

ANNEX D

Oral Statements, First and Second Panel meetings

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ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF BRAZIL - FIRST MEETING

(4-5 December 2001)

INTRODUCTION

1. In the following statement Brazil will merely point out to some of the core issues of the case. This is without prejudice to other important questions that, either because of their complexity or of their relationship with other related aspects of the case, will be better dealt with in the forthcoming Second Written Submission of Brazil to this Panel.

BACKGROUND OF THE CASE

2. The policy decision taken for structural reasons since the mid-1990s by a large part of the EC industry to outsource, and in some cases to relocate their production to countries outside the EC territory, is of paramount importance to this case. The EC's refusal to correctly assess this new structural reality contributed to its improper establishment and evaluation of the facts in this case.

3. The EC has never properly investigated the claims repeatedly raised by Brazil and previously by the Brazilian exporter (and by others).¹ Although it was given ample indications and leads to obtain information and evidence to verify the Brazilian exporter's claims, the EC merely affirmed that it could not verify the accuracy of that evidence.²

4. In essence, the Application had as its main purpose the ousting of Brazilian and other countries' imports from the EC market in order to make room for the EC industry's own outsourced products.³ In some cases production of the product concerned in the EC has been significantly reduced or even stopped altogether. The EC's labelling of these contentions as "wild allegations" is unwarranted.

5. A report which Brazil found on the website of the Bulgaria Economic Forum⁴ confirms that already in 1996 Atusa (an applicant) had acquired a controlling share of Berg Montana, a Bulgarian producer, and that in July 2000, Atusa had further acquired additional shares and strengthened its control over that Bulgarian producer.⁵ This was already anticipated in a report published in September 1999.⁶ Moreover, tables published on the Bulgarian Foreign Investment Authority's website clearly show Atusa's acquisition of control over Berg Montana in 1996 and 1997⁷ and its

¹ Tupy's First Submission, 2.1.7, 4th paragraph; Tupy's Second Submission, p. 2; Tupy's Fourth Submission, pages 23-24 (Brazil's First Submission page 119, 4th paragraph; page 222, 2nd paragraph; page 224, 2nd paragraph). References to statements and documents produced by Tupy during the investigation can be found in the Brazilian First Submission, *inter alia*, under 'B. History of precedents and their relevance to this case, on page 10 *et seq.* and under '*d) Imports from other Third Countries*' on page 217 *et seq.*, particularly on page 222 *et seq.*

² *Idem.*

³ *Idem.*

⁴ Biforum, www.biforum.org.

⁵ BRL-47

⁶ BRL-48

⁷ BRL-49

consolidation on 4 July 2000.⁸ The above leaves no room for doubt that the acquisition was made by Atusa itself.

6. Similar information was given by the Brazilian exporter to the EC regarding Woeste, another leading applicant in the investigation and other outsourcing arrangements that characterise the new situation of the EC industry⁹ (including the relations between the Swiss-Austrian applicant Georg Fischer (GF), and a Turkish producer). The EC sustains that “having been engaged in a close examination of the EC industry as part of this investigation, it has found no evidence to support Brazil’s allegations”.¹⁰ In failing to ascertain the accuracy of the information provided the EC also failed properly to establish the facts and to conduct an objective examination based on positive evidence.

BRAZIL AS A DEVELOPING COUNTRY

7. The EC has infringed various aspects of Article 15 of the AD Agreement:

8. (a) *Special regard to special situation of developing country Member*. The first sentence of Article 15 requires the developed country Member to give special regard to the special situation of developing country Members when considering the application of anti-dumping measures. That “special regard” must be reflected in facts. That was not the case of the measure before this Panel.

9. The second sentence of Article 15 sets forth two obligation, (b) *an obligation to explore possibilities of constructive remedies* whereby “the ‘exploration’ of possibilities [of constructive remedies] must be actively undertaken by the developed country ... with a willingness to reach a positive outcome”.¹¹ A meaningful and integral compliance with this obligation means giving the exporters notice on the opportunities to explore constructive remedies. In the present case, neither did the EC actively undertake such exploration nor was Tupy informed of such possibility.

10. The EC has never even mentioned the possibility of an undertaking to the Brazilian exporter during the investigation. It should be noted that – in accordance with the EC’s domestic law – the EC is entitled to suggest undertakings to the exporters concerned.¹² By the very nature of a price undertaking, the possibility of a constructive remedy cannot be properly explored unless the EC suggests this option to the exporter. This they did not do. This has not been raised with Brazil either. As the EC’s Exhibits show, the “matter” was always “raised” by the Brazilian side, not the other way around. In any event, as the Bed-Linen Panel instructs, “pure passivity is not sufficient to satisfy the obligation to ‘explore’ possibilities of constructive remedies”.¹³

11. (c) *Essential interests of a developing country Member*. It is not for the EC to determine what is an essential interest of Brazil. Secondly, as the EC anti-dumping investigation was an issue on the Brazilian agenda for high-level meetings between the Brazilian Government and the EC Commission, this clearly demonstrates that this matter was essential to Brazil’s interests.

⁸ BRL-50

⁹ Tupy’s First Submission, 2.1.7, 4th paragraph; Tupy’s Second Submission, p. 2; Tupy’s Fourth Submission, pages 23-24 (Brazil’s First Submission page 119, 4th paragraph; page 222, 2nd paragraph; page 224, 2nd paragraph).

¹⁰ EC’s First Submission, para. 18.

¹¹ European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, Report of the Panel (WT/DS141/R, 30 Oct 2000), para. 6.233.

¹² Article 8 of the Council Regulation (EC) n. 384/96 of 22 December 1995 on protection against imports from countries not members of the European Communities (Exhibit BRL-24).

¹³ European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, Report of the Panel (WT/DS141/R, 30 Oct 2000), para. 6.238.

APPLICATION

12. The EC failed to comply with the obligation of Article 5.3 to examine that the information provided in the Application was accurate and that all of the listed items in Article 5.2 were covered or were properly left out.

13. Given the fact that Brazil only received the confidential version of the Application together with the EC's First Submission, Brazil considers it necessary to examine this issue in more detail and reserves the right to make further comments on it in its next Written Submission to the Panel.

THE DEVALUATION IMPACT

14. The EC violated Article VI of GATT 1994 and Article 1 of the AD Agreement insofar as, following the devaluation of the Brazilian currency of 41.99 per cent in January 1999, no dumping could be found to exist so that the imposition of anti-dumping measures was unwarranted. Alternatively, the EC infringed Article 11.1 by permitting the measures to remain in force while they were no longer necessary to offset dumping. The EC also breached Article 11.2 of the AD Agreement by failing to review, on its own initiative, the need for the continued imposition of the measures given the new situation post devaluation.

15. EC AD rules do not give an exporter the right to request the initiation of a review within the first year after the imposition of duties. The Brazilian exporter cannot be blamed for failing to request a review during that year.

DUMPING

16. Brazil refers here only to two main aspects of this matter. First, in its analysis and calculation of PIS/COFINS, the EC resorted to *de facto* punitive sampling. Second, regarding "zeroing", the EC fails to address the implications of its methodology, although the zeroing and the infringement of article 2.4.2 are important elements in the overall pattern of the EC's bias in this investigation.

INJURY

17. **No proper consideration of alleged price undercutting** - The EC violated Articles 3.1 and 3.2 when examining the Brazilian imports' undercutting of the prices of the domestic industry as they failed to base their determination "on positive evidence and involve an objective examination". The EC, when "establishing the facts", "zeroed" the negative undercutting margins in violation of established WTO jurisprudence. This *de facto* "manipulation" of the export prices is inherently biased, as it (i) increases the likelihood of a determination of price undercutting; and (ii) increases the magnitude of that margin.

18. The EC flaws are further aggravated by the EC's refusal to take into account the significant differences between black and white heart fittings; an investigative authority must ensure that the prices it examines are comparable. Moreover, the EC failed to compare the Brazilian product types with black heart products of one EC producer or alternatively to make warranted adjustments.

19. **No proper cumulation** - the cumulation of the Brazilian exports with those of other exporting countries covered was inappropriate as the conditions allowing this under Article 3.3, and given Articles 3.1 and 3.2, have not been satisfied.

20. Article 3.3 deals with the possibility that the investigating authorities "cumulatively assess the effects" of the dumped imports. This clearly requires that (i) the authorities identify the effects; and

only after this identification could they proceed to step (ii): the cumulative assessment. Yet, the EC collapses these two steps into one. This does not reflect the concept of “successive addition”.¹⁴

21. Second, these procedures “may” be used “only” if the two conditions set out in Article 3.3 are met. The first set of conditions offers enough guidance to the investigating authorities. But with regard to the “conditions of competition”, Brazil has serious reservations as to the sufficiency of the criteria followed by the EC, an issue that will be further pursued in Brazil’s Second Written Submission. At this point it is noted that the imports from Brazil fit none of the required criteria.

22. Moreover, it is clear that the regular procedure for the EC authorities is to cumulate the imports. The burden of proving that the imports must not be cumulated is on the foreign exporter. Nevertheless, Article 3.3 is a clear exception to the normal procedure of determining injury in a non-cumulative way. Cumulation is permitted “only” when the conditions specified in Article 3.3 are fulfilled. In dubious situations, the authorities cannot engage in a cumulative assessment of the effects of the imports.

23. **Failure to evaluate all mandatory injury factors** - the EC did not evaluate all of the non-exhaustive fifteen injury factors of Article 3.4 for its determination of the state of the EC industry. The EC thus acted inconsistently with Article 3.4.

CAUSATION

24. The EC violated Article 3.5 by not *demonstrating* that the Brazilian imports are causing injury. The effects of the alternative causes of injury to the EC industry have wrongfully been attributed to the Brazilian imports. The EC conducted a perfunctory analysis of known causes such as: the impact of declined consumption and poor export performance of the EC industry, comparative advantage of the Brazilian exporter over the EC producers, outsourcing and rationalisation efforts of the EC industry, imports from the other third countries, substitution of the product concerned and difference in the market perception between the two variants of the product concerned. Moreover, the claimed factors regarding Brazilian imports were not established on the basis of positive evidence, which was contradicted by record evidence. The EC dismissed Brazil’s arguments, without “a reasoned explanation for the determination” and without “establish[ing] an adequate factual basis for the determination”. However, the non-attribution language of Article 3.5 obliges an investigative authority to *separate and distinguish* the injurious effects of the other factors from the injurious effects of the dumped imports. Without it, the authorities will be unable to ensure that a determination made concerning the injurious effects of dumped imports relate to those dumped imports and not to other factors.

¹⁴ The Shorter Oxford Dictionary, Third Edition.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES – FIRST MEETING

I. INTRODUCTION

1. Brazil has made a large number of claims. We have given a detailed and comprehensive refutation of these claims in our Submission. Rather than simply rehearse the arguments we have made there, in this Statement we wish to concentrate on a few issues of a more general nature.

II. CONDUCT OF THE INVESTIGATION

2. Brazil has made a number of false allegations about the conduct of the EC officials who carried out the investigation. For example, Brazil alleges, without providing any evidence, that the investigators cut short their on-the-spot verification of Tupy, and refused its requests for a warehouse to be visited. Brazil also accuses the EC of not providing Tupy with details of the exchange rates that were used in the dumping margin calculation. Anyone reading these allegations would be left with the impression that the investigators treated Tupy unfairly, and in an off-hand or even dismissive manner. The truth is quite opposite to this.

3. Tupy's cooperation was far from satisfactory. Its responses to the Questionnaires were inadequate. That of Tupy (Europe) was inaccurate, incomplete and misleading. In Tupy's own response the allowances regarding both export and domestic sales were wrongly calculated, figures were given in the wrong currency, and data for turnover were contradictory. The EC's attempts during the on-the-spot verification to get Tupy to correct these mistakes met with only limited success. The verification itself was needlessly extended because of the failure of Tupy to cooperate.

4. These problems were not caused by Tupy's lack of familiarity with anti-dumping matters – Tupy had been the subject of EC anti-dumping investigations on two separate occasions in the 1980s, and it has been involved in similar investigations in other countries. Nor were they the result of inadequate resources. Tupy is a large company with experienced management and professional accounting standards. Furthermore, Tupy was assisted in this investigation by expert legal counsel.

5. The EC has procedural rules designed to ensure the proper implementation of investigations. They are based on the requirements of the Agreement and the recommendations of the Anti-Dumping Committee. In accordance with the EC Commission's usual practice, Tupy benefited from a flexible and generous application of those rules. For example, an extra week was allowed for answering the Questionnaire; Tupy was granted two hearings by EC officials in Brussels; and it was permitted to submit corrections to essential information even after the on-the-spot verification had been completed. When Tupy presented confusing and contradictory information on export tax credits the EC officials themselves took the initiative in establishing price adjustments. After provisional measures had been adopted the EC took the initiative at the highest level to suggest that Tupy offer a price undertaking rather than have duties imposed.

6. Thus, despite the lack of cooperation, the EC authorities did their best to see that Tupy's interests were respected. In sum, the EC refutes all allegations, express or implied, that its officials acted in accordance with any but the highest standards.

7. In its Oral Statement, Brazil has made yet another suggestion that the EC authorities acted in bad faith in this case. Specifically, at paragraph 174, Brazil alleges that “the zeroing methodology and the infringement of Article 2.4.2 are important elements in the overall pattern of bias displayed by the authorities in the course of this investigation”. The EC would like to recall that the fittings investigation was completed, and definitive measures imposed, before the Appellate Body issued its report in the Bed Linen case. Before that report, the EC authorities had used the same averaging methodology in all investigations. Therefore, the EC rejects Brazil’s allegations. The EC authorities may have applied an incorrect averaging methodology in this case, but they displayed no bias against Tupy.

III. STANDARD OF REVIEW

8. The Panel will not need to be reminded that in these proceedings the appropriate standard of review regarding findings of fact is set out explicitly in Article 17.6(i) of the Anti-Dumping Agreement. However, we would like to use this opportunity to look more closely at this important provision and its correct interpretation.

9. The subject matter of Article 17.6(i) is the establishment and the evaluation of facts by the investigating authorities. I will deal with each of these in turn.

10. The establishment of facts covers the gathering of raw data, such as the profit levels of a business in particular years. According to Article 17.6(i), the establishment of facts must be ‘proper’. In *Thailand – H-Beams* the Appellate Body said that “the ordinary meaning of ‘proper’ suggests ‘accurate’ or ‘correct’”. However, it seems that the Appellate Body did not intend to give a definitive interpretation of this term. Rather, the purpose of the Appellate Body was to distinguish the obligation to make a ‘proper establishment of the facts’ from the obligation to disclose those facts to the parties.

11. The dictionary used by the Appellate Body (the New Shorter Oxford) gives another definition of the word ‘proper’ which seems even more relevant in this context. This reads: ‘Of requisite standard or type; fit, suitable, appropriate; fitting, right.’ One strong reason for preferring a meaning such as ‘suitable’ or ‘appropriate’ is that the phrase ‘establishment of the facts’ seems more naturally to relate to a *process* rather than to a *result*. In other words, it is the way that the authorities go about establishing the facts that must be proper. One panel has said that the question is whether the authorities collected relevant and reliable information. Whether or not the result is accurate is something that panels are generally not equipped to judge since they do not have the means to challenge the investigators’ conclusions (in fact, Article 17.5(ii) prevents them from having the means). However, the notion of correctness (or accuracy) is nevertheless relevant because the ‘suitability’ of the authorities’ establishment of the facts will be judged, *inter alia*, on the likelihood that it will produce correct accounts of the facts.

12. The second of the operations addressed by Article 17.6(i) is the ‘evaluation’ of facts. Like ‘establishment’, ‘evaluation’ is as much a process as it is an outcome. Furthermore, it is a process that is likely to take place several times in the course of an investigation. Evaluations may also be cumulative. For example, in the context of Article 3.4, annual data regarding a particular factor could be evaluated and lead to the conclusion that, say, profits had deteriorated over the investigation period. This conclusion could then be evaluated along with others and lead to authorities to the further conclusion that the domestic industry was suffering injury.

13. The questions that panels have to consider when examining the authorities’ ‘evaluation’ of the facts are whether it was ‘unbiased’ and whether it was ‘objective’. Bias is probably the easier of these concepts to define, but it seems not to be significant element in the present dispute since Brazil has not invoked it as a separate basis for complaint.

14. The notion of ‘objective’ evaluation is evidently a complex one, for which dictionary definitions provide little help. Perhaps the most pertinent group of meanings is ‘Dealing with or laying stress on what is external to the mind; concerned with outward things or events; presenting facts uncoloured by feelings, opinions, or personal bias; disinterested.’ Here ‘objective’ is being used to mean the opposite of ‘subjective’. An objective evaluation would be one that was governed by general considerations rather than ones that were special to the particular case. However, various reasons suggest that this interpretation is too narrow.

15. In the first place, a similarly worded obligation in Article 3.1 has been given a broader interpretation by the Appellate Body. Article 3.1 obliges national authorities to base determinations of injury on an ‘objective examination’. The Appellate Body has said that ‘The word "objective", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness.’

16. Secondly, several panels established under the Tokyo Round Codes have applied a standard of « reasonableness » in order to assess the evaluation of facts by the authorities. For example, in the context of Article 3.1 one Code panel said that its task was to examine ‘whether the investigating authorities had examined all relevant facts ... and whether a reasonable explanation had been provided of how the facts as a whole supported the determination made by the investigating authorities.’

17. ‘Reasonableness’ is far from being a precise standard. Nevertheless, it is worth stressing that reasonableness is not to be equated with perfection. The Code decisions where this standard was applied accepted that decisions could be reasonable despite the presence of ‘manifest deficiencies’ of analysis on the part of the national authorities.

18. Panels applying the WTO Anti-Dumping Agreement have, for the most part, avoided discussion of the meaning of the word ‘objective’, and have limited themselves to saying whether or not this criterion has been met. Sometimes panels have focussed on the *process* of the evaluation. In the context of Article 3.4 one panel said “An evaluation of a factor implies putting data in context and assessing such data both in their internal evolution and vis-à-vis other factors examined.” This implies that the authorities will provide an explanation of their reasoning. The panel in *Thailand – H-Beams* spoke of a ‘persuasive explanation’, but this begs the question of how persuasive it should be. If the explanation has to be of such cogency that *anyone* would be persuaded by it, then there would be little if any scope for the qualification in Article 17.6(i) that ‘even though the panel might have reached a different conclusion, the evaluation shall not be overturned’. A better formulation would be that the explanation should be *capable* of persuading a reasonable person. It is noteworthy that, as was recognised under the Codes, evaluations that were less than perfect have nevertheless been found to be ‘objective’.

19. Rather than look at the process of evaluating facts, panels sometimes examine its *outcome*, and ask whether, given the data available to the authorities, their conclusions can be justified. The notion of reasonableness has been explicitly invoked in this context.

20. Whether panels look at the process or at the outcome of the factual evaluations made by national authorities, it is evident that Article 17.6(i) does not set a precise boundary. Nevertheless, the specific reference to the possibility of those authorities reaching a ‘different conclusion’ from the panel indicates that the Agreement intends that national authorities should be accorded a significant area of discretion.

IV. INJURY AND CAUSATION

21. I would like now to say a few words about some aspects of injury and causation which we fear may otherwise give rise to difficulties in this case.

22. Brazil's Submission has created considerable confusion by failing to draw a proper distinction between the matters covered by Article 3.4 and by Article 3.5 of the Agreement. The point is made in our Submission, but some further explanation may be necessary.

23. Article 3.4 and Article 3.5 concern two distinct, albeit related, topics. The subject matter of paragraph 4 is the 'state' of the domestic industry, in particular whether it has been suffering material injury. In contrast, the principal concern of paragraph 5 is to identify the cause of that injury.

24. Paragraph 4 identifies a number of criteria for measuring what might be described as the 'state of health' of the domestic industry. If particular criteria indicate that the industry is unhealthy it may also be possible to establish a causal link between some of these criteria and the dumped imports. However, nothing in Article 3 requires such links to be established. The only causal link that needs to be established is that between the dumped imports and the 'injury' (singular, not plural) to the domestic industry. In other words, it is the overall injured state of the industry that matters when the focus is on causation.

25. It was for this reason that the EC, having identified several individual criteria where the domestic industry was doing badly, reached an overall conclusion that 'the Community industry suffered material injury'.

26. This finding was made in respect of the investigation period. This is the period of one year which was also used for determining the dumping margin. The individual criteria listed in Article 3.4 were examined over a longer 'injury investigation period', of about four years. However, as was explained in the Definitive Regulation, 'the developments and trends found in the years preceding the IP are only used in order to have a better understanding of findings relating to the IP'.

27. The Appellate Body has emphasised the parallels between the Anti-Dumping and Safeguard Agreements as regards the analysis of injury and the importance of considering trends and not relying on mere end-point-to-end-point analysis. As a general principle this is no doubt true. Trends are important in both types of investigations, but the implications of particular trends may differ. Under the Safeguards Agreement the causation of injury can commence at any point in the 'injury investigation period'. Thus in *Argentina – Footwear Safeguards* the panel said that if imports were causing injury it would expect to see an increase in imports coincide with a decline in injury factors. However, in an anti-dumping investigation, such a development throughout the injury investigation period would have to be treated more guardedly, since it might even indicate that injury was due to some other long-term factor and not to dumping.

V. NEW EXHIBITS – REQUEST FOR A PRELIMINARY RULING

28. We note that, in support of its oral statement, Brazil has submitted a series of new exhibits which, at first sight, do not seem to have been made available to the investigating authorities in the course of the investigation. We recall that Article 17.5 (ii) of the Anti-Dumping Agreement provides that the Panel must examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". The EC, therefore, objects to the submission of those exhibits by Brazil. Further, the EC requests the Panel to make a preliminary ruling rejecting to that effect. We are conscious that Rule 13 of the Working Procedures provides that preliminary rulings must be requested not later than the first submission. Nevertheless, that rule envisages that the Panel can grant exemptions upon good cause being shown.

ANNEX D-3

EXECUTIVE SUMMARY OF THE REPLY OF THE EUROPEAN COMMUNITIES TO THE RESPONSE OF BRAZIL TO THE PRELIMINARY RULINGS REQUESTED BY THE EUROPEAN COMMUNITIES – FIRST MEETING

(4–5 December 2001)

1. Terms of Reference

1. Brazil argues (RB para. 5) that a mere listing of articles need not necessarily be insufficient. The Appellate Body in *Korea - Dairy Safeguards*, which Brazil cites, emphasised the importance of examining each case on its merits, and of the question whether the ability of the respondent to defend itself was prejudiced. In the present case Brazil attempts to justify the inclusion of its claims in part on the basis of a substantial list articles and paragraphs of the Anti-Dumping Agreement contained on page 2 of its Panel Request. This list follows a reference to the EC Provisional and Definitive Regulations. There is no attempt to link particular provisions of the Agreement that are mentioned in the list to particular aspects of the two EC measures. Given the number of provisions invoked (which included most of those in the Agreement that impose obligations on Members) and the length and complexity of the two EC measures the EC maintains that the list as such was quite inadequate as a means of properly informing the EC of the case that it was going to have to answer. As a result, the EC would be prejudiced if the list were to be accepted as providing adequate notice of the WTO provisions that Brazil was invoking.

2. The inadequacy of the list was tacitly recognised by Brazil because the bulk of the Panel Request consisted of 38 paragraphs, covering seven pages, detailing individual claims against the EC. Brazil attempts (RB para. 8) to pass these paragraphs off as mere examples of the provisions covered by the list. However, although perfunctory expressions (such as ‘for example’) are included in an effort to keep open Brazil’s freedom of action, these paragraphs constitute a set of claims against the EC that exist quite independently of the earlier list. In fact, the list includes several provisions that are not mentioned in the individual paragraphs. It is as though Brazil had simply announced that it was accusing the EC of infringing every obligation in the Agreement.

3. Regarding the argument made (RB para. 9) on the basis of *Argentina – Footwear*, there appears to be no indication of the ‘certain claims’ to which Brazil refers. Several panels have supported the principle that a measure that is subsidiary and closely related to a measure specified in the terms of reference will also be included in the panel’s jurisdiction. This concerns a feature of the *domestic legal system* of the Member whose actions are being challenged. Even if not mentioned in the panel request, one national *measure* may fall within the panel’s terms of reference if it is subsidiary to another *measure*. Brazil (RB para. 10) seeks to apply this rule in a quite different context – that of the WTO provisions invoked in the claims.

4. The EC has argued that certain provisions of *WTO agreements* are related to other provisions, so that breach of one provision would lead automatically to breach of another provision. Whether this relationship exists is of course one of the issues which would come before the Panel only if the second provision fell within the terms of reference of the Panel. The rule concerning the relationship between national *measures* has nothing to do with this issue.

5. Brazil's argument based on the difference between 'claims' and 'arguments' (RB para. 12) is correct in principle, but has no relevance in the present context. In the first place, Brazil does not specify how it is to be applied. It does not say which of its propositions are claims and which are arguments. Secondly, Article 6.2 requires that the panel request should include a 'brief summary of the legal basis of the complaint', and this must consist, at least, of a reference to the provision that is being invoked.

6. Brazil also implies (RB para. 14) that the EC has said that a degree of intention to mislead must exist. The EC makes no such argument. In the present case a very large number of claims have been made by Brazil. The EC is entitled to have notice of these claims from the point at which the terms of reference are adopted so that it can adequately prepare its defence. Brazil notes (RB para. 17) that the EC did not request clarification of the Panel Request. However, the EC had every reason to believe that the substance of the Request consisted of the substantive paragraphs containing specific claims. It is only now that Brazil invokes the list of provisions in support of its claims. The EC does not accept that the discussion of matters in consultations (RB para. 18) constitutes adequate notice of claims. This conclusion can be inferred from the Appellate Body decision in *Thailand – H Beams* because third parties may not have participated in these consultations.

2. Vagueness of Claims

7. Brazil has cited (RB para. 22) the view of the Appellate Body in *Thailand – H-Beams* regarding the possibility of the defending Member requesting clarification on the claims made by the complainant. However, the Appellate Body was speaking of claims in the panel request, not in the submission. It is the complainant's responsibility to present proper claims in its first submission. The defending Member's rights would be seriously prejudiced if the complainant were to be permitted to formulate them over the course of the proceedings.

8. Brazil uses its Response (RB paras. 28 to 36) as a means of making good the inadequacies of its Submission, a technique that the Panel should reject for the reasons given in paragraph 7 above. The sole substantive argument that Brazil presents is in relation to the last of the EC's points, that concerning claims made in Issue 19 of Brazil's Submission. However, it is not sufficient for Brazil to observe (RB para. 35) that the claims are linked by the overall requirement of providing transparency. A claim based simply on a breach of an obligation of 'transparency' would be as irredeemably vague as one based simply on a reference to Article 12.

9. The quotations made (RB para. 36) from Brazil's Submission are taken from an introductory paragraph (BFS line 10105) and are of a general character. The Submission makes no attempt to link these remarks to the individual claims made by Brazil at BFS lines 10158 and following.

3. Specific Points regarding Terms of Reference

3.1 Article 9.3

10. Brazil argues (RB para. 37) that by listing Article 9 in the panel request it thereby brings Article 9.3 within the terms of reference. The EC has already explained why such a list is inadequate. Brazil's Panel Request includes an initial list of provisions alleged to be infringed, which includes 'Article 9, especially (but not exclusively) Articles 9.1 and 9.2.' Later paragraphs contain claims of infringement of 'Article 9.1', 'Article 9.2', and in one case 'Article 9', linking them to particular aspects of the EC's anti-dumping measures. Thus at no point does the Request either mention Article 9.3 or indicate even indirectly how Article 9.3 might have been infringed.

11. Article 9 contains some 900 words, and covers over two pages of the published text of the WTO Agreements. A better example of a 'mere list' that prejudices the interests of the defendant

Member would be difficult to imagine. Brazil cites the panel in *Thailand – H-Beams* in support of its argument, but the passage in question merely refers to provisions of an Article that are ‘logically and necessarily inapplicable or irrelevant’ to the dispute, and not those that might be ‘applicable or relevant’ as Brazil implies.

12. Brazil’s argument (RB para. 39) based on the EC’s point that Article 9.3 claims are entirely dependant on other claims suffers from the logical weakness described in paragraph 0 above. In any case, the EC is entitled to make substantive arguments as well as procedural, and cannot be denied its right to the protection provided by Article 6.2 because, *ex abundante cautela*, it answers the substantive point as well.

3.2 Article 5.2

13. Contrary to Brazil’s argument (RB paras. 43-44), the Panel Request was insufficiently precise in indicating the way in which the EC was alleged to have infringed Article 5.2. The initial list in the Panel Request effectively referred to the whole of Article 5 since it speaks of ‘Article 5, especially (but not exclusively) Articles 5.1, 5.2, 5.3, 5.4, 5.5, 5.7 and 5.8’. Paragraph 5 of the Panel Request merely referred to ‘Article 5’ of the Agreement, and then gave two specific examples. Article 5 is a lengthy provision, extending over more than two pages of the text of the Agreement. Furthermore, the fact that a matter has been raised in consultations cannot be taken as sufficient notice of its inclusion in the terms of reference since many matters may be discussed between the parties which are not pursued in the proceedings. Contrary to Brazil’s assertion (RB para. 45), the Panel Request did not provide a ‘brief summary’ of the legal basis.

3.3 Article 6.2

14. Brazil fails to show (RB para. 47) how the Panel Request gave sufficient notice of the claims regarding Article 6.2 that the EC has challenged. The phrase ‘among other respects’ in paragraph 8 of the Request is so vague as to be meaningless in this context. The notion that Articles 5.2 and 6.2 are ‘inherently inter-linked’ would have the effect of justifying a claim under Article 6.2 when virtually any other provision of the Agreement had been mentioned in the Panel Requests. It is consequently too broad. The argument concerning consultations has already been answered (paragraph 0 above).

3.4 Article 2.2.2

15. Brazil does not succeed in demonstrating (RB para. 50) that the Panel Request contains an adequate reference to Article 2.2.2. In effect it claims that any reference to Article 2.2 and constructed normal values is sufficient, whereas these provisions are very detailed and include numerous rules. In order to be able to defend its interests properly the EC was entitled to have more precise indication of its supposed errors.

3.5 Article 6.13

16. The EC’s request regarding Brazil’s claim under Article 6.13 should have referred to paragraph 216 rather than 220 of the EC Submission.

3.6 The accuracy of information

17. Brazil now (RB para. 57) explains that its claim (at BFS line 4750) regarding the EC’s supposed failure ‘to satisfy themselves regarding the accuracy of the information submitted’ was made under Article 3. This matter was not apparent in Brazil’s Submission.

3.7 Article 3.2

18. The EC rejects Brazil's claim (RB para. 59) that, in effect, any issue of undercutting is adequately raised by a mere reference to Article 3.2 of the Agreement. In paragraph 27 of its Panel Request Brazil identifies a number of specific grounds on which the EC is alleged to have infringed Article 3.2. Given the numerous possible ways in which infringement might occur in relation to undercutting the EC was entitled to regard the list given by Brazil as definitive.

3.8 Articles 6.2 and 6.9

19. Brazil again invokes (RB para. 63) the vague phrase 'among other respects' in paragraph 8 of its Panel Request. All of the accusations made against the EC in that paragraph concern the suggestion that the EC 'failed to satisfy itself as to the accuracy of certain information ...'. In contrast to this the claims at BFS lines 7210 and 9160 accuse the EC of not *disclosing* information. Thus, as regards the disclosure of information, paragraph 8 adds nothing to the mere listing of Article 6.2 that Brazil makes at the outset of its Panel Request. Furthermore, Brazil's use of the notion of 'inter-linking' implies that by mentioning one element of Article 6 (Article 6.2) it can therefore claim to have raised the other individual elements of that Article, including paragraph 9, when it did not even include that paragraph in the list at the start of its Request.

3.9 Article 3.4

20. In its Panel Request (paragraph 29) Brazil accuses the EC of failing to evaluate eight factors and of giving no proper consideration to 'outsourced products'. Its Submission went beyond this claim and therefore beyond the terms of reference of the panel because Brazil now alleges in general terms that the EC inaccurately examined *all* factors in Article 3.4. Brazil cannot escape by presenting (RB para. 65) the words of its Submission (BFS line 7909) as 'one of several arguments interpreting the obligation of the examination of injury factors listed in Article 3.4'. The Submission stated that 'Brazil submits that the Provisional and the Definitive Regulations do not contain an evaluation of factors affecting the prices of the EC industry that is either comprehensible or based on positive evidence.' The context confirms that Brazil is referring to Articles 3.1 and 3.4 of the Agreement. This statement is clearly a claim (among several others) that the EC had infringed these provisions.

3.10 Article 3.5

21. Brazil makes (RB para. 67) no serious attempt to justify the inclusion of claims regarding Article 3.5 referred to at paragraphs 432 and 500 of the EC's Submission. In the first place Brazil offers merely a listing of Article 3.5 along with numerous other provisions of the Agreement. Secondly, paragraph 30 of its Panel Request, apart from giving specific instances of alleged failures by the EC, is no more than a reference to the subject matter of Article 3.5. Contrary to Brazil's assertion, the fact that an issue was raised in the course of the investigation does not bring it within the terms of reference of the Panel. Brazil also attempts to present the statements (BFS lines 9008 and 9922) as arguments rather than claims. The EC refutes this proposition since the statements form individual claims within a series of claims. Because they all relate to Article 3 they are not reduced to mere 'arguments'.

3.11 Article 6.6

22. Brazil argues (RB para. 69) that its claim (BFS line 9338) of breach of Article 6.6 in respect of imports from Poland had been raised in paragraph 8 of the Panel Request. However, that paragraph referred to importations by domestic producers, whereas in fact the only such imports came from Bulgaria. Consequently, no claim under Article 6.6 had been made in respect of Polish imports. Brazil's suggestion that it was sufficient if the matter had been raised during the investigation is an argument that has already been disposed of.

3.12 Article 12

23. Brazil is vague (RB para. 71) as to how it identified claims under Article 12 in its Panel Request. Apart from the mere listing of 'Article 12, especially (but not exclusively) Article 12.2', Brazil made a number of specific claims in respect of Article 12.2. Brazil seeks (RB para. 72) to use the obvious relationship of Article 12.1 with Article 5.2 to argue that separate mention of Article 12.1 in the Panel Request is not necessary. However, this argument fails to respect the distinction between the substantive obligations of the Agreement and the procedural obligations of Article 12. The point has been made by the Appellate Body in regard to the terms-of-reference issue, and generally. The EC does not agree, as implied by Brazil (RB para. 73) that it must show that it has suffered prejudice. However, were such evidence necessary it is apparent in the difficulties created for the EC in knowing how best to present its defence against Brazil in the absence of adequate disclosure of what Brazil's claims will be.

ANNEX D-4

ADDITIONAL ORAL STATEMENT OF BRAZIL REGARDING EXHIBITS 47-52 – FIRST MEETING

(5 December 2001)

Mr Chairman and Members of the Panel

1. During our meeting/hearing yesterday morning we presented to you some information in our oral statement together with BRL-47 to BRL-52 regarding the relocation and outsourcing arrangements of several leading EC producers. These also included strategic long-term investments in such foreign pipefitting producers. This information is the same that Tupy, as well as other parties in the EC investigations, have presented to the EC authorities during the anti-dumping investigation.¹

2. As we said yesterday, we do not know if that information which is now available on the Internet was already available in the same way during the EC investigation. We have also mentioned, nonetheless, that this, in our view, is not the issue. For us, the main issue relies on the fact that solid information, indications and leads pointing out to these relations was given to the EC on several occasions during the anti-dumping. The EC was asked to examine that information and its full bearing on the EC's findings in the investigation. This was not limited to the immediate aspects of imports and injury determination only but also to the EC producers' long-term strategic investments in foreign markets and their implications.² Similar information regarding EC imports from Egypt had also been raised during the EC investigation proceedings.³

3. Despite the persuasive, or even convincing, nature of the above-mentioned information, we see nothing in the EC records before us that shows that the EC has made any inquiry or findings regarding the imports and the new realities in the EC market. Yesterday we heard the EC admitting for the first that they were aware of certain imports made by Atusa. Nothing more. We now understand that the reference to "one Community producer (who) did import the product concerned from one third country" (rec. 174 of the Provisional Regulation) in fact referred to Atusa.

4. Until yesterday, Tupy basically ruled out in its guesswork of the EC's language that this EC producer could be Atusa. In the first place, Tupy knew that it could concern one of the several arrangements that Tupy had raised with the EC (regarding 3 out of the 5 EC producers, i.e. either Woeste, Georg Fischer or Atusa). Secondly, the EC dictum merely concerned "imports" and said nothing on investments in foreign countries. With regard to Atusa for example, the information that Tupy provided to the EC included evidence in the form of several letters from Atusa to customers in the EC which invited them to buy fittings produced by Atusa in Bulgaria. One such letter specifically mentioned products made in "our plant" in Bulgaria.⁴ Thirdly, in the same recital, the EC mentioned that the volumes of these imports were "very low". Thus, the EC's own data for the investigation clearly showed that the volume of imports from Bulgaria (and there is only one producer there) amounted to 1,109 tonnes in the IP, which incidentally constituted an increase of 2,585 per cent in the IIP!

¹ See references, for example in Brazil's First Submission, under d) on page 217 et seq. and under e) on page 223 et seq., particularly on page 225.

² See Annex 2, Annex 3 and Annex 6 of Tupy's 4th Submission (BRL-13).

³ See page 2 of Tupy's 4th Submission (BRL-13).

⁴ See page 2 of Tupy's 4th Submission (BRL-13).

5. As we have mentioned, 1,109 tonnes are more than one quarter of the volume exported by Tupy in the same period (4,188 tonnes). It also represents a share of 6.3 per cent of the total imports, well above the *de minimis* threshold in that investigation. As an illustration, we point out that Japan, with a lower volume of 1,020 and much higher prices than Bulgaria's was included in the investigation. Imports from South Korea, which has also been included in the investigation, amounted to 1,360 tonnes in the IP. The truth of the matter is, **Mr Chairman**, that with the kind of information which the EC made available in its above-mentioned announcements, there was no way for the parties concerned to conclude with any degree of certainty whatsoever, which Community producer the EC had in mind when it made such open-ended statements, although the information available to the EC at that time should have allowed it to state more clearly the identity of the EC producer concerned. In fact, given the language of the recital, Tupy could assume that the imports in question were coming from any of the other companies, but Bulgaria.

6. As we have said, yesterday's information was simply information that the EC authorities had all along. The facts to which it pertains are not new and have been part of the EC files in this matter ever since the days of the anti-dumping investigation. They were made available to the EC authorities, as mentioned, in compliance with the EC anti-dumping procedures. Nothing in the provisions of Article 17.5(ii) could therefore properly be construed to limit Brazil in presenting that information in its oral statement yesterday.

7. **Mr Chairman and Members of the Panel**, we have looked for precedents regarding this issue of Article 17.5(ii) in the DSB. Rather interestingly we found one similar set of circumstances that has been dealt with recently by another Panel (*US-Japan HR Steel AD Measures Panel Report (DS184)* of 28 February 2001). It must be noted that in that case the information included "web-site information" (Paragraph 7.11), as well as newspapers articles and affidavits. There, the US, very similarly to the EC yesterday, contended that,

(t)he scope of the Panel's review is limited by Article 17.5(ii) of the AD Agreement to the facts that were before the investigating authority when it made its determination, *i.e.* the evidence contained in the administrative record. (Paragraph 7.25)

8. On the other hand, Japan argued that,

Members must be permitted to submit evidence that explains or demonstrates how the authority's investigating procedures or determinations were unfair, unreasonable or biased. (Paragraph 7.4).

9. The Panel referred to Article 17.5 (ii) but nonetheless allowed the presentation of information in exhibits which specifically concerned the anti-dumping aspects of the dispute. The Panel concluded that,

(t)here is, however, a significant distinction between questions concerning the admissibility of evidence, and the weight to be accorded to the evidence in making our decisions. That we have concluded that it is not appropriate to exclude from this proceeding at the outset evidence put forward by Japan has no necessary implications concerning the relevance or weight of that evidence in our ultimate determinations on the substantive claims before us (Paragraph 7.12).

It follows, that this Panel would act with full authority in denying the EC's request for preliminary ruling.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF JAPAN

1. Mr. Chairman, Members of the Panel, Japan appreciates this opportunity to highlight three systematic violations of WTO obligations that the European Communities (EC) appear to have committed in imposing anti-dumping duties on malleable cast iron tube or pipe fittings (pipe fittings).¹

2. Since we have already submitted our main arguments in our written submission, we would refrain from repeating them at length in this statement, but only touch upon the four main points that we believe are worthy of the Panel's attention. Our arguments concern zeroing, relevant factors for injury determination, non-attribution standard in injury determination, and violation of Article VI of GATT 1994 and Article 1 of the Anti-Dumping Agreement.

3. Japan's first claim is that, by "zeroing" negative dumping margins calculated for certain products, the EC violated Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

4. The EC "zeroed" the negative dumping margins it calculated for some product types exported to the EC during the period of investigation. The EC then failed to offset the margins of dumping which were calculated to be negative against those margins of dumping which it calculated to be positive.

5. Japan notes that at paragraph 249 of its First Written Submission, the EC states that its authorities are examining its practice of "zeroing" in light of the Appellate Body decision in the *Bed Linen*. Japan sincerely hopes that, even before the decision of the Panel in this dispute, the EC will formally end its WTO-inconsistent practice of "zeroing".

6. Japan's second claim is that, by failing to examine each of the relevant injury factors and each of the factors listed at Article 3.4 of the Anti-Dumping Agreement, the EC violated Articles 3.1, 3.4, 12.2.1(iv) and 12.2.2 of the Agreement.

7. The EC failed to evaluate all 15 of the injury factors specified in Article 3.4 of the Anti-Dumping Agreement, and failed to fully address those factors which it did evaluate. Moreover, the factors which the EC did evaluate do not provide a sufficient basis for the EC's finding of injury. In addition, the EC failed to describe in the Provisional Regulation and the Definitive Regulation² all elements that it considered in its injury determination.

8. In addition, the lack of any findings or conclusions regarding the seven factors identified above in the public notices of the EC's Provisional and Definitive Regulations also violates the obligations of the EC set out in Articles 12.2.1(iv) and 12.2.2. This obligation was reviewed in the dispute *Mexico—HFCS*, where the Panel ruled that because Mexico did not provide in its anti-

¹ Since the Government of Japan was not a party to the anti-dumping proceeding, it has no independent knowledge of the facts. Japan's allegations of WTO violations are based on the public notices of determinations made by the EC authorities and by the factual recitation made by Brazil, the complaining Member, in its submission to the Panel.

² Council Regulation (EC) No 1784/2000 (11 August 2000), published in the *Official Journal* L208 (18 August 2000); Council Regulation (EC) No 449/2000 (28 February 2000), published in the *Official Journal* L 055 (29 February 2000).

dumping determinations an explanation of the facts and conclusions underlying a decision by its authorities, Mexico violated Article 12.2.2.³

9. The EC attempts to justify its claim that it examined all fifteen factors on the basis of an “internal EC Commission note for the file”.⁴ Regardless of the contents of the note, this attempt fails since, by definition, an internal note is not publicly available.

10. Japan also requests that the Panel carefully review whether the EC’s analysis of the factors which it did consider was adequate. The EC appears to have focused on a comparison of end points, ignoring the intervening trends of those factors. As a result of this failure, the EC did not provide “a well-reasoned and meaningful analysis of the state of the industry”, which the *H-Beams* Panel ruled is required by Article 3.4 of the Anti-Dumping Agreement.⁵

11. Japan’s third claim is that the EC violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because it failed to ensure that injury from factors other than imports was not attributed to imports.

12. Japan requests that the Panel carefully review whether the EC failed to demonstrate that imports were, through the effects of dumping as set forth in Articles 3.2 and 3.4 of the Anti-Dumping Agreement, causing injury within the meaning of the Agreement without attributing injurious effects of other factors in violation of Article 3.5.

13. Japan’s final point is that, by failing to conduct its investigation in accordance with the provisions of the Anti-Dumping Agreement, the EC violated Article VI of GATT 1994 and Article 1 of the Anti-Dumping Agreement.

* * *

14. We hope our view is taken fully into consideration in this proceeding. Thank you.

³ *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (28 January 2000) (*Mexico—HFCS*) at para. 7.198.

⁴ First Submission of the EC (14 November 2001) at para. 346.

⁵ *H-Beams*, WT/DS122/R (28 September 2000) at para. 7.236.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

5 December 2001

I. INTRODUCTION

1. Thank you Mr. Chairman, members of the Panel. The United States appreciates this opportunity to appear before you today to present our views in this proceeding. I will begin my discussion today by addressing the proper interpretation of Article 15 of the Anti-Dumping Agreement, and will then briefly discuss the relationship between Articles 2.2 and 2.4 of the Agreement and the imposition of anti-dumping duties following a devaluation. Finally, I will discuss three issues relating to injury.

II. GENERAL AND ANTI-DUMPING ISSUES

A. ARTICLE 15 OF THE AD AGREEMENT

2. Mr. Chairman, as we noted in our written submission, nothing in Article 15 of the Anti-Dumping Agreement requires developed country Members to either offer or accept a particular remedy when investigating an allegation of dumping by a developing country Member. Article 15 is a process-based provision.

3. For example, the requirement in the first sentence of Article 15 that special “regard” be given to the situation of developing country Members does not create a substantive obligation either to elect undertakings in lieu of anti-dumping duties or to impose such duties at less than the full extent of dumping. Nor does it create an obligation to use different methodologies in determining the extent of dumping, based on whether the imports at issue originate in a developed or a developing country.

4. Similarly, the requirement in the second sentence of Article 15 to “explore” the “possibilities” of constructive remedies cannot properly be read to require the developed country Member to ultimately offer either an undertaking or a lesser duty to the developing country Member.

5. Even the requirement to consider such possibilities arises only when the application of anti-dumping duties would affect the “essential interests” of the developing country Member. Accordingly, when a developing country Member seeks the application of Article 15, it must demonstrate to the investigating authority that there are “essential interests” implicated in the case and that they would be affected by the application of anti-dumping duties. A reviewing Panel, in turn, must first determine whether the developing country Member has made these demonstrations. Any reading of the “essential interests” clause that does not reflect its limiting nature cannot be a permissible reading.

B. THE RELATIONSHIP OF ARTICLES 2.2 AND 2.4

6. I will now turn briefly to the relationship of Articles 2.2 and 2.4 of the Anti-Dumping Agreement. As we noted in our written submission, it is important to recognize the separate and distinct functions of Article 2.2 (which deals with the identification of normal value) and Article 2.4 (which deals with the subsequent comparison, including any adjustments, between normal value and

export price). Brazil's claims that the EC violated Article 2.2 should be evaluated on their own merits, and should not be addressed in terms of Article 2.4.

C. THE IMPOSITION OF ANTI-DUMPING DUTIES FOLLOWING A DEVALUATION

7. With respect to the imposition of anti-dumping duties following a devaluation, Brazil claims that when circumstances are alleged to have changed significantly between the period of investigation and the imposition of an order, an investigating authority must conduct one investigation to meet the terms of the Anti-Dumping Agreement and a second investigation to meet the general terms of Article VI:2 of GATT 1994. As an initial point, we note that the Anti-Dumping Agreement constitutes the agreed rules for determining how to implement Article VI:2 by identifying and countering injurious dumping. Thus, Article VI and the AD Agreement are meant to be read together, as described in the *Desiccated Coconut* Appellate Body report at page 16.

8. With respect to the particulars of Brazil's claim, the Anti-Dumping Agreement provides for reviews under Article 11. Footnote 22 to Article 11 confirms that even a finding that no dumping occurred in a period subsequent to that examined in the original investigation does not by itself require authorities to terminate the definitive duty order. Furthermore, as the panel recognized in *Korea – DRAMS* at paragraphs 6.26 to 6.29 of its report, Article 11.2 does not require the revocation of an order upon the finding of no dumping in a review on the grounds that duties are no longer "necessary". There is simply no basis for Brazil's argument in the text of the Anti-Dumping Agreement or in Article VI:2.

III. INJURY ISSUES

9. I would now like to address three of the injury issues that this case presents. I will first discuss the general prerequisites for cumulation under Article 3.3. I will then address the "conditions of competition" that an authority must examine before cumulating under Article 3.3. I will conclude by discussing the consideration of whether there has been significant price undercutting under Article 3.2.

A. CUMULATION UNDER ARTICLE 3.3

10. Turning first to the issue of cumulation, as a general matter, the United States agrees with the EC that it is not necessary for an authority to consider the significance of the volume and price effects of imports from each individual subject country before it may cumulate imports under Article 3.3. We agree in particular with the EC's arguments in paragraphs 302-307 of its First Written Submission.

11. Brazil argues that an investigating authority wishing to cumulate imports under Article 3.3 must first determine that the volume and price effects of imports from individual countries are significant. The plain language of Article 3.3, which sets out specific criteria for conducting a cumulative analysis, contradicts its argument. Under Article 3.3, an investigating authority may cumulate imports only if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate in light of the conditions of competition both between the imported products and between the imported products and the like domestic product. Given these specific textual prerequisites for cumulation, there is no basis for Brazil's argument that Article 3.3 imposes other unmentioned prerequisites for cumulation.

12. If Article 3.2 were meant to be grafted onto the prerequisites for cumulation, Article 3.3 would include the significance of volume as a required criterion. But the only reference to volume in

Article 3.3 is the requirement that investigating authorities not cumulate imports that are individually found to be negligible. There are no other obligations relating to volume in Article 3.3.

13. Brazil's argument suffers from another flaw as well, because it would require investigating authorities to conduct the Article 3.2 analysis before considering whether to cumulate under Article 3.3. This would turn the Agreement on its head. As the EC has noted, Article 3.3 explicitly establishes a test applied before investigating authorities may cumulatively assess the effects of aggregate imports from sources under investigation. In other words, the investigating authorities must first determine whether cumulation is appropriate before they can consider the effects of those cumulated imports.

14. Read in the context of Article 3 as a whole, it is clear that the term "effects" as used in Article 3.3 refers to volume and price effects, as well as the impact of imports on the domestic industry. This interpretation is confirmed by reference to Article 3.5, which refers to the *"effects of dumping, as set forth in paragraphs 2 and 4"*. Paragraph 3.2, in turn, addresses the volume (in relative or absolute terms) and price effects of dumped imports. Thus, the "effects" that may be considered cumulatively after application of the Article 3.3 cumulation test include the volume and price effects discussed in Article 3.2.

15. Brazil argues that, aside from meeting the criteria of Article 3.3, cumulation is permitted only if the contribution to injury from each country is significant. That interpretation would render Article 3.3 meaningless, contrary to established tenets of treaty interpretation. If the contribution to injury from each country is significant, there is no need to cumulate the imports to determine whether their cumulative effects contribute to the injury.

16. Finally, the United States agrees with the EC that Article 3.2 requires only that the investigating authorities consider the volume and price effects of the dumped imports. The investigating authorities do not have to find either significant volume or price effects in order to find that the dumped imports are having an injurious impact on the industry. Brazil's interpretation incorrectly presumes that such findings are necessary in any instance. Since it is not even necessary to find significant volume and price effects in order to reach an overall affirmative injury determination, there is no basis in the Agreement for Brazil to argue that these findings are somehow necessary where an investigating authority is considering a cumulative assessment.

B. THE "CONDITIONS OF COMPETITION" REQUIREMENTS FOR CUMULATION

17. I will turn now to the parties' arguments relating to the "conditions of competition" provision in Article 3.3. Just as the volume and price considerations of Article 3.2 cannot be grafted onto the overall cumulation requirements of Article 3.3, they also cannot be read as requirements for addressing "conditions of competition" under Article 3.3. If the significance of import volume and price effects were required subjects for determining whether the conditions of competition supported cumulation, that would mean that Articles 3.2 and 3.3 contain redundant considerations. Therefore, Brazil is incorrect in arguing that the "conditions of competition" provision requires a similarity in significant import volume and price effects trends over the period of investigation.

18. The EC's interpretation of the "conditions of competition" provision in Article 3.3 is also flawed. As the EC has noted, the proper interpretation of how to evaluate "conditions of competition" for purposes of cumulation under Article 3.3 is an issue that an Ad-Hoc group of the Anti-Dumping Committee continues to debate. The Members of the WTO are not in agreement on this issue. The United States in particular has concerns about the EC's general practice of focusing on similarities in import and price trends as the primary indication of competition supporting cumulation. The fact that increases or decreases in the volume of imports from one country parallel increases or decreases in the volume of imports from other countries does not necessarily answer the question of whether they compete.

19. Moreover, the EC's approach regarding "the conditions of competition" provision of Article 3.3 is inconsistent with its position concerning the overall relationship between the Article 3.2 considerations and Article 3.3. The EC correctly states in its First Written Submission (at para. 305) that "there is no reason in principle why products with opposite volume trends may not be competing, and such development may even provide proof of competition". It is difficult to reconcile this reasoned analysis with the EC's reliance on trends as a main criterion for determining whether imports compete with one another.

20. The same analysis also applies to the value of comparing price trends and the extent of price undercutting. The fact that imports from one country decline or undercut the prices of the domestic product while imports from another country remain steady is not necessarily indicative of whether the various imports are competing. It may simply mean that the imports from one country that maintained prices were successful in their competition, while the imports from the other were not.

21. In sum, the United States agrees that Members have discretion under Article 3.3 to develop appropriate criteria and analytical frameworks for assessing whether cumulation is appropriate in light of the conditions of competition among imports and between imports and the domestic like product. However, those criteria and analyses must bear a reasonable relationship to the inquiry into whether the various products compete in the domestic market of the importing Member. Isolating one's focus on a comparison of import trends falls short of addressing the competition inquiry.

C. PRICE UNDERCUTTING UNDER ARTICLE 3.2

22. Finally, I will briefly address the issue of an investigating authority's consideration of price undercutting pursuant to Article 3.2. The United States agrees with the EC that the Anti-Dumping Agreement does not prescribe any particular methodology for addressing whether "there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member". In the absence of any such prescription, the investigating authorities may make price comparisons by any methodology that assures an unbiased and objective examination.

23. In particular, nothing in Article 3.2 requires investigating authorities, in considering the significance of undercutting, to apply the methodology set out in Article 2 for determining dumping and dumping margins. Indeed, Article 2 of the Agreement specifically applies to the "Determination of Dumping", whereas Article 3 applies to the "Determination of Injury". The purposes and obligations addressed in each of these articles are distinct and there is no basis in the text of the Agreement to treat them interchangeably.

24. Again, the United States takes no position with respect to the application of the required legal framework to the specific facts in this investigation. However, we do have several observations with respect to the objections that Brazil has raised concerning the method that the EC used in comparing prices. To the extent Brazil is arguing that its product was of higher quality and reliability than other imports and was sold in a different market segment than other subject imports, it is raising a factual question under Article 3.3 concerning whether "a cumulative assessment of the effects of imports is appropriate in light of the conditions of competition between the imported products". As discussed above, the Article 3.2 analysis of price undercutting and price effects occurs subsequently to the Article 3.3 cumulation determination. If the EC's finding that cumulation was appropriate met the standards of Article 3.3, then it was consistent for the EC to consider the significance of price undercutting and other price effects for imports from all cumulated countries.

25. Brazil also faults the EC for failure to adjust the respective prices of the domestic and Brazilian product to account for differences in production costs. However, there is no legal requirement under the Anti-Dumping Agreement for an authority to adjust prices before comparing them for the purposes of addressing injury. On the contrary, Article 3.1 refers to the examination of

prices *in the domestic market*. Thus, the Agreement instructs authorities to examine and compare the actual prices that the products sold for in the investigating Member's market; it does not permit a comparison of fictitious prices.

26. Finally, Brazil argues in the alternative that the EC should have compared the prices of the imports from Brazil, which were all black heart fittings, with those of exported black heart fittings produced by the EC producers. A comparison of this sort would not have met the requirements of Article 3. As we discussed above, Article 3.1 requires the competent authorities to conduct an objective examination, of, *inter alia*, "the effect of the dumped imports on prices *in the domestic market* for like products".

IV. CONCLUSION

27. Mr. Chairman, this concludes our statement today. Thank you for your attention.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF CHILE

1. Chile would like to thank the Panel for this opportunity to submit its views on this dispute. Although we have no direct trade interest in the case, we are exercising our right under Article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in the belief that the issue before this Panel is important for the proper functioning of the multilateral trading system. Chile has noted with concern the increasing use of anti-dumping measures not as an instrument to correct trade distortions between Members, but as trade barriers against legitimate imports and as a means of protecting, in many cases, industries that are not very competitive. Chile, whose economic development is based on an export model, considers anti-dumping duties to be legitimate measures of an exceptional nature, to be applied only under the specific and strict circumstances expressly provided for in Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), as established in Panel and Appellate Body precedent.

2. Thus, both the investigation by the European Communities of imports of malleable cast iron tube or pipe fittings from a series of countries and the application of anti-dumping duties are questionable from various points of view. However, in this submission, Chile would like to confine itself to the four following points: the need for the measure to remedy the injury; zeroing; Article 3.4 of the Anti-Dumping Agreement; and causation and non-attribution.

Application of the anti-dumping duty only to the extent necessary

3. Article VI.2 of the GATT 1994 states that:

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

4. Article 11.1 of the Anti-Dumping Agreement states that:

"An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." (Emphasis added)

5. Both provisions make it clear that the investigating authority cannot apply an anti-dumping duty in excess of the margin of dumping calculated, and that the duty shall remain in force as long as and to the extent necessary to counteract the dumping which is taking place. In the case at issue, the European Communities appear to have determined a margin of dumping without taking account of a number of important factors, such as the devaluation of the Brazilian currency, and this led it to apply an anti-dumping duty in circumstances in which it was not necessary to counteract the alleged injury that the Brazilian industry could have been causing.

6. If the circumstances change in such a way that the margin of dumping calculated is not representative, either because the dumping situation has ceased to exist – which is the case made by Brazil – or because the margin is higher than necessary, then the investigating authorities must re-evaluate the dumping situation.

7. Anti-dumping duties, like safeguard measures, are instruments, clearly and specifically enshrined in the GATT 1994 and in the relevant agreements, to which Members may resort in very particular circumstances. As such, they must be applied to the extent necessary and for the time

necessary to prevent or counteract injury. Brazil rightly recalls that both the Panel and the Appellate Body in *Korea – Dairy Products* concluded that the measure (safeguard) must be no more restrictive than is necessary to prevent or remedy the serious injury ..., or that it must be commensurate with the goals of preventing or remedying the injury. In Chile's view this evidence of conditionality and proportionality is also implicit in Article VI.1 of the GATT and Article 11.1 of the Anti-Dumping Agreement.

Zeroing

8. The meeting of the Dispute Settlement Body of 12 March 2001 saw the adoption of the reports of the Panel and the Appellate Body in the dispute *European Communities – Bed Linen*. Article 86.1 of the Appellate Body Report upholds the finding of the Panel that the practice of "zeroing" of negative dumping margins applied by the European Communities when establishing the existence of margins of dumping is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. At the said DSB meeting, the European Communities stated that it would promptly comply with the relevant recommendations and rulings.¹ Moreover, the representative of the European Communities stated that the method that was declared inconsistent with the WTO was also applied by other Members, and that it expected that those Members would bring their practices in line with the Anti-Dumping Agreement. It is up to the European Communities to practice what it preaches and to amend this practice.

9. In view of this clear precedent and the express recognition by the European Communities, the Panel cannot but repeat the inconsistency of the EC's practice of zeroing negative dumping margins when establishing the existence of margins of dumping. This would confirm the true meaning and scope of Article 2.4.2 of the Anti-Dumping Agreement.

Evaluation of all factors

10. Chile considers that, as stated in Brazil's first written submission², Article 3.4 of the Anti-Dumping Agreement establishes a strict, but not exhaustive, list of the economic factors and indices that the investigating authority must necessarily examine to determine the effects of dumped imports on the domestic industry in question. It is strict in that it requires the investigating authority to consider and evaluate each and every one of the factors and indices indicated therein; but it is not exhaustive in that the investigating authority may consider and evaluate other factors as it deems necessary, provided it has also evaluated those indicated in Article 3.4. This was confirmed in various Panel and Appellate Body reports, most recently in *Thailand – H-Beams*³, adopted on 18 June 2002.

11. Without prejudice to the above considerations, Chile would like to stress that in its analysis of this issue, Brazil refers to the reports of the Panel and the Appellate Body in *Argentina – Footwear*, pointing specifically to the mention, in the findings of each report (paragraphs 8.276 and 129 respectively), of "trends" in imports, without making it clear how this ties in with its argument on Article 3.4 of the Anti-Dumping Agreement.

Causation and attribution

12. In Chile's view, Article 3.5 of the Anti-Dumping Agreement is clear: the investigating authority must examine not only the impact of the dumped imports on the domestic industry concerned, but also, all of the other known factors which are injuring the said industry as well; and, the injury caused by these other factors must not be attributed to the dumped imports. Here, we agree entirely with the finding of the Appellate Body in *United States – Hot-Rolled Steel* that "[i]f the

¹ WT/DSB/M/101, paragraph 77.

² Part VIII, Issue 16.

³ WT/DS122/AB/R.

injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors".⁴

13. In other words, Article 3.5 requires the investigating authority to evaluate the allegedly dumped imports and any other factor that could be causing injury to the domestic industry at the same time, to distinguish the effects of those imports from the other factors that could be causing injury to the industry, and to attribute to each set of factors the effects due to it. That is, the investigating authority must ensure that the injury caused to the domestic industry by the other factors is not attributed to the dumped imports.

Conclusions

14. Strict observation of the disciplines of the WTO Agreements, in particular the Anti-Dumping Agreement, is essential to ensure that their implementation is not discriminatory and does not constitute a barrier to legitimate trade. The investigation conducted by the European Communities in this case inspires considerable doubt as to its consistency, and the consistency of the measure applied, with those Agreements. Consequently, it is essential that the Panel should repeat, in its findings, the principles of transparency and equity on which the WTO Agreements are based.

⁴ WT/DS184/AB/R, paragraph 228.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ORAL STATEMENT MADE BY BRAZIL – SECOND MEETING

(11 June 2002)

1. Brazil's position with regard to the various points and issues raised in this proceeding has been clearly made throughout the different procedural stages. In this Statement, Brazil only takes up some of the points that should be further explored and stressed.

2. In particular, an important aspect of this case is that of the Standards of Review by which the measure should be assessed. Brazil submits that it is in line with these Standards, as laid down in Article 17.6 of the AD Agreement that the EC's investigation must be evaluated. The Standards of Review instruct panels not to overturn the establishment and evaluation of facts by any given investigating authority, as long as that establishment was proper and the evaluation was unbiased and objective.

3. In this respect, Brazil submits that the EC's establishment of the essential facts of this case was clearly *improper* and its evaluation of those facts suffered from a serious *lack of objectivity*. The EC's evaluation of those facts was plainly *biased*.

Preliminary Observations

4. An interesting illustration of this is the EC's reaction to the Brazilian exporter's repeated submissions that the EC assess the implications of ownership and outsourcing relations that exist and have existed between leading EC Applicants and producers of the product concerned in certain third countries. The EC authorities have never addressed this issue directly, or at least there is no record of such mention at any point during the investigation. Yet, the EC states that it has examined this point and provides references which nowhere address head-on the ownership related claims.

5. Moreover, the EC suggests that "the question of which, if any, imports into the EC were causing injury was central to the investigation, regardless of the legal arrangements giving rise to such imports". Brazil submits that this statement by the EC demonstrates the fatal failures of its establishment and evaluation of the relevant facts, particularly with regard to the EC's finding and determinations on injury under Articles 3.4 (injury indicators) and 3.5 (causation).

6. The EC seems to admit, at least with regard to one EC producer (Atusa), that such ownership relation existed and that it was well known to the EC. The EC was very well aware, on the basis of the information made available to it during the investigation, of (i) the efforts made by the Spanish producer to export its Bulgarian products into the EC; (ii) that the Bulgarian share of the EC market increased by 1,800% and its share of total imports rose by 2,500 per cent during the IIP; and (iii) that Atusa has continued its effort to increase market share even further by offering its Bulgarian product at prices well below market level and below those of the Brazilian exporter.

7. In its provisional findings on causation, referring to the imports by the Spanish producer, the EC stated that "since these volumes were very low and represented only a negligible pa[rt] of its sales in the Community, no significant influence on the situation of that Community producer could have resulted from these imports". Brazil does not know to which imports the EC had specifically referred

in this passage. The record suggests that the EC had in fact examined the Spanish producer's own purchases for its own purposes and/or for resale only. Nothing on the records indicates that the EC authorities evaluated the impact of these imports nor that these effects were duly separated from the other causes of injury to ensure that they are not attributed to the dumped imports, as required for example by Article 3.5.

8. Similarly, the EC admits that, with regard to "purchases/imports from other sources (in volume and value), the Spanish producer Atusa, as well as the "Austrian" producer GF provided that information during the investigation. This seems to suggest that the EC was at best unaware of these considerations at the time it had processed the EC industry's Application in order to assess "the adequacy and accuracy of the evidence provided" therein, as required under Article 5.3. Thus, by failing to give information on their own "contribution" to the alleged injury to the EC industry, these EC producers failed to provide adequate information as required under that provision, the accuracy and adequacy of which the EC was under an obligation to examine.

9. Moreover, Brazil believes that, in a parallel way to that described with regard to the Spanish producer, the EC has not examined the effects of the self-inflicted injury that the imports from Turkey, by the "Austrian" producer (GF), have caused to that producer (and to its co-Applicants). This establishment and evaluation of the relevant facts, or rather the lack of both, have thus suffered from similar fatal failures to those described in relation to Atusa.

10. Further, Brazil recalls that the Brazilian exporter submitted to the EC during the investigation that GF has imported the product concerned not only from Turkey but also from Poland. Although the EC looked into imports from Poland in general under its causation analysis, it has nonetheless never addressed this own-import aspect of the Brazilian exporter's claims with regard to GF at any point on record. As the EC has not indicated whether it has made any examination at all at group level at GF Switzerland or anywhere else outside the EC, Brazil must conclude that such an examination has not taken place.

11. In Brazil's view, the EC's very partial examination of the facts regarding GF's own imports from both Poland and Turkey does not meet the requirements of Article 3.4. Moreover, as already mentioned, these EC failures also infringed Article 3.5, by attributing to the "dumped imports" the injurious effects of these own "non-injurious" imports from Bulgaria, Turkey and Poland.

Brazil as a Developing Country

12. Brazil is surprised by the EC's defence whereby they have thought that by raising the possibility of an undertaking with the Brazilian authorities they were in fact dealing directly with Tupy. Undertakings are in fact a contract and contracts are negotiated and concluded by the parties thereto. Brazil could in no way be such a party; the undertaking should have been negotiated with Tupy directly. The EC's attempts to find an excuse for its failure to comply with Article 15 should fail.

13. The EC has tried to show how diligent it nonetheless was to express its "special regard" in this respect. However, records show that (a) the EC was not the first to raise this issue; and (b) Brazil always took the initiative to discuss it.

Dumping

14. Brazil would like to give a few blatant examples of the EC's improper establishment of the facts concerning the determination of dumping. First, Brazil recalls that the EC explicitly and exclusively stated that the conversion of currencies was based on daily rates. However, before the Panel, the EC admitted that the conversion of *transport costs* and *credit costs, warranty* and

commissions was based on monthly rates. Brazil therefore submits that the EC's *selective use of the exchange rates* cannot be in accordance with Articles 2.4.1 and 2.4, let alone meet the applicable Standard of Review.

15. Brazil notes further the EC's new Exhibit EC-25 named "Data on Tupy's export sales showing effect of conversion rates". The meaning of the related table is unclear. Consequently, the EC's conclusion that "Tupy benefited from the use of the EC's monthly exchange rates" is inadequate or at least not supported by sufficient or available evidence.

16. Regarding PIS/COFINS indirect taxes, the EC seems to believe that administrative convenience takes precedence over the obligation to properly establish the facts and to make fair comparisons. Indeed, the EC's analysis was limited, without any proper justification, to a mere 20 most exported models. Brazil submits that this kind of careless and arbitrary conduct does not constitute a proper establishment or evaluation of the relevant facts.

Injury

17. Turning now to the determination of injury, we would like to refer briefly to Brazil's Article 3 claims, which are one of the main issues in this proceeding.

A. *The EC's determination of injury was not based on "positive evidence" and did not involve an "objective examination" of the facts, in violation of Article 3.1*

18. Brazil believes that the requirements of Article 3.1 are well settled and unambiguous. At a minimum the "positive evidence" requirement precludes an investigating authority from basing its findings on *incorrect* or *inaccurate* facts. The "objective examination" obligation means that the process of examination must conform to the basic principles of good faith and fundamental fairness.

19. In this respect, Brazil would highlight five aspects. Firstly, Brazil has demonstrated, especially with regard to the outsourcing issue, that the EC's factual basis for its injury determination was, at the very least, *incorrect*.

20. Secondly, Brazil observes that the EC's examination and evaluation of the factual basis for its findings and determinations regarding the cumulation of the effects of the Brazilian imports with those of the other imports concerned failed to satisfy the basic requirements of Article 3.3. The EC confuses the "conditions of competition" test with the "like product test". Compounding this error, the EC cumulates imports, not the "effects of such imports" as required by the language of Article 3.3.

21. Thirdly, Brazil notes that the EC did not examine all injury factors of Article 3.4 . Exhibit EC-12 must not be admitted by this panel and even if it were, it does not cure the complete lack of an "objective examination" "based on positive evidence".

22. Fourthly, the EC did not provide an adequate explanation as to whether and how "*positive movements*" of certain injury indicators were outweighed by certain injury factors moving in a "*negative direction*". Furthermore, an unbiased and objective investigating authority could *not* have on the basis of "positive evidence" in this case concluded that "the trends of profits is obviously a deteriorating one" as the EC concluded. Finally, the EC admits that the volume of the domestic producers' stocks was the only indicator suggesting that some sort of injury might have happened. However, Brazil has demonstrated that all these facts were manifestly incorrect.

23. Finally, when comparing prices under Article 3.2 the EC applied a practice of "zeroing" where the Brazilian exporter's prices were equal to or higher than the domestic industry's prices. The effect of "zeroing" was exacerbated by the EC's decision to limit the examination to the *identical*

types of the product concerned exported from Brazil and sold domestically by the domestic industry. Finally, as the EC did not compare the exported “black” heart fittings with the domestic “black” heart fittings, Brazil does not believe that a comparison between the prices of “black” and “white” heart fittings without any adjustments constituted an “objective examination”.

B. The EC failed to evaluate all mandatory injury factors, in violation of Article 3.4

24. To Brazil, Exhibit EC-12 should be *completely disregarded* and not be considered as being properly before the Panel. There are many indications showing that Exhibit EC-12 is just an EC attempt to cure the flaws of its investigation. Its acceptance would undermine the due process and transparency obligations of the AD Agreement. Brazil also has serious reservations with regard to the substance of that EC’s alleged examination.

C. The EC failed to establish a causal link between the dumped imports and injury to the domestic industry, in violation of Article 3.5

25. Assuming that the EC had properly established that its domestic industry had suffered injury, which it did not, the EC was still required under Article 3.5 to establish that such injury was caused by the allegedly dumped imports.

26. Brazil submits that the EC’s “*no-significant contribution*”- test does not fulfil the requirements of Article 3.5. Indeed, the EC concluded that the effects of the other known injurious factors were “*not* such to break the causal link“ between the material injury and the dumped imports. In particular, this kind of statements relate to (i) the declining consumption and the domestic industry’s exports, (ii) the Applicant’s own imports, (iii) imports from other third countries; and (iv) substitution. However, Brazil submits that the EC has never provided any clear, unambiguous and straightforward explanation as to *how* it separated and distinguished the effects of the above-mentioned factors from the effects of the dumped imports.

27. As the EC did not establish any explicit non-attribution explanation, it is logical to conclude that the EC’s conclusion of “no-significant-contribution” was based on an *assumption* that the injury caused by those other known factors was insignificant. However, assumptions cannot establish a “genuine and substantial relationship of cause and effect” as required under Article 3.5.

28. Moreover, the public documentation contains several indications that the EC’s conclusions on causation were not based on “positive evidence” and did not involve an “objective examination”. Firstly, the EC has *not* examined at all the injurious effects of the Brazilian exporters comparative advantage. Moreover, the EC did not properly examine the issues of outsourcing and substitution. Secondly, the EC’s conclusion that the imports from Poland had not caused any injury to the domestic industry must be factually incorrect in view of the EC’s price sensitivity findings, combined with the quantity and price effects of those Polish imports. Similarly, the EC’s conclusions regarding the domestic industry’s “continuous decline of sales” and “deteriorating profitability” allegedly due to the dumped imports were factually incorrect.

Conclusion

29. Brazil submits that this dispute involves a relatively large number of important aspects of the AD Agreement. A number of claims we made were not mentioned in this statement.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES – SECOND MEETING

(18 June 2002)

1. In the EC's view Brazil has introduced in its second submission new claims with regard to Article 15 (breach of obligation of first sentence, exploration of constructive remedies *before* the imposition of provisional measures) and Article 2.4 (obligation to indicate necessary information) which should be declared inadmissible because they were not raised previously. Moreover, the EC reiterates the requests that it made in its First Submission for the Panel to disregard certain of Brazil's claims because they are vague or not covered by the terms of reference.

2. The EC notes that Brazil is basically seeking a *de novo* rehearing which is contrary to Article 17.6(i) of the Agreement, and infringes the notion of a fair hearing that is contained in WTO law. If by presenting new evidence Brazil could show that the EC authorities had reached a conclusion on the basis of a factual finding that was now proved to have been erroneous, that conclusion would be undermined. This is the very process that Article 17.5(ii) is designed to prevent.

1. Issues raised by Brazil

1.1 Issue 1 "No special regard to Brazil as a developing country"

3. The EC rejects Brazil's allegation of a breach of the first sentence of Article 15 as this provision does not contain a separate obligation, and Brazil has not shown how issues such as the IPI Premium credit or devaluation have any relevance. Article 15 first sentence does not relate to just any aspect of an anti-dumping investigation but applies specifically when a Member is "considering the *application* of anti-dumping measures". In any event, the investigators did give proper consideration to this issue and the EC by satisfying the obligation in the second sentence, also satisfied whatever obligation might be imposed by the first. Brazil allegations regarding a violation of Article 15 second sentence have already been answered by the EC.

1.2 Issue 2 "Inappropriate Application"

4. Because of Brazil's withdrawal of this complaint the EC makes no further comment.

1.3 Issue 3 "Inappropriate Measures"

5. The EC maintains that Brazil distorts the meaning of the Appellate Body report in the *Carbon Steel* case by selective quotation. The Appellate Body was simply pointing out that, if the practice in question is not a subsidy, countervailing duties are not justified.

6. The EC reaffirms that Brazil's assertions about the consequences of devaluation are baseless, and that it is not true that the data indicated that the chances of dumping occurring after the investigation had been totally eradicated.

7. In regard to Brazil's claim under to paragraph 1 of Article 11 the EC notes that if the claims are appropriate to paragraphs 2 and/or 3, then by satisfying the appropriate paragraph the Member will also be satisfying the requirements of paragraph 1. The assertions made by Brazil are entirely

within the framework provided by paragraph 2, and since the EC has satisfied the requirements of that paragraph it has also satisfied those of paragraph 1.

8. In some circumstances a Member might be obliged to self-initiate a review in accordance with Article 11.2. Yet, as is evident from the terms of Article 11.2 these circumstances must be different from, and most probably more demanding than, those which would normally justify a review (after the reasonable period). Brazil has not attempted to argue what factors may be relevant in this regard. Still less has it shown that such factors actually pertained or pertain in the present case.

9. Neither Tupy nor Brazil has made an application for a review, despite the fact that they were invited by the EC to do so if they could show that the dumping margin had been reduced since the original investigation period. Furthermore, Tupy has declined to participate in the review initiated by the EC, although this would have examined the situation that Brazil alleges has changed as a result of devaluation.

1.4 Issue 4 “Improper normal value – inappropriate product types”

10. The categorization adopted by the EC in any dumping investigation is designed to facilitate the identification of comparable and like products. It is made at the outset of the investigation but it may expand during the proceedings. Investigators will where possible adopt the same product categorization that is employed by the exporter.

11. The EC rejects Brazil’s language of “a finding of ‘unreliability’ under Article 2.2”. as inconsistent with the respective provision. Regarding Brazil’s argument on the exclusion of profit margins of ‘unrepresentative’ sales the EC notes that the methodology set out in Article 2 for constructing normal values is essentially one of averaging profit and SG&A data from a range of (profitable) sales, and is as such calculated to produce the fairest result. In any case, the consequence in this investigation of excluding data from the so-called ‘unrepresentative’ sales would have been to lower the profit margin by 0.01 per cent.

1.5 Issue 5 “Improper normal value – inappropriate product codes”

12. Brazil’s interpretation of Article 2.2.2 is flawed. For every type where normal value needs to be constructed, there are by definition no representative sales of the identical type made in the ordinary course of trade. Otherwise, normal value could and should be based on the domestic sales prices of that type. Thus, SG&A and profit always have to be based on types sold domestically which are not identical to the types exported. The consequences of Brazil’s thesis would be inconsistent if applied to the definition of domestic industry (Article 4.1), and to the domestic production to be considered for injury purposes (Article 3.6), both of which would then differ for each exporter. Since, the definition of like product applies throughout the Agreement, an interpretation that is impossible in any particular context of the Agreement has to be rejected for the entire Agreement. In any event, Brazil’s application of its thesis to malleable fittings lacks consistency.

1.6 Issue 6 “No proper consideration of tax neutralisation”

13. The EC has already explained the way it considered indirect taxes such as IPI, ICMS, PIS/COFINS for the calculation of the normal value. No adjustment was necessary for the IPI Premium Credit as no such tax was identified during the investigation. The panel report *United States – Steel Plate, Sheet and Strip* does not support Brazil’s argument in this regard. On the contrary, the Appellate Body in *United States – Hot Rolled Steel* and the panel *Argentina – Tiles* both confirm that the Agreement puts the burden of proof on the interested party, while requiring the authorities to make a fair comparison and not to impose an unreasonable burden of proof on the parties. Tupy did not meet this standard.

1.7 Issue 7 “No proper adjustment for advertising and sales promotional expenses”

14. Because of Brazil’s withdrawal of this complaint the EC makes no further comment.

1.8 Issue 8 “No proper adjustment for packing costs”

15. The EC rejects Brazil misinterpretation of its position in this regard. Tupy has not adequately demonstrated any justification for an adjustment.

1.9 Issue 9 “No proper currency conversion”

16. The EC has given a precise explanation of the details of the various rates that were used. The issue of conversion rates for allowances is one of *de minimis* significance since the consequences for the dumping margin would be a change of a fractional amount. Moreover, compared to the conversion rates proposed by Tupy, the effect of those adopted by the EC was, if anything, to *lower* dumping margins.

1.10 Issue 10 “No proper basis to assess PIS/COFINS indirect taxes”

17. The EC has already explained the methodology it adopted in arriving at the adjustment figure and the circumstances of its adoption. In this respect, the EC notes that Tupy had been rather obstructive during the investigations. Even if Brazil’s approach by using 40 instead of 20 models were to be accepted the result demonstrates that the EC used a very reasonable allocation keys as the difference in adjustments amounts to merely 0.03 per cent.

1.11 Issue 11 “No proper dumping margin finding (‘zeroing’)”

18. The EC has no further comments to make on this Issue.

1.12 Issue 12 “No proper consideration of import volume trends

19. Regarding whether either of the factors mentioned in Article 3.2 (volume, and price effects) must be established, Brazil is at odds with this provision because if one or other factor must be present this would give a factor decisive guidance on the question of injury. The EC further rejects Brazil’s attempt to twist the words of the EC’s Submission to give a false impression of what was intended.

1.13 Issue 13 “No proper consideration of alleged price undercutting”

20. The EC notes that the effect of using zeroing in this investigation was to increase Tupy’s undercutting margin by 0.01 per cent. Regarding the EC use of a methodology based on matching of products Brazil had characterised that methodology as unfair, but it has no better alternative to propose.

1.14 Issue 14 “No proper calculation of alleged price undercutting margins”

21. Brazil makes various misleading or inaccurate statements about the EC’s criteria for classifying malleable fittings. These centre on the question whether the differences between white and black heart fittings were significant. The EC has already addressed this argument. Brazil is unable to refute the EC’ assessment that the distinction between black and white heart fittings was irrelevant.

1.15 Issue 15 “No proper cumulation of imports”

22. The EC agrees with Brazil that the authorities must justify the use of cumulation, and has never pretended otherwise. However, Brazil’s claims that ‘the investigating authority should identify the effects of the dumped imports from each country’ has no basis under Article 3.3. The same is true of Brazil’s proposal that a Member may not cumulate ‘where it becomes apparent under Article 3.2 that there are differences in the way in which products of exporting Members compete among themselves or with the like domestic product’.

23. The EC has listed in the Definitive Regulation the factors that it considered regarding the conditions of competition, and it refutes Brazil’s accusations of not being exhaustive. In this context, the difference between white and black heart fittings has no relevance. The EC has already rejected Brazil attempts to confuse an already complex issue by raising and introducing specific new aspects and interpretations. This relates in particular to its reference to EMAFIDA, markets segments and the channels of trade.

1.16 Issue 16 “Inappropriate consideration of injury factors”

24. The EC warns against exaggerated interpretations of the *H-Beam* panel’s views of the proper role of panels in reviewing national decisions on injury. This section of the panel’s report was not considered by the Appellate Body.

25. As to the EC’s argument on “growth”, this factor is inevitably associated with other factors and in so far as the authorities properly consider the growth aspects of those factors they will also be properly considering growth. There is nothing in the rulings of the Appellate Body that says that the findings on a particular factor cannot be implicit. In fact, the *Bedlinen* panel, which was applying the criteria laid down by the Appellate Body, said that the test was whether a reviewing panel is able to determine whether the authorities complied with the requirements of Article 3.4. In the EC’s view the findings in the Provisional and Definitive Regulations and the explanations set out in Exhibit EC-12 show the EC authorities’ compliance with these requirements.

26. Brazil claims of a breach of Article 6.2 is not within the Panel’s terms of reference and in any case the accusation is baseless. The same goes for the claim under Article 6.4, which has not been made before in this context, and which is therefore also outside the terms of reference. The EC has already noted the tendency of Brazil to confuse the obligations in Article 3.4 with those in Article 6, an error against which the Appellate Body has warned.

27. Brazil presents further a series of arguments regarding the allegedly flawed determination of injury to which the EC has already responded. This relates in particular to “outsourcing”, factors affecting domestic prices, price sensitivity, profitability, stocks and export performance. As to stocks, the EC rejects Brazil claims that the EC has infringed Article 6.2 and 6.4 of the Agreement by not disclosing to Tupy information on EC producers’ purchases and exports because these claims are new, and consequently outside the Panel’s terms of reference.

1.17 Issue 17 “Inappropriate establishment of causation”

28. The EC notes that if a particular factor constitutes no significant cause of injury to the EC industry then there are no injurious effects of that factor which can be separated and distinguished. In the light of this logic, Brazil’s criticism of the EC’s methodology is misplaced. The EC rejects Brazil’s argument regarding ‘margins analysis’, ‘export performance’, ‘imports from other third countries’, ‘rationalisation efforts’ and ‘outsourcing’. Regarding the last of these, the EC properly examined any loss of market share that could have come about through imports from the firms to whom production had been outsourced.

1.18 Issue 18 “No timely opportunities given to see all relevant information”

29. It appears that this claim is now solely concerned with information on the currency conversion rates used in relation to allowances in the dumping calculation. The EC has given a complete explanation of the rates that were used at the various phases of the investigation.

1.19 Issue 19 “No proper information on matters of fact or law”

30. The EC has complied with its obligations under Article 15 by pursuing, through diplomatic channels, the possibility of a price undertaking. In both cases the EC regards the confidentiality rule in Article 6.5 as applicable.

31. As to Exhibit EC-12, the EC found that for the factors mentioned in this document developments during the IIP were in line with one or more of the other factors. As a consequence it saw no point in recording them individually in the Regulation; this general observation constituted “sufficient detail”, which is the criterion applicable to both Article 12.2 and 12.2.2.

2. Concluding remarks

32. In respect of Brazil’s claims under Issue 9, Issue 10 and Issue 13 the EC has shown that any implications for the anti-dumping duties imposed on Tupy were *de minimis*. As such, these infringements could not have nullified or impaired any benefit accruing to Brazil, directly or indirectly, under the Agreement.

33. Even were the Panel to find that the EC had violated its WTO obligations in regard to ‘zeroing’ and ‘devaluation’, the EC would, by initiating a review, have done what was necessary to remedy this situation. The EC refers in this respect to the distinction made by the panel in *India – Automotive Sector* between a panel’s finding of infringement and its recommendation to the DSB.

34. The EC therefore requests the Panel to make no recommendation in respect of Tupy’s claims in this regard, irrespective of its findings on the issue of infringement.