

ANNEX A

First written submissions by the Parties and written submissions relating to Parties' requests for preliminary rulings

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF BRAZIL

1. On 7 June 2001 the Government of Brazil requested that a panel be established in the matter of, *inter alia*, the imposition by the EC of provisional and definitive anti-dumping duties on imports of certain malleable cast iron tube or pipe fittings originating in Brazil. A panel was established on 24 July 2001, composed on 5 September 2001 and the First Written Submission of Brazil was presented to the Panel on 10 October 2001. This document is a brief executive summary of the main issues raised in the First Submission of Brazil.

2. Brazil submits that the EC has acted and is acting in a manner which is inconsistent with the obligations incumbent on the EC under the WTO Agreements, including Article VI of the GATT 1994 and the Anti-Dumping Agreement ('AD Agreement') in that benefits accruing to Brazil have been nullified or impaired as a result of the anti-dumping measures which the EC has imposed on imports of malleable cast iron tube or pipe fittings from Brazil.

3. The EC did not give any special regard to Brazil's special situation as a developing country and, in violation of Article 15 of the AD Agreement, the EC neither explored nor communicated either to Brazil or to the Brazilian exporting producer that it might consider the possibility of constructive remedies over and above the possibility of the imposition of anti-dumping measures.

4. The Applicants withheld information as to the factors and indices listed in Article 3.4, which were reasonably available to them and which were manifestly relevant to the initiation of the investigation. As a consequence, the EC did not discharge its obligations under Article 5.8 by not rejecting the Application. Moreover, as the product definition in the Application was broader than the one applied in the investigation, the information provided in the Application was inaccurate and meaningless. Consequently, the Brazilian exporting producer was not able to properly defend its interests, as provided for in Article 6.2.

5. Given that the Brazilian currency was devaluated by 41.99 per cent in January 1999, there was no need whatsoever for the EC to impose measures on the Brazilian imports to offset dumping, which did not exist, and the imposition of anti-dumping measures in these circumstances constitute a violation by the EC of Article VI of the GATT 1994 and of Article 1 of the AD Agreement. Alternatively, the EC violated Article 11.1 of the AD Agreement as it has not, simultaneously with its order imposing the measures, also ordered the revocation of these measures in order to comply with the obligation of Article 11.1, namely, not to allow the duty to remain in force when it was no longer necessary to offset dumping. The EC also violated Article 11.2 as, further to its order to impose the measures, it has failed to self-initiate a review concerning the need for the continued imposition of the measures in view of the new situation after the devaluation of the Brazilian currency.

6. The manner in which the EC constructed normal values for certain types of the investigated product breached the requirements of the AD Agreement. Firstly, in its quantification of the SG&A and profit amounts to be added into the cost of production, the EC applied different tests for the SG&A costs and for profits where only one test is expressly mandated by Article 2.2.2. Alternatively, given that the constructed normal values were based on data pertaining to sales of product types, which did not permit a proper comparison, the EC did not make a fair comparison by refusing to grant relevant allowances in the form of an adjustment, and by doing so the EC also inflated the dumping margin. Secondly, regarding certain product types, the EC included in its calculation types of fittings that were not like products, in violation of Article 2.2. The EC also acted inconsistently with

Article 2.2.2 by adding the actual amounts for SG&A costs and for profits pertaining to production and sales in the ordinary course of trade types of the product concerned, which are not identical to the compared products. By refusing to make due merited allowances for differences in physical characteristics affecting price comparability, the EC violated Article 2.4. As a consequence, the EC also improperly inflated the dumping margin.

7. With regards to the comparison between the normal value and the export price, the following five claims are submitted. Firstly, by refusing to take into account the effect of internal taxation, the EC increased the price difference between the export price and the normal value and hence improperly increased the dumping margin, if any, found for the Brazilian exporting producer in violation of Article VI:4 of the GATT 1994. Secondly, the EC violated Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement by failing to fulfil the requirement of a fair comparison by denying an allowance for differences in indirect taxation, advertising and sales promotional expenses and packing costs affecting price comparison. Thirdly, the EC's method of currency conversion and its method of assessment of indirect taxes by sampling violated Article 2.4. Fourthly, by zeroing the negative dumping margins found for some product types of the Brazilian exporting producer the EC did not make a fair comparison between the export price and the normal value in violation of Article 2.4 and a distorted margin of dumping was calculated by the EC in violation of Article 2.4.2. Finally, the above violations resulted in an exaggerated and inflated dumping margin and, consequently, in the imposition of anti-dumping duties in excess of the actual margin of dumping, if any, in violation of Article 9.3.

8. The manner in which injury was determined by the EC also breached the requirements of the AD Agreement. Firstly, the EC violated Articles 3.1 and 3.2 as it did not properly consider whether there had been a significant increase in allegedly dumped imports from Brazil. As the EC failed to satisfy the requirements of Article 3.2 it was prevented from making any findings under the subsequent sub-sections of Article 3.

9. Secondly, the EC violated Articles 3.1 and 3.2 as it failed to properly consider whether the allegedly dumped Brazilian imports had significantly undercut the prices of the like product in the EC. In the context of price undercutting, the EC's consideration did not relate to the "*dumped imports*" as referred to in Article 3.2. In addition, by failing to consider the effect on prices of the "*dumped imports*" under Article 3.2, the EC's price undercutting calculation for the Brazilian exporting producer was not based on positive evidence and the EC's examination whether the export price of the product concerned from Brazil had significantly undercut the EC producers prices was not objective. Consequently, the EC's undercutting calculation resulted in an exaggerated and inflated undercutting margin.

10. Thirdly, by improperly and unjustifiably refusing to accept that the black heart Brazilian product was different from the white heart EC product and by refusing to recognize an adjustment in this respect or by refusing to make the price comparison on the basis of black heart fittings only, the EC failed to make an 'objective examination' of the facts of the matter on the basis of 'positive evidence' as required by Article 3.1 and also failed to make a proper price comparison in violation of Article 3.2. Consequently, the EC's undercutting calculation thus resulted in an exaggerated and inflated undercutting margin.

11. Moreover, the EC violated Article 3.2 and 3.3 by attributing the injury said to have been sustained by the EC cumulatively over imports from the countries concerned. The EC failed to take due account of the preliminary need to conduct a country-by-country analysis and to properly establish the relevant conditions of competition. The EC also violated Article 3.3 by cumulating imports from the countries concerned although the relevant requirements relating to the conditions of competition have not been satisfied by the EC's findings. Given the inconsistencies in its approach, the EC has failed to comply with the requirement of an 'objective examination' provided for in Article 3.1.

12. Furthermore, the EC did not discharge its obligations under Articles 3.1 and 3.4 as its finding of injury was not based on positive evidence. The EC did not in its injury analysis evaluate all of the non-exhaustive fifteen individual factors and indices going to the issue of injury within the meaning of the AD Agreement. The EC also violated Article 3.4 as the evaluated factors disclosed an insufficient basis for a positive finding of injury by an objective and unbiased investigating authority. In addition, the EC's injury finding was not based on positive evidence as the EC did not consider the trends of those factors and indices partially analysed but just compared the end points. By not disclosing the EC producers' purchases and exports the EC precluded the Brazilian exporter from verifying the consistency of the data used. This non-disclosure, which is a serious violation of Article 12.2.2, denied the Brazilian exporter the right of access to the essential facts being considered by the EC prior to the imposition of definitive anti-dumping duties, in violation of Article 6.9, and precluded it from properly defending its interests, in violation of Article 6.2.

13. Finally, the EC violated Articles 3.1 and 3.5 by attributing injury to the Brazilian imports despite the fact that no injury had been sustained by the EC producers in respect of which causation could then legitimately be established. The EC also violated Articles 3.1 and 3.5 by failing to ensure that the injury caused to the EC industry by factors other than the allegedly dumped imports – for example the EC producers' comparative disadvantage, failing export performance, outsourcing and rationalisation efforts, and/or imports from the other third countries, substitution of the product concerned and/or the difference in the cost of production and the market perception – were not attributed to the Brazilian imports. Also, by not disclosing certain essential information, like the EC producers' own purchases and exports, the EC precluded the Brazilian exporter from verifying the consistency of the EC's data in violation of Articles 6.2, 6.9 and 12.2.2.

14. By not disclosing its methodology and calculations with regard to the currency conversions made pursuant to the requirements of Article 2.4, the EC failed to provide to the Brazilian exporting producer timely opportunities to see all information that was relevant to the presentation of its case, in violation of Article 6.4. The EC also violated Articles 12.2 and 12.2.2 by not setting out in the Provisional Regulation and the Definitive Regulation or otherwise make available in separate reports all relevant information on the matters of fact and law.

15. Brazil respectfully requests that the Panel find that the EC acted inconsistently with Article VI of GATT 1994 and the AD Agreement, recommend that the EC brings its measures into conformity with Article VI of GATT 1994 and the AD Agreement, and suggest that the EC revoke its anti-dumping duty order and reimburse all anti-dumping duties collected thereunder.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES AND REQUEST FOR PRELIMINARY RULINGS

(21 November 2001)

The large number of claims in Brazil's Submission means that this summary can give only a cursory account of the arguments that the EC presents in its defence. Consequently, the omission of any argument from this summary should not be taken to indicate that the EC does not regard it as important.

I. INTRODUCTION

1. The dispute arises out of the imposition by the EC of anti-dumping duties on malleable cast iron fittings from Brazil and other countries. The EC makes a number of introductory points covering, for example, the problems created by the form of Brazil's Submission. (Paras. 1 to 12)
2. The EC stresses that the burden of proof lies on Brazil to establish at least a prima facie case in support of its claims. (Para. 13)
3. The EC designates certain of its documents as confidential. (Para. 14)

2. PRELIMINARY ISSUES

4. The EC denies that there is any evidence to support the allegations made by Brazil concerning the motives of the domestic industry in making their Application. (Paras. 15 to 18)
5. Many of Brazil's claims are formulated so vaguely that they should be rejected by the Panel. They fall below the good faith standard required by the DSU. To entertain them would be to infringe the EC's rights to a 'natural justice' and 'due process'. The EC requests a preliminary ruling dismissing on these grounds seven individual claims and all the claims made under Issue 19. For brevity's sake the individual requests are not repeated in the following account. (Paras. 19 to 22)
6. Brazil has made over twenty claims in its Submission which are new to this dispute, not having been mentioned in its Panel Request. Claims of this kind are outside of the Panel's terms of reference, and the EC requests a preliminary ruling dismissing them. For brevity's sake the individual requests are not repeated in the following account. (Paras. 23 to 24)
7. The standard of review to be applied by the Panel in this dispute is that laid down in Article 17.6(i) of the Anti-Dumping Agreement (the 'Agreement'). (Paras. 25 to 28)

3. ISSUES

3.1 Issue 1: ‘ No special regard to Brazil as a developing country, no constructive remedies explored’.

8. Brazil claims that the EC has infringed various aspects of Article 15 of the Agreement. No coherent claim under the first sentence is made, and this provision in any case creates no separate obligation. (Paras. 30 to 31, 44)

9. The EC denies that its anti-dumping measures affected the “essential interests” of Brazil. The importance of the malleable fittings business to either Tupy in particular or the Brazilian economy in general was minimal. (Para. 32)

10. The EC also denies that it failed to explore possibilities of “constructive remedies” as provided for in the Agreement. Contrary to Brazil’s assertion’s, several meetings were held between EC and Brazilian officials at which the EC indicated the possibility of an undertaking being accepted. (Paras. 33 to 43)

3.2 Issue 2 – ‘Inappropriate Application’

11. The obligation in Article 5.2 is directed not to WTO Members but to parties who present applications. Any corresponding obligation on Members is to be found only in Article 5.3, and EC denies that it has infringed this provision. The criteria in Article 5.2 were satisfied, and the EC does not express a view on whether they are conditions precedent to initiation of an investigation. The propriety of the EC’s decision must be judged on the facts available to it at the time. (Paras. 45 to 50)

3.2.1 Volume and value of domestic production; complete description of product

12. Contrary to Brazil’s claim, there is no inconsistency between the scope of the application and that of the investigation. Both concerned “malleable cast iron fittings”. CN codes were given in both cases as guidance. Although code CN 7307 19 90 does not cover such fittings it mentioned by the Applicants in order to catch any fittings that were being wrongly classified on import. The definition in the Notice of Initiation would also have covered such misclassified products because, although it gave the code CN 7307 19 10, it said that this was “given for information”. No claim can lie under Article 5 for possible defects in the Provisional or Definitive Regulations. (Paras. 51 to 57)

13. The EC refutes Brazil’s claim that the Application contained insufficient information on the volume and value of production of the like product accounted for by the Applicants. (Paras. 58 to 62)

3.2.2 List of importers

14. The list of importers provided in the Application satisfied the criteria listed in Article 5.2(ii) since the list required by that provision covers importers of allegedly dumped products only. In any event, in the circumstances of the EC authorities’ assessment of the list presented in the Application satisfied the requirements of the Agreement. (Paras. 65 to 72)

3.2.3 Information on consequent impact

15. The Application met the criteria of Article 5.2(iv). The Agreement does not require that every injury factor listed in Article 3.4 be addressed in the Application. In fact, this Application contained information on all but a couple of these factors, as well as on several not listed there. Brazil has made no attempt to show that information on the other factors was relevant to substantiate the allegations of injury. (Paras. 73 to 83)

3.3 Issue 3 – ‘Inappropriate measures’

16. Brazil claims that the EC should not have imposed anti-dumping duties because, owing to the devaluation that occurred towards the end of the investigation period, these exports were no longer being dumped and duties were therefore not “necessary”. (Paras. 84 to 86)

17. Brazil’s claim fails to understand the basis on which anti-dumping duties are calculated under the Agreement. In the case of most Members, this is by examining imports over a set ‘investigation period’ prior to the initiation of the investigation. This system has built-in mechanisms (review, refunds, undertakings) to take into account changes which may occur after the investigation period. (Paras. 87 to 91)

18. Brazil’s argument would give national authorities the power to set anti-dumping duties on the basis of a qualitative assessment of events that cannot be objectively predicted. (Paras. 92 to 93).

19. Brazil provides no legal basis for its argument. The only criteria provided in the Agreement for judging whether measures are “necessary” are those for determining the dumping margin and the issues of causation and injury. (Paras. 94 to 99)

20. The fact that the EC has occasionally taken account of events following the investigation period is not relevant. Firstly, such decisions are discretionary, and secondly the devaluation took place within the period. Furthermore, devaluation does not by itself determine the pricing decisions of companies. (Paras. 100 to 103).

21. Brazil has presented no evidence to justify its apparent claim that the EC should have initiated a review of its measure. (Paras. 104 to 110).

3.4 Issue 4 – ‘Improper normal value – inappropriate product types’

3.4.1 Constructing normal value

22. Brazil has objected to the fact that when constructing the normal value, in arriving at the profit margin, the EC included data relating to ‘unrepresentative’ domestic sales. (These sales were not used to establish the normal value based on prices because of the ‘low volume’ rule in Article 2.2). However, the EC did no more than apply the rule in the relevant provision, Article 2.2.2. (Paras. 111 to 119)

23. Brazil is mistaken in alleging that the EC used different methods for calculating SG&A and profit. Both figures were (totally in accordance with Article 2.2.2) based on sales in the ordinary course of trade of the like product by Tupy. (Paras. 112 to 127)

3.4.2 Allowances

24. Brazil claims that the EC, when comparing the normal value and export price, should have made an allowance to take account of the inclusion of data from ‘unrepresentative sales’ in the constructed normal value (see paragraph 22 above). However, no basis for making this allowance has been proposed either by Tupy or by Brazil. (Paras. 128 to 132)

3.5 Issue 5 – ‘Improper normal value – inappropriate product codes’

25. Brazil claims that the EC based its calculation of the dumping margin on a comparison of non-like products (specifically product types ‘68’ and ‘69’). However, Brazil has provided no evidence in support of this claim, which even Tupy admitted was not sustainable. (Paras. 133 to 142)

26. Brazil also claims an adjustment should be made in the comparison because of differences between the products, however no basis has been proposed on which such an adjustment could be made. (Paras. 143 to 145)

3.6 Issue 6 – ‘No proper consideration of tax neutralisation’

27. Brazil claims that an allowance should have been made in respect of the 20 per cent tax credit – ‘IPI Premium Credit’ – scheme operated by the Brazilian government because it compensated for prior-stage indirect taxes.

28. The main reason for denying Tupy’ request for this allowance was that it did not demonstrate that the credit compensated for internal taxes “borne” by the like product when destined for consumption on the Brazilian market.

29. The EC identified various taxes (IPI, ICMS, PIS, COFINS) for which specific adjustments were given where justified. The claimed allowance regarding IPI Premium Credit was based on the mere assertion in the relevant Brazilian law, and no evidence was provided of particular taxes that had imposed on inputs for which it was supposed to compensate. (Paras. 146 to 156)

30. The legal status of compensation for prior-stage cumulative taxes is explained in the SCM Agreement, which forms part of a common framework with GATT Article VI and the Anti-Dumping Agreement. The SCM Agreement emphasises that the burden is on the party concerned to establish clearly the link between the credit and the tax (on inputs) for which it is compensation. (Paras. 157 to 173)

31. Several other reasons were given to Tupy for refusing the allowance, and the EC endorses these. Consequently none of Brazil’s claims are justified. (Paras. 174 to 178)

3.7 Issue 7 – ‘No proper adjustment for advertising and sales promotional expenses’

32. Brazil claims that, in calculating the dumping margin, Tupy should have been given an adjustment for differences in advertising, etc., expenses. However, Tupy did not present the EC with evidence justifying such an adjustment. (Paras. 179 to 192).

33. In any event, the EC made adjustments for differences in ‘level of trade’ between Tupy’s home and EC sales, and these subsumed any differences in advertising, etc. expenses. (Paras. 193 to 194).

3.8 Issue 8 – ‘No proper adjustment for packing costs’

34. Brazil also claims that an adjustment should have been given for packaging costs. Such an adjustment was also refused by the EC because of lack of evidence to support it. (Paras. 195 to 212)

35. Contrary to Brazil’s claim, the EC properly indicated what information was necessary to ensure a fair comparison, in particular by means of the Questionnaire, and gave Tupy practicable assistance in presenting its requests for adjustments. (Paras. 212 to 218)

3.9 Issue 9 – ‘No proper currency conversions’

36. Brazil accuses the EC of not explaining the basis of the exchange rate used in currency conversions when comparing Tupy’s home and EC prices. It claims a breach of Article 2.4.1, but that Article contains no relevant obligation. (Paras. 219 to 221)

37. In fact, Tupy had never requested an explanation, and did not need one because it had itself provided the EC with the table of rates used in the conversion. The rate used to convert transport costs had a special conversion rate, but in any case these accounted for only a tiny part of the total costs. (Paras. 222 to 230)

3.10 Issue 10 – ‘No proper basis to assess PIS/COFINS indirect taxes’

38. Brazil accuses the EC of infringing Article 2.4 in the way in which it calculated the adjustment for PIS/COFINS indirect taxes. In fact, Tupy never put forward a coherent claim for this adjustment, and it was made by the EC itself on the basis of information obtained from Tupy. The calculation was made on the basis that the adjustment was to be made to the normal value, on the basis of actual amounts paid or received by Tupy. Furthermore, Brazil’s claim is based on new evidence, contrary to Article 17.5(ii). (Paras. 231 to 238)

39. Brazil claims that the EC chose a punitive methodology for calculating the adjustment. In fact the EC adopted a practical method in the absence of any coherent request from Tupy, despite the clear indication that it had been given of what was required. (Paras. 239 to 248)

3.11 Issue 11 – ‘No proper dumping margin findings (“zeroing”)’

40. The EC is currently considering the implications of the Appellate Body report in the Bedlinen case. The effect of ‘zeroing’ in the calculation of the dumping margin in this case was to increase it by less than 3 per cent. (Paras. 249 to 250).

3.12 Issue 12 – ‘No proper consideration of import volume trends’

41. Brazil’s main claim under this heading is that the EC failed to comply with the obligation in Article 3.2 regarding significant volume increase. The claim fails to appreciate that Members are required to consider whether there has been such an increase. There is no need for a positive finding on the point, or of a recording of the outcome of the consideration.

42. In fact, the EC Regulations show that it considered the issue of significant increase both individually for Brazil, and cumulatively for all the ‘countries concerned’. (Paras. 251 to 265)

3.13 Issue 13 – ‘No proper consideration of alleged price undercutting’

43. Brazil accuses the EC of infringing Article 3.2 by improperly calculating the degree of undercutting by ‘zeroing’ negative margins. Brazil’s use of the Bedlinen case as a precedent is unfounded because of the many differences between dumping margins and margins of undercutting. Mere comparison of average prices would conceal the real effect of undercutting. In any event, there is only 0.01 per cent difference, a *de minimis* amount, between the margins as calculated by the two methods. (Paras. 266 to 270)

44. Brazil accuses the EC of infringing the same provision by confining its calculation of undercutting to those product types that are exported to the EC. The claim is baseless since the methodology applied was entirely legal. Furthermore, Brazil’s claim is based on new evidence, contrary to Article 17.5(ii). (Paras. 271 to 279)

3.14 Issue 14 – ‘No proper calculation of alleged price undercutting margins’

45. Brazil makes several unjustified claims that the EC’s estimation of the margin of undercutting infringed Articles 3.1 and 3.2. Firstly, Brazil’s mistakenly argues that differences in cost of production should be taken into account (although it could not even demonstrate that such differences existed). (Paras. 280 to 286)

46. Nor could Brazil establish that market perceptions of the products were different. (Paras. 287 to 290)

3.15 Issue 15 – ‘No proper cumulation of imports’

47. As regards cumulation of dumped imports in the investigation of injury the EC law and practice, applied in this case, follows the requirements of Article 3.3. (Paras. 291 to 299)

48. Both the text of Article 3.2 and its context indicate that the rule regarding consideration of the increased volume of dumped imports applies to the cumulated volume, where cumulation is justified. This provision does not set a ‘competition’ requirement in addition to the one contained in Article 3.3. (Paras. 300 to 306)

49. WTO law, as reflected in national practice, allows considerable discretion to Members in the application of the notion of “conditions of competition” in Article 3.3(b). The EC practice is to take account of volume trends, but only in extreme cases will the analysis of volume trends result in a decision not to cumulate. (Paras. 307 to 315)

50. The various specific challenges raised by Brazil are groundless. Firstly, the issue of ‘like products’ has no relevance in this context. Secondly, there is no obligation to refuse cumulation because of differences in volume trends. Thirdly, the EC’s consideration of prices was quite consistent with its conclusion to cumulate. Fourthly, the issue of channels of distribution was properly considered by the EC. (Paras. 316 to 341).

3.16 Issue 16 – ‘Inappropriate consideration of injury indicators’

51. Brazil’s main claim concerns Article 3.4. Contrary to Brazil’s assertion, the EC did comply with the requirement to examine each of the injury factors that are listed in that Article. For most of the factors this consideration is reported in detail in the Regulations. For a small number, which the examination showed did not have a separate significance or did not indicate injury, the conclusions were elaborated in an internal record. The factor ‘growth’ was addressed as part of the investigation of other listed factors. (Paras. 342 to 349)

52. Brazil fails to recognise that Articles 3.4 and 3.5 deal, respectively, with the state of the domestic industry, and with the causes of any injury that is being suffered. The EC’s Regulations reflect this division. Brazil’s claims regarding ‘potential’ effects are misplaced since this provision is relevant only in claims of threat of injury or review requests. Brazil’s claim regarding ‘endpoint-to-endpoint’ analysis are also misplaced since it is based on the summaries made in the Regulations regarding the Article 3.4 analysis, and does not to reflect the actual examination made by the EC. (Paras. 350 to 370)

53. Regarding the consideration of individual factors in Article 3.4, the phrase ‘factors affecting domestic prices’ refers to the price factors in Article 3.2, principally undercutting, which were fully examined by the EC. In particular, Brazil’s denial of the importance of price sensitivity is not justified. (Paras. 371 to 385)

54. Contrary to Brazil’s claims, the EC properly examined the ‘utilisation of capacity’, ‘output’, ‘sales’ and ‘market share’. (Paras. 386 to 402)

55. Brazil’s criticisms of the EC’s examination of ‘profits’ are based on a misunderstanding of the nature of the injury investigation which, unlike that in safeguards cases, is focused on the one-year investigation period for which dumping has been determined. The EC also refutes Brazil’s criticisms

of its examination of ‘employment’, ‘investments’ and ‘stocks’. Brazil’s arguments concerning export performance are misplaced. (Paras. 403 to 424)

3.17 Issue 17 – ‘Inappropriate establishment of causation’

56. This issue concerns the matters covered by Article 3.5, in particular the obligation not to attribute to dumped imports any injuries that are caused by other factors. An important feature of this paragraph is that, in contrast to Article 3.4, the onus lies on interested parties to raise ‘other factors’ during the investigation. (Paras. 427 to 429)

57. Several of Brazil’s claims are inadmissible because they concern factors that were not raised during the investigation. Its claims also fail on substantive grounds. The alleged comparative advantage of Tupy is irrelevant to the issue of causation. Regarding EC export sales, the EC properly determined that they had no significant contribution to injury. Furthermore, the EC properly used the various sources of data that were available. Imports from third countries were thoroughly examined, and, where found to exist, their effects on the EC industry were separately identified. This was the case in particular as regards imports from Bulgaria. (Paras. 430 to 464)

58. Brazil’s claim regarding outsourcing of production by EC producers is irrelevant since any consequences would be seen in the imports from third countries and this factor is specifically examined. Contrary to Brazil’s accusation, the EC fully investigated (and reported in the Regulations) the consequences of the rationalisation carried out by the domestic industry at the beginning of the injury investigation period, and the issue of rising prices in the EC market. Furthermore, the EC’s examination of sales volume and market share were quite proper. (Paras. 465 to 488)

59. The EC did investigate the issue of substitution by plastic fittings, and found that this has problem had arisen in the 1980s. Furthermore, the relevant issue is not ‘substitution’ but ‘demand’ (upon which substitution would have its effect, if any), and the EC properly investigated that factor. (Paras. 489 to 497)

60. Brazil’s claims regarding the alleged differences between black and white heart fittings are not relevant to the issue of causation since there are no significant cost differences between them and consequently no scope for injury to the EC from such a factor. (Paras. 498 to 502)

3.18 Issue 18 – ‘No timely opportunities given to see all relevant information’

61. Brazil adopts a distorted reading of the EC Regulations in order to claim that the details of currency conversions made by the EC were not disclosed. The claim is against the Provisional Regulation and does not satisfy the requirements for such claims. In any case the meaning of the Regulations is obvious, and merely requires a distinction to be made between the rate applied on a particular day, and the period (month or day) from which that rate is derived. (Paras. 503 to 509)

62. Brazil gives a misleading account of the source of the table of conversion rates used in the dumping margin calculation. This source was Tupy rather than the EC, and Tupy also provided the explanation. (Paras. 510 to 513)

3.19 Issue 19 – ‘No proper information on matters of fact and law’

63. Under Issue 19 Brazil makes about twenty-five individual claims that the EC infringed Article 12. All of these claims are irredeemably vague and should be rejected by the Panel.

64. Several of these claims are also misplaced because they refer to matters which, for proper reasons (such as confidentiality), would never be included by the EC in its published instruments, and which Article 12 does not require should be included.

65. Some of the claims refer to non-existent obligations in Article 12.1. Others are in effect criticisms of the EC for accurately reporting the decisions it has taken when Brazil is also challenging those decisions. In so far as the claims touch on matters properly within the scope of Article 12 the EC has fully discharged its obligations in the texts of the Regulations. (Paras. 514 to 566)

4. CONCLUSIONS, REMEDIES AND REQUESTS

66. The EC refutes the claims made by Brazil. It also objects to the remedies sought by Brazil, and denies that any suggestion by the Panel would be appropriate. (Paras. 567 to 571).

ANNEX A-3

REQUEST OF BRAZIL FOR A PRELIMINARY RULING

(20 November 2001)

1. On 14 November 2001 the EC presented its First Written Submission in the above referenced case and made a Request for a Preliminary Ruling.
2. In the second line of Paragraph N° 11 on Page 6 of the EC's 1st Submission, the EC refers to what it views as "considerable practical problems" allegedly relating to the presentation of Brazil's First Submission. The EC went as far as to state that in order to "enable members of the Panel to quickly identify the part of that document" (i.e. Brazil's First Submission) "to which this Submission" (i.e. the EC's 1st Submission) is referring", the EC has produced a version of Brazil's Submission that includes line numbers (Exhibit EC-1). References to this will be made in the style 'BFS line 275'".
3. The EC has thus taken a most unusual step of producing its own "version" of Brazil's First Submission and in fact sought to compel the Panel and the parties to this dispute to make use of that "version" instead of the only official text of Brazil's First Submission.
4. Whatever the motives behind this seemingly unprecedented EC step to modify Brazil's document and to attempt to replace it with the EC's own "version", Brazil submits that this must not be allowed. Such modifications of an opposing party's material in the framework of legal proceedings of the present nature, whether this is acknowledged by the EC or not, is fundamentally wrong and is patently unacceptable in most if not all the legal systems of WTO Members. Further, Brazil notes that nothing in the Working Procedures adopted by this Panel or in other relevant WTO rules requires line numbering or other similar forms of presentation in documents such as Brazil's First Submission. Remarkably, the EC does not provide for such line numbers in its own 1st Submission.
5. The EC authorities have no right and must not be allowed to physically alter Brazil's document, change its presentation, renumber its pages or otherwise modify it in the way in which the EC authorities have taken the liberty to do on this occasion. Further, the EC authorities have no right and must not be allowed to compel the Panel and/or any party to this proceeding to rely or to make any use of the EC's "version" of Brazil's First Submission in the way which the EC authorities seek to do in this case.
6. Brazil has willingly agreed to the EC authorities' request to be granted additional time, well above and beyond the deadline prescribed by Paragraph 12 of the Working procedures of Appendix 3 of the DSU, to prepare and present the EC's 1st Submission. The EC had five weeks since it received Brazil's First Written Submission to ask the Brazilian authorities to number paragraphs in that document, which Brazil could have, and would have, done in due time. Instead of doing so, the EC preferred to resort to an unusual and unacceptable meddling with the Brazilian text.
7. Moreover, Brazil's First Submission is clearly presented with each numbered page plainly divided into well-defined paragraphs which, although not specifically numbered, are nonetheless unmistakably distinguished and separated from each other. The EC could simply have referred to page numbers and to paragraphs in their descending order in each page, such as "Brazil observes on Page 63, 4th Paragraph that..."

8. In any event, Brazil reaffirms its understanding that for all purposes the only official version of the Brazilian First Written Submission is the one handed in by the Permanent Mission of Brazil in Geneva on 10 October 2001, in accordance with the timeframe set out for this case. In fact, Brazil cannot confirm that the EC's version of Brazil's First Submission is accurate. Further, contrary to the EC's claims, this unusual EC approach, if it were to be accepted, would in all likelihood add considerable confusion to the entire proceeding. The Panel and parties would constantly have to refer simultaneously to three documents rather than to two, namely to the EC's 1st Submission, to Brazil's First Submission and to the EC's "version" of Brazil's First Submission.

9. Brazil therefore respectfully requests that the EC be called, by way of a preliminary ruling pursuant to paragraph 13 of this Panel's Working Procedures, to amend the text of the EC's 1st Submission so that all references therein to Brazil's First Submission be made to the actual text of Brazil's First Submission as originally submitted by Brazil. Such new EC references may be made, for example in the manner proposed in paragraph 7 (above). Brazil respectfully further requests that the preliminary ruling require the EC to make the relevant amendments and present its new submission within a short period of time which would not lead to any delays to these proceedings.

10. In view of the exceptional nature of the EC's approach and its timing, Brazil makes this request by way of an exception to the general rule of paragraph 13 of this Panel's Working Procedures and respectfully requests that the Panel accept Brazil's above mentioned reasoning as showing good cause for the submission of this request at this stage.

ANNEX A-4

REPLY OF THE EUROPEAN COMMUNITIES TO BRAZIL'S REQUEST FOR A PRELIMINARY RULING

(26 November 2001)

1. In its letter of 20 November 2001, Brazil has requested that the EC “be called by way of preliminary ruling pursuant to paragraph 13 of this Panel’s Working Procedures, to amend the text of the EC’s 1st Submission so that all references therein to Brazil’s First Submission be made to the actual text of Brazil’s First Submission as originally submitted by Brazil”.
2. The EC rejects the Complainant’s unsupported allegations that the EC has somehow “modified”, “changed”, “altered” or “meddled with” Brazil’s First Submission. There is no difference between the text of the document contained in Exhibit EC – 1 and what the Complainant calls the “actual text” of its submission, except the addition of line numbers. Thus, the amendments requested by the Complainant would be totally unnecessary because all the references made in the EC’s First Submission to Brazil’s First Submission are already to the “actual text” of that submission.
3. Furthermore, the EC has never requested that the Panel “replace” Brazil’s First Submission by the numbered version included in Exhibit EC – 1. The EC has provided that version to the Panel exclusively in order to facilitate the reading of its own First Submission. The EC could have omitted that exhibit and leave to the Panel the task of numbering by itself the lines of Brazil’s submission.
4. As noted by the Complainant, nothing in the Working Procedures adopted by this Panel requires line numbering or other form of presentation. However, by the same token, nothing in the Working Procedures requires that the EC refer to Brazil’s First Submission in any particular form, let alone in a form chosen by Brazil. More specifically, nothing in the Working Procedures prevents the EC from identifying a passage in Brazil’s First Submission by citing the number of the line in which it is found. The request made by the Complainant, if granted, would impose a new obligation upon the EC which it did not have at the time when it made its First Submission.
5. Admittedly, the method followed by the EC is “unprecedented”. But so was the submission by the Complainant of a document with more than 250 pages without numbered paragraphs or lines. An examination of those Panel reports where parties’ submissions have been reproduced (including submissions by Brazil) shows that the use of numbering is universal.
6. The omission of numbering cannot have been unintentional. Previous submissions by the Complainant (the Panel Request and Request for Consultations) and by Tupy (which were drafted by the same law firm) have included numbered paragraphs. The same is true of the Complainant’s Executive Summary and its request for a preliminary ruling of 20 November 2001.
7. It was completely foreseeable that the omission of numbering would cause great inconvenience to both the Panel and other parties to the dispute in identifying elements in the Complainant’s Submission. The method of citation suggested by the Complainant (e.g. “seventh paragraph of the page 236”) is quite impracticable, and it is not used even by the Complainant itself

(e.g. BFS line 5826: “Although the EC’s price undercutting methodology has been provided otherwise of this document (see Issue 13 above),”. ‘Issue 13’ covers 13 pages of the submission.)

8. Finding itself in a detrimental situation the EC reacted in a pragmatic way by adopting a non-intrusive method of identifying passages in the Complainant’s Submission. This approach was actually more appropriate than paragraph numbering given the style of the Complainant’s Submission, and could be done without affecting its structure. (Such a system is not appropriate to the EC’s submission where the average length of paragraphs is only seven lines.)

9. Having behaved at the very least negligently in placing the EC in this situation the Complainant should not now be allowed to mandate retroactively the way in which the EC could react. Still less should the Panel and the other parties be compelled to live with the difficulties gratuitously placed on them by the Complainant.

10. For the above reasons, the EC asks the Panel to reject Brazil’s request. The EC further requests that, in order to avoid the repetition of similar incidents, the Panel amend its Working Procedures in order to provide that the parties shall number the paragraphs or the lines of all their subsequent submissions.

ANNEX A-5

RESPONSE OF BRAZIL TO THE PRELIMINARY RULINGS REQUESTED BY THE EUROPEAN COMMUNITIES

(26 November 2001)

On 14 November 2001 the EC presented the First Written Submission of the EC and made a Request for a Preliminary Ruling (the EC's Request for a Preliminary Ruling).

The following is the Response of Brazil to the EC's Request for a Preliminary Ruling.

A. THE EC'S REQUEST FOR A PRELIMINARY RULING

1. The EC makes its request for preliminary rulings on the basis of a claim that the request for the establishment of a panel submitted by Brazil (WT/DS219/2, BRL-22) does not meet the requirements of Article 6.2 of the DSU. The EC alleges that a number of claims made in the First Submission of Brazil "are not raised or are inadequately defined" in the panel request and cannot therefore be considered as falling within the panel's terms of reference.¹ Moreover, the EC authorities further allege that certain claims in the First Submission of Brazil are "so vaguely defined that the EC's fundamental rights would be seriously prejudiced if they were to be entertained by the Panel".

B. WITH REGARD TO THE TERMS OF REFERENCE

2. Brazil agrees with the EC that the panel's terms of reference are important for two major reasons. First, the terms of reference establish the jurisdiction of the panel. Second, they fulfil an important due process objective.² That is why the DSB has insisted that terms of reference should meet a certain standard of clarity.

3. However, considering the list of claims alleged to fall outside the panel's terms of reference³, the EC appears to believe that Article 6.2 DSU imposes an obligation on the Applicant to set out, in the panel request, every element of each obligation it intends to invoke to make its case.

4. Brazil submits that the EC's interpretation is not only at odds with the letter of Article 6.2 of the DSU but is also incompatible with the spirit and purpose of Article 6.2 DSU.⁴

5. Brazil recalls that in *Korea - Dairy Safeguards* the Appellate Body held that the **mere listing of the articles** of the agreement on which the complaint is based may, "in the light of the attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the

¹ The EC's First Written Submission, hereafter *ECFS*, para. 23.

² *EC - Regime for the Importation, Sale and Distribution, of Bananas*, Appellate Body Report ('EC - Bananas AB Report'), WT/DS 27/AB/R, adopted 25 September 1997, para 142.

³ *ECFS*, para. 24.

⁴ In *United States - Tax treatment for "Foreign Sales Corporations"*, Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, para 166, the AB found that "the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes"; see also *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ('Thailand - H-Beams AB Report'), WT/DS122/AB/R, adopted 12 March 2001, para 97.

complaint”.⁵ In other words, the Appellate Body did not say that a “mere listing” would *necessarily* be insufficient under Article 6.2 DSU.

6. Brazil's panel request indisputably meets at least the minimum standard of clarity under Article 6.2 DSU. In fact, Brazil began its request by listing the provisions of the AD Agreement it believes the EC had violated (Articles 1 to 7, 9, 11, 12 and 15). By identifying the EC measure in cause and the WTO provisions, which it considers that the EC had violated, Brazil had made a clear statement of the “problem” in question and duly fulfilled thereby the “minimum standards” requirement of specificity as established in DSU.⁶

7. Brazil then went on to describe more precisely some of its arguments relating to the EC's initiation and conduct of the investigation, the determination of dumping and injury, the causal link between dumping and injury, the developing country status, the imposition and collection of anti-dumping duties, as well as the public notice and explanations.

8. In that part of its panel request, Brazil also refers to numerous sub-paragraphs of the Articles it believes the EC has violated. In addition, Brazil provides examples of the arguments it would put forward in its First Submission. This appears clearly, for example, in paragraph 5 of the panel request where the expressions “for example” and “for instance” are used. Brazil therefore submits that its panel request goes far beyond the mere listing of the articles of the AD Agreement which in Brazil's view have been violated by the EC.

9. Regarding certain claims allegedly not referred to in the panel request, Brazil refers *Argentina - Footwear*, where the Panel decided that a “legal act not explicitly listed in panel request but which has a direct relationship to a measure that is specifically described therein can properly be considered by the panel”.⁷

10. In other words, the requirements of Article 6.2 DSU are met if a “measure” is **subsidiary or so closely related to** a measure specifically identified, and the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the Applicant.

11. Brazil submits that the EC seems to confuse Brazil's elaboration of certain arguments in the panel request with the concrete claims which Brazil makes there. A good example is that of Article 9.3 of the AD Agreement which, according to the EC, would fall outside the terms of reference. However, the EC itself acknowledges in its First Written Submission that the Article 9.3 claim is “entirely dependent on other claims”.⁸ The EC does not contest that these “other claims” are within the terms of reference. It is therefore indisputable that the Article 9.3 claim must also fall and indeed falls within the terms of reference.

12. Moreover, Brazil contends that the EC confused the distinction between claims and arguments. As made clear by the Appellate Body,

“... there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out

⁵ *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Report (‘Korea – Dairy AB Report’), WT/DS98/AB/R, adopted 12 January 2000, para. 124.

⁶ *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, the Report of the Panel, WT/DS27/R/USA, adopted 22 May 1997, para 7.29.

⁷ *Argentina – Safeguard Measures on Imports of Footwear*, (‘Argentina – Footwear’), WT/DS/121/R, adopted 25 June 1999; para 8.35; see also *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS/44/R, adopted on 22 April 1998, para. 10.8.

⁸ ECFS, para. 132.

and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."⁹ (emphasis in the original)

Hence, while *claims* had to be "specified sufficiently in the request for the establishment of a panel in order to allow the defending party ... to know the legal basis of the complaint"¹⁰, the *arguments* in support of those claims should be set out and be refined in the course of the proceeding.

13. It is only as a matter of example that Brazil had set out some of the arguments in the panel request. There is no obligation on Brazil to lay down exhaustively all the arguments underpinning its claims as the EC seems to imply.

14. Finally, Brazil asserts that the issue of the sufficiency of a panel request depends on whether the respondent, in view of "attendant circumstances", has been misled as to what claims were in fact being asserted against it in a manner actually prejudicing its ability to defend itself.¹¹ Brazil has never intended to mislead the EC and can indeed see no valid basis for any suggestion that it has misled the EC in the way, which appears to be implied by the EC.

15. In any event, the existence of prejudice must be determined in light of the overall circumstances and considerations, "given the actual course of the panel proceedings", *i.e.* a respondent must have experienced actual prejudice in its ability to defend its interests before a mere listing or provisions would be found to be insufficient under Article 6.2 DSU.

16. Brazil submits that the EC has not demonstrated, based on supporting evidence that it has suffered any prejudice as a result of the alleged imprecision of Brazil's panel request.

17. Moreover, Brazil notes that the EC has not requested any clarification of the claims raised in the panel request prior to its claims in the EC's First Written Submission. In *Thailand - H Beams AB Report*, the Appellate Body made clear that such a request can be made by the defending party and that a line of argument according to which the respondent's rights of defence have been prejudiced must not be abused. Moreover, the Appellate Body further instructed to keep in mind that WTO Members should engage in dispute settlement procedures "in good faith in an effort to resolve the dispute".¹²

18. It is also submitted and reminded that Brazil's claims had already been raised in its request for consultations¹³ and all of them were aired during the actual consultations. The EC was therefore fully aware of Brazil's contentions and did not try to seek further explanations. Therefore, Brazil submits that the EC did not establish in any way that the alleged deficiency in the panel request prejudiced its rights of defence.¹⁴

C. WITH REGARD TO THE EC'S CLAIMS OF ALLEGED "VAGUENESS"

19. Regarding the proposal that certain claims made by Brazil are "vague", Brazil observes first that the summaries it has provided in its First Submission clearly indicate the sense of the claims (and the arguments) which it made in that Submission and these summaries in fact eliminated any risk of any "vagueness" with regard to Brazil's claims. Nonetheless, the EC seems to suggest that its right to a fair hearing "would be seriously prejudiced" if the claims were to be entertained by the Panel.¹⁵

⁹ *EC - Bananas*, para 141.

¹⁰ *Ibid.* 142.

¹¹ *Korea - Dairy Products AB Report*, para 127.

¹² *Thailand - H-Beams AB Report*, para. 97.

¹³ Document WT/DS219/1 of 9 January 2001.

¹⁴ *Korea - Dairy Products AB Report*, para 131.

¹⁵ ECFS, para. 19 *et seq.*

20. Brazil cannot accept this interpretation and submits that it is plainly unfounded. Brazil submits that, in any event, allegations such as that the claims in parties' *written submissions* are inaccurate, imprecise and/or vague, would have to be analysed by the Panel when the Panel deals with the substance of the dispute and, in general, such claims cannot be fully assessed, let alone dismissed in the framework of a preliminary ruling.

21. As already stated, Brazil agrees with the EC that the request for the establishment of a panel does have to meet a certain standard of clarity as set out in Article 6.2 of the DSU. However, claims which have been recognised as falling *within* a panel's terms of reference and are therefore properly before a panel, Brazil submits that it is for the Panel to decide, in its substantive analysis of the matter, whether the claims are or are not too vague to be accepted.¹⁶

22. As stated above, Brazil notes that it is common practice in WTO proceedings to request clarification of unclear matters from the other party. In *Thailand – H Beams AB Report* the Appellate Body held that “nothing in the DSU prevents a defending party from requesting further clarification” on the claims raised by the complaining party.¹⁷ According to the Appellate Body, one must keep in mind that Members of the WTO should engage in dispute settlement procedures “in good faith and in an effort to resolve the dispute”. Brazil notes that the EC has not attempted in any way to have any clarification of the allegedly defective claims.

23. Even if the Panel were to accept the EC's basic assumption that a preliminary ruling can be requested on the basis of such “vagueness”, Brazil recalls that it is for the EC to prove that its fundamental rights would be “seriously prejudiced” were the allegedly “vague” claims to be entertained by the Panel.

24. Finally, Brazil concurs with the EC's assertion that “the defending Member should not itself have to **identify** the provisions which it is accused of infringing”.¹⁸ However, Brazil believes that the obligations, which in its view the EC has infringed, are clearly “identified” in the First Submission of Brazil. Thus, considering the EC's definition of vagueness, which basically relates to non-identification of the legal basis of the complaint, Brazil's claims cannot be considered vague as it has clearly identified that legal basis in its First Written Submission.

25. In any event, Brazil submits that allegations relating to the alleged vagueness of the claims raised in the First Submission are to be dealt with in the substantive analysis conducted in the Panel Report rather than at the preliminary stage. If the panel were to decide otherwise, Brazil believes that its claims cannot be considered vague and that it is for the EC to prove that its rights of defence would be prejudiced were these allegedly vague claims to be entertained by the panel.

D. SPECIFIC COMMENTS WITH REGARD TO THE EC'S SPECIFIC POINTS RAISED IN ITS REQUEST FOR A PRELIMINARY RULING

(a) *With regard to the alleged vagueness*

26. With regard to the alleged vagueness of some of Brazil's claims, Brazil would like to respond, while also bearing in mind paragraph 13 of the Working Procedures of the Panel, as follows:

¹⁶ See, e.g., *United States – Measures Treating Exports Restraints as Subsidies*, Report of the Panel, WT/DS194/R, adopted 29 June 2001, para. 8.120 *et seq.*; *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Panel, WT/DS70/R, adopted 14 April 1999, para. 9.247 *et seq.*; *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Panel, WT/DS24/R, adopted 8 November 1996, para. 7.38 *et seq.*

¹⁷ *Thailand – H-Beams AB Report*, para. 97.

¹⁸ ECFS, para. 20.

27. The EC seems to suggest that,
- (i) “[c]laim at BFS line 1226, discussed at paragraph 63 below”;
 - (ii) “[c]laim at BFS line 1737, discussed at paragraph 106 below”;
 - (iii) “[c]laim at BFS line 3840, discussed at paragraph 221 below”;
 - (iv) “[c]laim at BFS line 4750, discussed at paragraph 253 below”;
 - (v) “[c]laim at BFS line 7160, discussed at paragraph 339 below”;
 - (vi) “[c]laim at BFS line 9762, discussed at paragraph 489 below”;
 - (vii) “[c]laim at BFS line 9922, discussed at paragraph 499 below”; and
 - (viii) “[a]ll the claims made under Issue 19, discussed at paragraph 515 below” are defectively vague and should be dismissed.

28. Brazil strongly disagrees in all of these instances with the EC’s allegations that the claims are vague. Regarding the “Application” (the EC’s 1st claim),¹⁹ Brazil submits, in essence, that, as the product definition in the Application was broader than the one applied in the investigation, the information provided in the Application in accordance with Article 5.2 was inaccurate and meaningless, and, hence, the Brazilian exporting producer was not able to properly defend its interests, as provided for in Article 6.2. It is to be noted that the Application and the Notice of Initiation were the only sources of information available to the Brazilian exporter until the Disclosure Preceding the Provisional Regulation. Brazil recalls that these claims were clearly presented in Brazil’s First Submission at pages 22-35.

29. Regarding the “*ex-officio* review” (the EC’s 2nd claim), Brazil is, in sum, claiming that the EC violated Article 11.2 as it has failed to self-initiate a review concerning the need for the continued imposition of the measures although, in view of the new situation after the devaluation of the Brazilian currency, such a review was warranted. Brazil recalls that this claim was clearly presented in Brazil’s First Submission at pages 35-46.

30. Regarding the “conversion of currencies” (the EC’s 3^d claim), Brazil submitted in the First Submission that the EC infringed Article 2.4.1 by not converting currencies using the rate of exchange on the date of sale. Brazil recalls that this claim was clearly presented in Brazil’s First Submission at pages 93-97.

31. Regarding the “other CN codes” (the EC’s 4th claim), Brazil is, in essence, claiming that the EC has failed to comply with the requirement of an ‘objective examination’ under Article 3.1 as it refused to investigate Tupy’s claim that the product concerned is imported under other CN codes than CN code 7307 19 10. The legal base of Brazils’ claim is clearly stated at page 115 of the First Submission.

32. Regarding the “channels of distribution” (the EC’s 5th claim), Brazil is, in essence, claiming that the EC has failed to comply with the requirement of an ‘objective examination’ provided for in Article 3.1 by stating but not examining whether the conditions of competition were similar. The legal base of Brazils’ claim is clearly stated at pages 170-171 of the First Submission.

¹⁹ Brazil notes that the EC refers to BFS line 1185.

33. Regarding the substitution (the EC's 6th claim), the legal base of this claim is clearly provided at pages 170-171 of the First Submission.

34. Regarding the difference between two variants of the product concerned (the EC's 7th claim), the legal base of this claim is clearly stated at page 235 of the First Submission.

35. Regarding the "public notice claims" (the EC's 8th claim), Brazil agrees with the EC that "these provisions are many lines in length, and contain many clauses and subclauses".²⁰ However, Brazil submits that the basic obligation, which is common to all these provisions and subclauses, is linked to one simple requirement, which is that of transparency. As held by the Panel in *EC – Bed Linen* in the same circumstances, that the requirements in Article 12.2 "all provide for transparency with respect to the decisions of which notice is being given".²¹

36. Brazil further recalls the general statement in page 240 of its First Submission that "[a]s a corollary of the substantive violation claims, Brazil also submits that the EC infringed the transparency requirements under Article 12.2 by failing adequately to explain its decisions". Moreover, it was also stated there that the EC's "public notices or separate reports do not set forth the EC's reasoning as to why it applied the relevant provisions of the AD Agreement (*via* the EC's Basic Regulation) in the way it did". Brazil also argued that "contrary to its obligations under Article 12 the EC failed to explain its choices of methodology, analysis, and conclusions on questions of fact, and failed to explain why it rejected arguments by the Brazilian exporting producer concerned." As all of Brazil's separate claims regarding Article 12 are reflecting the fact that the EC infringed the transparency obligation by not providing as the basis for the imposition of anti-dumping duties in this case duly motivated public decisions, the EC's allegation should fail.

(b) *With regard to the EC's claims of dismissal*

Article 9.3

37. The EC seems to suggest that "[c]laim (BFS line 1760) of breach of Article 9.3 (paragraph 132 below)", "[c]laim (BFS line 2350) of breach of Article 9.3 (paragraph 134 below)", "[c]laim (BFS line 2685) of breach of Article 9.3 (paragraph 178 below)", "[c]laim (BFS line 3845) of breach of Article 9.3 (paragraph 230 below)" and "[c]laim (BFS line 3970) of breach of Article 9.3 (paragraph 248 below)" were not covered by the panel request.

38. Brazil rejects the EC's suggestion that these claims were not covered by the panel request and that they should be dismissed. Brazil listed, *inter alia*, Article 9 ('*Imposition and Collection of Anti-Dumping Duties*') on the basis of which Brazil contested the EC's actions. Brazil has, thus, by identifying the WTO provision which it claims that the EC had violated (Article 9), constituted a clear statement of the "problem" in question. Moreover, as also held for example by the Panel (*Thailand – H-Beams*), "the nature and underlying AD investigation that led to the imposition of the challenged measures, make certain paragraphs" of the provision of the AD Agreement concerned (which has not been specified in the panel request) "logically and necessarily"²² relevant or applicable (or, as the case may be, irrelevant or inapplicable in the dispute). This is particularly so where, as further discussed below, the AD Agreement's provision in question in fact follows automatically from the application of other AD Agreement's provisions which are specifically mentioned in the panel request.

39. In addition, Article 9.3 is a general provision obliging Members not to impose anti-dumping measures above the margin of dumping "as established under Article 2". As pointed out in

²⁰ ECFS, para 515.

²¹ *European Communities – Anti-dumping duties on imports of cotton-type bed linen from India*, WT/DS141/R, adopted on 30 October 2000, para 6.260.

²² All citations refer to para 7.21 in that Panel Report.

paragraph 11 above, the EC itself acknowledges (paragraphs 132, 134, 178, 230 and 248) that Brazil's claims based on Article 9.3 are "entirely dependant on other claims" and the EC does not contest that these other claims are within the terms of reference. As a finding of violation of Article 9.3 *automatically* follows from the inconsistencies with the other Articles of the AD Agreement, Brazil submits that there cannot be any additional obligation whatsoever to mention the said article specifically in the panel request.

40. Brazil, therefore, submits that the EC's request should be rejected.

Article 5.2

41. The EC suggests that "[c]laim (BFS line 1185) of breach of Article 5.2 on the basis that products covered in the investigation must be identical with those described in the application (paragraph 52 below)" and "[c]laim (BFS line 1228) of breach of Article 5.2 on the grounds that the Application did not include a complete list of known importers (paragraph 69 below)" should be dismissed.

42. Regarding the latter claim, Brazil observes that the EC is cross-referring to "paragraph 67 below". Although the EC stated in paragraph 20 of the ECFS that "the defending Member should not itself have to identify the provisions which it is accused of infringing", Brazil has, in a spirit of co-operation, identified that the correct reference might be paragraph 66.

43. Brazil rejects the EC's suggestion that Brazil has failed to clearly identify these "claims" under Article 5 of the panel request. The opening part of the panel request states, *inter alia*, that "Brazil believes that the initiation of the Investigation, ... by the EC are actions which are inconsistent with the following provisions of the AD Agreement and of the GATT 1994". Brazil also indicated that its claims of violation of Article 5 concerned "especially (but not exclusively)" Article 5.2. Brazil also briefly summarised in paragraph 5 that the EC "did not discharge its obligations under Article 5 in that (for example) the application did not contain a complete description of the volume and value of domestic production of the like product accounted for by the applicants (Article 5.2(i))". The expression 'for example' shows that Brazil did not intend to be exhaustive but rather to exemplify certain aspects of the Application and, on the basis of that Application, the subsequent initiation of the investigation by the EC, was not in line with the requirements of Article 5. Moreover, the issue of the initiation of the investigation was raised during the consultations between Brazil and the EC.

44. As in its First Submission, Brazil indicated that its claims of violation of Article 5 of the AD Agreement fell under Articles 5.2 and 5.3 and given that not only both Articles were mentioned but also "a brief summary of the legal basis was provided" in the panel request, Brazil, therefore, submits that the panel request goes far beyond the mere listing of Article 5 alleged to have been violated by the EC.

Article 6.2

45. The EC proposes that "[c]laim (BFS line 1226) that the supposed difference between the product scope of the Application and of the investigation precluded Tupy from being able to properly defend its interests in violation of Article 6.2 (paragraph 67 below)" are out of the terms of reference.

46. Brazil notes, in a spirit of co-operation, that the correct reference is probably paragraph 63.

47. Brazil does not agree to exclude this claim. In the panel request, Brazil refers not only to Article 6 but also to the specific sub-paragraph 6.2 under which its claims of violation fall. Brazil also pointed out in paragraph 8 of its panel request that the EC "failed to discharge its obligations under Article 6 in that, *inter alia*, it failed to satisfy...and thereby also denied Tupy the full opportunity for the defence of its interests in these among other respects (Article 6.2)" (emphasis

added). Moreover, Brazil submits that Articles 5.2 and 6.2 are inherently inter-linked, i.e. if the product definition in the Application was broader than the one applied in the investigation, the information provided in the Application was inaccurate and meaningless and, consequently, the Brazilian exporting producer was not able to properly defend its interests, as provided for in Article 6.2. Finally, the issue of the initiation of the investigation and the issue of evidence were raised during the consultations between Brazil and the EC.

48. As in its First Submission, Brazil indicated that the EC's course of action precluded Tupy from being able to properly defend its interest in violation of Article 6.2 and given that Article 6.2 and "a brief summary of the legal basis" were provided in the panel request, Brazil, submits that the panel request goes far beyond the mere listing of Article 6 alleged to have been violated by the EC.

Article 2.2.2

49. The EC advocates that "[c]laim (BFS line 2233) of infringement of Article 2.2.2 because of use of different criteria for the calculation of SG&A costs and of profits (paragraph 121 below)" should be dismissed.

50. Brazil does not agree with the EC. Article 2 and the specific sub-paragraph 2.2 under which Brazil's claims of violation fall, were listed in the panel request. Brazil also briefly pointed out in paragraph 17 of its panel request the manner in which the EC constructed normal values for certain types of the investigated product breached the requirements of Article 2.2. As the issue of 'construction of normal values' was specified, also the issue raised by the EC, which *automatically* follows from the inconsistencies with Article 2.2, was covered. Moreover, the issue of the initiation of the investigation was raised during the consultations between Brazil and the EC.

51. Consequently, Brazil has by identifying the above made a clear statement of the "problem" in question.

Article 6.13

52. The EC suggests that "[c]laim (BFS line 3821) of breach of Article 6.13 (paragraph 220 below)" was not covered by the panel request.

53. In the said paragraph 220 the EC is suggesting that "Brazil presents no evidence in support of this claim". However, given that the EC's claim is "untimely" at this stage of the dispute proceeding, and not related to whether Brazil's claim was covered by the panel request, Brazil requests the Panel to dismiss the EC's suggestion.

The Accuracy of information

54. The EC proposes that "[c]laim (BFS line 4750) that the EC authorities failed to satisfy themselves as to the accuracy of information in the Application (paragraph 253 below)" is outside the panel request.

55. Under this claim the EC is referring to "paragraph 253 below". However, in that paragraph the EC states that "Brazil also argues (BFS line 4750) that the volume of imports was not properly established because the EC authorities failed to satisfy themselves as to the accuracy of the information submitted by Tupy regarding imports under other CN codes. This is a new claim not mentioned in the Panel Request and should be rejected by the Panel as outside its terms of reference (paragraph 23 above)."

56. Although Brazil has, in a spirit of co-operation, tried to understand, how the EC's claim of dismissal and the reasons stated in paragraph 253 are interlinked, Brazil is unable to see any relation

between that claim and the reasoning. Consequently, Brazil requests the Panel to dismiss the EC's proposal.

57. However, for the sake of transparency, Brazil would like to point out that both Articles 3 and the specific sub-paragraphs 3.1 and 3.2 under which its claim of violation fell were listed in the panel request. Moreover, in paragraph 26 of the panel request Brazil argued that “[t]he EC did not consider whether there had been a significant increase in dumped imports from Brazil either in absolute terms or relative to production or consumption in the EC”. Given that Brazil's claim, which the EC would like to have dismissed, relates to ‘the volume of imports’, the claim is covered by paragraph 26 of the panel request.

Article 3.2

58. The EC argues that “[c]laim (BFS line 5294) of infringement of Article 3.2 because the consideration of significant undercutting was confined to products that had matching EC products (paragraph 272 below)” is not covered by Brazil's panel request.

59. Brazil disagrees. The panel request refers not only to Article 3 but also to the specific sub-paragraph 3.2 under which its claims of violation fall in the panel request. Brazil also pointed out in paragraph 27 of its panel request that “[t]he EC did not discharge its obligations under Article 3.1 and 3.2 in that it did not, *inter alia*, consider (with a basis of positive evidence) the effect of the allegedly dumped imports on prices, ...” (emphasis added). Brazil is arguing that the EC's consideration in the context of price undercutting under Article 3.2 did not relate to the “*dumped imports*”. Consequently, Brazil submits that all aspects of the price undercutting and underselling determinations, whether ‘zeroing’ or ‘matching’ were covered by the panel request. Brazil also submits that the stated “claim” is in fact an argument supporting the claim relating to the notion of “the price effect”. Finally, the expression ‘*inter alia*’ shows that Brazil does not aim at being exhaustive but rather exemplifying that certain aspects of the price comparison were not in line with Article 3.

Articles 6.2 and 6.9

60. The EC alleges that “[c]laims (BFS line 7210) under Articles 6.2 and 6.9 in connection with Issue 16 (paragraph 347 below)” and “[c]laim (BFS line 9160) regarding Articles 6.2 and 6.9 (paragraph 446 below)” were not covered by the panel request.

61. Regarding the first claim, Brazil submits that in paragraph 347 the EC provides argumentation, which is totally unconnected to Articles 6.2 and 6.9. Also here, Brazil has, in a spirit of co-operation, identified that the correct reference is probably paragraph 343.

62. Brazil strongly disagrees with the demand to exclude this claim. In essence, Brazil submits that by not disclosing the EC producers' purchases and exports the EC precluded the Brazilian exporter from being able to verify the consistency of the data used in violation of, *inter alia*, Articles 6.2 and 6.9.

63. As stated above, Brazil refers in the panel request not only to Article 6 but also to the specific sub-paragraph 6.2 under which its claims of violation fall. Brazil also pointed out that in paragraph 8 of the panel request that the EC “failed to discharge its obligations under Article 6 in that, inter alia, it failed to satisfy...and thereby also denied Tupy the full opportunity for the defence of its interests in these among other respects (Article 6.2)” (emphasis added). Moreover, Brazil submits that Articles 6.2 and 6.9 are inter-linked, namely the first sentence of the former provides an important due process obligation and the latter is an important application of this obligation in the context of final determination. In essence, how would interested parties have a full opportunity for the defence of their interests if an investigative authority were not disclosing the essential facts under consideration

before the imposition of the definitive measures? Consequently, Brazil submits that both of the Articles were covered by the panel request and the EC's proposal of dismissal should be rejected.

Article 3.4

64. The EC suggests that “[c]laims regarding the examination of specific injury factors listed in Article 3.4 (paragraph 350 below), including in particular the claim (BFS line 7909) of inadequate consideration of ‘factors affecting domestic prices’ in breach of Article 3.4 (paragraph 371 below)” should be dismissed. Regarding the latter claim, Brazil notes that the correct reference is probably paragraph 372.

65. Brazil rejects the EC's suggestion. Brazil refers in the panel request to Articles 3 and 3.1 as well as Article 3.4. Moreover, the claims were clearly covered by paragraph 29 of the panel request. Brazil also submits that the stated “claim” is one of several arguments interpreting the obligation of the examination of injury factors listed in Article 3.4. Brazil submits, thus, that the EC's proposal should be rejected.

Article 3.5

66. The EC suggests that “[c]laim (BFS line 9008) of violation of Article 3.5 based on the ‘comparative advantage’ of Tupy (paragraph 432 below)” and also that “[c]laim (BFS line 9922) of breach of Article 3.5 based on the differences between ‘black heart’ and ‘white heart’ fittings (paragraph 500 below)” were not identified in the panel request and should be dismissed.

67. Brazil rejects the EC's suggestion that these claims should be dismissed. Firstly, Brazil identified both Articles 3, 3.1 and 3.5 under which its claims of violations fall in the panel request. Moreover, paragraph 30 of the panel request clearly mentions that “[t]he EC did not ensure that injury caused to the domestic EC industry...was not attributed to imports of the product concerned from Brazil”. Consequently, by claiming that the EC violated Articles 3.1 and 3.5 by attributing the injury caused by factors other than the allegedly dumped imports to the allegedly dumped imports, is just a reformulation of paragraph 30 of the panel request. Moreover, the issue of difference in the cost of production was raised before the EC by the Brazilian exporter in the actual course of the anti-dumping investigation. Brazil also submits that the stated “claims” are in fact arguments supporting the claim relating to the notion of causation. Therefore, the EC's request should fail.

Article 6.6

68. The EC suggests that “[c]laim (BFS line 9338) regarding Article 6.6 (paragraph 448 below)” should be dismissed.

69. Brazil strongly disagrees and requests the Panel reject the EC's suggestion. As Articles 6 and 6.6 were listed in the panel request, Brazil has made a clear statement of the “problem” in question. Moreover, Brazil stated in paragraph 8 of its panel request that “[t]he EC failed to discharge its obligations under Article 6 in that, *inter alia*, it failed to satisfy itself as to the accuracy of certain information submitted to it by Tupy in connection with ... the importation of the product concerned by domestic EC producers from countries not subject to the Investigation... (Article 6.6)”. Consequently, the imports from Poland were covered by the panel request. Finally, as the EC states, the issue of imports from Poland was raised before the EC by the Brazilian exporter in the actual course of the underlying anti-dumping investigation.

Article 12

70. Finally, the EC alleges that “[c]laim (BFS line 10158) of breach of Articles 12.2 and 12.2.2 (paragraph 520 below)”, “[c]laims (BFS line 10165) of failure to provide information under

Article 12.1 (paragraph 522 below)”, “[c]laim (BFS line 10235) regarding disclosure and Article 12 (paragraph 529 below)”, “[c]laim (BFS line 10265) of breach of Articles 12.2 and 12.2.2 (paragraph 532 below)”, “[c]laim (BFS line 10414) of breach of Articles 12.2 and 12.2.2 (paragraph 544 below)” and “[c]laim (BFS line 10470) of breach of Articles 12.2 and 12.2.2 (paragraph 550 below)” were out of the panel request.

71. Brazil rejects the suggestion of the EC that Brazil has failed clearly to identify “claims” under Article 12 in the panel request. By identifying Article 12 (‘Public Notice and Explanation of Determination’) and the specific sub-paragraph 12.2 under which certain claims of violations fall in the panel request, Brazil has made a clear statement of the “problems” in question. For the sake of transparency, Brazil also emphasises that the problems were summarised in paragraphs 11 to 15 and 36 of the panel request.

72. In addition, Brazil submits that Article 12.1 is a general provision laying down notification and public notice requirements of an initiation of an investigation. More specifically, Article 12.1.1 requires that “[a] public notice of the initiation of an investigation shall contain, ...adequate information of the following: (i)...the product involved;...(iv) a summary of the factors on which the allegation of injury is based;...”. As Brazil is claiming that the initiation of the investigation by the EC infringes Article 5, a finding of violation of Article 12.1 follows from those inconsistencies with Article 5.2. Consequently, Brazil submits that there cannot be any additional obligation whatsoever to mention the said sub-paragraph specifically in the panel request.

73. Finally, Brazil observes that the EC has not shown in any way if, and if so how the EC interests were prejudiced in this case by any of the “omissions” the EC attributes to Brazil. In the absence of such prejudice Brazil considers that the EC claims are without merit and must therefore be rejected.

E. BRAZIL’S REQUEST

74. In view of the foregoing, Brazil respectfully requests that the Panel,

- (i) reject for being unfounded the EC’s request for a preliminary ruling alleging that claims in Brazil’s First Written Submission have not been properly covered by its request for the establishment of a panel (WT/DS219/2, BRL-22);
- (ii) reject for being unfounded the EC’s request for a preliminary ruling alleging that claims in Brazil’s First Written Submission are vague.

Alternatively, in case the Panel would consider that any of the above-mentioned requests might have some merit, Brazil would request that any final decision on that would only be made once the full scope, substance and all the merits of this dispute have been properly and conclusively assessed.