. paras. 6.228 and 6.229.

Question 11

Is there an obligation under Article 15 AD to "communicate" to developing country Members that an investigating authority is exploring possibilities of constructive remedies?

10. The EC sees no reason in theory why Article 15 requires that fact to be communicated to developing country Members. However, when the remedy being contemplated is an undertaking communicating the fact to the Member would be a highly practical means of exploring it.

Question 12

What factors should guide a panel's consideration as to whether the imposition of anti-dumping measures would affect Brazil's "essential interests" within the meaning of Article 15 AD? Do the parties agree with the statement of the United States in its third party written submission (para. 14) that the term "essential" implies a very high standard for the level of national interest which the developing country must demonstrate would be affected by anti-dumping duties?

11. An '*essential* interest' is one that is considerably more important than a mere 'interest'. The EC does not find that the notion of a 'high standard' adds significantly to the term 'essential' (except perhaps by emphasising where the burden of proof lies). It is unlikely that a country would have more than a handful of essential interests. The measurement of the importance of the interest would be primarily economic. The size of the industry relative to the whole economy of the country would be a major criterion. However, it is possible that a small industry might be essential if other industries depended upon it. In the present case, where the industry comprises a small part of a single large company, Brazil would have to show firstly that the company was an essential interest of the country, and secondly that the company's viability was put in doubt by the action against the part of its activities that comprised the industry.

12. Since Article 15 is an exception to the rules of the Anti-Dumping Agreement the onus lies on the developing Member concerned to prove that its invocation of the exception is justified.

Question 13

We note the section on "Undertakings" in the Definitive Regulation does not refer to Tupy/Brazil. Comment.

13. It is the practice of the EC to refer to undertakings in its anti-dumping regulations only in regard to those companies that have offered one (whether or not it has been accepted).

Question 15

Could Brazil elaborate upon its assertion on p. 32 of its first written submission that:

> **"…the Application did not contain a description of the volume and value of production of the like product accounted for by the Applicants" and that "[t]he Applicants provided information in respect of which the volume and value of production of the like product accounted for by them only insofar as the same could be broadly and rather inaccurately deduced from figures provided in respect of total consumption, price undercutting calculations and the volume of imports as a whole entering the EC."**

Could the European Communities comment on this argument as it currently stands?

14. In so far as the EC understands Brazil's argument, the EC believes that an answer is given in its First Submission.[4]

Issue 2: "Inappropriate application"

Question 16

Brazil states: "…the evidence provided by the Applicant did not comply with the requirements of Article 5.3" (Brazil's oral statement at the first Panel meeting, para. 31). Comment.

15. In this part of its Oral Statement Brazil adopts the view (presented by the EC at paragraph 48 of its First Submission) that a failure of the applicant to meet the criteria of Article 5.2 can only be challenged by alleging a breach of Article 5.3 arising from a failure of a Member's authorities to properly check whether the criteria have been met. However, the basis for Brazil's claim remains the assertion that the criteria were not met. As the EC observed in paragraph 49 of its First Submission, even if this were true, it would not follow necessarily that the EC had infringed Article 5.3. In any event, the EC demonstrates in its First Submission that the criteria were met.

Question 17

What is the relationship between: (i) Articles 5.2 and 5.3; (ii) Articles 5.2 and 5.8; (iii) Articles 5.2 and 6.2 -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.

16. The EC has addressed the first issue in its answer to the previous question and in parts of its First Submission there referred to.

17. Article 5.8 refers to the existence of sufficient evidence. This phrase is also found in Article 5.3. This level of evidence it is to be distinguished from that defined in Article 5.2, which is to be presented by the Applicant. Consequently, there is no direct link between Article 5.2 and Article 5.8. In any event, as the EC explains in paragraph 46 of its First Submission, the notion of 'violation' should not be applied to Article 5.2 in the same way that it is applied to other provisions of the Anti-Dumping Agreement.

18. Assuming that the obligation in the first sentence of Article 6.2 is a general one rather than one limited to the subject matter of the rest of the paragraph,[5] its scope is nevertheless restricted to procedural rights associated with the notions of 'fair hearing' and 'due process'. Article 5.2 effectively confers certain rights on the domestic industry, which have consequent implications for the rights referred to in Article 6.2. How these rights would be enforced is problematic since other Members are unlikely to pursue them through the WTO dispute-settlement process. Fortunately, this issue is academic in the present context, when only the rights of exporters are relevant. Since at the initiation stage of proceedings exporters have no role, and even no right to know, of the investigation, there can be no scope for the application of Article 6.2 in their regard.

[4] At paras. 51 and 58.

[5] One panel has taken this view: Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Portland Cement from Mexico ("Guatemala – Cement II")*, WT/DS156/R, adopted 17 November 2000, para. 8.162, and footnote 849.

Question 18

What is the relationship between: (i) Articles 5.3 and 5.8; (ii) 5.3 and 6.2 -- -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.

19. If the determination referred to in Article 5.3 results in the authorities concluding that there is insufficient evidence of either dumping or of injury to justify initiation this would also amount to their being 'satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case' in terms of Article 5.8. They should therefore reject the application. Consequently, if they initiated the investigation despite reading such a negative conclusion they would not only be infringing Article 5.3 but would also be failing to reject the application as required by Article 5.8.

20. The position of Article 5.3 in regard to Article 6.2 is the same as that of Article 5.2 described in the previous answer.

Issue 3: "No need to impose measures"

Question 20

According to Brazil, the first "explicit consideration" by the European Communities of the currency devaluation was on 20 July 2000 in the Disclosure Preceding the Definitive Regulation. Does the European Communities agree? Is this relevant? Why or why not?

21. The first explicit reference by the EC authorities to the currency devaluation was in its letter of 30 May 2000,[6] which was as a reaction to Tupy's letter of 30 March 2000,[7] where Tupy referred for the first time during the proceeding to the devaluation. Tupy said that '*had the Commission considered this fundamental change, it would not have found a dumping margin*'. This imprecise argument was not supported by any evidence.

22. Tupy raised the same argument during the hearing of 29 May 2000.[8] The argument was again vague and not supported by any evidence. The EC Commission requested Tupy to clarify its argument. In its letter of 30 May 2000,[9] Tupy said '*it is clear that the normal value had fallen dramatically to the point that no dumping could reasonably be established*'. Again, this argument was not supported by any evidence.

23. The EC's explicit consideration of devaluation had begun well before these dates. Already in its pre-verification letter of 7 September 1999,[10] the EC has requested Tupy to prepare a table giving the official exchange rates of a number of currencies used by Tupy against the Real. This is not the EC's normal practice, but was done in this case because the pre-verification preparation had shown the use by Tupy of strongly varying exchange rates. During the on-the-spot verification, Tupy was asked to explain in detail how its foreign currencies were converted into Real.

24. The timing of the EC's consideration of devaluation is significant only in regard to whether that consideration satisfied the requirements of the Agreement. In this case the facts relating to

[6] Annex I, page 14, 'g. currency conversions' and the same document Annex II, page 6, first paragraph, BRL-16.
[7] BRL-13, page 37, paragraph 16.
[8] BRL-14, point 8.
[9] BRL-15.
[10] BRL-8, page 3.

devaluation were properly established and evaluated. The references to devaluation in correspondence with Tupy at a late stage in the investigation arose in response to comments made at that time by Tupy.

Articles 11.1 and 11.2 AD

Question 26

Does the European Communities believe that the price comparison at the end of the IP revealed no, or declining, differences between export price and normal value at the end of the period? Explain the significance this has for the establishment of the margin of dumping in the IP as a whole. Provide the legal basis for your response, citing any relevant material.

25. Because the EC has data for Tupy's individual export sales during the IP it can say that, measured in Real, *export prices* declined following devaluation. However, it is not possible to identify *normal values* for particular parts of the IP because the EC's methodology is based on a consideration of the whole of that period. To calculate normal values for particular parts of the IP would require reprocessing the basic data. Furthermore, a recalculation of this kind would conflict with the basic rationale of the EC's calculation of the dumping margin, which itself reflects the obligations of Article 2.4.2 AD. In this respect the EC agrees with the view expressed by the Panel in *United States – Steel Plate, Sheet and Strip*[11] that the normal time period for comparison is the whole of the IP.

26. It should also be remembered that Tupy's prices at the end of the IP, immediately following devaluation, are no reliable indicator of its prices in the medium term.

Question 33

What is the meaning of the phrase "where warranted" in Article 11.2 AD? Provide the legal basis for your answer. Assuming arguendo that initiation of a review is "warranted", is there a legal obligation to self-initiate a review?

27. The phrase 'where warranted' in the first sentence of Article 11.2 qualifies the statement that the 'authorities shall review … on their own initiative'. Thus it states the condition giving rise to this obligation, but the condition contains no explicit criteria. To identify any implicit criteria it is necessary to look at the context. Part of this is provided by the statement in Article 11.1 that 'An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.' However, the Agreement provides explicit circumstances in which reviews are to be commenced (on request, or by means of an expiry review) which largely secure respect for this principle. Self-initiation therefore remains a residual category, appropriate for unusual or extreme circumstances. In such circumstances the existence of a legal obligation to self-initiate cannot be entirely excluded.

Question 34

Is there any relevant material the Panel might be guided by in its examination of the EC allegations under Article 11.2 AD?

28. The EC assumes that the panel is referring to the statement in paragraph 107 of the EC's First Submission that 'Brazil's account of what happened following devaluation is all hypothetical, and no

[11] Panel Report, United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WT/DS179/R, adopted 1 February 2001, para. 6.120 et seq.

evidence of changes has been presented, merely assertions.' Brazil makes these assertions under Issue 3 of its First Submission, and the relevant material is referred to there.

Question 35

What, if any, is the relevance and role in these proceedings of the EC case-law and practice concerning "changed circumstances" cited by Brazil on pp. 38 et seq. of its first written submission?

29. The EC addresses this point, and the arguments of Brazil, at paragraph 101 of its First Submission. The EC's practice regarding changes that occur following the investigation period has been expressed in a recent decision as follow: "Developments occurring after the IP can be taken into account exceptionally provided that the imposition of anti-dumping duty based on the IP would be manifestly unsuitable. Indeed, these developments could only be used if their effects are manifest, undisputed, lasting, not open to manipulation and did not stem from a deliberate action by interested parties".[12] It is very rare for the EC authorities to conclude that these conditions have been met. (It should be noted that, as a term of art, the phrase 'changed circumstances' is used in EC practice to refer not to the situation described here, but to factors taken into account in the course of a review to justify modification of a measure).

30. As the EC pointed out in its First Submission, the devaluation took place during the investigation period and such effects as it had on export prices were taken into account in the calculation of the dumping margin. However, even if the practice described above were one that was applied to events occurring during the investigation period, the EC would not regard the circumstances of the present investigations as ones that met its conditions. In particular, even assuming that the dumping margin had declined in the period immediately following devaluation there would have been no basis for concluding that such a change would be lasting.

31. In any event, there is no obligation in the Anti-Dumping Agreement for the EC to modify its procedures in the way described here.

Issues 4 and 5: "Improper normal value" - "inappropriate product types"; "inappropriate product codes"

Question 36

Could the European Communities thoroughly outline the precise steps it took in calculating normal value, including constructed normal value, in this investigation, citing the relevant parts of the record of the investigation. In responding, could the European Communities clarify what is the "representativeness" test referred to in para. 27 of the Provisional Regulation? Does it correspond to the test foreseen in Article 2.2 and footnote 2 of the AD Agreement? If not, where is the basis in the AD Agreement?

I. Definition of the product under consideration and the like product

32. The 'product under consideration' was defined as threaded malleable cast iron tube or pipe fittings. The product types exported by Tupy falling within this category were product types of which the internal codes start with 12 or 18.[13]

[12] Iron and steel ropes and cables originating in Czech Republic, Russia, Thailand and Turkey, *EC Official Journal* L 211, 4.8.2001, page 1, recital 32.

[13] Provisional Regulation: recitals. 9 to 12.

33. The 'like product' was defined as threaded malleable cast iron tube or pipe fittings. The product types sold by Tupy in Brazil falling within this category were those with internal codes starting with 12, 68 and 69.[14]

II. Determination of whether actual sale prices could be used in calculating the normal value.

34 Actual sales prices were used provided that the 'representativeness' and 'ordinary course of trade' tests were satisfied. These tests were applied to the data of each exporting/producing company.

A) Representativeness test

35. This test corresponds to the test foreseen in Article 2.2 and footnote 2 of the Anti-Dumping Agreement.

36. Firstly, the EC determined whether the total domestic sales volume of the like product constituted at least 5 per cent of the total export sales volume to the EC of the product concerned. The criterion was met in this case: the volume of domestic sales of the like product by Tupy was 22.8 million units, compared to 22.3 million units exported to the EC[15] (Had the criterion not been met the domestic prices of the company would not have been used in the calculation of normal value).

37. Secondly, the EC determined whether, for each of the product types exported, the quantity sold on the domestic market was at least 5 per cent of the identical type exported to the EC.[16] The results of these calculations were disclosed to the company.[17] For product types that did not satisfy this test the normal value was constructed (see below).

B) Sales in the ordinary course of trade.

38. The EC first looked to see whether, considered as a whole, the product was being sold 'in the ordinary course of trade'. Then, for each product type sold on the domestic market, it checked whether the sales could be regarded as being made in the ordinary course of trade, by establishing the proportion of profitable sales to independent customers of the type in question. If 80 per cent or more of the sales were profitable, normal value was based on all sales of that product type, if less than 80 per cent but at least 10 per cent were profitable, normal value was based on profitable sales only. If less than 10 per cent of sales of the product type were profitable the normal value was constructed. The profitability test was done on a transaction by transaction basis, and the result for each transaction,[18] and for each type,[19] were disclosed to the company, as was the methodology.[20] Reference was also made to this test in the Provisional Regulation.[21]

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[14] Provisional Regulation: recitals. 13 to 19.

[15] Definitive Disclosure, Annex II, page 8, point 2.1.1, BRL-16; Provisional Disclosure, Annex II, page 1, point 1.1, BRL-11; and Provisional Regulation, recital 20.

[16] Provisional Disclosure, Annex II, page 1, point 1.1, BRL-11; Provisional Regulation, recitals 21 and 22.

[17] Provisional Disclosure Annex II, Annex 4 'Normal values used', column '% of quantity exported sold on the domestic market', BRL-11; Definitive disclosure, Annex II, Annex 4 'Normal values used', column '% of quantity exported sold on the domestic market', BRL-16.

[18] Provisional Disclosure, Annex II, Annex 2 'Domestic sales on a transaction by transaction basis', BRL-11; Definitive disclosure, ditto, BRL-16.

[19] Provisional Disclosure, Annex II, Annex 3 'normal value based on domestic sales', column '% of domestic sales which are profitable', BRL-11; Definitive disclosure, ditto, BRL-16.

[20] Provisional Disclosure, Annex II, page 3, last four paragraphs.

[21] Recitals 23 and 24.

III. Calculation of the normal value

39. For those product types that satisfied both the 'representativeness' test and the 'ordinary course of trade' test the normal value was based on the sale prices on the domestic market. A weighted average price was determined for each product type.

40. For those product types that failed either or both of the above tests the EC constructed a normal value.[22]

41. The EC first calculated the manufacturing costs of the product types. To these were added an amount for SG&A expenses and for profit in accordance with the rules set out in Article 2.2 and the chapeau of Article 2.2.2 of the Agreement. SG&A expenses were based on sales in the ordinary course of trade only, although, since these expenses were allocated on the basis of turnover, the point was not significant. Details of the calculation were disclosed to the company,[23] and reported in the Provisional Regulation.[24] The amount for profit was derived from the sales of the like product in the ordinary course of trade.[25]

42. The EC disclosed to the company the normal value used for each product type, and the basis (sale price or construction) for each such value.[26]

Question 37

Did the European Communities include data from sales not permitting a proper comparison to calculate SG&A costs? To what extent, if at all, would this be a relevant consideration under Articles 2.2 and 2.2.2 AD?

43. As mentioned in the answer to Question 36, the EC made its calculation of SG&A costs on the basis of sales in the ordinary course of trade only. The panel refers to 'sales not permitting a proper comparison' which is a broader category than sales 'not in the ordinary course of trade' (mentioned in Article 2.2) because it includes, e.g., 'unrepresentative' (i.e. low volume) sales. The latter category were included in the data from which the EC calculated SG&A costs because this is what is required by Article 2.2.2 of the AD.

44. As the SG&A expenses were allocated to the different product types on the basis of turnover,[27] the exclusion of certain categories of products or certain types from the calculation of these expenses actually had no consequences in this case.

Question 38

Were there any sales to related parties? If so, how were they treated in the application of the methodology under Article 2.2.2 chapeau?

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[22] Since Tupy was the sole Brazilian exporter the option of using data of other exporters was not available.

[23] Provisional disclosure, Annex II, page 4 point 1.2, second paragraph, BRL-11.

[24] Recital 27.

[25] Provisional disclosure, Annex II, page 4 point 1.2, third paragraph, BRL-11. Provisional Regulation recital 27.

[26] Provisional and Definitive disclosures, Annex II, Annex 4 – final column: the figure is taken from that in the 'adjusted domestic normal value' column or in the 'adjusted constructed normal value per unit' column.

[27] Provisional Regulation, recital 37; Provisional disclosure, Annex II, page 3, second paragraph, BRL-11.

45. There were no domestic sales to related parties. The only sales made by Tupy to related parties were export sales via Tupy Europe. These sales in no way affected the application of the methodology under Article 2.2.2. chapeau.

Question 39

Is the Panel correct in understanding that the European Communities constructed the normal value of products with Tupy internal product code "18" by using the methodology set out in the chapeau of Article 2.2.2 (i.e. actual data from sales in the ordinary course of trade for SG&A and profit of types within internal product codes 12, 68 and 69)? If so, how does this relate to the following European Communities statement: "the normal value was constructed based on the cost of manufacture of the exported types so that also for those types no further physical differences existed and therefore no further adjustment was warranted." (Definitive Regulation, para. 43)

46. It is correct that the EC constructed normal values for products starting with code 18 by using the methodology set out in the chapeau of Article 2.2.2. Of course, this provision provides only a partial guide because it concerns only two elements in the construction of normal values: SG&A and profits. The other main element, the 'cost of manufacture' (or 'cost of production' in terms of Article 2.2) is calculated using actual costs of the exported product types.

47. The EC determined normal value for in total 1375 product types exported. For 566 types (all code 12 types), normal value was based on domestic sales. For the remaining 809 types, normal value was constructed. These 809 types can be divided in two categories: product types with code 12 (526 types) and product types with code 18 (283 types). For each of the normal values constructed, the EC took the cost of manufacturing of the type exported, and added SG&A expenses and profit by using the actual data from sales of the like product in the ordinary course of trade. Recital 43 has to do with the repeated and strongly varying claims for an adjustment for physical difference that were made by Tupy during the proceeding. It should be read in conjunction with recitals 30 and 31 of the same Regulation. Together these recitals cover and justify the rejection of the not very specific claims made by Brazil to make adjustments to the constructed normal values. These claims were as follows:

48. Tupy had during the investigation made a claim for an adjustment for physical differences to the normal value. This claim was made in the reply to the Questionnaire:[28] '*This refers to point f on the "DMALLUR" table where it is shown NPT and BSP range as NPT is sold to the domestic market and other external market but not to the EC countries. Since there are significant technical differences between NPT and BSP and due to the fact that the EC standard code for the concerned product do not made any differences between them we could not exclude NPT and we had to adjust the* ***domestic price*** (bold added) *to those differences in physical characteristics'*.

49. At provisional measures stage, the EC Commission decided to use the internal product codes of Tupy rather than the product code numbers proposed in the questionnaire, so that normal values based on domestic sales were based only on product types 12 in order to compare with the export prices of the identical exported product types 12. As a consequence, no adjustments for physical differences to these domestic normal values were warranted as the types compared on both domestic and export side were completely identical.

50. Tupy argued in its comments to the provisional disclosure[29] that 'Where the Commission has constructed the normal value based on the profitable sales of product types starting with a '68', '69' or '79', it must grant Tupy an adjustment to take account of the differences in their physical characteristics. If it does not, then it will not have recognised, as it properly should, that these

[28] BRL-4, section G-2.1.
[29] BRL-13, page 39, points 21 to 24

products attract higher prices and profits and that they are not even sold on the Community market. …'. It should be noted that this claim is already fundamentally different from the original one, because the adjustment now claimed was an adjustment to the **profit margin** used to construct normal value. Tupy also argued[30] that 'Where the Commission chooses to analyse the product types using Tupy's internal coding, this does not constitute a reason to deny a validly claimed adjustment for physical differences as the physical difference in this case causes the constructed profit margin to be inflated, thus increasing unfairly the normal value. It is therefore submitted that the Commission must grant the claim for an adjustment as claimed. …'

51. The EC refuted these arguments in the Definitive disclosure letter:[31]

> 'Tupy also considers it inappropriate that the calculation of the profit margin includes domestic sales of product types that are not sold at all for export to the EC. Again, Article 2(6) of the basic Regulation says "sales of the like product" and does not put any condition of whether like product types are exported to the EC or not. Tupy further argues that sales of products with different threading (NPT threaded) should be excluded. As these products are like products to the products exported, there is no reason to exclude them. It also argues that if these products are not excluded, an adjustment for physical difference should be made to the profit margin, based on Tupy's claim for an adjustment for physical differences. Adjustments for physical differences are foreseen in Article 2(10)(a) of the Basic Regulation and are intended to make a fair comparison between normal value and export price. No adjustments are foreseen when calculating the profit margin for constructing the normal values. It is clear that, as both costs of manufacturing and sales prices of NPT threaded like products are claimed to be higher than costs and sales prices of BSP threaded like products, any hypothetical adjustment should be made on both the cost of production and the sales prices and would as such not affect the profit margin.'

Question 37

Comment on Brazil's allegation of the inconsistency between your statement in the Disclosure Preceding the Provisional Regulation:

"- On the domestic market, products starting with a 12, 68, 69 and 79 code were sold. Products starting with 68 and 69 had a different thread (NPT instead of BSP), while 79 products were not threaded. Products with code 68 were also made for higher pressure than other products. The costs of manufacturing of these products appeared to be different, and most of these products had also market values which were very different.

- On the EC market, Tupy sold products starting with a 12 code (own brand) and products starting with an 18 code (Nefit brand). Again, these products appeared to have sometimes very different costs of manufacturing." (footnotes omitted, emphasis added)

and the position taken in the investigation not to grant adjustments as envisaged by Article 2.4

[30] Ibid., page 24, point 24.
[31] Provisional disclosure, Annex II, page 4, last paragraph, BRL-16.

A. Description of the product categories and differences in cost of manufacturing and market value

52. Tupy reported in its reply to the Questionnaire that it sold on the domestic market four different categories (according to Tupy's internal product classification) of malleable cast iron tube or pipe fittings: product types starting with code 12, code 68, code 69 and code 79. All these categories seemed to correspond to the definition of the product as given in the Notice of Initiation: '*malleable cast iron tube or pipe fittings*'.

53. However, at the provisional stage, the EC authorities decided to exclude unthreaded fittings. The reasons for this exclusion were given in the Provisional Regulation.[32] They were not contested by Tupy during the investigation.

54. As a consequence, the product types starting with internal product code 79 were excluded from the scope of the investigation because they were not threaded. Types in this category were all sold to one and the same customer, Meikon, on an OEM basis. In fact, these product types were not fittings but were reported as such by Tupy because they were produced on the same production line and fall under the same CN code as fittings. These products were not used as a fitting but as a tooling for making threads in plastic tubes. These products were furthermore re-exported by Meikon in South-American markets. It should be noted that the EC omitted to exclude this category from the calculations at provisional stage, but corrected this at definitive stage.[33]

55. Within each remaining category (12, 68 and 69), many types were sold on the domestic market. The differences between the types within each category mainly concern the shape, size, weight and surface finishing, resulting in different costs and market values. All these types have, despite these differences, the same basic physical and technical characteristics as well as the same uses, and were therefore considered as a single product.[34]

56. It should be noted that there were also general differences between the three remaining categories. The main differences were:

- Code 12: BSP or cylindrical (parallel) threading, pressure resistance from 290 to 360 psi.
- Code 68: NPT or conical threading, pressure resistance from 230 to 2000 psi.
- Code 69: NPT or conical threading, pressure resistance from 75 to 300 psi.

57. These differences in threading and pressure resistance also led to differences in weight, in cost of manufacturing and in market value (sales prices) for fittings types for which all other physical characteristics (shape, dimension, surface, etc) were the same.

58. Two different categories were exported to the EC (code 12 and 18). Although Tupy argued that these types were identical, apart from the branding, it was found that the types within these two categories had different costs of manufacturing. Apart from the use of a different mould, this was also caused by differences in weight and differences in testing.

59. The paragraphs of the Provisional disclosure quoted in the Question refer to the comparison method used by the EC Commission, i.e. to use the internal product codes of Tupy rather than the product control numbers as defined by the EC in the Questionnaire. A practical example will demonstrate why it was necessary to use Tupy's internal product codes:

[32] Recitals 10 and 11.
[33] Definitive disclosure, Annex II, page 8, point 2.1.1, BRL-16.
[34] Provisional Regulation, recital 12.

Product control number EC	Internal product number Tupy	Product description	Cost of manufacturing during the POI per unit	Average domestic sales price during the POI
A400DD00BB	121100431	M/F Elbow, ½ inch, BSP thread, black, Tupy brand, pressure 150 lb	0.192	0.5488
A400DD00BB	681100441	M/F Elbow, ½ inch, NPT thread, black, Tupy brand, pressure 300 lb	0.921	1.3070
A400DD00BB	691100441	M/F Elbow, ½ inch, NPT thread, black, Tupy brand, pressure 150 lb	0.219	0.7291
A400DD00BB	181100431	M/F Elbow, ½ inch, BSP thread, black, NEFIT brand, pressure 150 lb	0.182	Not sold in Brazil, only exported

60. This example shows that fittings with different threading or brand name although being for the rest quasi-identical have a strongly varying market value and that it would be unreasonable to combine domestic sales of 12, 68 and 69 types to determine a normal value combined for 12 and 18 types which have in their turn a strongly varying cost and market value.

B. Position taken not to grant adjustments under Article 2.4

61. For product types with code 12 exported to the EC for which identical types were sold on the domestic market, the domestic prices of those types only were used to determine the normal value (if sales were made in sufficient quantities and in the ordinary course of trade).

62. For product types with code 12 for which no identical types were sold on the domestic market and for product types 18 (which were exported only to the Community) the normal value was constructed (as described in the answer to Question 36).

63. The comparison of normal value and export price of identical types make by definition a claim under Article 2.4 for physical differences unfounded. A claim to make an adjustment for physical differences to the profit used for constructing normal value runs counter to the logic implicit in Article 2.2.2 which requires the profit level to be based on a data for a range of products. There is no logical basis on which an adjustment could be made to provide for different profit levels for the various product types.

64. Article 2.4 requires the authorities to make due allowance for differences between the normal value and the export price. The adjustment claimed by Brazil is not based on any such difference. In reality, Brazil's claim amounts to requesting an adjustment for the alleged difference between the profit margin included in the constructed normal value in accordance with Article 2.2.2 and the theoretical profit margin which the exported type would have obtained if it had been sold Brazil in the ordinary course of trade and in sufficient quantity. However, Article 2.4 is not concerned with that type of difference. Moreover, the profit margin which the exported types would have obtained in Brazil is unknown, which is precisely why it becomes necessary to calculate a "reasonable" amount for profit in accordance with Article 2.2.2.

Question 41

Comment on Brazil's statements on page 60 of its first written submission:

> **"Consequently, the words "throughout this Agreement" in Article 2.6 when read together with the wording of Article 2.2.2 obliges the investigating authorities to use the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products which are identical, i.e. alike in all respects, to the product under consideration. Only in the absence of such identical products can the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products, which are, although not alike in all respects, having characteristics closely resembling those of the product under consideration. However, in the latter case the investigative authority is obliged to make due allowances in each case, on its merits, for differences in physical characteristics affecting price comparability….."**

65. Brazil's proposal is based on a misunderstanding of the notion of like product. The base point for applying this notion is not the particular selection of products for which a relationship with other products is sought. Rather it is the 'product under consideration' as defined for the investigation (normally in the notice of initiation). Where the Agreement intends the kind of relationship proposed by Brazil it uses the notion of comparable products, and allows for adjustments where there are differences. The chapeau of Article 2.2.2 explicitly directs the use of production and sales data pertaining to the *like* product and not a comparable product.

66. The kind of interpretation proposed by Brazil would lead to arbitrary if not chaotic results, which are clearly not the intention of the Agreement. The SG&A and profits used for constructing prices would depend on the particular distribution of similarities and differences in the exporter's product range. On the other hand, the method actually intended by the Agreement results in an averaging of data, which ensures a much fairer solution. Furthermore, taken literally, Brazil's methodology would lead to the use of data pertaining exclusively to the sales of the very product type whose sales price had been rejected, e.g. because sales were not in the ordinary course of trade, so that the constructed price would be the same as the (rejected) sale price. It was in order to avoid such a contradictory result that the chapeau of Article 2.2.2 specified the use of data pertaining to production and sales of the 'like product'.

67. Furthermore, Brazil's comments appear to contradict its own view, expressed on the same page, that 'the AD Agreement does not allow for separate like products to be defined for the various product types, this is borne out by the use of the word 'the' in Article 2.6. Whatever like product is defined will apply to the construction of all the relevant normal values'.

Question 47

What is the relationship between Article 2.2 and the chapeau of Article 2.2.2 AD?

68. The chapeau of Article 2.2.2 provides the basic rule for determining the amounts for SG&A costs and for profit for the purposes of Article 2.2. Whenever those amounts have been determined in conformity with the chapeau of Article 2.2.2, they must be deemed in conformity also with Article 2.2[35].

[35] See the Panel Report on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, where the Panel concluded that "AD Article 2.2.2 (i), when applied correctly, necessarily yields reasonable amounts for profits" and that Article 2.2 imposes no

Question 48

Is the meaning of "proper comparison" in Article 2.2 AD the same as "fair comparison" in Article 2.4 AD? Provide the legal basis and substantiation for your response, with reference to all relevant provisions in the AD (and, if necessary, other) Agreement.

69. No. The circumstances mentioned in Article 2.2 ("the particular market situation or the low volume of the sales in the domestic market of the exporting country") suggest that domestic prices are deemed not to allow a "proper comparison" when they are not reliable. On the other hand, Article 2.4 comes into play where a reliable normal value has already been established - whether it is based on domestic prices or constructed- but there are differences between that normal value and the export price for which it is necessary to make an allowance in order to ensure that the comparison is fair.

Question 49

What is the nature of the reference in Article 2.2 AD concerning "sales [that] do not permit a proper comparison"? Is it merely a threshold to guide the decision whether or not to proceed to constructed normal value, or is it also a consideration to be taken into account in constructing normal value? What is the basis for your response, using the customary rules of interpretation of public international law?

70. The reference in Article 2.2 concerning "sales that do not permit a proper comparison" is a threshold to guide the decision whether or not to construct normal value and not a rule for constructing the normal value. The rules for constructing the normal value are contained elsewhere in the Agreement, namely in the last phrase of Article 2.2 and in Article 2.2.2, as regards the amount for SG&A expenses and profits. If the drafters had intended to exclude the sales that "do not permit a proper comparison" from the chapeau of Article 2.2.2, they would have indicated so expressly, as they did with respect to the category of sales "not in the ordinary course of trade", which is also mentioned in Article 2.2.

Question 50

Would the removal of sales of such a low volume as to not permit a proper comparison within the meaning of Article 2.2 AD contradict Article 2.2.2 AD by removing a category that should properly have been included in the calculation?

71. Article 2.2.2 does not provide for the discarding of low-volume sales as part of the data employed in constructing a normal value. The approach adopted by the Appellate Body in the *Bed Linen* case in regard to Article 2.2.2(ii)[36] suggests that panels should be reluctant to abandon the literal interpretation of a provision because of what might seem to be its perverse consequences.

Question 51

Does the definition of "like product" apply among types falling within the scope of the like product? Provide the basis for your reasoning.

72. The meaning of this question is unclear to the EC.

"separate reasonability test" (at para 7.128). The Panel implied that the same is true also of the chapeau of Article 2.2.2 (ibid., at para. 7.125)

[36] Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India ("European Communities – Bedlinen"), WT/DS141/R, adopted 12 March 2001, para. 80.

Question 52

How do the parties respond to the US statement in its written third party submission that an improper calculation of constructed normal value cannot constitute a breach of Article 2.4 AD, and that a putative breach of Article 2.4 AD cannot be used to bolster a claim under Articles 2.2 and 2.2.2 AD?

73. Article 2.4, and Articles 2.2 and 2.2.2, are distinct elements of a complex structure. In principle, claims of a breach of one provision do not automatically constitute breaches of the other. On the other hand, the EC does not argue that the way that a normal value is constructed can never have an influence on the way in which the price comparison should be carried out. What it rejects is Brazil's argument that an adjustment should be made for the way in which the profit level has been calculated.

74. The EC is not clear what the US means by the expression 'bolster a claim'. The US itself refers to the use of 'context' in interpreting provisions of the Agreement. Article 2.4 is obviously part of the context of Articles 2.2 and 2.2.2, and is therefore in principle to be considered in interpreting those provisions. Whether it actually contributed to that interpretation would depend on the particular aspect of those provisions that was being examined.

Question 53

Comment on the statement by the European Communities at para. 127 of its first written submission that "…both SG&A and profit were based on the 1260 types of the like product sold on the domestic market".

75. The EC considered the domestic sales of all types of the like product sold on the domestic market in order to determine SG&A costs and profit for the purpose of constructing the normal value. On reviewing the data the EC has discovered that the total number of types of the like product sold of the domestic market was 1261 rather than 1260 (the figure given in the EC's First Submission).

76. While all types of the like product sold on the domestic market were taken into consideration, SG&A costs and profit were based solely on those types sold on the domestic market in the ordinary course of trade. Out of the 1261 types sold on the Brazilian domestic market, 68 types were not sold in the ordinary course of trade. SG&A costs and profit were thus based on the 1193 types sold on the domestic market in the ordinary course of trade. This can clearly be seen in the Definitive disclosure.[37] These data were also provided to Tupy during the proceeding on a CD-ROM.

77. The approach followed by the EC is fully in line with Article 2.2.2 which says: 'the amounts for administrative selling and any other 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'.

Issues 6 & 10: "No proper consideration of tax neutralisation"; "no proper basis to assess PIS/COFINS indirect taxes"

Question 54

Does the European Communities believe that the IPI Premium rates applicable to exported products were established by Resolution no. 2 of 17 January 1979 of the Exportation Incentive Commission ('Resolution no. 2') attached to the Ministry of the Inland Revenue and

[37] Annex II 'Company specific findings concerning dumping', Annex 3 'Normal value based on domestic sales', BRL-16.

that Resolution no. 2 established an IPI Premium Credit of 20 per cent for fittings under which the definition of the like product in this investigation falls? (Brazil first written submission, p. 78). Was this legislation on the record of the underlying AD investigation?

78. The only legal document referred to by Tupy during the investigation in respect of the IPI Premium Credit was the 'Brazilian law-edict nr 491-dated March 5th, 1969. A four-page translation of that edict was part of Tupy's reply to the Questionnaire. Although this subject was examined at length during the on-the-spot verification and additional evidence was requested by the EC investigators, no such evidence in the form of any law was presented. Nor was additional evidence of this kind submitted later in the investigation.

79. The legislation referred to in the question was thus not on the record of the investigation. More particularly, in terms of Article 17.5(ii), it was not a 'fact made available in conformity with appropriate domestic procedures to the authorities', and is therefore not a matter to be considered by the Panel. Under Article 2.4 (the relevant context here) the burden lay on Tupy to present the evidence in support of the adjustments that it claimed.

80. The EC is therefore not in a position to make a judgement on the relationship of this legislation and the IPI Premium rates.

81. The EC notes that whether or not this legislation provides the basis for the IPI Premium Credit, the arguments presented in EC's Submission[38] remain valid.

Question 55

With reference to the record of the investigation, can the European Communities substantiate its statement in para. 153 of its first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary?

82. The Panel's question suggests some confusion between the so-called 'IPI Premium Credit' and the IPI tax .

83. The IPI tax is a "value added tax". It is collected on the domestic sales of fittings by Tupy but not on the exports of fittings. The IPI tax is levied also on the purchases of inputs by Tupy. Since the IPI is a VAT-type tax, the IPI paid by Tupy on its purchases of inputs can be credited against the IPI collected on the sales of fittings. This means that the IPI imposes no net cost on Tupy and, therefore, does not increase the price of the fittings sold in Brazil

84. The so-called 'IPI Premium Credit' is a tax credit equal to a certain percentage of the beneficiary's export turnover. That tax credit can be deducted from the beneficiary's IPI liability or, where this is not possible, from other taxes. The IPI Premium Credit is granted as "compensation" for some unspecified internal taxes allegedly borne by the exported products. Neither Tupy nor Brazil have identified which are those internal taxes. Thus, the Panel should not assume that the internal tax purportedly "compensated" by the IPI Premium Credit is the IPI.

85. In support of the statement that the domestic prices used by the EC in order to calculate the normal value did not include the IPI on the sales of fittings the EC presents the following three documents :

1. A table of data on a CD-ROM that formed part of the Definitive disclosure to Tupy, file dmsalur241043 (Exhibit EC-18), 'Domestic sales transaction per transaction'. It gives the net domestic sales invoices values on a per product type basis for invoice nr

[38] Paragraphs 149 et seq.

203886, one of the invoices checked during the verification. The totals have been added.

2. A copy of the invoice ('Nota Fiscal Fatura') number 203886 (exhibit 25 on spot verification – Exhibit EC-19)

3. An explanation requested by the case-handlers and provided by Tupy of how domestic sales invoices are booked in its accounting records. (page 13 hand-written notes on spot – Exhibit EC-20)

86. The first document shows that the net invoice value reported by Tupy to the EC and taken into account in the dumping calculations was 31.416,52 Real for a quantity of 89202 units.

87. The second document, the invoice, shows a total invoice amount of 39.753,77 Real. This amount is composed of the following two amounts: 'baso de calculo do ICMS' (36.809,05 Real) and 'valor total do IPI' (2.944,72 Real). In the first amount are included: the freight charged to the customer (valor do frete 1.653,02 Real), the amount of ICMS tax (4.417,09 Real). Also included in the same amount, but not visible on the invoice, are the amounts for the PIS and COFINS tax. Note that the invoice also shows in the column 'Quandidade' the same quantities (3050+3000+39960+43192) as reported by Tupy to the EC.

88. The third document shows the accounts used and the amounts booked on the different accounts to record the invoice. In fact, the accountant was requested to demonstrate and wrote down how domestic invoices were booked. 35.156,03 Real is booked as gross sales receipts (credit of account 'Receita Bruta de Vendas'), 2.944,72 as IPI payable (credit of account 'IPI a Recolter'), and 1.653,02 Real as receipts of freight ('Receita de Frete'). The total of these three amounts, which corresponds to the total invoice value, is booked as a receivable (39.753,77 Real). Three additional bookings were made for the taxes included in the gross sales receipts. The amounts debited were in each case debited on accounts (8501, 8601 and 8701) as a 'reduction of sales'. The amounts booked were 4.417,09 Real for ICMS tax, 239,26 Real for PIS tax, 1.104,27 Real for COFINS tax.

89. In conclusion, the total net value booked in the accounts is 35.156.03 Real gross sales, already excluding the IPI tax, and then further reducing this gross sales by 4417,09 + 239,26 + 1.104,27 other taxes, or a net turnover of 29.395,41 Real. The net invoice value reported to the EC is 31.416,52 Real and includes 1.653,02 Real inland freight (net value of goods is 29.763,50 Real). The inland freight was claimed and granted as an adjustment to the normal value. There was a slight difference between the net amount of goods as explained by Tupy and the net amount of goods reported to the EC. Tupy has looked this up during the investigation and the explanation was accepted by the case-handlers. However, there is no detailed record of this explanation.

90. Thus the domestic prices for fittings on the basis of which the normal value was calculated were not only net of IPI tax on those sales , but also net of ICMS, PIS and COFINS.

91. Moreover, as mentioned above, since the IPI is VAT-type tax, the IPI paid by Tupy on its purchases of inputs can be credited against the IPI collected on the domestic sale of fittings. Thus, the IPI on those inputs is not "borne" by the domestic sales of fittings and no adjustment is required. The same is true of the ICMS, which is also a VAT-type tax.

92. In contrast, PIS and COFINS are cumulative taxes. This means that the PIS and COFINS on inputs are included in the cost of production of the fittings sold in Brazil by Tupy and, presumably, have been reflected in the domestic prices. Thus, to the extent that the PIS and COFINS on inputs were refunded in respect of the exported fittings, it was appropriate to grant an adjustment to the normal value, which the EC authorities did.

Question 56

How does the European Communities reconcile the statements in paras. 153-156 of the EC's first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary, but that the EC investigating authorities denied an allowance in respect of the IPI Premium Credit as Tupy did not demonstrate that this credit "compensated" for internal taxes "borne by the like product "when destined for consumption" on the Brazilian market within the meaning of Article VI:4 of the GATT 1994.

93. An IPI tax was applicable to domestic sales of fittings. However, as explained in the reply to the previous question Tupy had reported its domestic sales net of this tax. As also explained, the IPI on the inputs used by Tupy can be credited against the IPI on Tupys sales of fittings. Consequently, in the context of GATT Article VI:4, no IPI tax was 'borne by the like product' or by materials physically incorporated therein 'when destined for consumption' in the Brazilian domestic market.

Question 57

On what basis does the European Communities justify the use of data relating to the 20 "most exported types" of the product concerned in calculating the adjustment for PIS/COFINS?

94. The EC based its calculation on data relating to these types because they were representative of the products sold. The EC investigators knew they could safely proceed on this basis because the outcome of this calculation would have only a minor effect on the level of the dumping margin.

Question 58

Can the EC direct the Panel to where in its first written submission it describes the methodology used to calculate the PIS/COFINS adjustment? Is this methodology outlined in paras. 237-239 of its first submission? Is the relevant Deficiency Letter sent to Tupy during investigation in Exhibits BRL-6 and 7?

95. The methodology used by the EC to calculate the PIS/COFINS adjustment is, as the Panel suggests, described in paragraphs 237-239 of its First Submission.

96. The Deficiency Letter is the EC's letter of 9 August 1999 (BRL-6). Tupy's description (in its list of annexes) of the Letter as '*requesting additional information'* is not entirely correct. The Letter says '*a preliminary scan of the information provided indicates the following deficiencies and points, which need clarification*:'

97. Tupy's reply to the letter is Exhibit BRL-7.

Question 66

What considerations could guide a panel's examination of type by type analysis under the AD Agreement and the EC's use of the 20 "most exported types" in calculating the adjustment for the PIS/COFINS credit? Refer also to any other relevant material. Address the legal relevance, if any, of footnote 1 to the SCM Agreement to this issue.

98. The EC does not understand this question.

Question 67

In respect of Issues 6 & 10, to what extent does the EC method of calculating adjustments relate to the concept of "sampling"? Is this more an issue of "allocation"? Please explain, referring to any relevant provisions of the AD Agreement.

99. The method used by the EC authorities does not constitute "sampling", at least in the ordinary sense in which that term is used in Article 6.10. The EC authorities did not limit their examination of the existence of dumping to a "sample" of types or transactions. Rather, the method challenged by Brazil was used in order to allocate the total amount of the PIS/COFINs refund among the different types of fittings with a view to adjust the normal value for each type.

100. As explained in paragraphs 231-248 of the EC's First Submission, in the course of investigation, the EC authorities found that Tupy had received a certain amount by way of refund of the PIS/COFINs taxes previously levied on the inputs incorporated into the exported fittings. Since the actual amount refunded in respect of each type of fittings was not provided by Tupy, it was necessary to device a method to allocate the total amount of the refund among the different types of fittings. An allocation of the basis of the export turnover (i.e. by expressing the total amount of the refund as a percentage of the total export turnover and then deducting that percentage from the normal value for each type) would have resulted in an excessive adjustment, because the unit export price for each type was, as a general rule, much lower than the domestic unit price for the same type, while the unit cost of the incorporated inputs for which the refund was granted was the same, irrespective of whether the fittings were sold in Brazil or for export. In order to avoid this result, the investigators adjusted first the export turnover by using an estimated ratio between the domestic and export prices. That ratio was derived from data for the twenty-most exported types sold in Brazil. The EC believes that this was a reasonable method to allocate the refund, given the practical constraints under which investigators act. Indeed, Brazil has not shown that using a larger number of types to calculate the ratio would have yielded a significantly different result, let alone one which was more favourable to Tupy.

Question 68

Comment on the statement in the disclosure preceding the provisional regulation (Annex II , pp(7&8) that " … only 23.541.250 Real was booked, because the credit will not be used in the next few years due to the fact that the company is still entitled to tax credits foe losses carried forward."

101. The EC listed a number of factors which demonstrated, apart from the fact that the taxes were not born by the fittings when consumed in Brazil, that the claim was also incorrect.

102. Apart from the fact that the adjustment claimed was calculated on domestic prices instead of on the much lower export prices and that it was not consistently booked over the previous years (although the legislation had not changed in this respect during those years), it was also confirmed during the on-the-spot verification that out of the total tax credit of 31.812.500.49 Real relating to exports of all products by Tupy during the year 1998, only 23.541.250.36 Real was booked in the gross sales revenue in 1998. The explanation given was that, as Tupy was still entitled to tax credits for losses carried over, the tax credit would therefore not be used in the next few years, and as a consequence only an 'actualisation value' was booked and not the full amount.

103. As evidence for this statement, a detailed listing of all exports, allowing for tax credit, during 1998 is added (collected on spot, – Exhibit EC-21). At the bottom the 'total general' amount of 31.812.500,49 Real is shown, the net amount 'liquido' 23.541.250.36 Real, and the difference between both of 8.271.250,13 Real, called 'Honorarios A' which was explained by the company to be 'booked as a reserve for losses'.

104. This conclusion was not seriously contested by Tupy during the investigation.[39] The statement in the Brazil's first Submission[40] that '*the difference between the credit received 31.812.500 Real and the one booked 23.541.250 Real is to be understood mainly in the context of the delays incurred by the inspection of the fiscal authorities and also with regard to expenses involved with those proceedings'* was never raised during the investigation, is in contradiction with the explanation given on spot, and does not conform to the listing given during the on-the-spot verification.

Issue 7: "No proper adjustment for advertising and sales promoting expenses"

Question 69

What supporting documentation underlies the statement: "Similar commissions were paid for similar purposes to Tupy Europe for export transactions with other clients" (in the Disclosure Preceding Definitive Regulation)?

105. The EC presents documents, obtained during the on-the-spot verification, relating to three payments of commissions to Tupy Europe (Exhibit EC-22).

106. It became apparent during the verification that commissions were paid to Tupy Europe and that these commissions were partly used by Tupy Europe for promotion and advertising of the product concerned. When checking the payment of these commissions, the EC discovered that each of the payments referred to several invoices. The three payments for commissions paid by Tupy Brazil to Tupy Europe refer to the following invoices (it must be made clear that these are not all the payments of commission by Tupy Brazil to Tupy Europe, but only the ones relating to a limited selection of verified export invoices):

Payment no 1 was done in Italian lira (amount not readable, but should be according to our notes 15% of invoice values) and refers to the following invoices				
Invoice no	Number of export lines	Client	Invoice currency	Total invoice value
10720	Invoice before IP, details not available			
10798	61	Jannone – Italy	LIT	50.390.535
10964	185	Jannone – Italy	LIT	389.637.313
11026	135	Jannone – Italy	LIT	362.031.915
11028	227	Jannone – Italy	LIT	360.040.035
11113	7 l	Jannone – Italy	LIT	103.298.580
Payment no 2 was done in pesetas (amount : 217.528, 5% of invoice values, does not match entirely) and refers to the following invoices				
12025	150	Thisa – Spain	PTA	2.494.399
12026	153	Thisa – Spain	PTA	2.227.204
Payment no 3 was done in Italian lira (amount : 15.440.221, 5% of invoice values, does not match entirely) and refers to the following invoices				
11463	28	Jannone Ferro Tubi – Italy	LIT	73.588.014
11511	43	Jannone Ferro Tubi – Italy	LIT	76.659.705
11565	27	Jannone Ferro Tubi – Italy	LIT	167.179.613

[39] See Tupy's 'Fourth Submission', quoted in Brazil's Submission at page 73.
[40] Page 80.

Question 70

Did the advertising expenses at issue relate to export transactions of Tupy specifically involving pipe fittings?

107. Yes (see answer to Question 69 above). The EC presents a copy of one invoice (number 11113) out of the ones listed in the reply to Question 69 (Exhibit EC-23, obtained during the on-the-spot verification). All the other invoices for which the above commissions were paid are listed in the information provided by Tupy (on CD-ROM) on export sales of fittings to the Community.

Question 71

Does the European Communities agree that advertising expenses might form the basis for an adjustment under Article 2.4 AD? Refer to any relevant material.

108. Differences in advertising expenses might form the basis for an adjustment under Article 2.4 if they qualify as '*any other differences which are also demonstrated to affect price comparability*'. The EC has rejected the claim made by Tupy because, by not reporting all its expenses incurred for advertisement and promotion on the exports of fittings to the EC, it did not allow the EC authorities to establish the existence of such a difference between domestic and export sales.

Issue 8: "No proper adjustment for packing costs"

Question 77

In the Disclosure Preceding the Definitive Regulation, the European Communities stated "…the estimation of labour costs was not supported by evidence, although evidence was asked during the on-the-spot verification…" Can the European Communities provide evidence of this request for evidence during verification ? Cite to the relevant portions of the record of the investigation.

109. The request was made orally during the on-the-spot verification, but this was merely an application of the general requirement for supporting evidence that is established by Article 2.4 of the Agreement, and was emphasised in the EC's Questionnaire and in its letter (BRL-8) notifying Tupy of the visit. The EC does not understand that Brazil denies that requests for supporting evidence were made, or at least that the need for such evidence was apparent to Tupy.

Question 83

Would an adjustment under Article 2.4 AD be justified for general costs incurred by a company in maintaining inventory? Does Article 2.4 AD relate to indirect (i.e. "pre-sale") and direct (i.e. "post-sale") packing expenses? Why does Brazil / Tupy believe this method used by the European Communities was unreasonable or inconsistent with Article 2.4?

110. The EC authorities would make an adjustment under Article 2.4 for maintaining inventory if a company demonstrates that differences in costs exist for domestic and export markets and if such difference affects price comparability.

111. The question whether Article 2.4 relates to indirect and direct packing expenses cannot be answered by a simple yes or no. Differences in pre-sale expenses between export and domestic market will normally be taken into account by a company when setting its prices and thus affect the price comparability. If this is demonstrated an adjustment is warranted.

112. Post-sale expenses known at the moment of sale will also affect price comparability and an adjustment will be warranted. Post-sales expenses for packing not known at the moment of sale will not affect price comparability and no adjustment can therefore be granted.

113. It should be noted that in the present case the issue of pre- or post-sale expenses did not present any difficulty. A problem arose because the allocation key used by Tupy was not supported by any evidence, and was completely at odds with any figure that could be derived from the volumes of sales on the domestic and export markets.

Question 84

Was the verification visit in this investigation "essentially documentary"? Is an "essentially documentary" verification consistent with the AD Agreement? Why or why not?

114. The basis for verification is to be found in Article 6.6 AD:

> Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

115. All anti-dumping verifications are essentially documentary. One simple reason for this is that on-spot verifications take place after the investigation period, and there is no guarantee that the factual situation has not changed, be it unwittingly or wittingly, since the investigation period.

116. Whereas documentary evidence is readily available, other kinds of evidence are not. The information that forms the basis of anti-dumping investigations is as a matter of course recorded in documents. The relationships that a company has with shareholders, governmental (especially tax) authorities, and purchasers/sellers and other contractors, all depend on the maintenance of satisfactory records. Although investigators will often put questions to company officials and their representatives, they have no authority to examine or cross-examine them in the manner that might be adopted in a court of law, still less to take evidence on oath.

Issue 9: "No proper currency conversions"

Question 85

Can the European Communities clarify the meaning of each of the headings of the columns referred to by Brazil in its first written submission (p.96)?

117. The meanings of the column headings is the following :

> SN: Sequential number of all transaction lines reported (i.e. the first transaction is "1", the second is "2", and so on).
>
> Sales code: The code used for the product type in Tupy's records (Tupy's products code).
>
> Invoice number: Tupy's export invoice number.
>
> Quantity: the quantity invoiced to Tupy's customer in units.
>
> Net invoice value: The net invoice value, net of taxes and after discount deducted on the invoice, in the currency of sale

Currency: the currency of the sale.

Turnover in Real: The net invoice value in Real, using the daily exchange rate at the date of the export invoice.

CIF Community frontier value in Real: the CIF value of the goods at the Community border in Real.

Transport Real: The amount of the adjustment made to the export price for inland transport costs incurred in Brazil from Tupy's premises to the port.

Question 86

Does converting the transport cost figures from the European currency reported by Tupy to Brazilian Reals on the same monthly rate basis as Tupy converted those amounts from Reals to the European currency make any difference to the result of the calculation?

118. The EC presents (Exhibit EC-24) the final page of a table listing details of all export sales that were included in the dumping calculations. This document was contained in the Definitive disclosure[41] (and was also provided on a CD-Rom). The only information added is the totals. The total for 'Transport Real' is 50.200,00 Real. This amount corresponds exactly to the amount which Tupy converted into foreign currency.[42] It is clear that the currency conversion had no influence to the result of the calculation.

Question 87

Is it the usual practice of the EC to compare the prices used to compare the dumping margin on the basis of the exporter's currency?

119. It is the EC's consistent practice to calculate the dumping margin in the exporter's currency for companies located in market economy countries. For non-market economy countries, the EC might deviate from this practise and calculate the dumping margin either in the currency most used for exports, or in the currency of the analogue country.

Question 88

Was the conversion of the amounts reported by Tupy from the European currency to Reals done only in the case of transport costs?

120. No, a conversion from foreign currencies into Real was also necessary for all other adjustments made to the export price, as Tupy had reported all these adjustments in the currency of the export invoices, despite instructions to report in Real.

121. For most allowances to the export price, the EC used the exchange rates used by Tupy to convert the BRL into foreign currency. This was the case for the allowances for inland transport, freight, insurance, charges, packing and other (publicity expenses). There should as a result be no difference between the amounts in BRL from which Tupy converted into foreign currency and the amounts reached by the EC. Note that no adjustments to the export price were made for packing and other expenses.

[41] Annex II, Annex 5, BRL-16.
[42] Annex BRL 7, ECALLUR, TRANS.

122. For three other allowances, the EC used the monthly rates as mentioned in the Questionnaire and not the exchange rates as used by Tupy. This was the case for credit costs, warranty and commission.

123. The justification for this is the following:

- the adjustment for credit costs is not based on real costs as found in the exporter's accounts but is a notional cost based on the agreed payment terms. As the EC reconverted the export prices at the rates at the date of invoice the allowance for credit cost should be based on the new export invoice values. The EC therefore used the monthly rates corresponding to the months in which the invoices were issued.

- for warranties a rate of 0.000312[43] was used and for commissions a percentage of the export value rather than the distribution of absolute amounts in order to calculate the adjustments made. Therefore it was considered also more appropriate to use monthly rates of the months during which invoices were issued because any other method would have distorted the rate or percentage. In any event these two allowances were minimal in absolute amounts and in relation to the total export value.

124. It should be noted that the use of the monthly EC conversion rates for the latter three adjustments led to smaller adjustments to the export price than the conversion at Tupy's exchange rates. As a result, the adjusted export price used to compare with the normal values was higher and the dumping margin was lower, so that Tupy benefited from the use of the EC's monthly exchange rates. The EC has prepared a document to illustrate the differences (Exhibit EC-25). This listing shows amongst others :

- the monthly exchange rates used by Tupy

- the monthly exchange rates used by the EC

- the amounts for respectively credit, warranty and commission in foreign currency as reported by Tupy.

- the amounts for credit, warranty and commission converted in Real by using respectively Tupy's exchange rate and the EC's exchange rate.

125. The totals on the final page show that:

- for credit the adjustment at Tupy's exchange rate would have been 454.447,8 Real, while the EC only made an adjustment for 398.900,0 Real.

- for warranty the adjustment at Tupy's exchange rate would have been 4.658,00 Real, while the EC only made an adjustment for 4.046,3 Real.

- for commission the adjustment at Tupy's exchange rate would have been 70.987,4 Real, while the EC only made an adjustment for 58.427,4 Real.

[43] File ECALLUR, Tupy's letter of 5 October 1999, EC-5.

Issue 11:"No proper dumping margin findings"("zeroing")

Question 95

The European Communities calculates the impact of the application of zeroing in this investigation to be 2.73 per cent (i.e. a dumping margin of 34.82 per cent as opposed to 32.09 per cent). Does Brazil believe that this is a "relatively limited impact"? (see EC first written submission, para. 250) How would this consideration be relevant here?

126. The EC provides this information by way background to the case.

Issue 12: "No proper consideration of import volume trends"

Question 97

How, if at all, do the obligations in Articles 3.2 and 3.3 AD interrelate? Could Brazil comment on the EC statement in paragraph 263 of its first written submission that "…Brazil denies … that cumulation applies in the operation of Article 3.2"?

127. The EC examined the relationship of Articles 3.2 and 3.3 at paragraphs 300 to 307 of its First Submission. The key question appears to be whether the consideration of volume and of price effects that is required by Article 3.2 has always to be carried out on a country-by-country basis, or whether the authorities may consider cumulated data (assuming the requirements of Article 3.3 have been fulfilled).

128. Article 3.3 says that, if its requirements are fulfilled, the authorities 'may cumulatively assess the effects of such imports', that is the imports that are subject to simultaneous anti-dumping investigation.

129. The question which arises is whether the steps required by Article 3.2 constitute an assessment of the 'effects' of the allegedly dumped imports. Article 3.2 speaks of 'the effect of the dumped imports on prices', but does not use the word 'effects' in regard to volume. However, Article 3.5 refers to 'the effects of dumping, as set forth in paragraph 2 and 4'. It does not seem plausible that this reference is merely to the issue of prices in paragraph 2. For one thing, an increase in imports can quite reasonably be described as an 'effect of dumping'. Secondly, such an increase is likely to be of particular relevance to the examination of causation which is the subject matter of Article 3.5. Consequently, since both the steps required by Article 3.2 constitute consideration of the effects of dumped imports both are capable of qualifying under Article 3.3 for cumulative assessment.

130. Finally, as was observed in the EC's First Submission, Article 3.3 has a specific condition relating to the volume of imports from each country (it must not be negligible). It seems improbable that the drafters intended that the authorities should consider whether there had been a *significant increase* in imports from the individual countries when the only finding that they had to make was that such imports should not be *negligible*.

Question 98

Does the data before an investigating authority have to demonstrate that a significant increase in imports from a particular source has occurred during the IP in order to satisfy Article 3.2? What is the significance – if any -- of the term "whether" (rather than "that") in the phrase "consider whether there has been a significant increase in dumped imports" in Article 3.2 AD?

131. The EC has addressed the first of these issues in its answer to Question 97. The meaning of 'consider' in Article 3.2 is examined at paragraph 256 of the EC's first Submission.

132. The significance of the word 'whether' rather than 'that' in Article 3.2 is straightforward. To 'consider that' there has been a significant volume increase, etc., is to hold the view that such an increase has occurred. To 'consider whether' there has been such an increase is to engage in an examination of the issue.

Question 99

For the purposes of an injury analysis under Articles 3.2 and 3.3 AD, is it necessary for a Member to establish that a significant increase in the volume of dumped imports has occurred with respect to imports from exporting countries individually before and/or after proceeding to a cumulative analysis? Why or why not? Comment, including with reference to paragraph 12 of the US oral statement.

133. The EC argues in paragraphs 302 to 307 of its First Submission that such a country-by-country consideration of significant volume increase is not required by Article 3.2 if the conditions for cumulation under Article 3.3 are satisfied.

134. The US argument in question seems broadly the same as that made at paragraph 304 of the EC's First Submission.

Issue 13: "No proper consideration of alleged undercutting"

Question 100

What is the significance, if any, of the reference in Article 3.2 AD to "a" (rather than "the") like product? And to domestic "prices" (in the plural rather than singular)?

135. The reference to "prices" in the plural suggests that, as argued by the EC,[44] Article 3.2 does not require to calculate an overall margin of undercutting for the product under consideration, let alone to use any specific methodology when calculating such margin (such as, for example, averaging without "zeroing" the "overcutting" margins). It supports the view that the existence of "significant undercutting" can also be considered by comparing the prices for individual sales or the average prices for types or models of the product under consideration.

136. The reference to *a* like product (rather than *the* like product) has similar implications. Furthermore, it suggests that the comparison does not have to include all domestic like products, but can be limited to a representative selection of transactions or of models/types.

137. It is significant that Article 6.3(c) of the Agreement on Subsidies and Countervailing Measures in dealing with the same issue uses the same wording as Article 3.2:

> 6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> …
>
> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same

[44] EC first Submission, para. 268.

> market or significant price suppression, price depression or lost sales in the same market;

138. Unlike the Anti-Dumping Agreement, an explanation is provided:

> 6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

139. This provision also suggests that a comprehensive calculation of prices of all sales is not required.

Question 101

What is the significance, if any, of the reference to " the dumped imports" in Article 3.2 AD?

140. The panel in *European Communities – Bed Linen*[45] found that the investigating authorities can consider, for the purposes of the injury analysis, that all the imports made by a producer/exporter found to be dumping are "dumped imports". This means that, in considering whether, "dumped imports" undercut the prices of the Community producers, the EC authorities were not required to distinguish between "dumped" and "non-dumped" imports of Tupy's products. The EC notes that, in any event, Brazil has not made any claim to that effect.

Question 102

What is the significance, if any, of the EC assertion that the practical result of "zeroing" in the consideration of whether there was significant price undercutting in this case was de minimis (0.01 per cent)?

141. It must be recalled that Brazil's claim is concerned exclusively with the use of zeroing in this investigation and not with the EC's practice of zeroing as such. Accordingly, in order to substantiate this claim Brazil must show that the use of zeroing in this investigation was incompatible with the obligation of the EC authorities to consider whether price undercutting was significant. It is not enough for Brazil to show that zeroing may be inconsistent with that obligation in other investigations.

142. Brazil seems to be arguing that by resorting to "zeroing" the EC authorities failed to make an objective examination of this issue. The point made by the EC was that the objectivity of the methodology used by the EC authorities in this case must be assessed in light of its results in this investigation and not of the consequences that it might have in other circumstances. The averaging methodology used by the EC in this investigation yields a result which is virtually identical to the result of another methodology which Brazil appears to consider as objective. Whether the undercutting margin is 39.77 per cent or 39.78 per cent is immaterial for the purposes of deciding whether undercutting was significant. The use of a methodology which did not affect the outcome of the examination required by Article 3.2 in this investigation cannot be considered incompatible with

[45] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India ("European Communities – Bedlinen")*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, paras. 6.132 et seq..

that provision simply because the use of that methodology might affect that outcome in other investigations.

Question 103

Unlike Article 2 of the AD Agreement in relation to dumping, Article 3 contains no specific guidance as to the methodology an investigator may use to consider price undercutting. Comment.

143. The EC has commented on this issue in paragraph 268 of its Submission.

Issue 14: "No proper calculation of alleged undercutting margins"

Question 105

Is there a requirement under the AD Agreement, whether in Article 3.2 or elsewhere, to adjust prices before comparison in the context of injury?

144. Article 3.2 refers to "undercutting by the dumped imports as compared with the price of a like product of the importing Member". As defined in Article 2.6, the concept of 'like product', which sets the outer limits of comparison, is broad enough to include models that differ greatly in the characteristics that affect purchasers' choices. Unless adjustments are made to take account of the differences, price comparisons between models that do not share the same characteristics will produce arbitrary results. An interpretation of the Agreement that permitted such comparisons would be perverse. These are not complex notions, but ones that are familiar to every shopper.

145. Consequently, the price comparison must take account of the various characteristics, etc., of the product. The Agreement does not state how this is to be done. Price adjustment to take account of differences between product models is one option, but the differences may be such that rational criteria of adjustment are difficult to identify. The alternative is to confine the comparison to those imported models that are identical to ones sold by the domestic industry. However, these may constitute only a small proportion of the dumped imports. In practice the EC authorities often apply a combination of the two approaches.

146. The silence of the Agreement on this subject indicates that investigating authorities have considerable discretion in deciding on the appropriate methodology. This discretion is not compatible with a requirement to adjust prices in every case. There will undoubtedly be instances where there are sufficient sales of identical models, or where there are no rational criteria for price adjustment. On the other hand, cases will also arise where there are few sales of identical models, but when straightforward criteria exist for adjusting prices in order to make comparisons for the remaining sales. In these cases a complete refusal to base the comparison on appropriately adjusted prices would constitute a breach of the obligation in Article 3.2 to consider the issue of significant price undercutting.

Question 106

Article 3.1 AD refers to "prices on the domestic market". Comment, in relation to the nature of the consideration required under Article 3.2 AD.

147. The reference to the impact "on prices in the domestic market for like products" rather than to the impact "on the price in the domestic market for the like product" is a further indication that the Agreement does not require the calculation of an overall undercutting margin for the product under consideration based on the comparison of *the* price for the dumped imports with *the* price of the domestic like product.

Issue 15: "No proper cumulation of imports"

Question 107

What is the meaning of cumulatively assessing the "effects" under Article 3.3 of the AD Agreement? What are the "effects" that can be cumulated and where are these referred to in the other provisions of Article 3? Comment including with reference to para. 14 of the US oral statement (to the extent it is relevant).

148. In paragraph 304 and footnote 97 of its First Submission the EC examined the various uses of the words 'effects' and 'impact' in Article 3. It follows from this examination that the EC agrees with the analysis presented by the US.

149. Article 3.2 does not use the word 'effects' in relation to the volume factor. However, it would be contrary to common sense to deny that increased volume could be an 'effect' of dumped imports, in the ordinary meaning of that word, and this is explicitly envisaged by the terms of Article 3.5 ('through the effects of dumping, as set forth in paragraphs 2 and 4'). See also the response to Question 97.

Question 108

With reference to paragraph 341 of the EC first written submission, would a breach of Article 6.2 AD be possible where no breach of Articles 3.2 or 3.3 AD was found?

150. The reference to Article 6.2 in paragraph 341 of the EC Submission was an error. No claim of breach of Article 6.2 was made by Brazil in the context of Issue 15.

151. The EC intended to refer to Article 3.1. It maintains that, since Brazil's claim under Article 3.1 was dependent on its claims under Article 3.2 and 3.3, and since the EC has refuted the latter, the claim under Article 3.1 fails.

Issue 16: "Inappropriate consideration of injury indicators"

Question 109

Is the European Communities arguing that its evaluation of "growth" is implicitly apparent in the final determination? If so, on what basis?

152. In this context the EC is arguing that the examination of sales, profits, output, market share, productivity, return on investments, and utilisation of capacity, all necessarily involved the question of whether or not they were increasing, and the extent of such increases (or decreases), and that as a consequence, at least in the circumstances of this investigation, it was examining the factor 'growth'.

153. The EC is not aware of any significant element of this factor which was not included in the factors to which explicit attention was given by the investigators and recorded in the Provisional and Definitive Regulations.

Question 110

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. In particular:

- **How was the statement in Exhibit EC-12 on "ability to raise capital" derived from the information given in "questionnaires and annual accounts"?**

154. The assessment of 'ability to raise capital' was derived from the fact (confirmed by the annual accounts) that the EC industry continued to invest in the product.

- **How was the statement in Exhibit EC-12 on "wages" derived from the information given in " annual accounts"? Explain the meaning of "allocation on the basis of turn over"?**

155. In the annual accounts are found entries for 'salaries, wages, social security' (they may occupy one or more lines). The sum of these lines was converted from local currency into EURO with the annual conversion rate at the time. The next step was to calculate the ratio of the (smaller) turnover of the product concerned by comparison to the total turnover of the respective companies. For example, if the turnover of the product concerned is 90 and the total turnover of the company is 100, the ratio would be 90 per cent. This ratio was applied to the overall salaries (calculated as explained above). In the given example, the wages taken into account for the proceeding would be 90 per cent of the total wages. This was done first by company, and then a total was established by adding up the figures of all six complainants.

- **How was the statement in Exhibit EC-12 on "productivity" derived from the information given in "questionnaires"?**

156. Productivity was established as follows: annual production of the product concerned in tonnes (derived from the verified questionnaire responses), divided by the number of personnel directly or indirectly dealing with the product concerned, as per year. In order to establish the number of personnel dealing with the product concerned as compared to other personnel, this derived from the verified questionnaire responses.

- **How was the statement in Exhibit EC-12 on "return on investments" derived from the information given in "questionnaires and annual accounts"?**

157. This was established according to the following formula: profit or loss for the product concerned divided by the tangible fixed assets for the product concerned. The actual profit or loss came from the verified questionnaire replies. The tangible fixed assets can be found in the annual accounts. They were converted into EURO and allocated on the basis of turnover as explained above. This was done first by company, and then a total was established by adding up all six complainants' figures.

- **How was the statement in Exhibit EC-12 on "cash flow" derived from the information given in "questionnaires and annual accounts"?**

158. This statement was derived from the figures for profit or loss plus the differences between opening stock and closing stock, with depreciation added. These data can be found in the annual accounts. The results per individual company were converted into EURO and the ratio for turnover of the product concerned was applied as explained above. All the figures for the individual companies were totalled.

- **How and on what basis was the statement in Exhibit EC-12 on "magnitude of margin of dumping" derived?**

159. The EC takes it as a statement of the obvious that the price pressure on the products of the domestic industry would have been lower if the margin of dumping had been lower.

Question 115

We note the questionnaire to domestic producers (Exhibit BRL-37 ff.) requests information in section D2 concerning quantities and values of purchases/ imports of the product concerned. Does this pertain only to the product originating in the countries listed on the first page of the questionnaire, or to all imports of the product concerned from all sources?

160 The producer questionnaire contains the following text: in section D2 'Purchases/imports of the products from other sources': If you purchase the product from independent parties, either originating in the Community or in non-EC countries, for sale in the Community, please fill in the following table …. . It is therefore clear that all countries and not just the 'countries concerned' are covered. This information is necessary in order to assess any impact on the evaluation of the company's capacity as an EC producer. (See for instance also section F22 relating to resale prices of purchased products.)

Question 116

Does each questionnaire response by the domestic industry provide information on each of the factors identified in the questionnaire? Provide a detailed response with reference to the relevant provisions of the record of the investigation.

161. The information requested in the Questionnaires addressed to the domestic producers and provided by each of them is summarised in the table below

Main information requested	**Confidential replies**					
	Companies*					
	1	**2**	**3**	**4**	**5**	**6**
A) General information on the company						
Corporate information	yes	yes	yes	yes	yes	yes
Principal shareholders	yes	yes	yes	yes	yes	yes
Corporate structure of the company (including links with other companies)	yes	yes	yes	yes	yes	yes
Financial accounts	yes	yes	yes	yes	yes	yes
B) Product concerned						
Product specification: creation of Product Control Numbers	yes	yes	yes	yes	yes	yes
Product comparability	yes	yes	yes	yes	yes	yes
C) Total sales						
Total turnover	yes	yes	yes	yes	yes	yes
Main customers	no	yes	yes	yes	yes	yes
D) Production, Purchases and Stocks						
Production and production capacity	yes	yes	yes	yes	yes	yes

Purchases/imports from other sources (in volume and value)	yes **	yes	yes	yes **	yes	yes
Development of stocks (in volume and value)	yes	yes	yes	yes	yes	yes

E) Sales

Sales in volume and value (net of all rebates, discounts and free of taxes)	yes	yes	yes	yes	yes	yes

F) Distribution system and selling prices

Distribution system and channels of sales	yes	yes	yes	yes	yes	yes
Price setting	yes	yes	yes	yes	yes	yes
Sales transactions in the EC during the investigation period to unrelated customers	yes	yes	yes	yes	yes	yes
Sales transactions in the EC during the investigation period to related customers	yes	yes	yes	yes	yes	yes
Credit notes	yes	yes	yes	yes	yes	yes

G) Cost of production

Manufacture of the product concerned	yes	yes	yes	yes	yes	yes
Costs of the product manufactured by the company (allocation of costs, standard costs and variances, cost of production per Product Control Number)	yes	yes	yes	yes	yes	yes
Related suppliers	yes	yes	yes	yes	yes	yes

H) Profitability

Profitability of EC sales to unrelated customers	yes	yes	yes	yes	yes	yes
Minimum profit required	yes	yes	yes	yes	yes	yes
Investments	yes	yes	yes	yes	yes	yes

I) Employment

Employment of the total company and attributed to the product concerned	yes	yes	yes	yes	yes	yes

*** Legenda:**

1 = Atusa Accesorios de Tuberìa S.A. (Spain)
2 = Crane Fluid Systems (United Kingdom)
3 = Ferriere e Fonderie Di Dongo S.p.A. (Italy)
4 = Georg Fischer Fittings GmbH (Austria)
5 = Raccordi Pozzi Spoleto (Italy)
6 = R. Woeste & Co. GmbH & Co. Kg (Germany)

yes = a reply has been provided by the company
no = no reply has been provided by the company
yes** = the information has been provided during the investigation

Question 117

Would a breach of Article 3.4 AD necessarily also lead to a breach of Article VI of the GATT 1994?

162. The EC believes that this would normally be the case because of the link established by Article 3.1.

Question 118

Does Brazil's allegation concerning cumulation and injury on page 205 of its first written submission relate to the obligations under Article 3.4 or 3.5? Substantiate your response.

163. The EC does not understand this question.

Question 119

Could information requested by the European Communities in the questionnaires to domestic producers relating to the "effect of continued imports" support an investigating authority's evaluation of the magnitude of the margin of dumping within the meaning of Article 3.4 AD ? Did it in this case?

164. The information collected under this rubric is intended to assist the investigating authorities in determining the 'Community interest', albeit that this topic is covered elsewhere in the Questionnaire (under heading K). The information would be relevant were the investigating authorities addressing the issue of 'threat of injury', which was not the case here.

Question 120

How can the Panel verify whether and to what extent the European Communities investigating authorities examined the issue of outsourcing and ownership links of the domestic industry with producers located in countries not subject to the investigation? Please indicate the relevant parts of the record of the investigation.

165. Information regarding ownership links and outsourcing was contained in the Questionnaire answers on company structure and imports, and information on investments was contained in the annual accounts of the companies. The figures found during verification in the companies' accounts books confirmed this information. The books would have recorded and explained any major investments in other companies.

166. The results of the investigation are reported in recitals 134 and 174 of the Provisional Regulation, and recitals 65 et seq., and 106 et seq., of the Definitive Regulation. The EC authorities also addressed the issue in the 'Transparency Letter' of 20 July 2000 (Exhibit BRL-18, point 7.1).

167. It should be said that, with the exception of Bulgaria, and (to some extent) Turkey, the allegations of outsourcing, etc., were never substantiated.

Question 121

Indicate the relevant parts of the record of the investigation dealing with sales outside the European Communities.

168. Data on exports of the Community industry were contained in the companies' answers to the Questionnaires. These figures were confirmed by the EC authorities during the on-the-spot verification. The results of this examination are recorded in the 'Transparency Letter' (point 6.4). They are reflected in the comments on stocks in the Provisional and Definitive Regulations.

Issue 17: "Inappropriate establishment of causation"

Question 126

What relevant material may guide a panel's consideration concerning the issue of "attribution" under Article 3.5 AD?

169. The EC reaffirms that the Panel's task is not to attempt a *de novo* determination of the issue of causation and attribution, or even to determine what an ideal consideration would have consisted of, but to determine whether the EC authorities have correctly applied the law, have established the facts properly, and have evaluated those facts in an unbiased and objective manner.

170. Consequently, the material that guides the Panel's consideration should be that considered by the investigating authorities.

Question 127

What type of economic analysis would an investigating authority actually need to perform to "separate" and "distinguish" between each distinct causal factor?

171. For the same reasons that the EC has given in its previous answer, the EC's view is that the proper function of the Panel is to review the analysis carried out by the investigating authority. The process of separating and distinguishing between causal factors is an aspect of the evaluation of facts in terms of Article 17.6(i).

172. This analysis (which was reported in recitals 166 to 176 of the Provisional Regulation, and recitals 106 to 113 of the Definitive Regulation) satisfies the requirements of Article 3.5

Question 128

If a product is "dumped" does the reason for that dumping (e.g. a possible comparative advantage) matter?

173. The EC assumes that this question is raised in the context of the issue of causation. That being the case it is not aware of any way in which the 'reason' for the dumping could be relevant, if by 'reason' the Panel means a factor that facilitates or encourages dumping by an exporter.

174. The EC does not accept that comparative advantage could be a 'reason' for dumping, rather it is a reason why an exporter might be able to undercut domestic producers without dumping. The benefits of comparative advantage can be enjoyed by domestic customers as well as those in export markets. The 'reason' for dumping is more likely to derive from the degree of protection enjoyed by the exporter in its home market.

Question 129

How, if at all, do the standards of "significant contribution" (e.g. Definitive Regulation, para. 113) and "not such to have broken the causal link" (e.g. Definitive Regulation, para. 111) relate to a genuine and substantial relationship of cause and effect?

175. The EC notes that the Appellate Body has employed the phrase 'genuine and substantial relationship of cause and effect' to describe the causal link that must be established for the purposes Article 4 of the Safeguards Agreement.[46]

176. The EC has no difficulty in agreeing that the causal link to be established in accordance with Article 3.5 must be both genuine and substantial. In fact, the exclusion of links that were not genuine or were insubstantial would hardly be controversial.

177. In recital 113 of the Definitive Regulation the EC said 'any substitution effect cannot have significantly contributed to the injury suffered by the Community industry'. It should not be assumed that, had there been a significant contribution from the 'substitution effect', the necessary causal connection between dumped imports and injury would have ceased to exist. However, in the absence of any significant contribution the question did not even arise. In other words, the process of allocating causes to injuries need not be embarked upon in the case of a factor which made no significant contribution to injury. Although the notion of 'significant contribution' is here applied to other causes, it is in essence no different from the notion of 'substantial cause' that the Panel by its question implies should be applied to the dumped imports.

178. In recital 111 the EC said that '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.' This statement was made as a summing-up of an examination of the effects of imports from a number of third countries. As stated above, the phrase used by the Appellate Body reflected the conclusion of an analysis which distinguished between the different causes of injury. In recital 111 the EC was summing up just such an analysis. If the consequences of third-country imports had been sufficiently great they would have broken the causal link between the dumping and the injury found. The EC authorities found this not to be the case. In any event, their conclusion fits within the framework of analysis described by the Appellate Body.

Question 130

What does it mean for a factor to be "known" in the sense of Article 3.5 AD? Comment on the phrase "all relevant evidence before the authorities" in the sense of Article 3.5 AD.

179. Article 3.5 states that 'The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry …'. At paragraph 428 of its First Submission the EC explains that the phrase 'any known imports' indicates that the onus lies on interested parties to raise issues during the course of the investigation. As explained in that Submission, this interpretation has been adopted by two WTO panels.

180. The second sentence of Article 3.5 states that '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.' This rule requires the authorities not to disregard the evidence that has been presented to them.

[46] Appellate Body Report, United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities ("United States – Wheat Gluten Safeguards"), WT/DS166/AB/R, adopted 19 January 2001, para. 69; Appellate Body Report, United-States – Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia ("United-States – Lamb Safeguards"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 168.

Question 131

The European Communities has relied on information that differs from Eurostat data. How could an interested party verify the accuracy of the information relied on? Comment, with reference to paras. 434-446 and 447-464 of the EC's first written submission.

181. The EC applies confidentiality rules in accordance with Article 6.5. Like most WTO Members, it does not allow interested parties in anti-dumping investigations to see confidential data of other parties. As a consequence situations arise frequently where an interested party is unable to verify the information that the authorities rely on for their decision. For example, the domestic producers cannot verify that the dumping margin calculation is based on the information provided by the exporters, let alone verify that such information is accurate. For that, it would be necessary that representatives of the domestic producers were present during the on-the sport verification The difficulties that are thereby created for parties are to some extent reduced by the provision of non-confidential versions of the protected information, such as tables showing indexed data rather than actual import, etc., figures.

182. In the two sections of the EC's First Submission mentioned by the Panel the EC made use, respectively, of confidential information from EC producers, and of Eurostat data. The EC's view (First Submission paragraph 444) is that information collected directly from producers (and other interested parties) is preferable (even if it is confidential) because it is subject to verification. Such information was available in regard to the exports made by the domestic producers (the subject of the first section) but not in relation to the total volume of third-country imports (the subject of the second) because not all such imports were made by interested parties. Consequently in the latter case it was necessary to have resort to the second-best source of information, Eurostat.

Issue 18: "No timely opportunities to see all relevant information"

Question 136

How, if at all, might Article 17.4 AD be relevant here? Provide reasoning.

183. Brazil appears to challenge the provisional regulation (see question 132). If so, it would have to show that the requirements of the last sentence of Article 17.4 are met. In any event, the provisional measure was no longer in force when the panel was established. According to WTO practice,[47] only those measures that are in force at the time of establishment of the panel can be the subject of dispute settlement.

Issue 19: "No proper information on matters of fact and law"

What is the relationship between the substantive provisions regarding the determination on dumping, injury and causation (Articles 2 and 3) and the transparency obligations under Article 12? Would a violation of the substantive provisions automatically constitute a violation of the Article 12?

[47] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline ("United States – Gasoline")*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, para. 6.19; Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ("Argentina – Textiles and Apparel")*, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, para. 6.14.

184. The EC is in agreement with the following observations made on this issue by the *Bed Linen* panel:[48]

> Having found a violation of the substantive requirement to consider all the factors set forth in Article 3.4 in assessing the impact of imports, the question of whether the notice of either the preliminary or affirmative determination of injury is "sufficient" under Article 12.2 is immaterial. A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement.

Question 139

What is the scope of Article 12.2 and 12.2.2? Do these provisions cover only the public notices preliminary and final determinations, or do they also cover other documents in the investigation, i.e. disclosure documents and transparency letters? Can the disclosure documents and transparency letters be considered as a "separate report" under Article 12.2 and 12.2.2?

185. The EC has addressed these issues in paragraph 216 of its First Submission. Articles 12.2 and 12.2.2 are explicitly concerned with public notices. They relate explicitly to preliminary and final determinations. The 'separate report' is to be 'made available'. Footnote 23 states that 'Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public'. The disclosure documents and transparency letters contained information intended for the recipients only. They are not covered by these provisions.

Question 140

Do the parties believe that clerical errors in the public notices of preliminary or final determinations may constitute grounds for a violation of Article 12.2 and 12.2.2?

187. Errors which are transparent and do not prejudice the rights of the interested parties (which is the case in this dispute) provide no legal basis for calling into question the propriety of a Member's measures.

Question 141

What is the relationship between Articles 12.2 and 12.2.2 and the provisions concerning the protection of confidential information in Article 6.5?

187. The publication obligations in both Articles 12.2.1 and 12.2.2 contain the qualification 'due regard being paid to the requirement for the protection of confidential information'. The nature of this requirement is elaborated in Article 6.5. However, confidentiality is not the sole boundary to the publication obligations of Article 12. Article 12.2 requires publication 'in sufficient detail', and

[48] Panel Report, *European Communities – Bedlinen*, para. 6.259. The same view is expressed in Article 21.5 Panel Report, *Mexico — Anti-Dumping investigation of high fructose corn syrup (HFCS) from the United States*, WT/DS132/RW, circulated 2001, as confirmed by the Appellate Body Report, WT/DS132/AB/RW, para. 6.40.

Article 12.2.1 speaks of 'sufficiently detailed explanations'. These provisions anticipate that some amount of detail will not be included in the published texts. There are also the qualifications implicit in the phrase 'issues … considered material by the investigating authorities' (see the following Question).

Question 142

What criteria may be relevant in deciding which issues of fact and law can be considered "material by the investigating authorities" under Article 12.2?

188. The EC is not aware of any general criteria that can be invoked in this context. The issues that arise are ones of fact which will depend on the circumstances of individual cases.

Other

Question 143

Could the EC clarify the meaning of the Article 11.3 of the EC Basic Regulation on whether the exporter has the right to <u>have</u> a review or has the right to <u>request</u> a review?

189. Article 11.3 of the EC's Basic Anti-Dumping Regulation states as follows:

> The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the Community producers which contains sufficient evidence substantiating the need for such an interim review.
>
> An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.
>
> In carrying out investigations pursuant to this paragraph, the Commission may, *inter alia*, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence.

190. In the light of the facts of the present dispute, the EC assumes that the Panel is primarily concerned with the situation prior to the elapsing of the one-year period.

191. The second paragraph of Article 11.3 establishes that, provided certain conditions are fulfilled, the authorities have a duty to carry out a review. Thus it can be said that in these circumstances an exporter which requests a review has an enforceable 'right' to have that review carried out.

192. Prior to the expiry of the one-year period no such obligation or right exists, but the Commission has the discretion to initiate a review on its own initiative. The circumstances in which it shall exercise this initiative are not defined. They do not exclude a request by an exporter. In this sense it can be said that the exporter has a right to *request* a review during this period. The European

Court of Justice could then review whether the Commission had acted within the bounds of its discretion.

Question 144

Can the EC confirm that if Tupy has requested a review within the year following the imposition of the anti-dumping duties the Commission would have exercised discretion on the granting of such a request?

193. A request for a review made by Tupy within the one-year period would have been seriously considered. On 10 August 2001 the Commission wrote to Tupy inviting it to request an interim review. Tupy replied on 14 August, observing that it had no right to an interim review. In fact the one-year period expired on 19 August.

194. In response to a request from one of the other exporters, but basing its action on a special procedure introduced in 2001 for taking account of the results of WTO dispute rulings, the EC has opened a review of the anti-dumping duties that are the subject of this dispute.[49] A copy of the Notice of initiation is provided as Exhibit EC-26. This review is 'limited in scope to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a dumping methodology at issue in the [WTO *Bed Linen*] reports, and which submit a full questionnaire reply within the time limits'.

195. Since the review examines data for the period 1 January 2001 to 30 September 2001, it would have provided an opportunity to evaluate Tupy's claims regarding the effects of the devaluation. Yet, even though the EC Commission has granted two extensions of the deadline for co-operation, Tupy has decided not to co-operate, thus rendering it impossible to ascertain the alleged effects of the devaluation after the original investigation period.

Also, if the request had been made after the year following the imposition of the anti-dumping duty would the Commission have automatically granted the request?

196. If Tupy had made a request for a review following the one-year period that request would have been accepted provided the conditions in Article 11.3 regarding 'sufficient evidence' were fulfilled.

Question 149

Are WTO dispute settlement consultations relevant in determining whether or not a claim falls within a panel's terms of reference? Why or why not? In general, is there any kind of verifiable record kept of WTO dispute settlement consultations? Is there any such record of the consultations in this dispute? Please cite any relevant material in responding.

197. In general a panel's terms of reference are determined by the decision of the DSB that establishes it. Consultations are not intended simply as a first step in panel proceedings, but as an alternative means of dispute settlement. Consequently they may cover a wide range of issues that are never expected to come before a panel. The independent nature of consultations would be undermined if they were seen as helping to define a panel's terms of reference. This is not to say that consultations can never have relevance to the terms of reference – the Appellate Body has used evidence of the parties' consultations to show that they understood the meaning of terms in the panel request.[50] But their influence is at most indirect.

[49] *EC Official Journal*, C342/5, 5 Dec. 2001.

[50] Panel Report, *European Communities - Customs Classification of Certain Computer Equipment ("European Communities – Computer Equipment")*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June

198. An additional consideration is that one of the functions of a panel request is to give notice to third parties, which may not have participated in the consultations, e.g. in the case of Article XXIII consultations.

199. The EC keeps some records for its own purposes of the substance of consultations in which it is involved. In general no attempt is made to draft a jointly-agreed record.

Question 150

In this case, was the information relating to the examination by the EC authorities of the issue of outsourcing and links the EC industry may have with producers located in countries not subject to the investigation "confidential" for the purposes of the EC investigation?

200. The EC authorities had evidence of EC producers importing the product under consideration from third countries in respect of two countries only, Bulgaria and Turkey. The exact relationships between the EC companies concerned and both the Bulgarian and the Turkish plant/producers and the exact amount of their imports were considered confidential.

Question 151

Assume that the complaining party points to information that it submitted in the investigation and that is on the record of the investigation. The complaining party alleges that it does not have access to any additional information on the issue, nor to any indication that the investigating authority examined this information or sought additional information. How can the complaining party (and the Panel) assess whether and to what extent the investigating authority examined the information?

201. The complaining party can ask the defending Member to provide information, and the Panel is empowered under Article 13 of the Dispute Settlement Understanding to request information regarding the examination that the investigating authority has conducted.

EXHIBITS

Exhibit EC-18	Table dmsalur241043.
Exhibit EC-19	Copy of invoice number 203886.
Exhibit EC-20	Handwritten note, 21-23 September 1999.
Exhibit EC-21	Listing of all exports allowing for tax credit during 1998.
Exhibit EC-22	Tupy document concerning payments of commissions to Tupy Europe.

1998, as modified by the Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, paras. 70 et seq.

Exhibit EC-23	Tupy invoice to Jannone, Italy.
Exhibit EC-24	Data on Tupy's export sales showing totals.
Exhibit EC-25	Data on Tupy's export sales showing effect of conversion rates.
Exhibit EC-26	Notice of Initiation of Review, 5 Dec. 2001.

ANNEX E-4

REPLIES OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF BRAZIL

14 May 2002

1. With reference to the construction of normal value, the Provisional Regulation states, in the case of constructing normal value:

> **"(26)(…), in accordance with Article 2(3) of the basic Regulation, normal value was constructed by adding to the manufacturing costs of the exported types, adjusted where necessary, a reasonable percentage for selling, general and administrative expenses ("SG&A") and a reasonable margin of profit. To this end, the Commission examined whether the SG&A incurred and the profit realized by each of the exporting producers concerned on the domestic market constituted reliable data.**
>
> **(27) Actual domestic SG&A expenses were considered reliable when the domestic sales volume of the company concerned could be regarded as representative when compared to the volume of export sales to the Community. The domestic profit margin was determined on the basis of domestic sales made in the ordinary course of trade, i.e., when these sales to independent customers at prices equal to or above the cost of production represented at least 10 per cent of the total of domestic sales volume of the product concerned made by the company concerned. (…)" (emphasis added)**

(a) Could the EC confirm that, if the domestic sales were representative, sales of types that were not made in the ordinary course of trade (unprofitable sales) were included in the basis for the determination of SG&A?

Domestic sales of types that were not made in the ordinary course of trade were **not** included in the basis for the determination of SG&A expenses. The amounts for SG&A expenses and for profits were both based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporting producer under investigation, as prescribed by Article 2.2.2.

As explained in paragraphs 122 to 127 of the EC's First Submission, this is demonstrated by the figures contained in the Provisional disclosure and the Definitive disclosures.[1]

(b) In the case of an affirmative answer, considering that sales of types that were not considered to be made in the ordinary course of trade were included in the basis for SG&A expenses determination, but were not included in the basis for profit margin determination, does the EC reaffirms that the same method for calculating of SG&A expenses and profit margin were adopted?

Since the same method was used to determine both SG&A expenses and profit, this question is irrelevant.

[1] Annex II, Annex 3, page 28, BRL-11 and BRL-16.

2. In its first submission, the EC informed that "the total of COM [cost of manufacturing], SG&A and profit corresponds to the value of sales made in the ordinary course of trade" (par.124, p. 30, THE ECFS) and that "both SG&A and profit were based on the 1260 types of the like product sold on the domestic market" (par.127, p. 31, ECFS, emphasis added).

Does the EC confirm that the sales of the 1,260 types were made in the "ordinary course of trade"? If so, why was the normal value constructed for 36 types[2] that domestic sales were considered as being representative?

[2] The number 36 results from the difference between 602 types that were sold on the domestic market in sufficiently representative quantities and 566 types for which it was concluded that the normal value could be based on domestic prices of identical types, mentioned in the Disclosure Preceding Provisional Regulation (BFS, p.51).

At paragraph 117 of its First Submission the EC explained that, in accordance with Article 2.2.2, the constructed normal value was based on SG&A expenses and profits of domestic sales in the ordinary course of trade of all types of the like product.

The EC has reviewed that data and finds that the number of types sold on the domestic market was 1,261 rather than 1,260 as stated in its Submission. Of these 1,261, 68 types (not 36), were found not to have been sold in the ordinary course of trade and were excluded from the calculation. SG&A expenses and profit were thus derived from data relating to 1,193 types sold on the domestic market in the ordinary course of trade. The EC's methodology and the data were provided to Tupy in the Definitive disclosure.[2] The data were also provided to Tupy on a CD-ROM.

(Issue 5 –Normal Value – Inappropriate Product Types)

3. Could the EC confirm the data presented in the table below?

	Number of Types	Code 12	Code 18
1. Types Exported to the EC	**1,375**	**1,092**	**283**
2. Identical Types (IT) Sold in the Dom Market	**653**	**653**	**0**
2.1. IT – representative and profitable sales	**566**	**566**	**0**
2.2. IT – representative and unprofitable sales	**36**	**36**	**0**
2.3 IT – unrepresentative and profitable sales	**45**	**45**	**0**
2.4. IT – unrepresentative and unprofitable sales	**6**	**6**	**0**
3. Non Identical Types sold in the Domestic Market	**722**	**436**	**286**

The correct data are as follows:

[2] Annex II, Annex 3 , BRL-16.

	Number of types	Code 12	Code 18
1. Types exported to the EC.	1,375	1,092	283
2. Identical types sold in the domestic market.	668	668	0
2.1 Identical types – representative and profitable	566	566	0
2.2 Identical types – representative and unprofitable	36	36	0
2.3 Identical types – unrepresentative and profitable	62	62	0
2.4 Identical types – unrepresentative and unprofitable sales	4	4	0
3. Non identical types sold in the domestic market. (This is understood as types exported which were not sold on the domestic market)	707	424	283

4. Could the EC confirm whether it has identified any export sales to the EC of types initiating with 68 and 69 during the POI?

The EC did not find any sales for export to the EC of types starting with codes 68 or 69 during the investigation period.

5. Could the EC indicate what was the evidence presented by the Brazilian exporter to demonstrate that types initiating with 79 code were not a like product and in which way it differs from the evidence that was presented related to 68 and 69 product types?

Product types with code 79:

Tupy neither requested nor contested the exclusion of product types starting with code 79 from the scope of the investigation, nor did it present evidence to demonstrate that they were not a like product. The reasons why the product scope was limited to threaded malleable cast iron tube or pipe fittings are set out in recitals (10) and (11) of the Provisional Regulation and in the Provisional disclosure document.[3]

In its Questionnaire response Tupy gave a description of its product coding system[4], but did not mention product types with code 79. As the case-handlers noticed such types in Tupy's domestic sales (twelve types starting with code 79 of which 1.502.207 units were sold), Tupy, on request, provided corrected information during the on-the-spot verification. This explained that product types with code 79 were 'Malleable iron – Special Meikon Mark' and added to the finishing codes reported in the reply to the questionnaire which were 3-BSP Thread and 4-NPT Thread three additional codes (0-raw mat-deburring; 1-semi-machined part; 2-machined part). Of the twelve '79' types sold on the domestic market, six (accounting for 95.842 units sold) were reported to be BSP threaded (finishing code 3), and six (accounting for 1.406.365 units sold) were reported to be raw part-deburring.

[3] Annex I, paragraph 2.1, BRL-11.
[4] Section B.2.3, BRL-5.

Product types with code 79 were not mentioned in Tupy's commercial brochures of malleable cast iron pipe fittings.

While discussing the technical aspects of the products sold by Tupy during the on-the-spot verification Tupy explained that all '79' types were unthreaded, and were sold to a single customer, Meikon, on an OEM basis. In fact, these product types were not fittings but were reported as such because they were produced on the same production line and fell under the same CN code. They were not used as a fitting but as a tooling for making threads in plastic tubes. They were re-exported by Meikon in South-American markets.

In conclusion, the types starting with code 79 were all unthreaded and were excluded from the product definition for this reason. The fact that they were not used as fittings but as tooling and that they were not consumed on the Brazilian market but exported to other South-American markets, could have been used as additional reasons to exclude them from the product scope of the proceeding.

Product types with codes 68 and 69:

Tupy neither requested the exclusion of product types with codes 68 and 69 from the scope of the investigation nor contested their inclusion. Although Tupy requested an adjustment for physical differences when comparing normal value and export price, the fact that domestic sales prices of '68' and '69' types were not used to determine normal value rendered such adjustments unnecessary.

Tupy did not make specific arguments during the proceeding to support exclusion of these product types. They were included in the types reported by Tupy in its reply to the Questionnaire. Unlike the '79' types, in Tupy's commercial brochures they appeared alongside the '12' types, and were described as 'Malleable iron pipe fittings'.

The differences between '12' and '18' types, on the one hand, and '68' and '69' types on the other, lie mainly in the threading: the former are BSP threaded and the latter are NPT threaded. While the pressures that fittings with '12', '18' and '69' types can resist are broadly the same,[5] fittings with code 68 can resist a higher pressure.

All these types were considered to be like products because they have the same basic physical and technical characteristics, and the same uses, despite differences in sizes, shape, surface finishing and grade of cast iron. Specific differences in threading, which were claimed to exist by Korean exporting producers and were examined by the EC, were not considered sufficient to exclude certain types from the product scope.[6]

(Issue 9 – No proper adjustment for packing costs)

6. Paragraph 228 of EC's First Submissions reads:

> **" Regarding the conversion of the amount for transport there is a precise, but quite technical, reason why the monthly rate was used. The EC will gladly provide this explanation, but at this stage of the proceedings merely contends that the issue is *de minimis* since transport costs were less than 0.5 per cent of the total sum"**

[5] Commercial brochure in Tupy's reply to the questionnaire, BFL-5.
[6] Provisional Regulation, recitals 17 to 19.

(a) Could the EC explain the reason why the monthly rate was used in the conversion of the amount for transport instead of the rate of exchange on the date of sale, as established by Art. 2.4.1?

Contrary to the precise instructions in the Questionnaire the allowances claimed on export prices were reported by Tupy in the foreign currency of the respective export invoices, rather than in Brazilian Real.

In order to convert the allowance for *transport* from foreign currency into Real, the EC used the same conversion rate that Tupy has used to convert the amounts from Real into foreign currency. Tupy reported these exchange rates in the file ECALLUR, column 'EXCHANGE', on the CD-ROM accompanying their letter of 5 October 1999. The method applied by the EC guaranteed that the amount in Real made as an adjustment (50.200 BRL) corresponded to the amount booked for inland transport in Tupy's accounts.

(b) Could the EC confirm whether the monthly rate was used only regarding the conversion of the amount for transport? Was the monthly rate used regarding the conversion of the amount for other allowances?

See the answer to the Panel's Question 88.

(Issue 10 – Punitive Sampling)

7. Could the EC explain why it decided to compare domestic and export prices of a sample of 20 types, instead of comparing the prices of the 566 types that sales were representative and were made in the ordinary course of trade? Was not the data related to the sales of those 566 types available to the investigating authorities?

The EC has addressed this issue in answering the Questions posed by the Panel (numbers 57 and 67).

ANNEX E-5

RESPONSE OF THE UNITED STATES TO QUESTIONS OF THE PANEL TO THE THIRD PARTIES

7 January 2002

Q1. What is the significance, if any, of the phrase "prices in the domestic market" in Article 3.1?

Reply

1. The phrase reflects that the injury determination involves an examination of conditions in the domestic market of the importing Member. Whereas the dumping determination under Article 2 involves a comparison of the price of the exported products with the price for the comparable product when sold in the exporting Member's home market or in a third country market, the injury determination focuses on the volume, price effects and impact of the dumped imported product on domestic producers *in the importing Member's market*.

Q2 What is the significance, if any, of the reference to "the dumped imports" in Article 3.2?

Reply

2. The "dumped imports" referenced in Article 3.2 and throughout Article 3 refer to all imports of the product from the countries subject to the investigation, other than those goods for which there has been a negative dumping determination. The term must be read so that it has meaning as used throughout Article 3, specifically in light of the framework of the injury determination. In this respect, the Agreement requires investigating authorities to examine, on one hand, the volume and price effects of *the dumped imports*, and on the other, all relevant economic factors having a bearing on the state of the domestic industry. Through this overlapping examination of both *the dumped imports* and the domestic industry factors, the investigating authorities examine the "consequent impact" of those *dumped imports* on the domestic industry.[1]

3. "The dumped imports" referenced in Article 3 are neither confined to particular transactions which have been examined for dumping determinations nor limited temporally to the period covered by the dumping determination. This interpretation is consistent with the Agreement's recognition that it will be impracticable in some cases to make individual dumping determinations for each known exporter or producer; in those cases, the authorities may limit their dumping examination to either a sampled selection or the largest percentage of the volume of exports from the subject county which "can reasonably be investigated".[2] In addition, the Agreement allows a presumption that the companies whose sales are not specifically examined to compute a dumping margin also have been made at dumped prices if the examined companies' sales reveal dumping. In each of the circumstances illustrated above, the dumping determination would not be specific to individual sales of the subject imports in the importing member's domestic market, and all the imports either specifically subject to their own calculated margin or to a presumptive margin based on an "all-others rate" should be treated as "dumped imports" for purposes of the injury determination.

[1] *See* Articles 3.1 and 3.3.

[2] *See* Article 6.10.

4. Furthermore, if "the dumped imports" examined under Article 3.2 were limited to those covered by the precise transactions examined in the dumping determination, then an importing Member would not be permitted to consider for injury purposes the volume and price effects of any imports that fall outside the typical twelve month period used by most investigating authorities as the period of investigation for determining dumping.[3] Whereas the determination of dumping normally need not consider trends over time, the requirements of Article 3.1 concerning a determination of injury necessarily contemplate that the importing Member will gather information covering more than one year in order to evaluate volume and price changes.[4] An importing Member's consideration of whether there have been significant absolute or relative increases in the volume of dumped imports and of whether the dumped imports have to a significant degree depressed or suppressed prices for the like product in the domestic market must be made in the context of an appropriate time frame, which will almost always extend longer than the period of investigation for making a dumping calculation. Depending on the circumstances, volume and price effects resulting from subject imports may be immediate or only evident over a longer period of time. Furthermore, the fact that execution of sales in some industries can take longer than a year, and that in some industries sales are made pursuant to annual or longer contracts, further demonstrates the frequent need for examining a multi-year period in injury investigations.

5. The meaning of the term "the dumped imports" as used throughout Article 3 was discussed in *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*.[5] The *Bed Linens* panel found that the dumping determination is made with reference to a *product*, not with reference to individual transactions, and that investigating authorities may therefore treat all imports subject to the dumping determination as "dumped imports" for purposes of the injury analysis under Article 3.[6] The Panel's rationale for this conclusion was based on many of the same considerations set forth above. In addition, as that Panel noted, the view that "the dumped imports" include all imports from the subject sources without distinction by transaction is also consistent with the findings of the GATT Panels in the *Salmon* cases.[7]

6. Article 3.2 of the AD Agreement contemplates that investigating authorities will examine the volume and price effects of all imports subject to the dumping determination. This does not mean, however, that the investigating authorities must somehow account for each and every subject import. The Agreement does not set forth explicit methodologies that the investigating authorities must use in considering import volume or price effects.

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[3] The time period covered by the dumping determination will normally be one year, but in no case less than six months. Article 2.2.1, n.4.

[4] The disparity between the typical period of investigation of 12 months for calculating dumping and the substantially lengthier period of investigation for making an injury determination existed well before the Uruguay Round. The negotiators were well aware that the period for calculating dumping would be shorter than that for assessing injury. With this awareness, they reaffirmed the requirement that investigating authorities evaluate injury based upon an examination of volume and price effects and impact that inherently would cover more than one year. Indeed, WTO Members have, by consensus, endorsed the practice of collecting data for a one year period for dumping determinations and for at least a three year period for evaluating injury. This consensus is reflected in a *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* adopted by the WTO Committee on Anti-Dumping Practices on 5 May 2000.

[5] *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted as modified by the Appellate Body report on 12 March 2001, paras. 6.121–141 (hereinafter, "*Bed Linens*").

[6] *Bed Linens*, paras. 6.136, 6.139. The *Bed Linens* panel characterized the subject products as "all imports from producers/exporters for which an affirmative determination of dumping is made." However, it is clear that the Panel was actually referring to all imports from India for which there was *not* a *negative* dumping determination. *See* Para. 6.138. In *Bed Linens*, the imports for which there was an affirmative dumping determination and those for which there was no negative dumping determination were the same.

[7] *Bed Linens*, para. 6.141, *citing Salmon-Anti-Dumping Duties*, Report of the Panel at paras. 565-571; *Salmon-Countervailing Duties*, Report of the Panel at paras. 328-340.

Q3. Unlike Article 2 of the Antidumping Agreement in respect of dumping, Article 3 contains no specific guidance as to the methodology an investigator must use to consider price undercutting. Comment.

7. As the Panel notes, Article 3.2 contains no requirement that a particular methodology be employed by investigating authorities in addressing whether there has been significant price undercutting for the purposes of the injury determination. Particularly when contrasted with the inclusion of specific methodologies in Article 2 for examining transactional prices for the purposes of the dumping determination, the absence of a reference to a particular methodology in Article 3 must be interpreted to mean no specific methodology is prescribed.

8. That said, the procedure that an investigating authority uses to make price comparisons under Article 3.2 must be consistent with the objectives and other requirements of Article 3. Thus, the price comparisons must reflect an objective examination in accordance with Article 3.1, and must involve a comparison of prices for the dumped imports (see response to question 2, above, concerning the meaning of "dumped imports" in this context) with prices for a like product of the importing Member.[8] Further, as explained above in response to question 1, the overarching objective of comparing prices and examining price depression or suppression is to determine the effects, if any, of the dumped imports in the domestic market for like products.[9]

[8] *See* Article 3.2.

[9] *See* Article 3.1.

ANNEX E-6

COMMENTS OF BRAZIL ON THE RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM THE PANEL TO THE PARTIES

(21 May 2002)

General Remark

Brazil's comments on the EC's answers to the Panel's questions are given below. Brazil observes that in the following it will not go through all the issues and arguments raised in the EC's answers to the Panel's questions to the Parties. Brazil has already had the opportunity, in its own submissions, statements and answers to the Panel's and to the EC's questions, to present its own position on the matters below. Brazil's following additional comments are therefore made only where in Brazil's view, further clarification of its position is called for at this stage with regard to certain issues. Brazil may choose in any event to elaborate further, as appropriate, on any aspect of the matters concerned in the subsequent phases of this proceeding.

Question 1

With respect to Brazil's allegations under Article 15 *AD*, would the European Communities have conducted itself in the same manner in an anti-dumping investigation involving a developed country Member? Is this relevant here? If not, what is the meaning and legal significance of the phrase "special regard" in the first sentence of Article 15.

Brazil notes the EC's statements that "[a]s a general rule, the EC authorities would not act in the same manner in the application of anti-dumping measures involving a developed country Member" and that "no similar steps were taken in regard to Japan, the sole undeniably-developed country concerned by the same proceedings"[1] (emphasis added). It is not clear to Brazil which "steps" the EC is referring to. If these "steps" refer to the suggestion that Tupy should offer an undertaking, Brazil recalls that such "steps" were only taken after Brazil raised this issue in the bilateral contacts. With regard to paragraph 2 of the EC's response Brazil refers the Panel to the arguments submitted on this issue in the Second Submission of Brazil.

Question 6

What legal obligations does Article 15 AD impose? Could Brazil comment on the European Communities statement in paragraph 31 of its first written submission that "…the first sentence [of Article 15] imposes no legal obligation"? If there is more than one obligation in Article 15, what is the relationship, if any, between these obligations-- i.e. are they separate, independent obligations, or are they interrelated and dependent? Explain your response, with reference to the customary rules of interpretation of public international law and any relevant material.

Brazil notes the EC's broad brush statement that "[t]his interpretation was justified in accordance with the rules stated in the Vienna Convention".[2] However, Brazil submits further that the

[1] See Answers of the European Communities to the Questions from the Panel at the First Substantive Meeting, Geneva, 14 May 2002, 'the EC's Answers', para 1.

[2] See the EC's Answers, para 3.

EC does not provide any supportive argumentation why the first sentence of Article should be *reduced* into the second sentence, and why the Panel should accept this kind of suggestion, which is against *the principles of effective interpretation*.

Question 12

What factors should guide a panel's consideration as to whether the imposition of anti-dumping measures would affect Brazil's "essential interests" within the meaning of Article 15 *AD*? Do the parties agree with the statement of the United States in its third party written submission (para. 14) that the term "essential" implies a very high standard for the level of national interest which the developing country must demonstrate would be affected by anti-dumping duties?

Brazil strongly disagrees with the EC's suggestion that Article 15 constitutes an exception to other obligations under the AD Agreement and that the burden of proof is on the Member invoking the exception.[3] Effectively, the EC argues that *only* if the application of anti-dumping measures "would affect the essential interests of developing countries", then the obligation to explore the "possibilities" of "constructive remedies" arises. The EC seems also to suggest that the burden of proof to show that the essential interest would be affected is on a developing Member.

Brazil submits that the EC's interpretation, which is not supported by any relevant material, is against the plain text of Article 15. The exact wording of the second sentence of Article 15 lays down an obligation ('shall') on developed Members to 'explore' possibilities of constructive remedies before applying anti-dumping duties against imports from a developing Member. Consequently, Article 15 is not an exception but lays down an additional substantive requirement to developed Members which need to be met before applying anti-dumping duties. Brazil notes that this obligation is qualified by the phrase "where they [anti-dumping duties] would affect the essential interest of developing country Members". However, given that the principal obligation to 'explore' is on the developed Members, Brazil submits that in the same way the obligation to show that the intended application of anti-dumping duties would *not* affect the essential interest of developing country is on developed Members. Indeed, a simple reading of Article 15 must mean that that a developed Member is expected to explore possibilities of constructive remedies *unless it* can demonstrate that the intended anti-dumping measure would *not* affect the essential interest of a developing country Member. Brazil's response to the Panel's question 12 should be read in that context.

Question 20

According to Brazil, the first "explicit consideration" by the European Communities of the currency devaluation was on 20 July 2000 in the Disclosure Preceding the Definitive Regulation. Does the European Communities agree? Is this relevant? Why or why not?

As a background information, Brazil recalls that the EC provided at the very beginning of the investigation detailed exchange rates for conversion into ECU/EURO.[4] The conversion rates for the Brazilian Reais were the following:

[3] See *Ibid*. para 11.
[4] See the Questionnaire (BRL-3), page 72.

Period	ECU/EURO = real
1995	1,199
1996	1,276
1997	1,222
1998	1,299
IP	1,509
199804	1,245
199805	1,273
199806	1,272
199807	1,275
199808	1,291
199809	1,363
199810	1,419
199811	1,390
199812	1,413
199901	1,785
199902	2,236
199903	2,146

Consequently, the issue of the significant devaluation of the Brazilian Real was known to the EC even before the initiation of the proceeding.[5] An important consequence of this EC knowledge was that the EC was fully aware that the dumping situation complained about by the Applicants and which served as a basis for the initiation of the anti-dumping investigation against Brazil had been totally different by the time of initiation (i.e. there was no dumping to be offset), and that the anti-dumping measures which the EC has adopted following the investigation in this case have been totally misplaced and inappropriate, as Brazil submitted under the first alternative of its Issue 3.

Question 26

Does the European Communities believe that the price comparison at the end of the IP revealed no, or declining, differences between export price and normal value at the end of the period? Explain the significance this has for the establishment of the margin of dumping in the IP as a whole. Provide the legal basis for your response, citing any relevant material.

With regard to the EC's statement that "Tupy's prices at the end of the IP, immediately following devaluation, are no reliable indicator of its prices in the medium term",[6] Brazil has two comments**.** Firstly, Brazil recalls the following example provided in its First Submission:

"Presume, for the sake of argument, that a Brazilian exporting producer sold in April 1998 the product concerned on the Brazilian market for 10 Reais per one unit and at the ECU/EURO equivalent of 8.03 when sold on the same day to the EC. At that point in time the unit price of the product concerned was the same in Brazilian Real and in ECU/EURO in both markets. On the assumption that the nominal value of the home market price and the export price was unaffected by other factors between April 1998 and March 1999, when the Brazilian Real depreciated by 41.99 per cent in ECU/EURO terms following the devaluation [footnote: One ECU/EUR corresponded to 1.245 real in April 1998 and to 2.146 in March 1999; see Questionnaire, page 72], the export price of 8.03 ECU/EURO when converted into Real in March 1999 was 17.23. Inversely, by converting these prices into ECU/EURO, both prices were 8.03 ECU/EURO in April 1998, but given the devaluation the domestic price became a mere 4.66 ECU/EURO in March 1999."[7] Consequently, Brazil submits

[5] See the EC's Answers, para 21.
[6] See the EC's Answers, para 26; see also para 30.
[7] BFS, para 194.

that *under normal conditions* a steep devaluation makes the normal value of the product concerned significantly lower than the export price so that, no dumping would actually take place in the said circumstances.

Secondly, Brazil submits that the obvious method to establish whether such "normal conditions" have continued in this case after the devaluation (*i.e.* assessing how the Brazilian exporter reacted to currency devaluation), was to self-initiate an immediate review (see also Brazil's comments under question 33 below).

Question 33

What is the meaning of the phrase "where warranted" in Article 11.2 AD? Provide the legal basis for your answer. Assuming *arguendo* that initiation of a review is "warranted", is there a legal obligation to self-initiate a review?

Brazil disagrees with the EC's interpretation that "[s]elf-initiation therefore remains a residual category, appropriate for unusual or extreme circumstances". Brazil submits that Article 11.1 contains a *general* "necessity rule" whereby anti-dumping duties shall remain in force only as long as and to the extent necessary to counteract injurious dumping and that this general rule is implemented through, *inter alia*, Article 11.2.[8]Brazil believes that the investigating authority has an obligation to conduct a review on its own initiative "where warranted" and this obligation applies throughout the life of an anti-dumping measure.

Question 35

What, if any, is the relevance and role in these proceedings of the EC case-law and practice concerning "changed circumstances" cited by Brazil on pp. 38 et seq. of its first written submission?

Brazil disagrees with the EC's conclusion that "even assuming that the dumping margin had declined in the period immediately following devaluation there would have been no basis for concluding that such a change would be lasting". As commented above in question 33, the proper basis for the EC to examine, whether "such a change" would or would not be lasting, would have been to self-initiate a review under Article 11.2, given that there were ample indications that such a review was indeed "warranted".

Question 37

Comment on Brazil's allegation of the inconsistency between your statement in the Disclosure Preceding the Provisional Regulation:

"- On the domestic market, products starting with a 12, 68, 69 and 79 code were sold. Products starting with 68 and 69 had a different thread (NPT instead of BSP), while 79 products were not threaded. Products with code 68 were also made for higher pressure than other products. The costs of manufacturing of these products appeared to be different, and most of these products had also market values which were very different.

- On the EC market, Tupy sold products starting with a 12 code (own brand) and products starting with an 18 code (Nefit brand). Again, these products appeared to have sometimes very different costs of manufacturing." (footnotes omitted, emphasis added)

and the position taken in the investigation not to grant adjustments as envisaged by Article 2.4

[8] See, for example, *'US- DRAM'*, para 6.41.

Brazil disagrees with the EC that "[t]his example shows that fittings with different threading or brand name although being for the rest quasi-identical have a strongly varying market value and that it would be unreasonable to combine domestic sales of 12, 68 and 69 types to determine a normal value combined for 12 and 18 types which have in their turn a strongly varying cost and market value".[9] Brazil contests that the difference in the costs of manufacturing between product types starting with internal product codes '12' and '18' as exemplified by the EC of *around 5 per cent* warrants the conclusion that these product types have "strongly varying costs". Moreover, given that the product types starting with the internal product codes '18' were not sold on the domestic market at all, it is logically impossible that the product types of '12' and '18' had "strongly varying market values".[10]

Question 41

Comment on Brazil's statements on page 60 of its first written submission:

"Consequently, the words "throughout this Agreement" in Article 2.6 when read together with the wording of Article 2.2.2 obliges the investigating authorities to use the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products which are identical, i.e. alike in all respects, to the product under consideration. Only in the absence of such identical products can the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products, which are, although not alike in all respects, having characteristics closely resembling those of the product under consideration. However, in the latter case the investigative authority is obliged to make due allowances in each case, on its merits, for differences in physical characteristics affecting price comparability….."

Brazil recalls the EC's claim that "[t]he kind of interpretation proposed by Brazil would lead to arbitrary if not chaotic results, which are clearly not the intention of the Agreement".[11] Brazil submits that its textual interpretation of Articles 2.2.2 and 2.6 is confirmed in light of the requirements of Article 31 of the Vienna Convention. Brazil submits that an examination of the elements in Article 31 does not leave the consistent meaning of "the like product" in the AD Agreement "ambiguous or obscure". However, the EC's position that "[t]he chapeau of Article 2.2.2 explicitly directs the use of production and sales data pertaining to the *like* product and not a comparable product"[12] is clearly against the opening sentence of Article 2.6 of the AD Agreement ("[t]hroughout this Agreement"). In essence, Brazil submits that Article 2.2.2 (in light of Article 2.2) requires the investigating authority to base the amounts for SG&A and for profits in the construction of normal values on the data of *representative* and *profitable* domestic sales of the identical product types, if available. Consequently, all of the examples provided by the EC are misplaced.[13]

Question 53

Comment on the statement by the European Communities at para. 127 of its first written submission that "…both SG&A and profit were based on the 1260 types of the like product sold on the domestic market".

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[9] See the EC's Answers, para 60; see also para 58.

[10] See also the Disclosure Preceding the Provisional Regulation (BRL-11), where the EC stated that "these products [product types starting with internal product codes '12'and '18'] appeared to have sometimes very different costs of manufacturing"; Annex I, page 2.

[11] See the EC's Answers, para 66.

[12] See *Ibid.*, para 65.

[13] See *Ibid.*, para 66.

Brazil notes the clear contradiction between the above-quoted EC's statement at para. 127 of its first written submission and the EC's response to Question 53. While the EC firmly contended in its first submission that "…both SG&A and profit were based on the 1260 types of the like product sold on the domestic market", the EC now states that "...SG&A costs and profit were based solely on those types sold on the domestic market in the ordinary course of trade."

On the other hand, Brazil notes that the EC alleges that "[t]his [SG&A costs and profit based on 1193 types] can clearly be seen in the Definitive disclosure. In Brazil´s view, at a minimum, it is not as clear as the EC points out, since the EC itself seems to be confused with its own data.

Question 57

On what basis does the European Communities justify the use of data relating to the 20 "most exported types" of the product concerned in calculating the adjustment for PIS/COFINS?

Brazil notes the EC's statement that "[t]he EC investigators *knew* they could safely proceed on this basis [re: 20 "most exported types"] because the outcome of this calculation *would have* only a minor effect on the level of the dumping margin" (emphasis added).[14] The EC itself admits that it knew beforehand that its method of examination would have effect on the level of the dumping margin. However, the EC's method was punitive, as shown by Brazil, specifically in light of extensive information that the Brazilian exporter had submitted to the EC. Brazil opines that anti-dumping investigations should be based on facts (actual data) and not on the investigating authority's presumptions or hunches, as the latter undermine the objective standards imposed on the investigating authorities by the AD Agreement.

Question 88

Was the conversion of the amounts reported by Tupy from the European currency to Reals done only in the case of transport costs?

Brazil does not understand the EC insistence that "a conversion from foreign currencies into Real was also necessary for all other adjustments made to the export price, as Tupy had reported all these adjustments in the currency of the export invoices, despite instructions to report in Real".[15] All the Brazilian exporter's export sales of the product concerned to the EC were made and expressed in the currency agreed between the parties to the transaction (i.e. Tupy on the one hand and the EC importer on the other). Moreover, the term of delivery was 'CIF' and thus all cost items between *ex-factory* and the agreed port in the EC were indicated in the same currency as the agreement.[16]

Question 100

What is the significance, if any, of the reference in Article 3.2 AD to "a" (rather than "the") like product? And to domestic "prices" (in the plural rather than singular)?

[14] See *Ibid.*, para 94.

[15] See *Ibid.*, para 120.

[16] See the Questionnaire (BRL-3), Section H – 6 'Formats of allowances' where the EC requested the exporters to "[p]repare a listing named "ECALLUR"…of all adjustments you claim for sales to independent customers in the European Community on a transaction-by-transaction basis following the same order of the listing in Section H3 (I)". Brazil recalls that all of the listings requested by the EC were provided by the Brazilian exporter in its Tupy's Questionnaire Response (BRL-4).

Brazil notes again the EC's references to the Agreement on Subsidies and Countervailing Measures.[17] However, Brazil denies all of the EC's suggestions that the obligations in the AD Agreement should be interpreted, let alone replaced by the obligations in the SCM Agreement.

Question 114 (indicated in the EC's response as Question 110)

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. In particular:

- **How was the statement in Exhibit EC-12 on "ability to raise capital" derived from the information given in "questionnaires and annual accounts"?**
- **How was the statement in Exhibit EC-12 on "wages" derived from the information given in " annual accounts"? Explain the meaning of "allocation on the basis of turn over"?**
- **How was the statement in Exhibit EC-12 on "productivity" derived from the information given in "questionnaires"?**
- **How was the statement in Exhibit EC-12 on "return on investments" derived from the information given in "questionnaires and annual accounts"?**
- **How was the statement in Exhibit EC-12 on "cash flow" derived from the information given in "questionnaires and annual accounts"?**
- **How and on what basis was the statement in Exhibit EC-12 on "magnitude of margin of dumping" derived?**

For the reasons point out in its Second Submission, Brazil believes that the Panel should entirely disregard Exhibit EC-12. Nevertheless, the following observations must be made. Article 3.4, when read together with Article 4.1, obliges the investigating authority to examine the impact of the dumped imports on the domestic producers of the like product (*i.e.* 'domestic industry'). In view of this, Brazil notes the EC's methodology to allocate certain parameters (like tangible fixed assets, stock and depreciation) by turnover ratio.[18] Indeed, this shows that the domestic industry was also producing products other than the like product. With particular regard to "return on investments" and "cash flow", Brazil submits that the allocation of tangible fixed assets and depreciation on the basis of turnover is meaningless for the purpose of an anti-dumping investigation. The reason is very simple: turnover does *not* indicate what amount of the company's assets (and depreciation related to these assets) relates to which specific segments of the business. For example, high/low turnover of a product is not necessarily related to high/low share of the total assets (land and buildings, plant and machinery etc.) used to generate that turnover. Consequently, Brazil submits that the EC's examination was not based on the like product specific "positive evidence" as required in Article 3.4. Finally, the acceptance of the EC's examination method would also have practical consequences. If this happened, the only data the investigating authority would need to request from the domestic industry would be the turnover of the like product, as the rest of the injury indicators under Article 3.4 could technically be examined on the basis of companies' income statements and balance sheets. This is clearly not what is required in order to satisfy the conditions of Article 3.4 in this respect.

[17] See the EC's Answers, para 137 *et seq*.

[18] Regarding the EC's general methodology; see the EC's Answers, para 155; particular methodologies regarding "return on investments" and "cash flow" see paras 157 and 158 respectively.

Question 120

How can the Panel verify whether and to what extent the European Communities investigating authorities examined the issue of outsourcing and ownership links of the domestic industry with producers located in countries not subject to the investigation? Please indicate the relevant parts of the record of the investigation.

Brazil observes that, for the first time ever, the EC seems to admit that two of the Applicants forming part of the EC industry did delocalise production to plants under EC industry control in certain third countries.[19] Brazil observes further that a third Applicant (Woeste) which, as the Brazilian exporter had submitted to the EC authorities, delocalised its production to a subsidiary in Egypt,[20] has still not been recognised as such by the EC. The EC nonetheless still describes that situation as an "allegation" which was "never substantiated"[21] thus still trying to attribute the failures of its own examination to the Brazilian exporter, and now also to Brazil's related contentions.

Moreover, Brazil notes that *none* of the references given by the EC really addresses the issue of the EC producers' production plants located outside the EC.[22] Regarding one aspect of this problem, Brazil submits that the EC producers' direct investments outside the EC was a relevant economic factor having a bearing on the state of the domestic industry under Article 3.4. Furthermore, it was also a known factor other than the dumped imports under Article 3.5 explaining, for example, why the EC producer's investments in the EC decreased by around 16 per cent between 1995 and the IP.[23]

Furthermore, Brazil fails to understand how the EC could avoid addressing the issue of the EC industry's ownership over foreign producers of the product concerned and their strategic decision to delocalise (outsource) production to such foreign production plant where this issue has been at the very centre of the EC's investigation from its very beginning. As repeatedly stated, the Brazilian exporter as well as other exporters have made such submissions on different occasions during the EC investigation. Perhaps even more importantly, the highest levels at the EC Services have also been alerted to this phenomenon and to its crucial importance to the issue of the legality of the investigation under the "spirit and letter of the relevant international anti-dumping rules."[24] Thus, this issue, and the related question whether the "Community interest" to impose anti-dumping measures[25] should also include the interests of EC producers in foreign countries, have been raised at different times during the EC investigation and are paramount to the understanding of the general context in which that investigation was conducted. To Brazil, the EC's failure to confront the above mentioned submissions in any of the documents forming the record of this proceeding must raise very serious

[19] See the EC's Answers, para 167.

[20] See the Fourth Submission of Tupy (BRL-13, page 2); see also BRL-51 and BRL-52 (exhibits submitted during the First Substantive meeting with the Panel).

[21] See the EC's Answers, para 167.

[22] See the EC's Answers, para 166. Brazil notes that of the mentioned references recital 134 of the Provisional Regulation (BRL-12) and recitals 65 *et esq.* of the Definitive Regulation (BRL-19) are related to the definition of domestic industry under Article 4.1 of the AD Agreement. Brazil also notes references related to the EC's causation analysis, namely in recital 174 of the Provisional Regulation the EC states that "one Community producer did import the product concerned from one third country", and in recitals 106 *et esq.* of the Definitive Regulation the EC analyses the imports of the product under consideration from Turkey, Bulgaria and Poland. Finally, Brazil notes the EC's explanations in the Transparency Letter (BRL-18) with regard to the non-initiation against Turkey, product mix exported from Poland and import prices of the Bulgarian imports.

[23] See recital 159 of the Provisional Regulation (BRL-12).

[24] See para 3 in the letter dated 23 February 2000 of the Brazilian Ambassador to the EC to Mr Wenig, Director, EC Anti-dumping Services, with copies, *inter alia*, to the Chief of Cabinet of Trade Commissioner Mr Lamy; submitted by the EC as CONFIDENTIAL Exhibit EC-29.

[25] Article 21 of the EC's Basic Regulation (BRL-24).

questions also in relation to the way in which the EC had discharged its obligations of an investigating authority to conduct a proper investigation on the basis of positive evidence and objective examination.

Finally, given that the issue of the domestic industry's outsourcing of the product concerned to foreign subsidiaries, including in *Egypt*, was an issue which was properly raised during the investigation, but the EC preferred not to react to it, Brazil submits that the EC also violated Article 12.2.2 by not providing *any* reasons for the rejection of the relevant arguments made by the Brazilian exporter in this regard.[26]

Question 129

How, if at all, do the standards of "significant contribution" (e.g. Definitive Regulation, para. 113) and "not such to have broken the causal link" (e.g. Definitive Regulation, para. 111) relate to a genuine and substantial relationship of cause and effect?

Brazil notes the EC's statements that "[i]t should not be assumed that, had there been a significant contribution from the 'substitution effect', the necessary causal connection between dumped imports and injury would have ceased to exist"[27] and that "[i]f the consequences of third-country imports had been sufficiently great they would have broken the causal link between the dumping and the injury found".[28] Brazil submits that these statements are not only self-contradictory but also indicative of the EC's conduct as the EC effectively assumed, in violation of Article 3.5 that certain other known factors did not "break the causal link". They also indicate that the EC's causation determination does not fulfil the non-attribution obligation in Article 3.5.

Question 143

Could the EC clarify the meaning of the Article 11.3 of the EC Basic Regulation on whether the exporter has the right to <u>have</u> a review or has the right to <u>request</u> a review?

Brazil observes that the EC's attempt to make a distinction between a situation where an exporter has a right to <u>have</u> a review and the situation where it has a right to <u>request</u> a review is nothing more than a rather meaningless tautological exercise. <u>Any</u> party has a right to <u>request</u> a review, regardless of how sound or legitimate its claims may be. It is a mere right to express a wish or to address the Commission. Such a "right" is however meaningless if the EC regulations do not allow such a request to be heard or accepted. Even if the EC understood that such a request was legitimate, it would not open the review as a response to the request; it would formally <u>self-iniate</u> the review

Question 144

Can the EC confirm that if Tupy has requested a review within the year following the imposition of the anti-dumping duties the Commission would have exercised discretion on the granting of such a request? Also, if the request had been made after the year following the imposition of the anti-dumping duty would the Commission have automatically granted the request?

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[26] Brazil recalls for example the Brazilian exporter's claims regarding outsourced imports from Egypt, e.g. in the Fourth Submission of Tupy (BRL-13, page 2).

[27] See the EC's Answers, para 177.

[28] See *Ibid.* para 178.

Brazil notes the EC's statement whereby "a request for a review made by Tupy within the one year period would have been seriously considered."[29] However, the EC seems to have forgotten its own contradicting statement in its First Submission that "[t]he EC authorities did not believe that the devaluation that occurred in the course of the investigation was an event that warranted a review."[30]

As to the review mentioned by the EC, Brazil notes that that this issue is not a matter to be considered by the Panel, as it is outside the Panel's terms of reference.

However, should the Panel consider that the EC's review is relevant to this proceeding Brazil would submit that this review is bound to create more confusion rather than provide for a proper solution to the problems raised by Brazil in this proceeding. Brazil notes the EC's explanations regarding the review of the measure subject of this dispute[31] and observes that the nature and purpose of that review are far from being clear. Firstly, the review was initiated on 5 December 2001 and it might be a mere coincidence that that date was the second day of the first substantive meeting with the Panel. This is the first indication of the confusion regarding the real purpose of that review.

Secondly, Brazil notes that the review to which Brazil referred under Issue 3 concerned a review in the sense of Article 11 of the AD Agreement (parallel to Article 11 of the EC's Basic Regulation). Nonetheless, the legal basis given by the EC to the new review is a new EC act of EC legislation[32] which, unlike the Basic Regulation, does not find its source in the AD Agreement, to which it does not even refer.

Thirdly, Brazil notes that as a justification for the review, the EC noted that "the exporting producer requested a review on the basis that its individual anti dumping duty rate is based on methodologies [re: 'zeroing' of dumping margins] which are not in line with the conclusions contained in the [re: DSB's 'EC-Bed-Linen'] reports".[33] On the other hand, however, the review does *not* seem to be confined to zeroing. It would seem that the review was meant to cover *all* the material aspects of dumping. This is indicated, for example, by the fact that the EC examines data for a totally new investigation period, *i.e.* from 1 January 2001 to 30 September 2001.[34] However, a review relating to the mere changes required by the zeroing correction would have *not* required any new information at all. A simple modification of the EC's calculation formula, applied to the old data, would have sufficed for that kind of a review. By making a full-scale review of dumping measures in force 16 months after their adoption and 10 months after the adoption of the *'EC – Bed Linen'* reports, the EC has clearly recognised that the motive for that review was not merely related to the Czech exporter's request.

The EC seems to give an answer to the obvious question that one could have thus put to it, namely, why would an investigating authority initiate a *full* dumping review to correct the mechanical effects of zeroing, as it explicitly stated that the review "would have provided an opportunity to evaluate Tupy's claims regarding the effects of the devaluation".[35] The EC thus admits that it should have initiated a review as submitted by Brazil under its Issue 3. However, the confused way in which the EC approached its new review raises serious doubts as to whether it would even be compatible with the AD Agreement.

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[29] See *Ibid.*, para 193.
[30] ECFS, para 109.
[31] See the EC's Answers, paras 193and 195.
[32] Regulation 1515/2001.
[33] *Ibid.* Brazil notes that the DSB adopted *'EC – Bed Linen'* reports on 1 March 2001.
[34] See the EC's Answers, para 195.
[35] See *Ibid.* para 195.

Brazil also deplores the statement made by the EC regarding the EC's "invitation" to Tupy to request an interim review and the misleading way that the EC chose to present this issue.[36] Brazil notes first that, this matter is not covered by this Panel's terms of reference and is therefore totally irrelevant here and in the context of the review to which it referred under its Issue 3. Brazil referred to a review which should have been self initiated by the EC at the time of imposition of the measures, as was warranted in view of the data that the EC collected from the Brazilian exporter and verified in the framework of its original investigation. On the other hand, Brazil notes that the above-mentioned letter, which specifically referred to these DSB proceedings and to the EC's zeroing methodology, could not cure in any way the EC's failure to initiate a review at the time relevant to this proceeding.

Brazil regrets that the EC failed to mention the Brazilian exporter's commitment to fully co-operate in a full review which only the EC could have initiated and which the Brazilian exporter was clearly not invited to request.

Brazil also deeply regrets the EC's statement regarding the EC's granting of "two extensions of the deadline" for the Brazilian exporter to give its response in the context of the review mentioned by the EC, extensions which were part of an arrangement between the EC and Brazil that the two parties agreed to keep in strict confidence. In this arrangement, the "extensions" were mutually agreed, not in order to give Tupy any additional time to prepare for the review, as the EC seems to imply. They were granted simply to allow the search for a mutually agreed solution to continue without the distractions of the review. According to representatives of the company, Tupy's decision not to co-operate is mostly related to the insufficient scope of the review, which Tupy believes should also cover the injury aspects of the investigation.

[36] See *Ibid.*, para 193.

ANNEX E-7

REPLIES OF BRAZIL TO QUESTIONS OF THE PANEL – SECOND MEETING

A. ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

To Brazil

Q1. As a result of the meetings between Brazilian and EC government officials, did the Brazilian government transmit to Tupy the possibility of pursuing a price undertaking with the EC? If not, why not? If so, how did Tupy react? Provide supporting evidence.

Reply

The Government of Brazil has no record of any contacts maintained with the Brazilian exporter regarding the issue of undertakings. In fact, there was no need at all for Brazil to inform the Brazilian exporter of the possibility of a price undertaking, which possibility is explicitly provided by the AD Agreement.

In any event, particularly in view of the EC's confirmation during the second substantive meeting that a price undertaking was its preferred "constructive remedy" and given the inherent nature of that "contractual" remedy, the EC could not satisfy the requirements of Article 15 merely by discussing an undertaking in such general terms with Brazil and not raising it at all with Tupy. Price undertakings are a matter to be negotiated between and agreed by the authorities and the exporter. The EC did not even try to explore that possibility with the Brazilian exporter.

Q2. We note that Article 12.2 states "*Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking,….*". How and to what extent is this relevant here?

Reply

Brazil understands this question in the context of Paragraph 19 of its Second Written Submission and its answer to the Panel's question Nº 13 following the first substantive meeting.

In Brazil's view, the EC's contention that it had explored the possibility of an undertaking with the Brazilian authorities and that in doing so it complied with its obligations under Article 15 must fail, also in view of the EC's failure to report on this "exploration" under Article 12.2.

In the present case, no public notice was given of any decision (affirmative or negative) to accept an undertaking pursuant to Article 8 with regard to the Brazilian exporter. This fact shows that:

(a) the EC did not explore the possibility of a price undertaking as a "constructive remedy" and, therefore, there was nothing to be reported through a public notice pursuant to Article 12.2; OR

(b) assuming that the EC did explore the possibility of a price undertaking as a "constructive remedy", its failure to report it would constitute a violation of Article 12.2.

In any event, the fact that no public notice was given of any decision (affirmative or negative) to accept an undertaking clearly indicates that the EC did not consider the exploration of constructive remedies a "material" issue of fact and law[1], which is at odds with Article 15.

To the EC

Q3. With reference to the relationship between the obligations in Articles 12.2 and Article 15 of the *Anti-Dumping Agreement*, comment on Brazil's response to Panel Question 13 stating that the EC did not mention in the Provisional or Definitive Regulation that the possibility of an undertaking had been explored with regard to the Brazilian exporter.

To both parties

Q4. With reference to Brazil's assertion in para. 20 of its second written submission and Brazil's response to Panel Question 4 following the first meeting, are undertakings other than price undertakings provided for by the *Anti-Dumping Agreement*? How, if at all, is Article 8.1 of the *Anti-Dumping Agreement* relevant in this context?

Reply

Brazil believes that undertakings other than price undertakings are provided for by the Anti-Dumping Agreement. As a general premise, Brazil suggests that any measure which would have a less restrictive impact than an anti-dumping duty should be allowed under Article 8. Indeed, Article 8.1 of the Anti-Dumping Agreement does mention both price undertakings and undertakings to cease exports. Brazil is of the view that, in application of the maxim "the greater power includes the lesser", if the Anti-Dumping Agreement applies to undertakings to cease exports, it also allows less restrictive quantitative measures, i.e. a limitation of exports. It can therefore be inferred that the Anti-Dumping Agreement does not prevent WTO Members from accepting quantitative undertakings, tariff quotas or "price quotas". Notwithstanding the EC statement that it is no longer its practice to accept such undertakings[2], the EC is known to have subscribed to this interpretation on record until recently[3], and in any event at a time later than the entry into force of the AD Agreement. Brazil observes that the EC has not elaborated why it had now allegedly decided to discontinue this long standing practice.

Q5. Previous panels have indicated that the application of the "lesser duty rule" and "price undertakings" are possible constructive remedies under Article 15 of the Anti-Dumping Agreement. Can both parties suggest any other remedy that could be seen as constructive in terms of Article 15?

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[1] Article 12.2 states in the relevant part: "… Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities…".

[2] Second Oral Statement by the EC, para. 28.

[3] See J.F. Beseler and A.N. Williams, *Anti-dumping and Anti-subsidy Law: the European Communities*, Sweet & Maxwell, 1986, at p.215 and E. Vermulst and P. Waer, *EC Anti-dumping Law and Practice*, Sweet & Maxwell, 1996, at p.71 (Copied pages attached)

Reply

Brazil observes that it was the duty of the EC to explore "constructive remedies" and therefore it was the role of the EC to devise such an undertaking. More generally, as already mentioned in its Second Submission[4], Brazil contends that the Panel's statement in *EC-Bed Linen* implies that there might be other kinds of constructive remedies under Article 15 of the Anti-Dumping Agreement than "lesser duty" and "price undertaking". Brazil referred, in its Second Submission to undertakings which limit the quantities to be exported. One could also think of tariff quotas or "price quotas" as other kinds of a constructive remedy.

B. ISSUE 3 : "INAPPROPRIATE MEASURES"

To Brazil

Q6. Can Brazil comment on para. 39 of the EC oral statement at the second meeting?

Reply

In the above-mentioned paragraph the EC relates to two main issues: its letter of 10 August 2001 and its initiation of a "review" in December 2001. Both issues are not covered by the Terms of Reference (TOR) as set out for this Panel proceeding[5] and must equally be rejected as they concern facts which have not been made available as part of the record of the EC's investigation, in the sense of Article 17.5(ii) of the AD Agreement.

The TOR for this Panel proceeding[6] are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS219/2, the matter referred to the DSB by Brazil in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

The matter referred to by these TOR is defined in Brazil's Request for the Establishment of the Panel[7] and is repeated in its First Written Submission as the definitive anti-dumping duty which the EC had imposed on imports of malleable cast iron tube or pipe fittings from Brazil. The duty was imposed on 18 August 2000 and the matter is thus reflected in the Definitive Regulation.[8]

It follows that as the above-mentioned issues came into being subsequently to the Definitive Regulation and are by no way covered by it, nor otherwise by the TOR, they fall outside the scope of the present proceeding and must therefore have no place before this Panel.

In addition, as the two issues relate to facts which have not been part of the record of the original EC anti-dumping investigation, this Panel is not authorised, in view of Article 17.5(ii) to examine them.

In any event, however, also on their own merits, the two above-mentioned issues are totally irrelevant to this proceeding.

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[4] Second Written Submission of Brazil, para. 20.
[5] WT/DS219/3 of 11 September 2001 (BRL-22).
[6] In the sense of Article 7 DSU.
[7] WT/DS219/2, first para.
[8] BRL-19.

The EC seems to entirely miss the point as it refers to "Brazil's insistence that the EC authorities should have opened a review". Brazil confirms that it had never requested the initiation of a "review". Brazil recalls that under the main argument supporting its claim of "inappropriate measures" in its Issue 3 it submitted that the imposition of anti-dumping duties was inappropriate, in view of the disappearance of dumping following the devaluation of the Brazilian currency. Brazil noted in that regard that, "although the EC was very well aware of the fact that there was no need anymore to offset dumping it has nonetheless imposed anti-dumping measures on the Brazilian imports."[9] Brazil further recalls that it had submitted that the EC's own rules allowed it to take into account data collected after the formal end of the Investigation Period where such data "disclose new developments which make the planned imposition of an anti-dumping duty manifestly inappropriate."[10]

Thus, Brazil's alternative contention regarding that kind of review is an inseparable part of its main argument namely, that there was no need to impose measures in this case. In case the EC needed a longer period to confirm its initial data regarding this absence of justification to impose measures, the ultimate administrative instrument that could have allowed it to do that would have been a self-initiated, partial interim review.

Brazil recalls that it had specifically referred to a review which the EC should have self-initiated simultaneously with its improper imposition of the original measures. That review was thus meant to allow the EC to examine a longer period post devaluation which in fact was meant to extend the original investigation period by several more months. This would have allowed the EC to avoid the results that it had achieved in this case where it has knowingly conducted an investigation for a period which has been totally irrelevant as a justification for the imposition of anti-dumping measures, in clear violation of the substantive provisions of the AD Agreement.

Moreover, Brazil recalls that the said EC letter[11] corresponded to a totally different situation that the one referred to under Issue 3. That EC letter was addressed to the Brazilian exporter "within the context of the current DSB proceeding in Geneva on malleable fittings originating inter alia in Brazil" and its main thrust related "to the issue of 'zeroing' which has been raised by the Brazilian authorities". While referring to the EC's revised policy following the DSB decisions in *Indian Bed-Linen*, the EC further stated that, "given that this issue has now been also raised again in the current WTO panel … the Commission Services take the opportunity to invite you to consider the possibility of an interim review".

Brazil observes that nowhere in that letter did the EC refer to the argument it now puts forward on the "insistence that the EC .. should have opened a review". Nor did it mention anything with regard to a self-initiated review.

Furthermore, to avoid any doubt, Brazil submits that neither it nor, reportedly, the Brazilian exporter have ever contemplated a review, in the sense of Issue 3, based on or even relating to 'zeroing'. Brazil also notes the Brazilian exporter's reply[12] to that EC letter where it has unambiguously stated that (i) such a late review should not be limited to zeroing only; (ii) the EC Commission can self-initiate such a review at any time; and (iii) the Brazilian exporter would fully

[9] BFS para 171.

[10] Reference in BFS para 169.

[11] Exhibit BRL-55. Brazil emphasises that this Exhibit is presented here solely for the purpose of informing the Panel of the general context, nature and purpose of that EC letter which are clearly not those which the EC is trying to give them before this Panel.

[12] Exhibit BRL-56. Brazil emphasises that this Exhibit is presented here solely for the purpose of informing the Panel of the straight-forward way in which the Brazilian exporter has dealt with the EC's letter.

cooperate with the EC authorities should a proper interim review of all the aspects of the EC's original investigation be self-initiated by the EC.

Brazil understands that the Brazilian exporter has finally declined to take part in the new EC "review" as that "review" was clearly not an interim review and as it was expecting that methodologies similar to those against which Brazil complains in this proceeding would be applied again in its regard. Equally, given these unacceptable methodologies and the fact that the EC has waited for more than a year to initiate this review, the Brazilian exporter appears to be of the view that the EC should be also reviewing its determinations not only in relation to dumping, but also to injury and causality.

C. ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"

To the EC

Q7. Did the EC have available to it in the record of the investigation all of the information that would have been required to conduct a calculation of PIS/COFINS adjustment on a more thorough or a comprehensive basis? If so, cite to the relevant portion of the record. If not, why did the EC not request the information that would have been necessary for such a more extensive calculation?

Q8. Why did the EC resort to the use of data of the 20 most exported types in calculating the PIS/COFINS adjustment? Was it exclusively because of the "constraints of time and personnel" that you refer to in para. 84 of your oral statement at the second meeting?

Q9. In an investigation not involving "facts available" or "sampling" within the meaning of the *Anti-Dumping Agreement,* what is the legal basis that permits or does not preclude the use by an investigating authority of data from only a selection of transactions or the use of an "allocation key" for the purposes of calculating adjustments?

To Brazil

Q10. Could Brazil comment on the EC's answer to Panel question 55? Even assuming *arguendo* that the normal value was calculated net of the IPI tax, would this preclude the necessity to consider whether or not the IPI premium credit would be potentially the subject of an adjustment?

Reply

Brazil believes that the EC has misunderstood the relationship between the IPI tax and the IPI Premium Credit. IPI premium credit does not relate only to IPI tax. Therefore, even in case the normal value was calculated net of the IPI tax, there could be basis for granting an adjustment on the grounds of IPI premium credit. The EC simply denied such an adjustment, without indicating to the Brazilian exporter what additional information was necessary to justify the differences between IPI premium credit and IPI tax, in order to ensure a fair comparison pursuant to Article 2.4.

D. ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"

To Brazil

Q11. With respect to the EC's assertion at para. 77 of its oral statement at the second meeting, did Tupy request information on rates of exchange used for allowances? Please cite to the relevant portions of the record of the investigation.

Reply

Yes, given that it was unclear on which exchange rates basis the EC had made its currencies conversion the Brazilian exporter requested information on the actual exchange rates thus used.[13] Brazil does not believe that the EC could escape the disciplines of Article 2.4 simply by stating that the Brazilian exporter's requests were not specific enough to cover both the export prices and the allowances deducted from the export prices.[14] It is also senseless to deny that the said requests covered the exchange rates used for both the export prices and the deductions (allowances).

Q12. Could Brazil clarify whether and to what extent its claim is now limited to the exchange rates used in conversions relating to adjustments? Please indicate how this is reflected in the allegation stated in para. 21 of your Panel request.

Reply

Brazil clarifies that its claims under Issue 9 are limited to the exchange rates used in the conversions relating to adjustments.[15] Brazil submits that there is a clear disagreement between the exchange rates actually used (*i.e.* daily *and* monthly rates)[16] and the EC's explicit statements (*i.e.* daily rates).[17] Although Brazil is not aware of the reasons why the EC did not disclose the actual exchange rates used in the conversion of currencies until it did so before the Panel, Brazil notes that the EC has now admitted the said discrepancy.

With regard to the second part of the Panel's question, Brazil submits that the issue of 'currency conversion' is covered by *Brazil's Request for the Establishment of a Panel* where Article 2.4 is listed in the general part and a brief summary of the legal basis is provided in paragraph 21. Brazil recalls that the said paragraph provides Brazil's main claim (*i.e.* "[t]he EC did not make the currency conversions required under Article 2 for the purposes of effecting a fair comparison between the export price and the normal value") and a specific instance (*i.e.* "in particular") of such a violation.

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[13] See the Fourth Submission of Tupy (BRL-13), paras 14 and 15; and the Fifth Submission of Tupy (BRL-17) page 6, para 2.5.6.

[14] In particular, Brazil recalls Tupy's following statements: "it is submitted that it is misleading and inaccurate of the Commission to state in Annex I of the disclosure that *"the Commission recalculated the export price by using exchange rates at the date of the invoice …"* and "[t]he inaccuracy lies in the fact that the Commission actually used, by its own admission, average monthly rates…" (The Fourth Submission of Tupy (BRL-13), page 36, para.14; "Tupy's objection was to the fact that the Commission had stated on the other hand that it used daily rates and, yet, on the other hand, it became clear that it had used monthly rates" and "the Commission itself has now accepted Tupy's arguments by conceding on page 5 that a daily rate should be applied" (see the Fifth Submission of Tupy (BRL-17) page 6, para.2.5.6).

[15] See BFS, pages 93-97; BSS, para 85 *et esq.*, and Brazil's Answers to the Panel's First set of Questions No 89 to 94.

[16] See ECFS, para 228; the EC's Response to the Panel's First Set of Questions, No 88; and ECSS, para 77 *et seq*.

[17] See recital 52 of the Definitive Regulation (BRL-19); the Disclosure Preceding the Definitive Regulation (BRL-16), Annex II, page 5: and the Transparency Letter (BRL-18), page 4.

To the EC

Q13. Could the EC expand upon the explanations provided in response to Panel Question 88 following the first meeting – in particular: 1. clarify the meaning of "the allowance for credit cost should be based on the new export invoice values" and why these were not used in the context of allowances for credit costs; and 2. provide a more extensive account of the methodologies used concerning warranties and commissions?

Q14. Can the EC explain how its response to Panel question 88 following the first meeting can be reconciled with para. 52 of the Definitive Regulation?

To both parties

15. How and to what extent does the obligation in Article 2.4.1 to perform currency conversion using the rate of exchange on the date of sale apply to the adjustments at issue under this claim? Is this relevant or applicable here? What are the legal obligations that govern the calculation of such adjustments and allowances?

Brazil believes that the term 'comparison' in the general rule contained in the first sentence of Article 2.4.1 refers to a comparison between export price and normal value, *as both are adjusted as factors affecting price comparability*. Therefore, Brazil submits that the obligation in the first sentence of Article 2.4.1 covers not only export prices but also allowances deducted from the export prices. Moreover, although Article 2.4.1 deals with a *selection of exchange rates*, Brazil submits that a *selective use of exchange rates*, as the EC had made in the case before the Panel, cannot be in accordance with the fair comparison requirement of Article 2.4.

E. ISSUE 12: "NO PROPER CONSIDERATION OF IMPORT VOLUME TRENDS"

To Brazil

Q16. Could Brazil comment on the EC statement in paragraph 88 of its oral statement at the second meeting that "Brazil appears to confirm the EC's understanding that Brazil is not claiming an infringement of Article 3.1 other than as an automatic consequence of alleged infringements of other parts of Article 3"?

Brazil disagrees with this EC's statement. Indeed, Brazil believes that there may well be an infringement of Article 3.1 other than as an automatic consequence of alleged infringements of other parts of Article 3. Brazil is aware of the statement of the Appellate Body in *Thailand - H-Beams* that Article 3.1 "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the determination of injury.[18] It is true that Article 3.1 informs the more detailed obligations in succeeding paragraphs. Article 3.1 sets forth a general obligation according to which the determination of injury must be based on "positive evidence" and involve an "objective examination". Brazil does not see any reason why this general obligation could not be infringed independently of any other obligation laid down in Article 3.[19] In other words, an investigative authority might very well evaluate all of the fifteen injury factors under Article 3.4 and still infringe Article 3.1 by not being objective and/or by not basing its findings on "positive evidence".

[18] See Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R, para. 106.

[19] See also Brazil's answer to the Panel question 23 below, in relation to the relevance of Article 3.1 in the context of Article 4.1 of the AD Agreement.

F. ISSUE 13: "NO PROPER CONSIDERATION OF ALLEGED UNDERCUTTING"

To Brazil

Q17. Could Brazil comment on the EC assertions in para. 95 of its oral statement at the second meeting regarding the price undercutting analysis?

Reply

Given the lack of transparency of the EC's disclosure, Brazil is not really able to comment whether column 5 of the EC's Annexes III(3) or III(4) refers to the matching product types, zeroing the negative undercutting margins or both; whether these issues are also covered by columns 6 to 12; and whether the EC's statement regarding the number of product types with negative undercutting margins is factually correct.[20]

Q18. Could Brazil comment on the EC' assertion in para. 122 of its oral statement?

Reply

Brazil recalls its warnings with regard to the practical consequences if the EC's method of "examination" were to be accepted.[21] Brazil also notes that there is nothing on the record of the investigation (as it currently stands) to suggest that the domestic industry was not in a position to make a separate identification of the domestic production of the like product. Therefore, the EC was in a position to request such "positive evidence" directly from the domestic industry and there was no need for the excessive *ex-officio* allocations. Brazil submits that the EC cannot reasonably require exporters to go through a most burdensome process of responding to detailed questionnaires while submitting its own Applicants to much lighter obligations. Indeed, Brazil submits that the way the EC conducted its investigation in this regard, has made this finding of injury more likely (than not), so that this was certainly *not* handled in an even-handed manner.[22]

G. ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"

To the EC

Q19. Are there any worksheets or investigation notes which formed the basis for Exhibit EC-12? If so, please provide copies or explain why not?

Q20. Could the EC confirm and substantiate that the Exhibit EC-12 was written within the time period of the investigation?

Q21. Taking note of what was stated in para. 122 of your second oral statement, could you please state how you reconcile this with the requirements of Article 3.6? Could you specify whether this is or is not relevant here?

To both parties

Q22. Is this the first time in either the course of the investigation that the EC has supplied to Brazil/Tupy, or in this Panel proceeding that the EC has supplied to Brazil the information

[20] See the Disclosure Preceding the Provisional Regulation (BRL-11), Annex III(3); and the Disclosure Preceding the Definitive Regulation (BRL-16), Annex III(4) with 2 pages.

[21] See Brazil's Comments on the EC's Responses to Questions from the Panel to the Parties No 114.

[22] See *US – Hot-Rolled Steel AB Report*, para 196.

concerning "return on investments" that is contained in paragraph 123 of the EC's oral statement at the second meeting, or any other information relating to this factor?

Reply

Yes. The first reference to the issue of "return on investments" was made in Exhibit EC-12, which the EC submitted in this Panel proceeding. Importantly, Brazil submits that the audited accounts of at least two Applicants (R. Woeste & Co and Georg Fischer Fittings Gmbh) were classified as 'confidential' or 'strictly confidential' and have therefore not been included in the non-confidential file of the EC investigation. These accounts could thus not be inspected at all by the Brazilian exporter or by other interested parties.[23] Therefore, *not* all of the audited accounts of the domestic industry were, contrary to the EC's explicit assertions to this effect, part of the non-confidential files and have thus not been made available to interested parties.[24]

H. ISSUE 17: "CAUSATION"

Q23. With reference to para. 16 of Brazil's oral statement at the second meeting:

To Brazil

(a) Would an examination carried out for the purpose of the definition of domestic industry in Article 4 necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?

Reply

As explained in the following, Brazil's answer to this question is in the negative.

Brazil recalls that in paragraph 16 of its oral statement at the second meeting it submitted that "the EC cannot deny that the examination it referred to[25] was carried out for the purpose of the examination of the domestic industry in the sense of Article 4 of the AD Agreement and not for any other purpose". Brazil observes that a somewhat similar question to that which the Panel is asking here has been addressed by the panel in *US-Hot-Rolled Steel from Japan*.[26] Brazil thus understands this Panel's question to refer to the situation in the present case where a major part of the EC industry shielded itself from the injurious impact of the "dumped imports" through its own strategically motivated outsourced imports (including from related producers) in Other Third Countries.

Brazil notes that although it may well be that data serving for the purpose of Articles 4 and 3.4 / 3.5 would be the same or similar, that data would usually serve totally different purposes and form the

[23] See sections A.5.2 of the non-confidential responses of R. Woeste & Co (BRL-38) and Georg Fischer Fittings Gmbh (BRL-39).

[24] See Second Oral Statements of the European Communities, para 130, and oral statements made by the EC during the second substantive meeting of the Panel. Brazil notes that the EC refers in the mentioned paragraph to the "published accounts". However, in view of the EC's explicit statements that the information used was based on audited accounts of the domestic industry (see, for example, the EC's answer to the Panel's question No. 110), Brazil just notes the possibility that the EC might (now) argue that the examination was based on a sample of the domestic producers, *i.e.* those which accounts were published.

[25] As most recently made in ECSS, para 18; footnote added.

[26] WT/DS184/R of 28 February 2001; "First, we must determine what is required by the AD Agreement, that is, whether the investigating authority is in all cases required to make a determination of injury to the domestic industry as a whole. If so, we must then consider whether the primary focus on the merchant market with respect to market share and financial performance set out in the 'captive production' provision of the US statute is inconsistent, on its face, with this requirement?" (para 7.188).

basis for different determinations, each one in the context of the provision in relation to which it is being made. Brazil observes that, in the present case the EC has never even pretended during the investigation and in the Provisional and Definitive Regulations that its considerations relating to its Article 4 determinations served any other purpose beyond that one. Under Article 4 the EC merely looked at the status of the Applicants as "Community Producers". The EC make its pretensions before this Panel but these must fail as at the relevant time the EC did not make the substantive link it now makes between Article 4 on the one hand and Articles 3.4 and 3.5 on the other.

Brazil recalls that its statement in the above-mentioned paragraph 16 was made as a counter argument to the EC's contention whereby it had allegedly examined the injurious impact of such own imports by that major part of the EC industry under Article 3 and under Article 4.1 in the Provisional and Definitive Regulations. The main thrust of that counter argument was that this EC's contention is baseless and that the examinations that the EC had carried out for the two purposes (Article 4.1 on the one hand and Articles 3.4 and 3.5 on the other) each had its own role so that one (re: 4.1) could not compensate for failures of the other (re: 3.4 & 3.5).

Brazil position is in line with the principles established by the DSB. In the particular circumstances of this case, where the Applicants have not been found by the EC "to be related to the exporters or importers or are themselves importers <u>of the allegedly dumped product</u>"[27], that examination which the EC had carried out for the purpose of the definition of the domestic industry indeed served no other purpose and was therefore totally oblivious to the EC's (plainly inadequate) Article 3.4 and 3.5 analysis.

Brazil recalls the relevant part of the Appellate Body report in *US-Hot-Rolled Steel from Japan* with regard to the relationship between Articles 4 and 3 where it held that, "an injury determination, under the *Anti-Dumping Agreement*, is a determination that the domestic producers 'as a whole', or a 'major proportion' of them, are 'injured'. This is borne out by the provisions of Articles 3.1, 3.4, 3.5, 3.6, and 3.7 of the Agreement, which impose certain requirements with respect to the investigation and examination leading to an injury determination. Investigating authorities are directed to investigate and examine imports in relation to the 'domestic industry', the 'domestic market for like products' and 'domestic producers of [like] products'. The investigation and examination must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry."[28]

This requirement to examine the industry as a whole, does not, however, necessarily mean that certain parts of the industry may not also be looked at separately. In *US-Hot-Rolled Steel*, the Appellate Body further confirmed that "it may be highly pertinent for investigating authorities to evaluate the relevance of the fact that a significant proportion of the domestic production of the like product is shielded from direct competition with imports, and that the part of the domestic industry that is most likely to be affected by the imports is limited to the merchant market".[29] The Appellate Body thus found that such a more specific examination of segments of the industry is still compatible with the requirements resulting from Article 4.1.

Brazil observes that if such a specific examination into major segments of the domestic industry which are "shielded from direct competition with imports" is acceptable (albeit as part of an overall examination of the situation of the entire industry), it must be even more acceptable in the present case where those own imports do not relate to the "dumped imports" as such. Thus, Brazil submits that, as held by the Appellate Body in the above-mentioned case, such an examination is even

[27] Article 4.1(i), emphasis added.
[28] WT/DS184/AB/R, at para 190.
[29] At para 198.

required as an obligation under Article 3.1 (re: "positive evidence" and "objective examination"), particularly for the purpose of the subsequent Articles 3.4 and 3.5 analyses.[30]

Brazil notes that despite the fact that in the present case the EC authorities were perfectly aware that a major part of the EC industry was able to shield itself and in fact has been shielding itself from competition with imports through own outsourced imports (as well as injuring other Applicants with these imports), the EC has still not conducted, let alone considered it "highly pertinent," an evaluation of the relevance of that fact primarily for the purpose of its Articles 3.4 and 3.5 analyses. However, Brazil continues to submit that, notwithstanding Article 4.1, the EC's examination and evaluation under Articles 3.4 and 3.5 has been totally inadequate particularly as it failed to consider these "own imports" as a "relevant economic factor" for the purpose of its Article 3.4 analysis[31], and has subsequently also failed properly to assess the full impact of that factor on the EC industry (as also referred to above) for its causality analysis under Article 3.5.

To the EC

(b) How do you respond to Brazil's assertion in para. 16 of its oral statement in particular with reference to an examination being carried out for the purpose of the definition of domestic industry in Article 4? Would this necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?

(c) The EC asserts in its second written submission that Brazil has nowhere explained how, even had they existed, such outsourcing arguments could of themselves have affected the findings on causation. Could you specify in detail what was required, in the view of the EC from Tupy to submit in this regard?

I. ISSUE 18: "NO TIMELY OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION"

To Brazil

Q24. Does Brazil agree with the EC assertion in para. 157 of the EC oral statement at the second meeting that "It appears that this claim is now solely concerned with information on the currency conversion rates used in relation to allowances in the dumping calculation"?

Reply

Brazil clarifies that its claims under Issue 9 are limited to the exchange rates used in the currency conversions relating to adjustments (see also Brazil's answer to the Panel's question 12 above).

Other

To Brazil

Q25. Could Brazil comment on the EC assertions in, *inter alia*, paras. 9, 130, 140 of the EC's oral statement at the second substantive meeting that certain "new claims" are inadmissible?

[30] At para 190 *et seq*.

[31] See most recently para 12 *et seq*. of Brazil's Oral Statement during the second substantive meeting, where Brazil referred to such own imports / outsourcing as an injury factor affecting the EC industry as a whole, comprising of both "shielded" and "unshielded" EC Applicants.

Reply

Brazil disagrees with the EC and submits that all of these so-called "new claims" are nothing but *arguments* in support of the claims set out in Brazil's Panel Request. Regarding each of the EC's allegations, Brazil's responds as follows:

Article 15 (paras 14 and 25 of the EC's Second Oral Statement). Brazil recalls that the Panel Request lists Article 15 and provides a description as to the nature of the claim (see paras 33 and 35). Consequently, TOR covers the first and the second sentences of Article 15 as well as the issue of 'exploration of the possibility of constructive remedies'. However, Brazil is pleased to note that by making this claim the EC seems accept that Article 15 establishes *multiple* obligations.

Article 2.4 (para 66 of the EC's Second Oral Statement). Brazil recalls that Article 2.4 is listed in Brazil's Panel Request and an elaboration as to the nature of the claim is also provided, *i.e.* that the EC's comparison between the export price and normal value was not fair (see paras 17 *et seq.* of the Panel Request).

Article 6.2 and 6.4 (paras 130 and 140 of the EC's Second Oral Statement). Brazil recalls that Articles 6.2 and 6.4 are listed in Brazil's Panel Request. Brazil also recalls that the substance of Article 6.2 claims is described in para 8 of Brazil's Panel Request ("…an thereby also denied Tupy the full opportunity for the defence of its interest in these *among other respects*" – emphasis added) and Article 6.4 claims in the chapeau of para 10.

In any case, Brazil denies that the EC's ability to defend itself has been prejudiced in any way.[32] Indeed, the EC has *not* offered any supporting particulars to show that its ability to defend itself in the course of the Panel proceeding has been prejudiced; even the EC's detailed answers to Brazils' arguments demonstrate the opposite.

Q26. Are the EC's 10 August 2001 "invitation" to Tupy to apply for a review, and Tupy's response thereto, part of the Panel's record? If so, please cite to the relevant portion of the record. If not, please provide or explain why not.

Reply

The EC's above mentioned 10 August 2001 "invitation" and Tupy's response thereto are not part of the Panel's record. Brazil refers the Panel to the relevant part of its answer to question 6 above.

To the EC

Q**27. With respect to each of the claims which you have indicated you view as outside the Panel's terms of reference, could you indicate how, if at all, your interests have been prejudiced over the course of the Panel proceedings?**

To both parties

Q28. With respect to the reference made to the issue of reviews, could both parties specify the nature and scope of reviews conducted by the EC since the investigation that is the subject of these panel proceedings?

[32] See the Appellate Body's Report in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para 131.

Reply

Brazil refers to the relevant parts of its answer to question 6 above where it submits that the EC's "review" is not covered by the TOR and is therefore outside the scope of this proceeding, and that that contention must equally be rejected by means of Article 17.5(ii) of the AD Agreement, as that matter did not form part of the original record of the EC investigation.

In any event, as further elaborated in Brazil's answer to question 6 above, also on its own merits, that "review" is totally irrelevant to this proceeding.

Brazil further observes that the EC's attempt to portray this "review" as if it were initiated merely to respond to the Brazilian exporter and/or to Brazil's wishes is rather perplexing. Did the EC really have to go through all the trouble, as it seems to allege, of a "full dumping review" regarding all the six countries covered by the original investigation in order to assess the implications of the Brazilian currency devaluation? It is almost unthinkable that a responsible investigating authority would expose exporters from six countries to heavy financial and other liabilities involved with defending their respective interests only because the investigating authority is seeking to satisfy the authorities and one exporter company in one of these countries.

Brazil submits that the EC demonstrates the confusion it created by the new "review" as it presents it in different – and conflicting - ways depending on the forum where such a presentation is being made. Brazil observes that even before this Panel the EC had presented conflicting views regarding the EC's own position on this "review". In the EC and for its own internal constituency, the EC presents the "review" as if it is meant to take account of the DSB decisions in *Bed Linen*. In this Panel preceding the EC seems to suggest that this "review" is meant to serve an entirely different purpose, i.e. to be the obvious response to the Brazilian exporter – and now to Brazil's – wish to assess the implications of the Brazilian 1999 devaluation. However, Brazil observes that the EC itself admits that the new "review" is not an interim review in the sense of Article 11.3 of the Basic Regulation, which parallels Article 11.2 of the AD Agreement.[33] But in so far as the EC is concerned, for its internal purposes this review is presented as a means to rectify certain methodological errors following DSB decisions unrelated to this case. Conversely, in so far as this Panel proceeding is concerned, the new "review" is, nonetheless, still presented as an interim review.

Further, Brazil notes that the EC again submits that "the facts of the present case have never warranted such a step" of self-initiating a review.[34] At the same time, the EC suggests that such a review could have, in any event, only been initiated "until the reasonable period [which the EC has determined in all cases as one year] has expired".[35] The EC confirmed moreover that the "review" that it refers to was "initiated at the request of another [i.e. not the Brazilian] exporter".[36] And to sum up this circled line of argument, the EC continues to pretend that the "review" which it has initiated is its response to the argument which Brazil has made under its Issue 3. Even assuming, *arguendo*, that the new "review" is indeed the review to which Brazil referred in Issue 3, why was that review unwarranted according to the EC in August 2000[37] but is considered to be warranted now? Brazil submits that this is but another example showing the failures of the EC's arguments. As Brazil has already had the opportunity to point out[38], the question whether a self-initiated review is warranted or

[33] As unambiguously implied under section 5 (Procedure) in the EC's notice of initiation (note the reliance on Article 2(3) of Regulation 1515/2001 - review in view of DSB reports - rather than on the EC's Basic Regulation)

[34] EC's Second Oral Statement, para 36.

[35] EC's Second Oral Statement, para 38.

[36] See the EC's answer to the Panel's questions 143 and 144 and para 9 of ECSS.

[37] EC's Second Oral Statement, para 36.

[38] Brazil's answer to the Panel's question 33 after the first substantive meeting.

not is a substantive one. It relates to the need for the continued imposition of the duty, which is totally unrelated to timing issues or other consideration to satisfy the EC's conveniences. The EC fails to give a coherent presentation, not even a solid presentation, of the nature, scope and purpose of its "review", thus adding to the confusion it has created with the initiation of that "review". Even more importantly, this lack of direction must mean that this EC "review" has no relevance whatsoever and clearly cannot serve the purpose that the EC seeks to give to it in this proceeding.

Finally, during the second substantive meeting with the Panel, the EC contended that its initiation of the new "review" was meant to anticipate the Panel's possible ruling in this proceeding whereby the EC should have initiated a review as allegedly requested by Brazil under its Issue 3. This fatally premature and misplaced contention must equally fail. In the first place, should the Panel accept Brazil's claim under Issue 3, the proper way for the EC to remedy the situation would be to revoke the duty altogether rather than merely to review it.

LIST OF NEW EXHIBITS

55. Letter dated 10 August 2001 from the European Commission to Tupy.

56. Answering letter dated 14 August 2001 from Counsel to Tupy to the European Commission.

ANNEX E-8

REPLIES OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL – SECOND MEETING

A. ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

To Brazil

Q1. As a result of the meetings between Brazilian and EC government officials, did the Brazilian government transmit to Tupy the possibility of pursuing a price undertaking with the EC? If not, why not? If so, how did Tupy react? Provide supporting evidence.

Q2. We note that Article 12.2 states "*Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking,….*". How and to what extent is this relevant here?

To the EC

Q3. With reference to the relationship between the obligations in Articles 12.2 and Article 15 of the *Anti-Dumping Agreement*, comment on Brazil's response to Panel Question 13 stating that the EC did not mention in the Provisional or Definitive Regulation that the possibility of an undertaking had been explored with regard to the Brazilian exporter.

Reply

As the EC has stated,[1] it does not publish information regarding undertakings except in regard to companies that have offered one. The rationale for this policy is that undertakings are primarily a matter for exporters, who best know their interests and their plans.

The matters covered by Article 12.2 do not cover the exploration of constructive remedies that is required by Article 15. Article 12.2 covers, *inter alia*, "any preliminary and final determination" of dumping and injury, and "any decision to accept an undertaking pursuant to Article 8". The reference to Article 8 shows that Article 12.2 applies only where the exporter has actually proposed an undertaking since Article 8.1 provides explicitly that "proceedings may be suspended or terminated … *upon receipt* of satisfactory voluntary *undertakings from any exporter* …." (Emphasis added). As Tupy has never proposed an undertaking, the obligation under Article 12.2 to explain why an undertaking has been accepted or rejected did not apply in this case.

Furthermore, the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury. Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies those matters of fact and law that justified the imposition of such measures. The exploration of possibilities of constructive remedies is not such a matter since at most it might lead to the imposition

[1] EC Answer to Questions from the Panel at the First Substantive Meeting, question 13.

of remedies which were less stringent than those that would otherwise be justified. The context supports this interpretation since the only matters referred to "in particular" in subparagraph 12.2.2 are, in addition to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for decisions made under Article 6.10.2.

Furthermore, a specific mention is made of the requirement for the protection of confidential information. As the history of the current dispute demonstrates, the exploration of constructive remedies can involve communications at a diplomatic level which the EC regards as "by nature confidential" in the sense of Article 6.5.

To both parties

Q4. With reference to Brazil's assertion in para. 20 of its second written submission and Brazil's response to Panel Question 4 following the first meeting, are undertakings other than price undertakings provided for by the *Anti-dumping Agreement*? How, if at all, is Article 8.1 of the *Anti-Dumping Agreement* relevant in this context?

Reply

Article 8.1 provides for "undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated". In the EC's view these options achieve the same result in practice, since in the second case it would be necessary to specify the price which would eliminate injurious dumping, which would be the revised price under the first case. Consequently, the EC regards all undertakings envisaged under the Article 8.1 as essentially price undertakings. The EC has no view whether Article 15 permits action beyond the scope of Article 8.1.

Q5. Previous panels have indicated that the application of the "lesser duty rule" and "price undertakings" are possible constructive remedies under Article 15 of the Anti-Dumping Agreement. Can both parties suggest any other remedy that could be seen as constructive in terms of Article 15?

Reply

The EC does not have any other examples of possible constructive remedies to suggest.

B. ISSUE 3 : "INAPPROPRIATE MEASURES"

To Brazil

Q6. Can Brazil comment on para. 39 of the EC oral statement at the second meeting?

Reply

C. ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"

To the EC

Q7. Did the EC have available to it in the record of the investigation all of the information that would have been required to conduct a calculation of PIS/COFINS adjustment on a more thorough or a comprehensive basis? If so, cite to the relevant portion of the record. If not, why

did the EC not request the information that would have been necessary for such a more extensive calculation?

Reply

All Tupy's export and domestic prices were available in the record of the investigation that was disclosed to Tupy. However, the EC does not agree that the use of all these data on a more thorough or comprehensive basis would have necessarily led to a more precise adjustment. The use of the 20 most-exported models was not the only 'reasonable basis' that the EC had to use in order to grant Tupy this unclaimed adjustment. As can be seen on EC's letter of 28 February 2000[2], the EC had also to use data pertaining to all exports rather than those of the exports of the product concerned. The text is as follows (emphasis added): *'Tupy received on a total amount of 159.335.000 real exported 2.491.000 real returned PIS/COFINS taxes paid on materials used for the production of exported goods. This is the amount 'refunded in respect of the product exported to the Community'. The above amounts refer to* ***all exports of all products and have been taken as a reasonable basis as the total turnover of the company was the only one that Tupy has been able to reconcile during the on-the-spot verification.'***

In the course of investigations it is necessary for investigators to make pragmatic decisions for dealing with information which is incomplete or unsatisfactory. The procedure for using 'facts available' in accordance with Article 6.8 and Annex II of the Agreement is an elaborate one, and, as exporters know, tends to lead to less favourable results. In this instance Tupy, having presented no coherent claim for an adjustment itself, acquiesced in the formulation by the EC of an adjustment based on the 20 most-exported models. It was a pragmatic solution, that was acquiesced in by Tupy at the time and was much to its advantage.

Q8. Why did the EC resort to the use of data of the 20 most exported types in calculating the PIS/COFINS adjustment? Was it exclusively because of the "constraints of time and personnel" that you refer to in para. 84 of your oral statement at the second meeting?

Reply

The judgement made by the EC investigators was that, in the circumstances of the investigation, given the data in question and the significance of the outcome of the calculation relative the size of the dumping margin, the use of a key based on the 20 most-exported types was appropriate and reasonable. Therefore it was not exclusively because of personnel and time constraints.

It should be noted that Tupy at no time during the investigation proposed any other reasonable method or provided any assistance on this issue to the EC investigators. Rather, it argued, in the face of the evidence and data available to the EC and itself, that the adjustment for PIS/COFINS should be 5.37 per cent. It persisted in this claim until after provisional disclosure[3], when all the facts were known to the EC as well as to Tupy. The EC considers that taking account of these particular circumstances, even assuming that it missed 0.03 per cent of an unclaimed adjustment, this does not render the comparison between normal value and export price 'unfair' as that term is used in Article 2.4 of the anti-dumping agreement.

Q9. In an investigation not involving "facts available" or "sampling" within the meaning of the *Anti-Dumping Agreement*, what is the legal basis that permits or does not preclude the use by an investigating authority of data from only a selection of transactions or the use of an "allocation key" for the purposes of calculating adjustments?

[2] Page 7 of Annex II, Exhibit BRL-11
[3] See Tupy's letter of 13 June 2000, page 8, point 2.7.5, Exhibit BRL-17

Reply

In paragraph 82 of its Second Oral Statement the EC drew the Panel's attention to Article 6.14 of the Agreement. This provision entitles the investigating authorities to take the kind of approach adopted in this case by the EC when the progress of the investigation had been considerably impeded by Tupy's failure to supply the information which had been requested of it. The use of the 'facts available' procedure in Article 6.8 would itself substantially interfere with the expeditious handling of the investigation if it were to be invoked on every occasion that the exporter failed to provide exactly what had been demanded by the investigators. Consequently the Agreement allows investigators a margin for making pragmatic judgements in order to reach a determination of the matter. It should be noted that the adjustment proposed by Tupy itself involved the use of an allocation key since it made the (unlikely) assumption that the PIS/COFINS tax rate for each product type was at the level of the average of all Tupy products (including those not covered by the investigation).

To Brazil

Q10. Could Brazil comment on the EC's answer to Panel question 55? Even assuming *arguendo* that the normal value was calculated net of the IPI tax, would this preclude the necessity to consider whether or not the IPI premium credit would be potentially the subject of an adjustment?

D. ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"

To Brazil

Q11. With respect to the EC's assertion at para. 77 of its oral statement at the second meeting, did Tupy request information on rates of exchange used for allowances? Please cite to the relevant portions of the record of the investigation.

Q12. Could Brazil clarify whether and to what extent its claim is now limited to the exchange rates used in conversions relating to adjustments? Please indicate how this is reflected in the allegation stated in para. 21 of your Panel request.

To the EC

Q13. Could the EC expand upon the explanations provided in response to Panel Question 88 following the first meeting – in particular: 1. clarify the meaning of "the allowance for credit cost should be based on the new export invoice values" and why these were not used in the context of allowances for credit costs; and 2. provide a more extensive account of the methodologies used concerning warranties and commissions?

Reply

The EC has noticed an error in table contained in Exhibit EC-25 which accompanied its answer to Question 88.[4] The EC apologises for the confusion this may have caused and takes this

[4] The figures in the eighth column, with heading 'Monthly exchange rate used by the EC' were not the monthly rates used to convert the three allowances (credit, warranty and commissions) into Real, but the daily exchange rates that were used to covert the export invoice value into Real.

opportunity to present a new version of the table (Exhibit EC-28A), containing additional information, which it trusts will be of greater assistance to the Panel.[5]

At the provisional stage of the investigation, the EC converted both the (export) invoice prices, and the allowances claimed by Tupy (in foreign currency rather than in Real as requested by the EC), at the monthly exchange rates, as provided for in the EC's questionnaire, as is the EC's usual practice. In its comments on the provisional disclosure.[6] Tupy raised the issue of the conversion rates in connection with the export price, but not in regard to the various allowances. The EC responded by changing to a system of daily exchange rates for the export price, but for three allowances it maintained the monthly rates. The reasons were as follows.

1. Allowance for credit cost.[7]

In the case of credit costs, there are no items in Tupy's accounts, corresponding to those that are found for costs such as packaging or transport, that permit the adjustment to be calculated directly for individual sales. Credit costs are therefore calculated as a percentage (based on current interest rates) of the invoice price. In converting the invoice prices into Real for this purpose the EC kept in place its ordinary approach of monthly average exchange rates (which it has used in the provisional measures). There were several reasons for taking this approach. Firstly, Tupy had made no requests concerning conversion rates for the allowances. Secondly, because the allowances were themselves small compared to the export price, any differences arising from the application of the different rates would be very small. Thirdly, the monthly-rate system produced figures that were actually slightly more favourable to Tupy than the ones it had itself proposed.

2. Allowance for warranty and commissions.

For warranty and commission costs, like credit costs, there are no clearly separate items in the accounts associating particular costs with export sales to the EC. Instead, as requested by Tupy, for each consignment the EC used a fixed percentage (0.0312 per cent, based on an insurance rate) of the export price to calculate the amount for the warranty, and a varying percentage of the export price (depending on the customer) for the commission. In converting the export price for these purposes the monthly rate was retained for the same reasons that it was used in the calculation of credit costs (above).

Q14. Can the EC explain how its response to Panel question 88 following the first meeting can be reconciled with para. 52 of the Definitive Regulation?

Recital (52) of the definitive Regulation refers to the conversion of the export price. The conversion of the adjustments into Real was a correction of misreported data by Tupy, which was required by the Questionnaire instructions to report these adjustments into Real. As explained in answer to Question 15, Article 2.4.1 is aimed at export prices and their conversion, and not at conversions made regarding adjustments. Correct reporting by Tupy would have made currency conversions, except for the export price, unnecessary. If Article 2.4.1 were to be applied mechanically to such conversions an exporter would be able to distort the outcome of the calculation by its choice of the currency in which it reported costs associated with the sale.

[5] The new material is in italics.
[6] Tupy's letter of 30 March 2000, page 35, points 13 to 16, Exhibit BRL-13.
[7] EC Answer to Questions from the Panel at the First Substantive Meeting, question 88, para. 123.

To both parties

Q15. How and to what extent does the obligation in Article 2.4.1 to perform currency conversion using the rate of exchange on the date of sale apply to the adjustments at issue under this claim? Is this relevant or applicable here? What are the legal obligations that govern the calculation of such adjustments and allowances?

Reply

It should be said that in this investigation there was no dispute as to whether the rate of exchange on the date of sale should be applied. The question that arose was whether to use a monthly average rate on the date of sale or a daily average rate on the date of sale.

The obligation in Article 2.4.1 to perform currency conversions using the rate of exchange on the date of sale refers to export sales' prices and not to conversions that might be necessary in the course of making adjustments.

This is apparent from the text of Article 2.4.1, which reads as follows (emphasis added):

> When the **price comparison under this paragraph requires a conversion of currencies**, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the **export sale** involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and, in an investigation the authorities shall allow exporters at least 60 days to have adjusted their **export prices** to reflect sustained movements during the period of investigation.

The emphasized words show that what the paragraph refers to is export sales' prices. The primary context of this provision is provided by Article 2.4, which sets out its objective in the first sentence: "A fair comparison shall be made between the export price and the normal value". If the 'date of sale' criterion were applied mechanically to every conversion that had to be made in the course of an investigation the result would be anything but fair.

In many cases cost differences leading to differences in market value and to adjustments between domestic and export prices are not incurred on the date of the export sale. Purchases of packing material, inland transport to the harbour, warranty expenses, costs linked to physical differences, etc., are, depending on the nature of each expense, incurred before or after the date of the export sale.

A conversion of all these data at the exchange rate of the export sale for the purpose of an anti-dumping investigation would be a pointless and burdensome task for the exporting producer and would render the verification by the investigating authorities impossible, because no amount reported would correspond to the data available in the accounts of the company. That is why the EC normally requires, as it did in this case, that companies report all data as contained in their accounting records.

E. ISSUE 12: "NO PROPER CONSIDERATION OF IMPORT VOLUME TRENDS"

To Brazil

Q16. Could Brazil comment on the EC statement in paragraph 88 of its oral statement at the second meeting that "Brazil appears to confirm the EC's understanding that Brazil is not claiming an infringement of Article 3.1 other than as an automatic consequence of alleged infringements of other parts of Article 3"?

F. ISSUE 13: "NO PROPER CONSIDERATION OF ALLEGED UNDERCUTTING"

To Brazil

Q.17 Could Brazil comment on the EC assertions in para. 95 of its oral statement at the second meeting regarding the price undercutting analysis?

Q18. Could Brazil comment on the EC' assertion in para. 122 of its oral statement?

G. ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"

To the EC

Q19. Are there any worksheets or investigation notes which formed the basis for Exhibit EC-12? If so, please provide copies or explain why not?

Reply

The conclusions recorded in Exhibit EC-12 are based on worksheets, but these contain highly confidential business information relating to the performance of individual EC producers, and the EC would prefer not to release them.

Q20. Could the EC confirm and substantiate that the Exhibit EC-12 was written within the time period of the investigation?

Reply

The EC confirms that Exhibit EC-12 was written on 14 April 2000, i.e. within the time period of the investigation.

EC is not clear what evidence the Panel would regard as appropriate to substantiate this fact. It is not the practice of the EC anti-dumping division to number its 'Notes for the File', but merely to date them.[8]

Q21. Taking note of what was stated in para. 122 of your second oral statement, could you please state how you reconcile this with the requirements of Article 3.6? Could you specify whether this is or is not relevant here?

It was with Article 3.6 in mind that the EC made its comments on the allocation of data on return on investments, etc., in its second oral statement. For many aspects of the injury investigation on malleable fittings, data pertaining to the production of the like product were available. Where for certain of the injury criteria this was not possible the EC, in accordance with Article 3.6, had resort to data relating to "the production of the narrowest group or range of products which includes the like product". In several cases this involved using information contained in annual reports.

To both parties

Q22. Is this the first time in either the course of the investigation that the EC has supplied to Brazil/Tupy, or in this Panel proceeding that the EC has supplied to Brazil the information

[8] The EC can provide other examples of such notes should the Panel so wish.

concerning "return on investments" that is contained in paragraph 123 of the EC's oral statement at the second meeting, or any other information relating to this factor?

Reply

In the disclosure documents (Exhibits BRL-11 and BRL-16), in an aggregated form, Tupy was provided with the profitability of the Community industry, in terms of net profit before taxes on the net turnover. It was been provided, in an aggregated form, with the turnover relating to the product concerned. The details of the total turnover (i.e. relating to the whole activity of the company) and of the turnover relating to the product concerned per company were provided in the non-confidential version of the questionnaire replies, that Tupy exercised its right to consult. Moreover, the annual accounts for four out of six Community producers for different periods were contained in the non-confidential files.[9]

H. ISSUE 17: "CAUSATION"

Q23. With reference to para. 16 of Brazil's oral statement at the second meeting:

To Brazil

(a) Would an examination carried out for the purpose of the definition of domestic industry in Article 4 necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?

To the EC

(b) How do you respond to Brazil's assertion in para. 16 of its oral statement in particular with reference to an examination being carried out for the purpose of the definition of domestic industry in Article 4? Would this necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?

Reply

In general, an examination merely for the purpose of determining the scope of the 'domestic industry' as defined in Article 4 would not be adequate for the examination under Article 3.4 of whether that industry was suffering injury, or under Article 3.5 of what was the cause of that injury. The issues involved in these provisions are quite distinct. Nevertheless, information gathered in the pursuit of one matter may be of use in one of the other contexts. In the present investigation the distinction between the different examinations was reflected in the enquiries pursued by the EC authorities. The EC investigated whether it was appropriate to exclude certain domestic producers in accordance with Article 4.1(i), and concluded that it was not.[10]

The EC understands that Brazil's complaint (in so far as it goes beyond a concern about outsourcing *per se*) concerns Article 3.5 and the allegation that the domestic industry injured itself by giving away market share to those companies to which it outsourced production. In the context of Article 3.5, the EC investigated the levels of imports of malleable fittings from countries other than those accused of dumping, and found them not to be a significant cause of injury to the domestic industry. Those imports necessarily included any production that was the result of outsourcing. Since the imports as a whole from each of these countries were found not to be a significant cause of injury,

[9] The annual reports of the other two companies are not publicly available documents.
[10] Prov. Reg. rec. 134; Def. Reg. recs. 65 to 68.

the same was necessarily true of that part of those imports (however large) which resulted from outsourcing. Clearly, this investigation was quite different from that involved in the determination of the 'domestic industry'.

The EC does not understand how (if at all) Brazil argues that outsourcing was relevant to the assessment of the condition of the domestic industry that is required by Article 3.4. In any event, the EC's investigation under Article 3.4 was quite distinct from that under Article 4.

(c) The EC asserts in its second written submission that Brazil has nowhere explained how, even had they existed, such outsourcing arguments could of themselves have affected the findings on causation. Could you specify in detail what was required, in the view of the EC from Tupy to submit in this regard?

Reply

As stated above, the EC understands that Brazil claims that Tupy argued that outsourcing was causing the domestic industry to lose market share. For such an argument to have been sustained it would have been necessary (at the least) to show that imports from the companies to which production had been outsourced were a significant cause of injury to the EC domestic industry. Tupy did not submit evidence to support such an allegation. (Nor did the EC's own investigations produce such data.)

I. ISSUE 18: "NO TIMELY OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION"

To Brazil

Q24. Does Brazil agree with the EC assertion in para. 157 of the EC oral statement at the second meeting that "It appears that this claim is now solely concerned with information on the currency conversion rates used in relation to allowances in the dumping calculation"?

OTHER

To Brazil

Q25. Could Brazil comment on the EC assertions in, *inter alia*, paras. 9, 130, 140 of the EC's oral statement at the second substantive meeting that certain "new claims" are inadmissible?

Q26. Are the EC's 10 August 2001 "invitation" to Tupy to apply for a review, and Tupy's response thereto, part of the Panel's record? If so, please cite to the relevant portion of the record. If not, please provide or explain why not.

To the EC

Q27. With respect to each of the claims which you have indicated you view as outside the Panel's terms of reference, could you indicate how, if at all, your interests have been prejudiced over the course of the Panel proceedings?

Reply

The EC takes the view that in all the cases in which it has raised this objection its interests have been prejudiced by the lack of adequate notice of the issues. The scope of the claims that are explicitly made in Brazil's panel request is already exceptionally broad. The EC is entitled to the period that elapses between the establishment of the panel and the presentation of the complainant's

first written Submission to prepare its defence. Such preparation is only possible if the complainant adequately specifies its claims in its panel request for incorporation into the terms of reference.

To both parties

Q28. With respect to the reference made to the issue of reviews, could both parties specify the nature and scope of reviews conducted by the EC since the investigation that is the subject of these panel proceedings?

The only review commenced in regard to malleable iron fittings is the one initiated in December 2001 (Exhibit EC-26). This states that "The review is limited in scope to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a dumping methodology at issue in the reports and which submit a full questionnaire reply with the time limits set out in points 6(a)(i) and (ii) of the present notice. … The investigation shall cover the period from 1 January 2001 to 30 September 2001." The "reports" in question are those of the Panel and Appellate Body in 'European Communities – Anti-Dumping Measures on Imports of Cotton-Type Bed-Linen from India'.

Since a new investigation period has been established the EC will examine the situation on the basis of new facts. Thus, had Tupy participated in the review, the EC would have looked at price data from the period after devaluation and would necessarily have examined (as Tupy had argued) whether the dumping margin had disappeared following that event.

The first time that Tupy raised doubts about the scope of the review was in a letter to the EC dated 22 April 2002, more than four months after the publication of the notice of initiation. In a letter dated 7 May 2002 the EC offered to hold a hearing for Tupy where the questions it had raised concerning the scope of the review, could have been discussed. Tupy has never replied to this offer. This is another illustration of the obstructive attitude Tupy has taken throughout the proceedings.

ANNEX E-9

COMMENTS OF BRAZIL ON THE RESPONSES OF THE EUROPEAN COMMUNITIES TO THE PANEL'S QUESTIONS – SECOND MEETING

(28 June 2002)

A. ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

To the EC

Q3. With reference to the relationship between the obligations in Articles 12.2 and Article 15 of the *Anti-Dumping Agreement*, comment on Brazil's response to Panel Question 13 stating that the EC did not mention in the Provisional or Definitive Regulation that the possibility of an undertaking had been explored with regard to the Brazilian exporter.

Brazil welcomes the EC's admission "that undertakings are primarily a matter for exporters, who best know their interests and their plans". It follows that (assuming *arguendo* that the EC raised the possibility of a price undertaking during governmental bilateral talks mentioned during these proceedings) it should have equally been clear to the EC that its adequate counterpart in exploring the possibility of a constructive remedy such as a price undertaking should have been the Brazilian exporter, "who best know[s its] interests and [its] plans" rather than the Brazilian Government who had knowledge of neither.

Brazil further observes that the EC does not even address the Panel's question in relation to Article 15.

C. ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"

To the EC

Q7. Did the EC have available to it in the record of the investigation all of the information that would have been required to conduct a calculation of PIS/COFINS adjustment on a more thorough or a comprehensive basis? If so, cite to the relevant portion of the record. If not, why did the EC not request the information that would have been necessary for such a more extensive calculation?

Brazil submits that convenient "pragmatic solutions" resorted to by investigating authorities cannot override the substantive requirements of the AD Agreement. Therefore, the EC's approach in respect of PIS/COFINS, which lacks any support in the AD Agreement, must be rejected.

Q8. Why did the EC resort to the use of data of the 20 most exported types in calculating the PIS/COFINS adjustment? Was it exclusively because of the "constraints of time and personnel" that you refer to in para. 84 of your oral statement at the second meeting?

With regard to the EC's answer, Brazil recalls the calculation it had made on the basis of the Brazilian exporter's 40 most exported product types (and not 20 as the EC) which demonstrated very

clearly that the price difference between the domestic and export prices *decreases* where the number of product types increases.[1] Therefore, Brazil has demonstrated that that adjustment was *understated* by the EC. In contrast with the EC's position that a missing adjustment does not (somehow) render the price comparison 'unfair', Brazil submits that investigating authorities cannot discharge their "fair comparison" obligation by pragmatism or an administrative convenience. Moreover, Article 2.4 does not make a distinction between "slight" and "grave" violations.

Q9. In an investigation not involving "facts available" or "sampling" within the meaning of the *Anti-dumping Agreement,* what is the legal basis that permits or does not preclude the use by an investigating authority of data from only a selection of transactions or the use of an "allocation key" for the purposes of calculating adjustments?

Brazil denies that the substantive "fair comparison" requirement in Article 2.4 could be replaced or limited in any way by a general procedural rule to manage investigations expeditiously in Article 6.14. In the same vein, Brazil also rejects the EC's attribution of its failures to any conduct of the Brazilian exporter, as this is totally unacceptable. The obligation to conduct a fair comparison lays squarely in this respect on the shoulders of the investigating authority.

D. ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"

To the EC

Q13. Could the EC expand upon the explanations provided in response to Panel Question 88 following the first meeting – in particular: 1. clarify the meaning of "the allowance for credit cost should be based on the new export invoice values" and why these were not used in the context of allowances for credit costs; and 2. provide a more extensive account of the methodologies used concerning warranties and commissions?

Q14. Can the EC explain how its response to Panel question 88 following the first meeting can be reconciled with para. 52 of the Definitive Regulation?

Brazil takes note of the EC's answers to the Panel's questions No 13 and 14 and of the new table (Exhibit EC-28A), which the EC has now provided. Brazil does not see any reason why, neither how this "new version" could "be of greater assistance to the Panel" as stated by the EC.

Brazil recalls again the EC's original recorded statements that the conversion of currencies was based on daily rates.[2] However, in the first submission, the EC first denied but, in the same vein, admitted Brazil's claim whereby the conversion of *transport* costs was *not* based on daily rates.[3]

Then, in its answer to the Panel's first and second set of questions, the EC had to admit that none of the *credit costs*, *warranty* and *commission* were converted on the basis of its explicitly stated rates.[4]

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[1] See *Brazil's calculation of the price difference between the domestic prices and the export prices based on the 40 most exported types* (BRL-54).

[2] See the Disclosure Preceding the Definitive Regulation (BRL-16), Annex II, page 5; the Definitive Regulation (BRL-19), recitals 51 and 52, and the Transparency Letter (BRL-18), page 4.

[3] ECFS, para 220 and 228.

[4] See *Answers of the European Commission to the Questions from the Panel at the First Substantive Meeting*, question No. 88; and *Answers of the European Commission to the Questions from the Panel at the Second Substantive Meeting*, question No. 13.

The EC has now provided a new Exhibit EC-28A. However, this table seems to provide the currency conversions for about 400 lines out of more than 16.000 lines of the Brazilian exporter's export transactions in the IP. Brazil submits that such a partial statement of facts is meaningless. It is certainly not a "rebuttal" of anything and at best (using the EC's own words) might merely serve as a lip-service. Other than its own failures, the EC has nowhere been able to demonstrate that the effect of the actual rates used, which were *not* exclusively based on daily rates, were somehow "more favourable" to the Brazilian exporter. They demonstrate nothing of the sort.

Brazil cannot accept the EC's way to attribute its own failures to alleged Brazilian misconduct. Brazil notes the EC's repetitions that the Brazilian exporter had "misreported data …which was required by the Questionnaire instructions to report these adjustments into Real". However, Brazil cannot find such instructions in the Questionnaire (BRL-3) or in any other documentation, like the deficiency letter (BRL-6), forming the record of its investigation.

Brazil submits that the clear contradictions between the versions given by the EC must have only one result namely, that none can be accepted.

To both parties

Q15. How and to what extent does the obligation in Article 2.4.1 to perform currency conversion using the rate of exchange on the date of sale apply to the adjustments at issue under this claim? Is this relevant or applicable here? What are the legal obligations that govern the calculation of such adjustments and allowances?

Brazil confirms its disagreement with the EC's suggestions with regard to the relationship between Articles 2.4 and 2.4.1. Article 2.4.1 does not apply only to itself, as suggested by the EC, but to the whole paragraph 4 of Article 2. The text of Article 2.4.1, which spells out a general rule for selecting exchange rates, refers explicitly to "the comparison" under Article 2.4. This provision respectively requires that the factors to be ultimately compared are the export price and the normal value, both as adjusted to take due account of "differences which affect price comparability". Therefore, the chapeau of Article 2.4.1, which does not provide for any separate rules on currency conversions with regard to different factors, refers to *both* the conversion of currencies related to the export price *and* the allowances to be deducted from the said price. Finally, Brazil submits that the EC's wordy explanations before the Panel do not alter the record of this case, which include the EC's statements that daily rates were used for the conversion of currencies.

G. ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"

To the EC

Q19. Are there any worksheets or investigation notes which formed the basis for Exhibit EC-12? If so, please provide copies or explain why not?

Brazil would merely observe that the EC does not indicate why it could not make use of the applicable confidentiality provisions, such as those available under Article 18 (including 18.2) of the DSU, which provisions are meant to protect exactly the kind of information which the EC prefers not to release here. This new EC conduct gives yet another impetus to Brazil's insistence that Exhibit EC-12 should be ignored altogether.

Q21. Taking note of what was stated in para. 122 of your second oral statement, could you please state how you reconcile this with the requirements of Article 3.6? Could you specify whether this is or is not relevant here?

Brazil disagrees with the EC. The second sentence of Article 3.6 ("[i]f such separate identification of that production is not possible,…") shows that the general rule regarding assessment is laid down in the first sentence. That is, *only if* the separate identification of the domestic production of the like product is *not* possible, an investigating authority is obliged to assess the effects of the dumped imports in relation to the "narrowest group or range of products". The EC, however, seems to interpret the phrase "available data" in the first sentence from the perspective of an investigating authority, *i.e.* whether something was available to the EC. However, the text of the second sentence ("for which the necessary information *can be provided*" – emphasis added) is clear enough to suggest that the issue of availability is to be evaluated from the perspective of the domestic industry, *i.e.* whether the domestic industry is or is not able to make a separate identification of the domestic production of the like product and to provide the necessary information. There is nothing in the record (as it currently stands) to suggest that the EC industry was *not* able to make such a separate identification. Inversely, it is clear from the record that the EC did not even request the data on certain *per se* relevant injury factors from the domestic industry.

To both parties

Q22. Is this the first time in either the course of the investigation that the EC has supplied to Brazil/Tupy, or in this Panel proceeding that the EC has supplied to Brazil the information concerning "return on investments" that is contained in paragraph 123 of the EC's oral statement at the second meeting, or any other information relating to this factor?

Indeed, Brazil agrees that the EC had provided certain aggregated information on the profitability of the domestic industry. However, Brazil does not see how the information on "profitability" is relevant as regards the issue of "return on investments". With regard to the annual reports, Brazil recalls the EC's written statements, which the EC then also explicitly confirmed orally in the Second Substantive Meeting with the Panel[5], that the annual accounts of the domestic industry were available to interested parties whereas this information is, at best, only partial. Indeed, had these EC's firm assurances been correct, the Brazilian exporter would have been able to calculate the level of data used on "return on investments" from the EC producers' audited accounts, as suggested by the EC. But this is not the case, as the EC now admits that only "the audited accounts for four out of six Community producers" were made available in the non-confidential file. It follows that the Brazilian exporter was unable to make that calculation and had thus been deprived even of this possibility to defend itself.

H. ISSUE 17: "CAUSATION"

Q23. With reference to para. 16 of Brazil's oral statement at the second meeting:

To the EC

(b) How do you respond to Brazil's assertion in para. 16 of its oral statement particular with reference to an examination being carried out for the purpose of the definition of domestic industry in Article 4? Would this necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?

Brazil welcomes this new EC's U-turn, which now admits that the EC's stated reliance on and references to its examinations for the purpose of Article 4 indeed served no purpose in relation to the

[5] See Second Oral Statements of the European Communities where the EC stated in para 130 that "the information used by the EC authorities was drawn from the *published* accounts of the companies concerned" (emphasis added).

examinations required under Articles 3.4 and 3.5. But the EC does not take the subsequent step that it should have taken following that admission. What is also implied by its admission is that the EC's examination of injury for the purposes of Article 3.4 and 3.5 have been totally insufficient and shallow, as the EC has not looked into all the injury indicators that it should have looked at under Article 3.4 and then also failed to take these, and other factors into account, for its subsequent causation analysis under 3.5. In particular, the EC failed to take into account in both these respects the implications of 'outsourcing', including imports from related companies in Other Third Countries, as a "relevant economic factor… and indice(s)…having a bearing on the state of the industry' under Article 3.4.[6] Brazil recalls that it had referred to this factor as a cause of injury, other than the dumped imports, which the EC had to take full account of for its causation analysis under Article 3.5, but failed to do so, repeating its failed analysis under Article 3.4.[7]

For some reason the EC chooses to assume that Brazil's arguments regarding the full injurious impacts of that 'outsourcing' is merely limited to considerations under Article 3.5. Brazil reaffirms that its arguments do relate to the EC's failed examinations under both Articles 3.4 AND 3.5.[8]

(c) The EC asserts in its second written submission that Brazil has nowhere explained how, even had they existed, such outsourcing arguments could of themselves have affected the findings on causation. Could you specify in detail what was required, in the view of the EC from Tupy to submit in this regard?

Brazil submits that the EC's contention must be flatly rejected by the Panel, without any further ado. As also indicated in its above comments on (b), Brazil is of the view that the EC had all the relevant information before it, as made available to it by the Brazilian exporter and by others throughout the original investigation, perfectly allowing the EC to conduct a full and appropriate injury examination. As indicated above, the EC failed to abide by its most basic obligations under the AD Agreement, primarily under Articles 3.4 and 3.5. The EC's suggestions that the failures of its injury examination could result in any way from an alleged obligation on the Brazilian exporter to "submit evidence to support" its related submissions must be rejected forthwith by the Panel. The EC chooses to give the impression as if it misunderstands its own obligations of an investigating authority as it clearly inverses its role of an investigating authority with that of an exporter which it investigates. Unlike the EC authorities, the Brazilian exporter did not have any investigating powers. It submitted well-documented information and evidence to support its arguments which the EC should have then further investigate but failed to do so. The Panel should reject this EC's line of argument which is, to say the least, inappropriate for an investigating authority such as the EC. And the Panel should thus also record, most importantly, that the EC in fact admits that it failed to conduct a proper investigation and examination for the purposes of Articles 3.4 and 3.5.

[6] See BSS paras 263 to 269 under '3.3 Outsourcing'.

[7] See BSS paras 322 to 326 under '2.3 Imports from other third countries', and further BSS paras 327 to 335 under '2.4 Outsourcing'.

[8] See also Brazil's answer to the same question where it further referred to the 'shielding' impact of the imports made by a major part of the EC industry and the implications that this had, and which the EC ignored, on the injury examination for the EC industry as a whole, as well as for the two segments of the industry (importers and non-importers).

OTHER

To the EC

Q27. With respect to each of the claims which you have indicated you view as outside the Panel's terms of reference, could you indicate how, if at all, your interests have been prejudiced over the course of the Panel proceedings?

Brazil observes that this EC answer remains vague and unspecific. Brazil is of the view that the EC's arguments in this respect have no substantive merit and are meant to serve the EC's litigation tactics which, to say the least, are not in line with its responsibilities under the DSU, including Article 3.8 thereto. Furthermore, Brazil further observes, if still necessary, that the EC cannot deny that it have had full knowledge of Brazil grievances as these have reflected arguments that have already been raised by the Brazilian exporter during the investigation and by Brazil during consultations.

To both parties

Q28. With respect to the reference made to the issue of reviews, could both parties specify the nature and scope of reviews conducted by the EC since the investigation that is the subject of these panel proceedings?

Brazil affirms firstly that the Brazilian exporter reacted to the EC's "review" during the timeframe formally agreed with and confirmed by the EC. Secondly, according to information given by Tupy to the Brazilian Government, the Brazilian exporter explained to the EC why, given the confusing nature and doubtful legal basis of that "review" it did not consider its participation in that "review" to be of its best interest.[9] Moreover, as the Brazilian exporter reportedly also informed the EC, as a matter of courtesy and fair play, that the EC should not expect to receive the Brazilian exporter's replies to the EC's questionnaire until it is satisfied that the EC would not apply its questionable methodologies to these replies, Brazil is at a loss not only with regard to the tone of this EC answer but also to understand what else the EC was still expecting the Brazilian exporter to add on this. Finally, Brazil reminds the Panel that, in Brazil's view, all such reviews are outside the terms of reference of the Panel.

Furthermore, as regards the last paragraph of the EC's answer, it must be noted that while assessing the convenience to participate in the review, Tupy - in a letter[10] dated 22 April 2002 -, requested a hearing to further discuss issues of its interests. However, the company then decided that such hearing was unnecessary in light of the ongoing procedures in the WTO. Brazil stresses, therefore, the inaccuracy of the EC's assertion that it "offered" to hold the hearing and that Tupy had an "obstructive attitude".

[9] See Brazil's answer to Question 28.
[10] BRL – Exhibit 57. Letter from Tupy to the Panel from 22 April and EC's answer from 7 May 2002.

ANNEX E-10

COMMENTS OF THE EUROPEAN COMMUNITIES ON RESPONSES OF BRAZIL – SECOND MEETING

28 June 2002

1. In its answers to the Panel's second set of questions Brazil has made a number of false assertions and allegations. On most of these points the true picture has already been stated in the EC's submissions. However, on some of them it is necessary for the EC to make a further response.

Questions 6 and 28

2. Brazil seems to imply that the terms of reference of the Panel limit the defences and arguments that the EC may raise. There is of course no legal basis for such a contention. The only effective limitation is the criterion of relevance.

3. The EC raised the topic of reviews for two purposes. The first of these was to show that Tupy lacked confidence in its own claim regarding the consequences of devaluation on its dumping margin. Both the review that the EC offered in August 2001, and the one that it actually initiated in December 2001, were primarily intended to deal with the consequences of the legal interpretations of the Appellate Body in the *Bedlinen* case as regards dumping, notably as regards zeroing, a methodology which had been applied to Tupy's exports. However, in addition, each review would be based on a new investigation period (1 January 2001 to 30 September 2001 for the review initiated in December 2001)[1] and would have calculated Tupy's dumping margin over a period following the devaluation. Therefore, according to Tupy, no margin of dumping would have been found to exist. Despite this fact Tupy chose not to participate in the reviews. Tupy's explanation is that it wanted a full review. However, it did not itself request such a review when the one-year delay was over, and in any case a negative finding on dumping would have been sufficient in itself to terminate the duty. Brazil's attempts to create confusion regarding the purposes of the review[2] do not conceal the inconsistency between Tupy's arguments and its behaviour.

4. The EC's second reason for mentioning reviews was to argue[3] that the Panel should not issue a recommendation on certain matters even if it were to find inconsistency with WTO obligations.

Question 22

The companies whose audited accounts were confidential were Atusa and R. Woeste.

[1] See Notice of Initiation of Review, 5 Dec. 2001, (Exhibit EC-26).
[2] Brazil Answers to Panel's Second Questions, question 28.
[3] EC Second Oral Statement, para. 167.

Question 23

Brazil develops a new argument to the effect that, because of outsourcing, the domestic industry (or major parts of it) was shielded from direct competition with imports. The nature of this shielding is not explained. Even if outsourced imports had been sufficient to constitute a significant cause of injury (as was not the case) the various products in the market would have remained in competition with one another. In any event, because of the burden of proof established by Article 3.5 of the Agreement, any such causal explanation would be relevant only if it had been presented by Tupy in the course of the proceedings.