

ANNEX C

Second Submissions by the Parties

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ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF BRAZIL

1. This document is a brief executive summary of the main claims and arguments raised in Brazil's Second Submission, in line with the Working Procedures for the Panel.
2. Brazil reaffirms its previous statements regarding the background to this case, which is an integral part of Brazil's claims concerning the EC's establishment and evaluation of the facts of this case.
3. Brazil submits that the EC acted inconsistently with its obligations under the first sentence of Article 15 of the AD Agreement by failing to give special regard to the special situation of Brazil as a developing country Member. Furthermore, the EC's authorities could not have complied with its obligations under the second sentence of Article 15 unless they had given the Brazilian exporting producer notice or information concerning the possibility of an undertaking. As the EC has never 'suggested or tried to engage in any negotiations or discussions' concerning a possible undertaking with the Brazilian exporter, the EC failed to explore the possibilities of constructive remedies and, thereby, infringed the second sentence of Article 15.
4. The EC provided with its First Submission a copy of the confidential version of the Application. Given that Brazil's claims were based on the non-confidential version, Brazil withdraws its claims regarding the Application.
5. The Brazilian currency was significantly devalued in January 1999. As there was no need to impose measures on the Brazilian imports to offset dumping, which did not exist after the devaluation, the EC imposed an anti-dumping duty under circumstances *other* than those provided in Article VI:1 of the GATT 1994 and Article 1 of the AD Agreement. Alternatively, the EC violated its obligations under Article 11.1 of the AD Agreement by maintaining the duty at the time and to the extent where it was not necessary to counteract present dumping. The EC also failed to abide by Article 11.2 of the AD Agreement by failing to self-initiate an immediate review after the imposition of the measure to assess the need for the anti-dumping duty in view of the new situation after the devaluation of the Brazilian currency.
6. The manner in which the EC constructed normal values for certain types of the product concerned breached the requirements of the AD Agreement. The exact wording of Article 2.2.2 read together with Article 2.6 makes it clear that where an identical product exists, data relating to its SG&A costs and profits shall be used. Only 'in the absence of such a product', an interpretation that is supported by the word '*or*' in Article 2.6, may data relating to SG&A costs and profits of a product with closely resembling characteristics be used. This interpretation also applies in cases where the investigating authority *subdivides* the product concerned into product types. Moreover, in case the investigating authority excludes the data under Article 2.2, it follows as a matter of construction that the same data should be excluded under Article 2.2.2. Consequently, although identical product types of the like product exist, the EC violated Article 2.2.2 by including actual data relating to SG&A costs and profits of non-identical product types.
7. Moreover, the EC infringed Article 2.2.2 by including in the amounts for SG&A and for profits used in the establishment of constructed normal values actual data pertaining to production and

sales of product types of the like product, for which domestic sales were *not* representative within the meaning of Article 2.2 and footnote 2 thereto. The EC also failed to ensure a fair comparison, as no adjustment was made for the use of data relating to sales, which do not permit a proper comparison, therefore infringing Article 2.4.

8. Regarding a fair comparison between the normal value and the export price, the following claims are submitted. Firstly, the EC acted inconsistently with its obligations under Article VI:4 of the GATT 1994 by not neutralising or not neutralising fully the identified differences in indirect taxation, *i.e.* the effects of the IPI Premium Credit and PIS/COFINS respectively. Brazil also denies any reduction of the AD Agreement to the SCM Agreement. Secondly, Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement oblige an *investigating authority* to ensure that a fair comparison between the normal value and the export price of the product concerned is undertaken. Consequently, the EC violated Article VI:1 of the GATT 1994 and Article 2.4 of the AD Agreement by failing to fulfil the requirement of a fair comparison between the normal value and the export price by denying allowances or a full allowance for differences in *indirect taxation* (the IPI Premium Credit and PIS/COFINS) and in *packing costs* between domestic and export sales although these differences affected price comparability.

9. Moreover, the EC's quantification of the allowance for PIS/COFINS was arbitrary, manipulative and punitive in violation of Article 2.4. The EC also acted inconsistently with its obligations under Article 2.4 by not indicating to the Brazilian exporter what additional information with regard to the IPI Premium Credit and packing costs were necessary to ensure a fair comparison. Finally, the EC violated Article 2.4 by imposing an unreasonable burden of proof upon the Brazilian exporter to demonstrate the justification of the Brazilian tax law concerned and the direct allocation of packing materials and the working time spent for both domestic and exported fittings.

10. As the EC has in its First Submission provided information that the domestic price level used to determine normal values does not include advertising expenses, Brazil withdraws its claims regarding advertisement and promotional expenses under Article 2.4.

11. The EC violated Article 2.4.1 by using the exchange rates on the date of sale for the export transaction values but not for the allowances deducted from the export price. The EC also failed to abide by its obligations under Article 2.4 by using the exchange rates selectively and by increasing the nominal values of allowances deducted from the export prices.

12. The EC acted inconsistently with Article 2.4.2 in establishing the existence of margins of dumping by "zeroing" the negative dumping margins. The EC's method of comparison was also inherently unfair in violation of Article 2.4.

13. The EC's import volume consideration under Article 3.2 did not involve an "objective examination" and was not based on "positive evidence". Indeed, the EC just stated that the Brazilian import volumes were "always significant" and the market share was "far from negligible" but did not consider whether the dumped imports from Brazil had increased significantly.

14. With regard to the price comparison between the export prices and the domestic prices under Article 3.2, the EC's consideration did not involve an "objective examination" and was not based on "positive evidence" as it disregarded the "negative" undercutting margins from the calculation (*i.e.* "zeroing"). In addition, the calculation was not based on the "dumped imports", but just on some types of the product concerned (*i.e.* "matching models"). The EC's methodology amounts to manipulation of the prices of the Brazilian exported product types and thus the EC's price effect consideration was not based on "positive evidence". The price comparison was also manipulative given that the EC artificially "compelled" the product concerned and the like product to be comparable. Moreover, the EC had an opportunity to compare the Brazilian product types identical to

those produced and sold in the domestic market by the EC producers. However, the EC opted to conduct a price comparison of 'black with white', without making the warranted adjustments in order to ensure price comparability. Finally, the EC's conclusions that "the only differences [between black and white heart fittings] are due to higher energy use" and that this difference is "not significant" as well as that "there is no difference in market perception distinguishing between white heart fittings and black heart fittings" were not supported by the facts and thus were not based on "positive evidence".

15. The manner in which the EC addressed the issue of cumulation in this case breaches the requirements of Articles 3.1 and 3.3. Firstly, the EC by reversing the burden of proof and by assuming in favour of cumulative assessment acted inconsistently with its obligations under Articles 3.1 and 3.3 to determine, on the basis of "positive evidence" and after an "objective examination", that the cumulative assessment of the effects of the dumped imports was appropriate. Secondly the EC did not identify, on the basis of "positive evidence" and after an "objective examination", that the dumped imports *per* each importing Member under investigation had the effects, which it then may assess cumulatively. Indeed, the EC's approach is not a cumulative assessment of the effects of the dumped imports as required by Article 3.3 but just a cumulation of imports. Thirdly, the EC's determination of the conditions of competition under Article 3.3 is meaningless as the focus of the EC's determination is on the similarities (and not on the dissimilarities) of the conditions of competition between the dumped imports themselves and between the dumped imports and the like domestic product. However, these similarities are just logical consequences of the EC's definitions of "the product concerned" and "the like product", which are by definition in some kind of competition with each other. Fourthly, the EC failed to address, on the basis of "positive evidence" and after an "objective examination", dissimilarities in the conditions of competition like the differences in the product concerned, the trends of import volumes, the price trends, the level of trade and the market segmentation. Finally, although the EC stated that "both the Community product and the product imported from the countries concerned have been found to have common or similar channels of distribution", there are strong indications that the EC's conclusion was not based on "positive evidence".

16. The EC's injury examination is not consistent with the requirements in the AD Agreement. The EC provided new documentation (Exhibit EC-12) in the course of a dispute settlement proceeding suggesting that it had examined all of the injury factors with the exception of "growth". However, this document is not part of the non-confidential file and there are mutually supportive indications that neither was it part of the confidential file. Exhibit EC-12 is, therefore, not part of the EC's record and should not be considered by the Panel. Indeed, the consequences of the EC's approach, if accepted, would entirely undermine the due process and transparency obligations of the AD Agreement and lead to proliferation of disputes under the DSU. Consequently, as Exhibit EC-12 is not properly before the Panel, the EC failed to analyse all of the fifteen mandatory injury factors under Article 3.4. In any case, the EC did not examine "factors affecting domestic prices" and the issue of "growth".

17. With regard to the content of Exhibit EC-12, the domestic industry was not requested to provide information regarding 'return on investments', 'wages', 'cash flow' and 'ability to raise capital' and the like product specific data was not available to the EC. Consequently, the EC's alleged examination of these mandatory injury factors was not based on positive evidence. Furthermore, the alleged examination is not a well-reasoned and meaningful analysis of the state of the domestic industry and does not provide a persuasive explanation of how the evaluation led to the determination of injury. Finally, as the EC neither disclosed nor published its examination regarding all of the fifteen injury factors, the Brazilian exporter did not have an opportunity to respond, in violation of Article 6.2, or timely opportunities to see all relevant information, in violation of Article 6.4.

18. Regarding the injury examination disclosed *before* the dispute settlement proceeding, the EC's injury findings were demonstratively based on manifestly incorrect data and, thus, the facts concerning the consequential impact of the dumped imports on the EC industry were not based on "positive evidence". Secondly, as the injury factors show divergent trends, the EC violated Article 3.4 by failing to provide a thorough and persuasive explanation as to whether and how "positive movements" of certain injury indicators were outweighed by other injury factors moving allegedly in opposite directions. Thirdly, as the examination of certain injury factors was an end-point-to-end-point analysis, the EC failed to put the data in context and to assess such data regarding their internal evolution and *vis-à-vis* other factors analysed. Fourthly, the EC did not properly examine the issue of outsourcing and did not examine at all the domestic industry's export performance, a relevant economic factor having a bearing on the state of the EC industry. Moreover, the EC's conclusions regarding price sensitivity, profitability, investments and inventories were not based on "positive evidence" and the examination was not even-handed (*i.e.* "objective"). Finally, by not disclosing the figures related to the EC producers' exports, the EC did not provide the Brazilian exporter either a full opportunity to defend itself, in violation of Article 6.2, or timely opportunities to see all relevant information, in violation of Article 6.4.

19. With regard to causation, the EC infringed the non-attribution requirement in Article 3.5 by allocating the total injury over the allegedly dumped imports although at least part of this injury was caused by the effects of the other known factors (the decreased consumption and substitution; the EC producers' own imports and outsourcing, including from related foreign suppliers; poor export performance; and imports from countries not subject to the investigation). The EC violated Article 3.5 by just *assuming* that these other known factors did not "break the causal link" between the dumped imports and the injury allegedly suffered by the domestic industry. The EC also failed to separate and distinguish the effects of the competitive advantage of the Brazilian exporter, the injurious effects of the EC industry's known price increases and the issue of the cost difference between the two variants of the product concerned. Thus, the injury caused by these known factors was attributed to the dumped imports in violation of Article 3.5. Moreover, the following conclusions of the EC were not based on "positive evidence": (i) the imports from Poland had not caused any injury to the domestic industry; (ii) the EC industry "began to suffer a continuous decline of its sales volume" between 1996 and the IP; and (iii) the EC industry's profitability "turned negative after 1996". Finally, by not properly examining the issues of self-inflicted injury, substitution and the cost difference and the difference in market perception between the two variants of the product concerned, the EC's examination was not "objective" and its conclusions were not based on "positive evidence". Indeed, the EC just lumped the injurious effects of the allegedly dumped imports and the injurious effects of these other known factors together in violation of Article 3.5.

20. Although the EC explicitly referred to the exchange rates as "the daily exchange rates as collected during the on-the-spot verification", the EC's conversion of currencies with regard to allowances was not based on these tables. Therefore, the Brazilian exporter was deprived of an opportunity of having sight of the evidential basis behind the conversion rates applied by the EC in violation of Article 6.4

21. By not making public its findings and conclusions with regard to the exploration of possibilities of constructive remedies under Article 15, to all of the mandatory injury factors under Article 3.4 and to the EC producers' export performance, the EC violated Articles 12.2 and 12.2.2.

22. Brazil respectfully requests that the Panel find that the EC acted inconsistently with Article VI of the GATT 1994 and the AD Agreement, recommend that the EC brings its measures into conformity with Article VI of the GATT 1994 and the AD Agreement, and suggest that the EC immediately repeal the Decision imposing definitive anti-dumping duties and refund anti-dumping duties collected thus far.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

14 May 2002

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1. Introduction

1. The European Communities (hereafter 'the EC') welcomes this opportunity to make a second written Submission in the case brought by Brazil against the imposition of definitive anti-dumping measures by the EC on imports of malleable cast iron tube or pipe fittings originating in Brazil.

2. The primary purpose of this Submission is to refute the claims and arguments that Brazil has made in its Oral Statement to the Panel in so far as they go beyond the scope of Brazil's First Submission.

3. For the purposes of the EC's defence certain documents are presented which contain information that for one reason or another is confidential. The relevant documents are marked as such in the Annex at the end of this Submission, and the EC designates them as confidential in accordance with Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter 'the DSU') and Paragraph 3 of the Working Procedures of the Panel.

2. General

2.1 Article 15

4. In its First Submission Brazil claimed that the EC had infringed the obligation in the second sentence of Article 15 and as a consequence had failed to give special regard to the special situation of a developing country Member, as specified in the first sentence. In its Oral Statement Brazil seems to

go a step further by claiming that ‘There is nothing in the records of this case that suggests that the EC did anything special or out of the ordinary for Brazil as a developing country Member that it would not have done to any other WTO Member’.¹ For a legal analysis of Article 15 the EC refers the Panel to the answer given by the EC to the first of the Questions addressed to parties by the Panel. As to the facts, the EC has also explained in its first Submission the considerable steps that it took to raise the possibility of Tupy giving an undertaking.² These steps went well beyond the EC’s normal practice in anti-dumping investigations. Consequently, even if the first sentence imposes an obligation on Members, which the EC contests, the EC has fully respected it.

5. Brazil has again denied that the EC explored the possibilities of ‘constructive remedies’, as specified in the second sentence of Article 15.³ As the EC has shown in its First Submission⁴, in the course of discussions with Brazilian officials the EC several times raised the possibility of Tupy offering an undertaking. In its Oral Statement⁵ Brazil chose to pretend that when the EC said that it had ‘pursued the matter vigorously’ the ‘matter’ in question was the anti-dumping action against Tupy. As the context makes quite clear, the ‘matter’ to which the EC was referring in its Submission was the possibility of Tupy offering an undertaking as a way of bringing the anti-dumping investigation to a mutually satisfactory conclusion. That it was the EC and not Brazil that raised this matter, and on several occasions, cannot be doubted.

6. Brazil argues that, in order to satisfy Article 15, the possibility of undertakings should have been raised directly with Tupy.⁶ However, one of the unusual features of this investigation was the obvious close involvement of the Brazilian government on Tupy’s behalf. A Brazilian official was present throughout the on-the-spot verification in September 1999. Furthermore, Brazilian officials and diplomatic representatives in Brussels actively promoted Tupy’s interests. In December 1999 the Brazilian Ambassador sent to Mr Lamy, the EC Commissioner, a copy of the submission that Tupy had recently presented to the investigators.⁷ Further letters to Commission officials followed this in January and February 2000, and it is evident that Brazil’s diplomatic representatives had a detailed appreciation of issues in the investigation.⁸ A Brazilian official was present at the hearing given to Tupy by Commission officials in Brussels in December 1999. Thus the EC had every reason to believe that in speaking to these officials it was speaking to Tupy.

7. Also in the context of Article 15, Brazil asserts that the EC is not entitled to determine what is an essential interest of Brazil, and in effect claims that right for itself.⁹ However, to interpret the provision so as to give either party the right to determine unilaterally and conclusively whether the condition had been fulfilled would be to render it redundant. Brazil argues that the fact that the investigation was raised in high-level discussions itself indicates that it concerned an essential interest, but to accept that would also be to render the assessment purely subjective. An exporting Member could convert any issue into an essential interest merely by making a fuss. Nor does it appear that Brazil actually made such a claim during the discussions.

8. Brazil presents little in the way of objective criteria to support its contention. Firstly, it states that the ‘steel, metals and machinery sectors form part of its essential interests’. Secondly, it claims

¹ Brazil Oral Statement, para. 20.

² EC first Submission, paras. 38 et seq.

³ Brazil Oral Statement, paras. 21 et seq.

⁴ Paras. 38 et seq.

⁵ Para. 23.

⁶ Brazil Oral Statement, para. 25.

⁷ Exhibit EC-27.

⁸ Letter from Ambassador to DG Trade, 29 Jan. 2000, Exhibit EC-28; Letter from Ambassador to DG Trade, 23 February 2000, Exhibit EC-29.

⁹ Brazil Oral Statement, at para. 29.

that 'Tupy is the only fittings producer in Brazil, and by far the largest in South America'. The first statement is bald assertion, the second is both *ex post facto* and irrelevant. Anti-dumping investigations necessarily cover all the exporters of the product in the exporting country, however many there are, and in many cases these will constitute all the producers in the country. That fact cannot in itself convert those producers into an essential interest. Nor can the fact that a producer is the largest in the continent.

2.2 Devaluation

9. Contrary to Brazil's assertion¹⁰, the EC authorities' decisions have never been based on the view that Brazil's devaluation was 'a mere currency fluctuation'. Rather, the EC has taken the view¹¹ that the implications of the devaluation for Tupy's dumping margin would depend on pricing decisions made by Tupy. It was by no means a foregone conclusion that the devaluation would result in a reduction of the dumping margin. Tupy could have taken advantage of the devaluation by lowering its export prices (in foreign currency terms), so that, without reducing its proceeds per unit sale (in home currency terms), it could attract additional buyers. Alternatively, it could have maintained the same export prices and thereby increased its proceeds per sale. Or Tupy could have adopted a pricing strategy that lay between these extremes. The EC had no way of knowing which strategy Tupy might adopt, and of course that strategy might change. Brazil refers¹² to the data from the post-devaluation part of the investigation period which were already in the EC's hands. However, prices in this period could be expected to reflect price-lists and quotations made some time previously, and could not be taken as an indication of Tupy's long-term reaction to the devaluation.

10. Brazil raises the question of a review.¹³ As explained in its answers to the Panel's questions¹⁴, at the request of another exporter, the EC has opened a review of the anti-dumping duties that are the subject of this dispute¹⁵. Since the review covers the period 1 January 2001 to 30 September 2001, it would have provided an opportunity for Tupy to substantiate its claims that dumping ceased as a result of the devaluation. Significantly, however, Tupy has decided not to co-operate in the review.

2.3 Dumping

11. While referring to its previous claims regarding dumping Brazil speaks of 'the overall pattern of bias displayed by the authorities in the investigation'. This is not an accusation that Brazil has previously made regarding the EC investigation. No evidence is provided to support it, and the EC strongly refutes it.

2.4 'Outsourcing' and related issues

12. Brazil has placed considerable reliance on claims relating to 'outsourcing' of production by EC producers. In other words, rather than produce themselves, it is alleged that they arranged to have fittings manufactured in third countries and exported to the EC. The EC has explained how these relationships were investigated and found to amount to little consequence. Brazil has evidently persuaded itself of the contrary, and seeks by repetition to persuade the Panel, in the apparent belief that repeated assertion is itself a form of evidence.

¹⁰ Brazil Oral Statement, para. 36.

¹¹ EC first Submission, para. 102.

¹² Brazil Oral Statement, para. 40.

¹³ Brazil Oral Statement, para. 38.

¹⁴ Questions 143, 144.

¹⁵ EC Official Journal, C/342/5, 5, 5 December 2001, Exhibit EC – 26.

13. In its Oral Statement Brazil makes various observations about the relationship between a Community producer and an exporter in Bulgaria. The EC investigators looked at this relationship in the course of their enquiries. Their conclusions were published in the Provisional Regulation, and the relevant provisions are quoted in the EC's First Submission.¹⁶ The names of the firms involved were not mentioned for reasons of confidentiality. The new documents now presented by Brazil are both inadmissible (because of Article 17.5(i) AD), and pointless (since they merely confirm a relationship which was already well-known to the EC). They leave unaffected the EC's conclusion as to the significance (or lack of it) of imports from Bulgaria.

14. Brazil again alleges¹⁷ that other EC producers had significant outsourcing arrangements and accuses the EC of failing to investigate them. The EC did investigate these allegations and the results of its enquiries are reported in the Provisional and Definitive Regulations.¹⁸

15. Such is Brazil's concentration on 'outsourcing' and the links between domestic firms and producers in third countries that one would think that the topic constituted a distinct element of the definition of injurious dumping. Brazil speaks of 'a proper comprehension of the market situation, of the positioning of the different competitors in the market concerned, and of the evolving nature of the EC industry and of the EC market'.¹⁹

16. However, the Anti-Dumping Agreement is drawn in much more precise terms, and it is in these terms that Brazil must prove its case. In its first Submission, if not in the Oral Statement, Brazil pursued these matters in order to challenge the EC's findings regarding the causes of injury to the domestic industry. However, it has nowhere explained how, even had they existed, such outsourcing arrangements could of themselves have affected the findings on causation.

17. Tupy's argument seems not to have concerned the investment implications of such outsourcing, but the EC in any case examined the level of investment in the EC industry and found this to be rather significant during the whole IIP, showing that the Community industry was still viable and not ready to abandon this segment of production.²⁰ Rather, the essence of Tupy's complaint was that the domestic industry arranged for products to be manufactured abroad and imported into the EC. Thus, the arrangements on which Tupy, and now Brazil, have laid so much stress are of no significance unless they were associated with imports into the EC. Furthermore, the question of which, if any, imports into the EC were causing injury was central to the investigation, regardless of the legal arrangements giving rise to such imports. Consequently, although the EC did investigate, and report on, the relationships that existed between producers in and outside the EC, its primary focus was on imports, in particular their volume and prices.

18. Thus, Brazil complains that the EC did not pursue investigations regarding arrangements between EC and Turkish producers along the precise lines that Tupy proposed, i.e. by questions to the Turkish authorities.²¹ However, in the first place, there is no obligation in the Agreement for national authorities to adopt investigative methodologies merely because they are suggested by an interested party. Secondly, the EC did investigate imports from Turkey. It was found that a Community producer did import the product under consideration from Turkey, but in such minimal quantities that those imports were considered not to affect its status of Community producer.²² Moreover, as concerns the general assessment on Turkish imports, it was found 'that imports from Turkey were

¹⁶ Paras. 467 and 468.

¹⁷ Oral Statement, para. 13.

¹⁸ Provisional Regulation recitals 134 and 174; Definitive Regulation recitals 65 to 68, 106 to 111.

¹⁹ Oral Statement, para. 6.

²⁰ Provisional Regulation recital 159.

²¹ Ibid., para. 14.

²² Definitive Regulation, recital 67.

stable at almost negligible levels during the entire IIP'.²³ This finding would have been sufficient to make the possible existence of 'outsourcing' arrangements irrelevant.

3. Conclusion

19. Taken with its answers to the Panel's Questions the EC maintains that this Submission comprehensively refutes Brazil's claims, as further elaborated in its Oral Statement, and requests the Panel to make appropriate rulings.

²³ Provisional Regulation, recital 169. This conclusion was confirmed in the Definitive Regulation, recitals 67, 108.

EXHIBITS

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| Exhibit EC-27 | Confidential: Letter of Brazilian Ambassador, 10 December 1999. |
| Exhibit EC-28 | Confidential: Letter of Brazilian Ambassador, 29 January 2000. |
| Exhibit EC-29 | Confidential: Letter of Brazilian Ambassador, 23 February 2000. |