

## ANNEX E

### Questions and Answers

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## ANNEX E-1

### REPLIES FROM BRAZIL TO QUESTIONS FROM THE PANEL FIRST SUBSTANTIVE MEETING

#### ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

*To the EC:*

**1. With respect to Brazil's allegations under Article 15 AD, would the European Communities have conducted itself in the same manner in an anti-dumping investigation involving a developed country Member? Is this relevant here? If not, what is the meaning and legal significance of the phrase "special regard" in the first sentence of Article 15.**

*To Brazil*

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**2. Could Brazil comment on the European Communities statements in paragraphs 38-41 of its first written submission -- and supporting documents submitted by the European Communities -- that the European Communities raised the possibility of a price undertaking, but that Tupy/Brazil did not appear to be interested in pursuing this as a possibility? How do these statements relate to Brazil's assertion on p. 21 of its first written submission that "...at no time has the EC suggested or tried to engage in any negotiations or discussions whatsoever with regard to any proposition or initiative to prefer any sort of constructive remedies other than the imposition of the anti-dumping measures concerned"?**

Brazil points out that:

- (a) as the EC's reports themselves recognise, it was the Brazilian authorities who put the matter on the agenda of those meetings; and
- (b) at that time, the EC's authorities made nothing but to suggest to the Brazilian authorities that Tupy could offer a price undertaking.

The EC's approach does not cope with the requirement established by the *EC – Bed Linen* Panel whereby "the 'exploration' of possibilities [of constructive remedies] must be actively undertaken by the developed country with a willingness to reach a positive outcome".<sup>1</sup>

In any event, the EC's authorities could not have complied with its obligations under the second sentence of Article 15 unless they had given the Brazilian exporting producer notice or information concerning the possibility of an undertaking. By the very nature of a price undertaking, the possibility of such a constructive remedy cannot be properly explored unless the authorities suggest this option to the exporter.

However, the EC has never 'suggested or tried to engage in any negotiations or discussions' concerning a possible undertaking with Tupy.

This conclusion is further supported by the fact that, no public notice was issued detailing any examination by the EC of the 'possibilities of constructive remedies' with regard to Tupy, as required

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<sup>1</sup> *EC – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, Panel Report, WT/DS141/R, 'EC – Bed Linen', para. 6.233.

by Article 12.2 of the AD Agreement. By implication this means that the EC did not consider the exploration of ‘possibilities of constructive remedies’ as ‘material’ within the meaning of Article 12.2. In addition, the fact that the EC did not mention in either the Definitive or the Provisional Regulation (or other related documents) that the possibility of an undertaking had been explored with regard to the Brazilian exporter (whereas this was mentioned in relation to the Czech and Japanese exporters in the same case) clearly demonstrates that the EC itself did not consider that it had made any effort in this respect with regard to the Brazilian exporter.

**3. In the course of the investigation, did Tupy/Brazil actively communicate to the European Communities a desire to offer undertakings or to pursue any other kind of "constructive remedy"? If so, submit supporting documentation or indicate the relevant parts of the record.**

No. However, Brazil recalls that the burden of actively undertaking the exploration of constructive remedies lies on the developed country Member. In this context, Brazil notes that the EC has never mentioned to the Brazilian government that it considered a concrete price undertaking or any other kind of constructive remedy. Furthermore, the EC investigators have never raised this issue in any way with Tupy. Consequently, the EC has never indicated to Tupy that a constructive remedy was a concrete possibility that could be discussed with the EC.

**4. Does Brazil believe that the European Communities explored the possibility of imposing a "lesser duty"? If so, on what basis? In Brazil's view, what else could/should the European Communities have done to fulfill its obligation under Article 15 in this context? Did Brazil suggest any alternative to a price undertaking at any time in the proceedings? If so, indicate the relevant part of the record.**

Brazil admits that the EC did consider the possibility of imposing a lesser duty. However, this is not something that they would have done as a direct consequence of Brazil's status as a developing country. Indeed, as a matter of general practice and as legally required by the Basic Regulation, the EC will always impose a lesser duty in an anti-dumping investigation, regardless of whether the country under consideration is developed or developing.

Brazil notes that the *EC – Bed Linen* Panel did not come to any conclusion as to what actions other than “lesser duty” and “price undertaking” might be considered to constitute “constructive remedies” under Article 15.<sup>2</sup> The Panel's statement implies that there might be other constructive remedies under Article 15 to be explored by the developed country Member. Brazil is of the opinion that in this respect the notion of ‘constructive remedies’ is similar to that of ‘undertakings’. In this context, Brazil points out that, in practice, the EC accepts undertakings other than price undertakings. For example, the EC has on several occasions considered it more appropriate to accept an undertaking that limits the quantities to be exported to the Community.<sup>3</sup> Brazil therefore contends that the EC also

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<sup>2</sup> *Idem*, para 6.229.

<sup>3</sup> See, e.g., Commission Decision N° 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, OJ L 221, 1993, p.28; Commission Decision No 303/96/ECSC of 19 February 1996 imposing a definitive anti-dumping duty on imports into the Community of certain grain oriented electrical sheets originating in Russia, collecting definitively the provisional duty imposed and accepting an undertaking offered in connection with such imports, OJ L 42, 1996, p. 7; Commission Decision No 790/97/EC of 24 October 1997 accepting an undertaking in connection with the anti-dumping proceedings concerning imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, the Czech Republic, Romania and the Slovak Republic, OJ L 322, 1997 p. 63.

failed to explore all the possibilities of constructive remedies by not considering undertakings other than price commitments. Brazil did not suggest any alternative to a price undertaking at any time in the proceedings.

**5. Would Brazil elaborate upon the specific relevance of its statement on page 21 of its first written submission that "...the EC has even found it appropriate to increase significantly the level of the anti-dumping duty that it has imposed on the Brazilian imports from the provisional stage (duty imposed at the level of 26.1 per cent) to the definitive stage (where the definitive duty was imposed at the level of 34.8 per cent)"? Explain the relevance of this to Brazil's allegations under Article 15 AD.**

Brazil made this statement in order to illustrate the way that the EC did not take account of the special situation of Brazil as a developing country, where the system of indirect taxation is more cumbersome than in developing countries. Brazil expected the EC to be more considerate and understanding in this respect. The reversal of the EC's approach at the definitive stage demonstrates, in Brazil's view, that the EC showed no such deference or 'special regard' to the special situation of Brazil as a developing country.

*To both parties:*

**6. What legal obligations does Article 15 AD impose? Could Brazil comment on the European Communities statement in paragraph 31 of its first written submission that "...the first sentence [of Article 15] imposes no legal obligation"? If there is more than one obligation in Article 15, what is the relationship, if any, between these obligations i.e. are they separate, independent obligations, or are they interrelated and dependent? Explain your response, with reference to the customary rules of interpretation of public international law and any relevant material.**

The first sentence of Article 15 obliges the developed country Members to give special regard to the special situation of developing country Members when considering the application of anti-dumping measures, while the second sentence of this provision lays down an obligation of exploring constructive remedies before applying anti-dumping duties where they would affect the essential interests of developing country Members.

Brazil disagrees with the EC statement that the first sentence of Article 15 "imposes no legal obligation". Brazil is aware of the passage in the *EC – Cotton Yarn* panel report<sup>4</sup> quoted by the EC<sup>5</sup> that "assuming (...) arguendo that an obligation was imposed by the first sentence of Article 13 [GATT Anti-Dumping Code], its wording contained no operative language delineating the extent of the obligation" (emphasis added). However, Brazil cannot accept the EC's interpretation of this quotation, namely that the first sentence imposes no legal obligation. This excerpt in fact confirms that there is an obligation. It is the extent of this obligation that is not determined by 'operative language'. Brazil further points out that<sup>6</sup>, if an obligation did not arise from the first sentence of Article 15, it would be dead letter. It would therefore be difficult to understand why such a sentence was included in the AD Agreement at all. Moreover, it is a basic rule of interpretation that a treaty must be construed in the light of its object and purpose.<sup>7</sup> The preamble to the *Agreement establishing the World Trade Organisation* reads: "recognising further that there is need for positive efforts to ensure that developing countries, and especially the least developed among them, secure a share in the

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<sup>4</sup> *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, of 30 October 1995, 'EC – Cotton Yarn', para. 582.

<sup>5</sup> ECFS, para 31, footnote 14.

<sup>6</sup> The passages below largely parallel the discussion in Brazil's Second Submission, particularly in paras.3 to 12.

<sup>7</sup> Vienna Convention on the Law of Treaties, 1969, Article 31(1).

growth in international trade commensurate with the needs of their economic development". As the WTO Agreements form a package, when taking actions under the different Agreements Members must respect this principle. Therefore, the first sentence of Article 15 of the AD Agreement must be interpreted in the light of this statement. Brazil infers from the foregoing that the first sentence of Article 15 of the Anti-Dumping cannot be interpreted in a way that renders it meaningless.

Brazil contends that the first sentence of Article 15 sets out an obligation of a general nature, while the second sentence lays down one possible way of fulfilling this obligation.

**7. Is our understanding correct that the European Communities found that the level of dumping margins were in all cases lower than the injury threshold and that the level of duty was thus set at the level of the dumping margins found? Comment, with reference to the obligation(s) in Article 15 AD and the relevant portions of the record.**

Yes, the Panel's understanding is correct. According to Articles 7(2) and 9(4) of the Basic Regulation, the EC is bound to impose a duty at a level equal either to the margin of dumping or to the amount necessary to remove injury sustained by the Community industry, whichever is lower.<sup>8</sup> The EC applies this rule whatever the status - developing or developed - of the Member in which the exporter is located. In conclusion, the choice by the EC to impose a duty at the level of dumping margins is not a consequence of the obligations set out in Article 15 of the AD Agreement.

**8. Under Article 15 AD, is it for the Member imposing the measure to "propose" constructive remedies"? Provide the basis for your response. How, if at all, does this relate to the obligations in Article 8 (and any other provisions) of the AD Agreement? How, by whom and when should a price undertaking be sought/accepted for the purposes of Article 15 AD?**

The obligation arising out of the second sentence of Article 15 of the AD Agreement is an obligation to 'explore' possibilities of constructive remedies rather than an obligation to enter into constructive remedies as stated in the *EC – Bed Linen* panel report which reads in the relevant part: "[t]aken in its context, ..., and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome".<sup>9</sup> Thus, Brazil submits that an actively undertaken exploration (investigation, examination, scrutiny)<sup>10</sup> should involve the proposition of possibilities of constructive remedies.

Brazil is of the view that Article 15 does constitute an exception to Article 8 of the AD Agreement in the sense that, under Article 15, authorities have to propose constructive remedies whereas this is not the case under Article 8 of the AD Agreement.<sup>11</sup>

**9. Do the parties agree that the obligation(s) in Article 15 AD arise(s) only with reference to the imposition of definitive anti-dumping measures at the end of the investigative process? Refer to any relevant material in responding.**

Brazil contends that the obligation to 'explore' possibilities of constructive remedies can arise before the imposition of Provisional measures. Indeed, it is noted that this happened in the present case with regard to the Czech exporter.<sup>12</sup> Brazil submits that the imposition of a provisional measure, irrespective of the form of it takes, adversely affects the interests of the developing country Member concerned, for it restricts, since its very beginning, the access to the developed country market for the

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<sup>8</sup> See Articles 7.2, 8.1 and 9.4 of the Basic Regulation (BRL-24).

<sup>9</sup> *EC – Bed Linen*, para 6.233

<sup>10</sup> *Ibid.*

<sup>11</sup> Article 8.5 of the AD Agreement reads: 'Price undertakings may be suggested by the authorities of the importing country (...)'.

<sup>12</sup> See recital 195 of the Provisional Regulation (BRL-12).

product concerned. For instance, importers will likely to replace the investigated supplier by another one in view of the uncertainties introduced by the provisional measures.

Brazil is aware of the Panel's statement in the *EC – Bed Linen* report that “the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures”.<sup>13</sup> Brazil cannot agree with this interpretation. Were the Panel's reasoning prevail, there would be no need to qualify the term “duty” in the AD Agreement. However, that is not what happens in the Agreement. Brazil draws the Panel's attention to Articles 12.2 and 12.2.2, which representatively read in the relevant part “...and of the termination of a definitive anti-dumping duty” and “...the imposition of a definitive anti-dumping duty” (emphasis added). On the other hand, if the intention of the draftsmen of the AD Agreement were to give a uniform meaning to the term “duty” throughout the text, they would have used, for instance, a footnote, as in the case of the term “injury” (footnote 9 to Article 3).

**10. What do the parties understand to constitute "constructive remedies" within the meaning of Article 15 of the AD Agreement? Please refer to any relevant material.**

Brazil notes that the *EC – Bed Linen* Panel did not come to any conclusion as to what actions other than “lesser duty” and “price undertaking” might be considered to constitute “constructive remedies” under Article 15.<sup>14</sup> The Panel's statement implies that there might be other constructive remedies under Article 15 to be explored by the developed country Member. In this context, Brazil points out that, in practice, the EC accepts undertakings other than price undertakings. For example, the EC has, in particular circumstances, considered it more appropriate to accept an undertaking that limits the quantities to be exported to the Community.<sup>15</sup>

**11. Is there an obligation under Article 15 AD to "communicate" to developing country Members that an investigating authority is exploring possibilities of constructive remedies?**

No, there is not. However, Brazil recalls that, in the present case, the EC failed to abide by its obligations under the second sentence of Article 15 since no notice nor information regarding the exploration, if any, of the possibility of a price undertaking was given by the EC to the Brazilian exporting producer. By the very nature of a price undertaking, the possibility of such a constructive remedy cannot be properly explored unless the authorities suggest this option to the exporter.

In addition, Brazil submits that the exploration of possibilities of constructive remedies by virtue of Article 15 of the AD Agreement is a ‘material’ issue within the meaning of Article 12.2 of the AD Agreement. Indeed it is essential for a developing country to have the possibility of measures other than anti-dumping duties examined by the investigating authorities. A public notice therefore should be issued disclosing the investigating authorities' findings and conclusions with regard to the exploration of possibilities of constructive remedies.

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<sup>13</sup> *EC – Bed Linen*, para 6.231.

<sup>14</sup> *Idem*, para 6.229.

<sup>15</sup> See, e.g., Commission Decision N° 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, OJ L 221, 1993, p.28; Commission Decision No 303/96/ECSC of 19 February 1996 imposing a definitive anti-dumping duty on imports into the Community of certain grain oriented electrical sheets originating in Russia, collecting definitively the provisional duty imposed and accepting an undertaking offered in connection with such imports, OJ L 42, 1996, p. 7; Commission Decision No 790/97/EC of 24 October 1997 accepting an undertaking in connection with the anti-dumping proceedings concerning imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, the Czech Republic, Romania and the Slovak Republic, OJ L 322, 1997 p. 63.

**12. What factors should guide a panel's consideration as to whether the imposition of anti-dumping measures would affect Brazil's "essential interests" within the meaning of Article 15 AD? Do the parties agree with the statement of the United States in its third party written submission (para. 14) that the term "essential" implies a very high standard for the level of national interest which the developing country must demonstrate would be affected by anti-dumping duties?**

In Brazil's view, it is for the developing country Member to assess whether its essential interests are being affected. As regards the statement by the United States, Brazil believes that this too is an issue for the developing country Member to address. Therefore, from Brazil's point of view the factors to be taken into account in determining whether Brazil's essential interests have been affected include the following:

- (a) Tupy is the largest foundry in South America;
- (b) Tupy is one of the largest companies in the Brazilian metal industry, employing a workforce of more than 4500 people;
- (c) Brazilian authorities put the matter concerning the EC's anti-dumping investigation on Tupy's exports of malleable cast iron tubes and pipe fittings on the agenda of high-level bilateral meetings; and
- (d) Importance of exports in view of the external financial commitments of Brazil.

**13. We note the section on "Undertakings" in the Definitive Regulation does not refer to Tupy/Brazil. Comment.**

Brazil reiterates that the possibility of an undertaking has not been raised by the EC investigators with Tupy. Moreover, Brazil recalls the fact that the EC did not mention in the Provisional and/or the Definitive Regulations that the possibility of an undertaking had been explored with regard to the Brazilian exporter, although this was mentioned in relation to the Czech, the Korean, the Thai and the Japanese exporters, i.e. all the other exporters other than the Chinese.<sup>16</sup> This clearly demonstrates that the EC itself did not consider that (i) it had made any effort in this respect with regard to the Brazilian exporter, and (ii) that it viewed this issue as "material" within the meaning of Article 12.2 of the AD Agreement.

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<sup>16</sup> See the Provisional Duty Regulation (BRL-12 at para 195) with regard to the undertaking accepted by the Czech exporter and see the Definitive Duty Regulation (BRL-19, at paras 124 and 125) in relation to the Czech, the Korean, the Thai and Japanese exporters. It should be noted in this respect that the EC authorities have not, as a matter of policy at the relevant time, been accepting undertakings from Chinese exporters. The Chinese and the Brazilian exporters are the only exporters in this case in relation to which the EC makes no mention of an undertaking.

14. Could Brazil elaborate upon its assertion on p. 32 of its first written submission that:

**"...the Application did not contain a description of the volume and value of production of the like product accounted for by the Applicants" and that "[t]he Applicants provided information in respect of which the volume and value of production of the like product accounted for by them only insofar as the same could be broadly and rather inaccurately deduced from figures provided in respect of total consumption, price undercutting calculations and the volume of imports as a whole entering the EC."**

Brazil made this assertion on the basis of the non-confidential information it had in its possession in this respect. Brazil now withdraws its related claim.

15. Could the European Communities comment on this argument as it currently stands?

**ISSUE 2: "INAPPROPRIATE APPLICATION"**

*To the EC:*

16. Brazil states: **"...the evidence provided by the Applicant did not comply with the requirements of Article 5.3" (Brazil's oral statement at the first Panel meeting, para. 31). Comment.**

*To both parties*

17. What is the relationship between: (i) Articles 5.2 and 5.3; (ii) Articles 5.2 and 5.8; (iii) Articles 5.2 and 6.2 -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.

Given that Brazil's claims were based on the non-confidential version of the Application, Brazil withdraws its claims regarding the Application under Issue 2.

18. What is the relationship between: (i) Articles 5.3 and 5.8; (ii) 5.3 and 6.2 -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.

As stated in answer to question 17, Brazil withdraws its claims regarding the Application under Issue 2.

19. Issue 3: **"No need to impose measures"**

*To the EC:*

20. According to Brazil, the first "explicit consideration" by the European Communities of the currency devaluation was on 20 July 2000 in the Disclosure Preceding the Definitive Regulation. Does the European Communities agree? Is this relevant? Why or why not?

*To Brazil:*

21. How, if at all, does the alleged non-disclosure of "detailed information" "showing dumping margins after the devaluation took place" -- "ECSALUR file on the CD-ROM" that the EC Commission states that it supplied to Tupy (but Tupy states that it received 10 pages out of the 97) relate to a violation of Article VI of the *GATT 1994* and Article 1 *AD*?



Brazil referred to this matter under Issue 3 as in Brazil's view the circumstances described in the Panel's question must relate to the EC's failure to attribute adequate importance to the massive devaluation of the Brazilian currency. The implications of this structural change in the Brazilian economy, which the EC recorded, verified and admitted, should have demonstrated to the EC that circumstances had changed to such an extent that there was no need to impose measures to counteract dumping, as it no longer existed. The first alternative claim made by Brazil under Issue 3 concerned the EC's attitude to this. This attitude resulted in an inappropriate imposition of anti-dumping measures where dumping did not exist in the market. Brazil claims that this constitutes a violation by the EC of Article VI of the *GATT 1994* and Article 1 of the AD Agreement.

**22. In precisely what way (if at all) did the European Communities "fail... adequately to evaluate the full impact of [the] devaluation" during the IP. (see p. 43, Brazil's first written submission)? Does Brazil agree that the data examined by the European Communities pertaining to the IP established that dumping occurred during the IP? Do Brazil's allegations pertain exclusively to the period *following the end of the IP*, including the period between the end of the IP and the imposition of the measures?**

The above statement (BFS para 191) relates to two main considerations dealt with by Brazil in its First Submission. The first concerned Brazil's contention whereby following the devaluation of the Brazilian currency the EC's findings and determinations for the investigation period became obsolete. (As we are not contesting the findings with regard to the POI, this issue is dealt with here). Secondly, as the devaluation took place towards the end of the investigation period and, as verified by the EC, had a lasting effect for a period of more than two months, there were clear consequences, with regard to the need to impose anti-dumping measures where no dumping had taken place, which needed to be counteracted or offset. This relates to the same claim as referred to in Brazil's answer to question 21 above.

As stated above and in Brazil's First Submission (para 158), and also further elaborated on in Brazil's Second Submission (para 26 *et seq.*), Brazil does not deny that the general rule under Article VI of the *GATT 1994* and the AD Agreement is that the investigating authority acts in compliance with these principles where the basis for its findings and determination relates to the IP. Nonetheless, Brazil confirms its position whereby, even where the authorities of an importing Member conclude, following a proper anti-dumping investigation, that the formal conditions of the AD Agreement have been met so that anti-dumping measures may properly be imposed, the authorities concerned must still consider whether the circumstances at the time prior to the imposition make that imposition necessary. As stated, it is Brazil's view that in this case, the results of the EC's investigation during the IP became obsolete as a result of the Brazilian devaluation so that measures should not have been adopted on that basis.

With regard to the timing considerations in the Panel's question, Brazil's dividing line is the date of the devaluation. As of that date and in view of the lasting effect of that devaluation, any proper imposition of anti-dumping measures, or a decision to maintain such measures had to be assessed, as the case may be, against the need to offset or counteract dumping.

**23. What is the basis for Brazil's argument that the European Communities had an obligation to examine data after the end of the investigation period?**

As further elaborated under Issue 3 in Brazil's Second Submission (paras 24 *et seq.*), the obligation to examine such post-IP data arises as a result of the need to assess the situation given two basic requirements that Brazil identifies in this respect. Firstly, in line with Brazil's answer to question 22 above, as there was no need to impose any anti-dumping measures to counteract injurious dumping as this was non-existent after the IP, the EC was under a general obligation not to impose, or at least to withhold measures, in this case. Secondly, as Brazil has observed, the EC has developed its own methodology to deal with situations where exceptional circumstances call for a reconsideration

of measures that could have otherwise been adopted in view of the general findings for the IP (see also BFS paras 165 to 168 and see also Brazil's answer to the Panel's question 35). Thus, in line with the EC's own methodology, in order to assess a post-IP situation, related post-IP data must be examined. The EC failed to apply this methodology with regard to the Brazilian exporter.

**24. What is the supporting documentation for the statement that "...the devaluation has made the normal value of the product concerned significantly lower than the export price" (and your statement that dumping had ceased by the end of the IP) in Brazil's first written submission, p. 44. To what time-period does this statement refer?**

This statement (BFS 193) is supported by the electronic version of the Brazilian exporter's reply to the EC's Questionnaire ("ECSALUR file on the CD-ROM") which Brazil submitted to the EC and which the EC then used for its subsequent calculations, as also referred to in the Panel's question 21 above.

As has been mentioned, the Brazilian exporter received only 10 pages of the paper version of the EC's treated electronic file, which reportedly contains 97 pages. Neither the Brazilian exporter nor Brazil could therefore verify the EC's full conclusions regarding possible occurrences of dumping after the devaluation on 15 January 1999. Furthermore, Brazil does not know whether these EC findings concerned the full last quarter of the IP i.e. 1 January to 31 March 1999, which would then also cover about two weeks of transactions at pre-devaluation terms, or whether they related to the two and a half months of the post-devaluation period only.

However, an effort to simulate the EC's methodology, as reflected in the 10 available pages of that file (without zeroing dumping margins) and then applying it to the original electronic file which Brazil had kept, has resulted in the conclusions which allowed for the statements referred to in the Panel's Question. The two statements relate to the post-devaluation period *i.e.* from 15 January 1999 to the end of the IP.

By way of general indication, and as the EC calculated the dumping margin in the exporting country's currency, Brazil notes that the average exchange rate established on the basis of EC data for the entire IP, including two and half weeks post-devaluation in the last quarter of the IP, was 1.5, whilst it was 1.3 for 1998, which covered the first three quarters of the IP (see monthly data BFS 173). However, the average exchange rate for the last three months of the IP was 2.1.<sup>17</sup> Official exchange rate data communicated by the Brazilian Central Bank shows a rate of 1.9 by the end of 1999, 1.8 by the end of 2000 and 2.1 by the end of 2001. The devaluation of 41.99 per cent has more than entirely absorbed the dumping margin of 34.8 per cent that the EC established for Brazil.

**25. When did Tupy first raise the issue of the devaluation in the course of the investigation -- was it before the verification in September 1999? Cite the relevant portions of the record of the investigation and your submission.**

The massive devaluation of the Brazilian currency was at the forefront of the anti-dumping investigation from the very beginning. Indeed, it was the EC who first dealt with the issue. The significance of the Brazilian devaluation was clearly reflected in the detailed exchange rates listing which the EC had sent to Tupy together with its Questionnaire at the time of initiation on 29 May 1999 (BRL-3). Tupy's reply to the Questionnaire, which was delivered to the EC on 8 July 1999 (BRL-4), provided information based on daily exchange rates (which differed from the EC's monthly averages) to mirror the concerns relating to the devaluation. The differences between the EC and Tupy's respective positions were finally settled during the verification visit. This has been confirmed by the EC, for example in its Disclosure Preceding the Definitive Regulation (BRL-16).

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<sup>17</sup> See Annex II of the Questionnaire (BRL-3).

ARTICLES 11.1 AND 11.2 AD

*To the EC:*

**26. Does the European Communities believe that the price comparison at the *end* of the IP revealed no, or declining, differences between export price and normal value at the *end* of the period? Explain the significance this has for the establishment of the margin of dumping in the IP as a whole. Provide the legal basis for your response, citing any relevant material.**

*To Brazil:*

**27. Is Brazil arguing that the circumstances it describes in its first submission qualify as circumstances where a self-initiated review by the European Communities was "warranted" within the meaning of Article 11.2 AD? For what reason(s)?**

Yes. Brazil considers that the data, which the EC collected for the Brazilian exporter in relation to more than two months following the massive devaluation of the Brazilian currency, was of a nature which "warranted" such a self-initiated review.

The rationale of the Appellate Body ruling in *US-Carbon Steel*<sup>18</sup> which concerned similar circumstances to those discussed here but with regard to a review of countervailing duties under the SCM Agreement (Articles 21.1 and 21.2), can be transposed, *mutatis mutandis*, to this case. The requirements for a review of countervailing duties are defined in these SCM provisions in similar terms to those which are stipulated in the parallel provisions in the anti-dumping context (Articles 11.1 and 11.2 of the AD Agreement).

According to the Appellate Body (in para 53), "[p]ursuant to [Article 21.1 SCM which parallels Article 11.1 of the AD Agreement], the authorities of a Member applying a ... duty must, where warranted, 'review the need for the continued imposition of the duty'. In carrying out such a review the authorities must 'examine whether the continued imposition of the duty is necessary to offset subsidization' and/or 'whether the injury would be likely to continue or recur if the duty were removed or varied'. Article 21.2 provides a review mechanism to ensure that Members comply with the rule set out in Article 21.1."

As held by the Appellate Body (in para 61), "[o]n the basis of its assessment of the information presented to it by interested parties, as well as of other evidence before it ..., the investigating authority must determine whether there is continuing need for the application of countervailing duties. The investigating authority is not free to ignore such information. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose." In other words, a review is "warranted" where the information before the investigating authority would suggest, as in this case, that the continuing need for the application of the duty should be re-assessed.

This "triggering" information should be of a "positive" nature, of the kind so as to "substant[iate] the need for a review" (in the sense of Article 11.2 AD) and it should constitute more than a "mere assertion" (in the sense of Article 5.2 AD) so that it would have a similar persuasive value to that required from an "application" under Article 5.2. The information which the EC had before it, given its findings for the two and a half months after the devaluation, was certainly of such a nature.

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<sup>18</sup> *US-Carbon Steel Products Originating in the UK, Appellate Body Report, WT/DS138/AB/R of 10 May 2000, 'US – Carbon Steel AB Report.'*

In Brazil's view the EC "was not free to ignore such information" and has therefore been put under a clear obligation to self-initiate a review. In other words, that information certainly "warranted" a self-initiated review. Moreover, particularly in the circumstances of this case, there was no need for the Brazilian exporter to provide any additional information to the EC to trigger that review.

**28. Does Brazil argue that the continued effects of the devaluation upon the European Communities calculations establishing the margin of dumping would be similar or identical after the end of the IP? On what basis?**

Brazil confirms that in its view, the continued effects of the devaluation upon the European Community's calculations establishing the margin of dumping would have been similar after the end of the IP, at least substantially different from the IP. As stated and elaborated in Brazil's reply to the Panel's question 24, and in view of the data collected and verified by the EC for the last 2.5 months of the IP, the effect of the devaluation which more than absorbed the dumping margin which the EC had established for Brazil, continued in practice after the imposition of the definitive duties.

**29. Even if the price comparison at the *end* of the IP revealed no, or declining, differences between export price and normal value at the *end* of the period, what significance does this have for the establishment of the margin of dumping in the IP as a whole? Provide the legal basis for your response, citing any relevant GATT/WTO panel or Appellate Body reports. How does your view reconcile, for example, with the requirement in Article 2.4.2 AD to perform a weighted average to weighted average comparison?**

As stated in Brazil's First Submission (para 158) and also further elaborated in Brazil's Second Submission (para 26 *et seq.*), Brazil does not deny that the general rule under Article VI of GATT the 1994 and of the AD Agreement is that the investigating authority is acting in conformity with the methodologies set out in the AD Agreement. Nonetheless, as further elaborated under Issue 3 in Brazil's Second Submission, the imposition of anti-dumping measures must not be the result of a mechanical action as these may only be imposed in order to counteract and offset dumping in the market.

**30. Comment on the EC assertion that there was no certainty whether and how Tupy would reflect the devaluation in its export price.**

Brazil does not believe that that statement is well founded. As further elaborated in Brazil's Second Submission (para 34), Brazil would have in fact expected the EC to make an opposite statement. The EC has had before it concrete data provided by the Brazilian exporter in relation to the two and a half months following the devaluation. The EC verified that information, which clearly demonstrates that the Brazilian exporter has not changed its pricing policies as a result of the devaluation.

**31. Can Brazil clarify its statement that Tupy requested a "review" after the devaluation and did not get any response from the Commission? Was this request made *after* the imposition of the definitive anti-dumping duties? If the request was made *before* imposition of the definitive anti-dumping duties, does Brazil believe that this would constitute a "review" under Article 11 of the AD Agreement?**

Tupy has never requested a review. Brazil asked the EC not to impose anti-dumping duties with regard to Brazil as there had been no dumping following the Brazilian currency's devaluation. As further elaborated in its Second Submission (para 36 *et seq.*), Tupy was not in a position to request a review at that stage as the EC's anti-dumping rules do not give exporters a legal right to request such a review. Brazil recalls that that right is available to exporters in the EC only where "a

reasonable period of time of at least one year has elapsed since the imposition of the definitive measure...” (see Article 11.3 of the Basic Regulation, BRL-24).

**32. Has Tupy requested a “refund” of the anti-dumping duties following their imposition in light of the alleged impact of the devaluation? If not, why not?**

No. Tupy has not imported the product concerned into the EC and may therefore not request a refund of anti-dumping duties. Tupy is not aware whether any of its EC importers requested a refund.

*To both parties:*

**33. What is the meaning of the phrase “where warranted” in Article 11.2 AD? Provide the legal basis for your answer. Assuming *arguendo* that initiation of a review is “warranted”, is there a legal *obligation* to self-initiate a review?**

In Brazil’s view, the phrase “where warranted” in Article 11.2 of the AD Agreement refers to a situation where the investigating authority has in its possession sufficient information to justify and to give it authority<sup>19</sup> to order the initiation of a review “of the need for the continued imposition of the duty...” Under Article 11.2 such a review is a matter of obligation on the Member concerned (according to Article 11.2, “[t]he authorities shall review...”; emphasis added) where such information is presented to the Member in support of a request for a review or is otherwise available to it. In the present case, such information was made available to the EC through the data which Tupy provided to the EC in the course of the investigation and in view of the EC’s verification of that data.

**34. Is there any relevant material the Panel might be guided by in its examination of the EC allegations under Article 11.2 AD?**

Brazil believes that the EC has such relevant material in its possession. This will be the result of its examination of the information that Tupy provided in the course of the investigation, possibly also including the data to which the Panel refers in Question 21 (“ECSALUR file on the CD-ROM”).

**35. What, if any, is the relevance and role in these proceedings of the EC case-law and practice concerning “changed circumstances” cited by Brazil on pp. 38 *et seq.* of its first written submission?**

Brazil believes that the EC case-law and practice concerning “changed circumstances” cited by Brazil in its First Submission (BFS 166-169) is of particular relevance and importance to these proceedings as these demonstrate what the EC can do in such circumstances but chose not to do in this case.

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<sup>19</sup> The Concise Oxford Dictionary defines “warrant” as “justification or authority”, “justify or necessitate.”

**ISSUES 4 AND 5: "IMPROPER NORMAL VALUE" - "INAPPROPRIATE PRODUCT TYPES";  
"INAPPROPRIATE PRODUCT CODES"**

*To the EC:*

**36. Could the European Communities thoroughly outline the precise steps it took in calculating normal value, including constructed normal value, in this investigation, citing the relevant parts of the record of the investigation. In responding, could the European Communities clarify what is the "representativeness" test referred to in para. 27 of the Provisional Regulation? Does it correspond to the test foreseen in Article 2.2 and footnote 2 of the AD Agreement? If not, where is the basis in the AD Agreement?**

**37. Did the European Communities include data from sales not permitting a proper comparison to calculate SG&A costs? To what extent, if at all, would this be a relevant consideration under Articles 2.2 and 2.2.2 AD?**

**38. Were there any sales to related parties? If so, how were they treated in the application of the methodology under Article 2.2.2 chapeau?**

**39. Is the Panel correct in understanding that the European Communities constructed the normal value of products with Tupy internal product code "18" by using the methodology set out in the chapeau of Article 2.2.2 (i.e. actual data from sales in the ordinary course of trade for SG&A and profit of types within internal product codes 12, 68 and 69)? If so, how does this relate to the following European Communities statement: "the normal value was constructed based on the cost of manufacture of the exported types so that also for those types no further physical differences existed and therefore no further adjustment was warranted." (Definitive Regulation, para. 43)**

**40. Comment on Brazil's allegation of the inconsistency between your statement in the Disclosure Preceding the Provisional Regulation:**

"- On the domestic market, products starting with a 12, 68, 69 and 79 code were sold. Products starting with 68 and 69 had a different thread (NPT instead of BSP), while 79 products were not threaded. Products with code 68 were also made for higher pressure than other products. *The costs of manufacturing of these products appeared to be different, and most of these products had also market values which were very different.*

- On the EC market, Tupy sold products starting with a 12 code (own brand) and products starting with an 18 code (Nefit brand). Again, *these products appeared to have sometimes very different costs of manufacturing.*" (footnotes omitted, emphasis added)

**and the position taken in the investigation not to grant adjustments as envisaged by Article 2.4**

**41. Comment on Brazil's statements on page 60 of its first written submission:**

"Consequently, the words "throughout this Agreement" in Article 2.6 when read together with the wording of Article 2.2.2 obliges the investigating authorities to use the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products which are identical, i.e. alike in all respects, to the product under consideration. Only in the absence of such identical products can the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products, which are, although not alike in all respects, having characteristics closely resembling those of the product under consideration. However, in the latter case the investigative authority is obliged to make due allowances in each case, on its merits, for differences in physical characteristics affecting price comparability....."

*To Brazil:*

**42. Comment on the statement by the European Communities at para. 129 of its first written submission that the onus for proposing adjustments falls on the exporter and that since Tupy did not, in the investigation, request an adjustments under Article 2.4 concerning the exclusion of unrepresentative sales in the calculation of the profit margin, the claim is therefore inadmissible.**

Brazil disagrees with the EC's interpretation. Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement oblige an *investigating authority* to ensure that a fair comparison between the normal value and the export price of the product concerned is undertaken. This obligation is borne out by the unqualified word 'shall' in Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement. Indeed, the Appellate Body emphasised in *United States – Hot Rolled Steel* that "under Article 2.4, the obligation to ensure a "fair comparison" lies on the investigating authorities, and not the exporters"<sup>20</sup> (emphasis added). Consequently, the question, whether an interested party has identified a difference affecting price comparability or whether an investigating authority has made it, is of no importance as the investigating authority has in any case a positive obligation to ensure that the price comparison fulfils the requirement of fairness. Brazil submits that the EC's claim of inadmissibility should fail.

**43. Could Brazil comment on the European Communities statement in para. 141 of its first written submission that Brazil provides no support for its contention that the products in question are not "like", and is indeed prevented from submitting such evidence by Article 17.5(ii)? Did Tupy challenge the findings in the Provisional Regulation, paras. 14-16? Cite to the relevant parts of the record of the investigation.**

Brazil submits that Articles 2.6 and 2.2.2 must be given mutually consistent interpretation, particularly in the light of the opening clause of Article 2.6 ("[t]hroughout this Agreement..."). Brazil submits that the exact wording of Article 2.2.2 read together with Article 2.6 makes it clear that where an identical product exists, data relating to its SG&A costs and profits shall be used. Only 'in the absence of such a product' an interpretation that is supported by the word '*or*' in Article 2.6, may data relating to SG&A costs and profits of a product with closely resembling characteristics be used. The above interpretation applies also in cases where the investigating authority *subdivides* the product concerned into product types, as the EC made in this case. Accordingly Article 2.2.2 oblige the investigating authority to use the actual data for SG&A and for profits pertaining to *identical product types*. Only in the absence of such identical product types, the investigating authority has a right to use the actual data pertaining to *non-identical product types with closely resembling characteristics*.

Given that the product types under internal product code '12' were not identical to those under '68' and '69', Brazil notes that the Brazilian exporter had requested an allowance for the differences in costs and market values.<sup>21</sup> Moreover, due to the significant differences in physical characteristics and in market values between sales of '12', on the one hand, and sales of '68' and '69' on the other, the Brazilian exporter has also requested that the latter codes should be excluded from the data used in the construction.<sup>22</sup> Finally, Brazil recalls that the Brazilian exporter stated that "such product types ['68' and '69'] may constitute", and not that they constitute, the "like product".<sup>23</sup>

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<sup>20</sup> See *United States– Anti-dumping measures on certain hot-rolled steel products from Japan*, WT/DS184/AB/R of 24 July 2001, 'United States – Hot-Rolled Steel AB Report', para 178.

<sup>21</sup> See Tupy's Questionnaire Response (BRL-4); see also Tupy's Reply to the Deficiency Letter (BRL-7). Brazil recalls that the Brazilian exporter sold product types starting with internal product codes '12', '68' and '69' on the domestic market and exported to the EC products with codes '12' and '18'.

<sup>22</sup> See the Fourth Submission of Tupy (BRL-13), pages 34-35.

<sup>23</sup> See the Fifth Submission of Tupy (BRL-17), page 4.

**44. Could Brazil comment on the EC statement in para. 141 of its first written submission that "Article 2.4 presupposes that two like products may not be sufficiently similar to be comparable"? Refer to any relevant material in your response.**

Brazil disagrees. The term "like product" in Article 2.6, a concept that applies "[t]hroughout this Agreement", refers to either identical products *or*, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. The EC seems to indicate that two different products, which are not even "alike" under Article 2.6, may be used for the purpose of a dumping determination. Brazil, however, submits that the issue of "comparability" under Article 2.4 does not arise in this kind of situation, *i.e.* if two products are neither identical nor have characteristics closely resembling and, thus, as there are two distinct "like" products, there should be two different proceedings under the AD Agreement.

**45. Does Brazil believe that the European Communities took cost-based physical differences between the product types in issue into account in constructing normal value? If so, what would the legal basis be for the European Communities to grant additional adjustments for such physical differences under Article 2.4?**

Regarding the first sentence of the Panel's question, Brazil does not totally believe so. Although Brazil believes that the constructed normal values for certain product types were based on the cost of production per each product type, Brazil submits that the amounts for SG&A costs and for profits used by the EC in the construction relate not only to the non-identical product types (*i.e.* the product types starting with internal codes 68 and 69) but also to the product types, which domestic sales were unrepresentative (*i.e.* below 5 per cent of the export sales of the same product type). Consequently, Brazil's claims as developed below (see answers to the questions 46 to 50 and 52) are *not* related to adjustments for physical differences under Article 2.4 but to the amounts for SG&A costs and for profits added to the cost of manufacturing under Article 2.2.2.

Regarding the second sentence of the Panel's question, please see answer to question 42.

**46. Could Brazil comment on the EC statement in para. 144 of its first written submission that Brazil has proposed no basis for adjustment other than one that contradicts Article 2.2.2 AD by removing data that have been properly included?**

Brazil disagrees with the EC's basic logic. Brazil submits that the only domestically sold product types that the EC should refer to when identifying the amounts for SG&A costs and for profits under Article 2.2.2 for the exported product types '12' and '18' are 566 product types starting with internal product codes '12', which domestic sales were both representative and profitable.<sup>24</sup> Consequently, Brazil disagrees with the EC that the removal of domestic sales of unrepresentative product types from the data used in the construction contradicts Article 2.2.2.

*To both parties:*

**47. What is the relationship between Article 2.2 and the chapeau of Article 2.2.2 AD?**

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<sup>24</sup> For clarification, Brazil recalls that the Brazilian exporter sold product types starting with internal product codes '12', '68' and '69' on the domestic market and exported to the EC products with codes '12' and '18'. The Brazilian exporter had repeatedly claimed the exclusion of data related to product unrepresentative product codes from the construction: see the Fourth Submission of Tupy (BRL-13), pages 34-35; in particular see the Post Hearing Document (BRL-15); and the Fifth Submission of Tupy (BRL-17) page 4.



Article 2.2 permits the calculation of normal values on the basis of, *inter alia*, constructed normal values if the domestic selling prices have been found to be unreliable (*i.e.* “do not permit a proper comparison”). Brazil submits that Article 2.2 is an *overarching provision* informing the more detailed obligations in succeeding paragraphs concerning construction. Therefore, the finding of ‘unreliability’ under Article 2.2 restricts the investigating authority’s subsequent identification of the amounts for SG&A and for profit to product types for which domestic sales do permit a proper comparison. Indeed, Brazil recalls the Panel’s findings in *EC-Cotton Yarn* that “there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison”<sup>25</sup> and submits that low volume *affects* the domestic sales themselves in such a way that they would not permit a proper comparison in succeeding paragraphs concerning constructed normal values.

Brazil notes that the AD Agreement does not define the term “in the ordinary course of trade”<sup>26</sup>. Consequently the chapeau of Article 2.2.2 providing that the amounts for SG&A costs and for profits are to be determined on the basis of “actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation” is open to interpretation. Brazil also notes that Article 2.2.2 makes no explicit reference to any notion of ‘representativity’ within the meaning of Article 2.2 and footnote 2 thereto. However, Brazil submits that in case the investigating authority excludes the data under Article 2.2, it follows as a matter of construction that the same data should be excluded under Article 2.2.2.

Indeed, the intention of the drafters of the AD Agreement cannot have been to allow a situation where the investigating authority decides to construct the normal values in respect of sales of product types, which do not permit a proper comparison, and to use data, which do not permit a proper comparison, to construct the normal values for sales of the same product types. Therefore, to avoid unnecessary, inconsistent and incoherent situation whereby the data relating to sales not permitting a proper comparison are used to construct a normal value permitting a proper comparison, Article 2.2.2 (when read together with Article 2.2) requires that the amounts for SG&A and for profits should be based on the data of *representative* and *profitable* domestic sales. Brazil observes that also the EC accepts this interpretation.<sup>27</sup>

The above interpretation is also supported by the rationale underlying “construction”. The constructed normal value is to serve, as a *substitute* for the use of domestic prices, in other words, what it would be if the product under investigation or a type of such a product *had been sold* in the domestic market in the ordinary course of trade. Given that the profit margins associated with low volume domestic sales for which product types are normally produced on the basis of atypical specifications are unrepresentatively high, the inclusion of these margins in the data to be used in the construction would be against the idea of construction or “substitution”.

Therefore, Brazil submits that the EC violated Article 2.2.2 by including to the amounts for SG&A and for profits used in the determination of constructed normal values actual data pertaining to production and sales of product types, for which domestic sales were *not* representative within the meaning of Article 2.2 and footnote 2 thereto. Indeed, the only domestically sold product types that

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<sup>25</sup> ‘*EC – Cotton Yarn*’, para 478.

<sup>26</sup> See ‘*US-Hot-Rolled Steel AB Report*’, para 139 where the Appellate Body explicitly stated that the AD Agreement “does not define the term “in the ordinary course of trade””.

<sup>27</sup> See the EC’s statement in ‘*EC – Bed Linen*’ that “India assumes ... that the EC authorities, when requiring that the data used in applying Article 2.2.2(ii) should be subject to the “ordinary course of trade” principle, is relying on the chapeau to Article 2.2.2. It is true that the chapeau reflects this principle, but the basic principle is expressed in Article 2.2. In fact, it is a two-part principle: data associated with sales that are *unprofitable*, or are *unrepresentative*, are not reliable. For reasons of consistency, this principle applies to all the provisions coming within Article 2.2, including Article 2.2.2(ii)”; see the First Submission and Request for Preliminary Rulings of The European Communities (27 March 2000), para 152; see also the Panel report in ‘*EC – Bed Linen*’, para 6.79.

the EC should refer to when properly constructing normal values under Article 2.2.2 for the exported product types '12' and '18', are 566 product types starting with internal product codes '12', for which domestic sales were both representative and profitable.

**48. Is the meaning of "proper comparison" in Article 2.2 AD the same as "fair comparison" in Article 2.4 AD? Provide the legal basis and substantiation for your response, with reference to all relevant provisions in the AD (and, if necessary, other) Agreement.**

No, they are two different concepts. While "proper" relates to the "quality" of the data to be gathered in order to compose the set of comparable elements, "fair" regards the necessary equity on the part of the investigating authorities to compare the elements once they are properly gathered.

**49. What is the nature of the reference in Article 2.2 AD concerning "sales [that] do not permit a proper comparison"? Is it merely a threshold to guide the decision whether or not to proceed to constructed normal value, or is it also a consideration to be taken into account in constructing normal value? What is the basis for your response, using the customary rules of interpretation of public international law?**

Looking first at the text, Brazil notes that Article 2.2 allows the investigating authorities to use either constructed normal value or third country sales as the basis of the normal value where normal value cannot be established on the basis of domestic selling prices. The latter situation would arise where the available domestic sales had taken place in the ordinary course of trade but do not permit a proper comparison. In view of the Panel's findings in *EC-Cotton Yarn* that "there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison"<sup>28</sup>, Brazil submits that low volume *affects* the domestic sales themselves in such a way that they would not permit a proper comparison. Consequently, Brazil submits that Article 2.2 is not just a *threshold* to guide the decision whether or not to proceed to construct normal values but an *overarching provision* informing the more detailed obligations in succeeding paragraphs concerning constructed normal values. Indeed, Article 2.2 obliges the investigating authority not to use data denoting to unrepresentative domestic sales under Article 2.2.2.

**50. Would the removal of sales of such a low volume as to not permit a proper comparison within the meaning of Article 2.2 AD contradict Article 2.2.2 AD by removing a category that should properly have been included in the calculation?**

Yes. As stated in answer 47 above, Brazil submits that Article 2.2.2 (in light of Article 2.2) requires the investigating authority to base the amounts for SG&A and for profits in the construction of normal values on the data of *representative* and *profitable* domestic sales of the identical product types, if available. Indeed, Brazil submits that Article 2.2 *precludes* the use under Article 2.2.2 of data denoting to the domestic sales not permitting a proper comparison. Consequently, if the investigating authority excludes the data under Article 2.2, it follows as a matter of construction that the same data should be excluded under Article 2.2.2.

**51. Does the definition of "like product" apply among types falling within the scope of the like product? Provide the basis for your reasoning.**

Yes. Looking first at the text, Brazil notes that "the like product" in Article 2.6, a concept which applies "[t]hroughout this Agreement", refers to "a product which is identical, ...or in the absence of such a product, another product which, ... has characteristics closely resembling those of the product under consideration" (emphasis added). Brazil disagrees with the EC, which suggests that two different products, which are neither identical nor have even characteristics closely resembling,

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<sup>28</sup> See '*EC – Cotton Yarn*', para 478.

may still be sufficiently similar to be comparable for the purpose of a dumping determination. Brazil submits that in that case there should also be two different proceedings under the AD Agreement.

Conversely, in cases where the investigating authority sub-divides the like product into product types for dumping determination purposes, a practice which is not contested by Brazil, the AD Agreement provides only one concept for “the like product”. As stated in answer to question 43, the wording in Article 2.2.2, when read together with the wording in Article 2.6, implies that a hierarchy exists between the type of data that can be used to construct normal values for different product types. Accordingly Articles 2.2.2 and 2.6 oblige the investigating authority to use the actual data for SG&A and for profits pertaining to *identical product types*. Only in the absence of such identical product types, the investigating authority has a right to use the actual data pertaining to *non-identical product types with closely resembling characteristics*.

**52. How do the parties respond to the US statement in its written third party submission that an improper calculation of constructed normal value cannot constitute a breach of Article 2.4 AD, and that a putative breach of Article 2.4 AD cannot be used to bolster a claim under Articles 2.2 and 2.2.2 AD?**

Brazil does not agree with the US statement. As stated in answer to question 47 above, Brazil submits that the EC violated Article 2.2.2 by including to the amounts for SG&A and for profits used in the determination of constructed normal values actual data pertaining to production and sales of product types, which domestic sales were *not* representative within the meaning of Article 2.2 and footnote 2 thereto. However, in case the amounts for SG&A costs and profits under Article 2.2.2 pertain to production and sales of non-representative product types then Brazil cannot see how the investigating authority could make a fair comparison using data considered not to permit a proper comparison.

**53. Comment on the statement by the European Communities at para. 127 of its first written submission that "...both SG&A and profit were based on the 1260 types of the like product sold on the domestic market".**

This statement confirms that the EC violated Article 2.2.2 as the EC recognises that, in the construction of normal values, it used profit margins and SG&A costs associated with not only product types, which were not identical, but also product types found by the EC's investigating authorities not to permit a proper comparison.

**ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"**

*To the EC:*

**54. Does the European Communities believe that the IPI Premium rates applicable to exported products were established by Resolution no. 2 of 17 January 1979 of the *Exportation Incentive Commission* ('Resolution no. 2') attached to the Ministry of the Inland Revenue and that Resolution no. 2 established an IPI Premium Credit of 20 per cent for fittings under which the definition of the like product in this investigation falls? (Brazil first written submission, p. 78).**

[To both parties]:

**Was this legislation on the record of the underlying AD investigation?**

Resolution No 2 of 17 January 1979 was not part of the record. However, the Brazilian law-edict No 491 dated 5 March 1969, translated into English, was provided to the EC in Tupy's Questionnaire Response.<sup>29</sup>

Brazil recalls the EC's statement that it would "further investigate this issue in order to establish the exact amount of indirect taxes which was actually refunded on export sales made to the Community and at the same time borne by the like product concerned when consumed in Brazil".<sup>30</sup>

In view of the above, the Brazilian exporter presumed that the EC would "further investigate" the issue of internal taxes and presumed that it would have an opportunity to provide more information regarding the Brazilian legislation, if needed. Brazil recalls that the definition given in the Concise Oxford Dictionary for "investigate" is "to make a careful study of (a thing) in order to discover the facts about it". However, in the Disclosure Preceding the Definitive Regulation, without making any further investigation, the EC confirmed the rejection of the IPI Premium Credit.<sup>31</sup>

*To the EC:*

**55. With reference to the record of the investigation, can the European Communities substantiate its statement in para. 153 of its first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary?**

**56. How does the European Communities reconcile the statements in paras. 153-156 of the EC's first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary, but that the EC investigating authorities denied an allowance in respect of the IPI Premium Credit as Tupy did not demonstrate that this credit "compensated" for internal taxes "borne by the like product "when destined for consumption" on the Brazilian market within the meaning of Article VI:4 of the GATT 1994.**

**57. On what basis does the European Communities justify the use of data relating to the 20 "most exported types" of the product concerned in calculating the adjustment for PIS/COFINS?**

**58. Can the EC direct the Panel to where in its first written submission it describes the methodology used to calculate the PIS/COFINS adjustment? Is this methodology outlined in paras. 237-239 of its first submission? Is the relevant Deficiency Letter sent to Tupy during investigation in Exhibits BRL-6 and 7?**

*To Brazil:*

**59. Why does Brazil / Tupy believe that the method used by the European Communities (the use of data relating to the 20 "most exported types" of the product concerned) was unreasonable or inconsistent with the AD Agreement? Is it because it was only pertaining to approximately 33 per cent of total quantity exported, or to the 20 most exported types, or...?**

Brazil submits that the EC's approach was inconsistent with the AD Agreement. Brazil recalls that the Brazilian exporter had provided in the Questionnaire Response listings of all sales transactions of the product concerned on the domestic market and to the EC in the IP. Thus, the information needed for a full and complete analysis was available to the EC but the examination was

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<sup>29</sup> See Tupy's Questionnaire Response (BRL-4), Section G 2.2.

<sup>30</sup> Disclosure Preceding the Provisional Regulation (BRL-11), pages 7-8; see also Provisional Regulation (BRL-12), recital 47.

<sup>31</sup> Disclosure Preceding the Definitive Regulation (BRL-16), page 7, the Definitive Regulation (BRL-19), recital 46 and the Transparency Letter (BRL-18), pages 4-5.

limited to the 20 “most exported types”. Brazil submits that this limitation is inconsistent with the AD Agreement and effectively amounts to a *punitive* methodology.

Brazil claims that the EC’s approach lacks any legal support in the AD Agreement. Firstly, it is within the rights of an investigating authority under Article 6.8 to disregard the information provided by an interested party and base its calculations “on the facts available”. However, Brazil recalls the EC’s statement that “[a]lthough it could be argued that a claim of 20 per cent compared to a justified claims of 0.88 per cent is misleading in the sense of Article 18(1) of the Basic Regulation [Article 6.8 of the AD Agreement] and could therefore be totally rejected, the Commission services have decided, given the complexity of the issue, to grant nevertheless an adjustment corresponding to 0.88 per cent of the domestic sales prices”.<sup>32</sup> Consequently, Article 6.8 is for all intents and purposes irrelevant as the EC itself expressly held that that the ‘facts available’ method has not been applied.

Secondly, Brazil notes that Article 6.10 contains specific provisions that explicitly address the use of sampling techniques in anti-dumping investigations, that is, where the investigating authorities have limited their investigation to a selective group of, *inter alia*, types of products. Brazil, however, submits that that the EC has never invoked Article 6.10 as a legal basis for its approach.

With regard to “allocation”, Brazil notes that the ordinary meaning of “allocation” is “to allot”: *inter alia* “to distribute officially”. Given that all of the determinations should be based on the relevant substantive provisions of the AD Agreement, the only Article, which might provide the legal basis for the EC’s approach “to distribute officially”, is Article 2.2.1.1. In general, Brazil notes that the issue of “allocation” only normally arises in a situation where it is not possible to identify “a discrete item of cost with a cost centre and it is necessary to split a cost over several cost centres on some agreed basis”.<sup>33</sup> However, although Article 2.2.1.1 provides rules for the allocation of costs, where the issue of allocation might be relevant, Brazil submits that Article 2.2.1.1 does not provide any legal base for the allocation of prices.

Consequently, Brazil submits that the investigating authorities might deviate from the data submitted on the basis of Articles 6.8 and/or 6.10. However, given that the EC’s methodology is not based on these provisions and, irrespective of the fact of whether the data used pertains “to approximately 33 per cent of total quantity exported, or to the 20 most exported types”, the EC’s approach of quantifying the price difference and of limiting the allowance of PIS/COFINS to 0.88 per cent lacks any legal support in the AD Agreement.

**60. Could Brazil comment on the EC statements in para. 148 (and 162) of its first written submission that “...Article VI and the Agreement form an inseparable package of rights and obligations” and consequently “the rules laid down in Article 2.4, notably those regarding burden of proof also extend to Article VI?**

Brazil agrees. Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement oblige an investigating authority to ensure that a fair comparison between the normal value and the export price of the product under investigation is undertaken. This obligation is borne out by the unqualified word ‘shall’ in Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement.

The chapeau of Article 2.4 states that “[a] fair comparison shall be made between the export price and the normal value”. Brazil recalls the Appellate Body’s dictum in *United States – Hot Rolled Steel* that “[w]e would ... emphasize that, under Article 2.4, the obligation to ensure a “fair comparison” lies on the *investigating authorities*, and not the exporters”.<sup>34</sup> Moreover, Brazil recalls

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<sup>32</sup> See the Disclosure Preceding the Definitive Regulation (BRL-16), page 7

<sup>33</sup> See Lucey, Costing, 5<sup>th</sup> edition, 1996, page 12.

<sup>34</sup> ‘*United States – Hot-Rolled Steel*’, para 178.

the Panel's findings in '*Argentina – Tiles*' that the obligation of fairness "means at a minimum that the authority has to evaluate identified differences in ... to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement".<sup>35</sup> Consequently, the question, whether an interested party has identified a difference affecting price comparability or whether an investigating authority has made it, is of no importance as the investigating authority has in any case a positive obligation to ensure that the price comparison fulfils the requirement of fairness.

Given that the first sentence of Article 2.4 creates a fair comparison obligation independent of the other requirements in Article 2.4, Brazil submits that the last sentence of Article 2.4 ("burden of proof") must be read against the backdrop of this basic principle. Moreover, the issue of whether specific allowances should be made depends in any case very much on the factual circumstances surrounding the case. However, as the non-neutralised differences in taxation would automatically create a distorted dumping margin, Brazil submits that it was fundamentally unfair to penalise the Brazilian exporter for an event that is beyond its control, such as taxation.

**61. Could Brazil comment on the statement in para. 175 of the EC first written submission concerning the difference of 8,721,250 real being booked as a reserve for losses?**

With regard to the issue of the difference in booking of the amounts of R\$31.812.500 and R\$23.541.250, the EC claims that the difference of R\$8.271.250 was "booked as a reserve for losses".<sup>36</sup> This is a mistake made by the EC. Brazil stated in its First Submission that the said difference is to be understood "in the context of the delays incurred by the inspection of the fiscal authorities and also with regard to expenses involved with those proceedings".<sup>37</sup> Indeed, the difference of R\$8.271.250, which was related to the expenses of tax proceedings, was transferred to the reserve. These expenses occurred but were not formally reported in 1998 and were expected to be reported after the close of 1998.

**62. Could Brazil comment on the EC statement in para. 232 of the EC first written submission that "...Brazil is assuming that insofar as investigating authorities infringe Article 6 in regard to the process of comparing export prices and normal value they will have failed to make a proper comparison between the two and will therefore have acted inconsistently with Article 2.4." What is Brazil's view of the legal relationship between the cited provisions of Article 6 and Article 2.4?**

Brazil submits that an infringement of a procedural rule does not necessarily constitute an infringement of a substantive rule, and *vice versa*.

**63. Did Law 9363 and the formula referred to by Brazil at p. 83 of its first written submission form part of the record of the underlying AD investigation? Cite to the relevant parts of the record. Comment on the statement in para. 238 of the EC's first written submission that they are therefore "inadmissible in accordance with Article 17.5(ii)" of the AD Agreement. Cite any relevant material in your response.**

Law 9363 and the said formula, which relate to the quantification of PIS/COFINS, were *not* provided to the EC during the course of the investigation. However, the issue is without relevance as the EC identified that the amount of PIS/COFINS refunded to the Brazilian exporter was R\$2,491,000 in the IP.<sup>38</sup>

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<sup>35</sup> See *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R of 28 September 2001, '*Argentina – Tiles*', para 6.113

<sup>36</sup> ECFS, para 175.

<sup>37</sup> BFS, para 316.

<sup>38</sup> See the Disclosure Preceding the Provisional Regulation, Annex II, page 7 (BRL-11), the Disclosure

**64. Could Brazil comment on the statement in EC's first written submission para. 244: "...there is no reason to believe that the result was less favourable than one resulting from the use of complete data."**

Brazil disagrees. Brazil submits that the EC's approach effectively amounts to a punitive methodology. Brazil recalls that the EC's findings that the Brazilian exporter "received on a total amount of 159.335.000 real exported 2.491.000 real returned PIS/COFINS taxes paid on materials used for the production of exported goods".<sup>39</sup> The EC also found that this amount "represents 1.56 per cent of the value of total export sales". However, referring to the price difference between the domestic and export prices, the EC decided that "the amount of the PIS/COFINS tax refund would be limited to 0.88% of the domestic sales values".<sup>40</sup> The price difference was a result of the EC's calculation that "the export prices to the Community were on average 43.5 per cent lower than the domestic sales prices (based on the 20 most exported types, see annex 7)".<sup>41</sup>

By following the EC's methodology exactly, Brazil calculated that the price difference between the domestic prices and the export prices based on the 40 most exported types is not 43.5 per cent, but 41.4 per cent. Consequently, there are indications that the EC's statement that "...there is no reason to believe that the result was less favourable than one resulting from the use of complete data" is factually incorrect. Moreover, Brazil submits that all of the methods used by the investigating authority in its determinations should be reasonable, logical and not be based on chance. Indeed, the method used by the EC was inherently unfair as it created fundamental uncertainty and unpredictability.

**65. Could Brazil explain how and on what basis Tupy arrived at the estimated credit PIS/COFINS of 5.35 per cent?**

Brazil submits that the Brazilian exporter received under the Brazilian legislation a refund of PIS/COFINS amounting to 5.37 per cent over input, *i.e.* raw materials, packaging and other process materials, of the exported final product. This refund is based on Law no. 9363, edited on 13 December 1996 which in the relevant part provides that "[t]he fiscal credit will be the result of the application of the percentage of 5.37 per cent to the calculation basis defined in this article". This refund was also indicated by the Brazilian exporter in its Reply to the Deficiency Letter.<sup>42</sup>

*To both parties:*

**66. What considerations could guide a panel's examination of type by type analysis under the AD Agreement and the EC's use of the 20 "most exported types" in calculating the adjustment for the PIS/COFINS credit? Refer also to any other relevant material. Address the legal relevance, if any, of footnote 1 to the SCM Agreement to this issue.**

In general Brazil is not opposed to a "type-by-type" analysis. Indeed, depending very much on the facts surrounding the case, such an analysis might be appropriate. However, Brazil submits that following the definition of the product, an investigating authority is bound to treat that product consistently thereafter, in accordance with that definition.

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Preceding the Definitive Regulation, Annex II, page 7 (BRL-16) and the Transparency Letter, pages 4-5 (BRL-18).

<sup>39</sup> See the Disclosure Preceding the Provisional Regulation (BRL-11), page 7.

<sup>40</sup> See the Disclosure Preceding the Definitive Regulation (BRL-16), page 7.

<sup>41</sup> See the Disclosure Preceding the Provisional Regulation (BRL-11), page 7.

<sup>42</sup> BFS, para 328.

Secondly, as stated in answer to question 59 above, the EC's method of using the 20 "most exported types" in calculating the adjustment for the PIS/COFINS credit lacks any legal basis in the AD Agreement. Brazil recalls that the Brazilian exporter had provided in the Questionnaire Response listings of all sales transactions of the product concerned on the domestic market and to the EC in the IP. The EC disregarded this data. Regarding the legal basis of this approach, Brazil submits that Article 6.8 is irrelevant as the EC itself expressly held that the facts available have not being applied. Moreover, the EC has never invoked Article 6.10 as a legal basis for its approach. Finally, Brazil denies that Article 2.2.1.1 provides any legal base for the allocation of prices.

With regard to footnote 1 to Article 1 of the SCM Agreement, Brazil agrees with the EC that indirect taxes compensated "in excess of those, which have been accrued" may be a subsidy. However, Brazil denies the relevance of footnote 1 to the SCM Agreement under the AD Agreement. Firstly, Article VI:4 of the GATT 1994 and Article 2.4 of the AD Agreement contain a requirement that the comparison between the normal value and the export price is tax neutral. Secondly, although the SCM Agreement and the AD Agreement are part of an "inseparable package of rights and obligations" of the WTO, the AD Agreement should not be reduced to the SCM Agreement in a way that would deprive either Article VI or the AD Agreement of their own meaning. Thirdly, although both of the aforementioned Agreements are part of the WTO package, the obligations under these Agreements are distinct. Had the Members intended to merge these Agreements, they would have done so. Consequently, the EC's *argumentum e silentio* – type suggestion that if something is "only briefly mentioned in the AD Agreement" but "receives considerable attention in the SCM Agreement"<sup>43</sup>, obligations in the former should be interpreted or even replaced by the latter, is without any legal basis and should be rejected.

**67. In respect of Issues 6 & 10, to what extent does the EC method of calculating adjustments relate to the concept of "sampling"? Is this more an issue of "allocation"? Please explain, referring to any relevant provisions of the AD Agreement.**

Brazil's answer is the same as to question 59 above. In essence, Brazil recalls that the EC had at its disposal the full sales data provided by the Brazilian exporter.<sup>44</sup> Neither did the EC invoke Article 6.8 (the "best information available") or Article 6.10 ("sampling") as a legal basis for its approach. Furthermore, Article 2.2.1.1 does not provide any legal basis for the allocation of prices.

Consequently, Brazil submits that the EC's approach to quantify the difference between the domestic and the export prices on the basis of the 20 most exported types and to limit the allowance of PIS/COFIN to 0.88 per cent, lacks any legal basis in the AD Agreement.

**68. Comment on the statement in the disclosure preceeding the provisional regulation (Annex II , pp(7&8) that " ... only 23.541.250 Real was booked , because the credit will not be used in the next few years due to the fact that the company is still entitled to tax credits foe losses carried forward."**

As stated in answer to question 61, with regard to the issue of the difference in booking of the amounts of R\$ 31.812.500 Real and R\$ 23.541.250, the EC claims that the difference of R\$ 8.271.250 was "booked as a reserve for losses".<sup>45</sup> This is a mistake made by the EC. Brazil stated in its First Submission that the said difference is to be understood "in the context of the delays incurred by the inspection of the fiscal authorities and also with regard to expenses involved with those

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<sup>43</sup> ECFS, para 164.

<sup>44</sup> See the Disclosure Preceding the Provisional Regulation (BRL-11), page 7.

<sup>45</sup> ECFS, para 175.



proceedings".<sup>46</sup> Indeed, the difference of R\$ 8.271.250, which was related to the expenses of tax-related proceedings, was transferred to the reserve. These expenses occurred but were not formally reported in 1998 and were expected to be reported after the close of 1998.

ISSUE 7: "NO PROPER ADJUSTMENT FOR ADVERTISING AND SALES PROMOTING EXPENSES"

*To the EC:*

**69. What supporting documentation underlies the statement: "Similar commissions were paid for similar purposes to Tupy Europe for export transactions with other clients" (in the Disclosure Preceding Definitive Regulation)?**

**70. Did the advertising expenses at issue relate to export transactions of Tupy specifically involving pipe fittings?**

**71. Does the European Communities agree that advertising expenses might form the basis for an adjustment under Article 2.4 AD? Refer to any relevant material.**

*To Brazil:*

**72. Could Brazil comment on the EC statement that "Tupy Brazil paid 15 per cent commission to Tupy Europe on invoice NR 11113 for sales to JANNONE Italy." (Disclosure Preceding Definitive Regulation) Does Brazil believe that certain commissions were paid to Tupy Europe in relation to sales to unrelated clients and that these included costs relating to advertising and promotion of Tupy on the EC market? Were Tupy's export sales of pipe fittings to the European Communities affected by these advertising expenses? How, if at all, did Tupy demonstrate this to the European Communities in the course of the investigation?**

Given the information that the EC has now provided, that the domestic price level used to determine normal values does not include advertising expenses, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

**73. On pp. 88-89 of Brazil's first written submission, Brazil state that "advertising and sales promoting costs were reflected in the domestic sales price while they were not in practice reflected in the EC sales price....". What is Brazil's basis for this statement, and how was this brought to the attention of the European Communities in the course of the investigation? Cite to the relevant portions of the record and submit, if necessary, any additional relevant information on the record of the investigation that is not currently before the Panel.**

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

**74. In Tupy's questionnaire response, does the phrase "calculation for adjustment in the transaction by transaction was done by the ratio total expenses/total quantity" refer specifically to expenses and quantity associated with sales of *pipe fittings* or with all products produced by the company?**

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

**75. Could Brazil comment on the EC statements in para. 190 of its first written submission that:**

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<sup>46</sup> BFS, para 316.

"although Tupy acknowledged that part of the payments to Tupy Europe were for promotional and advertizing activities, it implied that the EC investigators should calculate the extent of those payments. This is to reverse the responsibilities that are established in the AD Agreement..."?

and (at para. 208 of the EC first written submission): "the burden of proof in the application of Article 2.4 lies on the party requesting the allowance".

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

**76. Could Brazil comment on the EC argument in para. 193 of its first written submission that even if Tupy had properly claimed and justified an allowance for advertising expenses, such an adjustment would not have been permitted under Article 2.4, as it would have effectively duplicated the adjustment granted for level-of-trade differences?**

As stated in answer to question 72, Brazil withdraws its claims regarding advertisement and promotional expenses (Issue 7) under Article 2.4.

ISSUE 8: "NO PROPER ADJUSTMENT FOR PACKING COSTS"

*To the EC:*

**77. In the Disclosure Preceding the Definitive Regulation, the European Communities stated "...the estimation of labour costs was not supported by evidence, although evidence was asked during the on-the-spot verification..." Can the European Communities provide evidence of this request for evidence during verification ? Cite to the relevant portions of the record of the investigation.**

*To Brazil:*

**78. How does Tupy determine and handle which products will go to domestic sales as opposed to export sales *before* a sale is made? Is there any differentiation in handling or treatment (i.e. for a product that is sold on both the domestic and foreign markets (i.e. "12"))?**

Regarding the domestic market, the Brazilian exporter's production is driven by production schedules and is *not* based on orders.<sup>47</sup> Packaging of domestically sold products takes place in two stages. Firstly, the product concerned is placed loosely in open boxes and stored in a warehouse. When an order is received, the amount of fittings (of each type) that are required are picked from the warehouse and re-packaged for the customer (the second stage). Given that export sales to the EC were driven by individual orders and no stocks were kept<sup>48</sup>, the only packing stage that is relevant is the second stage. Consequently, the costs (materials, labelling and labour etc.) of the first packing stage do not apply to the exported product.

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<sup>47</sup> See Tupy's Questionnaire Response (BRL-4), Section D-E, subsection 5 where the Brazilian exporter states that "[p]roduction starts pursuant to a normal production schedule of the company, based upon information received from the market"; see also Section G-2, subsection 10.2 where it states that "[t]he sales for the DM [domestic market] is based on available stock".

<sup>48</sup> See Tupy's Questionnaire Response (BRL-4), Section D-1 where the Brazilian exporter states that "4<sup>th</sup> step – when customer confirm the proforma we start the production"; see also Section G-1, subsection 8.2 where it states that "[t]he sales for the EC countries is against order confirmation" and that "[t]his means there is no stock kept for the foreign orders registered for production" and Section D-1.5.

**79. Does Brazil believe that what it describes as the "first packaging stage" on p. 89 of its first written submission occurs prior to the sale of (or "receipt of an order for") the product? Does Tupy only maintain an in-warehouse "inventory" for domestic sales? If there is a difference in this respect in the way that Tupy treats its domestic and foreign sales, why is the same procedure not followed for foreign sales?**

As stated in answer to question 78, packaging of domestically sold products covered two stages. Firstly, the product concerned is placed loosely in open boxes and stored in a warehouse. When an order is received, the amount of fittings (of each type) that are required are picked from the warehouse and re-packaged for the customer (the second stage).

Given that export sales to the EC were driven by individual orders and no stocks were kept<sup>49</sup>, the only packing stage that is relevant is the second stage. Consequently, the costs (materials, labelling and labour etc.) of the first packing stage do not apply to the exported product. Consequently, the "first packaging stage" described on p. 89 of BFS occurs prior to the sale of the product. Given that domestic sales are *not* order driven and that production was driven by production schedules, the Brazilian exporter kept stocks of the product concerned for its domestic sales.<sup>50</sup>

With regard to the second part of the question, the answer is yes. As domestic sales are not order but schedules driven, the Brazilian exporter maintained stocks of the product concerned for its domestic sales.

As for the third part of the question, exports sales to the EC were driven by individual orders and no stocks were kept. Thus, the only packaging stage which is relevant is the second and the costs, like materials, labelling and labour of the first packaging stage do not concern the exported product.<sup>51</sup>

**80. To what does the phrase "other important cost data" refer in the "Fifth Submission of Tupy"?**

Brazil recalls that in the EC refused to allow for differences in packaging costs. This is because it claimed that the Brazilian exporter did not have evidence (or "any evidence") to support its assertions as to how packing costs were allocated,<sup>52</sup> *i.e.* the Brazilian exporter asserted that it used an "allocation key" whereby 75 per cent of total packing costs were apportioned for domestic sales and 25 per cent for export sales.<sup>53</sup>

Importantly, companies like the Brazilian exporter rarely allocate their costs directly on the basis of the market on which the products have been sold and thus indirect costs should be allocated to the product concerned through the use of a proper allocation key. Cost allocation, even in accounting in general, is a convention. The choice of an appropriate basis for making the allocation is a matter of judgement. The basis that is chosen should ensure that the costs are apportioned fairly and equitably. Indeed, given the *ad hoc* nature of anti-dumping proceedings, in order to respond to the anti-dumping questionnaire, the parties must apportion the costs reasonably, but this will inevitably be done in *ad hoc* –way.

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Supra*, note 47.

<sup>51</sup> *Supra*, note 48.

<sup>52</sup> See the Disclosure Preceding the Provisional Regulation (BRL-11), Annex II, page 5; recital 44 of the Provisional Regulation (BRL-12); the Disclosure Preceding the Definitive Regulation (BRL-11), Annex II, page 6; and the Transparency Letter (BRL-18), page 5.

<sup>53</sup> The Brazilian exporter explained its packing expenses on domestic sales in Tupy's Questionnaire Response (BRL-4), section G.1; the First Submission (BRL-5), paragraph 1.3.4, page 5; the Fourth Submission (BRL-13), page 38; and the Fifth Submission (BRL-17), page 6.

In view of the above, it is important to note that the supporting evidence that the Brazilian exporter had of the use of the allocation key came from the visual inspection of the working activities and practices in the packaging area at the company's premises and the related company documents showing the number of employees in the packaging department. The visual inspection would have made it clear to the EC officials that the packaging process for domestic sales was and is considerably different and more involved than it is for export sales. It would then have been able to judge for itself whether the admittedly estimated 75/25 per cent allocation key had a proper factual basis.

**81. Comment on the EC statement in para. 201 of its first written submission that "no data were available either for packing materials, or for working time, that distinguished between foreign and domestic sales." Do Tupy's accounting data permit the separate identification of the cost of labour used for packing export (as opposed to domestic) sales? If so, in what way, and how was this communicated to the European Communities?**

Brazil submits that the EC imposed unrealistic pre-conditions for the granting of a relevant allowance. Brazil recalls that the Brazilian exporter had provided in the Questionnaire Response explanations concerning its general accounting system and policy.<sup>54</sup> Moreover, regarding general production processes and costs of production the Brazilian exporter explained that costs relating to "direct manpower" were "apportioned due to the standard "time/man", through cost centre, valued by the timetable rate for each cost centre".<sup>55</sup> However, the Brazilian exporter's accounting data did *not* permit the separate identification of the cost of labour used for packing. The Brazilian exporter did not allocate its costs directly on the basis of the market on which the product concerned was sold and thus indirect costs were allocated for the product concerned by the use of a proper allocation key. In general and as stated in answer to question 80 above, the choice of an appropriate allocation basis is a matter of judgement. The allocation key should ensure that the costs are apportioned fairly and equitably. Indeed, given the *ad hoc* nature of anti-dumping proceedings, in order to respond to the anti-dumping questionnaire, the parties must apportion the costs reasonably but this will inevitably be done in *ad hoc* way. The Brazilian exporter provided the EC with its general accounting principles and also evidence in support of its allocation key in its Questionnaire Response.

**82. Brazil also appears on pp. 90-91 of its first written submission to allege that, contrary to Article 12.2 AD, the European Communities failed to make any reasoning clear concerning its unwillingness to accept the 75 per cent/25 per cent allocation for packing costs, but then does not appear to refer to this allegation subsequently under "Issue 19". Does Brazil maintain this allegation?**

Brazil withdraws this claim.

*To both parties:*

**83. Would an adjustment under Article 2.4 AD be justified for general costs incurred by a company in maintaining inventory? Does Article 2.4 AD relate to indirect (i.e. "pre-sale") and direct (i.e. "post-sale") packing expenses? Why does Brazil/Tupy believe this method used by the European Communities was unreasonable or inconsistent with Article 2.4 ?**

Brazil believes that all of the costs relating to the commercialisation of the product concerned are covered i.e. Article 2.4 does not make a distinction between indirect and direct costs. With regard to the second part of the question, Brazil submits that, the ordinary meaning of the term "any other differences which are also demonstrated to affect price comparability" in Article 2.4 does not make a distinction between indirect and direct costs. Indeed, Article 2.4 implies that all differences, whether direct or indirect, could affect the price comparability.

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<sup>54</sup> See Tupy's Questionnaire Response (BRL-4), Section F.1.

<sup>55</sup> See Tupy's Questionnaire Response (BRL-4), Section F.2, subsection 4a).

The Brazilian exporter did not allocate its costs directly on the basis of the market on which the products were sold and, thus, indirect costs were allocated for the product concerned by the use of a proper allocation key. The choice of an allocation basis is a matter of judgement. The allocation key should ensure that the costs are apportioned fairly and equitably. Indeed, given the *ad hoc* nature of anti-dumping proceedings, in order to respond to the anti-dumping questionnaire, the parties must apply apportion the costs reasonably but this will inevitably be done in *ad hoc* –way. Consequently, Brazil submits that the EC's threshold of "the direct allocation" does not comply with the obligation under Article 2.4 "not to impose an unreasonable burden of proof" on the Brazilian exporter. Moreover, Brazil submits that the EC, by failing to indicate to the Brazilian exporter what information was necessary to ensure a fair comparison, failed to ensure that the price comparability fulfilled the requirement of fairness under Article 2.4.

**84. Was the verification visit in this investigation "essentially documentary"? Is an "essentially documentary" verification consistent with the AD Agreement? Why or why not?**

Brazil, submits that the verification visit in this investigation was exclusively "essentially documentary". From a general point of view, Brazil submits that to respond to an anti-dumping questionnaire is not within companies' normal activity. Given the *ad hoc* nature of anti-dumping proceedings, reasonable ad hoc – costing must be applied in order to respond to the anti-dumping questionnaire. There are numerous instances where companies are not able to "demonstrate" or provide "documentation". It might be normal for a company producing many products not to allocate their full costs with regard to, for example, product types. Consequently, Brazil submits that the EC's refusal to accept an "allocation key" ensuring a fair and equitable apportionment of costs was unreasonable. Moreover, Brazil submits that the EC, by failing to indicate to the Brazilian exporter what information was necessary to ensure a fair comparison, failed to ensure that the price comparability fulfilled the requirement of fairness under Article 2.4.

**ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"**

*To the EC:*

**85. Can the European Communities clarify the meaning of each of the headings of the columns referred to by Brazil in its first written submission (p.96)?**

**86. Does converting the transport cost figures from the European currency reported by Tupy to Brazilian Reals on the same monthly rate basis as Tupy converted those amounts from Reals to the European currency make any difference to the result of the calculation?**

**87. Is it the usual practice of the EC to compare the prices used to compare the dumping margin on the basis of the exporter's currency?**

**88. Was the conversion of the amounts reported by Tupy from the European currency to Reals done only in the case of transport costs?**

*To Brazil:*

**89. Why did Tupy convert the amounts reported for transport cost to European currencies?**

The Brazilian exporter's export sales of the product under investigation were made and expressed in a currency as agreed between it and the customer concerned. Therefore, normally all of the sales to Italy were made in ITL, to Finland, Sweden, Belgium and the Netherlands in DEM, to the United Kingdom in GBP, to Spain in PTA and to France in FRF. Given that the agreed terms of

delivery with regard to the Brazilian exporter's export sales were 'CIF'<sup>56</sup>, all of the items ("cost, insurance and freight") between *ex-factory* (the Brazilian exporter) and the agreed port in the EC were indicated in the currency of the purchase agreement. Consequently, Brazil disagrees with the EC that the Brazilian exporter made unnecessary currency conversions. Brazil also notes that the EC's deficiency letter contains no reference to the alleged unnecessary currency conversions.<sup>57</sup>

**90. Does Brazil believe that the amounts resulting from the currency conversion performed by the EC are the same as those that were reported by Tupy before it performed its own conversion?**

Brazil's claim with regard to the issue of currency conversions is related to the fact that although the export turnover of each transaction is converted on the basis of the daily conversion rates, as stated by the EC, the allowances reported by the Brazilian exporter in the Questionnaire Response and deducted from export transaction values were not converted on the same basis. Brazil recalls the EC's explicit statement that "daily rates were used for the definitive dumping calculations".<sup>58</sup> However, the EC's conversion of currencies with regard to the allowances (i.e. transport, freight, insurance, charges, credit, warranty, commission) were not based on the table of the daily exchange rates that was collected during the on-the-spot verification. Given that the Brazilian exporter used the exchange rates that prevailed on the day the foreign exchange transaction was settled, on the basis of the Brazilian Central Bank's rates, the currency conversions made by the Brazilian exporter and the EC could not lead to the same amounts.

**91. Does Brazil object to the ultimate use by the European Communities of daily exchange rates using the date of the invoice? If so, where is this specific objection evident in the record of the investigation? Can Brazil clarify the meaning of "the date of settlement of the foreign exchange transaction", used by Tupy in its Questionnaire Response?**

Brazil is not objecting to the EC's decision to convert currencies into Brazilian Reais by using the daily rates. Regarding the phrase "the date of settlement of the foreign exchange transaction" Brazil recalls that the Brazilian exporter used the exchange rates that prevailed on the day the foreign exchange transaction was settled, on the basis of the Brazilian Central Bank's rates.<sup>59</sup> Given that the Brazilian accountancy rules take the day of settlement as the date for calculating the amount received by the company and the high currency movements during the period considered, the Brazilian exporter reported its export transactions accordingly.<sup>60</sup>

**92. Under "Issue 9", is Brazil's objection the allegedly inadequate disclosure by the European Communities of the basis of its currency conversion calculations? If so, on what basis does Brazil believe that this claim involves Article 2.4.1?**

Brazil clarifies as follows. Given that the currency conversions were required in order to make a fair comparison between the export price and the normal value under Article 2.4, Brazil is not objecting to the EC's decision to convert currencies into Brazilian Reais but to the manner in which the conversion was carried out for the Brazilian exporter's export transactions. Article 2.4.1 sets forth rules with respect to the conversion of currencies to be applied "[w]hen the comparison under paragraph 4 requires a conversion of currencies" and that "such conversion should be made using the rate of exchange of the date of sale". However, the EC's conversion of currencies with regard to the

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<sup>56</sup> This information is part of the record of the investigation; see Tupy's Questionnaire Response (BRL-4), Section H-3.1.

<sup>57</sup> See the Deficiency Letter (BRL-6).

<sup>58</sup> See recital 52 of the Definitive Regulation (BRL-19).

<sup>59</sup> See Tupy's Questionnaire Response (BRL-4), Section G.1.7; see also the First Submission of Tupy (BRL-5), Section 1.3.6.

<sup>60</sup> See the Fourth Submission of Tupy (BRL-13), page 36, para 13.

allowances (*i.e.* transport, freight, insurance, charges, credit, warranty, commission) was not based on the tables of the daily exchange rates that were collected during the on-the-spot verification as stated by the EC. Consequently, as the EC's benchmark to convert currencies related to the invoice values and to the export expenses was not the same, the selective use of the exchange rates cannot be in accordance with Article 2.4.1. In any case the comparison between the adjusted export prices and the adjusted normal values under Article 2.4 was not fair.

**93. Did Brazil receive a comprehensive copy of the table it refers to on p. 96 of its first written submission? Comment on the EC statement in the Transparency Letter that the exchange rate could be calculated by dividing the "turnover in real" by the "net invoice value"? Can the relevant date for the exchange rate used be deduced by referring to the exchange rate of the date of the invoice referred to in the third column of the table?**

The Brazilian exporter *did* receive a copy of the tables of the daily exchange rates allegedly used by the EC.<sup>61</sup> Brazil submits that the EC's response to the Brazilian exporter's question was improper. Brazil agrees with the EC that a simple division of the column 'Turnover in real' by the column 'Net invoice value', as instructed by the EC, gives an exchange rate used in the conversion of invoice values of the export sales. However, the said response was not proper given that the Brazilian exporter had requested a disclosure of the exchange rates used in conversion by the EC. As stated in answer to question 90 above, this question related to the allowances, which the EC, depending on its findings, deducted from the export transaction prices of the Brazilian exporter and where the currency conversion is not in line with the table of daily rates provided.

**94. Could Brazil comment on the EC explanation concerning the exchange rate on a certain date in the EC's first written submission, para. 222?**

Brazil agrees with the EC that the turnover of each transaction was converted on the basis of the tables of exchange rates disclosed. However, Brazil submits under Issue 9 that the currency conversions of allowances granted by the EC were not based on the tables disclosed. Brazil observes that the EC tries to downplay Brazil's argument by lengthy explanations. However, Brazil submits that the claim under Issue 9 is not related to one date of exchange rate or one transaction, but the problem underlying the claim which is generic in nature.

#### **ISSUE 11: "NO PROPER DUMPING MARGIN FINDINGS"("ZEROING")**

*To Brazil:*

**95. The European Communities calculates the impact of the application of zeroing in this investigation to be 2.73 per cent ( i.e. a dumping margin of 34.82 per cent as opposed to 32.09 per cent). Does Brazil believe that this is a "relatively limited impact"? (see EC first written submission, para. 250)**

The EC tries to down play the infringement of Article 2.4.2 by alleging that the impact of the zeroing methodology in the present case is not significant. Brazil disagrees with this assessment given that the EC's methodology increases not only the likelihood of a determination of dumping but also the magnitude of the dumping margin that will be concluded. Brazil also points out that the practice of zeroing and the infringement of Article 2.4.2 are inherently unfair and do not allow a fair comparison to be made within the meaning of Article 2.4.

In view of the difference between 32.09 per cent and 34.82 per cent and assuming that the volume and the price of imports from the Brazilian exporter would have remained the same as during

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<sup>61</sup> These tables were annexed to the Disclosure Preceding the Definitive Regulation (BRL-16).

the IP and unchanged after the imposition of the definitive anti-dumping duties, the EC importers would have paid 25.154 Euro more each year.

*To both parties:*

**How would this consideration be relevant here?**

As the EC has failed to show that the zeroing methodology ensures a fair comparison between the normal value and export price, Brazil believes that the EC's statement of "relatively limited impact" is not relevant here.

**ISSUE 12: "NO PROPER CONSIDERATION OF IMPORT VOLUME TRENDS"**

*To Brazil:*

**96. Could Brazil comment on the EC statement in paragraph 252 of its first written submission concerning Article 3.1? Does Article 3.1 impose obligations that are additional to those imposed by paragraphs 3.2-3.5 AD? If so, what are those obligations? Would a violation of any of paragraphs 3.2-3.5 *ipso facto* lead to a violation of Article 3.1, or vice versa? Cite any relevant material in your response.**

With regard to the EC's argument, Brazil refers to the Appellate Body's findings in *Thailand – H-Beams* that Article 3.1 is "an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination and that this general obligation "informs the more detailed obligations" in the remainder of Article 3.<sup>62</sup> Brazil also recalls that the panel in *Mexico – HFCS* described the relationship between Article 3.1 and Articles 3.2-3.5 by stating that "Article 3.1 is a general provision" and that "[t]he succeeding sections of Article 3.1 provide more specific guidance in the determination of injury". The Panel also stated that "Article 3.2 sets forth factors to be considered with regard to the volume and price effects of imports which Article 3.1 requires to be examined ... Article 3.3 establishes the requirements for cumulative analysis... Article 3.4 sets forth factors to be considered in examining the impact of dumped imports on the domestic industry, as required by Article 3.1 ... Article 3.5 establishes requirements for the analysis of the causal link." (emphasis added).<sup>63</sup>

Brazil understands that Article 3.1 requires the investigating authority's determination to be based on "positive evidence" and involve an "objective examination", which obligation covers also the investigating authorities' examinations under the subsequent sections of Article 3.

Regarding "positive evidence", the Appellate Body in the *United States – Hot-Rolled Steel* case identified that the term relates to "the quality of the evidence that authorities may rely upon in making a determination" where "positive" means that "the evidence must be of an affirmative, objective and verifiable character, and that it must be credible". Consequently, the focus for "positive evidence" is on the facts underpinning and justifying the injury determination.<sup>64</sup> With regard to "objective examination" the same Appellate Body defined that the word "examination" relates "to the way in which the evidence is gathered, inquired into and, subsequently, evaluated" and that the word "objective" indicates essentially that the process of examining "must conform to the dictates of the basic principles of good faith and fundamental fairness". In particular, the Appellate Body specified that an objective examination "requires that the domestic industry, and the effects of dumped imports,

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<sup>62</sup> *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, 'Thailand – H-Beams AB Report', paras 90 and 106.

<sup>63</sup> *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, paras 7.118-7.119.

<sup>64</sup> *United States – Hot-Rolled Steel AB Report*, para 192.



be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation”<sup>65</sup> and that “investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured”.<sup>66</sup>

In the present case, for example, the EC has zeroed the “negative” undercutting margins when calculating an average margin of undercutting. Regarding this EC’s practice of zeroing, Brazil submits that the EC’s price effect determination under Article 3.2 was not based on “positive evidence” as obliged by Article 3.1. The EC’s practice of zeroing the “negative” undercutting margins effectively means that the EC reduces the prices of the exported product types in those comparisons. Specifically, when zeroing, the weighted average price for exported product types is counted as being *equal* to the weighted average price for the EC product types, irrespective of the fact that, in reality, the former is *higher* than the latter. Consequently, the EC’s methodology means that it is manipulating the prices of Brazilian exported product types.

Moreover, Article 3.2 directs an investigative authority to consider whether there has been “a significant price undercutting by the dumped imports”, *i.e.* whether the actual import prices of the dumped imports have been significantly lower than the actual prices of the domestic industry. As the EC, however, has not used actual but artificial import prices fixed at the level of the domestic industry, the EC’s consideration under Article 3.2 was not based on “positive evidence”.

Furthermore, the EC’s methodology for price effect determination leads to an unacceptable situation, in which an exported product type, which matches the EC product type, will always be equal to the EC industry’s prices. Given that this methodology, which increases not only the likelihood of a determination of price undercutting but also the magnitude of the price undercutting, always works to the prejudice of the exporter. Therefore, the EC’s methodology is inherently unfair, as condemned by the Appellate Body in *United States – Hot-Rolled Steel*, and does not constitute an “objective examination” under Article 3.1.

As the EC’s methodology leads inevitably to the affirmative final determination of price undercutting, the consideration of the effect of the dumped imports on prices in the EC market under Article 3.2 was not based on “positive evidence” and did not involve an “objective examination” as obliged by Article 3.1. Therefore, Brazil opines that the EC has acted inconsistently with both Articles 3.1 and 3.2.

*To both parties:*

**97. How, if at all, do the obligations in Articles 3.2 and 3.3 AD interrelate? Could Brazil comment on the EC statement in paragraph 263 of its first written submission that “...Brazil denies ... that cumulation applies in the operation of Article 3.2”?**

Article 3.2 requires the investigating authorities to “consider” two factors on a country per country basis while determining injury, *i.e.*, the volume trend of the dumped imports and the effect of the dumped imports on prices (whether there has been a significant price undercutting, price depression or price suppression).

Article 3.3, however, concerns an exceptional case where the investigating authorities may cumulatively assess the effects of the dumped imports “only if” they could satisfy three criteria: (i) the margin of dumping from each country is more than *de minimis*; (ii) the volume of imports from each country is not negligible; and (iii) a cumulative assessment of such effects is appropriate in light of the “conditions of competition”.

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<sup>65</sup> *United States – Hot-Rolled Steel AB Report*, para 193.

<sup>66</sup> *Ibid*, para 196.

Firstly, Brazil would like to point out that Article 3.3 (b) refers to “the conditions of competition” and not to “competition”, as the EC seems to advocate.<sup>67</sup> The ordinary meaning of “conditions of competition” is “something essential to the appearance or occurrence of the act or process of competing”.<sup>68</sup> Brazil thus submits that Article 3.3 directs the investigative authorities to evaluate all relevant economic factors that are specific to the market concerned, such as substitutability, price and non-price factors as well as channels of distribution among which the volume trend of the dumped imports from each country subject to the investigation is, as a function of other determinants of demand, one of the most important factors.

Brazil submits that considerations under Article 3.2, in particular the volume trend of the dumped imports, are essential to inform an investigating authority of the manner in which the dumped imports are competing with each other and with the domestic like product and, although indirectly, of the underlying conditions of competition. In case the volume trends of various imports as considered by an investigative authority under Article 3.2 are pointing in different directions, these dissimilarities are also indications that the conditions of competition for these imports are not the same or similar.

In this respect, given that Article 3.3 obliged the EC not only “to consider” but also “to determine”, the EC’s statement that it “has demonstrated that it did, in fact, consider the issue of significant volume increase for exports from Brazil considered in isolation”<sup>69</sup> is indicative of the EC’s lightweight approach. With regard to the term “determination” (and not “consideration”) in Article 3.3, instead of citing the Latin tag *expressio unius est exclusio alterius* the EC should have cited another Latin tag *ut res magis valeat quam pereat* whereby “all provisions of a treaty must be, to the extent possible, given their full meaning so that parties to such a treaty can enforce their rights and obligations effectively”.<sup>70</sup>

Indeed, Brazil claims that “if exports from one country are significantly increasing while those from another country are stable or decreasing then they are “competing to different extents and in different ways” and cumulation would not be justified” as quoted by the EC. In view of Brazil’s overall position as stated above, dissimilarities in the import volumes are inevitable indications that the conditions of competition of those imports are not the same or similar.

In this context, Brazil disagrees with the United States that “it is not necessary for an authority to consider the significance of the volume and price effects of imports from each individual subject country before it may cumulate imports under Article 3.3”.<sup>71</sup> Brazil opines that although Article 3.3 does not explicitly include Article 3.2 as a prerequisite for cumulation, the “conditions of competition” criterion under Article 3.3 (b), which is a prerequisite for cumulation, does cover a broad range of elements to be determined before the cumulative assessment, including the factors that are mentioned under Article 3.2.

Therefore, by failing to determine the volume trend of the dumped imports on a country by country basis, the EC did not satisfy the “conditions of competition” requirement under Article 3.3(b). Consequently, the EC should not apply cumulation to the Brazilian imports.

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<sup>67</sup> ECFS, para 305.

<sup>68</sup> The ordinary meaning of the word “competition” implies the notion of “the act or process of competing” and the word “condition” is “something essential to the appearance or occurrence of something else”; see the Concise Oxford Dictionary.

<sup>69</sup> ECFS, para 301 which is cross referring to para 264.

<sup>70</sup> ‘Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R of 31 May 1999; para 9.96 and footnote 327 where the Panel stated that “[t]he principle of effective interpretation or “l’effet utile” or in Latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty”.

<sup>71</sup> Oral Statement of the United States, para, 12.

**98. Does the data before an investigating authority have to demonstrate that a significant increase in imports from a particular source has occurred during the IP in order to satisfy Article 3.2? What is the significance – if any -- of the term “whether” (rather than “that”) in the phrase "consider whether there has been a significant increase in dumped imports" in Article 3.2 AD?**

With regard to the first part of the question, Brazil agrees that in order to satisfy Article 3.2, an investigating authority does *not* need to “demonstrate”, but has the obligation to “consider”, whether a significant increase in imports from a particular source has occurred during the investigating period.

In its First Submission the EC argued that “Article 3.2 has procedural and substantive aspects” and, as regards procedure, that Article 3.2 “requires the investigating authorities to ‘consider’ the volume and price factors”.<sup>72</sup> In other words, the EC argued that Article 3.2 only requires the investigating authority to consider the volume of the dumped imports and not to consider “whether there has been a significant increase in dumped imports”.<sup>73</sup> It seems that the EC is confused between Articles 3.2 (“the investigating authorities shall consider whether there has been a significant increase in dumped imports”) and 3.1 (“shall be based on positive evidence and involve an objective examination...the volume of the dumped imports...”).

Brazil understands that Article 3.1 requires the investigating authorities to examine both volume and price factors which determination should be based on “positive evidence” and involve an “objective examination.” With regard to the volume factor under 3.2, the element that the investigating authority should consider is “whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member”.

Therefore, the fact that the investigating authorities have considered just the volume of the dumped imports is not enough to satisfy the requirements under Article 3.2. They should consider whether there has been a significant increase in the import volume, where Brazil interprets the term “significantly” to refer to the amount of increase in dumped imports. This interpretation is supported, for example, by the findings in the *Thailand – H-Beams* where the Panel stated that “our task is to examine whether the Thai authorities properly established the facts concerning the existence of an increase in dumped imports and evaluated those facts in an unbiased and objective manner”<sup>74</sup> (emphasis added). Brazil submits that the EC did not consider at all whether the dumped imports from Brazil had significantly increased, but assumed that this was unnecessary because imports from Brazil had always been significant.<sup>75</sup>

With regard to the question as to what type of record could show that the investigating authorities have considered whether there has been a significant increase in dumped imports, in absolute or relative terms, the panel in the *Thailand – H-Beams* case has given some examples. This includes the statement made by the Thai authorities in the final determination that the volume of the dumped imports from Poland has “continuously increased” and the non-confidential disclosure tables which show a 10 per cent increase in volume from 1995 to the investigation period as well as other examples.<sup>76</sup>

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<sup>72</sup> ECFS, para 256.

<sup>73</sup> See also Brazilian Oral Statement para 23.

<sup>74</sup> See *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, ‘*Thailand – H-Beams*’, para. 7.157.

<sup>75</sup> See recital 140 of the Provisional Regulation (BRL-12) and recital 71 of the Definitive Regulation (BRL-19); see also BFS Part VIII and Brazilian Oral Statement para 22.

<sup>76</sup> See ‘*Thailand – H-Beams*’ paras 7.164 - 7.170.

However, in the present case, the EC's statement that the Brazilian imports "were always significant" and "far from being negligible" can only show that the EC has considered the *volume* of imports from Brazil. It cannot demonstrate that the EC has considered whether there has been a significant increase in dumped imports, in absolute or relative terms. Therefore, the EC's practice has violated Article 3.2.

As for the second part of the question, concerning the significance of the term "whether" (rather than "that") in Article 3.2, Brazil notes that there is a difference between the ordinary meanings of the terms "whether" and "that". According to the Concise Oxford Dictionary, "whether" introduces an alternative possibility, whereas "that" gives a more affirmative sense which does not introduce such an alternative possibility. In the context of Article 3.2, the sentence "whether there has been a significant increase in dumped imports" can be translated into "*either* there has been a significant increase in dumped imports *or* there has not been a significant increase in dumped imports". If "whether" is replaced by "that" in Article 3.2, the sentence "consider that there has been a significant increase in dumped imports" would seem to require the investigating authority to establish that a significant increase in imports has occurred.

However, Brazil believes that the term "whether" further enhances the word "consider" in the context of Article 3.2. Namely, the investigating authorities are obliged to "take into account" or "pay attention to" the matter in question. The result of their consideration may be positive or negative. However, in the current case, the key issue is not whether the EC has the obligation to find that there has been a significant increase in dumped imports. The key issue instead is whether the EC has the obligation to give consideration to the question of whether there has been a significant increase in dumped imports.

**99. For the purposes of an injury analysis under Articles 3.2 and 3.3 AD, is it necessary for a Member to establish that a significant increase in the volume of dumped imports has occurred with respect to imports from exporting countries individually before and/or after proceeding to a cumulative analysis? Why or why not? Comment, including with reference to paragraph 12 of the US oral statement.**

As stated in answer to question 97 above, Brazil submits that Article 3.2 requires the investigating authority to "consider" the volume and the price effects on a country by country basis.

Article 3.3, however, raises an exceptional case where the investigating authorities may cumulatively assess the effects of the dumped imports "only if" they could satisfy the dumping, volume and conditions of competition thresholds.

Brazil points out that Article 3.3 (b) refers to "the conditions of competition" and not to "competition".<sup>77</sup> The ordinary meaning of "conditions of competition" is "something essential to the appearance or occurrence of the act or process of competing".<sup>78</sup> Brazil, thus, submits that Article 3.3 directs the investigating authorities to evaluate all relevant economic factors that are specific to the market concerned, such as substitutability, price and non-price factors as well as channels of distribution among which the volume trend of the dumped imports from each country subject to the investigation is as a function of other determinants of demand one of the most important indicators.

Brazil recalls that the Appellate Body's defined in *'Korea – Alcoholic Beverages'* that the phrase "conditions of competition" describes "a particular type of relationship between two products, one imported and the other domestic" and that "[t]he context of the competitive relationship is

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<sup>77</sup> ECFS, para 305.

<sup>78</sup> *Supra* note 58.

necessarily the marketplace since this is the forum where consumers choose between different products” and that competition in the market place is “a dynamic, evolving process”.<sup>79</sup>

Brazil submits that considerations under Article 3.2, in particular the volume trend of the dumped imports, are essential to inform an investigating authority of the manner in which the dumped imports are competing with each other and with the domestic like product, if any, and, indirectly, of the underlying conditions of competition. Indeed, differing volume trends indicates that the conditions of competition for these imports could not be the same or even similar.

Indeed, Brazil claims that “if exports from one country are significantly increasing while those from another country are stable or decreasing then they are “competing to different extents and in different ways” and cumulation would not be justified”, i.e. dissimilarities in the import volumes are inevitable indications that the conditions of competition of those imports are not the same or similar.

Thus, Brazil disagrees with the United States that “it is not necessary for an authority to consider the significance of the volume and price effects of imports from each individual subject country before it may cumulate imports under Article 3.3”.<sup>80</sup> Brazil opines that, the “conditions of competition” criterion under Article 3.3 (b), which is a prerequisite for cumulation, does cover a broad range of elements to be determined before the cumulative assessment, including the factors that are mentioned under Article 3.2.

#### ISSUE 13: "NO PROPER CONSIDERATION OF ALLEGED UNDERCUTTING"

*To both parties :*

**100. What is the significance, if any, of the reference in Article 3.2 AD to “a” (rather than “the”) like product? And to domestic “prices” (in the plural rather than singular)?**

An investigating authority might find that the “product under investigation” corresponds to more than one like products produced by the domestic industry. For example, it may define imports subject to an investigation as “black heart malleable cast iron tube and pipe fittings” which correspond to two like products produced by the domestic industry: “black” and “white” heart malleable cast iron tube and pipe fittings. In such cases, the term “like product” refers to a like product of “white heart” and a like product of “black heart” malleable cast iron tube and pipe fittings.

In the context of the price effect examination, Article 3.1 refers to “the effect of the dumped imports on prices in the domestic market for like products”. In this respect Article 3.2 specifies that the investigative authorities shall consider whether there has been significant price undercutting of the dumped imports (“black heart”) in comparison with the price of a like product of “black” heart fitting or a like product of “white” heart fitting or, under certain conditions, both.

However, Brazil submits that the wording “throughout this Agreement” in Article 2.6, when read in conjunction with the wording in Article 3.2, obliges the investigating authorities to compare products which are identical, i.e. alike in all respects to the product under investigation. Only in the absence of such identical products can the investigating authorities resort to a comparison between products, which have, although not alike in all respects, characteristics closely resembling those of the product under investigation. Consequently, an investigating authority has an obligation to compare “black with black” and only in the absence of such identical products to compare “black with white”.

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<sup>79</sup> See ‘Korea – Beverages AB Report’, para 114.

<sup>80</sup> Paragraph 12 of the Oral Statement of the United States.

In the latter case the investigating authority has an obligation to ensure that the prices of the products are comparable, *i.e.* to neutralise the differences affecting price comparability.

**101. What is the significance, if any, of the reference to "the dumped imports" in Article 3.2 AD?**

The wording in Articles 3.1 and 3.2 indicates that a price undercutting must be established for the dumped imports, *i.e.* for the totality of the imports concerned. Firstly, Brazil notes the Panel's finding in '*EC – Audio Cassettes*' that "[t]he number of sales at undercutting prices was particularly important, because it would provide an indicator of the likely number of sales lost by the domestic industry".<sup>81</sup> However, this 'transaction-to-transaction' approach is principally the same as that advocated by India in '*EC – Bed-Linen*' that the volume effect, price effect and consequent impact considerations under Article 3 were related only to those transactions for which a positive dumping margin was calculated.<sup>82</sup> However, the panel disapproved and stated that "investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as "dumped imports" for purposes of injury analysis under Article 3".<sup>83</sup> Consequently, Brazil submits that the phrase "dumped imports" comprises all imports of the product from an exporting producer about whom an investigative authority has made an affirmative determination of dumping.

**102. What is the significance, if any, of the EC assertion that the practical result of "zeroing" in the consideration of whether there was significant price undercutting in this case was *de minimis* (0.01 per cent)?**

Neither the Brazilian exporter or Brazil are able to verify the accuracy and the adequacy of the EC's calculation. This is because the EC did not disclose any information with regard to the EC producer's prices per product type in cases where the undercutting margin was *negative*, *i.e.* where the Brazilian import price per matching product type was *equal to or higher* than the weighted average price of the comparable EC product type. Indeed, Brazil notes that the EC's price undercutting and underselling calculation, as disclosed, consists of 775 lines corresponding to the same number of matching PCN-codes (product types). Indeed, Brazil notes that out of these 775 types the undercutting margin was "negative" for 247 product types, which represents 32 per cent of the total product types used in the comparison. Finally, Brazil notes that the EC used only "matching types" leaving 40 per cent (in terms of volume) or 30 per cent (in terms of value) of Brazilian exports out of the calculations, but is unable to comment what the numbers would be had the EC used all the types in its calculations.

**103. Unlike Article 2 of the AD Agreement in relation to dumping, Article 3 contains no specific guidance as to the methodology an investigator may use to consider price undercutting. Comment.**

Brazil agrees. However, Brazil submits that all of the particular methodologies applied by the investigating authorities which operate against the basic principles of good faith and fairness are in violation of Article 3.1. The requirement in Article 3.1 to conduct an "objective investigation" on the basis of "positive evidence" obliges the investigating authority, *inter alia*, to conduct a fair comparison between the product under investigation and the like product. It follows that, although Article 3 does not contain an explicit provision for adjustments or allowances, such adjustments or allowances should be made if they are necessary to ensure price comparability. For example, the product concerned may be defined by an investigating authority as a 'passenger car'. Brazil does not believe that a comparison between the actual import price of a four door passenger car (the only

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<sup>81</sup> See *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, not adopted, '*EC – Audio Cassettes*', para 437; quotes in the EC's First Submission, para 269.

<sup>82</sup> See *EC – Bed Linen*, para 6.121-6.123.

<sup>83</sup> See *EC – Bed Linen*, para 6.139.

imported model) and the actual domestic industry's price of a two doors passenger car (the only domestically produced model) without any adjustments or allowances would constitute an "objective examination". Moreover, irrespective of the fact that Article 3.2 does not explicitly prescribe a particular methodology for a price comparison between the imported product and the domestic product, it is clear that such a comparison, for example at a different level of trade, would not constitute an "objective examination".

**ISSUE 14: "NO PROPER CALCULATION OF ALLEGED UNDERCUTTING MARGINS"**

*To Brazil:*

**104. Under Issue 14, it seems that Brazil is alleging that by not granting an adjustment under Article 2.4 for the alleged differences in the cost of production of "black heart" and "white heart" fittings, the European Communities consequently necessarily violated Article 3.2 AD? If not, could Brazil explain its allegation?**

Brazil regrets the misunderstanding and clarifies that its claim is not related to Article 2.4 but to Article 3.2. As stated in answer to question 103, Brazil submits that, although Article 3 does not contain explicit provision for adjustment or allowances, the basic principles of good faith and fundamental fairness mean that adjustments or allowances should be made if they are necessary to ensure price comparability. Brazil recalls that Article 3.2, when read in conjunction with the wording in Article 2.6, obliges the investigating authorities to compare products which are identical. Only in the absence of such identical products should the authorities resort to a comparison between products, which have characteristics closely resembling those of the product under investigation. Consequently, the EC had a positive obligation to compare "black with black" and only in the absence of such identical products to compare "black with white". However, in the latter case the EC was obliged to account for differences in the quality of the products, which were reflected on the market and affected price comparability, as an adjustment in the price effect examinations. Brazil does not believe that a comparison between the actual import price of a *black* heart fitting and the actual domestic industry's price of a *white* heart fitting without any adjustments or allowances, would constitute an "objective examination".

*To both parties:*

**105. Is there a requirement under the AD Agreement, whether in Article 3.2 or elsewhere, to adjust prices before comparison in the context of injury?**

Yes. As stated in answer to question 103, Brazil submits that all of the particular methods applied by the investigating authorities under Article 3.2 operating against the basic principles of good faith and fairness are in violation of Article 3.1. The requirement in Article 3.1 to conduct an objective investigation on the basis of positive evidence obliges the investigating authority, *inter alia*, to conduct a fair comparison between the product under investigation and the like product. It follows that, although Article 3 does not contain an explicit provision for adjustment or allowances, such adjustments or allowances should be made if they are necessary to ensure price comparability. Assume that the investigating authority defined the product concerned as a 'passenger car'. Brazil does not believe that a comparison between the actual import price of a four door passenger car (the only imported model) and the actual domestic industry's price of a two door passenger car (the only domestic produced model) without any adjustments or allowances, would constitute an "objective examination". Consequently, irrespective of the fact that Article 3.2 does not explicitly prescribe a particular methodology for a price comparison between the imported product and the domestic product, such a comparison, for example at a different level of trade, would not constitute an "objective examination".

**106. Article 3.1 AD refers to "prices on the domestic market". Comment, in relation to the nature of the consideration required under Article 3.2 AD.**

As stated in answer to question 100, an investigating authority might find that the “product under investigation” corresponds to more than one like products produced by the domestic industries. For example, it may define imports subject to an investigation as “black heart malleable cast iron tube and pipe fittings” which correspond to two like products produced by the domestic industry: “black” and “white” heart malleable cast iron tube and pipe fittings. In such cases, the term “like product” refers to a like product of “white heart” and a like product of “black heart” malleable cast iron tube and pipe fittings. In the context of the price effect examination, Article 3.1 refers to “the effect of the dumped imports on prices in the domestic market for like products”. In this respect Article 3.2 specifies that the investigating authorities shall consider whether there has been significant price undercutting of the dumped imports (“black heart”) in comparison with the price of a like product (either “black” or “white” or, in certain conditions, both) of the importing Member.

However, as stated in answer to question 104, Brazil submits that the wording “throughout this Agreement” in Article 2.6, when read in conjunction with the wording in Article 3.2, obliges the investigating authorities to compare products which are identical, *i.e.* alike in all respects to the product under investigation. Only in the absence of such identical products can the investigating authorities resort to a comparison between products, which, although not alike in all respects, have characteristics closely resembling those of the product under investigation. Consequently, an investigating authority has an obligation to compare “black with black” and only in the absence of such identical products to compare “black with white”. In the latter case the investigating authority has an obligation to ensure that the prices of the products are comparable, *i.e.* to neutralise the differences affecting price comparability.

**ISSUE 15: "NO PROPER CUMULATION OF IMPORTS"**

*To both parties:*

**107. What is the meaning of cumulatively assessing the "effects" under Article 3.3 of the AD Agreement? What are the "effects" that can be cumulated and where are these referred to in the other provisions of Article 3? Comment including with reference to para. 14 of the US oral statement (to the extent it is relevant).**

Brazil submits that Article 3.3 clearly requires a two stage approach: first, the investigating authority should identify the effects of the dumped imports; only after this identification can the authority proceed to a cumulative assessment. In the first phase the investigating authority should identify the effects of the dumped imports from each country, and it is only after this identification that the cumulative assessment takes place. Cumulation as such means that the investigating authority may depart, under strict conditions, from the normal procedures to conduct the injury and causation determination on a country by country basis.

It must be noted that Article 3.3 relates to the situation where the investigating authorities “may cumulatively assess the **effects** of [the] imports” (emphasis added) rather than the imports, or import volumes, as such. A similar approach is also taken in Article 3.1, which makes a distinction between the examination of “the volume of the dumped imports” and “the effect of the dumped imports” on domestic prices (Article 3.1a)), as well as the “consequent impact of these imports on” the domestic producers (Article 3.1b)). Similarly, Article 3.2 separates between the “increase in dumped imports” and the “effect of the dumped imports on prices.” On its part, Article 3.4 merely concentrates on the effects of the dumped imports as it outlines the fifteen injury factors that should be examined in this regard. Thus, the cumulative assessment authorised by Article 3.3 must indeed refer to the cumulative assessment of these fifteen injury factors, which should give a complete



picture of the injury caused by the dumped imports. On the other hand, a cumulative assessment of the volumes of the dumped imports would serve no purpose in this respect.

Moreover it also follows, in view of the wording of Article 3.2, that the preliminary injury indicators of “significant increase in dumped imports” and/or “significant price effect” must be present in order to justify a cumulative assessment of the effects of these dumped imports. Thus, only where injury seems to have been caused (i.e. satisfying the preliminary conditions of Article 3.2) the concrete scope of the injurious effects, as defined in Article 3.4 and their causal link to those effects, as measured under Article 3.5 may be cumulatively assessed, subject to the conditions of Article 3.3.

**108. With reference to paragraph 341 of the EC first written submission, would a breach of Article 6.2 AD be possible where no breach of Articles 3.2 or 3.3 AD was found?**

This may be the case if the investigating authority did not disclose material information under Articles 3.2 and 3.3 during the normal course of the proceeding, for example not until a dispute settlement proceeding. This practice may preclude an interested party from having the full opportunity to defend its interests, in violation of Article 6.2.

#### **ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"**

*To the EC:*

**109. Is the European Communities arguing that its evaluation of "growth" is implicitly apparent in the final determination? If so, on what basis?**

*To Brazil:*

**110. Could Brazil comment on the EC statement in paragraph 356 of its first written submission that many of Brazil's claims "are based on a misapprehension of the structure of Article 3 as regards the respective roles of paragraphs 4 and 5? In particular, what is Brazil's view of the relationship between the factors enumerated and referred to in Article 3.4 and those enumerated and referred to in Article 3.5?**

Articles 3.4 and 3.5 have a different focus. Article 3.4 focuses on an evaluation of the state of the industry concerned. This means that an evaluation of “all relevant factors and indices having a bearing on the state of the industry” should provide a description, (a picture) based on positive evidence of the economic situation of the domestic industry. Only after this examination takes place might an investigating authority conclude that the domestic industry has suffered injury as defined in footnote 9 to Article 3. However, in case there is an affirmative determination of injury, the focus of the determination of causation under Article 3.5 is to demonstrate why the domestic industry has suffered injury, i.e. what caused the injury. However, Brazil does note the “combined” concepts of “factors affecting domestic prices”, “the magnitude of the margin of dumping” and “negative effects on cash flow” listed in Article 3.4. An examination of these factors not only relates to whether the domestic industry might be injured (“a static analysis”) but also to a more dynamic, causal-like examination, i.e. why the domestic industry might be injured. Finally, Brazil submits that the EC’s approach is hypocritical as it is normal for investigating authorities, like the EC, to explain why the domestic industry has suffered injury when examining the injury indicators.<sup>84</sup>

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<sup>84</sup> See, for example, recital 150 (“[t]he decrease of the production was particularly strong from 1995 to 1996 for two main reasons: firstly, a plant manufacturing malleable fittings in Germany had to be closed and, secondly, a contraction of consumption had taken place on the Community market”), recital 153 (“that the Community industry's sales decreased in a time period during which the market contracted, while the countries concerned were able to expand their sales volume”, recital 156 (“[t]he rise of the stock volume has been particularly strong as from 1996, in line with the increase of the Community industry's production and

**111. Comment on the EC arguments concerning the examination of potential *and* actual decline under Article 3.4 (see EC first written submission, paras. 362-363).**

Brazil disagrees with the EC and regrets the tone of the EC's approach. Firstly, although Article 3.4 does not prescribe any specific methodology for examination, the investigating authority is obliged to evaluate certain injury factors not only from "actual" but also from "potential" perspective. Secondly, in line with the Appellate Body's finding in '*United States – Hot Rolled Steel*' Brazil submits that Articles 3.1 and 3.4 require that *the investigating authorities* "must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it".<sup>85</sup> Consequently, the obligations in Article 3.4 lie on the investigating authorities, and not on the Brazilian exporter or, in the course of the dispute settlement, on Brazil to instruct the EC with regard to the methods and approaches it might choose to carry out the process of examination under Article 3.4. However, Brazil notes, for example, that the issue of "potential growth" may be related to planned and/or made R&D expenses and investments.

**112. Comment on the EC statement in paragraph 349 of its first written submission that has also fulfilled the Article 3.4 obligation with respect to "growth".**

Brazil recalls the Appellate Body's finding in '*United States – Hot Rolled Steel*' that "Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it" and that in every investigation "this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry".<sup>86</sup> Consequently, Brazil denies that the EC's alleged examination of growth, which is only implicitly (if at all) inferred from its consideration of the other injury factors examined under Article 3.4, can be considered as a well-reasoned and meaningful analysis of the said factor.

**113. How, if at all, does the alleged non-disclosure by the European Communities of data concerning export performance -- also allegedly leading to inconsistencies with Articles 12.2.2 and 6.2 AD -- constitute a "failure to evaluate" under Article 3.4?**

Brazil submits that the said non-disclosure does not *per se* constitute a breach of Article 3.4, but the EC's non-examination does.

*To the EC:*

**114. Indicate in the record of the investigation the sources of information and the methodology on which the statements and information in Exhibit EC-12 are based. In particular:**

- How was the statement in Exhibit EC-12 on "ability to raise capital" derived from the information given in "questionnaires and annual accounts"?
- How was the statement in Exhibit EC-12 on "wages" derived from the information given in "annual accounts"? Explain the meaning of "allocation on the basis of turn over"?
- How was the statement in Exhibit EC-12 on "productivity" derived from the information given in "questionnaires"?

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decreasing sales volume") and recital 157 ("the year 1995 and the negative profitability level found on average for the Community industry reflect costs associated with the plant closure which occurred in 1995") of the Provisional Regulation (BRL-12).

<sup>85</sup> '*United States – Hot-Rolled Steel AB Report*', para 197.

<sup>86</sup> *Ibid*, para 197.

- How was the statement in Exhibit EC-12 on "return on investments" derived from the information given in "questionnaires and annual accounts"?
- How was the statement in Exhibit EC-12 on "cash flow" derived from the information given in "questionnaires and annual accounts"?
- How and on what basis was the statement in Exhibit EC-12 on "magnitude of margin of dumping" derived?

**115. We note the questionnaire to domestic producers (Exhibit BRL-37 ff.) requests information in section D2 concerning quantities and values of purchases/ imports of the product concerned. Does this pertain only to the product originating in the countries listed on the first page of the questionnaire, or to all imports of the product concerned from all sources?**

**116. Does each questionnaire response by the domestic industry provide information on each of the factors identified in the questionnaire? Provide a detailed response with reference to the relevant provisions of the record of the investigation.**

*To both parties:*

**117. Would a breach of Article 3.4 AD necessarily also lead to a breach of Article VI of the GATT 1994?**

Yes. Article VI of the GATT 1994 condemns dumping and authorises Members to apply duties only *if* "it [dumping] causes or threatens material injury... or materially retards the establishment of a domestic industry". With regard to the AD Agreement, Article 1 provides that "an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement". The substantive elements of the examination of the impact of the dumped imports on the domestic industry are provided in Article 3.4. Given that Article VI of the GATT 1994 does not condemn dumping as such but only injurious dumping, Brazil submits that defected injury determination under Article 3.4 of the AD Agreement infringes also Article VI, *i.e.* the measures imposed would be based on circumstances other than provided for in Article VI of the GATT.

**118. Does Brazil's allegation concerning cumulation and injury on page 205 of its first written submission relate to the obligations under Article 3.4 or 3.5? Substantiate your response.**

Article 3.3 provides an essential substantive requirement governing the cumulative assessment of the effects of the dumped imports. Brazil submits that a breach of Article 3.3 is irreparable and, thus, both the subsequent determinations of injury under Article 3.4 and causation under Article 3.5 would inevitably be defective. In other words, the requirements of Article 3.3 could not be "cured" through the subsequent determinations. Moreover, any anti-dumping duty imposed on the basis of an investigation not conducted in accordance with the provisions of the AD Agreement would also infringe Article 1 of the AD Agreement and the measures imposed would be based on circumstances other than those provided for in Article VI of the GATT.

**119. Could information requested by the European Communities in the questionnaires to domestic producers relating to the "effect of continued imports" support an investigating authority's evaluation of the magnitude of the margin of dumping within the meaning of Article 3.4 AD ? Did it in this case?**

No. Brazil denies any interrelation between these concepts. The concept of "the margin of dumping" relates, in general, to exporters' quantified price differentiation between domestic and export markets. Thus, "the magnitude of the margin of dumping" relates to the size ('magnitude') of

that price difference. However, the margin of dumping (or the size of that margin) is in *no* way indicative of foreign suppliers' competitive position in the market of the *importing* Member. For example, irrespective of the dumping margin or its magnitude, an actual price level applied by an exporter on the importing market may be higher than that of the domestic industry. Thus, the domestic producers' forward looking guess relating to the "effect of continued imports" (on the *importing* Member's market) could not form a positive basis for the investigating authority's evaluation of the issue of the magnitude of the dumping margin.

**120. How can the Panel verify whether and to what extent the European Communities investigating authorities examined the issue of outsourcing and ownership links of the domestic industry with producers located in countries not subject to the investigation? Please indicate the relevant parts of the record of the investigation.**

Brazil cannot see how it would be possible to prove the negative. What counts is the record of the investigation, which in this case does not give any detail of such an examination, if any.

Brazil recalls that the Brazilian exporter had repeatedly requested the EC to take account of the ownership of the sole Bulgarian fittings producer Berg Montana by Accesorios Tuberia SA (Atusa). Moreover, Brazil further recalls that the Brazilian exporter had also provided information regarding the two other Applicants, namely R.Woeste Co GmbH&Co and Georg Fischer Fittings GmbH, and their relations with Egyptian and Turkish producers respectively.<sup>87</sup> Given that the EC did not elaborate on the examination it claims it had undertaken, other than admitting rather flatly that it could not find anything except that "one Community producer did import the product concerned from one third country"<sup>88</sup>, Brazil is obviously unable to comment on the factual basis of that seemingly hollow statement.

Nonetheless, Brazil submits that the EC's statement does not seem to reflect any real effort by the EC genuinely to examine the concrete information provided to it by the Brazilian exporter and by others.<sup>89</sup> In any event, bearing in mind the concrete and detailed nature of the information that the Brazilian exporter made available to the EC throughout the original investigation, as well as the information supporting the Brazilian exporter's claims which was made available to the EC by other interested parties<sup>90</sup>, Brazil cannot help but infer from this and from the EC's blank assertion that it could find "no evidence to support Brazil's allegations"<sup>91</sup> that the EC's examination, was clearly fundamentally insufficient and inadequate. Moreover, Brazil submits that its Exhibits 47 to 52 support its conviction that the EC failed to properly investigate the Brazilian exporter's repeated submissions. Brazil is of the view that in the present context, it is incumbent on the EC to demonstrate and to convince the Panel, and Brazil, that its authorities had in fact properly examined these submissions. However, nothing on the record of these proceedings, other than the EC's mere unsubstantiated assertions, can show that the EC conducted itself, in this instance, as any responsible authority would have been expected to have conducted itself.

**121. Indicate the relevant parts of the record of the investigation dealing with sales outside the European Communities.**

Brazil recalls that the Brazilian exporter had raised the issue of export performance as a factor contributing to the EC producers' increased stocks.<sup>92</sup> However, the EC responded to this submission

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<sup>87</sup> See the First Submission of Tupy (BRL-5), page 9; the Second Submission of Tupy (BRL-9), page 2; the Third Submission of Tupy (BRL-10), pages 10-11; and the Fourth Submission of Tupy (BRL-13), para 14.

<sup>88</sup> See recitals 127 and 174 of the Provisional Regulation (BRL-11).

<sup>89</sup> See also answers to questions 145 to 147 below.

<sup>90</sup> As also admitted by the EC in recital 174 of the Provisional Regulation.

<sup>91</sup> ECFS, para 18.

<sup>92</sup> See the Fifth Submission of Tupy, BRL-17, para 3.8.2.

only indirectly in the Transparency Letter by stating that "it cannot be concluded that the decrease in sales outside the Community significantly contributed to the increase of the stock level".<sup>93</sup>

**ISSUE 17: "INAPPROPRIATE ESTABLISHMENT OF CAUSATION"**

*To Brazil:*

**122. Could Brazil comment on the EC statement in paragraph 433 of its first written submission that: "The reasons why Tupy is able to charge such prices ... have no significance in a dumping investigation"?**

Brazil disagrees with this statement. Indeed, an anti-dumping analysis focuses on the extent to which dumping causes injury to the competing domestic industry in the importing market. As regards the injury determination, the underlying conditions in the exporter's domestic market are *not* considered. However, the non-attribution obligation in Article 3.5 requires the investigating authority to examine any known factors other than the dumped imports causing injury at the same time to the domestic industry. In this case the EC calculated the following margins for the Brazilian exporter: dumping 34.80 per cent, undercutting 39.78 per cent and underselling 82.06 per cent.<sup>94</sup> Given that the quantified injury was *higher* than the dumping margin, the EC *knew* that the injury suffered by the EC industry was also caused by factors other than the dumped imports. In essence, even after neutralising the dumping margin of 34.8 per cent, the Brazilian exporter was still able to charge prices lower by 4.98 per cent than the EC industry and make a profit. In other words, the Brazilian producer was more competitive (cost effective) than the EC industry. Therefore, Tupy's competitive advantage over the EC industry did have an important significance in the investigation, which the EC failed to recognise. Moreover, by failing to separate and distinguish the injurious effects of this known factor (i.e. the injury caused to the EC industry by the Brazilian exporter's relative competitiveness) the EC infringed its non-attribution obligation under Article 3.5.

**123. How, if at all, does the alleged non-disclosure by the European Communities of data concerning export performance -- also allegedly leading to inconsistencies with Articles 12.2.2 and 6.2 AD -- constitute a breach of Article 3.5?**

Brazil submits that the said non-disclosure does not *per se* constitute a breach of Article 3.5, but the EC's non-examination does.

**124. Differentiate between the references to the different cost of production between "white heart" and "black heart" fittings in points b) and h) of your analysis under Article 3.5 in your first written submission.**

The margin analysis under point **b)** relates to the relative competitiveness (cost efficiency) of the Brazilian exporter over the EC producers. In particular, it refers to the fact that out of the injury suffered by the EC producers, as quantified by the EC, the figure of 4.98 percentage points (an injury margin of 39.78 per cent *minus* a dumping margin of 34.8 per cent = 4.98 per cent) is the quantified injury caused by factors other than the dumped imports.

The analysis under point **h)**, on the other hand, relates directly to the cost difference between the Brazilian exporter and the EC industry. As a part of its injury quantification, the EC calculated the *target price* as that at which the EC industry is able to cover its full costs and make a profit of 7 per cent. By comparing the Brazilian exporter's price with the target price, the EC found a difference of 82.06 per cent. Consequently, the EC industry's break-even point (*i.e.* the point where price

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<sup>93</sup> See the Transparency Letter, BRL-18.

<sup>94</sup> See the Disclosure Preceding the Provisional Regulation, Annex III (BRL-11) and the Disclosure Preceding the Definitive Regulation, Annex III (BRL-16).

equates to costs) is 75.06 per cent (82.06 per cent-7.0 per cent). Given that the Brazilian exporters' sales in the EC were not made at a loss, the cost difference between the Brazilian exporter and the EC industry was at least 75.06 per cent.

**125. Could Brazil indicate the relevant portions of the record of the investigation where it raised -- in the context of causation -- each factor it now refers to in relation to Issue 17.**

Brazil's arguments focus on seven other factors known by the EC:

- (i) margin analysis (the EC producers' competitive disadvantage) - *the First Submission of Tupy (BRL-5), para 2.1.7; the Third Submission of Tupy (BRL-10), para 4.5; the Fourth Submission of Tupy (BRL-13), para 6 and 7;*
- (ii) poor export performance (*the Fifth Submission of Tupy (BRL-17), para 3.8.3;*
- (iii) imports from the countries not subject to this investigation (*the First Submission of Tupy (BRL-5), page 20; the Third Submission of Tupy (BRL-10), para 2.5; the Fourth Submission of Tupy (BRL-13), pages 23-25; the Fifth Submission of Tupy (BRL-17), pages 15-16;*
- (iv) outsourcing (*the First Submission of Tupy (BRL-5), page 9; the Second Submission of Tupy (BRL-9), page 2; the Third Submission of Tupy (BRL-10), pages 10-11; the Fourth Submission of Tupy (BRL-13), para 14;*
- (v) rationalisation efforts (*the Fourth Submission of Tupy (BRL-13), para 30; the Fifth Submission of Tupy (BRL-17), page 14;*
- (vi) substitution of the product concerned (*the First Submission of Tupy (BRL-5), pages 19-20; the Third Submission of Tupy (BRL-10), page 8; the Fourth Submission of Tupy (BRL-13), pages 26-27;* and
- (vii) the difference in the cost of production and the market perception between the two variants of the product concerned (*the First Submission of Tupy (BRL-5), para 2.1.7; the Third Submission of Tupy (BRL-10), para 4.5; the Fourth Submission of Tupy (BRL-13), para 6.*

*To both parties:*

**126. What relevant material may guide a panel's consideration concerning the issue of "attribution" under Article 3.5 AD?**

Firstly, Brazil recalls the Appellate Body's findings in '*United States – Hot Rolled Steel*' where it stated that the non-attribution language in Article 3.5 requires an investigating authority appropriately to assess the injurious effects of the other injurious factors than the dumped imports. The said "appropriate assessment" must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports as in the absence of such separation and distinction the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing injury justifying the imposition of anti-dumping duties.<sup>95</sup> In the same appeal the Appellate Body also specified that Article 3.5 requires an identification of "the nature and extent of the injurious effects of the other known factors" as well as "a satisfactory explanation of the

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<sup>95</sup> '*United States – Hot Rolled Steel AB Report*', paras 222 and 223.

nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports”.<sup>96</sup>

Brazil recalls also that the Appellate Body instructed that “adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *AD Agreement*”.<sup>97</sup>

Consequently, the Panel might be inspired by the Appellate Body’s findings in *United States - Lamb Safeguards* where it clarified that “the effects of the increased imports, as separated and distinguished from the effects of other factors, must be examined to determine whether the effects of those imports establish a ‘genuine and substantial relationship of cause and effect’ between the increased imports and serious injury” and that an investigating authority “assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports”.<sup>98</sup> Brazil also recalls the Appellate Body’s findings in *United States - Line Pipes* where it specified that the investigating authority must “establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased [dumped] imports is not attributed to increased [dumped] imports” and that “[t]his explanation must be clear and unambiguous”, it “must not merely imply or suggest an explanation” and that it “must be a straightforward explanation in express terms”.<sup>99</sup>

**127. What type of economic analysis would an investigating authority actually need to perform to "separate" and "distinguish" between each distinct causal factor?**

Brazil submits that all of the particular methodologies applied by the investigating authorities, which operate against the basic principles of good faith and fairness, are in violation of Article 3.1 (an “objective examination”) and, thus, also in breach of Article 3.5. With regard to economic analysis, the obligation in Article 3.1 is that the causality determination must be based on “positive evidence” and involve an “objective examination”. Given the strict non-attribution obligation under Article 3.5, (i.e. the requirements to “separate” and “distinguish” in order to establish a ‘genuine and substantial relationship of cause and effect’), Brazil submits that the non-attribution should, as far as possible, be based on quantifiable methods.

**128. If a product is "dumped" does the reason for that dumping (e.g. a possible comparative advantage) matter?**

No. However, as stated in answer to question 122, Brazil submits that the Brazilian exporter’s relative competitiveness over the EC producers was a factor *other* than the dumped imports causing injury to the EC industry and known by the EC. By failing to separate and distinguish the injurious effects of this known “other” factor, the EC infringed its non-attribution obligation under Article 3.5.

**129. How, if at all, do the standards of "significant contribution" (e.g. Definitive Regulation, para. 113) and "not such to have broken the causal link" (e.g. Definitive Regulation, para. 111) relate to a genuine and substantial relationship of cause and effect?**

The EC’s standards are not related to “a genuine and substantial relationship of cause and effect”.

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<sup>96</sup> *Ibid*, para 227.

<sup>97</sup> *Ibid*, para 230.

<sup>98</sup> *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, paras 168 and 179.

<sup>99</sup> *United States - Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea*, WT/DS202/AB/R, para 217.

Brazil observes the EC's recognition that the other factors, like decline in consumption and exports, the EC producers' own imports, imports from the other third countries and substitution, were having injurious effects on the EC industry.<sup>100</sup> Brazil names this approach as the test of "significant contribution".

However, it is not apparent from the EC's analysis how, if at all, it separated and distinguished the injurious effects of these other factors from the injurious effects of the dumped imports. Moreover, the EC's "significant contribution" test provides no insight into the nature and extent of the injury caused by these other known factors. Brazil contests that the EC's characterisations do not establish any clear, unambiguous and straightforward explanation. Instead, Brazil submits that the EC, by just stating that there was "no significant contribution", effectively assumed that those factors did not cause the injury attributed to the dumped imports, which assumption is not consistent with Article 3.5.

**130. What does it mean for a factor to be "known" in the sense of Article 3.5 AD? Comment on the phrase "all relevant evidence before the authorities" in the sense of Article 3.5 AD.**

In view of the Panel's findings in *Thailand – H-Beams*, Brazil submits that known factors other than dumped imports in Article 3.5 include not only factors raised before the investigating authority but also other factors of which the investigating authority was aware.<sup>101</sup> Consequently the phrase "all relevant evidence before the authorities" refers to the totality of such evidence, namely all of the known factors that are simultaneously causing injury to the domestic industry.

**131. The European Communities has relied on information that differs from Eurostat data. How could an interested party verify the accuracy of the information relied on? Comment, with reference to paras. 434-446 and 447-464 of the EC's first written submission.**

Brazil submits that, in general an interested party is not able to verify the correctness of the data used by the investigating authority if an administrative system such as that applied by the EC is used. The EC's confidentiality system precludes interested parties from having access to factual information classified as confidential, affecting the fundamental rules of due process. In particular, Brazil notes that, for example, the apparent consumption as well as the import volumes and values from countries other than those under the investigation were based on the EC's official import statistics (Eurostat). However, it is still unclear to what extent and why for example, the information about export volume provided by the EC producers in their questionnaire responses, as verified by the EC, should have deviated from Eurostat. Moreover, as the export data has now been provided, Brazil submits that even a conservative estimate of consistency of the data used by the EC (*i.e.* a stock reconciliation) demonstrates that it was manifestly inaccurate. Furthermore, Brazil is of the view that

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<sup>100</sup> The EC concluded that the decline in *consumption* "is not such as to have contributed in any significant way to the material injury suffered by the Community industry"; see recital 176 of the Provisional Regulation (BRL-12). Similar statements are also found regarding the EC producers *export performance* ("it cannot be concluded that the decrease of the sales outside the Community significantly contributed to the increase of the stock levels"; see the Transparency Letter, BRL-18) and *own imports of the product concerned* ("one Community producer did import the product concerned from one third country" and "no significant influence on the situation of that Community producer could have resulted from these imports"; see recital 174 of the Provisional Regulation, BRL-12), *imports from the countries not subject to the investigation* ("even if imports from other third countries may have contributed to the material injury suffered by the Community industry, it is hereby confirmed that they are not such to have broken the causal link between the dumping and the injury found", see recital 111 of the Definitive Regulation, BRL-19) and *substitution* ("any substitution effect cannot have significantly contributed to the injury suffered by the Community industry", see recital 113 of the Definitive Regulation, BRL-19.). In general, the EC concludes that the factors other than the dumped imports were ""not such to have broken the causal link" (see recital 177 of the Provisional Regulation, BRL-12).

<sup>101</sup> See *Thailand – H-Beams*, para 7.273.



the EC authorities' reliance on data (e.g. the EC producers' export performance), which the Brazilian exporter could not see and verify, constituted a serious violation of the exporter's basic right to defend its interests, such as that covered by the first sentence of Article 6.2, Article 6.4 and Article 12, in particular Article 12.2 of the AD Agreement. Although the EC has now provided information regarding the EC industry's export figures<sup>102</sup>, this can in no way compensate for the EC's failure to provide such information at the time of the investigation.

**ISSUE 18: "NO TIMELY OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION"**

*To Brazil:*

**132. Regarding Brazil's claim of not being given timely opportunities to see the information on currency conversions used in the Provisional Regulation, does Brazil consider that it is making a claim concerning the provisional measure applied by the European Communities?**

Although the information on currency conversions used by the EC relates to both the Provisional and the Definitive Regulation, Brazil's claim concerns the EC's definitive measures only.

**133. On page 235 of its first submission, Brazil refers to certain currency conversion tables provided by the European Communities in the Transparency Letter. However, the copy of the Transparency Letter that has been provided to the Panel (Exhibit BRL-18) contains no such table. Is Brazil's reference to this document correct?**

Brazil apologises: the correct reference to the currency conversion table is Exhibit BRL-16

**134. On page 238, Brazil states that "the exchange rate tables disclosed by the EC are not providing a conversion rate for the precise date. Moreover, the currency conversion rates used by the EC insofar as they concerned conversions on certain pertinent dates as disclosed to Tupy did not enable Tupy to determine the methodology applied by the EC as on those dates no currency conversion rates were stated". Could Brazil clarify which tables and which precise dates it is referring to in its statement?**

The EC disclosed to the Brazilian exporter export sales included in the dumping calculations.<sup>103</sup> The EC also stated that it had used daily rates for the definitive calculations<sup>104</sup>, these rates provided by the Brazilian exporter during the on-spot verification.<sup>105</sup>

The reference to 'tables' is to the EC's Table "Export sales included in the dumping calculations".<sup>106</sup> These figures come from the Brazilian exporter's Tables "the Brazilian exporter's sales to the EC to independent customers" named "ECSALUR"<sup>107</sup> and "the Brazilian exporter's allowances on sales to the EC to independent customers" named "ECALLUR".<sup>108</sup> For the example

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<sup>102</sup> ECFS para 440.

<sup>103</sup> See the Disclosure Preceding the Definitive Regulation (BRL-16), the company specific findings concerning dumping (Annex II), sub-annex 1).

<sup>104</sup> See the Definitive Regulation (BRL-19), recital 52.

<sup>105</sup> See the Transparency Letter (BRL-18), page 4; with regard to the daily rates see the Disclosure Preceding the Definitive Regulation (BRL-16).

<sup>106</sup> See the Disclosure Preceding the Provisional Regulation; Annex II, sub-annex 5 (BRL-11), page 1 of 400, 1<sup>st</sup> transaction from above; it is to be noted that the figures regarding allowances granted by the EC are the same also in the Disclosure Preceding the Definitive Regulation (BRL-16).

<sup>107</sup> See Tupy's Questionnaire Response (BRL-4), Table H.3.1; page number as indicated 1, 1<sup>st</sup> transaction from above.

<sup>108</sup> See Tupy's Questionnaire Response (BRL-4); page number as indicated 1, 1<sup>st</sup> transaction from above.

provided in the First Submission of Brazil the date of invoice was 9 April 1998. Finally, the exchange rates allegedly used by the EC are enclosed in the Disclosure Preceding the Definitive Regulation.<sup>109</sup>

Brazil notes that the full paper versions of the EC's Table "Export sales included in the dumping calculations" and the Brazilian exporter's Tables "ECSALUR" and "ECALLUR" are part of the records (in electronic format) of the case. It is to be noted that the EC's inconsistent methodology is not related to specific dates or transactions because it is horizontal in nature and covers all of the allowances granted by the EC to the Brazilian exporter. As a practical solution, Brazil provides three examples, which are related to transactions reflected in Brazil's Exhibits<sup>110</sup>.

**135. Could Brazil comment on the statements in para. 510 of the EC first written submission. Was the table of daily exchange rates provided by Tupy during the verification? Does Brazil believe that the information provided by Tupy in the currency exchange rate tables was used by the investigating authorities in their currency conversions? If this information was the same that was provided by Tupy, should that information have been disclosed to Tupy under Article 6.4? What other information regarding currency conversions does Brazil believe should have been disclosed under Article 6.4?**

Yes, the table of daily exchange rates was used by the Brazilian exporter and was provided to the EC during the on-spot verification. As the EC calculated the dumping margin in the exporting country's currency, Brazil believes that the EC's conversion of each transaction's turnover into Brazilian Real was based on the currency exchange rate tables. However, Brazil submits that the conversion of currencies with regard to allowances was not based on the said tables. Consequently, this information was only partially the same as provided by the Brazilian exporter to the EC. The missing part should have been disclosed to the Brazilian exporter under Article 6.4.

*To both parties :*

**136. How, if at all, might Article 17.4 AD be relevant here? Provide reasoning.**

Given that the specific measure at issue in this dispute is the *definitive* anti-dumping measures imposed and applied by the EC, Article 17.4, second sentence, is not relevant.

#### **ISSUE 19: "NO PROPER INFORMATION ON MATTERS OF FACT AND LAW"**

*To Brazil:*

**137. Does Brazil agree that the information it asserts should have been published under Article 12.2 and 12.2.2 regarding Issues 3 and 9 is information regarded as confidential to Tupy?**

Brazil submits that if the information was confidential, a non-confidential summary should have been published, and if it is not confidential, it should have been published.

*To both parties:*

**138. What is the relationship between the substantive provisions regarding the determination on dumping, injury and causation (Articles 2 and 3) and the transparency obligations under Article 12? Would a violation of the substantive provisions automatically constitute a violation of the Article 12?**

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<sup>109</sup> See the Disclosure Preceding the Provisional Regulation (BRL-16).

<sup>110</sup> See BRL-53

Brazil contends that the substantive provisions, regarding the determination of dumping, injury and causation, and the more procedural ones, concerning the transparency obligation in Article 12 of the AD Agreement, are independent provisions. This means that there can be a violation of Article 12 without any infringement of a substantive provision. Similarly, a violation of the substantive provisions does not automatically constitute a violation of Article 12. On the contrary, a violation of a substantive provision would render recourse to Article 12 pointless. Indeed, as the Panel in the *EC – Bed Linen* report puts it: ‘a notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless’.<sup>111</sup>

**139. What is the scope of Article 12.2 and 12.2.2? Do these provisions cover only the public notices preliminary and final determinations, or do they also cover other documents in the investigation, i.e. disclosure documents and transparency letters? Can the disclosure documents and transparency letters be considered as a "separate report" under Article 12.2 and 12.2.2?**

Brazil is of the view that Articles 12.2 and 12.2.2 of the AD Agreement only cover the public notices of preliminary and final determinations. However, it is conceivable that these public notices refer to other documents in the investigation that can be considered ‘separate reports’ within the meaning of Article 12. Nevertheless, footnote 23 is clear on a document that can be described as a ‘separate report’. A separate report has to be ‘readily available to the public’. Both disclosure documents and transparency letters are documents submitted to parties only. They are not available to the public. In conclusion, disclosure documents and transparency letters cannot be considered ‘separate reports’.

**140. Do the parties believe that clerical errors in the public notices of preliminary or final determinations may constitute grounds for a violation of Article 12.2 and 12.2.2?**

Generally, Brazil does not believe that clerical errors in themselves constitute adequate grounds for a violation of Articles 12.2 and 12.2.2 of the AD Agreement. However, where such errors prevent interested parties from properly being able to defend their rights, a violation of Articles 12.2 and/or 12.2.2 should be recognised.

**141. What is the relationship between Articles 12.2 and 12.2.2 and the provisions concerning the protection of confidential information in Article 6.5?**

According to Article 6.5 of the AD Agreement, confidential information ‘shall not be disclosed without permission of the party submitting it’. Considering that Article 6 applies to evidence submitted throughout the whole investigation process, Brazil considers that Article 6 also applies to information used by the investigating authorities to reach a provisional or final determination. Consequently, when issuing a public notice of final determination or making a separate report available to the public under Article 12.2 of the AD Agreement, investigating authorities have to respect requests for confidentiality made by the defending party in conformity with Article 6.5 of the AD Agreement. This is confirmed by the *Argentina – Floor Tiles* report in which the Panel stated: ‘the transparency requirement which obligates the authority to explain its determination in a public notice is subject to the need to have regard to the requirement for the protection of confidential information of Article 6.5 of the AD Agreement. Confidentiality of the information submitted therefore limits the manner in which the authority explains its decision and supports its determination in a public notice’.<sup>112</sup>

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<sup>111</sup> See *EC – Bed Linen*, para 6.259.

<sup>112</sup> *Argentina – Tiles*, para 6.36.

**142. What criteria may be relevant in deciding which issues of fact and law can be considered “material by the investigating authorities” under Article 12.2?**

Brazil believes that, in order to determine the criteria relevant in deciding which issues of fact and law can be considered ‘material’, the dictionary definition should serve as a starting point. ‘Material’ is defined by the Concise Oxford Dictionary as ‘important, essential, relevant’. Consequently, ‘material’ issues are, at the very least, issues important for the other party and for the public to understand how the investigating authorities made the preliminary or final determination.

**OTHER**

*To the EC:*

**143. Could the EC clarify the meaning of the Article 11.3 of the EC Basic Regulation on whether the exporter has the right to have a review or has the right to request a review?**

**144. Can the EC confirm that if Tupy has requested a review within the year following the imposition of the anti-dumping duties the Commission would have exercised discretion on the granting of such a request? Also, if the request had been made after the year following the imposition of the anti-dumping duty would the Commission have automatically granted the request?**

*To Brazil:*

**145. Could Brazil comment on whether the Panel would be creating a “precedent” by admitting Exhibits BRL-47-52 containing information that the EC alleges was not in the record of the underlying AD investigation?**

Brazil understands this question in the context of Article 17.5(ii) of the AD Agreement, which requires a panel to examine the matter before it upon “the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member”. Brazil comments that the Panel would certainly not be creating a “precedent” by admitting Exhibits BRL-47 to 52. Brazil observes that although these Exhibits have not been presented as such to the EC at the time of the anti-dumping investigation (Brazil does not even know whether such Internet information was available in that form at all at the time), nonetheless, the facts contained in these Exhibits have clearly been made available by the Brazilian exporter and by others, on several occasions, to the EC during the investigation.

Brazil recalls the *Bed linen Panel Report* and the confirmation made there whereby “the form of the document ... does not preclude [the Panel] from considering its substance, which comprises facts made available to the investigating authority during the investigation.”<sup>113</sup>

Brazil observes that it is not asking the Panel to conduct a *de novo* review of the EC’s own investigation. Rather, the primary purpose of the new Exhibits in this respect is to support Brazil’s request that the Panel assesses whether the EC has properly examined all the relevant facts which the EC had before it at the time of the anti-dumping investigation, and whether the EC had provided an adequate explanation as to how the facts as a whole support the determination it had made. It would then be for the Panel to further establish whether that determination was consistent with the obligations on the EC<sup>114</sup>, primarily those which result from Article VI of the GATT 1994 and the AD Agreement (Brazil refers in particular to the EC’s obligations under Articles 3.1, 3.4 and 3.5).

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<sup>113</sup> See ‘EC – Bed Linen’, para 6.43.

<sup>114</sup> In line with *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R of 8 November 1996, para.7.

Brazil confirms that this Panel is not requested to consider the new Exhibits for any purpose other than in order to determine whether, on the basis of the facts made available to it during the investigation, the EC has properly discharged its obligations under the above-mentioned provisions of the GATT 1994 and the AD Agreement. How can the Panel properly assess whether the facts made available to (and ignored by) the EC at the time of the anti-dumping investigation were indeed correct and have truly reflected the description made by the Brazilian exporter without being able to see other sources of information regarding the same facts which prove (or disprove) it? Brazil notes that “the Panel’s function should be to assess objectively the review conducted by the national investigating authority...”<sup>115</sup> The Panel’s role is “to review the consistency of a determination by the national investigating authority imposing a restriction under the relevant provision of the relevant WTO legal instrument.”<sup>116</sup> The Panel should therefore allow Exhibits 47 to 52 to be considered in order to make that assessment.

**146. If the information in Brazil Exhibits BRL-47-52 had been before the investigating authority, would it have had the effect of altering the determination of the EC authorities?**

Brazil cannot see how the new Exhibits, which are mere Web Page printouts, would have altered the EC authorities’ relevant determinations, whereas the concrete evidence and other solid leads (i.e. the facts) which Tupy made available to the EC during the investigation<sup>117</sup> have not yielded such results. Brazil’s view in this regard is that the EC authorities were most probably uninterested in considering any kind of information, notwithstanding its source, nature or probative value, which could have made them change their predetermined position.

147. If Brazil is of the view that the information submitted by Tupy in the course of the investigation concerning outsourcing and links the EC industry may have with producers located in countries not subject to the investigation was “sufficient”, why does Brazil consider that it is necessary to submit Exhibits BRL-47-52 in these Panel proceedings?

Brazil recalls the answer it gave to the Panel’s question 145 above. Brazil notes that by presenting the new Exhibits it was not seeking to add any facts to that which the EC already had before it. The Panel is not requested to consider the new Exhibits for any purpose other than in order to inform itself of those facts provided to the EC in the course of the investigation. This should allow the Panel to determine whether, on the basis of the facts made available to the EC during the investigation, the EC had properly discharged its obligations under Article VI of the GATT 1994 and the AD Agreement, particularly under Articles 3.1, 3.4 and 3.5 so as to make its injury determination on the basis of “positive evidence” and following “an objective examination” of the relevant facts. Moreover, this should also allow the Panel to determine whether the EC’s establishment of the facts was proper and its evaluation of these facts was unbiased and objective as required by Article 17.6(i).

Brazil observes that the factual information contained in the new Exhibits confirm that the EC could have easily verified the factual information that Tupy (and others) made available to it at the time.<sup>118</sup> For example, how could the EC not find in the accounts of the EC producers concerned

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<sup>115</sup> See ‘US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Panel Report’, WT/DS184/R of 28 February 2001, para. 7.6 (unchanged by ‘US-Hot-Rolled Steel AB Report’, on the relation between Article 11 DSU and Article 17.6 AD see paras 50 to 62 in the Appellate Body Report).

<sup>116</sup> *Ibid.*

<sup>117</sup> For a description of and references to statements and documents made available by Tupy to the EC during the investigation see BFS, *inter alia*, under ‘d) Imports from other Third Countries’ and ‘e) Outsourcing’, at paras 765 to 801. Brazil recalls, for example, that these documents also included concrete evidence in the form of copies of official circular letters by which Atusa offered the product concerned for sale to customers in the EC while explicitly stating that it was produced by its own plant (Berg Montana) in Bulgaria (see these copies in Annex II and Annex III to Tupy’s Fourth Submission, BRL-13).

<sup>118</sup> See BFS para 68 and more generally also paras 61 to 67 and 69 to 71.

(Atusa, Woeste and Georg Fischer), which it was under a duty to verify in the investigation, any link to their investments in and/or preferred purchases from the foreign producers specifically named by Tupy? Why did the EC authorities not require these producers to answer the kind of questions put to the EC by the Brazilian exporter? Have the EC authorities for example, sought to obtain sworn statements from these EC producers to refute Tupy's contentions? Did the EC seek to obtain information from the Bulgarian authorities<sup>119</sup> on possible investments by Atusa in Bulgaria? Did the EC try to obtain information from its own Services dealing with investment promotion in Bulgaria (e.g. under the EU's 'Phare' programme) or in Egypt (e.g. under the EU's 'Meda' programme) regarding the investments by EC producers in the pipe-fittings sectors in these two non-EC countries?<sup>120</sup> Brazil recalls that none of these simple steps have been mentioned on the record before the Panel as steps taken by the EC.

**148. With respect to Issues 6, 7, 8 and 10, which adjustments were clearly requested by Tupy in its Questionnaire Response? Which adjustments were identified first by the EC investigating authorities? Indicate the relevant parts of the record of the investigation.**

With regard to export sales, the Brazilian exporter requested allowances for differences in transportation, insurance, handling, loading and ancillary costs; in the cost of any credit granted for the sales; in the direct costs of providing warranties and guarantees; and in commissions paid.<sup>121</sup> Regarding domestic sales it requested allowances for the differences in physical characteristics; in import charges or indirect taxes (i.e. the IPI Premium Credit); in the level of trade; in packaging costs; in the direct costs of providing warranties, guarantees, technical assistance and services (after-sales costs); in commissions paid; and other factors (promotion and advertising as well as financial costs for keeping stock).<sup>122</sup> Moreover, the Brazilian exporter, although not claiming a separate adjustment, identified in its Reply to the Deficiency Letter the issue of "PIS/COFINS of 5.37 per cent over input".<sup>123</sup>

*To both parties:*

**149. Are WTO dispute settlement consultations relevant in determining whether or not a claim falls within a panel's terms of reference? Why or why not? In general, is there any kind of verifiable record kept of WTO dispute settlement consultations? Is there any such record of the consultations in this dispute? Please cite any relevant material in responding.**

Brazil emphasises the importance of consultations as part of the WTO dispute settlement system under Article 4 of the DSU and believes that consultations are relevant in determining whether or not a claim falls within a panel's terms of reference. Brazil recalls the findings in '*Korea – Alcoholic Beverages*' where the Panel stated that "it would seriously hamper the dispute settlement process if the information acquired during the consultations could not subsequently be used by any party in the ensuing proceedings".<sup>124</sup>

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<sup>119</sup> For example, from the Bulgarian investment and/or privatisation agencies, from which websites the information in Exhibits BRL 49 and 50 was taken.

<sup>120</sup> It is worth noting that Exhibits 47 and 48 which provide that information for Bulgaria emanate from a semi-official Website (Bulgarian Economic Forum) with close links to the Phare Programme. Exhibit 52 which provides that information with regard to Egypt, states that the project is promoted by the 'Euro-Mediterranean Partnership,' which is sponsored by the EC and of which the EC is a party).

<sup>121</sup> See Tupy's Questionnaire Response (BRL-4), Section G-1.

<sup>122</sup> See Tupy's Questionnaire Response (BRL-4), Section G-2; see also the First Submission of Tupy (BRL-5), para 1.3.

<sup>123</sup> See Tupy's Reply to the Deficiency Letter (BRL-7).

<sup>124</sup> *Korea – Taxes on Alcoholic Beverages*, Panel Report, WT/DS75/R, WT/DS84/R, , '*Korea – Alcoholic Beverages*', para 10.23.

As stated by the Appellate Body in ‘*EC – Bananas*’<sup>125</sup>, the panel’s terms of reference are important for two reasons. Firstly, the terms of reference establish the jurisdiction of the panel. Secondly, they fulfil an important due process objective. It is precisely this second reason which enables Brazil to claim that consultations are relevant in the determination of the scope of the panel’s terms of reference. Brazil notes that what matters in this respect is that the defending party receives adequate notice of claims made by the complainant. This interpretation is also supported by the Appellate Body’s findings in *Korea – Dairy Safeguards* with regard to “attendant circumstances”.<sup>126</sup>

However, Brazil admits that, in general, there is indeed no formal requirement for an official record of dispute settlement consultations. There is no such record in the present dispute, although Brazil does have its own record of the consultation meeting with the EC in the present case and has offered to disclose it if the Panel deems necessary.

**150. In this case, was the information relating to the examination by the EC authorities of the issue of outsourcing and links the EC industry may have with producers located in countries not subject to the investigation “confidential” for the purposes of the EC investigation?**

No. Although contract terms and prices/quantities may have been deemed confidential, there is no reason why the links themselves should be characterised as such. Brazil wonders why such factual information, which was widely known in the market and also made available to the EC during the anti-dumping investigation could be viewed as “confidential”. In any event, Brazil notes that it is unaware of any non-confidential summary of that information which was made available to other parties in the original investigation or at any time thereafter.

**151. Assume that the complaining party points to information that it submitted in the investigation and that is on the record of the investigation. The complaining party alleges that it does not have access to any additional information on the issue, nor to any indication that the investigating authority examined this information or sought additional information. How can the complaining party (and the Panel) assess whether and to what extent the investigating authority examined the information?**

It is difficult for Brazil to assess whether and if so to what extent the investigating authority really examined the issue of outsourcing and the links EC producers have with producers in other countries. However, as Brazil stated during the first oral hearing, the EC files contained all the basic factual information on issues relating to outsourcing and those links which Tupy and other parties made available to the EC during the investigation. Moreover, Brazil managed to find extra information on the Internet very easily which also confirms that the EC could have had easy access to sources, including EC’s own sources and sources linked to the EC<sup>127</sup>, had the EC really wanted properly to examine the above-mentioned factual information which had been made available to it. In spite of this information, Brazil does not see anything in the records<sup>128</sup> that shows that the EC has made any meaningful inquiry concerning these issues.

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<sup>125</sup> *EC – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, para. 142.

<sup>126</sup> See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, paras 123-124.

<sup>127</sup> See Brazil’s answer to the Panel’s question 147 including footnotes 119, 120 and 120 there.

<sup>128</sup> Not even in a summarised form if the information is to be considered confidential.

## **ANNEX E-2**

### **REPLIES OF BRAZIL TO QUESTIONS OF THE EUROPEAN COMMUNITIES – FIRST MEETING**

#### **Issue 1**

**1. Could Brazil confirm whether EC officials raised the possibility of an undertaking during the meetings with Brazilian trade representatives described in paragraphs 38 and 39 of the EC's First Submission?**

The possibility of a price undertaking was raised in the course of a meeting between Mr Lamy and a Brazilian governmental delegation. However, Brazil observes that this case was a matter which the Brazilian side had put on the agenda for the meeting.

**2. In particular, could Brazil confirm that at the meeting of 23 March 2000 Commissioner Lamy indicated that the best solution would be a price undertaking?**

This possibility was never discussed in concrete terms. In particular, had the EC been ready to effectively examine the possibility of an undertaking, it would have addressed the Brazilian exporter directly. Indeed, Brazil is of the view that the obligation to 'explore the possibilities of constructive remedies' is an obligation relating to a conduct which should be directed towards exporters rather than towards WTO Members, especially with regard to price undertaking.

**3. What was the response of the Brazilian authorities to the suggestions regarding the possibility of an undertaking made by Commissioner Lamy and other EC officials during the above mentioned meetings?**

Brazil has no detailed reports of the conversations on this matter.

**4. Was Tupy interested in an undertaking? If so, why did Tupy not offer an undertaking?**

The EC would have known had it contacted Tupy on a possibility of a price undertaking.

Brazil refers to its answer to the Panel's question N° 8, where it submitted that Article 15 basically reverses the general order in Article 8 so that, where the exporting country is a developing country it is for the authorities in the importing country to take the initiative and approach the exporter. Brazil further recalls that in any event, Article 8.5 of the AD Agreement makes clear that "the fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case". Anyhow, Brazil recalls that the EC has never made such an invitation to Tupy.

#### **Issue 2<sup>1</sup>**

**5. Assume that on January 1999 the Real had depreciated vis-à-vis the Euro by 42 per cent,**

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<sup>1</sup> To avoid any doubt, Brazil assumes that the EC's questions 5 to 7 in fact relate to matters covered by **Issue 3** in Brazil's First Written Submission.



- (a) **would the EC authorities have been entitled to calculate Tupy's dumping margin on the basis of data for the portion of the period-of-investigation (POI) after the re-evaluation?**

Brazil notes the hypothetical nature of the EC's question and observes that such situations should be examined on a case-by-case basis in view of the prevailing facts and circumstances.

- (b) ***quid* if the re-evaluation had taken place after the end of the POI but before the imposition of measures? Could the EC have lowered the weighted average export price in Reals for the POI by 42 per cent in order to calculate Tupy's dumping margin?**

Brazil refers the EC to Brazil's answer to the previous question.

**6. How did the Brazilian anti-dumping authorities address the effects of the January 1999 devaluation in its own investigations? Specifically,**

- (a) **in the case of investigations where the POI included January 1999, were the effects of the dumped imports on the prices of the domestic industry assessed exclusively on the basis of data for the period after the devaluation?**
- (b) **in the case of ongoing investigations where the POI ended before January 1999, but the measures were imposed after that date, was the injury determination based on data not included in the POI?**
- (c) **have the Brazilian authorities reviewed ex officio all anti-dumping measures imposed prior to January 1999 in order to establish whether imports are still causing injury?**

With regard to all the EC's questions above, Brazil reminds the EC of the fundamental difference between the Brazilian law's approaches to reviews, as foreseen by Article 11 of the AD Agreement, and that of the EC's, which differs from that of Article 11. Unlike the position under the EC's Basic Regulation, the Brazilian rules do not impose any time limit to bar interested parties from requesting the authorities to initiate a review and to examine whether the continued imposition of the duty is necessary to offset dumping and/or whether the injury would be likely to continue or recur if the duty were removed or varied.

Unlike the EC, Brazil will always review the need for the continued imposition of the duty where warranted, i.e. where positive information substantiating the need for a review is being brought to the Brazilian authorities' attention. Whether such information is presented to the Brazilian authorities by an interested party or is otherwise made available, the Brazilian authorities will always initiate a review as long as it is warranted. Unlike the legal position in the EC, no other condition regarding timing or otherwise will be put by the Brazilian authorities to allow for such a review.

Finally, Brazil draws the EC's attention to the fact that no interested party has so far requested the Brazilian authorities to initiate a review on the ground of changed circumstances (Article 11.2 AD) in relation to the devaluation of the Brazilian currency.

**7. Is Tupy interested in a review? If so, why has Tupy not asked for a review?**

Brazil understands that Tupy would have indeed been very keen on having a review of the need for the continued imposition of the duty imposed by the EC, as a 'second-best' solution to its main argument against the duty as such, in line with the third alternative option that should have been used by the EC as stated in Brazil's First Submission under Issue 3.

In any event, however, Brazil understands that should a review been an option open to it under EC law, Brazil assumes that Tupy would have welcomed an EC review which would have looked into all the aspects of the original investigation, i.e. dumping, injury and causality. Brazil understands that, Tupy's position even during the EC investigation has been that the EC industry has suffered no injury at all and obviously not as a result of Tupy's imports.

With regard to the second part of the EC's question, Brazil respectfully refers the EC further to Brazil's Second Submission, where it reiterated that Tupy has not asked for a review as it was legally time-barred from doing that. Brazil recalls Article 11.3 of the EC's Basic Regulation, which does not give exporters the right to request a review unless "a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure".

### ANNEX E-3

## REPLIES OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL - FIRST MEETING

14 May 2002

**Issue 1: "No special regard to Brazil as a developing country", "no constructive remedies explored"**

#### Question 1

**With respect to Brazil's allegations under Article 15 AD, would the European Communities have conducted itself in the same manner in an anti-dumping investigation involving a developed country Member? Is this relevant here? If not, what is the meaning and legal significance of the phrase "special regard" in the first sentence of Article 15?**

1. As a general rule, the EC authorities would not act in the same manner in the application of anti-dumping measures involving a developed country Member. Indeed, no similar steps were taken in regard to Japan, the sole undeniably-developed country concerned by the same proceedings.

2. The Panel will be aware of the argument that the first sentence of Article 15 imposes no legal obligation on Members (see paragraph 31 of the EC's First Submission). The EC is of the view that, even if there was a legal obligation, it would be satisfied by complying with the obligation in the second sentence. Firstly, the period envisaged by the phrase '*before* applying anti-dumping duties' falls within that covered by the phrase 'when considering the application of anti-dumping duties'. Secondly, exploring possibilities of 'constructive remedies' is a way of giving 'special regard' to the special situation of developing country Members. Both these interpretations accord with the ordinary meaning of the terms of the Anti-Dumping Agreement. Nor is there anything in the context of these provisions, or of the Agreement's object and purpose (as far as that can be ascertained), to indicate any other meaning. The EC believes that this limited statement of the 'meaning and legal significance of the phrase "special regard"' is all that is required to decide the present case, and is reluctant to venture a more general definition.

#### Question 6

**What legal obligations does Article 15 AD impose? Could Brazil comment on the European Communities statement in paragraph 31 of its first written submission that "...the first sentence [of Article 15] imposes no legal obligation"? If there is more than one obligation in Article 15, what is the relationship, if any, between these obligations-- i.e. are they separate, independent obligations, or are they interrelated and dependent? Explain your response, with reference to the customary rules of interpretation of public international law and any relevant material.**

3. In its answer to Question 1 the EC has argued that in complying with the obligation in the second sentence of Article 15 a Member will also comply with any obligation that arises from the first. This interpretation was justified in accordance with the rules stated in the Vienna Convention.

Question 7

**Is our understanding correct that the European Communities found that the level of dumping margins were in all cases lower than the injury threshold and that the level of duty was thus set at the level of the dumping margins found? Comment, with reference to the obligation(s) in Article 15 AD and the relevant portions of the record.**

4. The EC applies the 'lesser duty' rule whereby anti-dumping duties are set at whichever is lower of the levels of the dumping margin and the injury margin.

5. Applying this principle, the duties that were imposed in the malleable fittings proceedings were set on the basis of the dumping margin in the case of all exporting countries except Japan.

Question 8

**Under Article 15 AD, is it for the Member imposing the measure to "propose" constructive remedies"? Provide the basis for your response. How, if at all, does this relate to the obligations in Article 8 (and any other provisions) of the AD Agreement? How, by whom and when should a price undertaking be sought/accepted for the purposes of Article 15 AD?**

6. The EC has examined the obligations in Article 15 at paragraph 34 of its First Submission. The second sentence of Article 15 says that 'Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties ...'. Brazil has said that this imposes an obligation to 'propose' constructive remedies. However, this word is not used in the Anti-Dumping Agreement, and the ordinary meanings of the terms 'propose' and 'explore the possibilities of' constructive remedies are certainly not identical. Whereas a proposal of an undertaking, for example, might amount to 'exploring the possibilities etc., one can envisage various ways in which a Member might do the latter without making a proposal. The panel in the *Bed Linen* case said that "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome', but that 'Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.'<sup>1</sup> emphasised the need for positive action, but never suggested that the Member must propose an undertaking or any other particular course of action.

7. Moreover, Article 8.2 of the Anti-Dumping Agreement speaks of undertakings being 'sought or accepted from exporters', which is language that envisages that proposals of undertakings are made by exporters rather than by importing Members. On the other hand, this provision also envisages that Members may *seek* undertakings. Article 8 places no obligation on them to do so, but to seek an undertaking would, in the ordinary meaning of the words, constitute a way of exploring the possibilities of constructive remedies. In the present case the EC on several occasions indicated that it saw an undertaking as the best outcome of the proceedings. Its actions can reasonably be described as seeking an undertaking.

Question 9

**Do the parties agree that the obligation(s) in Article 15 AD arise(s) only with reference to the imposition of definitive anti-dumping measures at the end of the investigative process? Refer to any relevant material in responding.**

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<sup>1</sup> Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India ("European Communities – Bedlinen"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.233.

8. The EC endorses the following views expressed by the panel in the *Bed Linen* case<sup>2</sup> on this issue:

6.231 In this regard, we note Article 1 of the AD Agreement, which provides that:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." (footnote omitted).

In our view, this implies that the phrase "before applying anti-dumping duties" in Article 15 means before the application of definitive anti-dumping measures. Looking at the whole of the AD Agreement, we consider that the term "provisional measures" is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Indeed, in our view, the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. We find no instance in the Agreement where the term "anti-dumping duties" is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, in our view, the ordinary meaning of the term "anti-dumping duties" in Article 15 is clear - it refers to the imposition of definitive anti-dumping measures at the end of the investigative process.

6.232 Consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it is certainly permitted, and may be in a foreign producer's or exporter's interest to offer or enter into an undertaking at this stage of the proceeding, we do not consider that Article 15 can be understood to **require** developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a "provisional" price undertaking could not be retroactively revised. We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required.

#### Question 10

**What do the parties understand to constitute "constructive remedies" within the meaning of Article 15 of the AD Agreement? Please refer to any relevant material.**

9. The *Bed Linen* panel came to the conclusion that 'constructive remedies' include price undertakings and reductions in duty levels<sup>3</sup> The EC agrees with that conclusion. The EC authorities complied with the requirements of Article 15 by exploring the possibilities of a price undertaking. In view of that, this Panel need not reach the issue of whether there may be other constructive remedies in addition to those identified by the *Bed Linen* panel

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid. paras. 6.228 and 6.229.

Question 11

**Is there an obligation under Article 15 AD to "communicate" to developing country Members that an investigating authority is exploring possibilities of constructive remedies?**

10. The EC sees no reason in theory why Article 15 requires that fact to be communicated to developing country Members. However, when the remedy being contemplated is an undertaking communicating the fact to the Member would be a highly practical means of exploring it.

Question 12

**What factors should guide a panel's consideration as to whether the imposition of anti-dumping measures would affect Brazil's "essential interests" within the meaning of Article 15 AD? Do the parties agree with the statement of the United States in its third party written submission (para. 14) that the term "essential" implies a very high standard for the level of national interest which the developing country must demonstrate would be affected by anti-dumping duties?**

11. An '*essential* interest' is one that is considerably more important than a mere 'interest'. The EC does not find that the notion of a 'high standard' adds significantly to the term 'essential' (except perhaps by emphasising where the burden of proof lies). It is unlikely that a country would have more than a handful of essential interests. The measurement of the importance of the interest would be primarily economic. The size of the industry relative to the whole economy of the country would be a major criterion. However, it is possible that a small industry might be essential if other industries depended upon it. In the present case, where the industry comprises a small part of a single large company, Brazil would have to show firstly that the company was an essential interest of the country, and secondly that the company's viability was put in doubt by the action against the part of its activities that comprised the industry.

12. Since Article 15 is an exception to the rules of the Anti-Dumping Agreement the onus lies on the developing Member concerned to prove that its invocation of the exception is justified.

Question 13

**We note the section on "Undertakings" in the Definitive Regulation does not refer to Tupy/Brazil. Comment.**

13. It is the practice of the EC to refer to undertakings in its anti-dumping regulations only in regard to those companies that have offered one (whether or not it has been accepted).

Question 15

**Could Brazil elaborate upon its assertion on p. 32 of its first written submission that:**

**"...the Application did not contain a description of the volume and value of production of the like product accounted for by the Applicants" and that "[t]he Applicants provided information in respect of which the volume and value of production of the like product accounted for by them only insofar as the same could be broadly and rather inaccurately deduced from figures provided in respect of total consumption, price undercutting calculations and the volume of imports as a whole entering the EC."**

**Could the European Communities comment on this argument as it currently stands?**

14. In so far as the EC understands Brazil's argument, the EC believes that an answer is given in its First Submission.<sup>4</sup>

**Issue 2: "Inappropriate application"**

Question 16

**Brazil states: "...the evidence provided by the Applicant did not comply with the requirements of Article 5.3" (Brazil's oral statement at the first Panel meeting, para. 31). Comment.**

15. In this part of its Oral Statement Brazil adopts the view (presented by the EC at paragraph 48 of its First Submission) that a failure of the applicant to meet the criteria of Article 5.2 can only be challenged by alleging a breach of Article 5.3 arising from a failure of a Member's authorities to properly check whether the criteria have been met. However, the basis for Brazil's claim remains the assertion that the criteria were not met. As the EC observed in paragraph 49 of its First Submission, even if this were true, it would not follow necessarily that the EC had infringed Article 5.3. In any event, the EC demonstrates in its First Submission that the criteria were met.

Question 17

**What is the relationship between: (i) Articles 5.2 and 5.3; (ii) Articles 5.2 and 5.8; (iii) Articles 5.2 and 6.2 -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.**

16. The EC has addressed the first issue in its answer to the previous question and in parts of its First Submission there referred to.

17. Article 5.8 refers to the existence of sufficient evidence. This phrase is also found in Article 5.3. This level of evidence it is to be distinguished from that defined in Article 5.2, which is to be presented by the Applicant. Consequently, there is no direct link between Article 5.2 and Article 5.8. In any event, as the EC explains in paragraph 46 of its First Submission, the notion of 'violation' should not be applied to Article 5.2 in the same way that it is applied to other provisions of the Anti-Dumping Agreement.

18. Assuming that the obligation in the first sentence of Article 6.2 is a general one rather than one limited to the subject matter of the rest of the paragraph,<sup>5</sup> its scope is nevertheless restricted to procedural rights associated with the notions of 'fair hearing' and 'due process'. Article 5.2 effectively confers certain rights on the domestic industry, which have consequent implications for the rights referred to in Article 6.2. How these rights would be enforced is problematic since other Members are unlikely to pursue them through the WTO dispute-settlement process. Fortunately, this issue is academic in the present context, when only the rights of exporters are relevant. Since at the initiation stage of proceedings exporters have no role, and even no right to know, of the investigation, there can be no scope for the application of Article 6.2 in their regard.

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<sup>4</sup> At paras. 51 and 58.

<sup>5</sup> One panel has taken this view: Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Portland Cement from Mexico* ("Guatemala – Cement II"), WT/DS156/R, adopted 17 November 2000, para. 8.162, and footnote 849.

Question 18

**What is the relationship between: (i) Articles 5.3 and 5.8; (ii) 5.3 and 6.2 -- -- would a violation of one necessarily constitute a violation of the other? Explain with reference to any relevant material.**

19. If the determination referred to in Article 5.3 results in the authorities concluding that there is insufficient evidence of either dumping or of injury to justify initiation this would also amount to their being 'satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case' in terms of Article 5.8. They should therefore reject the application. Consequently, if they initiated the investigation despite reaching such a negative conclusion they would not only be infringing Article 5.3 but would also be failing to reject the application as required by Article 5.8.

20. The position of Article 5.3 in regard to Article 6.2 is the same as that of Article 5.2 described in the previous answer.

**Issue 3: "No need to impose measures"**

Question 20

**According to Brazil, the first "explicit consideration" by the European Communities of the currency devaluation was on 20 July 2000 in the Disclosure Preceding the Definitive Regulation. Does the European Communities agree? Is this relevant? Why or why not?**

21. The first explicit reference by the EC authorities to the currency devaluation was in its letter of 30 May 2000,<sup>6</sup> which was as a reaction to Tupy's letter of 30 March 2000,<sup>7</sup> where Tupy referred for the first time during the proceeding to the devaluation. Tupy said that '*had the Commission considered this fundamental change, it would not have found a dumping margin*'. This imprecise argument was not supported by any evidence.

22. Tupy raised the same argument during the hearing of 29 May 2000.<sup>8</sup> The argument was again vague and not supported by any evidence. The EC Commission requested Tupy to clarify its argument. In its letter of 30 May 2000,<sup>9</sup> Tupy said '*it is clear that the normal value had fallen dramatically to the point that no dumping could reasonably be established*'. Again, this argument was not supported by any evidence.

23. The EC's explicit consideration of devaluation had begun well before these dates. Already in its pre-verification letter of 7 September 1999,<sup>10</sup> the EC has requested Tupy to prepare a table giving the official exchange rates of a number of currencies used by Tupy against the Real. This is not the EC's normal practice, but was done in this case because the pre-verification preparation had shown the use by Tupy of strongly varying exchange rates. During the on-the-spot verification, Tupy was asked to explain in detail how its foreign currencies were converted into Real.

24. The timing of the EC's consideration of devaluation is significant only in regard to whether that consideration satisfied the requirements of the Agreement. In this case the facts relating to

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<sup>6</sup> Annex I, page 14, 'g. currency conversions' and the same document Annex II, page 6, first paragraph, BRL-16.

<sup>7</sup> BRL-13, page 37, paragraph 16.

<sup>8</sup> BRL-14, point 8.

<sup>9</sup> BRL-15.

<sup>10</sup> BRL-8, page 3.



devaluation were properly established and evaluated. The references to devaluation in correspondence with Tupy at a late stage in the investigation arose in response to comments made at that time by Tupy.

### Articles 11.1 and 11.2 AD

#### Question 26

**Does the European Communities believe that the price comparison at the end of the IP revealed no, or declining, differences between export price and normal value at the end of the period? Explain the significance this has for the establishment of the margin of dumping in the IP as a whole. Provide the legal basis for your response, citing any relevant material.**

25. Because the EC has data for Tupy's individual export sales during the IP it can say that, measured in Real, *export prices* declined following devaluation. However, it is not possible to identify *normal values* for particular parts of the IP because the EC's methodology is based on a consideration of the whole of that period. To calculate normal values for particular parts of the IP would require reprocessing the basic data. Furthermore, a recalculation of this kind would conflict with the basic rationale of the EC's calculation of the dumping margin, which itself reflects the obligations of Article 2.4.2 AD. In this respect the EC agrees with the view expressed by the Panel in *United States – Steel Plate, Sheet and Strip*<sup>11</sup> that the normal time period for comparison is the whole of the IP.

26. It should also be remembered that Tupy's prices at the end of the IP, immediately following devaluation, are no reliable indicator of its prices in the medium term.

#### Question 33

**What is the meaning of the phrase "where warranted" in Article 11.2 AD? Provide the legal basis for your answer. Assuming *arguendo* that initiation of a review is "warranted", is there a legal obligation to self-initiate a review?**

27. The phrase 'where warranted' in the first sentence of Article 11.2 qualifies the statement that the 'authorities shall review ... on their own initiative'. Thus it states the condition giving rise to this obligation, but the condition contains no explicit criteria. To identify any implicit criteria it is necessary to look at the context. Part of this is provided by the statement in Article 11.1 that 'An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.' However, the Agreement provides explicit circumstances in which reviews are to be commenced (on request, or by means of an expiry review) which largely secure respect for this principle. Self-initiation therefore remains a residual category, appropriate for unusual or extreme circumstances. In such circumstances the existence of a legal obligation to self-initiate cannot be entirely excluded.

#### Question 34

**Is there any relevant material the Panel might be guided by in its examination of the EC allegations under Article 11.2 AD?**

28. The EC assumes that the panel is referring to the statement in paragraph 107 of the EC's First Submission that 'Brazil's account of what happened following devaluation is all hypothetical, and no

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<sup>11</sup> Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, para. 6.120 et seq.

evidence of changes has been presented, merely assertions.’ Brazil makes these assertions under Issue 3 of its First Submission, and the relevant material is referred to there.

Question 35

**What, if any, is the relevance and role in these proceedings of the EC case-law and practice concerning "changed circumstances" cited by Brazil on pp. 38 et seq. of its first written submission?**

29. The EC addresses this point, and the arguments of Brazil, at paragraph 101 of its First Submission. The EC’s practice regarding changes that occur following the investigation period has been expressed in a recent decision as follow: “Developments occurring after the IP can be taken into account exceptionally provided that the imposition of anti-dumping duty based on the IP would be manifestly unsuitable. Indeed, these developments could only be used if their effects are manifest, undisputed, lasting, not open to manipulation and did not stem from a deliberate action by interested parties”.<sup>12</sup> It is very rare for the EC authorities to conclude that these conditions have been met. (It should be noted that, as a term of art, the phrase ‘changed circumstances’ is used in EC practice to refer not to the situation described here, but to factors taken into account in the course of a review to justify modification of a measure).

30. As the EC pointed out in its First Submission, the devaluation took place during the investigation period and such effects as it had on export prices were taken into account in the calculation of the dumping margin. However, even if the practice described above were one that was applied to events occurring during the investigation period, the EC would not regard the circumstances of the present investigations as ones that met its conditions. In particular, even assuming that the dumping margin had declined in the period immediately following devaluation there would have been no basis for concluding that such a change would be lasting.

31. In any event, there is no obligation in the Anti-Dumping Agreement for the EC to modify its procedures in the way described here.

**Issues 4 and 5: "Improper normal value" - "inappropriate product types"; "inappropriate product codes"**

Question 36

**Could the European Communities thoroughly outline the precise steps it took in calculating normal value, including constructed normal value, in this investigation, citing the relevant parts of the record of the investigation. In responding, could the European Communities clarify what is the "representativeness" test referred to in para. 27 of the Provisional Regulation? Does it correspond to the test foreseen in Article 2.2 and footnote 2 of the AD Agreement? If not, where is the basis in the AD Agreement?**

**I. Definition of the product under consideration and the like product**

32. The ‘product under consideration’ was defined as threaded malleable cast iron tube or pipe fittings. The product types exported by Tupy falling within this category were product types of which the internal codes start with 12 or 18.<sup>13</sup>

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<sup>12</sup> Iron and steel ropes and cables originating in Czech Republic, Russia, Thailand and Turkey, *EC Official Journal* L 211, 4.8.2001, page 1, recital 32.

<sup>13</sup> Provisional Regulation: recitals. 9 to 12.

33. The 'like product' was defined as threaded malleable cast iron tube or pipe fittings. The product types sold by Tupy in Brazil falling within this category were those with internal codes starting with 12, 68 and 69.<sup>14</sup>

II. Determination of whether actual sale prices could be used in calculating the normal value.

34. Actual sales prices were used provided that the 'representativeness' and 'ordinary course of trade' tests were satisfied. These tests were applied to the data of each exporting/producing company.

A) *Representativeness test*

35. This test corresponds to the test foreseen in Article 2.2 and footnote 2 of the Anti-Dumping Agreement.

36. Firstly, the EC determined whether the total domestic sales volume of the like product constituted at least 5 per cent of the total export sales volume to the EC of the product concerned. The criterion was met in this case: the volume of domestic sales of the like product by Tupy was 22.8 million units, compared to 22.3 million units exported to the EC<sup>15</sup> (Had the criterion not been met the domestic prices of the company would not have been used in the calculation of normal value).

37. Secondly, the EC determined whether, for each of the product types exported, the quantity sold on the domestic market was at least 5 per cent of the identical type exported to the EC.<sup>16</sup> The results of these calculations were disclosed to the company.<sup>17</sup> For product types that did not satisfy this test the normal value was constructed (see below).

B) *Sales in the ordinary course of trade.*

38. The EC first looked to see whether, considered as a whole, the product was being sold 'in the ordinary course of trade'. Then, for each product type sold on the domestic market, it checked whether the sales could be regarded as being made in the ordinary course of trade, by establishing the proportion of profitable sales to independent customers of the type in question. If 80 per cent or more of the sales were profitable, normal value was based on all sales of that product type, if less than 80 per cent but at least 10 per cent were profitable, normal value was based on profitable sales only. If less than 10 per cent of sales of the product type were profitable the normal value was constructed. The profitability test was done on a transaction by transaction basis, and the result for each transaction,<sup>18</sup> and for each type,<sup>19</sup> were disclosed to the company, as was the methodology.<sup>20</sup> Reference was also made to this test in the Provisional Regulation.<sup>21</sup>

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<sup>14</sup> Provisional Regulation: recitals. 13 to 19.

<sup>15</sup> Definitive Disclosure, Annex II, page 8, point 2.1.1, BRL-16; Provisional Disclosure, Annex II, page 1, point 1.1, BRL-11; and Provisional Regulation, recital 20.

<sup>16</sup> Provisional Disclosure, Annex II, page 1, point 1.1, BRL-11; Provisional Regulation, recitals 21 and 22.

<sup>17</sup> Provisional Disclosure Annex II, Annex 4 'Normal values used', column '% of quantity exported sold on the domestic market', BRL-11; Definitive disclosure, Annex II, Annex 4 'Normal values used', column '% of quantity exported sold on the domestic market', BRL-16.

<sup>18</sup> Provisional Disclosure, Annex II, Annex 2 'Domestic sales on a transaction by transaction basis', BRL-11; Definitive disclosure, ditto, BRL-16.

<sup>19</sup> Provisional Disclosure, Annex II, Annex 3 'normal value based on domestic sales', column '% of domestic sales which are profitable', BRL-11; Definitive disclosure, ditto, BRL-16.

<sup>20</sup> Provisional Disclosure, Annex II, page 3, last four paragraphs.

<sup>21</sup> Recitals 23 and 24.

III. Calculation of the normal value

39. For those product types that satisfied both the ‘representativeness’ test and the ‘ordinary course of trade’ test the normal value was based on the sale prices on the domestic market. A weighted average price was determined for each product type.

40. For those product types that failed either or both of the above tests the EC constructed a normal value.<sup>22</sup>

41. The EC first calculated the manufacturing costs of the product types. To these were added an amount for SG&A expenses and for profit in accordance with the rules set out in Article 2.2 and the chapeau of Article 2.2.2 of the Agreement. SG&A expenses were based on sales in the ordinary course of trade only, although, since these expenses were allocated on the basis of turnover, the point was not significant. Details of the calculation were disclosed to the company,<sup>23</sup> and reported in the Provisional Regulation.<sup>24</sup> The amount for profit was derived from the sales of the like product in the ordinary course of trade.<sup>25</sup>

42. The EC disclosed to the company the normal value used for each product type, and the basis (sale price or construction) for each such value.<sup>26</sup>

Question 37

**Did the European Communities include data from sales not permitting a proper comparison to calculate SG&A costs? To what extent, if at all, would this be a relevant consideration under Articles 2.2 and 2.2.2 AD?**

43. As mentioned in the answer to Question 36, the EC made its calculation of SG&A costs on the basis of sales in the ordinary course of trade only. The panel refers to ‘sales not permitting a proper comparison’ which is a broader category than sales ‘not in the ordinary course of trade’ (mentioned in Article 2.2) because it includes, e.g., ‘unrepresentative’ (i.e. low volume) sales. The latter category were included in the data from which the EC calculated SG&A costs because this is what is required by Article 2.2.2 of the AD.

44. As the SG&A expenses were allocated to the different product types on the basis of turnover,<sup>27</sup> the exclusion of certain categories of products or certain types from the calculation of these expenses actually had no consequences in this case.

Question 38

**Were there any sales to related parties? If so, how were they treated in the application of the methodology under Article 2.2.2 chapeau?**

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<sup>22</sup> Since Tupy was the sole Brazilian exporter the option of using data of other exporters was not available.

<sup>23</sup> Provisional disclosure, Annex II, page 4 point 1.2, second paragraph, BRL-11.

<sup>24</sup> Recital 27.

<sup>25</sup> Provisional disclosure, Annex II, page 4 point 1.2, third paragraph, BRL-11. Provisional Regulation recital 27.

<sup>26</sup> Provisional and Definitive disclosures, Annex II, Annex 4 – final column: the figure is taken from that in the ‘adjusted domestic normal value’ column or in the ‘adjusted constructed normal value per unit’ column.

<sup>27</sup> Provisional Regulation, recital 37; Provisional disclosure, Annex II, page 3, second paragraph, BRL-11.

45. There were no domestic sales to related parties. The only sales made by Tupy to related parties were export sales via Tupy Europe. These sales in no way affected the application of the methodology under Article 2.2.2. chapeau.

Question 39

**Is the Panel correct in understanding that the European Communities constructed the normal value of products with Tupy internal product code "18" by using the methodology set out in the chapeau of Article 2.2.2 (i.e. actual data from sales in the ordinary course of trade for SG&A and profit of types within internal product codes 12, 68 and 69)? If so, how does this relate to the following European Communities statement: "the normal value was constructed based on the cost of manufacture of the exported types so that also for those types no further physical differences existed and therefore no further adjustment was warranted." (Definitive Regulation, para. 43)**

46. It is correct that the EC constructed normal values for products starting with code 18 by using the methodology set out in the chapeau of Article 2.2.2. Of course, this provision provides only a partial guide because it concerns only two elements in the construction of normal values: SG&A and profits. The other main element, the 'cost of manufacture' (or 'cost of production' in terms of Article 2.2) is calculated using actual costs of the exported product types.

47. The EC determined normal value for in total 1375 product types exported. For 566 types (all code 12 types), normal value was based on domestic sales. For the remaining 809 types, normal value was constructed. These 809 types can be divided in two categories: product types with code 12 (526 types) and product types with code 18 (283 types). For each of the normal values constructed, the EC took the cost of manufacturing of the type exported, and added SG&A expenses and profit by using the actual data from sales of the like product in the ordinary course of trade. Recital 43 has to do with the repeated and strongly varying claims for an adjustment for physical difference that were made by Tupy during the proceeding. It should be read in conjunction with recitals 30 and 31 of the same Regulation. Together these recitals cover and justify the rejection of the not very specific claims made by Brazil to make adjustments to the constructed normal values. These claims were as follows:

48. Tupy had during the investigation made a claim for an adjustment for physical differences to the normal value. This claim was made in the reply to the Questionnaire:<sup>28</sup> *'This refers to point f on the "DMALLUR" table where it is shown NPT and BSP range as NPT is sold to the domestic market and other external market but not to the EC countries. Since there are significant technical differences between NPT and BSP and due to the fact that the EC standard code for the concerned product do not made any differences between them we could not exclude NPT and we had to adjust the **domestic price** (bold added) to those differences in physical characteristics'*.

49. At provisional measures stage, the EC Commission decided to use the internal product codes of Tupy rather than the product code numbers proposed in the questionnaire, so that normal values based on domestic sales were based only on product types 12 in order to compare with the export prices of the identical exported product types 12. As a consequence, no adjustments for physical differences to these domestic normal values were warranted as the types compared on both domestic and export side were completely identical.

50. Tupy argued in its comments to the provisional disclosure<sup>29</sup> that 'Where the Commission has constructed the normal value based on the profitable sales of product types starting with a '68', '69' or '79', it must grant Tupy an adjustment to take account of the differences in their physical characteristics. If it does not, then it will not have recognised, as it properly should, that these

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<sup>28</sup> BRL-4, section G-2.1.

<sup>29</sup> BRL-13, page 39, points 21 to 24

products attract higher prices and profits and that they are not even sold on the Community market. ...'. It should be noted that this claim is already fundamentally different from the original one, because the adjustment now claimed was an adjustment to the **profit margin** used to construct normal value. Tupy also argued<sup>30</sup> that 'Where the Commission chooses to analyse the product types using Tupy's internal coding, this does not constitute a reason to deny a validly claimed adjustment for physical differences as the physical difference in this case causes the constructed profit margin to be inflated, thus increasing unfairly the normal value. It is therefore submitted that the Commission must grant the claim for an adjustment as claimed. ...'

51. The EC refuted these arguments in the Definitive disclosure letter:<sup>31</sup>

'Tupy also considers it inappropriate that the calculation of the profit margin includes domestic sales of product types that are not sold at all for export to the EC. Again, Article 2(6) of the basic Regulation says "sales of the like product" and does not put any condition of whether like product types are exported to the EC or not. Tupy further argues that sales of products with different threading (NPT threaded) should be excluded. As these products are like products to the products exported, there is no reason to exclude them. It also argues that if these products are not excluded, an adjustment for physical difference should be made to the profit margin, based on Tupy's claim for an adjustment for physical differences. Adjustments for physical differences are foreseen in Article 2(10)(a) of the Basic Regulation and are intended to make a fair comparison between normal value and export price. No adjustments are foreseen when calculating the profit margin for constructing the normal values. It is clear that, as both costs of manufacturing and sales prices of NPT threaded like products are claimed to be higher than costs and sales prices of BSP threaded like products, any hypothetical adjustment should be made on both the cost of production and the sales prices and would as such not affect the profit margin.'

#### Question 37

**Comment on Brazil's allegation of the inconsistency between your statement in the Disclosure Preceding the Provisional Regulation:**

**"- On the domestic market, products starting with a 12, 68, 69 and 79 code were sold. Products starting with 68 and 69 had a different thread (NPT instead of BSP), while 79 products were not threaded. Products with code 68 were also made for higher pressure than other products. The costs of manufacturing of these products appeared to be different, and most of these products had also market values which were very different.**

**- On the EC market, Tupy sold products starting with a 12 code (own brand) and products starting with an 18 code (Nefit brand). Again, these products appeared to have sometimes very different costs of manufacturing." (footnotes omitted, emphasis added)**

**and the position taken in the investigation not to grant adjustments as envisaged by Article 2.4**

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<sup>30</sup> Ibid., page 24, point 24.

<sup>31</sup> Provisional disclosure, Annex II, page 4, last paragraph, BRL-16.

A. Description of the product categories and differences in cost of manufacturing and market value

52. Tupy reported in its reply to the Questionnaire that it sold on the domestic market four different categories (according to Tupy's internal product classification) of malleable cast iron tube or pipe fittings: product types starting with code 12, code 68, code 69 and code 79. All these categories seemed to correspond to the definition of the product as given in the Notice of Initiation: '*malleable cast iron tube or pipe fittings*'.

53. However, at the provisional stage, the EC authorities decided to exclude unthreaded fittings. The reasons for this exclusion were given in the Provisional Regulation.<sup>32</sup> They were not contested by Tupy during the investigation.

54. As a consequence, the product types starting with internal product code 79 were excluded from the scope of the investigation because they were not threaded. Types in this category were all sold to one and the same customer, Meikon, on an OEM basis. In fact, these product types were not fittings but were reported as such by Tupy because they were produced on the same production line and fall under the same CN code as fittings. These products were not used as a fitting but as a tooling for making threads in plastic tubes. These products were furthermore re-exported by Meikon in South-American markets. It should be noted that the EC omitted to exclude this category from the calculations at provisional stage, but corrected this at definitive stage.<sup>33</sup>

55. Within each remaining category (12, 68 and 69), many types were sold on the domestic market. The differences between the types within each category mainly concern the shape, size, weight and surface finishing, resulting in different costs and market values. All these types have, despite these differences, the same basic physical and technical characteristics as well as the same uses, and were therefore considered as a single product.<sup>34</sup>

56. It should be noted that there were also general differences between the three remaining categories. The main differences were:

- Code 12: BSP or cylindrical (parallel) threading, pressure resistance from 290 to 360 psi.
- Code 68: NPT or conical threading, pressure resistance from 230 to 2000 psi.
- Code 69: NPT or conical threading, pressure resistance from 75 to 300 psi.

57. These differences in threading and pressure resistance also led to differences in weight, in cost of manufacturing and in market value (sales prices) for fittings types for which all other physical characteristics (shape, dimension, surface, etc) were the same.

58. Two different categories were exported to the EC (code 12 and 18). Although Tupy argued that these types were identical, apart from the branding, it was found that the types within these two categories had different costs of manufacturing. Apart from the use of a different mould, this was also caused by differences in weight and differences in testing.

59. The paragraphs of the Provisional disclosure quoted in the Question refer to the comparison method used by the EC Commission, i.e. to use the internal product codes of Tupy rather than the product control numbers as defined by the EC in the Questionnaire. A practical example will demonstrate why it was necessary to use Tupy's internal product codes:

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<sup>32</sup> Recitals 10 and 11.

<sup>33</sup> Definitive disclosure, Annex II, page 8, point 2.1.1, BRL-16.

<sup>34</sup> Provisional Regulation, recital 12.

Product control number EC	Internal product number Tupy	Product description	Cost of manufacturing during the POI per unit	Average domestic sales price during the POI
A400DD00BB	121100431	M/F Elbow, ½ inch, BSP thread, black, Tupy brand, pressure 150 lb	0.192	0.5488
A400DD00BB	681100441	M/F Elbow, ½ inch, NPT thread, black, Tupy brand, pressure 300 lb	0.921	1.3070
A400DD00BB	691100441	M/F Elbow, ½ inch, NPT thread, black, Tupy brand, pressure 150 lb	0.219	0.7291
A400DD00BB	181100431	M/F Elbow, ½ inch, BSP thread, black, NEFIT brand, pressure 150 lb	0.182	Not sold in Brazil, only exported

60. This example shows that fittings with different threading or brand name although being for the rest quasi-identical have a strongly varying market value and that it would be unreasonable to combine domestic sales of 12, 68 and 69 types to determine a normal value combined for 12 and 18 types which have in their turn a strongly varying cost and market value.

**B. Position taken not to grant adjustments under Article 2.4**

61. For product types with code 12 exported to the EC for which identical types were sold on the domestic market, the domestic prices of those types only were used to determine the normal value (if sales were made in sufficient quantities and in the ordinary course of trade).

62. For product types with code 12 for which no identical types were sold on the domestic market and for product types 18 (which were exported only to the Community) the normal value was constructed (as described in the answer to Question 36).

63. The comparison of normal value and export price of identical types make by definition a claim under Article 2.4 for physical differences unfounded. A claim to make an adjustment for physical differences to the profit used for constructing normal value runs counter to the logic implicit in Article 2.2.2 which requires the profit level to be based on a data for a range of products. There is no logical basis on which an adjustment could be made to provide for different profit levels for the various product types.

64. Article 2.4 requires the authorities to make due allowance for differences between the normal value and the export price. The adjustment claimed by Brazil is not based on any such difference. In reality, Brazil's claim amounts to requesting an adjustment for the alleged difference between the profit margin included in the constructed normal value in accordance with Article 2.2.2 and the theoretical profit margin which the exported type would have obtained if it had been sold Brazil in the ordinary course of trade and in sufficient quantity. However, Article 2.4 is not concerned with that type of difference. Moreover, the profit margin which the exported types would have obtained in Brazil is unknown, which is precisely why it becomes necessary to calculate a "reasonable" amount for profit in accordance with Article 2.2.2.



Question 41

**Comment on Brazil's statements on page 60 of its first written submission:**

**“Consequently, the words “throughout this Agreement” in Article 2.6 when read together with the wording of Article 2.2.2 obliges the investigating authorities to use the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products which are identical, i.e. alike in all respects, to the product under consideration. Only in the absence of such identical products can the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products, which are, although not alike in all respects, having characteristics closely resembling those of the product under consideration. However, in the latter case the investigative authority is obliged to make due allowances in each case, on its merits, for differences in physical characteristics affecting price comparability.....”**

65. Brazil's proposal is based on a misunderstanding of the notion of like product. The base point for applying this notion is not the particular selection of products for which a relationship with other products is sought. Rather it is the 'product under consideration' as defined for the investigation (normally in the notice of initiation). Where the Agreement intends the kind of relationship proposed by Brazil it uses the notion of comparable products, and allows for adjustments where there are differences. The chapeau of Article 2.2.2 explicitly directs the use of production and sales data pertaining to the *like* product and not a comparable product.

66. The kind of interpretation proposed by Brazil would lead to arbitrary if not chaotic results, which are clearly not the intention of the Agreement. The SG&A and profits used for constructing prices would depend on the particular distribution of similarities and differences in the exporter's product range. On the other hand, the method actually intended by the Agreement results in an averaging of data, which ensures a much fairer solution. Furthermore, taken literally, Brazil's methodology would lead to the use of data pertaining exclusively to the sales of the very product type whose sales price had been rejected, e.g. because sales were not in the ordinary course of trade, so that the constructed price would be the same as the (rejected) sale price. It was in order to avoid such a contradictory result that the chapeau of Article 2.2.2 specified the use of data pertaining to production and sales of the 'like product'.

67. Furthermore, Brazil's comments appear to contradict its own view, expressed on the same page, that 'the AD Agreement does not allow for separate like products to be defined for the various product types, this is borne out by the use of the word 'the' in Article 2.6. Whatever like product is defined will apply to the construction of all the relevant normal values'.

Question 47

**What is the relationship between Article 2.2 and the chapeau of Article 2.2.2 AD?**

68. The chapeau of Article 2.2.2 provides the basic rule for determining the amounts for SG&A costs and for profit for the purposes of Article 2.2. Whenever those amounts have been determined in conformity with the chapeau of Article 2.2.2, they must be deemed in conformity also with Article 2.2<sup>35</sup>.

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<sup>35</sup> See the Panel Report on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, where the Panel concluded that “AD Article 2.2.2 (i), when applied correctly, necessarily yields reasonable amounts for profits” and that Article 2.2 imposes no

Question 48

**Is the meaning of "proper comparison" in Article 2.2 AD the same as "fair comparison" in Article 2.4 AD? Provide the legal basis and substantiation for your response, with reference to all relevant provisions in the AD (and, if necessary, other) Agreement.**

69. No. The circumstances mentioned in Article 2.2 ("the particular market situation or the low volume of the sales in the domestic market of the exporting country") suggest that domestic prices are deemed not to allow a "proper comparison" when they are not reliable. On the other hand, Article 2.4 comes into play where a reliable normal value has already been established - whether it is based on domestic prices or constructed- but there are differences between that normal value and the export price for which it is necessary to make an allowance in order to ensure that the comparison is fair.

Question 49

**What is the nature of the reference in Article 2.2 AD concerning "sales [that] do not permit a proper comparison"? Is it merely a threshold to guide the decision whether or not to proceed to constructed normal value, or is it also a consideration to be taken into account in constructing normal value? What is the basis for your response, using the customary rules of interpretation of public international law?**

70. The reference in Article 2.2 concerning "sales that do not permit a proper comparison" is a threshold to guide the decision whether or not to construct normal value and not a rule for constructing the normal value. The rules for constructing the normal value are contained elsewhere in the Agreement, namely in the last phrase of Article 2.2 and in Article 2.2.2, as regards the amount for SG&A expenses and profits. If the drafters had intended to exclude the sales that "do not permit a proper comparison" from the chapeau of Article 2.2.2, they would have indicated so expressly, as they did with respect to the category of sales "not in the ordinary course of trade", which is also mentioned in Article 2.2.

Question 50

**Would the removal of sales of such a low volume as to not permit a proper comparison within the meaning of Article 2.2 AD contradict Article 2.2.2 AD by removing a category that should properly have been included in the calculation?**

71. Article 2.2.2 does not provide for the discarding of low-volume sales as part of the data employed in constructing a normal value. The approach adopted by the Appellate Body in the *Bed Linen* case in regard to Article 2.2.2(ii)<sup>36</sup> suggests that panels should be reluctant to abandon the literal interpretation of a provision because of what might seem to be its perverse consequences.

Question 51

**Does the definition of "like product" apply among types falling within the scope of the like product? Provide the basis for your reasoning.**

72. The meaning of this question is unclear to the EC.

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"separate reasonability test" (at para 7.128). The Panel implied that the same is true also of the chapeau of Article 2.2.2 (ibid., at para. 7.125)

<sup>36</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India* ("European Communities – Bedlinen"), WT/DS141/R, adopted 12 March 2001, para. 80.

Question 52

**How do the parties respond to the US statement in its written third party submission that an improper calculation of constructed normal value cannot constitute a breach of Article 2.4 AD, and that a putative breach of Article 2.4 AD cannot be used to bolster a claim under Articles 2.2 and 2.2.2 AD?**

73. Article 2.4, and Articles 2.2 and 2.2.2, are distinct elements of a complex structure. In principle, claims of a breach of one provision do not automatically constitute breaches of the other. On the other hand, the EC does not argue that the way that a normal value is constructed can never have an influence on the way in which the price comparison should be carried out. What it rejects is Brazil's argument that an adjustment should be made for the way in which the profit level has been calculated.

74. The EC is not clear what the US means by the expression 'bolster a claim'. The US itself refers to the use of 'context' in interpreting provisions of the Agreement. Article 2.4 is obviously part of the context of Articles 2.2 and 2.2.2, and is therefore in principle to be considered in interpreting those provisions. Whether it actually contributed to that interpretation would depend on the particular aspect of those provisions that was being examined.

Question 53

**Comment on the statement by the European Communities at para. 127 of its first written submission that "...both SG&A and profit were based on the 1260 types of the like product sold on the domestic market".**

75. The EC considered the domestic sales of all types of the like product sold on the domestic market in order to determine SG&A costs and profit for the purpose of constructing the normal value. On reviewing the data the EC has discovered that the total number of types of the like product sold of the domestic market was 1261 rather than 1260 (the figure given in the EC's First Submission).

76. While all types of the like product sold on the domestic market were taken into consideration, SG&A costs and profit were based solely on those types sold on the domestic market in the ordinary course of trade. Out of the 1261 types sold on the Brazilian domestic market, 68 types were not sold in the ordinary course of trade. SG&A costs and profit were thus based on the 1193 types sold on the domestic market in the ordinary course of trade. This can clearly be seen in the Definitive disclosure.<sup>37</sup> These data were also provided to Tupy during the proceeding on a CD-ROM.

77. The approach followed by the EC is fully in line with Article 2.2.2 which says: 'the amounts for administrative selling and any other costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation'.

**Issues 6 & 10: "No proper consideration of tax neutralisation"; "no proper basis to assess PIS/COFINS indirect taxes"**

Question 54

**Does the European Communities believe that the IPI Premium rates applicable to exported products were established by Resolution no. 2 of 17 January 1979 of the Exportation Incentive Commission ('Resolution no. 2') attached to the Ministry of the Inland Revenue and**

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<sup>37</sup> Annex II 'Company specific findings concerning dumping', Annex 3 'Normal value based on domestic sales', BRL-16.

**that Resolution no. 2 established an IPI Premium Credit of 20 per cent for fittings under which the definition of the like product in this investigation falls? (Brazil first written submission, p. 78). Was this legislation on the record of the underlying AD investigation?**

78. The only legal document referred to by Tupy during the investigation in respect of the IPI Premium Credit was the 'Brazilian law-edict nr 491-dated March 5<sup>th</sup>, 1969. A four-page translation of that edict was part of Tupy's reply to the Questionnaire. Although this subject was examined at length during the on-the-spot verification and additional evidence was requested by the EC investigators, no such evidence in the form of any law was presented. Nor was additional evidence of this kind submitted later in the investigation.

79. The legislation referred to in the question was thus not on the record of the investigation. More particularly, in terms of Article 17.5(ii), it was not a 'fact made available in conformity with appropriate domestic procedures to the authorities', and is therefore not a matter to be considered by the Panel. Under Article 2.4 (the relevant context here) the burden lay on Tupy to present the evidence in support of the adjustments that it claimed.

80. The EC is therefore not in a position to make a judgement on the relationship of this legislation and the IPI Premium rates.

81. The EC notes that whether or not this legislation provides the basis for the IPI Premium Credit, the arguments presented in EC's Submission<sup>38</sup> remain valid.

#### Question 55

**With reference to the record of the investigation, can the European Communities substantiate its statement in para. 153 of its first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary?**

82. The Panel's question suggests some confusion between the so-called 'IPI Premium Credit' and the IPI tax .

83. The IPI tax is a "value added tax". It is collected on the domestic sales of fittings by Tupy but not on the exports of fittings. The IPI tax is levied also on the purchases of inputs by Tupy. Since the IPI is a VAT-type tax, the IPI paid by Tupy on its purchases of inputs can be credited against the IPI collected on the sales of fittings. This means that the IPI imposes no net cost on Tupy and, therefore, does not increase the price of the fittings sold in Brazil

84. The so-called 'IPI Premium Credit' is a tax credit equal to a certain percentage of the beneficiary's export turnover. That tax credit can be deducted from the beneficiary's IPI liability or, where this is not possible, from other taxes. The IPI Premium Credit is granted as "compensation" for some unspecified internal taxes allegedly borne by the exported products. Neither Tupy nor Brazil have identified which are those internal taxes. Thus, the Panel should not assume that the internal tax purportedly "compensated" by the IPI Premium Credit is the IPI.

85. In support of the statement that the domestic prices used by the EC in order to calculate the normal value did not include the IPI on the sales of fittings the EC presents the following three documents :

1. A table of data on a CD-ROM that formed part of the Definitive disclosure to Tupy, file dmsalur241043 (Exhibit EC-18), 'Domestic sales transaction per transaction'. It gives the net domestic sales invoices values on a per product type basis for invoice nr

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<sup>38</sup> Paragraphs 149 et seq.

203886, one of the invoices checked during the verification. The totals have been added.

2. A copy of the invoice ('Nota Fiscal Fatura') number 203886 (exhibit 25 on spot verification – Exhibit EC-19)
3. An explanation requested by the case-handlers and provided by Tupy of how domestic sales invoices are booked in its accounting records. (page 13 hand-written notes on spot – Exhibit EC-20)

86. The first document shows that the net invoice value reported by Tupy to the EC and taken into account in the dumping calculations was 31.416,52 Real for a quantity of 89202 units.

87. The second document, the invoice, shows a total invoice amount of 39.753,77 Real. This amount is composed of the following two amounts: 'baso de calculo do ICMS' (36.809,05 Real) and 'valor total do IPI' (2.944,72 Real). In the first amount are included: the freight charged to the customer (valor do frete 1.653,02 Real), the amount of ICMS tax (4.417,09 Real). Also included in the same amount, but not visible on the invoice, are the amounts for the PIS and COFINS tax. Note that the invoice also shows in the column 'Quandidade' the same quantities (3050+3000+39960+43192) as reported by Tupy to the EC.

88. The third document shows the accounts used and the amounts booked on the different accounts to record the invoice. In fact, the accountant was requested to demonstrate and wrote down how domestic invoices were booked. 35.156,03 Real is booked as gross sales receipts (credit of account 'Receita Bruta de Vendas'), 2.944,72 as IPI payable (credit of account 'IPI a Recolter'), and 1.653,02 Real as receipts of freight ('Receita de Frete'). The total of these three amounts, which corresponds to the total invoice value, is booked as a receivable (39.753,77 Real). Three additional bookings were made for the taxes included in the gross sales receipts. The amounts debited were in each case debited on accounts (8501, 8601 and 8701) as a 'reduction of sales'. The amounts booked were 4.417,09 Real for ICMS tax, 239,26 Real for PIS tax, 1.104,27 Real for COFINS tax.

89. In conclusion, the total net value booked in the accounts is 35.156.03 Real gross sales, already excluding the IPI tax, and then further reducing this gross sales by 4417,09 + 239,26 + 1.104,27 other taxes, or a net turnover of 29.395,41 Real. The net invoice value reported to the EC is 31.416,52 Real and includes 1.653,02 Real inland freight (net value of goods is 29.763,50 Real). The inland freight was claimed and granted as an adjustment to the normal value. There was a slight difference between the net amount of goods as explained by Tupy and the net amount of goods reported to the EC. Tupy has looked this up during the investigation and the explanation was accepted by the case-handlers. However, there is no detailed record of this explanation.

90. Thus the domestic prices for fittings on the basis of which the normal value was calculated were not only net of IPI tax on those sales, but also net of ICMS, PIS and COFINS.

91. Moreover, as mentioned above, since the IPI is VAT-type tax, the IPI paid by Tupy on its purchases of inputs can be credited against the IPI collected on the domestic sale of fittings. Thus, the IPI on those inputs is not "borne" by the domestic sales of fittings and no adjustment is required. The same is true of the ICMS, which is also a VAT-type tax.

92. In contrast, PIS and COFINS are cumulative taxes. This means that the PIS and COFINS on inputs are included in the cost of production of the fittings sold in Brazil by Tupy and, presumably, have been reflected in the domestic prices. Thus, to the extent that the PIS and COFINS on inputs were refunded in respect of the exported fittings, it was appropriate to grant an adjustment to the normal value, which the EC authorities did.

Question 56

**How does the European Communities reconcile the statements in paras. 153-156 of the EC's first written submission that the normal value calculated was net of the IPI Premium Credit and thus no adjustment was necessary, but that the EC investigating authorities denied an allowance in respect of the IPI Premium Credit as Tupy did not demonstrate that this credit "compensated" for internal taxes "borne by the like product "when destined for consumption" on the Brazilian market within the meaning of Article VI:4 of the GATT 1994.**

93. An IPI tax was applicable to domestic sales of fittings. However, as explained in the reply to the previous question Tupy had reported its domestic sales net of this tax. As also explained, the IPI on the inputs used by Tupy can be credited against the IPI on Tupy's sales of fittings. Consequently, in the context of GATT Article VI:4, no IPI tax was 'borne by the like product' or by materials physically incorporated therein 'when destined for consumption' in the Brazilian domestic market.

Question 57

**On what basis does the European Communities justify the use of data relating to the 20 "most exported types" of the product concerned in calculating the adjustment for PIS/COFINS?**

94. The EC based its calculation on data relating to these types because they were representative of the products sold. The EC investigators knew they could safely proceed on this basis because the outcome of this calculation would have only a minor effect on the level of the dumping margin.

Question 58

**Can the EC direct the Panel to where in its first written submission it describes the methodology used to calculate the PIS/COFINS adjustment? Is this methodology outlined in paras. 237-239 of its first submission? Is the relevant Deficiency Letter sent to Tupy during investigation in Exhibits BRL-6 and 7?**

95. The methodology used by the EC to calculate the PIS/COFINS adjustment is, as the Panel suggests, described in paragraphs 237-239 of its First Submission.

96. The Deficiency Letter is the EC's letter of 9 August 1999 (BRL-6). Tupy's description (in its list of annexes) of the Letter as '*requesting additional information*' is not entirely correct. The Letter says '*a preliminary scan of the information provided indicates the following deficiencies and points, which need clarification:*'

97. Tupy's reply to the letter is Exhibit BRL-7.

Question 66

**What considerations could guide a panel's examination of type by type analysis under the AD Agreement and the EC's use of the 20 "most exported types" in calculating the adjustment for the PIS/COFINS credit? Refer also to any other relevant material. Address the legal relevance, if any, of footnote 1 to the SCM Agreement to this issue.**

98. The EC does not understand this question.

Question 67

**In respect of Issues 6 & 10, to what extent does the EC method of calculating adjustments relate to the concept of "sampling"? Is this more an issue of "allocation"? Please explain, referring to any relevant provisions of the AD Agreement.**

99. The method used by the EC authorities does not constitute "sampling", at least in the ordinary sense in which that term is used in Article 6.10. The EC authorities did not limit their examination of the existence of dumping to a "sample" of types or transactions. Rather, the method challenged by Brazil was used in order to allocate the total amount of the PIS/COFINs refund among the different types of fittings with a view to adjust the normal value for each type.

100. As explained in paragraphs 231-248 of the EC's First Submission, in the course of investigation, the EC authorities found that Tupy had received a certain amount by way of refund of the PIS/COFINs taxes previously levied on the inputs incorporated into the exported fittings. Since the actual amount refunded in respect of each type of fittings was not provided by Tupy, it was necessary to devise a method to allocate the total amount of the refund among the different types of fittings. An allocation of the basis of the export turnover (i.e. by expressing the total amount of the refund as a percentage of the total export turnover and then deducting that percentage from the normal value for each type) would have resulted in an excessive adjustment, because the unit export price for each type was, as a general rule, much lower than the domestic unit price for the same type, while the unit cost of the incorporated inputs for which the refund was granted was the same, irrespective of whether the fittings were sold in Brazil or for export. In order to avoid this result, the investigators adjusted first the export turnover by using an estimated ratio between the domestic and export prices. That ratio was derived from data for the twenty-most exported types sold in Brazil. The EC believes that this was a reasonable method to allocate the refund, given the practical constraints under which investigators act. Indeed, Brazil has not shown that using a larger number of types to calculate the ratio would have yielded a significantly different result, let alone one which was more favourable to Tupy.

Question 68

**Comment on the statement in the disclosure preceding the provisional regulation (Annex II , pp(7&8) that " ... only 23.541.250 Real was booked, because the credit will not be used in the next few years due to the fact that the company is still entitled to tax credits for losses carried forward."**

101. The EC listed a number of factors which demonstrated, apart from the fact that the taxes were not born by the fittings when consumed in Brazil, that the claim was also incorrect.

102. Apart from the fact that the adjustment claimed was calculated on domestic prices instead of on the much lower export prices and that it was not consistently booked over the previous years (although the legislation had not changed in this respect during those years), it was also confirmed during the on-the-spot verification that out of the total tax credit of 31.812.500.49 Real relating to exports of all products by Tupy during the year 1998, only 23.541.250.36 Real was booked in the gross sales revenue in 1998. The explanation given was that, as Tupy was still entitled to tax credits for losses carried over, the tax credit would therefore not be used in the next few years, and as a consequence only an 'actualisation value' was booked and not the full amount.

103. As evidence for this statement, a detailed listing of all exports, allowing for tax credit, during 1998 is added (collected on spot, – Exhibit EC-21). At the bottom the 'total general' amount of 31.812.500,49 Real is shown, the net amount 'liquido' 23.541.250.36 Real, and the difference between both of 8.271.250,13 Real, called 'Honorarios A' which was explained by the company to be 'booked as a reserve for losses'.

104. This conclusion was not seriously contested by Tupy during the investigation.<sup>39</sup> The statement in the Brazil's first Submission<sup>40</sup> that *'the difference between the credit received 31.812.500 Real and the one booked 23.541.250 Real is to be understood mainly in the context of the delays incurred by the inspection of the fiscal authorities and also with regard to expenses involved with those proceedings'* was never raised during the investigation, is in contradiction with the explanation given on spot, and does not conform to the listing given during the on-the-spot verification.

#### Issue 7: "No proper adjustment for advertising and sales promoting expenses"

##### Question 69

**What supporting documentation underlies the statement: "Similar commissions were paid for similar purposes to Tupy Europe for export transactions with other clients" (in the Disclosure Preceding Definitive Regulation)?**

105. The EC presents documents, obtained during the on-the-spot verification, relating to three payments of commissions to Tupy Europe (Exhibit EC-22).

106. It became apparent during the verification that commissions were paid to Tupy Europe and that these commissions were partly used by Tupy Europe for promotion and advertising of the product concerned. When checking the payment of these commissions, the EC discovered that each of the payments referred to several invoices. The three payments for commissions paid by Tupy Brazil to Tupy Europe refer to the following invoices (it must be made clear that these are not all the payments of commission by Tupy Brazil to Tupy Europe, but only the ones relating to a limited selection of verified export invoices):

<b>Payment no 1</b> was done in Italian lira (amount not readable, but should be according to our notes 15% of invoice values) and refers to the following invoices				
Invoice no	Number of export lines	Client	Invoice currency	Total invoice value
10720	Invoice before IP, details not available			
10798	61	Jannone – Italy	LIT	50.390.535
10964	185	Jannone – Italy	LIT	389.637.313
11026	135	Jannone – Italy	LIT	362.031.915
11028	227	Jannone – Italy	LIT	360.040.035
11113	71	Jannone – Italy	LIT	103.298.580
<b>Payment no 2</b> was done in pesetas (amount : 217.528, 5% of invoice values, does not match entirely) and refers to the following invoices				
12025	150	Thisa – Spain	PTA	2.494.399
12026	153	Thisa – Spain	PTA	2.227.204
<b>Payment no 3</b> was done in Italian lira (amount : 15.440.221, 5% of invoice values, does not match entirely) and refers to the following invoices				
11463	28	Jannone Ferro Tubi – Italy	LIT	73.588.014
11511	43	Jannone Ferro Tubi – Italy	LIT	76.659.705
11565	27	Jannone Ferro Tubi – Italy	LIT	167.179.613

<sup>39</sup> See Tupy's 'Fourth Submission', quoted in Brazil's Submission at page 73.  
<sup>40</sup> Page 80.



Question 70

**Did the advertising expenses at issue relate to export transactions of Tupy specifically involving pipe fittings?**

107. Yes (see answer to Question 69 above). The EC presents a copy of one invoice (number 11113) out of the ones listed in the reply to Question 69 (Exhibit EC-23, obtained during the on-the-spot verification). All the other invoices for which the above commissions were paid are listed in the information provided by Tupy (on CD-ROM) on export sales of fittings to the Community.

Question 71

**Does the European Communities agree that advertising expenses might form the basis for an adjustment under Article 2.4 AD? Refer to any relevant material.**

108. Differences in advertising expenses might form the basis for an adjustment under Article 2.4 if they qualify as '*any other differences which are also demonstrated to affect price comparability*'. The EC has rejected the claim made by Tupy because, by not reporting all its expenses incurred for advertisement and promotion on the exports of fittings to the EC, it did not allow the EC authorities to establish the existence of such a difference between domestic and export sales.

**Issue 8: "No proper adjustment for packing costs"**

Question 77

**In the Disclosure Preceding the Definitive Regulation, the European Communities stated "...the estimation of labour costs was not supported by evidence, although evidence was asked during the on-the-spot verification..." Can the European Communities provide evidence of this request for evidence during verification ? Cite to the relevant portions of the record of the investigation.**

109. The request was made orally during the on-the-spot verification, but this was merely an application of the general requirement for supporting evidence that is established by Article 2.4 of the Agreement, and was emphasised in the EC's Questionnaire and in its letter (BRL-8) notifying Tupy of the visit. The EC does not understand that Brazil denies that requests for supporting evidence were made, or at least that the need for such evidence was apparent to Tupy.

Question 83

**Would an adjustment under Article 2.4 AD be justified for general costs incurred by a company in maintaining inventory? Does Article 2.4 AD relate to indirect (i.e. "pre-sale") and direct (i.e. "post-sale") packing expenses? Why does Brazil / Tupy believe this method used by the European Communities was unreasonable or inconsistent with Article 2.4?**

110. The EC authorities would make an adjustment under Article 2.4 for maintaining inventory if a company demonstrates that differences in costs exist for domestic and export markets and if such difference affects price comparability.

111. The question whether Article 2.4 relates to indirect and direct packing expenses cannot be answered by a simple yes or no. Differences in pre-sale expenses between export and domestic market will normally be taken into account by a company when setting its prices and thus affect the price comparability. If this is demonstrated an adjustment is warranted.

112. Post-sale expenses known at the moment of sale will also affect price comparability and an adjustment will be warranted. Post-sales expenses for packing not known at the moment of sale will not affect price comparability and no adjustment can therefore be granted.

113. It should be noted that in the present case the issue of pre- or post-sale expenses did not present any difficulty. A problem arose because the allocation key used by Tupy was not supported by any evidence, and was completely at odds with any figure that could be derived from the volumes of sales on the domestic and export markets.

Question 84

**Was the verification visit in this investigation "essentially documentary"? Is an "essentially documentary" verification consistent with the AD Agreement? Why or why not?**

114. The basis for verification is to be found in Article 6.6 AD:

Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

115. All anti-dumping verifications are essentially documentary. One simple reason for this is that on-spot verifications take place after the investigation period, and there is no guarantee that the factual situation has not changed, be it unwittingly or wittingly, since the investigation period.

116. Whereas documentary evidence is readily available, other kinds of evidence are not. The information that forms the basis of anti-dumping investigations is as a matter of course recorded in documents. The relationships that a company has with shareholders, governmental (especially tax) authorities, and purchasers/sellers and other contractors, all depend on the maintenance of satisfactory records. Although investigators will often put questions to company officials and their representatives, they have no authority to examine or cross-examine them in the manner that might be adopted in a court of law, still less to take evidence on oath.

**Issue 9: "No proper currency conversions"**

Question 85

**Can the European Communities clarify the meaning of each of the headings of the columns referred to by Brazil in its first written submission (p.96)?**

117. The meanings of the column headings is the following :

SN: Sequential number of all transaction lines reported (i.e. the first transaction is "1", the second is "2", and so on).

Sales code: The code used for the product type in Tupy's records (Tupy's products code).

Invoice number: Tupy's export invoice number.

Quantity: the quantity invoiced to Tupy's customer in units.

Net invoice value: The net invoice value, net of taxes and after discount deducted on the invoice, in the currency of sale

Currency: the currency of the sale.

Turnover in Real: The net invoice value in Real, using the daily exchange rate at the date of the export invoice.

CIF Community frontier value in Real: the CIF value of the goods at the Community border in Real.

Transport Real: The amount of the adjustment made to the export price for inland transport costs incurred in Brazil from Tupy's premises to the port.

Question 86

**Does converting the transport cost figures from the European currency reported by Tupy to Brazilian Reals on the same monthly rate basis as Tupy converted those amounts from Reals to the European currency make any difference to the result of the calculation?**

118. The EC presents (Exhibit EC-24) the final page of a table listing details of all export sales that were included in the dumping calculations. This document was contained in the Definitive disclosure<sup>41</sup> (and was also provided on a CD-Rom). The only information added is the totals. The total for 'Transport Real' is 50.200,00 Real. This amount corresponds exactly to the amount which Tupy converted into foreign currency.<sup>42</sup> It is clear that the currency conversion had no influence to the result of the calculation.

Question 87

**Is it the usual practice of the EC to compare the prices used to compare the dumping margin on the basis of the exporter's currency?**

119. It is the EC's consistent practice to calculate the dumping margin in the exporter's currency for companies located in market economy countries. For non-market economy countries, the EC might deviate from this practise and calculate the dumping margin either in the currency most used for exports, or in the currency of the analogue country.

Question 88

**Was the conversion of the amounts reported by Tupy from the European currency to Reals done only in the case of transport costs?**

120. No, a conversion from foreign currencies into Real was also necessary for all other adjustments made to the export price, as Tupy had reported all these adjustments in the currency of the export invoices, despite instructions to report in Real.

121. For most allowances to the export price, the EC used the exchange rates used by Tupy to convert the BRL into foreign currency. This was the case for the allowances for inland transport, freight, insurance, charges, packing and other (publicity expenses). There should as a result be no difference between the amounts in BRL from which Tupy converted into foreign currency and the amounts reached by the EC. Note that no adjustments to the export price were made for packing and other expenses.

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<sup>41</sup> Annex II, Annex 5, BRL-16.

<sup>42</sup> Annex BRL 7, ECALLUR, TRANS.

122. For three other allowances, the EC used the monthly rates as mentioned in the Questionnaire and not the exchange rates as used by Tupy. This was the case for credit costs, warranty and commission.

123. The justification for this is the following:

- the adjustment for credit costs is not based on real costs as found in the exporter's accounts but is a notional cost based on the agreed payment terms. As the EC reconverted the export prices at the rates at the date of invoice the allowance for credit cost should be based on the new export invoice values. The EC therefore used the monthly rates corresponding to the months in which the invoices were issued.
- for warranties a rate of 0.000312<sup>43</sup> was used and for commissions a percentage of the export value rather than the distribution of absolute amounts in order to calculate the adjustments made. Therefore it was considered also more appropriate to use monthly rates of the months during which invoices were issued because any other method would have distorted the rate or percentage. In any event these two allowances were minimal in absolute amounts and in relation to the total export value.

124. It should be noted that the use of the monthly EC conversion rates for the latter three adjustments led to smaller adjustments to the export price than the conversion at Tupy's exchange rates. As a result, the adjusted export price used to compare with the normal values was higher and the dumping margin was lower, so that Tupy benefited from the use of the EC's monthly exchange rates. The EC has prepared a document to illustrate the differences (Exhibit EC-25). This listing shows amongst others :

- the monthly exchange rates used by Tupy
- the monthly exchange rates used by the EC
- the amounts for respectively credit, warranty and commission in foreign currency as reported by Tupy.
- the amounts for credit, warranty and commission converted in Real by using respectively Tupy's exchange rate and the EC's exchange rate.

125. The totals on the final page show that:

- for credit the adjustment at Tupy's exchange rate would have been 454.447,8 Real, while the EC only made an adjustment for 398.900,0 Real.
- for warranty the adjustment at Tupy's exchange rate would have been 4.658,00 Real, while the EC only made an adjustment for 4.046,3 Real.
- for commission the adjustment at Tupy's exchange rate would have been 70.987,4 Real, while the EC only made an adjustment for 58.427,4 Real.

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<sup>43</sup> File ECALLUR, Tupy's letter of 5 October 1999, EC-5.

**Issue 11: "No proper dumping margin findings" ("zeroing")**

Question 95

**The European Communities calculates the impact of the application of zeroing in this investigation to be 2.73 per cent ( i.e. a dumping margin of 34.82 per cent as opposed to 32.09 per cent). Does Brazil believe that this is a "relatively limited impact"? (see EC first written submission, para. 250) How would this consideration be relevant here?**

126. The EC provides this information by way background to the case.

**Issue 12: "No proper consideration of import volume trends"**

Question 97

**How, if at all, do the obligations in Articles 3.2 and 3.3 AD interrelate? Could Brazil comment on the EC statement in paragraph 263 of its first written submission that "...Brazil denies ... that cumulation applies in the operation of Article 3.2"?**

127. The EC examined the relationship of Articles 3.2 and 3.3 at paragraphs 300 to 307 of its First Submission. The key question appears to be whether the consideration of volume and of price effects that is required by Article 3.2 has always to be carried out on a country-by-country basis, or whether the authorities may consider cumulated data (assuming the requirements of Article 3.3 have been fulfilled).

128. Article 3.3 says that, if its requirements are fulfilled, the authorities 'may cumulatively assess the effects of such imports', that is the imports that are subject to simultaneous anti-dumping investigation.

129. The question which arises is whether the steps required by Article 3.2 constitute an assessment of the 'effects' of the allegedly dumped imports. Article 3.2 speaks of 'the effect of the dumped imports on prices', but does not use the word 'effects' in regard to volume. However, Article 3.5 refers to 'the effects of dumping, as set forth in paragraph 2 and 4'. It does not seem plausible that this reference is merely to the issue of prices in paragraph 2. For one thing, an increase in imports can quite reasonably be described as an 'effect of dumping'. Secondly, such an increase is likely to be of particular relevance to the examination of causation which is the subject matter of Article 3.5. Consequently, since both the steps required by Article 3.2 constitute consideration of the effects of dumped imports both are capable of qualifying under Article 3.3 for cumulative assessment.

130. Finally, as was observed in the EC's First Submission, Article 3.3 has a specific condition relating to the volume of imports from each country (it must not be negligible). It seems improbable that the drafters intended that the authorities should consider whether there had been a *significant increase* in imports from the individual countries when the only finding that they had to make was that such imports should not be *negligible*.

Question 98

**Does the data before an investigating authority have to demonstrate that a significant increase in imports from a particular source has occurred during the IP in order to satisfy Article 3.2? What is the significance – if any -- of the term "whether" (rather than "that") in the phrase "consider whether there has been a significant increase in dumped imports" in Article 3.2 AD?**

131. The EC has addressed the first of these issues in its answer to Question 97. The meaning of ‘consider’ in Article 3.2 is examined at paragraph 256 of the EC’s first Submission.

132. The significance of the word ‘whether’ rather than ‘that’ in Article 3.2 is straightforward. To ‘consider that’ there has been a significant volume increase, etc., is to hold the view that such an increase has occurred. To ‘consider whether’ there has been such an increase is to engage in an examination of the issue.

#### Question 99

**For the purposes of an injury analysis under Articles 3.2 and 3.3 AD, is it necessary for a Member to establish that a significant increase in the volume of dumped imports has occurred with respect to imports from exporting countries individually before and/or after proceeding to a cumulative analysis? Why or why not? Comment, including with reference to paragraph 12 of the US oral statement.**

133. The EC argues in paragraphs 302 to 307 of its First Submission that such a country-by-country consideration of significant volume increase is not required by Article 3.2 if the conditions for cumulation under Article 3.3 are satisfied.

134. The US argument in question seems broadly the same as that made at paragraph 304 of the EC’s First Submission.

#### **Issue 13: "No proper consideration of alleged undercutting"**

#### Question 100

**What is the significance, if any, of the reference in Article 3.2 AD to “a” (rather than “the”) like product? And to domestic “prices” (in the plural rather than singular)?**

135. The reference to “prices” in the plural suggests that, as argued by the EC,<sup>44</sup> Article 3.2 does not require to calculate an overall margin of undercutting for the product under consideration, let alone to use any specific methodology when calculating such margin (such as, for example, averaging without “zeroing” the “overcutting” margins). It supports the view that the existence of “significant undercutting” can also be considered by comparing the prices for individual sales or the average prices for types or models of the product under consideration.

136. The reference to *a* like product (rather than *the* like product) has similar implications. Furthermore, it suggests that the comparison does not have to include all domestic like products, but can be limited to a representative selection of transactions or of models/types.

137. It is significant that Article 6.3(c) of the Agreement on Subsidies and Countervailing Measures in dealing with the same issue uses the same wording as Article 3.2:

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

...

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same

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<sup>44</sup> EC first Submission, para. 268.

market or significant price suppression, price depression or lost sales in the same market;

138. Unlike the Anti-Dumping Agreement, an explanation is provided:

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

139. This provision also suggests that a comprehensive calculation of prices of all sales is not required.

#### Question 101

**What is the significance, if any, of the reference to " the dumped imports" in Article 3.2 AD?**

140. The panel in *European Communities – Bed Linen*<sup>45</sup> found that the investigating authorities can consider, for the purposes of the injury analysis, that all the imports made by a producer/exporter found to be dumping are “dumped imports”. This means that, in considering whether, “dumped imports” undercut the prices of the Community producers, the EC authorities were not required to distinguish between “dumped” and “non-dumped” imports of Tupy’s products. The EC notes that, in any event, Brazil has not made any claim to that effect.

#### Question 102

**What is the significance, if any, of the EC assertion that the practical result of “zeroing” in the consideration of whether there was significant price undercutting in this case was de minimis (0.01 per cent)?**

141. It must be recalled that Brazil’s claim is concerned exclusively with the use of zeroing in this investigation and not with the EC’s practice of zeroing as such. Accordingly, in order to substantiate this claim Brazil must show that the use of zeroing in this investigation was incompatible with the obligation of the EC authorities to consider whether price undercutting was significant. It is not enough for Brazil to show that zeroing may be inconsistent with that obligation in other investigations.

142. Brazil seems to be arguing that by resorting to “zeroing” the EC authorities failed to make an objective examination of this issue. The point made by the EC was that the objectivity of the methodology used by the EC authorities in this case must be assessed in light of its results in this investigation and not of the consequences that it might have in other circumstances. The averaging methodology used by the EC in this investigation yields a result which is virtually identical to the result of another methodology which Brazil appears to consider as objective. Whether the undercutting margin is 39.77 per cent or 39.78 per cent is immaterial for the purposes of deciding whether undercutting was significant. The use of a methodology which did not affect the outcome of the examination required by Article 3.2 in this investigation cannot be considered incompatible with

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<sup>45</sup> Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India* (“*European Communities – Bedlinen*”), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, paras. 6.132 et seq..

that provision simply because the use of that methodology might affect that outcome in other investigations.

Question 103

**Unlike Article 2 of the AD Agreement in relation to dumping, Article 3 contains no specific guidance as to the methodology an investigator may use to consider price undercutting. Comment.**

143. The EC has commented on this issue in paragraph 268 of its Submission.

**Issue 14: "No proper calculation of alleged undercutting margins"**

Question 105

**Is there a requirement under the AD Agreement, whether in Article 3.2 or elsewhere, to adjust prices before comparison in the context of injury?**

144. Article 3.2 refers to “undercutting by the dumped imports as compared with the price of a like product of the importing Member”. As defined in Article 2.6, the concept of ‘like product’, which sets the outer limits of comparison, is broad enough to include models that differ greatly in the characteristics that affect purchasers’ choices. Unless adjustments are made to take account of the differences, price comparisons between models that do not share the same characteristics will produce arbitrary results. An interpretation of the Agreement that permitted such comparisons would be perverse. These are not complex notions, but ones that are familiar to every shopper.

145. Consequently, the price comparison must take account of the various characteristics, etc., of the product. The Agreement does not state how this is to be done. Price adjustment to take account of differences between product models is one option, but the differences may be such that rational criteria of adjustment are difficult to identify. The alternative is to confine the comparison to those imported models that are identical to ones sold by the domestic industry. However, these may constitute only a small proportion of the dumped imports. In practice the EC authorities often apply a combination of the two approaches.

146. The silence of the Agreement on this subject indicates that investigating authorities have considerable discretion in deciding on the appropriate methodology. This discretion is not compatible with a requirement to adjust prices in every case. There will undoubtedly be instances where there are sufficient sales of identical models, or where there are no rational criteria for price adjustment. On the other hand, cases will also arise where there are few sales of identical models, but when straightforward criteria exist for adjusting prices in order to make comparisons for the remaining sales. In these cases a complete refusal to base the comparison on appropriately adjusted prices would constitute a breach of the obligation in Article 3.2 to consider the issue of significant price undercutting.

Question 106

**Article 3.1 AD refers to "prices on the domestic market". Comment, in relation to the nature of the consideration required under Article 3.2 AD.**

147. The reference to the impact “on prices in the domestic market for like products” rather than to the impact “on the price in the domestic market for the like product” is a further indication that the Agreement does not require the calculation of an overall undercutting margin for the product under consideration based on the comparison of *the* price for the dumped imports with *the* price of the domestic like product.



**Issue 15: "No proper cumulation of imports"**

Question 107

**What is the meaning of cumulatively assessing the "effects" under Article 3.3 of the AD Agreement? What are the "effects" that can be cumulated and where are these referred to in the other provisions of Article 3? Comment including with reference to para. 14 of the US oral statement (to the extent it is relevant).**

148. In paragraph 304 and footnote 97 of its First Submission the EC examined the various uses of the words 'effects' and 'impact' in Article 3. It follows from this examination that the EC agrees with the analysis presented by the US.

149. Article 3.2 does not use the word 'effects' in relation to the volume factor. However, it would be contrary to common sense to deny that increased volume could be an 'effect' of dumped imports, in the ordinary meaning of that word, and this is explicitly envisaged by the terms of Article 3.5 ('through the effects of dumping, as set forth in paragraphs 2 and 4'). See also the response to Question 97.

Question 108

**With reference to paragraph 341 of the EC first written submission, would a breach of Article 6.2 AD be possible where no breach of Articles 3.2 or 3.3 AD was found?**

150. The reference to Article 6.2 in paragraph 341 of the EC Submission was an error. No claim of breach of Article 6.2 was made by Brazil in the context of Issue 15.

151. The EC intended to refer to Article 3.1. It maintains that, since Brazil's claim under Article 3.1 was dependent on its claims under Article 3.2 and 3.3, and since the EC has refuted the latter, the claim under Article 3.1 fails.

**Issue 16: "Inappropriate consideration of injury indicators"**

Question 109

**Is the European Communities arguing that its evaluation of "growth" is implicitly apparent in the final determination? If so, on what basis?**

152. In this context the EC is arguing that the examination of sales, profits, output, market share, productivity, return on investments, and utilisation of capacity, all necessarily involved the question of whether or not they were increasing, and the extent of such increases (or decreases), and that as a consequence, at least in the circumstances of this investigation, it was examining the factor 'growth'.

153. The EC is not aware of any significant element of this factor which was not included in the factors to which explicit attention was given by the investigators and recorded in the Provisional and Definitive Regulations.

Question 110

**Indicate in the record of the investigation the sources of information and the methodology on which the statements and information in Exhibit EC-12 are based. In particular:**

- **How was the statement in Exhibit EC-12 on "ability to raise capital" derived from the information given in "questionnaires and annual accounts"?**

154. The assessment of 'ability to raise capital' was derived from the fact (confirmed by the annual accounts) that the EC industry continued to invest in the product.

- **How was the statement in Exhibit EC-12 on "wages" derived from the information given in "annual accounts"? Explain the meaning of "allocation on the basis of turnover"?**

155. In the annual accounts are found entries for 'salaries, wages, social security' (they may occupy one or more lines). The sum of these lines was converted from local currency into EURO with the annual conversion rate at the time. The next step was to calculate the ratio of the (smaller) turnover of the product concerned by comparison to the total turnover of the respective companies. For example, if the turnover of the product concerned is 90 and the total turnover of the company is 100, the ratio would be 90 per cent. This ratio was applied to the overall salaries (calculated as explained above). In the given example, the wages taken into account for the proceeding would be 90 per cent of the total wages. This was done first by company, and then a total was established by adding up the figures of all six complainants.

- **How was the statement in Exhibit EC-12 on "productivity" derived from the information given in "questionnaires"?**

156. Productivity was established as follows: annual production of the product concerned in tonnes (derived from the verified questionnaire responses), divided by the number of personnel directly or indirectly dealing with the product concerned, as per year. In order to establish the number of personnel dealing with the product concerned as compared to other personnel, this derived from the verified questionnaire responses.

- **How was the statement in Exhibit EC-12 on "return on investments" derived from the information given in "questionnaires and annual accounts"?**

157. This was established according to the following formula: profit or loss for the product concerned divided by the tangible fixed assets for the product concerned. The actual profit or loss came from the verified questionnaire replies. The tangible fixed assets can be found in the annual accounts. They were converted into EURO and allocated on the basis of turnover as explained above. This was done first by company, and then a total was established by adding up all six complainants' figures.

- **How was the statement in Exhibit EC-12 on "cash flow" derived from the information given in "questionnaires and annual accounts"?**

158. This statement was derived from the figures for profit or loss plus the differences between opening stock and closing stock, with depreciation added. These data can be found in the annual accounts. The results per individual company were converted into EURO and the ratio for turnover of the product concerned was applied as explained above. All the figures for the individual companies were totalled.

- **How and on what basis was the statement in Exhibit EC-12 on "magnitude of margin of dumping" derived?**

159. The EC takes it as a statement of the obvious that the price pressure on the products of the domestic industry would have been lower if the margin of dumping had been lower.

Question 115

We note the questionnaire to domestic producers (Exhibit BRL-37 ff.) requests information in section D2 concerning quantities and values of purchases/ imports of the product concerned. Does this pertain only to the product originating in the countries listed on the first page of the questionnaire, or to all imports of the product concerned from all sources?

160 The producer questionnaire contains the following text: in section D2 'Purchases/imports of the products from other sources': If you purchase the product from independent parties, either originating in the Community or in non-EC countries, for sale in the Community, please fill in the following table .... It is therefore clear that all countries and not just the 'countries concerned' are covered. This information is necessary in order to assess any impact on the evaluation of the company's capacity as an EC producer. (See for instance also section F22 relating to resale prices of purchased products.)

Question 116

Does each questionnaire response by the domestic industry provide information on each of the factors identified in the questionnaire? Provide a detailed response with reference to the relevant provisions of the record of the investigation.

161. The information requested in the Questionnaires addressed to the domestic producers and provided by each of them is summarised in the table below

Main information requested	Confidential replies					
	Companies*					
	1	2	3	4	5	6

**A) General information on the company**

Corporate information	yes	yes	yes	yes	yes	yes
Principal shareholders	yes	yes	yes	yes	yes	yes
Corporate structure of the company (including links with other companies)	yes	yes	yes	yes	yes	yes
Financial accounts	yes	yes	yes	yes	yes	yes

**B) Product concerned**

Product specification: creation of Product Control Numbers	yes	yes	yes	yes	yes	yes
Product comparability	yes	yes	yes	yes	yes	yes

**C) Total sales**

Total turnover	yes	yes	yes	yes	yes	yes
Main customers	no	yes	yes	yes	yes	yes

**D) Production, Purchases and Stocks**

Production and production capacity	yes	yes	yes	yes	yes	yes
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Purchases/imports from other sources (in volume and value)	yes **	yes	yes	yes **	yes	yes
Development of stocks (in volume and value)	yes	yes	yes	yes	yes	yes

#### **E) Sales**

Sales in volume and value (net of all rebates, discounts and free of taxes)	yes	yes	yes	yes	yes	yes
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#### **F) Distribution system and selling prices**

Distribution system and channels of sales	yes	yes	yes	yes	yes	yes
Price setting	yes	yes	yes	yes	yes	yes
Sales transactions in the EC during the investigation period to unrelated customers	yes	yes	yes	yes	yes	yes
Sales transactions in the EC during the investigation period to related customers	yes	yes	yes	yes	yes	yes
Credit notes	yes	yes	yes	yes	yes	yes

#### **G) Cost of production**

Manufacture of the product concerned	yes	yes	yes	yes	yes	yes
Costs of the product manufactured by the company (allocation of costs, standard costs and variances, cost of production per Product Control Number)	yes	yes	yes	yes	yes	yes
Related suppliers	yes	yes	yes	yes	yes	yes

#### **H) Profitability**

Profitability of EC sales to unrelated customers	yes	yes	yes	yes	yes	yes
Minimum profit required	yes	yes	yes	yes	yes	yes
Investments	yes	yes	yes	yes	yes	yes

#### **I) Employment**

Employment of the total company and attributed to the product concerned	yes	yes	yes	yes	yes	yes
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#### **\* Legenda:**

- 1** = Atusa Accesorios de Tubería S.A. (Spain)
- 2** = Crane Fluid Systems (United Kingdom)
- 3** = Ferriere e Fonderie Di Dongo S.p.A. (Italy)
- 4** = Georg Fischer Fittings GmbH (Austria)
- 5** = Raccordi Pozzi Spoleto (Italy)
- 6** = R. Woeste & Co. GmbH & Co. Kg (Germany)

**yes** = a reply has been provided by the company

**no** = no reply has been provided by the company

**yes\*\*** = the information has been provided during the investigation

Question 117

**Would a breach of Article 3.4 AD necessarily also lead to a breach of Article VI of the GATT 1994?**

162. The EC believes that this would normally be the case because of the link established by Article 3.1.

Question 118

*Does Brazil's allegation concerning cumulation and injury on page 205 of its first written submission relate to the obligations under Article 3.4 or 3.5? Substantiate your response.*

163. The EC does not understand this question.

Question 119

**Could information requested by the European Communities in the questionnaires to domestic producers relating to the "effect of continued imports" support an investigating authority's evaluation of the magnitude of the margin of dumping within the meaning of Article 3.4 AD ? Did it in this case?**

164. The information collected under this rubric is intended to assist the investigating authorities in determining the 'Community interest', albeit that this topic is covered elsewhere in the Questionnaire (under heading K). The information would be relevant were the investigating authorities addressing the issue of 'threat of injury', which was not the case here.

Question 120

**How can the Panel verify whether and to what extent the European Communities investigating authorities examined the issue of outsourcing and ownership links of the domestic industry with producers located in countries not subject to the investigation? Please indicate the relevant parts of the record of the investigation.**

165. Information regarding ownership links and outsourcing was contained in the Questionnaire answers on company structure and imports, and information on investments was contained in the annual accounts of the companies. The figures found during verification in the companies' accounts books confirmed this information. The books would have recorded and explained any major investments in other companies.

166. The results of the investigation are reported in recitals 134 and 174 of the Provisional Regulation, and recitals 65 et seq., and 106 et seq., of the Definitive Regulation. The EC authorities also addressed the issue in the 'Transparency Letter' of 20 July 2000 (Exhibit BRL-18, point 7.1).

167. It should be said that, with the exception of Bulgaria, and (to some extent) Turkey, the allegations of outsourcing, etc., were never substantiated.

Question 121

**Indicate the relevant parts of the record of the investigation dealing with sales outside the European Communities.**

168. Data on exports of the Community industry were contained in the companies' answers to the Questionnaires. These figures were confirmed by the EC authorities during the on-the-spot verification. The results of this examination are recorded in the 'Transparency Letter' (point 6.4). They are reflected in the comments on stocks in the Provisional and Definitive Regulations.

**Issue 17: "Inappropriate establishment of causation"**

Question 126

**What relevant material may guide a panel's consideration concerning the issue of "attribution" under Article 3.5 AD?**

169. The EC reaffirms that the Panel's task is not to attempt a *de novo* determination of the issue of causation and attribution, or even to determine what an ideal consideration would have consisted of, but to determine whether the EC authorities have correctly applied the law, have established the facts properly, and have evaluated those facts in an unbiased and objective manner.

170. Consequently, the material that guides the Panel's consideration should be that considered by the investigating authorities.

Question 127

**What type of economic analysis would an investigating authority actually need to perform to "separate" and "distinguish" between each distinct causal factor?**

171. For the same reasons that the EC has given in its previous answer, the EC's view is that the proper function of the Panel is to review the analysis carried out by the investigating authority. The process of separating and distinguishing between causal factors is an aspect of the evaluation of facts in terms of Article 17.6(i).

172. This analysis (which was reported in recitals 166 to 176 of the Provisional Regulation, and recitals 106 to 113 of the Definitive Regulation) satisfies the requirements of Article 3.5

Question 128

**If a product is "dumped" does the reason for that dumping (e.g. a possible comparative advantage) matter?**

173. The EC assumes that this question is raised in the context of the issue of causation. That being the case it is not aware of any way in which the 'reason' for the dumping could be relevant, if by 'reason' the Panel means a factor that facilitates or encourages dumping by an exporter.

174. The EC does not accept that comparative advantage could be a 'reason' for dumping, rather it is a reason why an exporter might be able to undercut domestic producers without dumping. The benefits of comparative advantage can be enjoyed by domestic customers as well as those in export markets. The 'reason' for dumping is more likely to derive from the degree of protection enjoyed by the exporter in its home market.

Question 129

**How, if at all, do the standards of "significant contribution" (e.g. Definitive Regulation, para. 113) and "not such to have broken the causal link" (e.g. Definitive Regulation, para. 111) relate to a genuine and substantial relationship of cause and effect?**

175. The EC notes that the Appellate Body has employed the phrase ‘genuine and substantial relationship of cause and effect’ to describe the causal link that must be established for the purposes Article 4 of the Safeguards Agreement.<sup>46</sup>

176. The EC has no difficulty in agreeing that the causal link to be established in accordance with Article 3.5 must be both genuine and substantial. In fact, the exclusion of links that were not genuine or were insubstantial would hardly be controversial.

177. In recital 113 of the Definitive Regulation the EC said ‘any substitution effect cannot have significantly contributed to the injury suffered by the Community industry’. It should not be assumed that, had there been a significant contribution from the ‘substitution effect’, the necessary causal connection between dumped imports and injury would have ceased to exist. However, in the absence of any significant contribution the question did not even arise. In other words, the process of allocating causes to injuries need not be embarked upon in the case of a factor which made no significant contribution to injury. Although the notion of ‘significant contribution’ is here applied to other causes, it is in essence no different from the notion of ‘substantial cause’ that the Panel by its question implies should be applied to the dumped imports.

178. In recital 111 the EC said that ‘even if imports from other third countries may have contributed to the material injury suffered by the Community industry, it is hereby confirmed that they are not such to have broken the causal link between the dumping and the injury found.’ This statement was made as a summing-up of an examination of the effects of imports from a number of third countries. As stated above, the phrase used by the Appellate Body reflected the conclusion of an analysis which distinguished between the different causes of injury. In recital 111 the EC was summing up just such an analysis. If the consequences of third-country imports had been sufficiently great they would have broken the causal link between the dumping and the injury found. The EC authorities found this not to be the case. In any event, their conclusion fits within the framework of analysis described by the Appellate Body.

#### Question 130

**What does it mean for a factor to be "known" in the sense of Article 3.5 AD? Comment on the phrase "all relevant evidence before the authorities" in the sense of Article 3.5 AD.**

179. Article 3.5 states that ‘The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry ...’. At paragraph 428 of its First Submission the EC explains that the phrase ‘any known imports’ indicates that the onus lies on interested parties to raise issues during the course of the investigation. As explained in that Submission, this interpretation has been adopted by two WTO panels.

180. The second sentence of Article 3.5 states that ‘The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities.’ This rule requires the authorities not to disregard the evidence that has been presented to them.

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<sup>46</sup> Appellate Body Report, United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities (“United States – Wheat Gluten Safeguards”), WT/DS166/AB/R, adopted 19 January 2001, para. 69; Appellate Body Report, United-States – Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia (“United-States – Lamb Safeguards”), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 168.

Question 131

**The European Communities has relied on information that differs from Eurostat data. How could an interested party verify the accuracy of the information relied on? Comment, with reference to paras. 434-446 and 447-464 of the EC's first written submission.**

181. The EC applies confidentiality rules in accordance with Article 6.5. Like most WTO Members, it does not allow interested parties in anti-dumping investigations to see confidential data of other parties. As a consequence situations arise frequently where an interested party is unable to verify the information that the authorities rely on for their decision. For example, the domestic producers cannot verify that the dumping margin calculation is based on the information provided by the exporters, let alone verify that such information is accurate. For that, it would be necessary that representatives of the domestic producers were present during the on-the spot verification. The difficulties that are thereby created for parties are to some extent reduced by the provision of non-confidential versions of the protected information, such as tables showing indexed data rather than actual import, etc., figures.

182. In the two sections of the EC's First Submission mentioned by the Panel the EC made use, respectively, of confidential information from EC producers, and of Eurostat data. The EC's view (First Submission paragraph 444) is that information collected directly from producers (and other interested parties) is preferable (even if it is confidential) because it is subject to verification. Such information was available in regard to the exports made by the domestic producers (the subject of the first section) but not in relation to the total volume of third-country imports (the subject of the second) because not all such imports were made by interested parties. Consequently in the latter case it was necessary to have resort to the second-best source of information, Eurostat.

**Issue 18: "No timely opportunities to see all relevant information"**

Question 136

**How, if at all, might Article 17.4 AD be relevant here? Provide reasoning.**

183. Brazil appears to challenge the provisional regulation (see question 132). If so, it would have to show that the requirements of the last sentence of Article 17.4 are met. In any event, the provisional measure was no longer in force when the panel was established. According to WTO practice,<sup>47</sup> only those measures that are in force at the time of establishment of the panel can be the subject of dispute settlement.

**Issue 19: "No proper information on matters of fact and law"**

**What is the relationship between the substantive provisions regarding the determination on dumping, injury and causation (Articles 2 and 3) and the transparency obligations under Article 12? Would a violation of the substantive provisions automatically constitute a violation of the Article 12?**

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<sup>47</sup> Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("United States – Gasoline"), WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, para. 6.19; Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("Argentina – Textiles and Apparel"), WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, para. 6.14.



184. The EC is in agreement with the following observations made on this issue by the *Bed Linen* panel:<sup>48</sup>

Having found a violation of the substantive requirement to consider all the factors set forth in Article 3.4 in assessing the impact of imports, the question of whether the notice of either the preliminary or affirmative determination of injury is "sufficient" under Article 12.2 is immaterial. A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement.

Question 139

**What is the scope of Article 12.2 and 12.2.2? Do these provisions cover only the public notices preliminary and final determinations, or do they also cover other documents in the investigation, i.e. disclosure documents and transparency letters? Can the disclosure documents and transparency letters be considered as a "separate report" under Article 12.2 and 12.2.2?**

185. The EC has addressed these issues in paragraph 216 of its First Submission. Articles 12.2 and 12.2.2 are explicitly concerned with public notices. They relate explicitly to preliminary and final determinations. The 'separate report' is to be 'made available'. Footnote 23 states that 'Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public'. The disclosure documents and transparency letters contained information intended for the recipients only. They are not covered by these provisions.

Question 140

**Do the parties believe that clerical errors in the public notices of preliminary or final determinations may constitute grounds for a violation of Article 12.2 and 12.2.2?**

187. Errors which are transparent and do not prejudice the rights of the interested parties (which is the case in this dispute) provide no legal basis for calling into question the propriety of a Member's measures.

Question 141

**What is the relationship between Articles 12.2 and 12.2.2 and the provisions concerning the protection of confidential information in Article 6.5?**

187. The publication obligations in both Articles 12.2.1 and 12.2.2 contain the qualification 'due regard being paid to the requirement for the protection of confidential information'. The nature of this requirement is elaborated in Article 6.5. However, confidentiality is not the sole boundary to the publication obligations of Article 12. Article 12.2 requires publication 'in sufficient detail', and

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<sup>48</sup> Panel Report, *European Communities – Bedlinen*, para. 6.259. The same view is expressed in Article 21.5 Panel Report, *Mexico – Anti-Dumping investigation of high fructose corn syrup (HFCS) from the United States*, WT/DS132/RW, circulated 2001, as confirmed by the Appellate Body Report, WT/DS132/AB/RW, para. 6.40.

Article 12.2.1 speaks of ‘sufficiently detailed explanations’. These provisions anticipate that some amount of detail will not be included in the published texts. There are also the qualifications implicit in the phrase ‘issues ... considered material by the investigating authorities’ (see the following Question).

Question 142

**What criteria may be relevant in deciding which issues of fact and law can be considered “material by the investigating authorities” under Article 12.2?**

188. The EC is not aware of any general criteria that can be invoked in this context. The issues that arise are ones of fact which will depend on the circumstances of individual cases.

**Other**

Question 143

**Could the EC clarify the meaning of the Article 11.3 of the EC Basic Regulation on whether the exporter has the right to have a review or has the right to request a review?**

189. Article 11.3 of the EC’s Basic Anti-Dumping Regulation states as follows:

The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the Community producers which contains sufficient evidence substantiating the need for such an interim review.

An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

In carrying out investigations pursuant to this paragraph, the Commission may, *inter alia*, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence.

190. In the light of the facts of the present dispute, the EC assumes that the Panel is primarily concerned with the situation prior to the elapsing of the one-year period.

191. The second paragraph of Article 11.3 establishes that, provided certain conditions are fulfilled, the authorities have a duty to carry out a review. Thus it can be said that in these circumstances an exporter which requests a review has an enforceable ‘right’ to have that review carried out.

192. Prior to the expiry of the one-year period no such obligation or right exists, but the Commission has the discretion to initiate a review on its own initiative. The circumstances in which it shall exercise this initiative are not defined. They do not exclude a request by an exporter. In this sense it can be said that the exporter has a right to *request* a review during this period. The European

Court of Justice could then review whether the Commission had acted within the bounds of its discretion.

Question 144

**Can the EC confirm that if Tupy has requested a review within the year following the imposition of the anti-dumping duties the Commission would have exercised discretion on the granting of such a request?**

193. A request for a review made by Tupy within the one-year period would have been seriously considered. On 10 August 2001 the Commission wrote to Tupy inviting it to request an interim review. Tupy replied on 14 August, observing that it had no right to an interim review. In fact the one-year period expired on 19 August.

194. In response to a request from one of the other exporters, but basing its action on a special procedure introduced in 2001 for taking account of the results of WTO dispute rulings, the EC has opened a review of the anti-dumping duties that are the subject of this dispute.<sup>49</sup> A copy of the Notice of initiation is provided as Exhibit EC-26. This review is 'limited in scope to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a dumping methodology at issue in the [WTO *Bed Linen*] reports, and which submit a full questionnaire reply within the time limits'.

195. Since the review examines data for the period 1 January 2001 to 30 September 2001, it would have provided an opportunity to evaluate Tupy's claims regarding the effects of the devaluation. Yet, even though the EC Commission has granted two extensions of the deadline for co-operation, Tupy has decided not to co-operate, thus rendering it impossible to ascertain the alleged effects of the devaluation after the original investigation period.

**Also, if the request had been made after the year following the imposition of the anti-dumping duty would the Commission have automatically granted the request?**

196. If Tupy had made a request for a review following the one-year period that request would have been accepted provided the conditions in Article 11.3 regarding 'sufficient evidence' were fulfilled.

Question 149

**Are WTO dispute settlement consultations relevant in determining whether or not a claim falls within a panel's terms of reference? Why or why not? In general, is there any kind of verifiable record kept of WTO dispute settlement consultations? Is there any such record of the consultations in this dispute? Please cite any relevant material in responding.**

197. In general a panel's terms of reference are determined by the decision of the DSB that establishes it. Consultations are not intended simply as a first step in panel proceedings, but as an alternative means of dispute settlement. Consequently they may cover a wide range of issues that are never expected to come before a panel. The independent nature of consultations would be undermined if they were seen as helping to define a panel's terms of reference. This is not to say that consultations can never have relevance to the terms of reference – the Appellate Body has used evidence of the parties' consultations to show that they understood the meaning of terms in the panel request.<sup>50</sup> But their influence is at most indirect.

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<sup>49</sup> EC Official Journal, C342/5, 5 Dec. 2001.

<sup>50</sup> Panel Report, *European Communities - Customs Classification of Certain Computer Equipment* ("European Communities – Computer Equipment"), WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June

198. An additional consideration is that one of the functions of a panel request is to give notice to third parties, which may not have participated in the consultations, e.g. in the case of Article XXIII consultations.

199. The EC keeps some records for its own purposes of the substance of consultations in which it is involved. In general no attempt is made to draft a jointly-agreed record.

Question 150

**In this case, was the information relating to the examination by the EC authorities of the issue of outsourcing and links the EC industry may have with producers located in countries not subject to the investigation “confidential” for the purposes of the EC investigation?**

200. The EC authorities had evidence of EC producers importing the product under consideration from third countries in respect of two countries only, Bulgaria and Turkey. The exact relationships between the EC companies concerned and both the Bulgarian and the Turkish plant/producers and the exact amount of their imports were considered confidential.

Question 151

**Assume that the complaining party points to information that it submitted in the investigation and that is on the record of the investigation. The complaining party alleges that it does not have access to any additional information on the issue, nor to any indication that the investigating authority examined this information or sought additional information. How can the complaining party (and the Panel) assess whether and to what extent the investigating authority examined the information?**

201. The complaining party can ask the defending Member to provide information, and the Panel is empowered under Article 13 of the Dispute Settlement Understanding to request information regarding the examination that the investigating authority has conducted.

**EXHIBITS**

Exhibit EC-18	Table dmsalur241043.
Exhibit EC-19	Copy of invoice number 203886.
Exhibit EC-20	Handwritten note, 21-23 September 1999.
Exhibit EC-21	Listing of all exports allowing for tax credit during 1998.
Exhibit EC-22	Tupy document concerning payments of commissions to Tupy Europe.

Exhibit EC-23	Tupy invoice to Jannone, Italy.
Exhibit EC-24	Data on Tupy's export sales showing totals.
Exhibit EC-25	Data on Tupy's export sales showing effect of conversion rates.
Exhibit EC-26	Notice of Initiation of Review, 5 Dec. 2001.

## ANNEX E-4

### REPLIES OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF BRAZIL

14 May 2002

**1. With reference to the construction of normal value, the Provisional Regulation states, in the case of constructing normal value:**

**“(26)(...), in accordance with Article 2(3) of the basic Regulation, normal value was constructed by adding to the manufacturing costs of the exported types, adjusted where necessary, a reasonable percentage for selling, general and administrative expenses (“SG&A”) and a reasonable margin of profit. To this end, the Commission examined whether the SG&A incurred and the profit realized by each of the exporting producers concerned on the domestic market constituted reliable data.**

**(27) Actual domestic SG&A expenses were considered reliable when the domestic sales volume of the company concerned could be regarded as representative when compared to the volume of export sales to the Community. The domestic profit margin was determined on the basis of domestic sales made in the ordinary course of trade, i.e., when these sales to independent customers at prices equal to or above the cost of production represented at least 10 per cent of the total of domestic sales volume of the product concerned made by the company concerned. (...)” (emphasis added)**

**(a) Could the EC confirm that, if the domestic sales were representative, sales of types that were not made in the ordinary course of trade (unprofitable sales) were included in the basis for the determination of SG&A?**

Domestic sales of types that were not made in the ordinary course of trade were **not** included in the basis for the determination of SG&A expenses. The amounts for SG&A expenses and for profits were both based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporting producer under investigation, as prescribed by Article 2.2.2.

As explained in paragraphs 122 to 127 of the EC’s First Submission, this is demonstrated by the figures contained in the Provisional disclosure and the Definitive disclosures.<sup>1</sup>

**(b) In the case of an affirmative answer, considering that sales of types that were not considered to be made in the ordinary course of trade were included in the basis for SG&A expenses determination, but were not included in the basis for profit margin determination, does the EC reaffirms that the same method for calculating of SG&A expenses and profit margin were adopted?**

Since the same method was used to determine both SG&A expenses and profit, this question is irrelevant.

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<sup>1</sup> Annex II, Annex 3, page 28, BRL-11 and BRL-16.

2. In its first submission, the EC informed that “the total of COM [cost of manufacturing], SG&A and profit corresponds to the value of sales made in the ordinary course of trade” (par.124, p. 30, THE ECFS) and that “both SG&A and profit were based on the 1260 types of the like product sold on the domestic market” (par.127, p. 31, ECFS, emphasis added).

Does the EC confirm that the sales of the 1,260 types were made in the “ordinary course of trade”? If so, why was the normal value constructed for 36 types<sup>2</sup> that domestic sales were considered as being representative?

<sup>2</sup> The number 36 results from the difference between 602 types that were sold on the domestic market in sufficiently representative quantities and 566 types for which it was concluded that the normal value could be based on domestic prices of identical types, mentioned in the Disclosure Preceding Provisional Regulation (BFS, p.51).

At paragraph 117 of its First Submission the EC explained that, in accordance with Article 2.2.2, the constructed normal value was based on SG&A expenses and profits of domestic sales in the ordinary course of trade of all types of the like product.

The EC has reviewed that data and finds that the number of types sold on the domestic market was 1,261 rather than 1,260 as stated in its Submission. Of these 1,261, 68 types (not 36), were found not to have been sold in the ordinary course of trade and were excluded from the calculation. SG&A expenses and profit were thus derived from data relating to 1,193 types sold on the domestic market in the ordinary course of trade. The EC’s methodology and the data were provided to Tupy in the Definitive disclosure.<sup>2</sup> The data were also provided to Tupy on a CD-ROM.

*(Issue 5 – Normal Value – Inappropriate Product Types)*

3. Could the EC confirm the data presented in the table below?

	Number of Types	Code 12	Code 18
1. Types Exported to the EC	1,375	1,092	283
2. Identical Types (IT) Sold in the Dom Market	653	653	0
2.1. IT – representative and profitable sales	566	566	0
2.2. IT – representative and unprofitable sales	36	36	0
2.3 IT – unrepresentative and profitable sales	45	45	0
2.4. IT – unrepresentative and unprofitable sales	6	6	0
3. Non Identical Types sold in the Domestic Market	722	436	286

The correct data are as follows:

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<sup>2</sup> Annex II, Annex 3 , BRL-16.

	Number of types	Code 12	Code 18
1. Types exported to the EC.	1,375	1,092	283
2. Identical types sold in the domestic market.	668	668	0
2.1 Identical types – representative and profitable	566	566	0
2.2 Identical types – representative and unprofitable	36	36	0
2.3 Identical types – unrepresentative and profitable	62	62	0
2.4 Identical types – unrepresentative and unprofitable sales	4	4	0
3. Non identical types sold in the domestic market. (This is understood as types exported which were not sold on the domestic market)	707	424	283

**4. Could the EC confirm whether it has identified any export sales to the EC of types initiating with 68 and 69 during the POI?**

The EC did not find any sales for export to the EC of types starting with codes 68 or 69 during the investigation period.

**5. Could the EC indicate what was the evidence presented by the Brazilian exporter to demonstrate that types initiating with 79 code were not a like product and in which way it differs from the evidence that was presented related to 68 and 69 product types?**

**Product types with code 79:**

Tupy neither requested nor contested the exclusion of product types starting with code 79 from the scope of the investigation, nor did it present evidence to demonstrate that they were not a like product. The reasons why the product scope was limited to threaded malleable cast iron tube or pipe fittings are set out in recitals (10) and (11) of the Provisional Regulation and in the Provisional disclosure document.<sup>3</sup>

In its Questionnaire response Tupy gave a description of its product coding system<sup>4</sup>, but did not mention product types with code 79. As the case-handlers noticed such types in Tupy's domestic sales (twelve types starting with code 79 of which 1.502.207 units were sold), Tupy, on request, provided corrected information during the on-the-spot verification. This explained that product types with code 79 were 'Malleable iron – Special Meikon Mark' and added to the finishing codes reported in the reply to the questionnaire which were 3-BSP Thread and 4-NPT Thread three additional codes (0-raw mat-deburring; 1-semi-machined part; 2-machined part). Of the twelve '79' types sold on the domestic market, six (accounting for 95.842 units sold) were reported to be BSP threaded (finishing code 3), and six (accounting for 1.406.365 units sold) were reported to be raw part-deburring.

<sup>3</sup> Annex I, paragraph 2.1, BRL-11.

<sup>4</sup> Section B.2.3, BRL-5.



Product types with code 79 were not mentioned in Tupy's commercial brochures of malleable cast iron pipe fittings.

While discussing the technical aspects of the products sold by Tupy during the on-the-spot verification Tupy explained that all '79' types were unthreaded, and were sold to a single customer, Meikon, on an OEM basis. In fact, these product types were not fittings but were reported as such because they were produced on the same production line and fell under the same CN code. They were not used as a fitting but as a tooling for making threads in plastic tubes. They were re-exported by Meikon in South-American markets.

In conclusion, the types starting with code 79 were all unthreaded and were excluded from the product definition for this reason. The fact that they were not used as fittings but as tooling and that they were not consumed on the Brazilian market but exported to other South-American markets, could have been used as additional reasons to exclude them from the product scope of the proceeding.

#### **Product types with codes 68 and 69:**

Tupy neither requested the exclusion of product types with codes 68 and 69 from the scope of the investigation nor contested their inclusion. Although Tupy requested an adjustment for physical differences when comparing normal value and export price, the fact that domestic sales prices of '68' and '69' types were not used to determine normal value rendered such adjustments unnecessary.

Tupy did not make specific arguments during the proceeding to support exclusion of these product types. They were included in the types reported by Tupy in its reply to the Questionnaire. Unlike the '79' types, in Tupy's commercial brochures they appeared alongside the '12' types, and were described as 'Malleable iron pipe fittings'.

The differences between '12' and '18' types, on the one hand, and '68' and '69' types on the other, lie mainly in the threading: the former are BSP threaded and the latter are NPT threaded. While the pressures that fittings with '12', '18' and '69' types can resist are broadly the same,<sup>5</sup> fittings with code 68 can resist a higher pressure.

All these types were considered to be like products because they have the same basic physical and technical characteristics, and the same uses, despite differences in sizes, shape, surface finishing and grade of cast iron. Specific differences in threading, which were claimed to exist by Korean exporting producers and were examined by the EC, were not considered sufficient to exclude certain types from the product scope.<sup>6</sup>

#### ***(Issue 9 – No proper adjustment for packing costs)***

#### **6. Paragraph 228 of EC's First Submissions reads:**

**“ Regarding the conversion of the amount for transport there is a precise, but quite technical, reason why the monthly rate was used. The EC will gladly provide this explanation, but at this stage of the proceedings merely contends that the issue is *de minimis* since transport costs were less than 0.5 per cent of the total sum”**

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<sup>5</sup> Commercial brochure in Tupy's reply to the questionnaire, BFL-5.

<sup>6</sup> Provisional Regulation, recitals 17 to 19.

- (a) **Could the EC explain the reason why the monthly rate was used in the conversion of the amount for transport instead of the rate of exchange on the date of sale, as established by Art. 2.4.1?**

Contrary to the precise instructions in the Questionnaire the allowances claimed on export prices were reported by Tupy in the foreign currency of the respective export invoices, rather than in Brazilian Real.

In order to convert the allowance for *transport* from foreign currency into Real, the EC used the same conversion rate that Tupy has used to convert the amounts from Real into foreign currency. Tupy reported these exchange rates in the file ECALLUR, column 'EXCHANGE', on the CD-ROM accompanying their letter of 5 October 1999. The method applied by the EC guaranteed that the amount in Real made as an adjustment (50.200 BRL) corresponded to the amount booked for inland transport in Tupy's accounts.

- (b) **Could the EC confirm whether the monthly rate was used only regarding the conversion of the amount for transport? Was the monthly rate used regarding the conversion of the amount for other allowances?**

See the answer to the Panel's Question 88.

***(Issue 10 – Punitive Sampling)***

**7. Could the EC explain why it decided to compare domestic and export prices of a sample of 20 types, instead of comparing the prices of the 566 types that sales were representative and were made in the ordinary course of trade? Was not the data related to the sales of those 566 types available to the investigating authorities?**

The EC has addressed this issue in answering the Questions posed by the Panel (numbers 57 and 67).

## ANNEX E-5

### RESPONSE OF THE UNITED STATES TO QUESTIONS OF THE PANEL TO THE THIRD PARTIES

7 January 2002

**Q1. What is the significance, if any, of the phrase “prices in the domestic market” in Article 3.1?**

Reply

1. The phrase reflects that the injury determination involves an examination of conditions in the domestic market of the importing Member. Whereas the dumping determination under Article 2 involves a comparison of the price of the exported products with the price for the comparable product when sold in the exporting Member's home market or in a third country market, the injury determination focuses on the volume, price effects and impact of the dumped imported product on domestic producers *in the importing Member's market*.

**Q2 What is the significance, if any, of the reference to “the dumped imports” in Article 3.2?**

Reply

2. The “dumped imports” referenced in Article 3.2 and throughout Article 3 refer to all imports of the product from the countries subject to the investigation, other than those goods for which there has been a negative dumping determination. The term must be read so that it has meaning as used throughout Article 3, specifically in light of the framework of the injury determination. In this respect, the Agreement requires investigating authorities to examine, on one hand, the volume and price effects of *the dumped imports*, and on the other, all relevant economic factors having a bearing on the state of the domestic industry. Through this overlapping examination of both *the dumped imports* and the domestic industry factors, the investigating authorities examine the “consequent impact” of those *dumped imports* on the domestic industry.<sup>1</sup>

3. “The dumped imports” referenced in Article 3 are neither confined to particular transactions which have been examined for dumping determinations nor limited temporally to the period covered by the dumping determination. This interpretation is consistent with the Agreement's recognition that it will be impracticable in some cases to make individual dumping determinations for each known exporter or producer; in those cases, the authorities may limit their dumping examination to either a sampled selection or the largest percentage of the volume of exports from the subject county which “can reasonably be investigated”.<sup>2</sup> In addition, the Agreement allows a presumption that the companies whose sales are not specifically examined to compute a dumping margin also have been made at dumped prices if the examined companies' sales reveal dumping. In each of the circumstances illustrated above, the dumping determination would not be specific to individual sales of the subject imports in the importing member's domestic market, and all the imports either specifically subject to their own calculated margin or to a presumptive margin based on an “all-others rate” should be treated as “dumped imports” for purposes of the injury determination.

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<sup>1</sup> See Articles 3.1 and 3.3.

<sup>2</sup> See Article 6.10.

4. Furthermore, if "the dumped imports" examined under Article 3.2 were limited to those covered by the precise transactions examined in the dumping determination, then an importing Member would not be permitted to consider for injury purposes the volume and price effects of any imports that fall outside the typical twelve month period used by most investigating authorities as the period of investigation for determining dumping.<sup>3</sup> Whereas the determination of dumping normally need not consider trends over time, the requirements of Article 3.1 concerning a determination of injury necessarily contemplate that the importing Member will gather information covering more than one year in order to evaluate volume and price changes.<sup>4</sup> An importing Member's consideration of whether there have been significant absolute or relative increases in the volume of dumped imports and of whether the dumped imports have to a significant degree depressed or suppressed prices for the like product in the domestic market must be made in the context of an appropriate time frame, which will almost always extend longer than the period of investigation for making a dumping calculation. Depending on the circumstances, volume and price effects resulting from subject imports may be immediate or only evident over a longer period of time. Furthermore, the fact that execution of sales in some industries can take longer than a year, and that in some industries sales are made pursuant to annual or longer contracts, further demonstrates the frequent need for examining a multi-year period in injury investigations.

5. The meaning of the term "the dumped imports" as used throughout Article 3 was discussed in *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*.<sup>5</sup> The *Bed Linens* panel found that the dumping determination is made with reference to a *product*, not with reference to individual transactions, and that investigating authorities may therefore treat all imports subject to the dumping determination as "dumped imports" for purposes of the injury analysis under Article 3.<sup>6</sup> The Panel's rationale for this conclusion was based on many of the same considerations set forth above. In addition, as that Panel noted, the view that "the dumped imports" include all imports from the subject sources without distinction by transaction is also consistent with the findings of the GATT Panels in the *Salmon* cases.<sup>7</sup>

6. Article 3.2 of the AD Agreement contemplates that investigating authorities will examine the volume and price effects of all imports subject to the dumping determination. This does not mean, however, that the investigating authorities must somehow account for each and every subject import. The Agreement does not set forth explicit methodologies that the investigating authorities must use in considering import volume or price effects.

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<sup>3</sup> The time period covered by the dumping determination will normally be one year, but in no case less than six months. Article 2.2.1, n.4.

<sup>4</sup> The disparity between the typical period of investigation of 12 months for calculating dumping and the substantially lengthier period of investigation for making an injury determination existed well before the Uruguay Round. The negotiators were well aware that the period for calculating dumping would be shorter than that for assessing injury. With this awareness, they reaffirmed the requirement that investigating authorities evaluate injury based upon an examination of volume and price effects and impact that inherently would cover more than one year. Indeed, WTO Members have, by consensus, endorsed the practice of collecting data for a one year period for dumping determinations and for at least a three year period for evaluating injury. This consensus is reflected in a *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* adopted by the WTO Committee on Anti-Dumping Practices on 5 May 2000.

<sup>5</sup> *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted as modified by the Appellate Body report on 12 March 2001, paras. 6.121–141 (hereinafter, "*Bed Linens*").

<sup>6</sup> *Bed Linens*, paras. 6.136, 6.139. The *Bed Linens* panel characterized the subject products as "all imports from producers/exporters for which an affirmative determination of dumping is made." However, it is clear that the Panel was actually referring to all imports from India for which there was *not* a *negative* dumping determination. See Para. 6.138. In *Bed Linens*, the imports for which there was an affirmative dumping determination and those for which there was no negative dumping determination were the same.

<sup>7</sup> *Bed Linens*, para. 6.141, citing *Salmon-Anti-Dumping Duties*, Report of the Panel at paras. 565-571; *Salmon-Countervailing Duties*, Report of the Panel at paras. 328-340.

**Q3. Unlike Article 2 of the Antidumping Agreement in respect of dumping, Article 3 contains no specific guidance as to the methodology an investigator must use to consider price undercutting. Comment.**

7. As the Panel notes, Article 3.2 contains no requirement that a particular methodology be employed by investigating authorities in addressing whether there has been significant price undercutting for the purposes of the injury determination. Particularly when contrasted with the inclusion of specific methodologies in Article 2 for examining transactional prices for the purposes of the dumping determination, the absence of a reference to a particular methodology in Article 3 must be interpreted to mean no specific methodology is prescribed.

8. That said, the procedure that an investigating authority uses to make price comparisons under Article 3.2 must be consistent with the objectives and other requirements of Article 3. Thus, the price comparisons must reflect an objective examination in accordance with Article 3.1, and must involve a comparison of prices for the dumped imports (see response to question 2, above, concerning the meaning of "dumped imports" in this context) with prices for a like product of the importing Member.<sup>8</sup> Further, as explained above in response to question 1, the overarching objective of comparing prices and examining price depression or suppression is to determine the effects, if any, of the dumped imports in the domestic market for like products.<sup>9</sup>

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<sup>8</sup> See Article 3.2.

<sup>9</sup> See Article 3.1.

## ANNEX E-6

### COMMENTS OF BRAZIL ON THE RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM THE PANEL TO THE PARTIES

(21 May 2002)

#### General Remark

Brazil's comments on the EC's answers to the Panel's questions are given below. Brazil observes that in the following it will not go through all the issues and arguments raised in the EC's answers to the Panel's questions to the Parties. Brazil has already had the opportunity, in its own submissions, statements and answers to the Panel's and to the EC's questions, to present its own position on the matters below. Brazil's following additional comments are therefore made only where in Brazil's view, further clarification of its position is called for at this stage with regard to certain issues. Brazil may choose in any event to elaborate further, as appropriate, on any aspect of the matters concerned in the subsequent phases of this proceeding.

#### **Question 1**

**With respect to Brazil's allegations under Article 15 AD, would the European Communities have conducted itself in the same manner in an anti-dumping investigation involving a developed country Member? Is this relevant here? If not, what is the meaning and legal significance of the phrase "special regard" in the first sentence of Article 15.**

Brazil notes the EC's statements that "[a]s a general rule, the EC authorities would not act in the same manner in the application of anti-dumping measures involving a developed country Member" and that "no similar steps were taken in regard to Japan, the sole undeniably-developed country concerned by the same proceedings"<sup>1</sup> (emphasis added). It is not clear to Brazil which "steps" the EC is referring to. If these "steps" refer to the suggestion that Tupy should offer an undertaking, Brazil recalls that such "steps" were only taken after Brazil raised this issue in the bilateral contacts. With regard to paragraph 2 of the EC's response Brazil refers the Panel to the arguments submitted on this issue in the Second Submission of Brazil.

#### **Question 6**

**What legal obligations does Article 15 AD impose? Could Brazil comment on the European Communities statement in paragraph 31 of its first written submission that "...the first sentence [of Article 15] imposes no legal obligation"? If there is more than one obligation in Article 15, what is the relationship, if any, between these obligations-- i.e. are they separate, independent obligations, or are they interrelated and dependent? Explain your response, with reference to the customary rules of interpretation of public international law and any relevant material.**

Brazil notes the EC's broad brush statement that "[t]his interpretation was justified in accordance with the rules stated in the Vienna Convention".<sup>2</sup> However, Brazil submits further that the

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<sup>1</sup> See Answers of the European Communities to the Questions from the Panel at the First Substantive Meeting, Geneva, 14 May 2002, 'the EC's Answers', para 1.

<sup>2</sup> See the EC's Answers, para 3.

EC does not provide any supportive argumentation why the first sentence of Article should be *reduced* into the second sentence, and why the Panel should accept this kind of suggestion, which is against *the principles of effective interpretation*.

#### Question 12

**What factors should guide a panel's consideration as to whether the imposition of anti-dumping measures would affect Brazil's "essential interests" within the meaning of Article 15 AD? Do the parties agree with the statement of the United States in its third party written submission (para. 14) that the term "essential" implies a very high standard for the level of national interest which the developing country must demonstrate would be affected by anti-dumping duties?**

Brazil strongly disagrees with the EC's suggestion that Article 15 constitutes an exception to other obligations under the AD Agreement and that the burden of proof is on the Member invoking the exception.<sup>3</sup> Effectively, the EC argues that *only* if the application of anti-dumping measures "would affect the essential interests of developing countries", then the obligation to explore the "possibilities" of "constructive remedies" arises. The EC seems also to suggest that the burden of proof to show that the essential interest would be affected is on a developing Member.

Brazil submits that the EC's interpretation, which is not supported by any relevant material, is against the plain text of Article 15. The exact wording of the second sentence of Article 15 lays down an obligation ('shall') on developed Members to 'explore' possibilities of constructive remedies before applying anti-dumping duties against imports from a developing Member. Consequently, Article 15 is not an exception but lays down an additional substantive requirement to developed Members which need to be met before applying anti-dumping duties. Brazil notes that this obligation is qualified by the phrase "where they [anti-dumping duties] would affect the essential interest of developing country Members". However, given that the principal obligation to 'explore' is on the developed Members, Brazil submits that in the same way the obligation to show that the intended application of anti-dumping duties would *not* affect the essential interest of developing country is on developed Members. Indeed, a simple reading of Article 15 must mean that that a developed Member is expected to explore possibilities of constructive remedies *unless it* can demonstrate that the intended anti-dumping measure would *not* affect the essential interest of a developing country Member. Brazil's response to the Panel's question 12 should be read in that context.

#### Question 20

**According to Brazil, the first "explicit consideration" by the European Communities of the currency devaluation was on 20 July 2000 in the Disclosure Preceding the Definitive Regulation. Does the European Communities agree? Is this relevant? Why or why not?**

As a background information, Brazil recalls that the EC provided at the very beginning of the investigation detailed exchange rates for conversion into ECU/EURO.<sup>4</sup> The conversion rates for the Brazilian Reals were the following:

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<sup>3</sup> See *Ibid.* para 11.

<sup>4</sup> See the Questionnaire (BRL-3), page 72.

<i>Period</i>	ECU/EURO = real
1995	1,199
1996	1,276
1997	1,222
1998	1,299
IP	1,509
199804	1,245
199805	1,273
199806	1,272
199807	1,275
199808	1,291
199809	1,363
199810	1,419
199811	1,390
199812	1,413
199901	1,785
199902	2,236
199903	2,146

Consequently, the issue of the significant devaluation of the Brazilian Real was known to the EC even before the initiation of the proceeding.<sup>5</sup> An important consequence of this EC knowledge was that the EC was fully aware that the dumping situation complained about by the Applicants and which served as a basis for the initiation of the anti-dumping investigation against Brazil had been totally different by the time of initiation (i.e. there was no dumping to be offset), and that the anti-dumping measures which the EC has adopted following the investigation in this case have been totally misplaced and inappropriate, as Brazil submitted under the first alternative of its Issue 3.

## Question 26

**Does the European Communities believe that the price comparison at the end of the IP revealed no, or declining, differences between export price and normal value at the end of the period? Explain the significance this has for the establishment of the margin of dumping in the IP as a whole. Provide the legal basis for your response, citing any relevant material.**

With regard to the EC's statement that "Tupy's prices at the end of the IP, immediately following devaluation, are no reliable indicator of its prices in the medium term",<sup>6</sup> Brazil has two comments. Firstly, Brazil recalls the following example provided in its First Submission:

"Presume, for the sake of argument, that a Brazilian exporting producer sold in April 1998 the product concerned on the Brazilian market for 10 Reais per one unit and at the ECU/EURO equivalent of 8.03 when sold on the same day to the EC. At that point in time the unit price of the product concerned was the same in Brazilian Real and in ECU/EURO in both markets. On the assumption that the nominal value of the home market price and the export price was unaffected by other factors between April 1998 and March 1999, when the Brazilian Real depreciated by 41.99 per cent in ECU/EURO terms following the devaluation [footnote: One ECU/EUR corresponded to 1.245 real in April 1998 and to 2.146 in March 1999; see Questionnaire, page 72], the export price of 8.03 ECU/EURO when converted into Real in March 1999 was 17.23. Inversely, by converting these prices into ECU/EURO, both prices were 8.03 ECU/EURO in April 1998, but given the devaluation the domestic price became a mere 4.66 ECU/EURO in March 1999."<sup>7</sup> Consequently, Brazil submits

<sup>5</sup> See the EC's Answers, para 21.

<sup>6</sup> See the EC's Answers, para 26; see also para 30.

<sup>7</sup> BFS, para 194.



that *under normal conditions* a steep devaluation makes the normal value of the product concerned significantly lower than the export price so that, no dumping would actually take place in the said circumstances.

Secondly, Brazil submits that the obvious method to establish whether such “normal conditions” have continued in this case after the devaluation (*i.e.* assessing how the Brazilian exporter reacted to currency devaluation), was to self-initiate an immediate review (see also Brazil’s comments under question 33 below).

### **Question 33**

**What is the meaning of the phrase "where warranted" in Article 11.2 AD? Provide the legal basis for your answer. Assuming *arguendo* that initiation of a review is “warranted”, is there a legal obligation to self-initiate a review?**

Brazil disagrees with the EC's interpretation that “[s]elf-initiation therefore remains a residual category, appropriate for unusual or extreme circumstances”. Brazil submits that Article 11.1 contains a *general* “necessity rule” whereby anti-dumping duties shall remain in force only as long as and to the extent necessary to counteract injurious dumping and that this general rule is implemented through, *inter alia*, Article 11.2.<sup>8</sup> Brazil believes that the investigating authority has an obligation to conduct a review on its own initiative “where warranted” and this obligation applies throughout the life of an anti-dumping measure.

### **Question 35**

**What, if any, is the relevance and role in these proceedings of the EC case-law and practice concerning "changed circumstances" cited by Brazil on pp. 38 et seq. of its first written submission?**

Brazil disagrees with the EC's conclusion that “even assuming that the dumping margin had declined in the period immediately following devaluation there would have been no basis for concluding that such a change would be lasting”. As commented above in question 33, the proper basis for the EC to examine, whether “such a change” would or would not be lasting, would have been to self-initiate a review under Article 11.2, given that there were ample indications that such a review was indeed “warranted”.

### **Question 37**

**Comment on Brazil’s allegation of the inconsistency between your statement in the Disclosure Preceding the Provisional Regulation:**

"- On the domestic market, products starting with a 12, 68, 69 and 79 code were sold. Products starting with 68 and 69 had a different thread (NPT instead of BSP), while 79 products were not threaded. Products with code 68 were also made for higher pressure than other products. The costs of manufacturing of these products appeared to be different, and most of these products had also market values which were very different.

- On the EC market, Tupy sold products starting with a 12 code (own brand) and products starting with an 18 code (Nefit brand). Again, these products appeared to have sometimes very different costs of manufacturing.” (footnotes omitted, emphasis added)

**and the position taken in the investigation not to grant adjustments as envisaged by Article 2.4**

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<sup>8</sup> See, for example, ‘US- DRAM’, para 6.41.

Brazil disagrees with the EC that “[t]his example shows that fittings with different threading or brand name although being for the rest quasi-identical have a strongly varying market value and that it would be unreasonable to combine domestic sales of 12, 68 and 69 types to determine a normal value combined for 12 and 18 types which have in their turn a strongly varying cost and market value”.<sup>9</sup> Brazil contests that the difference in the costs of manufacturing between product types starting with internal product codes ‘12’ and ‘18’ as exemplified by the EC of *around 5 per cent* warrants the conclusion that these product types have “strongly varying costs”. Moreover, given that the product types starting with the internal product codes ‘18’ were not sold on the domestic market at all, it is logically impossible that the product types of ‘12’ and ‘18’ had “strongly varying market values”.<sup>10</sup>

#### Question 41

**Comment on Brazil's statements on page 60 of its first written submission:**

**“Consequently, the words “throughout this Agreement” in Article 2.6 when read together with the wording of Article 2.2.2 obliges the investigating authorities to use the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products which are identical, i.e. alike in all respects, to the product under consideration. Only in the absence of such identical products can the actual amounts for SG&A and for profits pertaining to production and sales in the ordinary course of trade of products, which are, although not alike in all respects, having characteristics closely resembling those of the product under consideration. However, in the latter case the investigative authority is obliged to make due allowances in each case, on its merits, for differences in physical characteristics affecting price comparability.....”**

Brazil recalls the EC’s claim that “[t]he kind of interpretation proposed by Brazil would lead to arbitrary if not chaotic results, which are clearly not the intention of the Agreement”.<sup>11</sup> Brazil submits that its textual interpretation of Articles 2.2.2 and 2.6 is confirmed in light of the requirements of Article 31 of the Vienna Convention. Brazil submits that an examination of the elements in Article 31 does not leave the consistent meaning of “the like product” in the AD Agreement “ambiguous or obscure”. However, the EC’s position that “[t]he chapeau of Article 2.2.2 explicitly directs the use of production and sales data pertaining to the *like* product and not a comparable product”<sup>12</sup> is clearly against the opening sentence of Article 2.6 of the AD Agreement (“[t]hroughout this Agreement”). In essence, Brazil submits that Article 2.2.2 (in light of Article 2.2) requires the investigating authority to base the amounts for SG&A and for profits in the construction of normal values on the data of *representative* and *profitable* domestic sales of the identical product types, if available. Consequently, all of the examples provided by the EC are misplaced.<sup>13</sup>

#### Question 53

**Comment on the statement by the European Communities at para. 127 of its first written submission that “...both SG&A and profit were based on the 1260 types of the like product sold on the domestic market”.**

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<sup>9</sup> See the EC's Answers, para 60; see also para 58.

<sup>10</sup> See also the Disclosure Preceding the Provisional Regulation (BRL-11), where the EC stated that “these products [product types starting with internal product codes ‘12’ and ‘18’] appeared to have sometimes very different costs of manufacturing”; Annex I, page 2.

<sup>11</sup> See the EC’s Answers, para 66.

<sup>12</sup> See *Ibid.*, para 65.

<sup>13</sup> See *Ibid.*, para 66.

Brazil notes the clear contradiction between the above-quoted EC's statement at para. 127 of its first written submission and the EC's response to Question 53. While the EC firmly contended in its first submission that "...both SG&A and profit were based on the 1260 types of the like product sold on the domestic market", the EC now states that "...SG&A costs and profit were based solely on those types sold on the domestic market in the ordinary course of trade."

On the other hand, Brazil notes that the EC alleges that "[t]his [SG&A costs and profit based on 1193 types] can clearly be seen in the Definitive disclosure. In Brazil's view, at a minimum, it is not as clear as the EC points out, since the EC itself seems to be confused with its own data.

#### **Question 57**

**On what basis does the European Communities justify the use of data relating to the 20 "most exported types" of the product concerned in calculating the adjustment for PIS/COFINS?**

Brazil notes the EC's statement that "[t]he EC investigators *knew* they could safely proceed on this basis [re: 20 "most exported types"] because the outcome of this calculation *would have* only a minor effect on the level of the dumping margin" (emphasis added).<sup>14</sup> The EC itself admits that it knew beforehand that its method of examination would have effect on the level of the dumping margin. However, the EC's method was punitive, as shown by Brazil, specifically in light of extensive information that the Brazilian exporter had submitted to the EC. Brazil opines that anti-dumping investigations should be based on facts (actual data) and not on the investigating authority's presumptions or hunches, as the latter undermine the objective standards imposed on the investigating authorities by the AD Agreement.

#### **Question 88**

**Was the conversion of the amounts reported by Tupy from the European currency to Reals done only in the case of transport costs?**

Brazil does not understand the EC insistence that "a conversion from foreign currencies into Real was also necessary for all other adjustments made to the export price, as Tupy had reported all these adjustments in the currency of the export invoices, despite instructions to report in Real".<sup>15</sup> All the Brazilian exporter's export sales of the product concerned to the EC were made and expressed in the currency agreed between the parties to the transaction (i.e. Tupy on the one hand and the EC importer on the other). Moreover, the term of delivery was 'CIF' and thus all cost items between *ex-factory* and the agreed port in the EC were indicated in the same currency as the agreement.<sup>16</sup>

#### **Question 100**

**What is the significance, if any, of the reference in Article 3.2 AD to "a" (rather than "the") like product? And to domestic "prices" (in the plural rather than singular)?**

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<sup>14</sup> See *Ibid.*, para 94.

<sup>15</sup> See *Ibid.*, para 120.

<sup>16</sup> See the Questionnaire (BRL-3), Section H – 6 'Formats of allowances' where the EC requested the exporters to "[p]repare a listing named "ECALLUR"...of all adjustments you claim for sales to independent customers in the European Community on a transaction-by-transaction basis following the same order of the listing in Section H3 (I)". Brazil recalls that all of the listings requested by the EC were provided by the Brazilian exporter in its Tupy's Questionnaire Response (BRL-4).

Brazil notes again the EC's references to the Agreement on Subsidies and Countervailing Measures.<sup>17</sup> However, Brazil denies all of the EC's suggestions that the obligations in the AD Agreement should be interpreted, let alone replaced by the obligations in the SCM Agreement.

**Question 114 (indicated in the EC's response as Question 110)**

**Indicate in the record of the investigation the sources of information and the methodology on which the statements and information in Exhibit EC-12 are based. In particular:**

- **How was the statement in Exhibit EC-12 on "ability to raise capital" derived from the information given in "questionnaires and annual accounts"?**
- **How was the statement in Exhibit EC-12 on "wages" derived from the information given in "annual accounts"? Explain the meaning of "allocation on the basis of turn over"?**
- **How was the statement in Exhibit EC-12 on "productivity" derived from the information given in "questionnaires"?**
- **How was the statement in Exhibit EC-12 on "return on investments" derived from the information given in "questionnaires and annual accounts"?**
- **How was the statement in Exhibit EC-12 on "cash flow" derived from the information given in "questionnaires and annual accounts"?**
- **How and on what basis was the statement in Exhibit EC-12 on "magnitude of margin of dumping" derived?**

For the reasons point out in its Second Submission, Brazil believes that the Panel should entirely disregard Exhibit EC-12. Nevertheless, the following observations must be made. Article 3.4, when read together with Article 4.1, obliges the investigating authority to examine the impact of the dumped imports on the domestic producers of the like product (*i.e.* 'domestic industry'). In view of this, Brazil notes the EC's methodology to allocate certain parameters (like tangible fixed assets, stock and depreciation) by turnover ratio.<sup>18</sup> Indeed, this shows that the domestic industry was also producing products other than the like product. With particular regard to "return on investments" and "cash flow", Brazil submits that the allocation of tangible fixed assets and depreciation on the basis of turnover is meaningless for the purpose of an anti-dumping investigation. The reason is very simple: turnover does *not* indicate what amount of the company's assets (and depreciation related to these assets) relates to which specific segments of the business. For example, high/low turnover of a product is not necessarily related to high/low share of the total assets (land and buildings, plant and machinery etc.) used to generate that turnover. Consequently, Brazil submits that the EC's examination was not based on the like product specific "positive evidence" as required in Article 3.4. Finally, the acceptance of the EC's examination method would also have practical consequences. If this happened, the only data the investigating authority would need to request from the domestic industry would be the turnover of the like product, as the rest of the injury indicators under Article 3.4 could technically be examined on the basis of companies' income statements and balance sheets. This is clearly not what is required in order to satisfy the conditions of Article 3.4 in this respect.

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<sup>17</sup> See the EC's Answers, para 137 *et seq.*

<sup>18</sup> Regarding the EC's general methodology; see the EC's Answers, para 155; particular methodologies regarding "return on investments" and "cash flow" see paras 157 and 158 respectively.

## Question 120

**How can the Panel verify whether and to what extent the European Communities investigating authorities examined the issue of outsourcing and ownership links of the domestic industry with producers located in countries not subject to the investigation? Please indicate the relevant parts of the record of the investigation.**

Brazil observes that, for the first time ever, the EC seems to admit that two of the Applicants forming part of the EC industry did delocalise production to plants under EC industry control in certain third countries.<sup>19</sup> Brazil observes further that a third Applicant (Woeste) which, as the Brazilian exporter had submitted to the EC authorities, delocalised its production to a subsidiary in Egypt,<sup>20</sup> has still not been recognised as such by the EC. The EC nonetheless still describes that situation as an “allegation” which was “never substantiated”<sup>21</sup> thus still trying to attribute the failures of its own examination to the Brazilian exporter, and now also to Brazil’s related contentions.

Moreover, Brazil notes that *none* of the references given by the EC really addresses the issue of the EC producers’ production plants located outside the EC.<sup>22</sup> Regarding one aspect of this problem, Brazil submits that the EC producers’ direct investments outside the EC was a relevant economic factor having a bearing on the state of the domestic industry under Article 3.4. Furthermore, it was also a known factor other than the dumped imports under Article 3.5 explaining, for example, why the EC producer’s investments in the EC decreased by around 16 per cent between 1995 and the IP.<sup>23</sup>

Furthermore, Brazil fails to understand how the EC could avoid addressing the issue of the EC industry’s ownership over foreign producers of the product concerned and their strategic decision to delocalise (outsource) production to such foreign production plant where this issue has been at the very centre of the EC’s investigation from its very beginning. As repeatedly stated, the Brazilian exporter as well as other exporters have made such submissions on different occasions during the EC investigation. Perhaps even more importantly, the highest levels at the EC Services have also been alerted to this phenomenon and to its crucial importance to the issue of the legality of the investigation under the “spirit and letter of the relevant international anti-dumping rules.”<sup>24</sup> Thus, this issue, and the related question whether the “Community interest” to impose anti-dumping measures<sup>25</sup> should also include the interests of EC producers in foreign countries, have been raised at different times during the EC investigation and are paramount to the understanding of the general context in which that investigation was conducted. To Brazil, the EC’s failure to confront the above mentioned submissions in any of the documents forming the record of this proceeding must raise very serious

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<sup>19</sup> See the EC’s Answers, para 167.

<sup>20</sup> See the Fourth Submission of Tupy (BRL-13, page 2); see also BRL-51 and BRL-52 (exhibits submitted during the First Substantive meeting with the Panel).

<sup>21</sup> See the EC’s Answers, para 167.

<sup>22</sup> See the EC’s Answers, para 166. Brazil notes that of the mentioned references recital 134 of the Provisional Regulation (BRL-12) and recitals 65 *et seq.* of the Definitive Regulation (BRL-19) are related to the definition of domestic industry under Article 4.1 of the AD Agreement. Brazil also notes references related to the EC’s causation analysis, namely in recital 174 of the Provisional Regulation the EC states that “one Community producer did import the product concerned from one third country”, and in recitals 106 *et seq.* of the Definitive Regulation the EC analyses the imports of the product under consideration from Turkey, Bulgaria and Poland. Finally, Brazil notes the EC’s explanations in the Transparency Letter (BRL-18) with regard to the non-initiation against Turkey, product mix exported from Poland and import prices of the Bulgarian imports.

<sup>23</sup> See recital 159 of the Provisional Regulation (BRL-12).

<sup>24</sup> See para 3 in the letter dated 23 February 2000 of the Brazilian Ambassador to the EC to Mr Wenig, Director, EC Anti-dumping Services, with copies, *inter alia*, to the Chief of Cabinet of Trade Commissioner Mr Lamy; submitted by the EC as CONFIDENTIAL Exhibit EC-29.

<sup>25</sup> Article 21 of the EC’s Basic Regulation (BRL-24).

questions also in relation to the way in which the EC had discharged its obligations of an investigating authority to conduct a proper investigation on the basis of positive evidence and objective examination.

Finally, given that the issue of the domestic industry's outsourcing of the product concerned to foreign subsidiaries, including in *Egypt*, was an issue which was properly raised during the investigation, but the EC preferred not to react to it, Brazil submits that the EC also violated Article 12.2.2 by not providing *any* reasons for the rejection of the relevant arguments made by the Brazilian exporter in this regard.<sup>26</sup>

#### **Question 129**

**How, if at all, do the standards of "significant contribution" (e.g. Definitive Regulation, para. 113) and "not such to have broken the causal link" (e.g. Definitive Regulation, para. 111) relate to a genuine and substantial relationship of cause and effect?**

Brazil notes the EC's statements that "[i]t should not be assumed that, had there been a significant contribution from the 'substitution effect', the necessary causal connection between dumped imports and injury would have ceased to exist"<sup>27</sup> and that "[i]f the consequences of third-country imports had been sufficiently great they would have broken the causal link between the dumping and the injury found".<sup>28</sup> Brazil submits that these statements are not only self-contradictory but also indicative of the EC's conduct as the EC effectively assumed, in violation of Article 3.5 that certain other known factors did not "break the causal link". They also indicate that the EC's causation determination does not fulfil the non-attribution obligation in Article 3.5.

#### **Question 143**

**Could the EC clarify the meaning of the Article 11.3 of the EC Basic Regulation on whether the exporter has the right to have a review or has the right to request a review?**

Brazil observes that the EC's attempt to make a distinction between a situation where an exporter has a right to have a review and the situation where it has a right to request a review is nothing more than a rather meaningless tautological exercise. Any party has a right to request a review, regardless of how sound or legitimate its claims may be. It is a mere right to express a wish or to address the Commission. Such a "right" is however meaningless if the EC regulations do not allow such a request to be heard or accepted. Even if the EC understood that such a request was legitimate, it would not open the review as a response to the request; it would formally self-initiate the review

#### **Question 144**

**Can the EC confirm that if Tupy has requested a review within the year following the imposition of the anti-dumping duties the Commission would have exercised discretion on the granting of such a request? Also, if the request had been made after the year following the imposition of the anti-dumping duty would the Commission have automatically granted the request?**

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<sup>26</sup> Brazil recalls for example the Brazilian exporter's claims regarding outsourced imports from Egypt, e.g. in the Fourth Submission of Tupy (BRL-13, page 2).

<sup>27</sup> See the EC's Answers, para 177.

<sup>28</sup> See *Ibid.* para 178.

Brazil notes the EC's statement whereby "a request for a review made by Tupy within the one year period would have been seriously considered."<sup>29</sup> However, the EC seems to have forgotten its own contradicting statement in its First Submission that "[t]he EC authorities did not believe that the devaluation that occurred in the course of the investigation was an event that warranted a review."<sup>30</sup>

As to the review mentioned by the EC, Brazil notes that that this issue is not a matter to be considered by the Panel, as it is outside the Panel's terms of reference.

However, should the Panel consider that the EC's review is relevant to this proceeding Brazil would submit that this review is bound to create more confusion rather than provide for a proper solution to the problems raised by Brazil in this proceeding. Brazil notes the EC's explanations regarding the review of the measure subject of this dispute<sup>31</sup> and observes that the nature and purpose of that review are far from being clear. Firstly, the review was initiated on 5 December 2001 and it might be a mere coincidence that that date was the second day of the first substantive meeting with the Panel. This is the first indication of the confusion regarding the real purpose of that review.

Secondly, Brazil notes that the review to which Brazil referred under Issue 3 concerned a review in the sense of Article 11 of the AD Agreement (parallel to Article 11 of the EC's Basic Regulation). Nonetheless, the legal basis given by the EC to the new review is a new EC act of EC legislation<sup>32</sup> which, unlike the Basic Regulation, does not find its source in the AD Agreement, to which it does not even refer.

Thirdly, Brazil notes that as a justification for the review, the EC noted that "the exporting producer requested a review on the basis that its individual anti dumping duty rate is based on methodologies [re: 'zeroing' of dumping margins] which are not in line with the conclusions contained in the [re: DSB's 'EC-Bed-Linen'] reports".<sup>33</sup> On the other hand, however, the review does *not* seem to be confined to zeroing. It would seem that the review was meant to cover *all* the material aspects of dumping. This is indicated, for example, by the fact that the EC examines data for a totally new investigation period, *i.e.* from 1 January 2001 to 30 September 2001.<sup>34</sup> However, a review relating to the mere changes required by the zeroing correction would have *not* required any new information at all. A simple modification of the EC's calculation formula, applied to the old data, would have sufficed for that kind of a review. By making a full-scale review of dumping measures in force 16 months after their adoption and 10 months after the adoption of the '*EC – Bed Linen*' reports, the EC has clearly recognised that the motive for that review was not merely related to the Czech exporter's request.

The EC seems to give an answer to the obvious question that one could have thus put to it, namely, why would an investigating authority initiate a *full* dumping review to correct the mechanical effects of zeroing, as it explicitly stated that the review "would have provided an opportunity to evaluate Tupy's claims regarding the effects of the devaluation".<sup>35</sup> The EC thus admits that it should have initiated a review as submitted by Brazil under its Issue 3. However, the confused way in which the EC approached its new review raises serious doubts as to whether it would even be compatible with the AD Agreement.

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<sup>29</sup> See *Ibid.*, para 193.

<sup>30</sup> ECFS, para 109.

<sup>31</sup> See the EC's Answers, paras 193 and 195.

<sup>32</sup> Regulation 1515/2001.

<sup>33</sup> *Ibid.* Brazil notes that the DSB adopted '*EC – Bed Linen*' reports on 1 March 2001.

<sup>34</sup> See the EC's Answers, para 195.

<sup>35</sup> See *Ibid.* para 195.

Brazil also deplores the statement made by the EC regarding the EC's "invitation" to Tupy to request an interim review and the misleading way that the EC chose to present this issue.<sup>36</sup> Brazil notes first that, this matter is not covered by this Panel's terms of reference and is therefore totally irrelevant here and in the context of the review to which it referred under its Issue 3. Brazil referred to a review which should have been self initiated by the EC at the time of imposition of the measures, as was warranted in view of the data that the EC collected from the Brazilian exporter and verified in the framework of its original investigation. On the other hand, Brazil notes that the above-mentioned letter, which specifically referred to these DSB proceedings and to the EC's zeroing methodology, could not cure in any way the EC's failure to initiate a review at the time relevant to this proceeding.

Brazil regrets that the EC failed to mention the Brazilian exporter's commitment to fully co-operate in a full review which only the EC could have initiated and which the Brazilian exporter was clearly not invited to request.

Brazil also deeply regrets the EC's statement regarding the EC's granting of "two extensions of the deadline" for the Brazilian exporter to give its response in the context of the review mentioned by the EC, extensions which were part of an arrangement between the EC and Brazil that the two parties agreed to keep in strict confidence. In this arrangement, the "extensions" were mutually agreed, not in order to give Tupy any additional time to prepare for the review, as the EC seems to imply. They were granted simply to allow the search for a mutually agreed solution to continue without the distractions of the review. According to representatives of the company, Tupy's decision not to co-operate is mostly related to the insufficient scope of the review, which Tupy believes should also cover the injury aspects of the investigation.

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<sup>36</sup> See *Ibid.*, para 193.



## ANNEX E-7

### REPLIES OF BRAZIL TO QUESTIONS OF THE PANEL – SECOND MEETING

- A. ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

*To Brazil*

**Q1. As a result of the meetings between Brazilian and EC government officials, did the Brazilian government transmit to Tupy the possibility of pursuing a price undertaking with the EC? If not, why not? If so, how did Tupy react? Provide supporting evidence.**

Reply

The Government of Brazil has no record of any contacts maintained with the Brazilian exporter regarding the issue of undertakings. In fact, there was no need at all for Brazil to inform the Brazilian exporter of the possibility of a price undertaking, which possibility is explicitly provided by the AD Agreement.

In any event, particularly in view of the EC's confirmation during the second substantive meeting that a price undertaking was its preferred "constructive remedy" and given the inherent nature of that "contractual" remedy, the EC could not satisfy the requirements of Article 15 merely by discussing an undertaking in such general terms with Brazil and not raising it at all with Tupy. Price undertakings are a matter to be negotiated between and agreed by the authorities and the exporter. The EC did not even try to explore that possibility with the Brazilian exporter.

**Q2. We note that Article 12.2 states "*Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking,....*". How and to what extent is this relevant here?**

Reply

Brazil understands this question in the context of Paragraph 19 of its Second Written Submission and its answer to the Panel's question N° 13 following the first substantive meeting.

In Brazil's view, the EC's contention that it had explored the possibility of an undertaking with the Brazilian authorities and that in doing so it complied with its obligations under Article 15 must fail, also in view of the EC's failure to report on this "exploration" under Article 12.2.

In the present case, no public notice was given of any decision (affirmative or negative) to accept an undertaking pursuant to Article 8 with regard to the Brazilian exporter. This fact shows that:

- (a) the EC did not explore the possibility of a price undertaking as a "constructive remedy" and, therefore, there was nothing to be reported through a public notice pursuant to Article 12.2; OR

- (b) assuming that the EC did explore the possibility of a price undertaking as a “constructive remedy”, its failure to report it would constitute a violation of Article 12.2.

In any event, the fact that no public notice was given of any decision (affirmative or negative) to accept an undertaking clearly indicates that the EC did not consider the exploration of constructive remedies a “material” issue of fact and law<sup>1</sup>, which is at odds with Article 15.

*To the EC*

**Q3. With reference to the relationship between the obligations in Articles 12.2 and Article 15 of the *Anti-Dumping Agreement*, comment on Brazil's response to Panel Question 13 stating that the EC did not mention in the Provisional or Definitive Regulation that the possibility of an undertaking had been explored with regard to the Brazilian exporter.**

*To both parties*

**Q4. With reference to Brazil's assertion in para. 20 of its second written submission and Brazil's response to Panel Question 4 following the first meeting, are undertakings other than price undertakings provided for by the *Anti-Dumping Agreement*? How, if at all, is Article 8.1 of the *Anti-Dumping Agreement* relevant in this context?**

Reply

Brazil believes that undertakings other than price undertakings are provided for by the Anti-Dumping Agreement. As a general premise, Brazil suggests that any measure which would have a less restrictive impact than an anti-dumping duty should be allowed under Article 8. Indeed, Article 8.1 of the Anti-Dumping Agreement does mention both price undertakings and undertakings to cease exports. Brazil is of the view that, in application of the maxim “the greater power includes the lesser”, if the Anti-Dumping Agreement applies to undertakings to cease exports, it also allows less restrictive quantitative measures, i.e. a limitation of exports. It can therefore be inferred that the Anti-Dumping Agreement does not prevent WTO Members from accepting quantitative undertakings, tariff quotas or “price quotas”. Notwithstanding the EC statement that it is no longer its practice to accept such undertakings<sup>2</sup>, the EC is known to have subscribed to this interpretation on record until recently<sup>3</sup>, and in any event at a time later than the entry into force of the AD Agreement. Brazil observes that the EC has not elaborated why it had now allegedly decided to discontinue this long standing practice.

**Q5. Previous panels have indicated that the application of the “lesser duty rule” and “price undertakings” are possible constructive remedies under Article 15 of the *Anti-Dumping Agreement*. Can both parties suggest any other remedy that could be seen as constructive in terms of Article 15?**

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<sup>1</sup> Article 12.2 states in the relevant part: “... Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities...”.

<sup>2</sup> Second Oral Statement by the EC, para. 28.

<sup>3</sup> See J.F. Beseler and A.N. Williams, *Anti-dumping and Anti-subsidy Law: the European Communities*, Sweet & Maxwell, 1986, at p.215 and E. Vermulst and P. Waer, *EC Anti-dumping Law and Practice*, Sweet & Maxwell, 1996, at p.71 (Copied pages attached)

Reply

Brazil observes that it was the duty of the EC to explore “constructive remedies” and therefore it was the role of the EC to devise such an undertaking. More generally, as already mentioned in its Second Submission<sup>4</sup>, Brazil contends that the Panel’s statement in *EC-Bed Linen* implies that there might be other kinds of constructive remedies under Article 15 of the Anti-Dumping Agreement than “lesser duty” and “price undertaking”. Brazil referred, in its Second Submission to undertakings which limit the quantities to be exported. One could also think of tariff quotas or “price quotas” as other kinds of a constructive remedy.

B. ISSUE 3 : "INAPPROPRIATE MEASURES"

*To Brazil*

**Q6. Can Brazil comment on para. 39 of the EC oral statement at the second meeting?**

Reply

In the above-mentioned paragraph the EC relates to two main issues: its letter of 10 August 2001 and its initiation of a “review” in December 2001. Both issues are not covered by the Terms of Reference (TOR) as set out for this Panel proceeding<sup>5</sup> and must equally be rejected as they concern facts which have not been made available as part of the record of the EC’s investigation, in the sense of Article 17.5(ii) of the AD Agreement.

The TOR for this Panel proceeding<sup>6</sup> are the following:

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

The matter referred to by these TOR is defined in Brazil’s Request for the Establishment of the Panel<sup>7</sup> and is repeated in its First Written Submission as the definitive anti-dumping duty which the EC had imposed on imports of malleable cast iron tube or pipe fittings from Brazil. The duty was imposed on 18 August 2000 and the matter is thus reflected in the Definitive Regulation.<sup>8</sup>

It follows that as the above-mentioned issues came into being subsequently to the Definitive Regulation and are by no way covered by it, nor otherwise by the TOR, they fall outside the scope of the present proceeding and must therefore have no place before this Panel.

In addition, as the two issues relate to facts which have not been part of the record of the original EC anti-dumping investigation, this Panel is not authorised, in view of Article 17.5(ii) to examine them.

In any event, however, also on their own merits, the two above-mentioned issues are totally irrelevant to this proceeding.

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<sup>4</sup> Second Written Submission of Brazil, para. 20.

<sup>5</sup> WT/DS219/3 of 11 September 2001 (BRL-22).

<sup>6</sup> In the sense of Article 7 DSU.

<sup>7</sup> WT/DS219/2, first para.

<sup>8</sup> BRL-19.

The EC seems to entirely miss the point as it refers to “Brazil’s insistence that the EC authorities should have opened a review”. Brazil confirms that it had never requested the initiation of a “review”. Brazil recalls that under the main argument supporting its claim of “inappropriate measures” in its Issue 3 it submitted that the imposition of anti-dumping duties was inappropriate, in view of the disappearance of dumping following the devaluation of the Brazilian currency. Brazil noted in that regard that, “although the EC was very well aware of the fact that there was no need anymore to offset dumping it has nonetheless imposed anti-dumping measures on the Brazilian imports.”<sup>9</sup> Brazil further recalls that it had submitted that the EC’s own rules allowed it to take into account data collected after the formal end of the Investigation Period where such data “disclose new developments which make the planned imposition of an anti-dumping duty manifestly inappropriate.”<sup>10</sup>

Thus, Brazil’s alternative contention regarding that kind of review is an inseparable part of its main argument namely, that there was no need to impose measures in this case. In case the EC needed a longer period to confirm its initial data regarding this absence of justification to impose measures, the ultimate administrative instrument that could have allowed it to do that would have been a self-initiated, partial interim review.

Brazil recalls that it had specifically referred to a review which the EC should have self-initiated simultaneously with its improper imposition of the original measures. That review was thus meant to allow the EC to examine a longer period post devaluation which in fact was meant to extend the original investigation period by several more months. This would have allowed the EC to avoid the results that it had achieved in this case where it has knowingly conducted an investigation for a period which has been totally irrelevant as a justification for the imposition of anti-dumping measures, in clear violation of the substantive provisions of the AD Agreement.

Moreover, Brazil recalls that the said EC letter<sup>11</sup> corresponded to a totally different situation than the one referred to under Issue 3. That EC letter was addressed to the Brazilian exporter “within the context of the current DSB proceeding in Geneva on malleable fittings originating inter alia in Brazil” and its main thrust related “to the issue of ‘zeroing’ which has been raised by the Brazilian authorities”. While referring to the EC’s revised policy following the DSB decisions in *Indian Bed-Linen*, the EC further stated that, “given that this issue has now been also raised again in the current WTO panel ... the Commission Services take the opportunity to invite you to consider the possibility of an interim review”.

Brazil observes that nowhere in that letter did the EC refer to the argument it now puts forward on the “insistence that the EC .. should have opened a review”. Nor did it mention anything with regard to a self-initiated review.

Furthermore, to avoid any doubt, Brazil submits that neither it nor, reportedly, the Brazilian exporter have ever contemplated a review, in the sense of Issue 3, based on or even relating to ‘zeroing’. Brazil also notes the Brazilian exporter’s reply<sup>12</sup> to that EC letter where it has unambiguously stated that (i) such a late review should not be limited to zeroing only; (ii) the EC Commission can self-initiate such a review at any time; and (iii) the Brazilian exporter would fully

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<sup>9</sup> BFS para 171.

<sup>10</sup> Reference in BFS para 169.

<sup>11</sup> Exhibit BRL-55. Brazil emphasises that this Exhibit is presented here solely for the purpose of informing the Panel of the general context, nature and purpose of that EC letter which are clearly not those which the EC is trying to give them before this Panel.

<sup>12</sup> Exhibit BRL-56. Brazil emphasises that this Exhibit is presented here solely for the purpose of informing the Panel of the straight-forward way in which the Brazilian exporter has dealt with the EC’s letter.

cooperate with the EC authorities should a proper interim review of all the aspects of the EC's original investigation be self-initiated by the EC.

Brazil understands that the Brazilian exporter has finally declined to take part in the new EC "review" as that "review" was clearly not an interim review and as it was expecting that methodologies similar to those against which Brazil complains in this proceeding would be applied again in its regard. Equally, given these unacceptable methodologies and the fact that the EC has waited for more than a year to initiate this review, the Brazilian exporter appears to be of the view that the EC should be also reviewing its determinations not only in relation to dumping, but also to injury and causality.

C. ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"

*To the EC*

**Q7. Did the EC have available to it in the record of the investigation all of the information that would have been required to conduct a calculation of PIS/COFINS adjustment on a more thorough or a comprehensive basis? If so, cite to the relevant portion of the record. If not, why did the EC not request the information that would have been necessary for such a more extensive calculation?**

**Q8. Why did the EC resort to the use of data of the 20 most exported types in calculating the PIS/COFINS adjustment? Was it exclusively because of the "constraints of time and personnel" that you refer to in para. 84 of your oral statement at the second meeting?**

**Q9. In an investigation not involving "facts available" or "sampling" within the meaning of the *Anti-Dumping Agreement*, what is the legal basis that permits or does not preclude the use by an investigating authority of data from only a selection of transactions or the use of an "allocation key" for the purposes of calculating adjustments?**

*To Brazil*

**Q10. Could Brazil comment on the EC's answer to Panel question 55? Even assuming *arguendo* that the normal value was calculated net of the IPI tax, would this preclude the necessity to consider whether or not the IPI premium credit would be potentially the subject of an adjustment?**

Reply

Brazil believes that the EC has misunderstood the relationship between the IPI tax and the IPI Premium Credit. IPI premium credit does not relate only to IPI tax. Therefore, even in case the normal value was calculated net of the IPI tax, there could be basis for granting an adjustment on the grounds of IPI premium credit. The EC simply denied such an adjustment, without indicating to the Brazilian exporter what additional information was necessary to justify the differences between IPI premium credit and IPI tax, in order to ensure a fair comparison pursuant to Article 2.4.

D. ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"

*To Brazil*

**Q11. With respect to the EC's assertion at para. 77 of its oral statement at the second meeting, did Tupy request information on rates of exchange used for allowances? Please cite to the relevant portions of the record of the investigation.**

Reply

Yes, given that it was unclear on which exchange rates basis the EC had made its currencies conversion the Brazilian exporter requested information on the actual exchange rates thus used.<sup>13</sup> Brazil does not believe that the EC could escape the disciplines of Article 2.4 simply by stating that the Brazilian exporter's requests were not specific enough to cover both the export prices and the allowances deducted from the export prices.<sup>14</sup> It is also senseless to deny that the said requests covered the exchange rates used for both the export prices and the deductions (allowances).

**Q12. Could Brazil clarify whether and to what extent its claim is now limited to the exchange rates used in conversions relating to adjustments? Please indicate how this is reflected in the allegation stated in para. 21 of your Panel request.**

Reply

Brazil clarifies that its claims under Issue 9 are limited to the exchange rates used in the conversions relating to adjustments.<sup>15</sup> Brazil submits that there is a clear disagreement between the exchange rates actually used (*i.e.* daily and monthly rates)<sup>16</sup> and the EC's explicit statements (*i.e.* daily rates).<sup>17</sup> Although Brazil is not aware of the reasons why the EC did not disclose the actual exchange rates used in the conversion of currencies until it did so before the Panel, Brazil notes that the EC has now admitted the said discrepancy.

With regard to the second part of the Panel's question, Brazil submits that the issue of 'currency conversion' is covered by *Brazil's Request for the Establishment of a Panel* where Article 2.4 is listed in the general part and a brief summary of the legal basis is provided in paragraph 21. Brazil recalls that the said paragraph provides Brazil's main claim (*i.e.* "[t]he EC did not make the currency conversions required under Article 2 for the purposes of effecting a fair comparison between the export price and the normal value") and a specific instance (*i.e.* "in particular") of such a violation.

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<sup>13</sup> See the Fourth Submission of Tupy (BRL-13), paras 14 and 15; and the Fifth Submission of Tupy (BRL-17) page 6, para 2.5.6.

<sup>14</sup> In particular, Brazil recalls Tupy's following statements: "it is submitted that it is misleading and inaccurate of the Commission to state in Annex I of the disclosure that *"the Commission recalculated the export price by using exchange rates at the date of the invoice ..."* and "[t]he inaccuracy lies in the fact that the Commission actually used, by its own admission, average monthly rates..." (The Fourth Submission of Tupy (BRL-13), page 36, para.14; "Tupy's objection was to the fact that the Commission had stated on the other hand that it used daily rates and, yet, on the other hand, it became clear that it had used monthly rates" and "the Commission itself has now accepted Tupy's arguments by conceding on page 5 that a daily rate should be applied" (see the Fifth Submission of Tupy (BRL-17) page 6, para.2.5.6).

<sup>15</sup> See BFS, pages 93-97; BSS, para 85 *et seq.*, and Brazil's Answers to the Panel's First set of Questions No 89 to 94.

<sup>16</sup> See ECFS, para 228; the EC's Response to the Panel's First Set of Questions, No 88; and ECSS, para 77 *et seq.*

<sup>17</sup> See recital 52 of the Definitive Regulation (BRL-19); the Disclosure Preceding the Definitive Regulation (BRL-16), Annex II, page 5; and the Transparency Letter (BRL-18), page 4.

*To the EC*

**Q13.** Could the EC expand upon the explanations provided in response to Panel Question 88 following the first meeting – in particular: 1. clarify the meaning of "the allowance for credit cost should be based on the new export invoice values" and why these were not used in the context of allowances for credit costs; and 2. provide a more extensive account of the methodologies used concerning warranties and commissions?

**Q14.** Can the EC explain how its response to Panel question 88 following the first meeting can be reconciled with para. 52 of the Definitive Regulation?

*To both parties*

**15.** How and to what extent does the obligation in Article 2.4.1 to perform currency conversion using the rate of exchange on the date of sale apply to the adjustments at issue under this claim? Is this relevant or applicable here? What are the legal obligations that govern the calculation of such adjustments and allowances?

Brazil believes that the term 'comparison' in the general rule contained in the first sentence of Article 2.4.1 refers to a comparison between export price and normal value, *as both are adjusted as factors affecting price comparability*. Therefore, Brazil submits that the obligation in the first sentence of Article 2.4.1 covers not only export prices but also allowances deducted from the export prices. Moreover, although Article 2.4.1 deals with a *selection of exchange rates*, Brazil submits that a *selective use of exchange rates*, as the EC had made in the case before the Panel, cannot be in accordance with the fair comparison requirement of Article 2.4.

E. ISSUE 12: "NO PROPER CONSIDERATION OF IMPORT VOLUME TRENDS"

*To Brazil*

**Q16.** Could Brazil comment on the EC statement in paragraph 88 of its oral statement at the second meeting that "Brazil appears to confirm the EC's understanding that Brazil is not claiming an infringement of Article 3.1 other than as an automatic consequence of alleged infringements of other parts of Article 3"?

Brazil disagrees with this EC's statement. Indeed, Brazil believes that there may well be an infringement of Article 3.1 other than as an automatic consequence of alleged infringements of other parts of Article 3. Brazil is aware of the statement of the Appellate Body in *Thailand - H-Beams* that Article 3.1 "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the determination of injury.<sup>18</sup> It is true that Article 3.1 informs the more detailed obligations in succeeding paragraphs. Article 3.1 sets forth a general obligation according to which the determination of injury must be based on "positive evidence" and involve an "objective examination". Brazil does not see any reason why this general obligation could not be infringed independently of any other obligation laid down in Article 3.<sup>19</sup> In other words, an investigative authority might very well evaluate all of the fifteen injury factors under Article 3.4 and still infringe Article 3.1 by not being objective and/or by not basing its findings on "positive evidence".

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<sup>18</sup> See *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, para. 106.

<sup>19</sup> See also Brazil's answer to the Panel question 23 below, in relation to the relevance of Article 3.1 in the context of Article 4.1 of the AD Agreement.

F. ISSUE 13: "NO PROPER CONSIDERATION OF ALLEGED UNDERCUTTING"

*To Brazil*

**Q17. Could Brazil comment on the EC assertions in para. 95 of its oral statement at the second meeting regarding the price undercutting analysis?**

Reply

Given the lack of transparency of the EC's disclosure, Brazil is not really able to comment whether column 5 of the EC's Annexes III(3) or III(4) refers to the matching product types, zeroing the negative undercutting margins or both; whether these issues are also covered by columns 6 to 12; and whether the EC's statement regarding the number of product types with negative undercutting margins is factually correct.<sup>20</sup>

**Q18. Could Brazil comment on the EC' assertion in para. 122 of its oral statement?**

Reply

Brazil recalls its warnings with regard to the practical consequences if the EC's method of "examination" were to be accepted.<sup>21</sup> Brazil also notes that there is nothing on the record of the investigation (as it currently stands) to suggest that the domestic industry was not in a position to make a separate identification of the domestic production of the like product. Therefore, the EC was in a position to request such "positive evidence" directly from the domestic industry and there was no need for the excessive *ex-officio* allocations. Brazil submits that the EC cannot reasonably require exporters to go through a most burdensome process of responding to detailed questionnaires while submitting its own Applicants to much lighter obligations. Indeed, Brazil submits that the way the EC conducted its investigation in this regard, has made this finding of injury more likely (than not), so that this was certainly *not* handled in an even-handed manner.<sup>22</sup>

G. ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"

*To the EC*

**Q19. Are there any worksheets or investigation notes which formed the basis for Exhibit EC-12? If so, please provide copies or explain why not?**

**Q20. Could the EC confirm and substantiate that the Exhibit EC-12 was written within the time period of the investigation?**

**Q21. Taking note of what was stated in para. 122 of your second oral statement, could you please state how you reconcile this with the requirements of Article 3.6? Could you specify whether this is or is not relevant here?**

*To both parties*

**Q22. Is this the first time in either the course of the investigation that the EC has supplied to Brazil/Tupy, or in this Panel proceeding that the EC has supplied to Brazil the information**

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<sup>20</sup> See the Disclosure Preceding the Provisional Regulation (BRL-11), Annex III(3); and the Disclosure Preceding the Definitive Regulation (BRL-16), Annex III(4) with 2 pages.

<sup>21</sup> See Brazil's Comments on the EC's Responses to Questions from the Panel to the Parties No 114.

<sup>22</sup> See *US – Hot-Rolled Steel AB Report*, para 196.



**concerning "return on investments" that is contained in paragraph 123 of the EC's oral statement at the second meeting, or any other information relating to this factor?**

Reply

Yes. The first reference to the issue of "return on investments" was made in Exhibit EC-12, which the EC submitted in this Panel proceeding. Importantly, Brazil submits that the audited accounts of at least two Applicants (R. Woeste & Co and Georg Fischer Fittings GmbH) were classified as 'confidential' or 'strictly confidential' and have therefore not been included in the non-confidential file of the EC investigation. These accounts could thus not be inspected at all by the Brazilian exporter or by other interested parties.<sup>23</sup> Therefore, *not* all of the audited accounts of the domestic industry were, contrary to the EC's explicit assertions to this effect, part of the non-confidential files and have thus not been made available to interested parties.<sup>24</sup>

H. ISSUE 17: "CAUSATION"

**Q23. With reference to para. 16 of Brazil's oral statement at the second meeting:**

***To Brazil***

- (a) **Would an examination carried out for the purpose of the definition of domestic industry in Article 4 necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?**

Reply

As explained in the following, Brazil's answer to this question is in the negative.

Brazil recalls that in paragraph 16 of its oral statement at the second meeting it submitted that "the EC cannot deny that the examination it referred to<sup>25</sup> was carried out for the purpose of the examination of the domestic industry in the sense of Article 4 of the AD Agreement and not for any other purpose". Brazil observes that a somewhat similar question to that which the Panel is asking here has been addressed by the panel in *US-Hot-Rolled Steel from Japan*.<sup>26</sup> Brazil thus understands this Panel's question to refer to the situation in the present case where a major part of the EC industry shielded itself from the injurious impact of the "dumped imports" through its own strategically motivated outsourced imports (including from related producers) in Other Third Countries.

Brazil notes that although it may well be that data serving for the purpose of Articles 4 and 3.4 / 3.5 would be the same or similar, that data would usually serve totally different purposes and form the

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<sup>23</sup> See sections A.5.2 of the non-confidential responses of R. Woeste & Co (BRL-38) and Georg Fischer Fittings GmbH (BRL-39).

<sup>24</sup> See Second Oral Statements of the European Communities, para 130, and oral statements made by the EC during the second substantive meeting of the Panel. Brazil notes that the EC refers in the mentioned paragraph to the "published accounts". However, in view of the EC's explicit statements that the information used was based on audited accounts of the domestic industry (see, for example, the EC's answer to the Panel's question No. 110), Brazil just notes the possibility that the EC might (now) argue that the examination was based on a sample of the domestic producers, *i.e.* those which accounts were published.

<sup>25</sup> As most recently made in ECSS, para 18; footnote added.

<sup>26</sup> WT/DS184/R of 28 February 2001; "First, we must determine what is required by the AD Agreement, that is, whether the investigating authority is in all cases required to make a determination of injury to the domestic industry as a whole. If so, we must then consider whether the primary focus on the merchant market with respect to market share and financial performance set out in the 'captive production' provision of the US statute is inconsistent, on its face, with this requirement?" (para 7.188).

basis for different determinations, each one in the context of the provision in relation to which it is being made. Brazil observes that, in the present case the EC has never even pretended during the investigation and in the Provisional and Definitive Regulations that its considerations relating to its Article 4 determinations served any other purpose beyond that one. Under Article 4 the EC merely looked at the status of the Applicants as “Community Producers”. The EC make its pretensions before this Panel but these must fail as at the relevant time the EC did not make the substantive link it now makes between Article 4 on the one hand and Articles 3.4 and 3.5 on the other.

Brazil recalls that its statement in the above-mentioned paragraph 16 was made as a counter argument to the EC’s contention whereby it had allegedly examined the injurious impact of such own imports by that major part of the EC industry under Article 3 and under Article 4.1 in the Provisional and Definitive Regulations. The main thrust of that counter argument was that this EC’s contention is baseless and that the examinations that the EC had carried out for the two purposes (Article 4.1 on the one hand and Articles 3.4 and 3.5 on the other) each had its own role so that one (re: 4.1) could not compensate for failures of the other (re: 3.4 & 3.5).

Brazil position is in line with the principles established by the DSB. In the particular circumstances of this case, where the Applicants have not been found by the EC “to be related to the exporters or importers or are themselves importers of the allegedly dumped product”<sup>27</sup>, that examination which the EC had carried out for the purpose of the definition of the domestic industry indeed served no other purpose and was therefore totally oblivious to the EC’s (plainly inadequate) Article 3.4 and 3.5 analysis.

Brazil recalls the relevant part of the Appellate Body report in *US-Hot-Rolled Steel from Japan* with regard to the relationship between Articles 4 and 3 where it held that, “an injury determination, under the *Anti-Dumping Agreement*, is a determination that the domestic producers ‘as a whole’, or a ‘major proportion’ of them, are ‘injured’. This is borne out by the provisions of Articles 3.1, 3.4, 3.5, 3.6, and 3.7 of the Agreement, which impose certain requirements with respect to the investigation and examination leading to an injury determination. Investigating authorities are directed to investigate and examine imports in relation to the ‘domestic industry’, the ‘domestic market for like products’ and ‘domestic producers of [like] products’. The investigation and examination must focus on the totality of the ‘domestic industry’ and not simply on one part, sector or segment of the domestic industry.”<sup>28</sup>

This requirement to examine the industry as a whole, does not, however, necessarily mean that certain parts of the industry may not also be looked at separately. In *US-Hot-Rolled Steel*, the Appellate Body further confirmed that “it may be highly pertinent for investigating authorities to evaluate the relevance of the fact that a significant proportion of the domestic production of the like product is shielded from direct competition with imports, and that the part of the domestic industry that is most likely to be affected by the imports is limited to the merchant market”.<sup>29</sup> The Appellate Body thus found that such a more specific examination of segments of the industry is still compatible with the requirements resulting from Article 4.1.

Brazil observes that if such a specific examination into major segments of the domestic industry which are “shielded from direct competition with imports” is acceptable (albeit as part of an overall examination of the situation of the entire industry), it must be even more acceptable in the present case where those own imports do not relate to the “dumped imports” as such. Thus, Brazil submits that, as held by the Appellate Body in the above-mentioned case, such an examination is even

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<sup>27</sup> Article 4.1(i), emphasis added.

<sup>28</sup> WT/DS184/AB/R, at para 190.

<sup>29</sup> At para 198.

required as an obligation under Article 3.1 (re: “positive evidence” and “objective examination”), particularly for the purpose of the subsequent Articles 3.4 and 3.5 analyses.<sup>30</sup>

Brazil notes that despite the fact that in the present case the EC authorities were perfectly aware that a major part of the EC industry was able to shield itself and in fact has been shielding itself from competition with imports through own outsourced imports (as well as injuring other Applicants with these imports), the EC has still not conducted, let alone considered it “highly pertinent,” an evaluation of the relevance of that fact primarily for the purpose of its Articles 3.4 and 3.5 analyses. However, Brazil continues to submit that, notwithstanding Article 4.1, the EC’s examination and evaluation under Articles 3.4 and 3.5 has been totally inadequate particularly as it failed to consider these “own imports” as a “relevant economic factor” for the purpose of its Article 3.4 analysis<sup>31</sup>, and has subsequently also failed properly to assess the full impact of that factor on the EC industry (as also referred to above) for its causality analysis under Article 3.5.

*To the EC*

- (b) **How do you respond to Brazil's assertion in para. 16 of its oral statement in particular with reference to an examination being carried out for the purpose of the definition of domestic industry in Article 4? Would this necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?**
- (c) **The EC asserts in its second written submission that Brazil has nowhere explained how, even had they existed, such outsourcing arguments could of themselves have affected the findings on causation. Could you specify in detail what was required, in the view of the EC from Tupy to submit in this regard?**

I. ISSUE 18: "NO TIMELY OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION"

*To Brazil*

**Q24. Does Brazil agree with the EC assertion in para. 157 of the EC oral statement at the second meeting that "It appears that this claim is now solely concerned with information on the currency conversion rates used in relation to allowances in the dumping calculation"?**

Reply

Brazil clarifies that its claims under Issue 9 are limited to the exchange rates used in the currency conversions relating to adjustments (see also Brazil’s answer to the Panel’s question 12 above).

**Other**

*To Brazil*

**Q25. Could Brazil comment on the EC assertions in, *inter alia*, paras. 9, 130, 140 of the EC's oral statement at the second substantive meeting that certain "new claims" are inadmissible?**

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<sup>30</sup> At para 190 *et seq.*

<sup>31</sup> See most recently para 12 *et seq.* of Brazil’s Oral Statement during the second substantive meeting, where Brazil referred to such own imports / outsourcing as an injury factor affecting the EC industry as a whole, comprising of both “shielded” and “unshielded” EC Applicants.

Reply

Brazil disagrees with the EC and submits that all of these so-called “new claims” are nothing but *arguments* in support of the claims set out in Brazil’s Panel Request. Regarding each of the EC’s allegations, Brazil’s responds as follows:

*Article 15 (paras 14 and 25 of the EC’s Second Oral Statement).* Brazil recalls that the Panel Request lists Article 15 and provides a description as to the nature of the claim (see paras 33 and 35). Consequently, TOR covers the first and the second sentences of Article 15 as well as the issue of ‘exploration of the possibility of constructive remedies’. However, Brazil is pleased to note that by making this claim the EC seems accept that Article 15 establishes *multiple* obligations.

*Article 2.4 (para 66 of the EC’s Second Oral Statement).* Brazil recalls that Article 2.4 is listed in Brazil’s Panel Request and an elaboration as to the nature of the claim is also provided, *i.e.* that the EC’s comparison between the export price and normal value was not fair (see paras 17 *et seq.* of the Panel Request).

*Article 6.2 and 6.4 (paras 130 and 140 of the EC’s Second Oral Statement).* Brazil recalls that Articles 6.2 and 6.4 are listed in Brazil’s Panel Request. Brazil also recalls that the substance of Article 6.2 claims is described in para 8 of Brazil’s Panel Request (“...an thereby also denied Tupy the full opportunity for the defence of its interest in these *among other respects*” – emphasis added) and Article 6.4 claims in the chapeau of para 10.

In any case, Brazil denies that the EC’s ability to defend itself has been prejudiced in any way.<sup>32</sup> Indeed, the EC has *not* offered any supporting particulars to show that its ability to defend itself in the course of the Panel proceeding has been prejudiced; even the EC’s detailed answers to Brazils’ arguments demonstrate the opposite.

**Q26. Are the EC's 10 August 2001 "invitation" to Tupy to apply for a review, and Tupy's response thereto, part of the Panel's record? If so, please cite to the relevant portion of the record. If not, please provide or explain why not.**

Reply

The EC's above mentioned 10 August 2001 "invitation" and Tupy's response thereto are not part of the Panel's record. Brazil refers the Panel to the relevant part of its answer to question 6 above.

*To the EC*

**Q27. With respect to each of the claims which you have indicated you view as outside the Panel's terms of reference, could you indicate how, if at all, your interests have been prejudiced over the course of the Panel proceedings?**

*To both parties*

**Q28. With respect to the reference made to the issue of reviews, could both parties specify the nature and scope of reviews conducted by the EC since the investigation that is the subject of these panel proceedings?**

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<sup>32</sup> See the Appellate Body’s Report in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para 131.

## **Reply**

Brazil refers to the relevant parts of its answer to question 6 above where it submits that the EC's "review" is not covered by the TOR and is therefore outside the scope of this proceeding, and that that contention must equally be rejected by means of Article 17.5(ii) of the AD Agreement, as that matter did not form part of the original record of the EC investigation.

In any event, as further elaborated in Brazil's answer to question 6 above, also on its own merits, that "review" is totally irrelevant to this proceeding.

Brazil further observes that the EC's attempt to portray this "review" as if it were initiated merely to respond to the Brazilian exporter and/or to Brazil's wishes is rather perplexing. Did the EC really have to go through all the trouble, as it seems to allege, of a "full dumping review" regarding all the six countries covered by the original investigation in order to assess the implications of the Brazilian currency devaluation? It is almost unthinkable that a responsible investigating authority would expose exporters from six countries to heavy financial and other liabilities involved with defending their respective interests only because the investigating authority is seeking to satisfy the authorities and one exporter company in one of these countries.

Brazil submits that the EC demonstrates the confusion it created by the new "review" as it presents it in different – and conflicting – ways depending on the forum where such a presentation is being made. Brazil observes that even before this Panel the EC had presented conflicting views regarding the EC's own position on this "review". In the EC and for its own internal constituency, the EC presents the "review" as if it is meant to take account of the DSB decisions in *Bed Linen*. In this Panel preceding the EC seems to suggest that this "review" is meant to serve an entirely different purpose, i.e. to be the obvious response to the Brazilian exporter – and now to Brazil's – wish to assess the implications of the Brazilian 1999 devaluation. However, Brazil observes that the EC itself admits that the new "review" is not an interim review in the sense of Article 11.3 of the Basic Regulation, which parallels Article 11.2 of the AD Agreement.<sup>33</sup> But in so far as the EC is concerned, for its internal purposes this review is presented as a means to rectify certain methodological errors following DSB decisions unrelated to this case. Conversely, in so far as this Panel proceeding is concerned, the new "review" is, nonetheless, still presented as an interim review.

Further, Brazil notes that the EC again submits that "the facts of the present case have never warranted such a step" of self-initiating a review.<sup>34</sup> At the same time, the EC suggests that such a review could have, in any event, only been initiated "until the reasonable period [which the EC has determined in all cases as one year] has expired".<sup>35</sup> The EC confirmed moreover that the "review" that it refers to was "initiated at the request of another [i.e. not the Brazilian] exporter".<sup>36</sup> And to sum up this circled line of argument, the EC continues to pretend that the "review" which it has initiated is its response to the argument which Brazil has made under its Issue 3. Even assuming, *arguendo*, that the new "review" is indeed the review to which Brazil referred in Issue 3, why was that review unwarranted according to the EC in August 2000<sup>37</sup> but is considered to be warranted now? Brazil submits that this is but another example showing the failures of the EC's arguments. As Brazil has already had the opportunity to point out<sup>38</sup>, the question whether a self-initiated review is warranted or

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<sup>33</sup> As unambiguously implied under section 5 (Procedure) in the EC's notice of initiation (note the reliance on Article 2(3) of Regulation 1515/2001 - review in view of DSB reports - rather than on the EC's Basic Regulation)

<sup>34</sup> EC's Second Oral Statement, para 36.

<sup>35</sup> EC's Second Oral Statement, para 38.

<sup>36</sup> See the EC's answer to the Panel's questions 143 and 144 and para 9 of ECSS.

<sup>37</sup> EC's Second Oral Statement, para 36.

<sup>38</sup> Brazil's answer to the Panel's question 33 after the first substantive meeting.

not is a substantive one. It relates to the need for the continued imposition of the duty, which is totally unrelated to timing issues or other consideration to satisfy the EC's conveniences. The EC fails to give a coherent presentation, not even a solid presentation, of the nature, scope and purpose of its "review", thus adding to the confusion it has created with the initiation of that "review". Even more importantly, this lack of direction must mean that this EC "review" has no relevance whatsoever and clearly cannot serve the purpose that the EC seeks to give to it in this proceeding.

Finally, during the second substantive meeting with the Panel, the EC contended that its initiation of the new "review" was meant to anticipate the Panel's possible ruling in this proceeding whereby the EC should have initiated a review as allegedly requested by Brazil under its Issue 3. This fatally premature and misplaced contention must equally fail. In the first place, should the Panel accept Brazil's claim under Issue 3, the proper way for the EC to remedy the situation would be to revoke the duty altogether rather than merely to review it.

### **LIST OF NEW EXHIBITS**

55. Letter dated 10 August 2001 from the European Commission to Tupy.
56. Answering letter dated 14 August 2001 from Counsel to Tupy to the European Commission.

## ANNEX E-8

### REPLIES OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL – SECOND MEETING

- A. ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

*To Brazil*

**Q1.** As a result of the meetings between Brazilian and EC government officials, did the Brazilian government transmit to Tupy the possibility of pursuing a price undertaking with the EC? If not, why not? If so, how did Tupy react? Provide supporting evidence.

**Q2.** We note that Article 12.2 states "*Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking,....*". How and to what extent is this relevant here?

*To the EC*

**Q3.** With reference to the relationship between the obligations in Articles 12.2 and Article 15 of the *Anti-Dumping Agreement*, comment on Brazil's response to Panel Question 13 stating that the EC did not mention in the Provisional or Definitive Regulation that the possibility of an undertaking had been explored with regard to the Brazilian exporter.

#### Reply

As the EC has stated,<sup>1</sup> it does not publish information regarding undertakings except in regard to companies that have offered one. The rationale for this policy is that undertakings are primarily a matter for exporters, who best know their interests and their plans.

The matters covered by Article 12.2 do not cover the exploration of constructive remedies that is required by Article 15. Article 12.2 covers, *inter alia*, "any preliminary and final determination" of dumping and injury, and "any decision to accept an undertaking pursuant to Article 8". The reference to Article 8 shows that Article 12.2 applies only where the exporter has actually proposed an undertaking since Article 8.1 provides explicitly that "proceedings may be suspended or terminated ... *upon receipt of satisfactory voluntary undertakings from any exporter ....*" (Emphasis added). As Tupy has never proposed an undertaking, the obligation under Article 12.2 to explain why an undertaking has been accepted or rejected did not apply in this case.

Furthermore, the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury. Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies those matters of fact and law that justified the imposition of such measures. The exploration of possibilities of constructive remedies is not such a matter since at most it might lead to the imposition

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<sup>1</sup> EC Answer to Questions from the Panel at the First Substantive Meeting, question 13.



of remedies which were less stringent than those that would otherwise be justified. The context supports this interpretation since the only matters referred to “in particular” in subparagraph 12.2.2 are, in addition to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for decisions made under Article 6.10.2.

Furthermore, a specific mention is made of the requirement for the protection of confidential information. As the history of the current dispute demonstrates, the exploration of constructive remedies can involve communications at a diplomatic level which the EC regards as “by nature confidential” in the sense of Article 6.5.

*To both parties*

**Q4. With reference to Brazil's assertion in para. 20 of its second written submission and Brazil's response to Panel Question 4 following the first meeting, are undertakings other than price undertakings provided for by the *Anti-dumping Agreement*? How, if at all, is Article 8.1 of the *Anti-Dumping Agreement* relevant in this context?**

Reply

Article 8.1 provides for “undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated”. In the EC’s view these options achieve the same result in practice, since in the second case it would be necessary to specify the price which would eliminate injurious dumping, which would be the revised price under the first case. Consequently, the EC regards all undertakings envisaged under the Article 8.1 as essentially price undertakings. The EC has no view whether Article 15 permits action beyond the scope of Article 8.1.

**Q5. Previous panels have indicated that the application of the "lesser duty rule" and "price undertakings" are possible constructive remedies under Article 15 of the *Anti-Dumping Agreement*. Can both parties suggest any other remedy that could be seen as constructive in terms of Article 15?**

Reply

The EC does not have any other examples of possible constructive remedies to suggest.

B. ISSUE 3 : "INAPPROPRIATE MEASURES"

*To Brazil*

**Q6. Can Brazil comment on para. 39 of the EC oral statement at the second meeting?**

Reply

C. ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"

*To the EC*

**Q7. Did the EC have available to it in the record of the investigation all of the information that would have been required to conduct a calculation of PIS/COFINS adjustment on a more thorough or a comprehensive basis? If so, cite to the relevant portion of the record. If not, why**

**did the EC not request the information that would have been necessary for such a more extensive calculation?**

Reply

All Tupy's export and domestic prices were available in the record of the investigation that was disclosed to Tupy. However, the EC does not agree that the use of all these data on a more thorough or comprehensive basis would have necessarily led to a more precise adjustment. The use of the 20 most-exported models was not the only 'reasonable basis' that the EC had to use in order to grant Tupy this unclaimed adjustment. As can be seen on EC's letter of 28 February 2000<sup>2</sup>, the EC had also to use data pertaining to all exports rather than those of the exports of the product concerned. The text is as follows (emphasis added): *'Tupy received on a total amount of 159.335.000 real exported 2.491.000 real returned PIS/COFINS taxes paid on materials used for the production of exported goods. This is the amount 'refunded in respect of the product exported to the Community'. The above amounts refer to all exports of all products and have been taken as a reasonable basis as the total turnover of the company was the only one that Tupy has been able to reconcile during the on-the-spot verification.'*

In the course of investigations it is necessary for investigators to make pragmatic decisions for dealing with information which is incomplete or unsatisfactory. The procedure for using 'facts available' in accordance with Article 6.8 and Annex II of the Agreement is an elaborate one, and, as exporters know, tends to lead to less favourable results. In this instance Tupy, having presented no coherent claim for an adjustment itself, acquiesced in the formulation by the EC of an adjustment based on the 20 most-exported models. It was a pragmatic solution, that was acquiesced in by Tupy at the time and was much to its advantage.

**Q8. Why did the EC resort to the use of data of the 20 most exported types in calculating the PIS/COFINS adjustment? Was it exclusively because of the "constraints of time and personnel" that you refer to in para. 84 of your oral statement at the second meeting?**

Reply

The judgement made by the EC investigators was that, in the circumstances of the investigation, given the data in question and the significance of the outcome of the calculation relative the size of the dumping margin, the use of a key based on the 20 most-exported types was appropriate and reasonable. Therefore it was not exclusively because of personnel and time constraints.

It should be noted that Tupy at no time during the investigation proposed any other reasonable method or provided any assistance on this issue to the EC investigators. Rather, it argued, in the face of the evidence and data available to the EC and itself, that the adjustment for PIS/COFINS should be 5.37 per cent. It persisted in this claim until after provisional disclosure<sup>3</sup>, when all the facts were known to the EC as well as to Tupy. The EC considers that taking account of these particular circumstances, even assuming that it missed 0.03 per cent of an unclaimed adjustment, this does not render the comparison between normal value and export price 'unfair' as that term is used in Article 2.4 of the anti-dumping agreement.

**Q9. In an investigation not involving "facts available" or "sampling" within the meaning of the Anti-Dumping Agreement, what is the legal basis that permits or does not preclude the use by an investigating authority of data from only a selection of transactions or the use of an "allocation key" for the purposes of calculating adjustments?**

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<sup>2</sup> Page 7 of Annex II, Exhibit BRL-11

<sup>3</sup> See Tupy's letter of 13 June 2000, page 8, point 2.7.5, Exhibit BRL-17

Reply

In paragraph 82 of its Second Oral Statement the EC drew the Panel's attention to Article 6.14 of the Agreement. This provision entitles the investigating authorities to take the kind of approach adopted in this case by the EC when the progress of the investigation had been considerably impeded by Tupy's failure to supply the information which had been requested of it. The use of the 'facts available' procedure in Article 6.8 would itself substantially interfere with the expeditious handling of the investigation if it were to be invoked on every occasion that the exporter failed to provide exactly what had been demanded by the investigators. Consequently the Agreement allows investigators a margin for making pragmatic judgements in order to reach a determination of the matter. It should be noted that the adjustment proposed by Tupy itself involved the use of an allocation key since it made the (unlikely) assumption that the PIS/COFINS tax rate for each product type was at the level of the average of all Tupy products (including those not covered by the investigation).

*To Brazil*

**Q10. Could Brazil comment on the EC's answer to Panel question 55? Even assuming *arguendo* that the normal value was calculated net of the IPI tax, would this preclude the necessity to consider whether or not the IPI premium credit would be potentially the subject of an adjustment?**

D. ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"

*To Brazil*

**Q11. With respect to the EC's assertion at para. 77 of its oral statement at the second meeting, did Tupy request information on rates of exchange used for allowances? Please cite to the relevant portions of the record of the investigation.**

**Q12. Could Brazil clarify whether and to what extent its claim is now limited to the exchange rates used in conversions relating to adjustments? Please indicate how this is reflected in the allegation stated in para. 21 of your Panel request.**

*To the EC*

**Q13. Could the EC expand upon the explanations provided in response to Panel Question 88 following the first meeting – in particular: 1. clarify the meaning of "the allowance for credit cost should be based on the new export invoice values" and why these were not used in the context of allowances for credit costs; and 2. provide a more extensive account of the methodologies used concerning warranties and commissions?**

Reply

The EC has noticed an error in table contained in Exhibit EC-25 which accompanied its answer to Question 88.<sup>4</sup> The EC apologises for the confusion this may have caused and takes this

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<sup>4</sup> The figures in the eighth column, with heading 'Monthly exchange rate used by the EC' were not the monthly rates used to convert the three allowances (credit, warranty and commissions) into Real, but the daily exchange rates that were used to convert the export invoice value into Real.

opportunity to present a new version of the table (Exhibit EC-28A), containing additional information, which it trusts will be of greater assistance to the Panel.<sup>5</sup>

At the provisional stage of the investigation, the EC converted both the (export) invoice prices, and the allowances claimed by Tupy (in foreign currency rather than in Real as requested by the EC), at the monthly exchange rates, as provided for in the EC's questionnaire, as is the EC's usual practice. In its comments on the provisional disclosure,<sup>6</sup> Tupy raised the issue of the conversion rates in connection with the export price, but not in regard to the various allowances. The EC responded by changing to a system of daily exchange rates for the export price, but for three allowances it maintained the monthly rates. The reasons were as follows.

1. Allowance for credit cost.<sup>7</sup>

In the case of credit costs, there are no items in Tupy's accounts, corresponding to those that are found for costs such as packaging or transport, that permit the adjustment to be calculated directly for individual sales. Credit costs are therefore calculated as a percentage (based on current interest rates) of the invoice price. In converting the invoice prices into Real for this purpose the EC kept in place its ordinary approach of monthly average exchange rates (which it has used in the provisional measures). There were several reasons for taking this approach. Firstly, Tupy had made no requests concerning conversion rates for the allowances. Secondly, because the allowances were themselves small compared to the export price, any differences arising from the application of the different rates would be very small. Thirdly, the monthly-rate system produced figures that were actually slightly more favourable to Tupy than the ones it had itself proposed.

2. Allowance for warranty and commissions.

For warranty and commission costs, like credit costs, there are no clearly separate items in the accounts associating particular costs with export sales to the EC. Instead, as requested by Tupy, for each consignment the EC used a fixed percentage (0.0312 per cent, based on an insurance rate) of the export price to calculate the amount for the warranty, and a varying percentage of the export price (depending on the customer) for the commission. In converting the export price for these purposes the monthly rate was retained for the same reasons that it was used in the calculation of credit costs (above).

**Q14. Can the EC explain how its response to Panel question 88 following the first meeting can be reconciled with para. 52 of the Definitive Regulation?**

Recital (52) of the definitive Regulation refers to the conversion of the export price. The conversion of the adjustments into Real was a correction of misreported data by Tupy, which was required by the Questionnaire instructions to report these adjustments into Real. As explained in answer to Question 15, Article 2.4.1 is aimed at export prices and their conversion, and not at conversions made regarding adjustments. Correct reporting by Tupy would have made currency conversions, except for the export price, unnecessary. If Article 2.4.1 were to be applied mechanically to such conversions an exporter would be able to distort the outcome of the calculation by its choice of the currency in which it reported costs associated with the sale.

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<sup>5</sup> The new material is in italics.

<sup>6</sup> Tupy's letter of 30 March 2000, page 35, points 13 to 16, Exhibit BRL-13.

<sup>7</sup> EC Answer to Questions from the Panel at the First Substantive Meeting, question 88, para. 123.

*To both parties*

**Q15. How and to what extent does the obligation in Article 2.4.1 to perform currency conversion using the rate of exchange on the date of sale apply to the adjustments at issue under this claim? Is this relevant or applicable here? What are the legal obligations that govern the calculation of such adjustments and allowances?**

Reply

It should be said that in this investigation there was no dispute as to whether the rate of exchange on the date of sale should be applied. The question that arose was whether to use a monthly average rate on the date of sale or a daily average rate on the date of sale.

The obligation in Article 2.4.1 to perform currency conversions using the rate of exchange on the date of sale refers to export sales' prices and not to conversions that might be necessary in the course of making adjustments.

This is apparent from the text of Article 2.4.1, which reads as follows (emphasis added):

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

The emphasized words show that what the paragraph refers to is export sales' prices. The primary context of this provision is provided by Article 2.4, which sets out its objective in the first sentence: "A fair comparison shall be made between the export price and the normal value". If the 'date of sale' criterion were applied mechanically to every conversion that had to be made in the course of an investigation the result would be anything but fair.

In many cases cost differences leading to differences in market value and to adjustments between domestic and export prices are not incurred on the date of the export sale. Purchases of packing material, inland transport to the harbour, warranty expenses, costs linked to physical differences, etc., are, depending on the nature of each expense, incurred before or after the date of the export sale.

A conversion of all these data at the exchange rate of the export sale for the purpose of an anti-dumping investigation would be a pointless and burdensome task for the exporting producer and would render the verification by the investigating authorities impossible, because no amount reported would correspond to the data available in the accounts of the company. That is why the EC normally requires, as it did in this case, that companies report all data as contained in their accounting records.

E. ISSUE 12: "NO PROPER CONSIDERATION OF IMPORT VOLUME TRENDS"

*To Brazil*

**Q16. Could Brazil comment on the EC statement in paragraph 88 of its oral statement at the second meeting that "Brazil appears to confirm the EC's understanding that Brazil is not claiming an infringement of Article 3.1 other than as an automatic consequence of alleged infringements of other parts of Article 3"?**

F. ISSUE 13: "NO PROPER CONSIDERATION OF ALLEGED UNDERCUTTING"

*To Brazil*

**Q.17 Could Brazil comment on the EC assertions in para. 95 of its oral statement at the second meeting regarding the price undercutting analysis?**

**Q.18 Could Brazil comment on the EC' assertion in para. 122 of its oral statement?**

G. ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"

*To the EC*

**Q.19. Are there any worksheets or investigation notes which formed the basis for Exhibit EC-12? If so, please provide copies or explain why not?**

Reply

The conclusions recorded in Exhibit EC-12 are based on worksheets, but these contain highly confidential business information relating to the performance of individual EC producers, and the EC would prefer not to release them.

**Q.20. Could the EC confirm and substantiate that the Exhibit EC-12 was written within the time period of the investigation?**

Reply

The EC confirms that Exhibit EC-12 was written on 14 April 2000, i.e. within the time period of the investigation.

EC is not clear what evidence the Panel would regard as appropriate to substantiate this fact. It is not the practice of the EC anti-dumping division to number its 'Notes for the File', but merely to date them.<sup>8</sup>

**Q.21. Taking note of what was stated in para. 122 of your second oral statement, could you please state how you reconcile this with the requirements of Article 3.6? Could you specify whether this is or is not relevant here?**

It was with Article 3.6 in mind that the EC made its comments on the allocation of data on return on investments, etc., in its second oral statement. For many aspects of the injury investigation on malleable fittings, data pertaining to the production of the like product were available. Where for certain of the injury criteria this was not possible the EC, in accordance with Article 3.6, had resort to data relating to "the production of the narrowest group or range of products which includes the like product". In several cases this involved using information contained in annual reports.

*To both parties*

**Q.22. Is this the first time in either the course of the investigation that the EC has supplied to Brazil/Tupy, or in this Panel proceeding that the EC has supplied to Brazil the information**

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<sup>8</sup> The EC can provide other examples of such notes should the Panel so wish.

**concerning "return on investments" that is contained in paragraph 123 of the EC's oral statement at the second meeting, or any other information relating to this factor?**

Reply

In the disclosure documents (Exhibits BRL-11 and BRL-16), in an aggregated form, Tupy was provided with the profitability of the Community industry, in terms of net profit before taxes on the net turnover. It was been provided, in an aggregated form, with the turnover relating to the product concerned. The details of the total turnover (i.e. relating to the whole activity of the company) and of the turnover relating to the product concerned per company were provided in the non-confidential version of the questionnaire replies, that Tupy exercised its right to consult. Moreover, the annual accounts for four out of six Community producers for different periods were contained in the non-confidential files.<sup>9</sup>

H. ISSUE 17: "CAUSATION"

**Q23. With reference to para. 16 of Brazil's oral statement at the second meeting:**

*To Brazil*

- (a) **Would an examination carried out for the purpose of the definition of domestic industry in Article 4 necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?**

*To the EC*

- (b) **How do you respond to Brazil's assertion in para. 16 of its oral statement in particular with reference to an examination being carried out for the purpose of the definition of domestic industry in Article 4? Would this necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?**

Reply

In general, an examination merely for the purpose of determining the scope of the 'domestic industry' as defined in Article 4 would not be adequate for the examination under Article 3.4 of whether that industry was suffering injury, or under Article 3.5 of what was the cause of that injury. The issues involved in these provisions are quite distinct. Nevertheless, information gathered in the pursuit of one matter may be of use in one of the other contexts. In the present investigation the distinction between the different examinations was reflected in the enquiries pursued by the EC authorities. The EC investigated whether it was appropriate to exclude certain domestic producers in accordance with Article 4.1(i), and concluded that it was not.<sup>10</sup>

The EC understands that Brazil's complaint (in so far as it goes beyond a concern about outsourcing *per se*) concerns Article 3.5 and the allegation that the domestic industry injured itself by giving away market share to those companies to which it outsourced production. In the context of Article 3.5, the EC investigated the levels of imports of malleable fittings from countries other than those accused of dumping, and found them not to be a significant cause of injury to the domestic industry. Those imports necessarily included any production that was the result of outsourcing. Since the imports as a whole from each of these countries were found not to be a significant cause of injury,

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<sup>9</sup> The annual reports of the other two companies are not publicly available documents.

<sup>10</sup> Prov. Reg. rec. 134; Def. Reg. recs. 65 to 68.

the same was necessarily true of that part of those imports (however large) which resulted from outsourcing. Clearly, this investigation was quite different from that involved in the determination of the 'domestic industry'.

The EC does not understand how (if at all) Brazil argues that outsourcing was relevant to the assessment of the condition of the domestic industry that is required by Article 3.4. In any event, the EC's investigation under Article 3.4 was quite distinct from that under Article 4.

- (c) **The EC asserts in its second written submission that Brazil has nowhere explained how, even had they existed, such outsourcing arguments could of themselves have affected the findings on causation. Could you specify in detail what was required, in the view of the EC from Tupy to submit in this regard?**

Reply

As stated above, the EC understands that Brazil claims that Tupy argued that outsourcing was causing the domestic industry to lose market share. For such an argument to have been sustained it would have been necessary (at the least) to show that imports from the companies to which production had been outsourced were a significant cause of injury to the EC domestic industry. Tupy did not submit evidence to support such an allegation. (Nor did the EC's own investigations produce such data.)

I. ISSUE 18: "NO TIMELY OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION"

*To Brazil*

**Q24. Does Brazil agree with the EC assertion in para. 157 of the EC oral statement at the second meeting that "It appears that this claim is now solely concerned with information on the currency conversion rates used in relation to allowances in the dumping calculation"?**

**OTHER**

*To Brazil*

**Q25. Could Brazil comment on the EC assertions in, *inter alia*, paras. 9, 130, 140 of the EC's oral statement at the second substantive meeting that certain "new claims" are inadmissible?**

**Q26. Are the EC's 10 August 2001 "invitation" to Tupy to apply for a review, and Tupy's response thereto, part of the Panel's record? If so, please cite to the relevant portion of the record. If not, please provide or explain why not.**

*To the EC*

**Q27. With respect to each of the claims which you have indicated you view as outside the Panel's terms of reference, could you indicate how, if at all, your interests have been prejudiced over the course of the Panel proceedings?**

Reply

The EC takes the view that in all the cases in which it has raised this objection its interests have been prejudiced by the lack of adequate notice of the issues. The scope of the claims that are explicitly made in Brazil's panel request is already exceptionally broad. The EC is entitled to the period that elapses between the establishment of the panel and the presentation of the complainant's



first written Submission to prepare its defence. Such preparation is only possible if the complainant adequately specifies its claims in its panel request for incorporation into the terms of reference.

*To both parties*

**Q28. With respect to the reference made to the issue of reviews, could both parties specify the nature and scope of reviews conducted by the EC since the investigation that is the subject of these panel proceedings?**

The only review commenced in regard to malleable iron fittings is the one initiated in December 2001 (Exhibit EC-26). This states that “The review is limited in scope to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a dumping methodology at issue in the reports and which submit a full questionnaire reply with the time limits set out in points 6(a)(i) and (ii) of the present notice. ... The investigation shall cover the period from 1 January 2001 to 30 September 2001.” The “reports” in question are those of the Panel and Appellate Body in ‘European Communities – Anti-Dumping Measures on Imports of Cotton-Type Bed-Linen from India’.

Since a new investigation period has been established the EC will examine the situation on the basis of new facts. Thus, had Tupy participated in the review, the EC would have looked at price data from the period after devaluation and would necessarily have examined (as Tupy had argued) whether the dumping margin had disappeared following that event.

The first time that Tupy raised doubts about the scope of the review was in a letter to the EC dated 22 April 2002, more than four months after the publication of the notice of initiation. In a letter dated 7 May 2002 the EC offered to hold a hearing for Tupy where the questions it had raised concerning the scope of the review, could have been discussed. Tupy has never replied to this offer. This is another illustration of the obstructive attitude Tupy has taken throughout the proceedings.

## ANNEX E-9

### COMMENTS OF BRAZIL ON THE RESPONSES OF THE EUROPEAN COMMUNITIES TO THE PANEL'S QUESTIONS – SECOND MEETING

(28 June 2002)

- A. ISSUE 1: "NO SPECIAL REGARD TO BRAZIL AS A DEVELOPING COUNTRY", "NO CONSTRUCTIVE REMEDIES EXPLORED"

*To the EC*

**Q3. With reference to the relationship between the obligations in Articles 12.2 and Article 15 of the *Anti-Dumping Agreement*, comment on Brazil's response to Panel Question 13 stating that the EC did not mention in the Provisional or Definitive Regulation that the possibility of an undertaking had been explored with regard to the Brazilian exporter.**

Brazil welcomes the EC's admission "that undertakings are primarily a matter for exporters, who best know their interests and their plans". It follows that (assuming *arguendo* that the EC raised the possibility of a price undertaking during governmental bilateral talks mentioned during these proceedings) it should have equally been clear to the EC that its adequate counterpart in exploring the possibility of a constructive remedy such as a price undertaking should have been the Brazilian exporter, "who best know[s its] interests and [its] plans" rather than the Brazilian Government who had knowledge of neither.

Brazil further observes that the EC does not even address the Panel's question in relation to Article 15.

- C. ISSUES 6 & 10: "NO PROPER CONSIDERATION OF TAX NEUTRALISATION"; "NO PROPER BASIS TO ASSESS PIS/COFINS INDIRECT TAXES"

*To the EC*

**Q7. Did the EC have available to it in the record of the investigation all of the information that would have been required to conduct a calculation of PIS/COFINS adjustment on a more thorough or a comprehensive basis? If so, cite to the relevant portion of the record. If not, why did the EC not request the information that would have been necessary for such a more extensive calculation?**

Brazil submits that convenient "pragmatic solutions" resorted to by investigating authorities cannot override the substantive requirements of the AD Agreement. Therefore, the EC's approach in respect of PIS/COFINS, which lacks any support in the AD Agreement, must be rejected.

**Q8. Why did the EC resort to the use of data of the 20 most exported types in calculating the PIS/COFINS adjustment? Was it exclusively because of the "constraints of time and personnel" that you refer to in para. 84 of your oral statement at the second meeting?**

With regard to the EC's answer, Brazil recalls the calculation it had made on the basis of the Brazilian exporter's 40 most exported product types (and not 20 as the EC) which demonstrated very

clearly that the price difference between the domestic and export prices *decreases* where the number of product types increases.<sup>1</sup> Therefore, Brazil has demonstrated that that adjustment was *understated* by the EC. In contrast with the EC's position that a missing adjustment does not (somehow) render the price comparison 'unfair', Brazil submits that investigating authorities cannot discharge their "fair comparison" obligation by pragmatism or an administrative convenience. Moreover, Article 2.4 does not make a distinction between "slight" and "grave" violations.

**Q9. In an investigation not involving "facts available" or "sampling" within the meaning of the Anti-dumping Agreement, what is the legal basis that permits or does not preclude the use by an investigating authority of data from only a selection of transactions or the use of an "allocation key" for the purposes of calculating adjustments?**

Brazil denies that the substantive "fair comparison" requirement in Article 2.4 could be replaced or limited in any way by a general procedural rule to manage investigations expeditiously in Article 6.14. In the same vein, Brazil also rejects the EC's attribution of its failures to any conduct of the Brazilian exporter, as this is totally unacceptable. The obligation to conduct a fair comparison lays squarely in this respect on the shoulders of the investigating authority.

D. ISSUE 9: "NO PROPER CURRENCY CONVERSIONS"

*To the EC*

**Q13. Could the EC expand upon the explanations provided in response to Panel Question 88 following the first meeting – in particular: 1. clarify the meaning of "the allowance for credit cost should be based on the new export invoice values" and why these were not used in the context of allowances for credit costs; and 2. provide a more extensive account of the methodologies used concerning warranties and commissions?**

**Q14. Can the EC explain how its response to Panel question 88 following the first meeting can be reconciled with para. 52 of the Definitive Regulation?**

Brazil takes note of the EC's answers to the Panel's questions No 13 and 14 and of the new table (Exhibit EC-28A), which the EC has now provided. Brazil does not see any reason why, neither how this "new version" could "be of greater assistance to the Panel" as stated by the EC.

Brazil recalls again the EC's original recorded statements that the conversion of currencies was based on daily rates.<sup>2</sup> However, in the first submission, the EC first denied but, in the same vein, admitted Brazil's claim whereby the conversion of *transport* costs was *not* based on daily rates.<sup>3</sup>

Then, in its answer to the Panel's first and second set of questions, the EC had to admit that none of the *credit costs*, *warranty* and *commission* were converted on the basis of its explicitly stated rates.<sup>4</sup>

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<sup>1</sup> See *Brazil's calculation of the price difference between the domestic prices and the export prices based on the 40 most exported types* (BRL-54).

<sup>2</sup> See the Disclosure Preceding the Definitive Regulation (BRL-16), Annex II, page 5; the Definitive Regulation (BRL-19), recitals 51 and 52, and the Transparency Letter (BRL-18), page 4.

<sup>3</sup> ECFS, para 220 and 228.

<sup>4</sup> See *Answers of the European Commission to the Questions from the Panel at the First Substantive Meeting*, question No. 88; and *Answers of the European Commission to the Questions from the Panel at the Second Substantive Meeting*, question No. 13.

The EC has now provided a new Exhibit EC-28A. However, this table seems to provide the currency conversions for about 400 lines out of more than 16.000 lines of the Brazilian exporter's export transactions in the IP. Brazil submits that such a partial statement of facts is meaningless. It is certainly not a "rebuttal" of anything and at best (using the EC's own words) might merely serve as a lip-service. Other than its own failures, the EC has nowhere been able to demonstrate that the effect of the actual rates used, which were *not* exclusively based on daily rates, were somehow "more favourable" to the Brazilian exporter. They demonstrate nothing of the sort.

Brazil cannot accept the EC's way to attribute its own failures to alleged Brazilian misconduct. Brazil notes the EC's repetitions that the Brazilian exporter had "misreported data ...which was required by the Questionnaire instructions to report these adjustments into Real". However, Brazil cannot find such instructions in the Questionnaire (BRL-3) or in any other documentation, like the deficiency letter (BRL-6), forming the record of its investigation.

Brazil submits that the clear contradictions between the versions given by the EC must have only one result namely, that none can be accepted.

*To both parties*

**Q15. How and to what extent does the obligation in Article 2.4.1 to perform currency conversion using the rate of exchange on the date of sale apply to the adjustments at issue under this claim? Is this relevant or applicable here? What are the legal obligations that govern the calculation of such adjustments and allowances?**

Brazil confirms its disagreement with the EC's suggestions with regard to the relationship between Articles 2.4 and 2.4.1. Article 2.4.1 does not apply only to itself, as suggested by the EC, but to the whole paragraph 4 of Article 2. The text of Article 2.4.1, which spells out a general rule for selecting exchange rates, refers explicitly to "the comparison" under Article 2.4. This provision respectively requires that the factors to be ultimately compared are the export price and the normal value, both as adjusted to take due account of "differences which affect price comparability". Therefore, the chapeau of Article 2.4.1, which does not provide for any separate rules on currency conversions with regard to different factors, refers to *both* the conversion of currencies related to the export price *and* the allowances to be deducted from the said price. Finally, Brazil submits that the EC's wordy explanations before the Panel do not alter the record of this case, which include the EC's statements that daily rates were used for the conversion of currencies.

G. ISSUE 16: "INAPPROPRIATE CONSIDERATION OF INJURY INDICATORS"

*To the EC*

**Q19. Are there any worksheets or investigation notes which formed the basis for Exhibit EC-12? If so, please provide copies or explain why not?**

Brazil would merely observe that the EC does not indicate why it could not make use of the applicable confidentiality provisions, such as those available under Article 18 (including 18.2) of the DSU, which provisions are meant to protect exactly the kind of information which the EC prefers not to release here. This new EC conduct gives yet another impetus to Brazil's insistence that Exhibit EC-12 should be ignored altogether.

**Q21. Taking note of what was stated in para. 122 of your second oral statement, could you please state how you reconcile this with the requirements of Article 3.6? Could you specify whether this is or is not relevant here?**

Brazil disagrees with the EC. The second sentence of Article 3.6 (“[i]f such separate identification of that production is not possible,...”) shows that the general rule regarding assessment is laid down in the first sentence. That is, *only if* the separate identification of the domestic production of the like product is *not* possible, an investigating authority is obliged to assess the effects of the dumped imports in relation to the “narrowest group or range of products”. The EC, however, seems to interpret the phrase “available data” in the first sentence from the perspective of an investigating authority, *i.e.* whether something was available to the EC. However, the text of the second sentence (“for which the necessary information *can be provided*” – emphasis added) is clear enough to suggest that the issue of availability is to be evaluated from the perspective of the domestic industry, *i.e.* whether the domestic industry is or is not able to make a separate identification of the domestic production of the like product and to provide the necessary information. There is nothing in the record (as it currently stands) to suggest that the EC industry was *not* able to make such a separate identification. Inversely, it is clear from the record that the EC did not even request the data on certain *per se* relevant injury factors from the domestic industry.

*To both parties*

**Q22. Is this the first time in either the course of the investigation that the EC has supplied to Brazil/Tupy, or in this Panel proceeding that the EC has supplied to Brazil the information concerning "return on investments" that is contained in paragraph 123 of the EC's oral statement at the second meeting, or any other information relating to this factor?**

Indeed, Brazil agrees that the EC had provided certain aggregated information on the profitability of the domestic industry. However, Brazil does not see how the information on “profitability” is relevant as regards the issue of “return on investments”. With regard to the annual reports, Brazil recalls the EC’s written statements, which the EC then also explicitly confirmed orally in the Second Substantive Meeting with the Panel<sup>5</sup>, that the annual accounts of the domestic industry were available to interested parties whereas this information is, at best, only partial. Indeed, had these EC’s firm assurances been correct, the Brazilian exporter would have been able to calculate the level of data used on “return on investments” from the EC producers’ audited accounts, as suggested by the EC. But this is not the case, as the EC now admits that only “the audited accounts for four out of six Community producers” were made available in the non-confidential file. It follows that the Brazilian exporter was unable to make that calculation and had thus been deprived even of this possibility to defend itself.

H. ISSUE 17: "CAUSATION"

**Q23. With reference to para. 16 of Brazil's oral statement at the second meeting:**

*To the EC*

- (b) How do you respond to Brazil's assertion in para. 16 of its oral statement particular with reference to an examination being carried out for the purpose of the definition of domestic industry in Article 4? Would this necessarily both in general and in this particular case be inadequate for the purpose of Article 3.4 and/or 3.5 analysis? Why or why not?

Brazil welcomes this new EC’s U-turn, which now admits that the EC’s stated reliance on and references to its examinations for the purpose of Article 4 indeed served no purpose in relation to the

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<sup>5</sup> See Second Oral Statements of the European Communities where the EC stated in para 130 that “the information used by the EC authorities was drawn from the *published* accounts of the companies concerned” (emphasis added).

examinations required under Articles 3.4 and 3.5. But the EC does not take the subsequent step that it should have taken following that admission. What is also implied by its admission is that the EC's examination of injury for the purposes of Article 3.4 and 3.5 have been totally insufficient and shallow, as the EC has not looked into all the injury indicators that it should have looked at under Article 3.4 and then also failed to take these, and other factors into account, for its subsequent causation analysis under 3.5. In particular, the EC failed to take into account in both these respects the implications of 'outsourcing', including imports from related companies in Other Third Countries, as a "relevant economic factor... and indice(s)...having a bearing on the state of the industry" under Article 3.4.<sup>6</sup> Brazil recalls that it had referred to this factor as a cause of injury, other than the dumped imports, which the EC had to take full account of for its causation analysis under Article 3.5, but failed to do so, repeating its failed analysis under Article 3.4.<sup>7</sup>

For some reason the EC chooses to assume that Brazil's arguments regarding the full injurious impacts of that 'outsourcing' is merely limited to considerations under Article 3.5. Brazil reaffirms that its arguments do relate to the EC's failed examinations under both Articles 3.4 AND 3.5.<sup>8</sup>

- (c) The EC asserts in its second written submission that Brazil has nowhere explained how, even had they existed, such outsourcing arguments could of themselves have affected the findings on causation. Could you specify in detail what was required, in the view of the EC from Tupy to submit in this regard?

Brazil submits that the EC's contention must be flatly rejected by the Panel, without any further ado. As also indicated in its above comments on (b), Brazil is of the view that the EC had all the relevant information before it, as made available to it by the Brazilian exporter and by others throughout the original investigation, perfectly allowing the EC to conduct a full and appropriate injury examination. As indicated above, the EC failed to abide by its most basic obligations under the AD Agreement, primarily under Articles 3.4 and 3.5. The EC's suggestions that the failures of its injury examination could result in any way from an alleged obligation on the Brazilian exporter to "submit evidence to support" its related submissions must be rejected forthwith by the Panel. The EC chooses to give the impression as if it misunderstands its own obligations of an investigating authority as it clearly inverses its role of an investigating authority with that of an exporter which it investigates. Unlike the EC authorities, the Brazilian exporter did not have any investigating powers. It submitted well-documented information and evidence to support its arguments which the EC should have then further investigate but failed to do so. The Panel should reject this EC's line of argument which is, to say the least, inappropriate for an investigating authority such as the EC. And the Panel should thus also record, most importantly, that the EC in fact admits that it failed to conduct a proper investigation and examination for the purposes of Articles 3.4 and 3.5.

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<sup>6</sup> See BSS paras 263 to 269 under '3.3 Outsourcing'.

<sup>7</sup> See BSS paras 322 to 326 under '2.3 Imports from other third countries', and further BSS paras 327 to 335 under '2.4 Outsourcing'.

<sup>8</sup> See also Brazil's answer to the same question where it further referred to the 'shielding' impact of the imports made by a major part of the EC industry and the implications that this had, and which the EC ignored, on the injury examination for the EC industry as a whole, as well as for the two segments of the industry (importers and non-importers).

## OTHER

*To the EC*

**Q27. With respect to each of the claims which you have indicated you view as outside the Panel's terms of reference, could you indicate how, if at all, your interests have been prejudiced over the course of the Panel proceedings?**

Brazil observes that this EC answer remains vague and unspecific. Brazil is of the view that the EC's arguments in this respect have no substantive merit and are meant to serve the EC's litigation tactics which, to say the least, are not in line with its responsibilities under the DSU, including Article 3.8 thereto. Furthermore, Brazil further observes, if still necessary, that the EC cannot deny that it have had full knowledge of Brazil grievances as these have reflected arguments that have already been raised by the Brazilian exporter during the investigation and by Brazil during consultations.

*To both parties*

**Q28. With respect to the reference made to the issue of reviews, could both parties specify the nature and scope of reviews conducted by the EC since the investigation that is the subject of these panel proceedings?**

Brazil affirms firstly that the Brazilian exporter reacted to the EC's "review" during the timeframe formally agreed with and confirmed by the EC. Secondly, according to information given by Tupy to the Brazilian Government, the Brazilian exporter explained to the EC why, given the confusing nature and doubtful legal basis of that "review" it did not consider its participation in that "review" to be of its best interest.<sup>9</sup> Moreover, as the Brazilian exporter reportedly also informed the EC, as a matter of courtesy and fair play, that the EC should not expect to receive the Brazilian exporter's replies to the EC's questionnaire until it is satisfied that the EC would not apply its questionable methodologies to these replies, Brazil is at a loss not only with regard to the tone of this EC answer but also to understand what else the EC was still expecting the Brazilian exporter to add on this. Finally, Brazil reminds the Panel that, in Brazil's view, all such reviews are outside the terms of reference of the Panel.

Furthermore, as regards the last paragraph of the EC's answer, it must be noted that while assessing the convenience to participate in the review, Tupy - in a letter<sup>10</sup> dated 22 April 2002 -, requested a hearing to further discuss issues of its interests. However, the company then decided that such hearing was unnecessary in light of the ongoing procedures in the WTO. Brazil stresses, therefore, the inaccuracy of the EC's assertion that it "offered" to hold the hearing and that Tupy had an "obstructive attitude".

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<sup>9</sup> See Brazil's answer to Question 28.

<sup>10</sup> BRL – Exhibit 57. Letter from Tupy to the Panel from 22 April and EC's answer from 7 May 2002.

## ANNEX E-10

### COMMENTS OF THE EUROPEAN COMMUNITIES ON RESPONSES OF BRAZIL – SECOND MEETING

28 June 2002

1. In its answers to the Panel's second set of questions Brazil has made a number of false assertions and allegations. On most of these points the true picture has already been stated in the EC's submissions. However, on some of them it is necessary for the EC to make a further response.

#### Questions 6 and 28

2. Brazil seems to imply that the terms of reference of the Panel limit the defences and arguments that the EC may raise. There is of course no legal basis for such a contention. The only effective limitation is the criterion of relevance.

3. The EC raised the topic of reviews for two purposes. The first of these was to show that Tupy lacked confidence in its own claim regarding the consequences of devaluation on its dumping margin. Both the review that the EC offered in August 2001, and the one that it actually initiated in December 2001, were primarily intended to deal with the consequences of the legal interpretations of the Appellate Body in the *Bedlinen* case as regards dumping, notably as regards zeroing, a methodology which had been applied to Tupy's exports. However, in addition, each review would be based on a new investigation period (1 January 2001 to 30 September 2001 for the review initiated in December 2001)<sup>1</sup> and would have calculated Tupy's dumping margin over a period following the devaluation. Therefore, according to Tupy, no margin of dumping would have been found to exist. Despite this fact Tupy chose not to participate in the reviews. Tupy's explanation is that it wanted a full review. However, it did not itself request such a review when the one-year delay was over, and in any case a negative finding on dumping would have been sufficient in itself to terminate the duty. Brazil's attempts to create confusion regarding the purposes of the review<sup>2</sup> do not conceal the inconsistency between Tupy's arguments and its behaviour.

4. The EC's second reason for mentioning reviews was to argue<sup>3</sup> that the Panel should not issue a recommendation on certain matters even if it were to find inconsistency with WTO obligations.

#### Question 22

The companies whose audited accounts were confidential were Atusa and R. Woeste.

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<sup>1</sup> See Notice of Initiation of Review, 5 Dec. 2001, (Exhibit EC-26).

<sup>2</sup> Brazil Answers to Panel's Second Questions, question 28.

<sup>3</sup> EC Second Oral Statement, para. 167.



**Question 23**

Brazil develops a new argument to the effect that, because of outsourcing, the domestic industry (or major parts of it) was shielded from direct competition with imports. The nature of this shielding is not explained. Even if outsourced imports had been sufficient to constitute a significant cause of injury (as was not the case) the various products in the market would have remained in competition with one another. In any event, because of the burden of proof established by Article 3.5 of the Agreement, any such causal explanation would be relevant only if it had been presented by Tupy in the course of the proceedings.

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