

**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.

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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 Panel³:

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 Union⁴, 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 Journal⁵, 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

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.

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

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 meeting²⁶, 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 proceedings³⁸, 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 request⁴⁵ 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 claims¹ 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*.

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 submission⁶ and at the Panel's first substantive meeting with the parties.⁷

4. We understand that it is the request for establishment of the Panel⁸ 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 prejudice 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.

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 request³, 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 panel⁶ 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.

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 that⁵² 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 Panel⁵⁶ 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 16⁵⁹ 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).

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

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

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

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."

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 be 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* panel⁷⁷ 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.

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),

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:

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 duty⁸⁸ -- 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

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

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

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 recognize¹⁰³:

"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 time¹⁰⁸; 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 IP¹¹² 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 Experts 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,

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

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

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

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 producer¹⁴¹; 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 country², 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.

²Sales 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.

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.

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.

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

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 issue¹⁵⁸, 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 invoices¹⁵⁹, 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

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

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**

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.

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 questionnaire¹⁸⁰ 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 verification¹⁸¹, 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."

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 evidence¹⁹¹, 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 investigation¹⁹³ 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

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:

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 Communities²⁰³ 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

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

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

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.

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

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

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.

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 report²⁴⁴, 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.

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 or 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 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 panels²⁵¹ and the Appellate Body²⁵² 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".

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

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

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 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 share²⁸⁷ 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

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 assertions³⁰⁰ 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.

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 investigation³⁰³: (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

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 response³¹⁰ 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".

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 to the investigation; decline in consumption and substitution. With respect to each of these factors individually, the European Communities conducted a separate examination and found either that it “is not such as to have contributed in any significant way to the material injury suffered by the Community industry” (decline in consumption),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 causal 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

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}

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

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 Regulation³²⁶ 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

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 sensitivity³²⁹ (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 Poland³³², as well as its evaluation of imports from third countries as a whole, were set out in the Provisional Regulation³³³ 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.

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 Provisional³³⁵ and Definitive³³⁶ 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 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.

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 part [*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 Brazil³⁴⁰ 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.

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.

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 Provisional³⁵⁴ and Definitive³⁵⁵ 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 IIP³⁵⁶, 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

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 2001³⁶⁷, 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)

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**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 Members³⁶⁹ 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 Communities³⁷⁰ and provisional anti-dumping duties were imposed by the EC by way of Commission Regulation (EC) No 449/2000³⁷¹, 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 1784/2000³⁷², 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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