27 January 1994

BRAZIL - IMPOSITION OF PROVISIONAL AND DEFINITIVE COUNTERVAILING DUTIES ON MILK POWDER AND CERTAIN TYPES OF MILK FROM THE EUROPEAN ECONOMIC COMMUNITY

Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1994 (SCM/179, and Corr.1)*

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I. INTRODUCTION

1. On 30 April 1992, the European Economic Community (hereinafter "EEC") requested consultations with Brazil under Article 3:2 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereinafter "Agreement"), regarding the imposition of provisional countervailing measures on 9 April 1992 by Brazil on imports of milk powder and certain types of milk from the EEC. These consultation were held on 23 June 1992. On 6 July 1992, the EEC requested the Committee on Subsidies and Countervailing Measures (hereinafter "Committee") to conciliate on this matter under Article 17 of the Agreement (SCM/149). The conciliation request was considered at a special meeting of the Committee on 21 July 1992, and the EEC and Brazil were encouraged to find a mutually satisfactory solution consistent with Article 17:2 of the Agreement (SCM/M/61).

2. Brazil imposed definitive countervailing duties on milk powder and certain types of milk on 11 August 1992. On 31 August 1992, the EEC requested consultations with Brazil under Article 3:2 with regard to the definitive duties. These consultations were held on 5 October 1992. On 1 October 1992, the EEC requested conciliation under Article 17 regarding the definitive duties (SCM/151), and the Committee conciliated on this matter at its regular meeting on 28 October 1992 (SCM/M/62). The conciliation process did not lead to resolution of this dispute. On 23 December 1992, under Article 17:3 of the Agreement, the EEC requested the establishment of a panel on Brazil's imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC (SCM/155).

3. At a special meeting on 25 January 1993, the Committee agreed to establish a panel on the matter (SCM/M/64). Australia and the United States reserved their rights to present their views to the panel.

4. On 3 March 1993, the Committee was informed by its Chairman in document SCM/164 that the terms of reference and composition of the Panel were as follows:

Terms of Reference:

"To review the facts of the matter referred to the Committee by the EEC in SCM/155 and, in light of such facts, to present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement."

Composition:

Chairman:	Mr. Thomas A. Bernes
Members:	Mr. J. Antonio Buencamino
	Mr. Mark Trainor

5. The Panel met with the parties to the dispute on 22-23 April and 17-18 June 1993. The Panel received a written submission from the delegation of the United States. The Panel submitted its findings and conclusions to the parties to the dispute on 16 December 1993.

II. FACTUAL ASPECTS

6. The dispute before the Panel concerned the imposition by Brazil of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC. The provisional

countervailing duties were imposed by Administrative Order No. 297 of 8 April 1992 (see ANNEX 1), and the definitive duties were imposed by Administrative Order No. 569 of 10 August 1992 (see ANNEX 2). For provisional duties, the effective date was 9 April 1992, and the effective date for the definitive duties was 11 August 1992.

7. The investigation in this case was opened on the basis of a request for initiation of an investigation filed on behalf of the Brazilian dairy industry by Sociedada Rural Brasilieira (Brazilian Rural Society, or SRB) and by Associacao Brasilieira de Productores de Leite B (Brazilian "B" Milk Producers Association, or ABPLB). By a letter dated 27 February 1992, Brazil notified the EEC of the request made by the Brazilian Rural Society to Brazil's relevant Department (DECEX) that an investigation be opened into the subsidization by the EEC of the manufacture of milk powder and its export to Brazil, and into the injury caused or likely to be caused to domestic production as a result of such subsidization. The request concerned products falling within sixteen tariff headings of the Brazilian Customs Tariff[1], and the subsidies referred to in the request were those provided for in the EEC Regulations on export refund programmes and government aids for skimmed milk and butter, and on market expansion programmes. The letter offered the opportunity for consultations aimed at clarifying the situation and finding a solution satisfactory to both sides. The letter stated that, pursuant to Article 9 of Brazil's Resolution CPA No. 1227 of 2 June 1987, the EEC had fifteen days from the date of that notification to express formal interest in such consultations, which should be held within a month of that same date.

8. Public notice of initiation of an investigation was given by Brazil's Director of the Foreign Trade Department (DECEX) of the Ministry of Economic Affairs, Finance and Planning, in DECEX Circular No. 83, dated 16 March 1992 (see ANNEX 3). The product coverage included eleven headings of the Brazilian Customs Tariff Code.[2]

9. Brazil imposed provisional countervailing duties on imports falling under seven headings of the Brazilian Customs Tariff by Administrative Order No. 297 of 8 April 1992.[3] These duties ranged from 31 to 52 per cent. The EEC protested against the imposition of these duties and by letters dated 30 April and 6 May 1992 requested full evidence of the basis on which the preliminary affirmative finding was made. In its letter of 30 April 1992, the EEC stated its wish to hold bilateral consultations under Article 3:2. In its letter of 6 May 1992, the EEC asked for the relevant data on the basis of which the provisional duties had been imposed. Brazil accepted the request for consultations through a letter dated 19 May 1992. Brazil's response to the questions in the EEC's letter of 6 May 1992 were provided in its letter of 27 July 1992 in which Brazil provided the EEC with its data on domestic production of milk powder.

10. On 18 May 1992, Brazil submitted a questionnaire to the EEC, requesting that the authorities in the EEC also forward the questionnaire to the relevant exporters. The accompanying letter[4] informed the EEC that Brazil's Ministry of Economy, Finance and Planning, by Decision No. 83 of 16 March 1992

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[1]These were 0402.10.0100, 0402.10.0200, 0402.10.9900, 0402.21.0101, 0402.21.0102, 0402.21.0103, 0402.21.0200, 0402.21.0199, 0402.29.0101, 0402.29.0102, 0402.29.0103, 0402.29.0199, 0402.29.0200, 0402.91.0000, 0402.99.0100 and 0402.99.0200.

[2]These were 0402.10.0100, 0402.10.0200, 0402.10.9900, 0402.21.0101, 0402.21.0102, 0402.21.0103, 0402.21.0199, 0402.29.0101, 0402.29.0102, 0402.29.0103, 0402.29.0199.

[3]These were 0402.10.0100, 0402.10.0200, 0402.21.0101, 0402.21.0102, 0402.21.0103, 0402.21.0199 and 0402.29.0102.

[4]This was Brazil's Note No. 85.

published in the Official Journal of the Federal Government on 17 March 1992, regarding the case MEFP No. 10.768.007731/91/23, and considering that there was adequate evidence of subsidies to the EEC's production and exports of milk powder and of injury to the Brazilian industry resulting from the EEC's subsidies, had decided to open an investigation to demonstrate the existence of subsidies, of injury and of a causal link between the two regarding the EEC's exports of milk powder.[5] In a letter dated 25 May 1992, the EEC stated that, *inter alia*, it would like to hold consultations quickly in order to see positive evidence that the complaint met the requirements of Article 2:1 of the Agreement and to receive replies to the points raised in its letters of 30 April and 6 May 1992. This letter also stated that "[p]rovided the provisional measures are withdrawn and depending on the outcome of the consultation, the Commission will give due consideration to the questionnaire, but only as regards those parts which concerned it directly. … It should be understood that the period for completing questionnaires, should the need arise, should not start until after the provisional measures have been withdrawn and all consultations have been completed." The EEC's response to the questionnaire was notified on 24 June 1992 to Brazil's Mission to the EEC in Brussels. In its response, the EEC provided to Brazil a copy of the legislation, dated 12 June 1992, which provided the basis for the assistance given to producers and exporters of milk powder in the EEC and identified the amount of restitution for two tariff lines concerning skimmed milk powder and whole milk powder. The EEC also provided statistics relating to the export of skimmed milk and whole milk powder from the EEC to Brazil and to third countries for the period 1985-1991. The EEC also informed Brazil that full data for the first two months of 1992 were not yet available, and that the EEC was willing to provide further information on request.

11. Meanwhile, on 25 May 1992, a representative of the EEC visited the Ministry of Economy, Finance and Planning in Brasilia and obtained certain portions of the petition submitted by the domestic industry. The EEC did not consider this meeting to be a consultation meeting under the Agreement.

12. Administrative Order No. 569, dated 10 August 1992, imposed definitive countervailing duties of 20.7 per cent on imports under eight headings of the Brazilian Customs Tariff Code.[6] On 20 August 1992, a rectification of the import data, which was earlier mentioned in paragraph (e) of the Administrative Order No. 569, was published and the EEC was informed of this change.[7] Administrative Order No. 569 stated that the "period of inquiry concerned the 12 months prior to the date of publication of DECEX Circular No. 83 of 16 March 1992, namely April 1991-March 1992." The Order entered into force on the date of its publication in the Official Gazette of Brazil (11 August 1992) and will remain in force for five years.

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[5]This is an unofficial translation of the relevant text. All translated quotations from the correspondence and public notices relating to this case, including those provided in the Annexes to this Report, are also unofficial translations.

[6]These were 0402.10.0100, 0402.10.0200, 0402.21.0101, 0402.21.0102, 0402.21.0103, 0402.21.0199, 0402.29.0101 and 0402.29.0102.

[7]The rectification was as follows: In paragraph 1(e) of Administrative Order No. 569, the numbers for whole milk powder were "15.7 per cent, 3.4 per cent and 5 per cent" instead of "19 per cent, 4.8 per cent and 7.5 per cent", and for skimmed milk powder were "39.2 per cent, 33.2 per cent and 78 per cent" instead of "19.9 per cent, 12.9 per cent and 30.9 per cent".

III. FINDINGS REQUESTED BY THE PARTIES

13. The EEC requested the Panel to find that:

(a) the provisional countervailing duty imposed by Brazil on imports of milk powder and certain types of milk originating in the EEC violated Articles 5.1 and 1 of the Agreement;

(b) the definitive countervailing duty imposed on imports of milk powder originating in the EEC violated Articles 6:1, 6:2, 6:3 and 6:4 of the Agreement;

(c) the provisional and definitive countervailing duty imposed on imports of certain types of milk originating in the EEC violated Article 6 of the Agreement.

14. The EEC initially requested the Panel to recommend that the provisional and definitive countervailing duties imposed by Brazil by Administrative Orders No. 297 of 8 April 1992 and No. 569 of 10 August 1992 respectively on imports of milk powder and certain types of milk originating in the EEC be immediately lifted, and that Brazil, with respect to imports of milk powder and certain types of milk originating in the EEC, reimburse any provisional and definitive countervailing duties imposed in violation of the provisions of the Agreement. In support of this request, the EEC stated that at least one panel report involving countervailing duties had been adopted, which had recommended the reimbursement of duties found to have been imposed in a manner inconsistent with GATT obligations.[8]

15. The EEC subsequently informed the Panel that it was withdrawing the request for reimbursement. The EEC said that its initial request, which was motivated by the serious violations by Brazil of the provisions of the Agreement, was a policy recommendation that was normally within the competence of the Panel. However, in view of the EEC's general position that it should be left to the signatory concerned to determine the means by which it should bring its practice, if found contrary to the Agreement, into conformity with its provisions, the EEC no longer considered it necessary for the Panel to specifically recommend reimbursement, although in this particular case reimbursement may be the only way for Brazil to bring its action into conformity with the Agreement.

16. Brazil requested the Panel to find that the imposition of provisional and definitive duties by Brazil was in conformity with all applicable requirements of the Agreement. Brazil argued that the imposition of provisional measures in this case was not inconsistent with the requirements of Articles 1, 5:1 or 6 of the Agreement, and that the imposition of definitive duties was not inconsistent with Article 6 of the Agreement. Brazil had conducted the required investigation and there was ample evidence to support the conclusions regarding the imposition of the countervailing duties.

17. Regarding the EEC's request for reimbursement, Brazil recalled that the Committee established the Panel on the basis of document SCM/155 of 5 January 1993. In that document, the EEC had requested the establishment of the panel and that the panel "recommend that the countervailing duties … be immediately lifted". There was no request in document SCM/155 for a recommendation that the duties be reimbursed. In its submission to the Panel, the EEC had gone beyond the request mentioned in document SCM/155 by requesting that the duties be reimbursed.

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[8]This was the report of the panel on "United States countervailing duties on fresh, chilled and frozen pork from Canada" (adopted on 11 July 1991, hereinafter referred to as "United States - Pork"), BISD 38S/30.

IV. MAIN ARGUMENTS OF THE PARTIES

18. The main arguments of the parties to the dispute related to specific claims of the EEC with regard to provisional countervailing duties and definitive countervailing duties on milk powder and certain types of milk from the EEC. Section IV.3 presents arguments relating to provisional duties on imports of milk powder and certain types of milk, Section IV.4 presents the arguments relating to definitive duties on imports of milk powder, and Section IV.5 presents arguments relating to provisional and definitive countervailing duties on certain types of milk. In response to the EEC's claims, Brazil presented some evidence and arguments before the Panel which the EEC argued were not admissible because they were not reflected in the Administrative Orders No. 297 and No. 569. The main arguments relating to admissibility are presented in Section IV.1. Many of the arguments presented by the two parties to this dispute touched upon the importance of procedural obligations under the Agreement. In that context, Brazil argued that though the procedural obligations were important, the main issues in this case related to substantive aspects and those were what the Panel should focus on. The arguments relating to procedural and substantive aspects of the case are presented in Section IV.2.

1. Admissibility of Certain Evidence and Arguments

19. The EEC said that in response to the EEC's arguments on the insufficiency of the decisions published by Brazil, Brazil had for the first time adduced before the Panel what it considered to be relevant evidence, and for the first time made the argument that its decisions were based on best information available. The EEC argued that for evidence and arguments to be admissible before the Panel such evidence and arguments should have been reflected in the Administrative Orders imposing the measures, as required by Article 2:15 of the Agreement. Therefore, Brazil's evidence and arguments presented for the first time before the Panel were not admissible.

20. The EEC argued that in response to the EEC's claim that Administrative Orders No. 297 and 569 did not contain any basis for establishing material injury to domestic producers as required under the Agreement, Brazil had presented new evidence to the Panel in a belated attempt to justify the lack of factual basis and of a reasonable motivation in the two decisions imposing provisional and definitive duties in this case. Moreover, in an attempt to fit the data better to its arguments Brazil had repeatedly revised the data which it had provided to the Panel: for instance, Brazil had kept changing the figures of EEC's exports to Brazil of the products in question (see Section IV.4(a)). Also, the time period covered by the new data provided by Brazil was not always the same and furthermore, it differed from the period for which data was provided in Administrative Order No. 569.

21. The EEC said that the new evidence presented by Brazil related to the apparent consumption of milk powder in Brazil, the alleged volume of imports from the EEC, the share of these imports in Brazilian consumption, average producer prices of milk powder in Brazil, per capita income of agricultural workers, the sales of rehydrated milk in Brazil, and the effect of price controls on investment and productivity levels. Also for the first time, Brazil had presented in its written submission explanations of the relevance of that data for its decisions to impose countervailing duties. Similarly, for the first time Brazil had presented arguments based on a confidential World Bank report, the reference to the "formal and informal markets for milk in Brazil", and had made an attempt to address the possible impact on its domestic producers of factors other than the allegedly subsidized imports from the EEC (including information relating to imports of the products in question from Poland and Switzerland, and the alleged effect of Community exports on market prices in Brazil). The EEC argued that all the new information and data, irrespective of whether it was relevant or correct, was inadmissible and therefore should not be taken into account by the Panel in its examination.

22. The EEC explained its objections regarding the admissibility of the data and arguments presented by Brazil by pointing out that in accordance with Article 2:15 of the Agreement, Brazil had an obligation in its decisions of 8 April and 10 August 1992 "to set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor …". Article 5:1 required the investigating authorities to consider certain factors and to make a provisional determination based on sufficient evidence with regard to those factors. Equally, Article 6:1 required the investigating authorities to consider certain factors and to make a definitive determination based on positive evidence with regard to these factors. Therefore, the legal question raised by the references made by Brazil to new information, data and considerations not previously included or mentioned in the Administrative Orders Nos. 297 and 569 was whether the Panel could properly review the conformity of these Orders with the Agreement by reference to such new information, data and considerations. In order to permit effective review by the Panel of the provisional and definitive duty determinations, the public notice referred to in Article 2:15 of the Agreement required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence they used in their provisional or definitive findings with regard to the factors provided for in Articles 5:1 and 6:1 to 6:4 of the Agreement. This was what was meant by Article 2:15 of the Agreement, which required the investigating authorities to state in the public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor". It followed that Article 2:15 served the important purpose of transparency by requiring duly motivated decisions as the basis for the imposition of countervailing duties. The purpose of Article 2:15 would be frustrated if in a dispute settlement proceeding under the Agreement a signatory were allowed to defend challenged provisional and definitive determinations by reference to alleged facts and reasons for such determinations which were not part to the public notice of reasons accompanying these determinations.[9]

23. In addition, the EEC argued that for a panel to review provisional and definitive determinations by reference to facts and considerations not previously mentioned in the public notice of reasons would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process under the Agreement. A duly motivated and public statement of the reasons underlying a provisional or definitive countervailing duty determination at the time of that determination enabled the signatories to the Agreement to assess whether recourse to the dispute settlement mechanism was appropriate and provided a basis for a delimitation of the object of such dispute settlement proceedings. Furthermore, it was important to note that in the light of the wording of Administrative Orders Nos. 297 and 569, the EEC had no reason to believe that the countervailing duty determinations of Brazil were based on other considerations than those not reflected in these Orders. The task of the Panel was to review the consistency with the Agreement of Brazil's provisional and definitive duty determinations as stated in Orders No. 297 and No. 569, not the unpublished administrative record upon which these determinations were based. Therefore, even if Brazil was correct to argue that these facts, data and considerations existed in the administrative record upon which its countervailing duties were based, it was only the public notice issued pursuant to Article 2:15, not the administrative record *per se*, which was relevant for review by the Panel as a statement of reasons justifying the countervailing duties. Moreover, it was noteworthy that Brazil, in addition to not referring to these facts in Administrative

[9]The EEC referred to some reports of panels to support its position. These were: "United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway" (not yet adopted, hereinafter referred to as "United States - Salmon"), SCM/153, paragraphs 258-260; "United States - Measures Affecting Imports of Softwood Lumber From Canada" (not yet adopted, hereinafter referred to as "United States - Softwood Lumber"), SCM/162, paragraphs 332-333; and in particular, "Korea - Anti-Dumping Duties on Imports of Polyacetal Resins From the United States" (adopted on 27 April 1993, hereinafter referred to as "Korea - Polyacetal Resins"), ADP/92, paragraph 209.

Orders No. 297 and 569, did not provide them in its responses to the written requests for information in the EEC's letters of 30 April, 6 May and 31 August 1992.

24. The EEC argued that a proper review of Brazil's provisional and definitive countervailing duty determinations against the requirements of "sufficient evidence" in Article 5:1 and "positive evidence" in Article 6:1 and the footnote thereto meant that the Panel should examine whether the factual basis of the findings stated in the determinations were discernible from the text of Administrative Orders Nos. 297 and 569 and reasonably supported these findings. In carrying out this review, the Panel was not allowed to conduct a *de novo* review of the evidence relied upon by Brazil or to substitute its own judgement as to the sufficiency of the particular evidence considered by the investigating authorities in Brazil. To do so would ignore that the task of the Panel was not to make its own independent evaluation of the facts before the Brazilian authorities on whether the conditions of Article 5:1 and 6:1 to 4 of the Agreement were fulfilled, but to review the determination as made by Brazil for consistency with the above Articles of the Agreement, bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts.[10] Therefore, the role of the Panel in reviewing Brazil's provisional and definitive countervailing duties was to examine whether the factual findings and analysis actually reflected in the decisions imposing the duties constituted sufficient or positive evidence in support of the findings made by the Brazilian authorities. The Panel would exceed the scope of its competence if in its review it took into account facts, information and considerations not included or mentioned in the Administrative Orders Nos. 297 and 569.

25. Brazil denied that it had adduced most of the evidence for the first time before the Panel, and argued that the EEC had become aware of the evidence for the first time on reading Brazil's submission to the Panel because the EEC had refused throughout the investigation process to engage in any meaningful dialogue which would have resulted in the information being imparted to the EEC. According to Brazil, the EEC had consistently "stone-walled" Brazil, had refused consultations and later had insisted that consultations had failed, and had refused to discuss the merits of the case. The EEC did not address its export subsidies which were well known to distort world trade in milk powder and other agricultural products, nor the sharp increase in its subsidized exports of milk powder to Brazil during the period of investigation as demonstrated by Brazil, nor the impact of these imports on market share, prices or investment in Brazil as established by the information before the Panel. The evidence provided by Brazil was not "completely new" but it was "current" evidence, and most assuredly was in fact "previously used" by Brazil during the investigation. This evidence was in the record of the investigation and could have been examined in Brasilia by the EEC officials. The EEC had no interest in doing so because the facts established by the investigation conducted by Brazil justified the imposition of both provisional and definitive countervailing duties.

26. In response to the EEC's arguments regarding the role of the Panel, Brazil argued that what the EEC was attempting to impose on the Panel was not justified under Article VI of the General Agreement or Article 18:1 of the Agreement. The latter provision directed the Panel to "review the facts of the matter and, in light of such facts, … present to the Committee its findings concerning the rights and obligations of the signatories". Thus, no panel could perform its function if it was tied by the condition being imposed by the EEC.

27. Further, Brazil argued that the panel reports cited by the EEC did not support the EEC's position that for evidence and arguments to be admissible Article 2:15 required that such evidence and arguments should have been reflected in the Administrative Orders imposing the countervailing measures. The cited paragraphs in the report on "United States - Salmon" dealt with the volume and price effects of

[10]In support of this argument, the EEC cited the report of the panel on "Korea - Polyacetal Resins", paragraphs 227-228, and the report of the panel on "United States - Softwood Lumber", paragraph 335.

the imports in question and not with the alleged error in public notices of the determinations. The cited paragraphs in the report on "United States - Softwood Lumber" dealt with the evidence necessary to initiate an investigation, and the EEC had not complained that Brazil did not have adequate reason to initiate the investigation. Brazil agreed that a superficial reading of the paragraph cited from the report on "Korea - Polyacetal Resins" did suggest support for the EEC's position. However, a careful reading made clear that the situation confronting that panel was very different. The main issues in that case concerned injury, mainly with regard to the reasoning of the Korean authorities in applying a presumption of "import substitution". That Panel had found that the reasoning of the Korean authorities did not justify an affirmative determination.[11] A side issue involved the receipt by the panel of a "transcript" offered to supplement the written report of the injury determination of the Korean authorities. This document was in addition to the justification already issued. In the current case, the situation was different. Brazil had acknowledged that its public notices of the two determinations did not contain the full reasoning for those actions (see below). Brazil had expected to discuss the reasons for those actions, together with the evidence in the record, with the officials from the EEC and had attempted to do so from February 1992 onwards. The EEC, however, had refused to do so. The entire record of the Brazilian investigation was, and remained, available to the EEC's authorities in Brazil anytime they wished to see it.

28. Further regarding the report of the panel on "Korea - Polyacetal Resins", Brazil said that to the extent that that panel has suggested that panels must look only at published determinations of proceedings, and never at the underlying record, Brazil disagreed and was confident that this Panel would also disagree. At times, panels may and must go beyond the published determinations to examine the record. For instance, even though extensive and elaborate determinations were written by the United States authorities, panels reviewing those determinations had found it necessary to go beyond the published reports and examine the administrative record. In the specific case of the report of the panel on "United States - Salmon" for example, the issue of standing was assessed totally on the basis of evidence in the administrative record which was not dealt with in the published determination.[12] It was particularly important in the current case that the record be examined because throughout the investigation, Brazil had expected to discuss the record with the EEC. In fact, Brazil had expected to consult with a view to reaching an amicable settlement as contemplated by the General Agreement and the Agreement.

29. Brazil argued that there were no provisions in the Agreement that contradicted its statement that the administrative record could not be ignored in a panel review simply on grounds of lack of reference to it in the public notice. Brazil considered that Article 2:5 required the interested parties to go beyond the information in the public notice and to consult and examine relevant information in the record of the investigation. The record of the investigation in this case was replete with information on the requirements under Article 2 and 6, *inter alia*, the volume of subsidized imports, their effect on prices, the consequent impact of those imports on domestic producers, market share, and return on investments. It was not Brazil's fault that the EEC decided not to have access to the record of the investigation. Therefore the claim that Brazil did not carry out an investigation and that it failed to meet the requirements of Articles 2:1, 5:1 and 6, based on an isolated reading of the summarized public notices, was not acceptable.

30. Furthermore, Brazil argued that while the Administrative Orders No. 297 and No. 569 were brief and could have been more explicit, the Agreement did not specify exactly which details should

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[11]Brazil referred to the report of the panel on "Korea - Polyacetal Resins", paragraph 300 for this point.

[12]To support its response, Brazil cited paragraphs 221-234 of the same Report.

be spelled out in the public notice. The texts of such notices were intended, as was the usual procedure in similar cases in Brazil, to be a summary of the findings contained in the records of the investigation. This was due to domestic legislation that imposed an administrative constraint that, *inter alia*, public notices on import taxes should be as brief as possible and contain only indicative considerations.[13] Illustrative guidance for this purpose was provided by an example given in the "Manual de Redacao da Presidencia da Republic", which had been extended to notices on countervailing duties (the relevant portion of this Manual with the example was submitted by Brazil to the Panel). Therefore, the Brazilian authorities were particularly careful to mention in each public notice the same "label" reference to the record of the investigation, which for this case was No. 10768.007731/91-23, because they considered that this reference provided due transparency, making the information available in a pragmatic manner and providing the opportunity to all interested parties to make representations.[14] The Brazilian authorities responsible for the publication of notices pertaining to the investigation under review by this Panel also considered such practices to be in conformity with Resolution 1227, which had been examined by the Subsidies Committee and established that the notices should contain "a summary of the reasons justifying the initiation".[15] The Brazilian authorities were aware that analogous practice was also followed by other signatories. This practice was fully consistent with Brazil's obligations under the Agreement, and in no circumstances could it be interpreted as non-compliance with Articles 2:1, 2:3, 5:1 and 6.

31. The EEC argued that it was only the public notice pursuant to Articles 2:3 and 2:15, not the unpublished administrative record *per se*, which was relevant for review by the Panel of the statements of reasons that justified the countervailing duties. The one sentence reference to Case No. 10768.007731/91-23 in the Administrative Orders did not mean that those Orders had complied with the requirements of the Agreement. According to the EEC, Brazil had failed to explain in detail how Articles 2:1, 2:3, 5:1 and 6 of the Agreement had been complied with by the one sentence reference to Case No. 10768.007731/91-23. Moreover, the EEC did not know what case was referred to by this case number because the findings of that case were never communicated to it or made public.

32. The EEC disputed Brazil's argument that the panel reports cited by the EEC did not support the argument that all the relevant information for a panel review had to be in the public notice and not produced later. To substantiate its point, the EEC cited the following portions of the reports of some previous panels: paragraph 227 of the report by the panel on "Korea - Polyacetal Resins" stated that "[t]he Panel considered that a proper review of the KTC's determination against the requirement of positive evidence under Article 3:1 [of the Anti-Dumping Code] meant that it should examine whether the factual basis of the findings articulated in the determination was discernible from the text of the determination and reasonably supported those findings"; paragraph 260 of the report of the panel on "United States - Salmon" stated that "[a] review of whether in a given case this [i.e. positive evidence] requirement was met involved an examination of the stated factual basis of the findings made by the investigating authorities in order to determine whether the authorities correctly identified the appropriate facts, and whether the stated factual basis reasonably supported the findings of the authorities" (emphasis

[13]This was Article 2 in the Brazilian legislation which was provided in document SCM/1/Add.26/Suppl.1 of 14 September 1987. This document contained a non-official translation of Resolution No. 00-1227 adopted by the Customs Policy Commission on 14 May 1987 (and had already been examined by the Committee).

[14]Brazil said that the main report and some of the main documents (with cross-references to the documents kept elsewhere) were maintained by the Technical Department of Tariffs (or the "DTT") in Rio de Janeiro. The total volume of all documents and annexes relevant for the record comprised a total of seven volumes, or a little over one thousand pages.

[15]Article 12, paragraph 1 and, *mutatis mutandis*, other provisions of the Resolution 1227.

added by the EEC); paragraph 335 of the report of the panel on "United States - Softwood Lumber" had stated that "[t]he Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgement as to the sufficiency of the particular evidence considered by the United States authorities. Rather … [it] required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation". On the basis of these panel reports, the EEC also argued that the party taking action could not, when challenged, claim that the other party did not co-operate and thus "facts available" were used. This too had to be stated in the public notice.

33. Further, the EEC argued that Brazil was not correct in arguing that the EEC had not sought the evidence in this case from Brazil. The EEC had requested factual information in writing with regard to the provisional and definitive duties on 30 April, 6 May and 31 August 1992, i.e. information that Brazil now claimed was available "on the record", but had received no serious reply. The EEC also requested information at three separate meetings (25 May, 23 June and 5 October 1992), but instead of giving information, Brazil simply requested more data relating to subsidies and exports to third countries other than Brazil, which it seemed to have omitted from the questionnaire (for details on this point, see Section IV.4(c)). The EEC also said that Brazil declined to give the EEC full access to the "record" on 25 May 1992, explaining that there were a lot of documents and that the EEC should first make a selection. The EEC argued that obviously it was difficult to make such a selection without seeing the files first.

34. Brazil argued that except for the text from the panel report "Korea - Polyacetal Resins" (which, as explained earlier by Brazil, did not apply to the situation under review by this Panel), none of the passages cited by the EEC from the panel reports included the phrase that arguments and facts relied upon by the investigating authorities should be "stated in the public notice". Brazil asked the EEC to indicate where the text quoted from these panel reports contained the phrase "stated in the public notice".

35. Further, Brazil said that though panel reports were not to be ignored, they did not provide precedential value and although they were a secondary source of interpretation they did not bind future panels. Brazil argued that the record of the investigation in this case contained all elements relevant to the case, including those showing that the conditions set forth in Articles 5:1 and 6:1 to 6:4 were adequately met. The record had ample reference to factors considered during the investigation, such as existence of export subsidy, decline in the EEC's export price to Brazil, and the impact on the domestic industry. The causality had been obvious to the investigating authorities. Public access to the files of this case had been assured from the beginning of the investigation to any Party which requested it in writing.

36. The EEC explained that the text that had been quoted was from paragraph 260 of the report of the panel on "United States - Salmon". This paragraph stated that "[a] review of whether in a given case this requirement was met involved an examination of the stated factual basis of the findings made by the investigating authorities in order to determine whether the authorities had correctly identified the appropriate facts, and whether the stated factual basis reasonably supported the findings of the authorities".

37. In response, Brazil reiterated the comments made earlier about the relevance of the panel reports to support the point made by the EEC, and argued that these panel reports did not support the EEC point specially because the words "stated in the public notice" were not contained in those reports.

2. Arguments Regarding the Importance of Procedural Requirements Under the Agreement

38. In response to several legal claims raised by the EEC, Brazil argued that the EEC was hiding behind procedural arguments to evade the treatment of the real issues. Brazil said that while it was aware that the Panel had been established to address specific issues under specific terms of reference, it would be wrong for the Panel to disregard entirely some of the decisive features of the context in which this case was being conducted. This dispute involved one of the rare instances of a developing country imposing countervailing duties on imports from a developed country. It arose in the context of major changes in Brazil as the Government, despite many difficulties and social costs, had introduced market mechanisms through sweeping liberalization which involved drastic cuts in tariffs, virtual elimination of non-tariff barriers, and no subsidies being granted. Brazil had incurred the concomitant costs in the hope that the policy would lead to strong and stable growth in the productive capability of the dairy sector, but its hopes were frustrated by the subsidized exports from the EEC. The record showed that Brazil had acted responsibly in the investigation. The purpose of the duties was to countervail the notoriously unfair subsidization practised by the EEC in the agricultural sector. It was unfortunate that inexperience caused procedural errors, but it was fortunate that no actual harm or unfairness was caused to anyone by these errors. They should thus not be made the vehicle of undoing the countervailing measures that indisputably were necessary for Brazil to introduce an effective market mechanism in its dairy sector. Thus, Brazil asked the Panel to consider those elements which Brazil considered to be fully relevant for the fair examination of this case.

39. Brazil said that it had been careful and cautious in taking action to implement its rights under the Agreement due to its little experience in imposing countervailing duties. This was shown by the delay of a year before the petition in this case was accepted. The investigating authorities had acted only when the relevant evidence was overwhelming. The focus was on the entire set of issues, and not on procedure. The EEC on the other hand was focusing on procedural aspects and not on the important questions which included the EEC's subsidies on milk powder, the resulting increase in Brazilian imports of that subsidized milk powder, the increased market share of those subsidized imports gained at the expense of Brazilian producers, the lower prices received by Brazilian producers for the diminished quantities they sold, the resulting material injury to the Brazilian producers demonstrated by their smaller market share and lower prices for their product, and the necessity of imposing countervailing duties to remedy this material injury. The Panel was required to look at the entire set of issues and not just the procedures. Procedures were important, but they were not the major relevant aspect of this case. The relevant aspect was the milk and milk powder industries in a developing country which were denied their opportunity to benefit from the decontrol of the dairy sector by massive imports of subsidized milk powder unloaded in its market by the world's largest economic entity whose agricultural workers earned many times the income of those in Brazil. Brazil argued that it had demonstrated, and the record of the investigation had established, that the imports of subsidized milk powder from the EEC resulted in material injury to the Brazilian industry. The evidence overwhelmingly justified the imposition of countervailing duties against imports of milk powder from the EEC. The Panel had to consider the clear and specific information that substantiated Brazil's point of view on this point, in particular the information on the payment of subsidies by the EEC, growth in the volume of subsidized imports from the EEC, share of the EEC in total imports of milk powder, the share of these imports in the domestic market and consumption, losses to domestic producers, investment in the domestic industry and other aspects regarding the condition of the Brazilian dairy industry.

40. Brazil acknowledged that there may have been some misjudgement on the part of the Brazilian authorities as to some procedural matters, particularly relating to the amount of information from the record that should have been included in the public notice. Brazil agreed that the procedures employed in this case could be improved, and argued that if there had been a minor degree of misjudgement regarding the amount of information that should be included in the public notice, that should be an ancillary and not an essential element. Steps were being taken by Brazil to ensure that, in replacement

of short and summarized notes which only highlighted the major factors, the public notice in future would spell out more detail on the findings and conclusions on all issues of fact and law considered material by the investigating authorities and that procedures would always comply with the letter, as well as the spirit, of the Agreement.[16]

41. In this context, Brazil also drew the Panel's attention to the remedy recommended by the panel on "Korea - Polyacetal Resins". That panel had recommended that Korea "bring its measures … into conformity with its obligations under the Agreement." Such a measure was not even necessary in this case because Brazil was already changing its procedures to ensure that future determinations conformed to the letter as well as to the spirit of the publication requirements of the Agreement. But these procedural issues were secondary. The uncontradicted evidence in this case overwhelmingly supported the conclusions of the Brazilian authorities. Possible procedural errors that could not and did not cause harm or unfairness in actual fact should not be used to excuse the material injury caused by the subsidized imports from the EEC.

42. Brazil argued that the procedures employed in this case had in fact fully complied with the spirit of the procedural requirements of the Agreement, and if there was error, it was harmless error, not prejudicial error. Thus, this error should not detract from the substance of the matter because there could be no offence without prejudice. Moreover, the EEC had not as yet suggested how it or anyone else was in fact prejudiced by the procedures followed. The EEC had not mentioned arguments that could have been advanced or facts that might have been adduced, had different procedures been followed by Brazil.

43. Furthermore, Brazil argued that procedure was not valuable for its own sake, but to assure the substantial rights of signatories, and the procedural provisions had to be interpreted in relation to their purpose. The purpose of procedural requirements in the Agreement was not to place procedural obstacles in the way of signatories. Procedures were necessary to ensure fairness, and Brazil had been eminently fair to all parties in this investigation. The EEC had not been harmed by the information not being provided in the public notice. Brazil had sought to consult with the EEC before formally initiating the investigation, and had repeatedly expressed its willingness to consult throughout the proceedings. The public notice of the proceedings served to fulfil the legal requirement of notice to all interested parties, and as a practical matter also served to bring the investigation to the attention of Brazilian importers. These importers could and did make their views known. Also, the exporters were made aware of the proceedings through their contacts with their importing clients. The EEC was also well aware of the investigation and of its right and of opportunity to make representations and present data and information to the investigating authorities. Brazil had assured full access to the files kept not only in Brasilia but also at the headquarters in Rio de Janiero. However, no official request was ever received for the documents. The EEC officials who contacted the Brazilian authorities, according to the letters presented at the time, were not authorised to consult but only to collect documents which, by their nature, were not amenable to reproduction. Moreover, during the two sessions of consultations, the EEC representatives did not seem interested in actually obtaining the information. If the EEC had wished to know what was in record of the investigation, it would have obtained the relevant information if it had engaged in meaningful consultations. The EEC did not wish to see the information because it was aware that the evidence was overwhelming in favour of imposition of duties, and hence it was now focusing on procedure. The EEC had not been prejudiced by Brazil's failure to include detail in Administrative Order No. 569 but by its own failure to participate in the investigative process that culminated in that Order.

[16]Brazil stated that it had communicated to the Committee that it was revising the procedures on providing information in its public notices.

44. The EEC said that it attached as much importance to procedures as it did to the substantive provisions of the Agreement. Substantive rights under the Agreement could not be effectively guaranteed if minimum procedural requirements were not respected. In this case, Brazil had clearly violated the procedural requirements, thereby depriving the EEC of its rights under the Agreement.

45. Moreover, the EEC said that at least from the EEC's arguments relating to the definitive duties (see Section IV.4), it was clear that substantive provisions of the Agreement concerning the determination of material injury were also at stake. Also, it was not correct that the EEC had not sought to get the evidence in this case from Brazil. The EEC had done so through its letters of 30 April, 6 May and 31 August 1992, and in the consultation meetings.

46. The EEC disagreed with Brazil's claim that Brazil had been "fair to all parties in this investigation" and that the EEC had not suggested "how it was in fact prejudiced by the procedures followed" in this case. The EEC argued that accepting the Brazilian position that the EEC was not prejudiced by Brazil's failure to include detail in Administrative Order No. 569 but by its own failure to participate in the investigation process that culminated in that Order, would be contrary to the letter and purpose of the Agreement and would render meaningless the provisions of Article 2:15, 5:1 and 6 of the Agreement. Brazil had offered consultations before the initiation of the investigation, and then hurriedly opened the investigation and imposed provisional duties (see Section IV.3 for details). The EEC received formal notification of the initiation of the investigation (along with the questionnaire) after the imposition of the provisional duties. There was no notification of the opening of the investigation, of the results of Brazil's preliminary investigation, of the imposition of the provisional measure, and no explanation of the need for Brazil to proceed with such speed to impose the countervailing duties. Also, though required by Articles 2:15 and 5:1 of the Agreement, the Administrative Order No. 297 did not provide the factual and legal reasons for the action. The provisional duties equal to the full amount of the subsidy found to exist by Brazil were imposed, without any legal justification. Thus, it was clearly inaccurate to claim that the EEC had not suffered any prejudice by the procedures followed by Brazil. Had the EEC been timely informed of the opening of the investigation and of all the legal steps Brazil had taken thereafter, it would have acted differently to safeguard the legitimate rights of its exporters under the Agreement.

3. Provisional Countervailing Duties

47. The EEC claimed that the imposition of provisional countervailing duties by Brazil on imports of milk powder and certain types of milk originating in the EEC violated Article 5:1 of the Agreement, which provided that

> "Provisional measures may be taken only after a preliminary affirmative finding has been made that a subsidy exists and that there is sufficient evidence of injury as provided for in Article 2(1)(a) to (c). Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation."

In support of this claim, the EEC presented three main arguments:

(i) the provisional measures were imposed without any preliminary investigation;

(ii) no evidence was presented in the Brazilian determination of 9 April 1992 which could lead to a preliminary affirmative finding of the existence of a subsidy or of sufficient evidence of injury; and,

(iii) no ground or preliminary evidence was adduced for the determination that provisional measures were necessary to prevent injury being caused during the period of investigation.

The EEC also claimed that since Article 1 of the Agreement required that countervailing duties be imposed in accordance with the provisions of Article VI of the General Agreement and with the Agreement, Brazil had acted inconsistently with Article 1 of the Agreement.

48. Brazil argued that it had acted in conformity with the Agreement. The provisional duties were imposed on the basis of an adequate investigation, the interested parties had been effectively notified of the investigation, and there was ample evidence to justify the imposition of provisional countervailing duties which were deemed to be necessary to prevent injury to domestic industry during the period of investigation.

(a) Alleged lack of a preliminary investigation

49. The EEC said that the text of Article 5:1 of the Agreement required a "preliminary affirmative finding" on the existence of a subsidy and of sufficient evidence of injury before provisional measures could be taken. Such a preliminary affirmative finding could not be made without some "preliminary investigation". The investigating authorities could not just base themselves on the complaint. They had to make an affirmative finding which must be independent of the complaint, and for that they needed to give adequate opportunity to parties concerned to provide evidence and to make their views known.

50. The EEC argued that the principle of effective treaty interpretation required that the phrase "preliminary affirmative finding" be read in context and be interpreted consistently with the other provisions of the Agreement. Article 5:1 explicitly made reference to Article 2:1 (a) to (c) of the Agreement, and Article 2:1 laid down in relevant part that provisional or definitive duties "may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Article" (emphasis added by the EEC). The ordinary meaning to be given to this phrase was that an investigation was a condition precedent to the imposition of provisional or definitive countervailing duties. This had also been acknowledged in the recent report by the panel on "United States - Salmon"".[17]

51. The EEC further argued that there were several provisions in the Agreement that clearly indicated that some time had to elapse and some substantive and procedural steps needed to be observed from the date of initiating the investigation until a preliminary affirmative finding could be made. Thus, Article 2:3 required that the decision to initiate the investigation be notified, and Article 2:5 provided that the investigating authorities shall afford all interested parties a reasonable opportunity to see all relevant information and to present in writing or orally their views. Article 2:9 provided that preliminary and final findings, whether affirmative or negative, may be made on the basis of facts available to the investigating authorities only when the interested party refuses access to, or otherwise does not provide necessary information within a reasonable period of time or significantly impedes the investigation. Article 2:15 required that a public notice be given of any preliminary or final finding, whether affirmative or negative, and of the revocation of a finding. For an affirmative finding, each such notice had to set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis thereof.

52. In support of its argument that no investigation had taken place in this case, the EEC pointed out that Brazil had not informed nor requested information from the parties concerned. The Order

[17] *op. cit.*, paragraph 225.

imposing the provisional duties was adopted more than a month before the relevant questionnaire had even been sent to the EEC and the exporters concerned and before they had any meaningful and reasonable opportunity to provide information and to make their views known, as required by Article 2:5, and Article 3:2 and footnote thereto of the Agreement.

53. The EEC argued that the first time that Brazil officially informed the EEC of the initiation of the investigation was through the note accompanying the questionnaire; Brazil had also not informed the exporters of the products concerned in the EEC about the investigation till then. Moreover, Brazil had not informed the EEC about the imposition of the provisional duties, which was a violation of Article 2:15.

54. The EEC also claimed that it had not been given a reasonable opportunity for consultations because the provisional duties were imposed less than one month after the public notice of initiation of investigation was given. Moreover, the questionnaire relating to this investigation was sent to the EEC and its exporters more than a month after the provisional duties were imposed.

55. The EEC further argued that in the present case, the public notice of the initiation of the investigation (published on 16 March 1992) was extremely brief and did not adduce any sufficient evidence to show that the conditions (a) to (c) of Article 2:1 were respected. Equally brief and unsubstantiated was the Administrative Order No. 297 of 8 April 1992 which imposed provisional measures. This Order also clearly fell far short of the requirements laid down in Article 2:15 because it provided no reasons nor give the basis of all issues of fact and law that were considered material by the investigating authorities.

56. Therefore, the EEC concluded that the Brazilian authorities based their affirmative preliminary finding exclusively on the facts and allegations contained in the petition, without themselves conducting any preliminary investigation. This approach constituted a clear violation of Article 5:1 of the Agreement. Moreover, even if the Brazilian authorities could argue that the complaint included "sufficient evidence" to satisfy the conditions of Articles 2:1 and 5:1 of the Agreement, the burden of proof was on the Brazilian authorities to show that the conditions of Articles 2:1 and 5:1 were fulfilled.[18] A simple reading of both Circular No. 83 (i.e. the notice of initiation) and Administrative Order No. 297 showed clearly that they did not contain the slightest evidence to show that the Brazilian authorities had carried out a preliminary investigation or that they had based themselves on facts other than those contained in the complaint. The result of this was that the EEC had been effectively deprived of its right of consultations during the period of investigation.

57. Brazil argued that it had not violated any of the provisions of the Agreement either in its letter or its spirit when imposing provisional duties. The provisional duties had been imposed on the basis of a thorough preliminary investigation carried out by competent investigating authorities in which elements presented in the petition were examined in the light of other information the investigating authorities gathered for several months before opening the investigation. This investigation aimed at verifying whether the conditions prescribed in Articles 2:1 and 5:1 of the Agreement were duly fulfilled in order to justify the opening of the investigation and the imposition of provisional duties. The investigation showed the existence of the requisite conditions for imposing provisional duties.

58. Regarding the EEC's argument that Brazil had denied it the opportunity to consult, Brazil argued that before initiating the investigation, it had offered consultations under Article 3:1 to the EEC on 27 February 1992 but received no response to its offer. With no apparent interest by the EEC in this

[18]In support of this point, the EEC referred to the report of the panel on "United States - Pork", *op. cit.*, paragraph 4.4.

case, Brazil was fully justified, consistent with Articles 2:10 and 3:3 of the Agreement, in "proceeding expeditiously" on the basis of the information in its possession. The EEC in turn had requested consultations with Brazil through a letter dated 30 April 1992, more than two months after Brazil's offer of consultations on 27 February 1992 and after the imposition of the provisional duties.

59. Brazil said that the request for initiation of an investigation in this case was first submitted on 12 March 1991, but the authorities did not act on it because the imports of milk powder had declined in 1990. Subsequently, the petitioners supplemented the information on 12 June, 8 July and 25 November 1991 and on 14 January 1992. Also, the Government of Brazil had maintained a continuing dialogue with representatives of the dairy industry throughout 1991 concerning the condition of the industry, the level of subsidized imports and the relationship between the two. It was a well known fact that the EEC provided significant and direct subsidies to its exporters of milk powder. As the year 1991 progressed, the subsidized imports from the EEC rose sharply from the 1990 levels, and the condition of the Brazilian industry deteriorated. Brazil was fully justified in initiating the investigation based on the information available from the domestic industry and from its own examination of the relevant data.

60. Brazil argued that this was its first countervailing duty case, and the Government was reluctant to proceed until it possessed evidence that more than justified its action. When the investigation was initiated, Brazil was already in possession of reliable information justifying the conclusion that the EEC's subsidies to milk exports were causing material injury to the domestic industry. Therefore, at the date when provisional duties were imposed, Brazil had been effectively, if not formally, investigating the situation for more than a year. The available information showed that there was stagnation in the domestic industry. To support its contention that the imposition of provisional measure was justified, Brazil submitted to the Panel data on, *inter alia*, import volume and share of milk powder imports in the Brazilian market, domestic prices and domestic production of milk powder. Brazil said that it also had access to a report by the World Bank which had addressed the problems of the dairy sector in Brazil and had indicated that price controls and subsidized imports were the main reasons for the industry's stagnation.[19] Brazil said that the conclusions and recommendations of the section on "Stagnation in the Brazilian Milk Sector" in this report were taken into account in examining the question of the injury caused by imports of subsidized milk powder imports from the EEC. In that section, the World Bank had concluded that the Brazilian dairy sector had a comparative advantage in international terms, which had not been fully realized and the sector was experiencing stagnation mainly on account of price controls and the presence of relatively cheaper subsidized imports.

61. Brazil said that the gathering of information before initiation was one of the reasons which explained how the investigating authorities were able to reach a preliminary finding within a relatively short period of time after the opening of the investigation. This procedure was fully supported by Articles 2:10 and 3:3 of the Agreement.

62. Regarding notification under the Agreement, Brazil said that the public notices required under Article 2:3 and 2:15 of the Agreement were given by the means of Circular No. 83 of 18 March 1992, and the Administrative Orders No. 297 and 569 in the Official Journal of Brazil. This journal was the official publication of the Government of Brazil to make public its laws, norms, regulations and announcements. Its texts were legally binding in the sense that no one could claim lack of knowledge of what had been published in it. When the investigation was opened on 16 March 1992, Brazil published a public notice in the sense of Article 2:3 of the Agreement. This signalled the formal initiation of the investigation and all interested parties were effectively notified. In Brazil, representatives of all

[19]The World Bank (1991), "Brazil, Key Policy Issues in the Livestock Sector: Towards a Framework for Efficient and Sustainable Growth", Report Number 8570-BR.

sectors of the domestic milk industry and trade, as well as of all sectors of Government with responsibilities in this area met regularly at committee or Chamber level, or informally, within the National Council of Agricultural Policy. Therefore, all members were fully aware of the initiation of the investigation in particular because this sector was characterized by intense interaction between well-established exporters and importers, which were concentrated in a relatively small number of trading companies. They had access to all non-confidential information on issues of fact and law and on the findings and conclusions reached by the investigating authorities. They were free to make whatever representation they wished to make, and some of them did make those representations including those who objected to the decision to initiate the investigation and impose provisional measures.

63. Brazil said that the Diplomatic Note No. 85 (dated 18 May 1992) sent by the Mission of Brazil to the Commission of the European Communities was the official communication as required by Article 2:3 of the Agreement. That the official notification of the opening of the investigation was made only on 18 May 1992 did not warrant a conclusion that the EEC was unaware of the investigation till then. The EEC could have referred to the letter of 27 February 1992 through which Brazil had offered consultations. Moreover, given the wide publicity received by the case in the Brazilian press when the petition was first presented in 1991, it would not be convincing if the EEC claimed that it knew nothing about this case. That the EEC was already aware of the opening of the investigation was evident from the fact that it had raised this matter at the regular meeting of the Committee on 28 April 1992.

64. Brazil contended that it had found difficulty in communicating with the exporters to a large extent due to lack of co-operation on the part of the EEC. At the time the investigation started, strictly speaking, there were no "exporters known to the investigating authorities". Though it was not difficult to identify the importers in the closely linked industry, the same did not apply in the case of identifying the exporters established abroad and whose operational network was not well-known by the Brazilian investigating authorities. That was one of the reasons why meaningful consultations would have been useful if held at the time when Brazil requested them. Moreover, the lack of clarity regarding the identification of the producer/exporter should not be reason for a signatory not to take action against notorious subsidization injurious to its industry.

65. Brazil further argued that although the exporters did not receive a formal notification (largely due to lack of co-operation by the EEC) it would not be correct to say that they did not know that an investigation was taking place in Brazil. They had the opportunity to make representations either directly or through their clients (the importers). The public notice about the opening of the investigation in this case provided interested parties the possibility to access non-confidential documentation in the case. Also representations, as well as the submission of data and other information, could have been made at any time before or after the receipt of the questionnaire. Information contained in the public notices as well as in the non-confidential documents of the Case could have been disputed had the interested parties shown interest in referring properly to the investigating authorities, i.e. as prescribed in the relevant Brazilian legislation (Resolution CPA 1227). Moreover, it was puzzling that the EEC was raising the relevance of the timing of the questionnaire because after receiving the questionnaire it had not addressed it properly (for details on this point, see Section IV.4(c)).

66. Brazil further argued that even if there was any delay in the notification of the opening of the investigation it could not be used as a basis for an argument of non-compliance with the provisions of Article 5:1. Article 2:10 justified quick action if it was deemed necessary by the investigating authorities, provided that preliminary affirmative finding was made. These conditions were met in this case. Also, official notifications to producers and importers about the provisional measures were formalized by means of letters dated 7 April 1992 from the investigating authorities. Brazil emphasized that the seriousness with which it took into full consideration its obligations towards the EEC as a

signatory to the Agreement was shown by the fact that the duty imposed was lower than the maximum level allowed.

67. The EEC disputed Brazil's claim that the provisional countervailing duties in this case were less than the subsidy calculated, and argued that the duties imposed were equal to the subsidy calculated.

68. The EEC argued that Brazil's invocation of the alleged economic and trade bonds existing between exporters in the EEC and importers in Brazil did not provide a legal basis for not notifying the exporters, and was clearly in violation of the obligation imposed on Brazil in this case by Articles 2:3 and 2:15 of the Agreement. Brazil should have made a serious effort to identify the main exporters. The complainants should have provided this information, and had this been done, then the exporters could have been notified of the investigation in accordance with the Agreement. It was primarily Brazil's obligation (under Article 2:3) to inform the exporters about the opening of the investigation, and (under Article 2:15) about the imposition of the countervailing duties. In this context, the EEC also wondered why Brazil did not inform the EEC and the exporters about the investigation at the same time when it formally notified the domestic producers and importers on 7 April 1992, and instead informed them on 18 May 1992.

69. The EEC disagreed with Brazil's contention that Article 2:10 of the Agreement guaranteed the right to take provisional actions even in cases where the provisions of Article 2:3 and 2:9 were not respected by the investigating authorities. In the absence of the required notifications, Brazil's letter of 27 February 1992 alone could not enable Brazil to resort to the provisions of Article 2:9. Brazil opened the investigation only eleven days after the EEC received the letter offering consultations under Article 3:1 though the letter had provided to the EEC fifteen days to make its point of view known. The EEC had reasonably expected to be formally notified of the initiation of the investigation by Brazil. Despite the requirements of Articles 3:2 and 3:3, Brazil went ahead with its action without any further notification of the steps taken. By not undertaking the subsequent procedural steps required by Articles 2:3 and 2:15 of the Agreement, Brazil had led the EEC to believe that it did not intend to proceed further with the petition.

70. Regarding Brazil's point that the discussion in the Committee meeting revealed that the EEC was aware of the investigation, the EEC said that the minutes of the meeting showed that the EEC was at that time still trying to get information regarding the factual and legal basis of Brazil's action. The minutes of the meeting moreover showed that the Brazilian delegate had not provided the requisite information at the meeting. Rather, he had taken note of the points made and had asked for more time in order to provide full information on the points raised by the EEC.

71. Disputing Brazil's claim that the EEC had no interest in consultations in this case, the EEC argued that it had requested consultations under Article 3:2, i.e. after the initiation of the investigation, in order to get information on the basis on which Brazil had imposed the provisional duties, and later to get the relevant information with relation to the definitive duties. Moreover, the EEC also argued that it had not turned down the opportunity for consultations under Article 3:1 in this case. The EEC's delegation in Brasilia received Brazil's letter offering consultation on 5 March 1992; the EEC noted that this letter did not specifically mention Article 3:1. As mentioned earlier, the EEC's delegation in Brasilia was in the process of taking instructions when Brazil opened the countervailing duty investigation within eleven days from the day the letter was received despite Brazil having offered fifteen days from the date of the communication to respond. The EEC argued that it did not have an obligation to enter into consultations offered under Article 3:1 of the Agreement. However, in the letter through which Article 3:2 consultations were requested by the EEC, the EEC had also indicated that it was willing to continue Article 3:1 consultations.

72. In response to a question by the Panel about the link between Articles 2 and 3 of the Agreement, the EEC said that Article 3:1 was intended primarily as a procedural safeguard for signatories whose products might be subject to a countervailing duty investigation. This provision ensured that signatories were offered, before the initiation of the investigation, a reasonable opportunity for consultations with regard to the evidence contained in the complaint. Therefore, failure to respond in time to an offer of pre-consultations under Article 3:1 could not be construed as evidence of non-co-operation during a countervailing duty investigation. By definition, these consultations must be offered before an investigation was initiated and were meant to provide an opportunity to discuss the question of evidence for initiation. Moreover, the co-operation or lack of it during an investigation was covered by Article 2, and was not linked to the consultation provisions of Article 3. The heading of Article 2 was "domestic procedures and related matters". The obligation under Article 2:5 to afford "reasonable opportunity" was an obligation vis-a-vis all interested signatories and all interested parties. The "reasonable opportunity", therefore, must be seen in the context of the domestic procedures of the investigating authorities. Conversely, Article 3:2 lay down a general obligation for consultations, whose purpose included clarification of the factual situation and to afford a reasonable opportunity to arrive at a mutually agreed solution. Although consultations under Article 3:2 were normally part of the investigation process, the text of Article 3:2 did not seem to preclude consultations outside such a process.

73. The EEC disputed that Brazil had conducted an investigation in this case, and argued that the information collected by Brazil before the investigation, including the report by the World Bank which addressed the Brazilian dairy sector, might have played a role in the decision to open the investigation. However, the investigation did not begin until 16 March 1992, and Brazil could not simply rely on information obtained prior to the opening of the investigation and dispense with a preliminary investigation before the imposition of provisional measures. Moreover, Brazil's extensive borrowing from a confidential World Bank report on the Brazilian economy was clear evidence of the fact that Brazil had failed itself to carry out a preliminary investigation, as required under Article 5:1 in conjunction with Article 2:1 of the Agreement. Also, under Article 2:5, such a preliminary investigation must involve giving adequate opportunity to the parties to provide evidence and to make their views known. However, Brazil did not do so before taking provisional measures. Brazil did not even officially inform the EEC of the initiation of the investigation before taking such measures. The EEC argued that the fact that the EEC was not able to take up the offer of consultations under Article 3:1 was no reason for Brazil to dispense with a preliminary investigation, in which the EEC and the exporters would have had an opportunity to defend themselves.

74. The EEC further argued that even if Brazil did collect information before initiating the investigation, such information (and the argument regarding reliance on Article 2:9) was not mentioned in the Administrative Order No. 297 which imposed the provisional duties. Brazil could not now make up this lack of evidence in Administrative Order No. 297 by providing new information and claiming that it had collected the information before the initiation of the case, nor use the new argument that it was obliged to rely on the best information available under Article 2:9 of the Agreement (for details on this point, see Section IV.1).

75. Brazil contested the EEC's argument that the countervailing duty was not less than the subsidy. Brazil argued that the countervailing duty was less than the subsidy because Brazil had not considered any element of subsidies other than export restitution. Regarding the formal notification to only importers and producers on 7 April 1992, Brazil said that in this case it was appropriate to focus on importers for the information because in addition to being in touch with exporters, they had more relevant information on the market condition. The information that would be normally sought from exporters would consist of information regarding subsidies. Information from individual exporters was more relevant where individual firms received direct subsidies. It was less relevant in simple, clear-cut situations such as the consideration of EEC export restitution payments where standard amounts were

available to all exporters. In this investigation, information regarding these restitution payments was widely available.

76. Brazil did not agree with the EEC's contention that Brazil had relied on the information obtained prior to the opening of the investigation and had dispensed with a preliminary investigation before imposing provisional duties. Brazil emphasized that it had carried out a preliminary investigation and the report by the World Bank was part of the record of the investigation and did not substitute for the investigation. According to Brazil, the record consisted of all the documents obtained and used by the Ministry in making its determination. Brazil's investigation involved a review of extensive information, beyond that presented by the petitioners, which it had gathered in the period prior to the opening of the investigation. The information was part of the record of the case, and the EEC could have had access to it if it had so desired.

77. Regarding the EEC's argument that its Mission in Brasilia was still seeking instructions relating to the offer for consultations under Article 3:1 when Brazil initiated the investigation, Brazil argued that the question was why the offer of consultations was not immediately accepted, considering the potential of quick provisional actions guaranteed by recourse to Article 2:10. Further, the EEC had continued to ignore the offer even after the opening of the investigation. The EEC was minimizing the importance of Brazil's offer for consultations, and was confusing the issue by referring to it as an offer for "pre-consultations". At the meeting of the Committee on 28 April 1992, the representative of the EEC had stated with regard to Brazil's offer of consultations on 27 February 1992 that "it would seem that notwithstanding the offer for bilateral consultations …"[20], a statement which showed that the EEC did at that time consider that Brazil had offered bilateral consultations. Subsequently the EEC had changed its mind and used the term "pre-consultations" for the Brazilian offer. The Agreement did not have any term such as "pre-consultations". Brazil had offered bilateral consultations under Article 3:1, which the EEC had rejected, imposing undue constraints on the development of the investigation. Furthermore, regarding the EEC's offer to continue consultations under Article 3:1 along with consultations under Article 3:2, Brazil said that the consultations under Article 3:1 could not "continue" because they had not started due to the EEC's refusal to accept Brazil's offer of consultations.

78. Brazil further argued that the EEC was introducing new concepts alien to the spirit and the letter of the Agreement by trying to distinguish between the Brazilian offer of consultations already made with reference to the opening of the investigation and the EEC's request under Article 3:2 allegedly to deal with the question of the imposition of provisional duties. In its letter of 27 February 1992, Brazil had clearly offered consultations about the whole case and not just about the elements it had in hand to justify the opening of the investigation. In Article 3, "consultations" referred to the whole process mentioned in that provision: consultations would normally start by acceptance of an offer made under Article 3:1 and would continue throughout the period of investigation as provided in Article 3:2. The EEC's statement implied that the consultations be held separately concerning each action, i.e. opening of the investigation, imposition of provisional duties and the imposition of definitive duties. The provisions of Article 3 would not support such an interpretation. Any distinction between consultations offered or requested, or held under Article 3:1 or 3:2 was irrelevant. Consultations were intended to clarify the situation and to try to arrive at a mutually satisfactory solution, as prescribed by Article 3:1 of the Agreement. However, it did not appear that the EEC was interested in any mutually agreed solution to this case, and therefore the EEC's attitude was not in conformity with the provisions of the Agreement. At the consultations, the EEC had failed to take advantage of the occasions to supply the factual information and to make legal arguments that could have had an impact on the course of

[20]SCM/M/59, page 35

the investigation. The EEC's representatives were either "not authorized" or "not prepared" to hold consultations. Thus, serious consultations had not been held in this case.

79. Brazil argued that the EEC's had erroneously perceived that Brazil would not proceed with the case after sending the letter of 27 February 1992. In the circumstances, the EEC was on notice of the initiation of the investigation. The EEC had been urged to consult, but it did not react and neither was it later unaware of the investigation. In the specific circumstances, Brazil believed that all necessary steps were actually taken and obligations fulfilled for the purpose of notification, and it would be unfortunate to allow a procedural formality being emphasized by the EEC to overshadow the most crucial element of this case (for arguments relating to the procedures and their importance, see Section IV.2).

80. The EEC argued that it would not be correct to accept that the letter of 27 February was an offer of consultations for all stages of the procedure, including consultations preceding the opening of the investigation, the initiation of the investigation and the imposition of provisional duties. This would be contrary to an ordinary interpretation of the text and purpose of Articles 2:3, 2:15, 3:2 and 5:1 of the Agreement. In addition, this would shift the burden of proof from the signatory applying countervailing duties to the signatories and exporters affected by these duties to monitor constantly trade policies of other parties to detect possible trade measures that were prejudicial to their interests. This was not permitted by Articles 2:3 and 2:15 of the Agreement. Thus, the EEC disagreed with Brazil's argument that Article 3 did not provide any basis for distinguishing between consultations under Article 3:1 prior to initiation, and consultations under Article 3:2 regarding the imposition of provisional duties and subsequently regarding the imposition of definitive duties.

(b) Sufficient evidence on the existence of subsidy and injury

81. The EEC argued that the affirmative preliminary finding in Administrative Order No. 297 did not cite sufficient evidence on the existence of subsidy and injury and was thereby contrary to the requirements of Article 5:1.

82. Stating that customary principles of international law required that the term "sufficient evidence" in Article 5:1 be placed in its context and be examined in light of the treaty's object and purpose, the EEC argued that the text of Article 5:1 of the Agreement required a preliminary affirmative finding that a subsidy existed and "sufficient evidence" of injury as provided in Article 2:1 (a) to (c). As regards the amount and quality of evidence required, the EEC believed that something more than mere allegation or conjecture was needed. Given that provisional duties were just one step before imposing definitive countervailing duties, it appeared reasonable to assume that the amount of evidence required would be less than that required at the time of making the final determination. A mere textual comparison of Article 5:1 with Article 4:4 (in which the term "sufficient evidence" did not appear) clearly supported such an interpretation. On the other hand, under normal circumstances, the amount of evidence required for the imposition of provisional measures should be greater than that required when the decision to initiate the investigation was taken, since such decision was frequently taken on the basis of unverified information contained in the complaint.

83. The EEC argued that the term "sufficient evidence" would serve no meaningful purpose if it was not judged in relation to particular action contemplated in Article 5:1 of the Agreement and by taking into account also the intended anti-harassment function of that provision. Indeed, the substantive and procedural conditions laid down in Article 5:1 (and Article 2:1 to which Article 5:1 explicitly referred) aimed also at protecting the exporting country's interests from the potentially negative consequences of provisional duties imposed on unmeritorious or unjustifiable basis. It was clear,

therefore, that "sufficient evidence" could not be taken to mean just "any evidence"[21], but there was a need for a factual basis in the decision of the national authorities to initiate an investigation and in their decision to impose provisional measures, and this factual basis had to contain all the elements that would make it susceptible to review under the Agreement. In other words, the term "sufficient evidence" was to be interpreted to mean a factual basis that provided a reason to believe that a subsidy existed and that the domestic industry was injured as a result of the subsidized imports.[22]

84. The EEC argued that in the present case, Administrative Order No. 297 contained only one cryptic paragraph at the end of its preamble which read as follows[23]:

> "… taking account of the findings of case No. 10768.007731/91-23 and having regard to the existence of subsidies for the production and export to Brazil of the products referred to in this order, and the resulting injury to domestic industries, hereby lays down:"

This paragraph, which was a mere reproduction of the last paragraph in the preamble of the circular that notified the initiation of the investigation, did not provide "sufficient evidence" as required by the Agreement. It referred to the findings of a certain case No. 10768.007731/91-23, and the EEC did not know what this case was about because the findings of this case were never communicated to it or made public. Moreover, the above-quoted paragraph assumed, without offering any evidence or proof, that there existed subsidies for the production and export to Brazil of the products subject to Order No. 297. The above-quoted paragraph simply concluded that from those (unspecified) subsidies there resulted an injury to domestic industry, without moreover specifying whether the domestic industry for which injury had been concluded, produced like products. Also, the Administrative Order did not provide any information about the method used for the provisionally calculated amount of subsidization and of the duty rates. In fact, the summary explanation regarding the existence of a subsidy, of material injury and of a causal link between the subsidized imports and the alleged injury was inadequate by any standards.

85. The EEC argued that an analysis based on the Agreement should have explained the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and should have given the reasons and basis thereof. Article 2:1(b), to which Article 5:1 referred, provided that the term injury shall be taken to mean material injury and shall be interpreted in accordance with the provisions of Article 6 (and footnote No. 4 to Article 2:1). In its turn, Article 6 required that a determination of injury shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products; and, (b) the consequent impact of these imports on domestic producers of such products. Articles 6:2 to 6:4 then laid down a list of elements and factors that the objective examination of (a) and (b) referred to in Article 6:1 should consist of. Administrative Order No. 297 had completely overlooked all the above provisions of the Agreement.

86. The EEC questioned the "sufficiency of evidence" on the basis of which Brazil had imposed the provisional duties and in this regard pointed out that in this case the questionnaire to obtain information augmenting that in the petition was sent after the imposition of the provisional measures.

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[21]In this context, the EEC referred to paragraph 332 of the Report of the panel on "United States - Softwood Lumber".

[22]In support of this contention, the EEC cited *ibid.*, paragraph 333.

[23]The English version is quoted from an unofficial translation from Portuguese into English.

In addition, the EEC argued that Brazil was belatedly trying to justify the availability of sufficient evidence by presenting new information to the Panel (details on the arguments relating to this point are in Section IV.1). Without prejudice to its arguments on admissibility of new evidence provided by Brazil to the Panel, the EEC argued that even the new evidence showed that the EEC exports had declined by 1.3 per cent during 1989 to 1991, which was the period for which statistics were provided in the Order which finally imposed countervailing duties in this case. A similar fall in import volume occurred if the data for the first two months of 1992 were taken into account. Therefore, the EEC argued that the evidence on import volume developments was not sufficient in the sense of Article 5:1 of the Agreement to provide the basis for imposing the countervailing duties in this case.

87. Brazil did not agree with the EEC's view that "provisional duties were just one step before imposing definitive countervailing duties". Brazil argued that in line with Article 5:1, provisional duties were to prevent injury being caused (or continued) during the period of investigation. The provisional duties were to be imposed when a preliminary investigation demonstrated, in light of all the elements with the investigating authorities, the merit of the evidence presented in the petition. Subsequent information obtained during the investigation, including that presented in the replies to questionnaires sent by the investigating authorities to the interested parties, formed the basis for a decision regarding the imposition of definitive duties. Therefore, any complaint of non-compliance with Article 5:1 based on an alleged late receipt of the questionnaire was invalid. The questionnaire was intended to guide the investigating authorities concerning a final determination for the case, whereas the preliminary affirmative finding that led to the provisional duties was based on the examination of the information available to the investigating authorities at the time of the opening of the investigation, which by no means was restricted to the elements presented by the petitioners.

88. Brazil argued that it was undisputed that the EEC subsidized the exports of its milk powder. There had been ample information to calculate the level of subsidies and in spite of a lack of co-operation by the EEC, Brazil was able to calculate the rate of subsidy for the purpose of provisional measures by taking into account the publicly available information with regard to the amount of restitution available to the EEC's exporters of milk powder to Brazil. This amount was calculated in terms of the c.i.f. price, and the provisional duties imposed by Brazil were actually lower than the maximum amount possible, i.e. they were lower than the full amount of subsidy. This was in accordance with the recommendation of Article 4:1 of the Agreement that the duties be limited to the level sufficient to remove injury to domestic industry.

89. On the question of the method of calculation of the amount of duty, Brazil said that contrary to the claims of the EEC, the Brazilian authorities had tried to furnish the explanations to the EEC's officials in Brasilia, but alleging lack of authority to consult the EEC officials repeatedly rejected the efforts of the Brazilian authorities to explain. Even during the two consultation meetings, the EEC's officials had refused to understand the explanation by Brazil (for details, see Section IV.4(c)).

90. Brazil countered the EEC's contention that there was actually a decline in import volume during the reference period, and argued that the EEC was focusing on the data for 1989-1991 while the period of investigation was April 1991-March 1992. However, Brazil also clarified that the information on the first quarter of 1992 was not taken into account in the decision for imposing provisional duties because although the investigating authorities had some general information on the behaviour of imports during that period, official statistics were not yet available.

91. Brazil argued that the evidence showed that the level of subsidized imports from the EEC had risen sharply (an increase of 109 per cent from 1990 to 1991), these imports had captured an increasing share of the market (from 14.5 per cent in 1989 to 7.1 per cent in 1990 and then increasing to 14.8 per cent in 1991), and the domestic industry was facing severe economic difficulties. Regarding the question of injury to domestic production, Brazil contended that the investigating authorities had taken into account

the fact that imports from the EEC showed an artificial competitiveness backed by the heavy subsidization. This phenomenon made the imports from the EEC to be the major factor in the price formation for milk and milk powder in Brazil. In addition, the investigating authorities had considered the evolution of prices of milk powder from the EEC to Brazil, which were on a sharp downward trend. Information available at the time of the imposition of the provisional measures showed that subsidized imports from the EEC were increasing sharply, and could cause injury to the domestic milk and milk powder industries during the course of investigation. The elements considered by the investigating authorities at the time of the investigation, as well as their conclusions and findings had always been, and still were, available to any interested party which properly requested permission to examine the non-confidential documents contained in Case No. 10768.007731/91-23. This number identified the records of the investigation which contained all the relevant documents, statistics, technical reports and analyses, and annexes used as the basis for the successive conclusions. The public notices which gave information of the imposition of the countervailing duties in this case also mentioned this case number. Therefore, it was surprising that the EEC claimed not to know what this label number meant.

92. Brazil said that the domestic industry's severe economic difficulties were also documented in the report of the World Bank.[24] This report mentioned that the domestic milk industry was experiencing losses due to increased market share of subsidized imports. Brazil argued that the milk and powder industries in Brazil were experiencing material injury within the meaning of Article VI of the General Agreement as interpreted by the Agreement. This injury manifested itself primarily through the "stagnation" noted by the World Bank, as evidenced by the extremely low level of investment in the domestic industry. Brazil also noted that about six months before the provisional duties were imposed, it had removed price controls as recommended by the World Bank on the domestic industry so that it could benefit from price increases. However, the subsidized imports, the other of the two injurious factors mentioned by the World Bank, had prevented the domestic industry from getting these benefits, and instead resulted in material injury to the industry.

93. The EEC argued that a consideration of the different public notices and the questionnaire showed that it was not clear what period of investigation was used by Brazil in this case (see Section IV.4(a) for details).

94. The EEC argued that it had requested Brazil for access to the information in the administrative record but was not provided the relevant information. Noting that Brazil had now admitted that the first quarter of 1992 was not taken into account for provisional duties, the EEC said that the reference period for provisional duties was only nine months, i.e. April 1991-December 1991. The EEC further argued that since Brazil had admitted that when it had imposed provisional duties "official statistics were not yet available", but only "some general information on the behaviour of imports" was available to the investigating authorities, Brazil not only did not possess sufficient evidence before it imposed provisional duties but it also failed to carry out a preliminary investigation as required by Article 5:1. In addition, Brazil's conclusions were questionable because the retail prices in Brazil were liberalized for the first time in September 1991, and thus the market in Brazil was apparently undergoing structural adjustments during the period of investigation.

95. Brazil argued that the loss of market share by the domestic producers, and all the adverse consequences following from that loss, more than justified a preliminary affirmative determination under the standard of Article 5:1 of the Agreement.

96. Regarding the period of investigation, Brazil said that the Administrative Order No. 569 stated that the period of investigation was April 1991-March 1992. Brazil further argued that it was not clear

[24]The World Bank (1991), *op. cit*.

why EEC was belatedly invoking the question of reference period. Any ambiguity regarding the investigation period should have been clarified early by the EEC, but as with many other aspects, the EEC had not done so in this case. Also it was difficult to see how the definition of the "new", and shorter, period could in any way have harmed the EEC's interest. The choice had no significant bearing on the conclusions of the investigation, since the sharp increase in imports was verified along the whole of the period 1990-1992.

(c) Necessity of provisional measures to prevent injury to domestic industry during the period of investigation

97. The EEC argued that Administrative Order No. 297 did not make the slightest reference to the necessity of the provisional measures to prevent injury to domestic industry during the period of investigation, and was thereby inconsistent with Article 5:1 which required that provisional measures not be applied unless the authorities judged that they were necessary to prevent injury being caused to the domestic industry during the period of investigation.

98. Brazil stated that if an Administrative Order did not refer to the necessity of imposing provisional measures, this did not imply that the authorities had not determined that the provisional measures were necessary. On the contrary, all the sufficient factors were there to demonstrate the need for such a measure to prevent injury being caused during the period of investigation. Brazil also explained that of the eleven tariff lines which were included in the notice of initiation of this case, provisional duties were imposed on only seven. Of those excluded, two lines had not shown any imports from the EEC in 1991 and first quarter of 1992, and two others showed low levels of imports.[25]

4. Definitive Countervailing Duties

99. The EEC claimed that the definitive countervailing duties imposed by Brazil on milk powder from the EEC were inconsistent with Articles 6:1 to 6:4 of the Agreement which specified the requirements for a determination of the existence of material injury, given that:

(i) no attempt was made to examine the impact of imports on the domestic industry; and,

(ii) there was no evidence of causality and Brazil had failed to consider the impact of other factors.

100. Brazil argued that its definitive duties were imposed in conformity with the Agreement, and met the requirements of Articles 6:1 to 6:4 of the Agreement. There was an increase in the volume of subsidized imports of milk powder from the EEC, and these imports had resulted in a decline in domestic prices. The production in the domestic industry stagnated, and the decline in prices resulted in lower profits and investment in the domestic industry. There was a clear causal link between the subsidized imports of milk powder from the EEC and injury to the domestic industry. The investigating authorities had been aware of factors other than the subsidized imports which could have caused injury to the domestic industry, but had decided on the basis of the evidence that the increase in subsidized imports from the EEC caused material injury to the domestic industry.

[25]Tariff headings which showed no imports were 0402.10.9900 and 0402.29.0103. Imports under tariff heading 0402.29.0199 were 5.6 tonnes in the investigation period, and under 0402.29.0101 were 20 tonnes in 1991.

101. The EEC argued that Article 6:1 required that a determination of injury involve an objective examination of (a) the volume of subsidized imports and their effects on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products. These two criteria were elaborated in Articles 6:2 and 6:3, while Article 6:4 required that a causal link be established between subsidized imports and injury and that injury to domestic industry caused by factors other than subsidized imports not be attributed to the subsidized imports.

102. The EEC argued that the Administrative Order No. 569 which imposed the definitive duty constituted a clear violation of Article 6:1 and thereby a violation of Article 4 of the Agreement, because the Order did not provide any evidence to show that all the conditions of Article 6:1 were fulfilled.

103. The EEC argued that the evidence showed that the imports of milk powder from the EEC had declined over the reference period. Moreover, Administrative Order No. 569 made only a brief reference to these imports, and there was no consideration in the Order of the effect of the allegedly subsidized imports on prices or on Brazilian producers. Likewise, no causal link had been established between the effects of the allegedly subsidized imports and the alleged injury to domestic producers. Also, the Order did not discuss whether factors other than the allegedly subsidized imports were causing injury to domestic producers or how the stated facts supported, as a whole, the determination made by the investigating authorities.

104. Brazil argued that the substantive evidence had justified the imposition of the definitive duties. Brazil had to base its decision on the facts available because of the lack of co-operation by the EEC, in particular because of the wholly inadequate response of the EEC to the questionnaire sent by Brazil. The evidence which formed the basis of the affirmative determination in this case was in the administrative record, and had always been accessible to the interested parties. Brazil had notified the imposition of the definitive duties to the EEC by Diplomatic Note No. 150 (dated 15 September 1992) of the Brazilian Mission to the Commission of the European Communities. The exporters were not specifically notified because of difficulties in establishing communications with them.

105. The EEC recalled that Brazil had made the argument that its decisions were based on best information available for the first time in its submissions before the Panel. Therefore, as mentioned earlier, these arguments were inadmissible because they had not been stated in the Administrative Order imposing the countervailing duties, as required by Article 2:15 of the Agreement.

(a) Volume of imports

106. The EEC said that Brazil's analysis of the volume of allegedly subsidized imports did not meet the requirement specified in Article 6:2 that the investigating authorities had to consider whether there had been a significant increase in the volume of subsidized imports, either in absolute terms or relative to production or consumption in the importing country. Footnote 17 to Article 6:1 stated that such a consideration shall be based on positive evidence. The EEC said that the only reference to the volume of imports in Administrative Order No. 569 was the following:[26]

> "(e) The allegation of injury was found to be well-founded since imports of the products in question accounted for a large share of the domestic market. Total milk powder imports originating in the EEC represented 22.6%, 9.8% and 20.4% of domestic production in 1989, 1990 and 1991 respectively. Full cream milk powder represented 19.0%, 4.8% and 7.5% of domestic production in those years; imports of skimmed milk powder represented 19.9%, 12.9% and 30.9% of domestic production in those

[26]This was in paragraph (e) of Article 1 of the Administrative Order (see ANNEX 2).

years, thus contributing to the stagnation of domestic production ..." (unofficial English translation).

The EEC argued that these data actually showed a decline, and not a significant increase, in imports of milk powder in the period 1989 to 1991.

107. Furthermore, the EEC had serious difficulties in accepting the accuracy of these data. The EEC's own trade data showed a much larger decline.[27] According to the EEC's trade data, exports of total milk powder to Brazil fell from 63,335 tons in 1989 to 19,762 tons in 1990 and went up to 35,793 tons in 1991, i.e. a decline of almost 50 per cent between 1989 and 1991. For skimmed milk powder, on which Brazil seemed to base most of its allegations, EEC's exports fell from 29,995 tons in 1989 to 4,964 tons in 1990 and went up to 13,299 tons in 1991, i.e. a decline of almost 57 per cent between 1989 and 1991.

108. The EEC argued that as far as the differences in the data from Brazil and the EEC were concerned, it would be useful to consider the data from the United Nations, which was supplied normally by the country in question.[28] The estimates of total imports for 1989 were similar for the data from the United Nations and from the EEC, but differed from the Brazilian data. The totals for 1990 and 1991 were similar for data from all the three sources. The EEC found it difficult to explain the wide discrepancy between the United Nations statistics which were supplied by Brazil and the figures supplied by Brazil in Administrative Order No. 569 or in its submissions to the Panel. There was a clear discrepancy when the statistics were broken down by product, i.e. skimmed milk powder and whole milk powder. The EEC could not exclude the possibility that different classification for the product categories might have contributed to the discrepancy.

109. To illustrate its point regarding the difference in the developments reflected by the data from Brazil and the EEC, the EEC also provided data for the first two months of 1992 from the two sources. For the first two months of 1990, 1991 and 1992, the estimates, in tons, were as follows:

[27]As mentioned earlier, a correction to these data by Brazil was published on 20 August 1992. The EEC's data differed from the corrected data also.

[28]The EEC provided the Panel with the following export data, in units of thousand tons, from the three sources for the years 1989, 1990 and 1991:

	Skimmed Milk Powder			Whole Milk Powder		
United Nations	25.2	2.8	22.2	37.2	15.1	16.5
Brazil	19.9	12.9	30.9	19	4.8	7.5
EEC	30	5	13.3	33.4	14.8	22.5

	Total Milk Powder		
United Nations	62.4	17.9	38.7
Brazil	38.9	17.7	38.43
EEC	63.4	19.8	35.8

The data from the United Nations was from the United Nations COMTRADE Database.

	Brazil			EEC		
Skimmed milk powder	0	621	1,568	1,746	32	427
Whole milk powder	9	58	857	55	681	1,270
Total	9	679	2,425	1,801	713	1,697

110. The EEC said that while Brazil's own trade data was notified to the EEC on 26 October 1992, much after the decision to impose definitive duties had been taken, the EEC had notified its trade data to Brazil's Mission in Brussels on 24 June 1992 in response to the questionnaire sent by Brazil. The EEC had provided data on exports for the years 1990 and 1991 as requested in Brazil's questionnaire, as well as for the years 1985-89. The data for the first two months of 1992, which was also requested in the questionnaire, was not provided because it was not available at the time of the reply. However, Brazil did not take into account the data provided by the EEC, and gave no explanation for overlooking that data.

111. The EEC argued that a review of whether the investigating authorities had made a determination of injury based on an objective examination of the volume of subsidized imports had to include an examination of whether they had considered all relevant facts before them, including facts which might detract from an affirmative determination, and whether a reasonable explanation had been offered of how the facts as a whole supported the determination made by the investigating authorities.[29] This standard had not been met by the above-quoted paragraph 1(e) of the Administrative Order No. 569. Though Brazil had not taken into account in its final determination the trade data supplied by the EEC in response to the questionnaire sent by Brazil, it was clear that on the basis of any data there had been a significant decrease in imports of milk powder from the EEC, rather than a significant increase mentioned in Article 6:2 of the Agreement. Moreover, Administrative Order No. 569 did not provide any explanation of why the data on the decrease in the volume of imports, especially the dramatic fall shown by the data of both parties for 1990, did not detract from Brazil's affirmative finding of a significant increase in the volume of imports.

112. Brazil acknowledged that there were discrepancies in the data provided from the Brazil, EEC, and the United Nations, both for the total and the disaggregated product categories. Brazil explained that while the data it had used in the investigation referred to imports from the EEC, the EEC's trade data referred to exports from its Member States to Brazil. Also, since the tariff lines were not indicated in the data provided by the EEC to Brazil on 24 June 1992, it had been, and continued to be, difficult to compare the data from the two sources because information on tariff line coverage was essential for making a comparison. This was especially true for skimmed milk powder for which there were large discrepancies in the data from the EEC and Brazil. Regarding the data from the United Nations, Brazil said that there was no control by the member countries on how the United Nations allocated the data in different categories. Also, 1990 was a year when several countries had data problems because of a changeover to the Harmonized System and that could have affected the estimates prepared in that year.

113. Brazil argued that the definitive duties were based upon all the information that the investigation had revealed. In response to the EEC's complaint that Brazil had not used the data provided by the EEC, Brazil said that its data on import volume was based on official statistics. Furthermore, except for the year 1989, the situation according to Brazil's data was similar to that shown by the data from the EEC. Therefore, the picture was unchanged whatever data was used because the period of investigation was April 1991-March 1992. Brazil argued that the extensive information available with

[29]In this context, the EEC cited the Report of the panel on "United States - Salmon", paragraph 258.

the Brazilian authorities included information that import volume had continued to increase in 1992, following the increase in 1991. The volume of subsidized imports of skimmed milk powder from the EEC increased by 67 per cent in the first four months of 1992 in comparison to the same period in 1991. The corresponding increase for whole milk powder was 423 per cent. The volume of subsidized imports of total milk powder from the EEC increased by 109 per cent from 1990 to 1991, and by 229.5 per cent from the first four months of 1991 to the first four months of 1992. The share of the EEC in Brazilian imports of milk powder increased from 31.06 per cent in 1990 to 39.53 per cent in 1991[30], and its share in Brazilian consumption grew from 7.1 per cent in 1990 to 14.8 per cent in 1991. Also, as rehydration of imported milk powder increased, especially in 1991, the domestic producers of fluid milk were faced with depressed prices and with difficulties to market their product.

114. The EEC said that its claim that there was a decline in import volume was based on the data for 1989 to 1991, the period referred to in Brazil's definitive determination. While Brazil's data showed a decline of 1.3 per cent over this period[31], the decline according to EEC's data was 43.5 per cent, and according to the United Nations' data the decline was 38 per cent. While it was true that imports increased in 1991 compared to 1990, there was no attempt in Administrative Order No. 569 to address the decline (or the absence of a significant increase) in imports during the period under consideration, i.e. 1989 to 1991. In particular, no account was taken of the significant decline in imports between 1989 and 1990.

115. The EEC also argued that if, at the time of the final determination, Brazil had the required information on import volume for the entire period, i.e. including first quarter of 1992, then Brazil should have included that information in the Administrative Order No. 569 under Article 2:15 of the Agreement, or at the very least communicated it to the EEC following the EEC's request of 31 August 1992. The Administrative Order No. 569 provided only some import volume data for 1989-1991, and there was no information for the first quarter in 1992. Furthermore, Brazil had provided to the Panel estimates which had been updated more than once[32], and these statistics covered time periods which in certain instances went beyond the first quarter of 1992.

116. Regarding the EEC's claim that there was a decline in import volume over the period 1989 to 1991, Brazil clarified that the investigation period was that indicated in the Administrative Order No. 569, i.e. the twelve month period April 1991-March 1992. Brazil argued that data from any source showed that there was an increase in import volume during that period.

117. Brazil argued that though it had provided updated data to the Panel, the qualitative picture had remained the same as that shown by the data used for the investigation. The data showed that the volume of imports of milk powder from the EEC and the share of these imports in total imports of milk powder by Brazil had increased sharply. The volume of Brazilian imports of milk powder from the EEC had increased by 109.6 per cent in 1991 compared to 1990, and by 229.5 per cent in the first quarter of

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[30]As mentioned earlier, the data in the Administrative Order No. 569 on import shares was inaccurate because of some clerical errors. The corrected information was subsequently published on 20 August 1992, and Brazil had informed the EEC about these changes.

[31]The updated data provided by Brazil in its first submission to the Panel showed a decline of 4.6 per cent.

[32]The EEC pointed out that the statistics presented in the Administrative Order No. 569 were revised on 20 August 1992. However, even the corrected statistics were different from the import statistics communicated by Brazil to the EEC on 26 October 1992. Further changes were made in the data cited in the first submission of Brazil to the Panel, and in the revised version subsequently circulated to the Panel. The data provided by Brazil to the United Nations differed from all these estimates.

1992 compared to the same period in 1991. The EEC's share in total imports of milk powder was 31.36 per cent in 1990, 39.53 per cent in 1991, and 52.6 per cent in the first third of 1992.

118. Brazil argued that though information on the first quarter of 1992 was not mentioned in the Administrative Order No. 569, this did not warrant any allegation that the information relating to this period was not considered in the final determination. While this period was not taken into account in the decision for imposing provisional duties because official statistics were not yet available, the statistics were available at the time the definitive duties were imposed. The examination of these statistics had fully confirmed the sharp increase of imports from the EEC (a trend already noticed in 1991) and the harm they were causing to the domestic milk and milk powder industries. The information covering the first quarter of 1992 was not provided in the Administrative Order No. 569 because the information presented in that Order was a comparison between imports from the EEC and domestic production of milk powder, and at that time there were no statistics concerning domestic production of milk powder for the first quarter of 1992.

119. The EEC argued that a consideration of the different public notices and the questionnaire in this case showed that it was not clear what period of investigation was used by Brazil. While the Administrative Order No. 569 which imposed the definitive duties stated that the period of inquiry concerned "the 12 months prior to the date of publication of DECEX Circular No. 83 of 16 March 1992, namely April 1991-March 1992", Brazil had informed the Panel that the period of investigation covered the period April 1991-March 1992, i.e. including March 1992 and not twelve months prior to 16 March 1992. In contrast, Point 1 of the General Instructions for the questionnaire received by the EEC on 18 May 1992 stated a different period of investigation, namely that the "period covered by the enquiry was the two years 1990-1991, plus the months of January and February 1992". However, a consideration of the data requested in the questionnaire suggested a yet different period of investigation. In point 2.12 on page 5 of the questionnaire, Brazil had requested information relating to total sales for the period of 1990, 1991 and 1992. The picture was not clear if the public notices were considered for the period for which the data was considered. While Administrative Order No. 297 did not give data for any period, the Administrative Order No. 569 gave data for 1989-1991, but not for any period during 1992. Thus, the period of investigation in this case was not exactly clear.

120. The EEC argued that even if the reference period of April 1991-March 1992 was assumed to be correct, Brazil had violated Articles 2:15 and 6 of the Agreement by not providing the data (or the factual basis) for first quarter 1992 in the Administrative Order No. 569, because it had failed to provide the factual basis upon which its decisions were based. It was unconvincing that Brazil possessed the data for 1992 but did not provide it in the Administrative Order. Also, the EEC reiterated that the basis for the countervailing duty imposed had to be shown in the Administrative Orders and not in the administrative record.

121. Brazil said that the EEC's assertion that there was a decline in the volume of imports during 1989 to 1991 ignored what had happened in 1990. It was noteworthy that the Brazilian authorities had declined to open an investigation in 1991 when imports were declining in comparison to 1990. The picture had changed radically in 1992 because imports increased strongly during 1991 and the first quarter of 1992. Also, prices had continued on their downward trend recorded since 1989. Brazil emphasized that it did not impose countervailing duties in 1992 based on the trend of imports from 1989 to 1991. It did so in light of, among other factors, the sharp increase in imports from 1990 to 1991, which continued into 1992. The relevant data considered by the investigating authorities were those for 1990-1991, and for this period both the Brazilian and the EEC's data showed a sharp increase in imports. Moreover, if a longer period of 1981-1990 was considered, it could be observed that milk powder imports from the EEC to Brazil had been on a long term upward trend.

122. Regarding the difference between the period of investigation in Administrative Order and in point 1 of the General Instructions for the questionnaire, Brazil stated that although the period of investigation was April 1991-March 1992, the questionnaire had requested data for a longer period in order to ascertain trends considered to be useful for a good appreciation of the case. Information for a longer period was requested in the questionnaire in order to ascertain the trend of prices in the longer period and the occurrence of other factors. The analysis of data for a longer period was considered a useful additional instrument to decide if the impact resulted from the subsidized imports and not from other factors. Brazil found it difficult to see how the definition of the "new", and shorter, period could in any way have harmed the EEC's interest. Also, it was difficult to understand the real relevance of the question because whether one considered the indicative period of the questionnaire, or the more precise period of the Administrative Order No. 569, the choice had no significant bearing on the conclusions of the investigation, since the sharp increase in imports was verified along the whole of the period 1990 to first quarter 1992.

(b) Impact of subsidized imports on domestic producers

123. The EEC argued that Brazil had not considered the impact of the allegedly subsidized imports on the domestic producers as required under Articles 6:1(b) and 6:3 of the Agreement. The EEC said that Article 6:3 elaborated on the criteria for the examination of the impact on the domestic industry of the subsidized imports. The EEC argued that this subject was not addressed in the Administrative Order No. 569, where except for a vague reference in Article 1(e) to production having stagnated, there was no mention of any of the indicators which Brazil was required to evaluate in Article 6:3 of the Agreement. Even the reference to production stagnation was totally contradicted by data received from the Brazilian investigating authorities on 27 July 1992, showing a 50 per cent increase in milk powder production between 1989 to 1991, and by the data in the Administrative Order No. 569 itself comparing import volumes to levels of production in Brazil (see ANNEX 2). It could be deduced from the data in the Administrative Order No. 569 that production of milk powder in Brazil went up by 9 per cent from 172,000 tons in 1989 to 188,000 tons in 1991.[33] Moreover, the EEC said that Brazil had never provided definitive data on production, consumption, profitability, capacity utilization, market share or any of the other factors indicated in Article 6:3, nor were these issues dealt with in any way in the final determination.

124. The EEC also claimed that during consultations prior to imposition of definitive duties in this case, Brazil had insisted that it was for the EEC to demonstrate that the allegedly subsidized imports had not caused injury to Brazilian domestic industry rather than for Brazil to provide evidence of injury. Later, in a written reply of 30 September 1992 to the EEC following the imposition of the definitive duties, Brazil had stated that:

> "The Brazilian authorities consider that the level of subsidized imports in relation to domestic production and the price differential between the subsidized imported product and the domestic price are sufficient proof of injury to the domestic industry."

The EEC argued that this point of view could also be deduced from the first sentence of paragraph 1(e) of Administrative Order No. 569, which read as follows:

> "The allegation of injury was found to be well-founded since imports of the products in question accounted for a large share of the domestic market." (unofficial translation into English, emphasis added by the EEC).

[33]The EEC also referred to SCM/M/62, paragraph 63 in this context.

Thus, the EEC argued that it seemed that for Brazil, the concept of injury to domestic producers was synonymous with market share of imports, without there being any need to show any specific negative impact on producers. It was clear, therefore, that Brazil believed that it was necessary to look at only import volumes and prices, and not at their consequent impact on the domestic producers, as required by Articles 6:1(b) and 6:3 of the Agreement. It followed that Administrative Order No. 569 did not offer any reasonable explanation in support of its vague statement on stagnation of the domestic production. For these reasons, the EEC considered that Brazil had also violated Article 6:1(b) of the Agreement.[34]

125. The EEC argued that in carrying out an objective examination required under Article 6:1 of the Agreement, the investigating authorities were obliged to consider the criteria and indicators laid down in Articles 6:2 and 6:3. Therefore, an essential element of a review of whether a determination of material injury was in conformity with the standard of Article 6 was an examination of whether the factors set forth in Articles 6:2 and 6:3 had been properly considered, though Article 6 did not prejudge the weight to be assigned to each factor.[35] However, in this case, the data on the elements contained in Article 6:3, such as on consumption, market shares, production or prices, had not been provided by Brazil at the time of its definitive determination. Moreover, despite the EEC having had earlier requested data on these aspects from Brazil, the first time the EEC received such data was when Brazil submitted the information on these aspects to the Panel.

126. Brazil contested the EEC's statement that Brazil had not earlier shown the relevant evidence to the EEC. It argued that the evidence had been provided during consultations and during the conciliation meetings of the Committee, and later in Brazil's submissions to the Panel.

127. Brazil argued that when the investigating authorities decided to impose definitive duties in this case they had extensive information and all relevant aspects of Article 6:3 of the Agreement were considered in the record of the investigation. The Administrative Order No. 569 reflected the results of the investigation, and presented a summary of the relevant aspects of the investigation such as market share, identification and quantification of subsidies (Regulation 1513/92 of the EEC), indication of the stagnation of the milk production, and the domestic prices. Detailed information was in the records of the investigation, which was not considered by the EEC officials who visited the investigating authorities before and after the final determination. Brazil argued that it had to rely on the "facts available" due to lack of co-operation by the EEC in this case (for details on this argument, see Section IV.4(c)).

128. Brazil argued that it had conducted a detailed analysis of the impact of the subsidized imports of milk powder from the EEC on domestic sales, which had included a consideration of the fluid milk as well as milk powder. This had required an examination of both the formal and the informal markets for milk in Brazil. In response to a question by the Panel on whether the data in Administrative Order No. 569 referred to both formal and informal markets, Brazil explained that milk powder production

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[34]In this context, the EEC referred to the report of the panel on Canadian countervailing duties on grain corn from the United States, SCM/140 of 21 February 1992, paragraph 5.2.6 (adopted on 26 March 1992, hereinafter referred to as "Canada - Grain Corn"). In paragraph 5.2.6, the panel had noted that the investigating authority did not consider any evidence on price undercutting, price depression or sales lost due to subsidized imports, and thus found that the investigating authority did not consider the price effects of subsidized imports, as required by Article 6:2.

[35]To support its point that the question of whether the determination of injury was based on positive evidence was distinct from the question of the weight to be accorded to the facts before the investigating authorities, the EEC cited the report of the panel on "United States - Salmon", paragraph 260.

in Brazil occurred only in the formal market. Brazil said that the distinction between the formal and the informal markets was that the formal market was controlled by authorities implementing the sanitary standards, was well documented, and was fully represented in official data. The informal (unofficial) market operated outside official sanitary standards and was characterized by undocumented cash transactions. Brazil said that the prices in the formal market were higher, and the imported milk powder when reconstituted into milk as a result of rehydration competed directly with the pasteurized fluid milk in the formal market. Competition from imported milk powder had depressed prices in the formal market and had forced some of the fluid milk in the formal market to be converted into milk powder in order to be conserved and stored for possible sales at a later time. Much of the domestic milk powder factories (about 30 per cent of the installed capacity) belonged to co-operatives and were thus linked to milk producers. The conversion to milk powder added to the cost of the industry, and adversely affected cash flow. Moreover, the competition from imports resulted in diverting the production of milk to the lower priced informal market, where producers hoped to earn a higher return because of the lower cost structure. Sales of reconstituted milk, which had declined in 1991 compared to 1990, began climbing sharply in late 1991 and into 1992, and the domestic industry had lost market share to the imports of milk powder. For example, in Sao Paulo, the largest milk market in Brazil, sales of rehydrated milk declined by 43 per cent in the first half of 1991 compared to the first half of 1990, and then began to climb sharply, increasing by more than 65 per cent in the second half of 1991 and by 102 per cent in the first half of 1992.

129. Brazil argued that its investigation had revealed that, despite having a comparative advantage in the production of milk products, the domestic industry was not able to make much needed investment and improve productivity on account of the adverse effects of subsidized imports. This had also been documented in the above-mentioned report of the World Bank.[36] The impact on the Brazilian industry was all the more severe because Brazil was a developing country and the low income of its domestic producers in comparison to the income level of the EEC producers made the Brazilian industry more vulnerable. In reaching its final determination, Brazil had considered the incomes of its workers in the dairy sector and that a given level of subsidized imports (and a given level of price suppression or depression), was more injurious to its industry whose workers earned well under US$2,000 than it might be to an industry whose workers on average earned more than US$10,000.

130. The EEC emphasized that the obligations under Article 6 meant that Brazil had to conduct an investigation and collect the necessary data and evidence. In the absence of such an investigation, Brazil could not claim that such an approach could be covered by the use of "facts available" and substitute other information (such as that from the World Bank report) for a proper investigation of the state of its domestic industry. Brazil could not now, one year later, make up the lack of such evidence in Administrative Order No. 569 by providing new evidence or by referring to reports established by outside institutions such as the World Bank.

131. The EEC questioned the direct relevance to the discussion on the impact on sales of the alleged subsidized imports from the EEC, of Brazil's argument about the formal and informal milk markets in Brazil or Brazil's effort to compare the level of income of EEC farmers with the level of income of Brazilian farmers. The EEC further argued that with regard to formal and informal markets, on the one hand Brazil had argued that Brazilian milk producers could hope to earn a higher return in the informal markets, on the other hand it had also argued that imports had increasingly pushed Brazilian production into lower priced informal markets.

132. The EEC disagreed with Brazil's contention that Brazil had provided the relevant evidence on elements enumerated in Article 6:3 to the EEC prior to the panel proceedings. Brazil had never

[36]The World Bank (1991), *op. cit*.

provided any evidence on consumption, market shares, capacity utilization or profitability relevant to an examination of injury to the domestic industry under Article 6, either during the investigation or in consultations or conciliation meetings. These data were definitely not provided in Administrative Order No. 569 which imposed the definitive duty. The EEC recalled that Brazil had provided some relevant data to it only on a few occasions. In Brazil's letter of 27 July 1992, there was a table which provided data on production of milk powder in Brazil, but since the data was in units different from those for the import data provided later, it was difficult to compare the two sets of data. Further, in a letter of 30 September 1992, Brazil had provided the EEC with brief trade statistics on the volume of EEC exports of milk powder to Brazil and had compared proportionate share of EEC exports to Brazil's production of the products in question. However, Brazil had subsequently twice modified these estimates in its submissions to the Panel. Brazil had also briefly referred to prices in the letter of 30 September 1992, but had not linked the effects of EEC imports on the level of prices in Brazil. Also, Brazil had not explained how the volume of EEC imports and their price level had resulted in material injury to the domestic industry.

133. The EEC argued even if the evidence provided for the first time before the Panel was taken into account, Brazil had not shown that the conditions for imposing provisional or definitive countervailing duties under the Agreement were fulfilled. For instance, the evidence submitted at the time of the first submission to the Panel by Brazil showed an increase in domestic production of milk powder from 171,800 tons in 1989 to 190,800 tons in 1990 and a change to 188,100 tons in 1991. In contrast, domestic apparent consumption fell from 266,700 tons in 1989 to 247,700 tons in 1990 and to 250,900 tons in 1991. The EEC said that in light of data that showed a substantial increase of production when there was a considerable contraction in demand, it was not reasonable to argue that there was stagnation of domestic production.

134. Addressing the EEC's contention that Brazil had not provided much information prior to the Panel proceedings, Brazil said that though it attempted to provide information during the consultation meetings, the EEC did not seem to be interested in conducting meaningful consultations. Brazil argued that in the conciliation meeting of the Committee, Brazil had provided information only to the extent that the EEC had any questions. Furthermore, the information on aspects such as production and consumption was provided later by Brazil through a letter when it was requested to do so.

135. Brazil reiterated that the administrative record of this case showed that there was adequate basis for imposing definitive duties. It argued that a consideration of the lower income of the agricultural workers was relevant for injury analysis because a struggling industry in a developing country was more vulnerable than a similar industry in a developed country. The reason for taking account of the fluid milk production and the informal and the formal sector in the injury analysis was the link between the formal and informal markets, especially as the excess production in the formal market was transferred either to the informal market or converted to milk powder and because the imported powdered milk was transformed into fluid milk and thus competed with domestically produced fluid milk. There was fungibility between the two products and the injury analysis had to take into account both of them. Brazil also noted that the petitioners in this case were producers of fluid milk.

136. Addressing the EEC's argument that there was no stagnation in the Brazilian industry because the domestic output of milk powder had increased, Brazil said that one peculiar aspect of this industry was that idle capacity was reduced when the market was saturated with imports. This was a result of the competition of the rehydrated imported milk powder with the domestic fluid milk. Part of the fluid milk displaced from the formal commercialization circuit was transferred to be processed into milk powder, where it was stocked at high maintenance and financial costs until better market conditions came up. From the domestic industry's point of view, this was a situation that in the medium term would affect its performance and profitability. Brazil said that although the language in Administrative Order No. 569 may be somewhat confusing about the point on "stagnation", it was clear that Brazil

had always meant that the word "stagnation" used in the Administrative Order No. 569 referred to the production of fluid milk (as it was also meant in the World Bank report). As for the milk powder industry, the injury was caused by the need to withhold stocks with high financial and operational costs.

137. Brazil argued that the impact of imports of subsidized milk powder from the EEC on fluid milk production in Brazil was direct and severe, causing stagnation to which the World Bank had also referred. Total production of fluid milk in the period 1990-1991 stagnated as the increase was only 3.4 per cent. This increase was totally directed to the informal market, while production in the formal market in 1991 remained at the same level as in 1990. There was a replacement of the domestic product by the imported milk powder, mainly from the EEC which had a major, predominant, share in Brazil's total imports of milk powder. Brazil provided data for 1990-1991 on production, imports and market share for skimmed milk powder (because this type of milk was mainly destined to rehydration, and thus competed more adversely with domestic production).[37] This data showed that in 1991, Brazilian domestic production of skimmed milk powder increased by 1.8 per cent and its total imports of this product increased by 83.7 per cent (with imports from the EEC increasing by 129.6 per cent). Thus, while the share of domestic production of skimmed milk powder in domestic apparent consumption declined by 17.7 per cent, the corresponding share of imports from the EEC increased by 85.6 per cent.

138. Brazil further argued that there was a sharp decrease in domestic market prices as a result of the imports from the EEC. Moreover, an unusual feature was noted in 1990: prices declined even more during the dry season (April-September), something that even contradicted the logic of the market rules. This happened in a period when the producer, as a result of a quota formation system, was able to secure better prices both for scarce production in the dry season and for future production in the next season. The unexpected behaviour of prices was due to a concentration of imports of milk powder during this period. In 1991, the tendency of price decline had deepened, and the prices fell by 21 per cent compared to 1990. In comparison, the prices of imported milk powder had declined by 25.5 per cent during 1990-1991. Brazil argued that having lived for a long period under government intervention, the Brazilian dairy sector had always operated with low profit margins. The only opportunity for reversal of this picture, offered by the lifting of milk prices control in September 1991, was choked off by the effects of increasing subsidized imports of milk powder from the EEC.

139. The EEC argued that Brazil was introducing new information like the division between "dry season" and "rainy season" and new concepts like "the quota formation system". Brazil had also referred to the unexpected behaviour of prices but did not say how the liberalization of prices in September 1991 had affected the formation of prices of domestic and imported products in the present case. The liberalization of prices had also caused structural adjustment problems during the period of investigation. Furthermore, the EEC argued that the World Bank report, on which Brazil appeared to rely to a large extent, itself had indicated that the price controls which were in place till September 1991 had had an adverse effect on productivity levels and investment in the domestic industry in Brazil.

140. The EEC said that it appeared from Brazil's arguments that the fluid milk industry was different from the milk powder industry because the domestic fluid milk from the formal market was converted into milk powder in the formal market (and diverted as fluid milk into the informal market) when there was a displacement of the fluid milk from the formal market. The EEC noted Brazil's statement that injury to fluid milk industry consisted of the stagnation of production, while the injury to milk powder

[37]Brazil provided the following data on skimmed milk powder for the period 1989-1991, in units of 1,000 tonnes: domestic production (50.7, 38.9 and 39.6), total imports (44.7, 34.3 and 63), imports from EEC (19.9, 12.9 and 39.6), carry over (10, -- and 26), apparent consumption (85.4, 61.8 and 76.6), EEC's percentage share in apparent consumption (23.3, 20.8 and 38.9), Brazil's percentage share in apparent consumption (59.4, 62.9 and 51.7).

industry arose from the need to hold high stocks. The EEC argued that though Brazil was arguing that production in the fluid milk sector had stagnated, the data showed that it had actually increased by 3.4 per cent in 1991 compared to 1990. Regarding the displacement of milk into the informal market, the EEC pointed out that Brazil had itself stated that the producers hoped to earn a higher return because of the lower cost structure of the informal market. Therefore, Brazil had not shown how the domestic fluid milk industry had suffered any material injury. Regarding the milk powder industry, the EEC noted Brazil's argument that the injury was due to the need to hold high stocks, and that Brazil's explanation was mainly in terms of the market for skimmed milk because "this type of milk is mainly destined to rehydration, and thus competes more adversely with domestic production". The EEC argued that this stricter definition of milk was also a new element, never mentioned earlier in the Administrative Orders Nos. 279 and 569. The EEC further argued that Brazil had not explained that skimmed milk powder accounted for only about 20 per cent of its domestic production, a fact that rendered Brazil's arguments arbitrary; the EEC also argued that Brazil had also not explained what it meant by "carry over" and how this affected its calculations which were used to provide the information on domestic production. The EEC pointed out that in the data provided by Brazil, the figure for imports from the EEC should be 30.9 and not 39.6 for the year 1991. Moreover, Brazil's argument linking high imports and production of milk powder should logically imply that whenever there were high imports of milk powder the production of milk powder (particularly production of skimmed milk powder) should also show an increasing trend. However, the data showed that while total imports of skimmed milk powder increased during 1989 to 1991, the domestic production of skimmed milk powder decreased during that period.

(c) Causal link between allegedly subsidized imports and the injury

141. The EEC claimed that since Brazil had not complied with Articles 6:1 to 6:3 in determining injury, and because the causal "effects" under Article 6:4 had to be interpreted as set out in Articles 6:2 and 6:3, logically Brazil could not demonstrate causality between allegedly subsidized imports and injury as required under Article 6:4 of the Agreement. In addition, Brazil had not made any attempt to consider whether factors other than the allegedly subsidized imports had caused injury. For example, imports from Poland had increased rapidly from zero in 1989 to 3,943 tons in 1990 and to 19,110 tons in 1991. Brazil's own data showed that these imports were made at prices lower than the prices of the imports from the EEC. Regarding imports of whole milk powder, the imports from Switzerland increased from 9,048 tons in 1989 to 13,783 tons in 1991 even though these imports were selling at prices higher than those charged by the EEC. Therefore, the EEC claimed that Brazil had failed to consider the whole picture and to provide a reasonable explanation of why the above-mentioned factors did not detract from its affirmative finding on the effects on domestic industry. Article 6:4 laid down a legal obligation to demonstrate that injury is caused through the effects of the subsidized imports and that injury caused by other factors shall not be attributed to the subsidized imports. The EEC therefore concluded that Brazil had failed to establish any causal link between the effects of the subsidized imports and the alleged injury to domestic producers, as required by Article 6:4 of the Agreement. In addition, Brazil had not shown that it took account of factors other than the allegedly subsidized imports in assessing the causes of the alleged injury, and had not shown that injury caused by such other factors had not been attributed to the imports from the EEC.

142. The EEC argued that the requirement for "positive evidence" under Article 6:1 of the Agreement meant that clear, definite and certain evidence on the relevant factors must form the basis of the finding.[38]

[38]In this context, the EEC noted that the panel on "Canada - Grain Corn" had stated that a claim that injury had been caused by potential or likely imports of grain corn from the United States was a "speculative exercise and had potentially very broad implications" and therefore, did not constitute positive evidence as required by the Agreement. BISD 39S/411, 432

The EEC also stated that though the strict standard for positive evidence was somewhat less in the situation of threat of injury, Brazil had claimed that the situation in this case was one of material injury and not threat of injury. Brazil had clearly failed to meet the standard of "positive evidence" because the Administrative Order No. 569 contained only a brief reference to the volume of imports which showed a fall of 1.3 per cent instead of a "significant increase" as required by Article 6:2; did not consider the effect of the allegedly subsidized imports on prices; did not discuss the consequent impact of such imports on Brazilian producers; did not establish any causal link between the effects of the allegedly subsidized imports and the alleged injury to domestic producers; and did not discuss whether factors other than the allegedly subsidized imports were causing injury to domestic producers. Consequently, Brazil had failed to carry out an objective examination because it had not examined all the relevant facts that it was obliged to examine under Articles 6:1 to 6:4 (including facts which might detract from an affirmative determination) and had also failed to provide a reasonable explanation of how the stated facts in Order No. 569 supported, as a whole, the determination made by the investigating authorities.

143. Brazil argued that the data available with the Ministry at the time it made its final determination to impose definitive duties showed clearly that the heavily subsidized imports from the EEC were materially injuring the domestic milk and milk powder industries in Brazil. Even though the Ministry was aware that other factors might be causing injury to the domestic industries, it was fully satisfied that imports from the EEC, by themselves, were a clear cause of the material injury to those industries. The causal link was shown by the loss of market share held by the Brazilian producers, by the increased market share held by the subsidized imports from the EEC, by the displacement of domestic fluid milk into the informal market and to the milk powder factories, and by the decline in prices received by Brazilian producers resulting from excess supply originating in the increased subsidized imports from the EEC.

144. Brazil said that the rise in the volume of subsidized imports of milk powder from the EEC had a direct impact on the level of prices in the Brazilian market. Data regularly collected by, and thus available to, the Government during the investigation showed that average producer prices of milk in Brazil had first increased from US$0.23 in 1989 to US$0.28 in 1990, and then decreased by 21 per cent to US$0.22 in 1991. Average monthly producer prices in Brazil in 1991 were below the corresponding 1990 prices in 11 of the 12 months. These low prices had a severe injurious impact on the domestic industry. They discouraged investment and materially retarded the development of production facilities to increase productivity levels in Brazil at a time when Brazil had eliminated price controls on the domestic dairy products and was expecting that the domestic industry would be able to benefit from this liberalizing policy and accumulate the capital required to make the severely needed investments in the industry. The subsidized imports prevented this from happening and, in Brazil's view, this constituted a major harm to the industry. Brazil said that the World Bank had also found that imports of subsidized milk products had a detrimental effect on the long term viability of the Brazilian milk industry, and had recommended that Brazil impose a tariff on these subsidized imports.[39]

145. Brazil said that the EEC's protest that Brazil should have countervailed other suppliers, such as Poland, as well as (or instead of) the EEC was without merit. The question was not whether imports from other sources or any other factors caused material injury. The question was whether subsidized imports from the EEC caused material injury. Brazil had correctly concluded in its investigation that they did, and so decided to impose countervailing duties on them. The fact that Brazil might have justifiably imposed such duties on imports from other sources did not detract from the accuracy of Brazil's conclusion with regard to imports from the EEC, nor from the propriety of the actions taken in respect to these imports.

[39]The World Bank (1991), *op. cit*.

146. Brazil clarified that the investigating authorities nonetheless had considered the other factors when they decided to impose countervailing duties in this case, but they were convinced that these factors were not causing injury to the domestic industry. Imports from sources other than the EEC were examined with particular attention and the investigating authorities were aware that imports of milk powder from sources other than the EEC, particularly from Poland, were also increasing in 1991. However, it was observed that they had not caused the same problems as those raised by the imports from the EEC because of the differences when compared to imports from the EEC. For instance, the impact of imports from Poland was much less than the impact of the imports from the EEC because of the large share of the latter in Brazilian imports of milk powder. Brazil said that the share of imports from the EEC in Brazilian imports of milk powder increased from 31.36 per cent in 1990 to 39.53 per cent in 1991, and was still rising in the first quarter of 1992. Also, the Ministry had reliable information that the increased imports from Poland derived mainly from exceptional circumstances in Poland and that they were not likely to continue their rate of increase. Brazil added that the imports from Poland were of low quality milk powder, and Poland had never been a traditional supplier to Brazil. The prices for these imports did not decrease as much as those for the imports from the EEC. Furthermore, in the beginning of 1992, a significant decrease in imports from Poland was observed, which was different from the situation for imports from the EEC. In addition, the investigating authorities believed that the presence of imports from Poland in the Brazilian market, rather than in the EEC's market that was much closer to Poland, most likely had resulted from the same policies and programmes of the EEC that led to the presence of subsidized imports of milk powder from the EEC into Brazil.

147. Brazil further argued that imports from some other countries had a higher price than those from the EEC and were not destined for rehydration. For imports from Switzerland, the effect was not the same as the imports from the EEC. According to information available to the investigating authorities, which had also been supplied to the EEC, Switzerland's share in Brazil's imports of milk powder declined during 1989 to 1991 while the share of imports from the EEC increased during this period.[40] Regarding import prices too, the decline in the case of the prices for imports from the EEC was more than that for the imports from Switzerland.[41]

148. The EEC said that Brazil's argument regarding a consideration of factors other than the allegedly subsidized imports from the EEC was that the investigating authorities were "aware" of these factors. However, it appeared that the authorities did not find it appropriate to explain in Administrative Orders No. 297 and 569 what these other factors were and how they related to the affirmative determination made in these Orders. Brazil had not found it necessary to reply in a detailed and convincing manner regarding these aspects even in its written and oral submissions to the Panel.

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[40]While total imports of milk powder from Switzerland increased by 60.5 per cent in 1991, imports from the EEC increased by 109 per cent. For imports of skimmed milk powder, the category which dominates the Brazilian imports of milk powder, the increase in imports from the EEC in 1991 was 139 per cent, which resulted in the EEC accounting for an import share of 49 per cent for this product. Thus, in 1989, Switzerland's share in Brazil's imports of milk powder was 29.9 per cent, compared to 37.1 per cent for the EEC. In 1990, the former's share dropped to 17.2 per cent while the latter maintained its share at 31.3 per cent. In 1991, the EEC's share increased to 40.9 per cent, while Switzerland's share remained at 17.71 per cent.

[41]The average import price declined by 16.5 per cent in 1990 in comparison to 1989, and by 14.6 per cent in 1991. The corresponding decrease in the price of imports from Switzerland was 14.04 and 7.09 per cent, and for the imports from the EEC was 13.63 and 25.57 per cent.

149. The EEC said that it had not argued that Brazil should have imposed countervailing duties on other suppliers, such as Poland. Rather, it had submitted that Brazil should have considered, in conformity with the provisions of Article 6:4 of the Agreement, whether other factors had caused injury to its domestic industry. Administrative Order No. 569 did not address the question of whether other factors had contributed to injury. Neither did Brazil's reply to the EEC's written request of 31 August 1992. If Brazil was aware that other factors might have been causing injury, it should have examined them at the time of imposing the definitive duty, and provided an analysis of that examination in Administrative Order No. 569. As with the other aspects to be considered under Article 6, the signatories had an obligation to examine and provide a reasonable explanation of the impact of factors other than allegedly subsidized imports on the domestic producers in the decision imposing the definitive duties. Since the documents notified to the EEC did not contain any information on the factors other than allegedly subsidized imports, the EEC was not aware of what relevant information was available with the investigating authorities in Brazil.

150. Moreover, the EEC said that since the resale prices in Brazil were liberalized for the first time in September 1991, Brazil's market was apparently undergoing structural adjustments during the time period considered by Brazil. Also, Brazil had not discussed the quality factor, i.e. the effect of higher quality EEC products on domestic demand, nor did it discuss how other exporting countries (e.g., Argentina, Switzerland and Uruguay) had managed to export substantial quantities of the products concerned at prices higher than those of the EEC's exporters. The EEC recalled that in its answer to a question by the EEC, Brazil had indeed "conceded" that the quality of EEC products in question was higher than those of Poland.

151. Brazil reiterated that the relevant information was in the record of the case, and the interested parties could have access to it by following due process, i.e. requesting for the information as provided in Brazil's Resolution CPA 1227. By raising the issue of information contained in the Administrative Order No. 569, the EEC was focusing on procedural technicalities rather than on the factual aspects because the factual aspects were clear and because they fully justified Brazil's action under the Agreement and the General Agreement. Brazil was aware of, and had always upheld, the importance of due procedure. However, the heart of the matter was that the EEC heavily subsidized its exports of milk powder to Brazil, and this had resulted in a displacement of Brazilian milk, suppression of Brazilian prices, and stagnation of the Brazilian investment.

152. Furthermore, Brazil argued that it had been faced with an insufficient reply to its questionnaire by the EEC and no replies received from the exporters. This left Brazil with no other option than to resort to Article 2:9 in order to carry on the investigation.[42] Brazil said that while the EEC's detailed questions to Brazil on 6 May 1992 had been answered by Brazil in its letter of 27 July 1992, when Brazil submitted its questionnaire to the EEC on 18 May 1992, the EEC indicated that a response to this questionnaire would be provided only after the provisional duties were suspended and after the consultations had been held and concluded with a satisfactory result. The EEC had also declined to heed Brazil's request that the questionnaire be forwarded to the exporters. When the answers to the Brazilian questionnaire were submitted by the EEC on 24 June 1992, Brazil had found that response wholly inadequate because there was no response to virtually all the questions.[43] Specifically, the EEC

[42]A copy of this questionnaire was provided to the Panel.

[43]The points regarding which Brazil had sought information through the questionnaire were: the structure of the production sector of the products under investigation, how the sector was organized, recent developments in the sector, cost of production of the investigated products in the EEC, specific government incentive programmes for production, export or commercialization, sales, total exports and exports to Brazil, the price structure for domestic sales and exports, the relevant legislation, the

had furnished a copy of an internal regulation (i.e. Commission Regulation (EEC)1513/92), and data on total exports of skimmed milk powder from the EEC for a period different from the period of investigation established by Brazil. Regulation 1513/92 became effective on 11 June 1992 and provided no information concerning the level of restitution payments during the April 1991-March 1992 period of investigation. In these circumstances, Brazil was fully justified under Article 2:9 of the Agreement to proceed on the basis of the facts available. These facts had overwhelmingly established that subsidized imports from the EEC, by themselves, were the cause of material injury to the milk and milk powder industries in Brazil, and that Brazil's decision to impose definitive countervailing duties was fully in accordance with the Agreement.

153. The EEC pointed out that Brazil had not said in the Administrative Orders No. 279 and No. 569 that because the information the EEC had provided was insufficient or inaccurate it was making the use of Article 2:9. Furthermore, the EEC disputed Brazil's claim that it had not fully answered the questionnaire.[44] Firstly, it had appeared to the EEC that a substantial part of the questionnaire related to anti-dumping and not to countervailing duty cases.[45] The EEC had attempted to clarify which parts of the questionnaire it should reply to at two separate meetings with DECEX on 25 May and 23 June 1992, but did not receive a clear reply. Secondly, according to paragraphs 1 to 2.11 and 2.14 on pages 4-5 of the questionnaire, the EEC was expected to supply information on the internal company structure of the production enterprises and the activities of each exporter of milk powder in the EEC, but the Commission, to whom the questionnaire was addressed, did not have this information. Therefore, it distributed the questionnaire to the dairy industry and to its Member States. Thirdly, in addition to providing the relevant legislation, the EEC had provided a clear description of assistance to exporters of milk powder and the amounts of export refunds (which had hardly changed since the beginning of the investigation period). This, according to the EEC, covered points 2.12-2.13 on pages 5-6 of the questionnaire. The EEC also said that points II.2.1-II.2.3 on pages 9-11 of the questionnaire had been fully replied because the entire copy of the EEC legislation was sent to Brazil. Also, to the extent points II.1.(i)-II.1.(vi) were applicable to the proceedings, they were answered by sending the EEC legislation. The EEC explained that under the EEC law, Member States were not allowed to provide additional or supplementary assistance to exports of the products in question. Therefore, to the extent points II.1.(i)-II.1.(vi) referred to national assistance, they were irrelevant for the present case. Furthermore, the EEC also provided data on the exports of milk powder from the EEC to Brazil and other third countries for the period 1985-91.[46] Points 2.16.1-2.16.3 on page 8 of the questionnaire were optional, and the EEC had no remarks to make with regard to those points.

154. For export restitutions, the EEC said that it had provided the most up-to-date information, i.e. Regulation 1513/92, from which Brazil had used the data in its definitive determination. The amount of such refunds for both skimmed milk powder and whole milk powder had remained fairly stable since 1990. The EEC argued that if Brazil had considered that the data for export restitution in the previous years was essential for determining the actual level of countervailing duty, it could have requested that data from the EEC. However, Brazil did not do so although the EEC had expressly stated in its reply that it was willing to provide additional information to Brazil and was willing to submit all the information to on-the-spot verification. In the absence of clarifications requested by Brazil, the EEC had concluded that it had provided sufficient information to the questionnaire. The

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agencies involved, the criteria for eligibility, producers and/or exporters that had applied for any of the programmes, and the details of the so-called restitution programme on exports.

[44]A copy of the EEC's reply to the questionnaire was provided to the Panel.

[45]Paragraph 2.15, page 7 of the questionnaire.

[46]Data on exports to third countries were requested on 23 June 1992 by the Brazilian authorities.

EEC further argued that Brazil itself could easily have traced back the level of export restitutions by checking the references to the previous Regulations in Council Regulation (EEC) No. 1513/92, a copy of which was provided officially to Brazil in the reply. The EEC also argued that Brazil had not explained why it considered the EEC's reply inadequate and what more information it would have required from the EEC in order to make its determination.

155. The EEC said that it could not order its exporters to reply to the questionnaire. However, the EEC had encouraged the exporters to reply, and this was shown by the fact that the EEC had forwarded copies of the questionnaire to ASFALEC and ASSILEC, the main dairy associations in the EEC, and to representatives of the Member States for distribution to exporters and had explained to them the importance of the Brazilian action.[47] However, since the EEC could not get a clarification from Brazil about which parts of the questionnaire should be replied to, it was not able to accordingly inform its exporters. In support of the contention that the EEC could not get a clarification from the Brazilian authorities, the EEC said that in paragraph 3 of the common communiqué of the consultation meeting of 23 June 1992, DECEX had stated that certain parts of the questionnaire may not be relevant, but DECEX did not say which parts these were.[48] The EEC also noted that if Brazil was expecting answers regarding the assistance provided to the exporters, then the reply of the EEC had already provided the relevant information because the exporters could only reply about the company structure. Thus, in the circumstances, the EEC considered that it had done all it could to encourage the participation of its exporters.

156. Brazil said that the EEC's acknowledgement that it had distributed the Brazilian questionnaire to the exporters' organizations meant that the exporters had been notified and that they were aware of the investigation and of the opportunity of making their views known to the investigating authorities. However, the exporters were apparently not interested in taking advantage of that opportunity since there was no record of any reply having been received from them directly or through the good offices of the Commission. Brazil also argued that the text of the letter which the EEC had sent to the exporters' associations did not seem to corroborate the EEC's statement that the EEC had encouraged the exporters to send replies to the questionnaire.

157. Further, Brazil did not consider that the EEC had really responded to the questionnaire. The questionnaire transmitted to the EEC was clear in expressing the period of investigation, and contained questions about the official programmes for the producers and exporters of milk powder. The EEC's response was not clear because it did not cover the investigation period, and because there was not a single answer to any of the questions formulated by the Brazilian investigating authorities. The EEC had replied to the questionnaire in a perfunctory and unhelpful manner, a fact which could be corroborated by an examination of the contents of the questionnaire and the reply by the EEC. Therefore, Brazil was surprised by the EEC's claim that Brazil had never explained why it considered the EEC's reply inadequate. There was only a simple letter from the Commission expressing the values of export restitution relating to milk powder, with an indication to read what was included in a copy of the Commission Regulation 1513/92, dated 11 June 1992, which came into force after its date of publication and did not cover the investigation period. Regarding the EEC's statement that "Brazil could have requested the level of export restitutions for the previous years", Brazil said that the contents of the questionnaire showed that such a request had actually been made. Also, though the EEC provided Brazil with data on its exports of milk powder to all its trading partners for the period 1985 to 1991,

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[47]The EEC provided the Panel with a copy of its letters to the exporters' associations.

[48]The text in the common communiqué was as follows: "DECEX is waiting for the reply to the questionnaire sent to the EEC and agrees that some of its parts may not be fully applicable to the case in hand, in which case a justification should be provided."

there was no reference to the first quarter of 1992, nor an indication that data referring to that period would be presented later. Regarding the EEC's claim that it had stated in its reply to the questionnaire that it was willing to supply further data and was willing to submit all the information to on-the-spot verification, Brazil argued that the EEC did not provide the data on the first two months of 1992 even when it became available in June-July 1992. The availability of the new data would also have justified the continuation of consultations started on 23 June 1992. The EEC however did not continue consultations, which again reflected the lack of co-operation from the EEC in this case (see below for details of the arguments relating to consultations).

158. Regarding the EEC's argument that some portions of the questionnaire appeared to apply to anti-dumping and thus it was not clear which parts of the questionnaire it should have replied to, Brazil argued that the distinction between anti-dumping and countervail was obvious to anyone with a minimal experience of these type of cases. The EEC was one signatory with the largest experience in these fields, and it was not excessively difficult to select the questions to answer only in the case of countervailing duties provided there was any actual willingness or possibility to reply to the questionnaires. It had not occurred to the Brazilian authorities that such doubts would or could occur to experts in Brussels or to people with any knowledge of countervailing and anti-dumping practices. Brazil was thus puzzled at the EEC's claim that there was any difficulty in deciding which parts of the questionnaire to answer.

159. Brazil further argued that after the consultations on 23 June 1992, a common communiqué was issued by the two parties which included the statement that the countervailing duty had been applied on the basis of the information available. The communiqué stated in relevant part that "DECEX declared to have established the *ad valorem* amount on the basis of available information and technical assessment of the Brazilian Government, trying to keep it as low as possible". This, according to Brazil, showed that the EEC was aware of the fact that the decision was based on Article 2:9.

160. In response to a question by the Panel, Brazil said that not responding to an offer of Article 3:1 consultations did not by itself warrant the use of Article 2:9. Brazil said that it was the duty of the investigating authorities to seek all information relevant to the case in all available sources until such time as they satisfy themselves that all requirements for making the findings were met.

161. Brazil acknowledged that its recourse to Article 2:9 as a result of the EEC's refusal of the February 1992 offer to consult might have been inappropriate and that the invocation of Article 2:9 for the application of provisional duties was not reflected in the public notice. However, the imposition of provisional duties was fully justified on the existing record, and Brazil was fully justified in invoking Article 2:9 in reaching the decision on definitive duties, *inter alia*, on account of the EEC's casual treatment of the questionnaire.

162. With reference to Brazil's complaint that the data for the first two months of 1992 was not provided by the EEC when that data had become available, the EEC said that even in July 1992, the available information was provisional and subject to amendment. On the other hand, Brazil, as the importing country, was in a better position to get data sooner because the data from an exporting country was not entirely reliable since it was not always clear whether the destination of the exported products was ultimately that which was stated by the exporters. The EEC argued that during the consultation meeting held on 23 June 1992, i.e. before the data became available, Brazil had requested the EEC for export data concerning markets other than Brazil for the years 1989, 1990 and 1991, but not the export data for the first two months of 1992. Brazil did not ask for that data even at the conciliation meeting of 21 July 1992. Therefore, the relevance and consequences of supplying this information after the expiry of the deadline stated in the questionnaire was not clear to the EEC. Moreover, since the exact reference period in the questionnaire was not clear and the EEC could not clarify which parts of the questionnaire to reply to, the EEC had not been sure whether it had to supply data for those

two months. If Brazil needed the data, it should have asked the EEC about it after the reply was submitted because the EEC had offered to provide more data if required. Brazil did not make such a request and the EEC concluded that Brazil did not need that data.

163. The EEC disagreed with Brazil's contention that the EEC's reply to the questionnaire was inadequate. The EEC argued that there were many ways to reply to a questionnaire, i.e. one could provide a detailed response or a response in a summary form. The response of the EEC which was sent to Brazil pertained to only some of the questions asked, and on the basis of that response it would be appropriate for Brazil to assume that the EEC did not have any answers to the other questions. Furthermore, the EEC said that prior to answering the questionnaire, it had made an attempt to clarify which parts of the questionnaire were relevant, but did not get any clarification on that point. The EEC argued that the Brazilian questionnaire itself was not provided in a clear manner. For example, there could have been a cover letter which could have indicated which questions were relevant and the EEC would not have had difficulty in answering the relevant questions. Moreover, if Brazil required some additional information or clarification then it should have asked the EEC, in particular due to the EEC's offer to provide additional information or clarification if so requested by Brazil. The EEC argued also that, except for the questions relating to the internal company structure of the production enterprises, it had replied to all the questions, bearing in mind that for some questions there was no need to reply.

164. Brazil argued that an appropriate reply to the questionnaire required that each question be addressed separately. The EEC did not do so. Brazil disagreed with the EEC's statement that if the EEC had not replied to any particular question, then Brazil could have considered the lack of an answer as indicating that the EEC did not have any answer to that question.

165. Brazil also argued that as the EEC had itself acknowledged, the exporters in the EEC did not know the precise destination of their products. The best sources of information in this case were the trading companies in charge of import/export operations in Brazil. These companies were fully aware of the proceedings and the information on the relevant information with them was already available from them to Brazil. Therefore, in the circumstances, any formal request for clarification regarding the inadequacies in the EEC's replies did not seem necessary to the Brazilian authorities.

166. Brazil further argued that it did not seek clarifications from the EEC with regard to its replies to the questionnaire because Brazil was discouraged by the content of the EEC's letter of 25 May 1992. In that letter, the EEC had said that it would only consider replying to the questionnaire "after the suspension of provisional measures ha[d] been obtained and the satisfactory result of consultations ha[d] been reached", and that the EEC was "firmly opposed to the direction that made the EC responsible for the distribution of the above-mentioned questionnaire to the enterprises involved".[49] The EEC's vague answer to the questionnaire only illustrated the total lack of co-operation by the EEC. While Brazil had co-operated with the EEC in this case, Brazil in turn had not received the co-operation from the EEC throughout the investigation that a signatory to the Agreement had the right to expect from other signatories. The Brazilian authorities had concluded, on the basis of the EEC's reactions at that time, that any attempt to obtain further information would be fruitless.

167. Brazil argued that it had been very co-operative in this case and had maintained transparency, but the EEC had started a bilateral dialogue with Brazil only after the Committee meeting on 28 April 1992 in Geneva. Brazil argued that even subsequently the EEC had not co-operated in this case, and Brazil claimed that the lack of co-operation by the EEC had been very harmful to the

[49]Brazil noted that the latter was a gratuitous contention since the EEC had actually forwarded the questionnaires to the producers, as the EEC later informed the Panel.

investigation. Failure to accept to promptly hold consultations had some influence on the course of the investigation. Also, Brazil argued that by not informing the investigating authorities about the questionnaires having been passed on to the exporters, the EEC had affected the proceedings. According to Brazil, since it was deprived of the opportunity for clarification in consultations with the EEC's experts on dairy products trade, and faced with an insufficient reply to its questionnaire by the EEC and none received from the exporters, it was left with no option other than to resort to Article 2:9 to carry on its investigation. Thus, Brazil argued that any shortcomings in the record concerning the amount of subsidies[50], and any failure of the European exporters to participate on the question of injury or subsidies, was also the responsibility of the EEC.

168. To illustrate to the Panel that the EEC had not co-operated in this case, Brazil made particular reference to a number of events during the consultation phase. Brazil argued that lack of co-operation by the EEC ranged from its refusal to engage in meaningful consultations, to make available information in its possession concerning the identity and addresses of exporters, and its insistence that consultations be held away from Brasilia which was the location of the relevant officials and records. Brazil argued that further evidence of lack of co-operation was provided by the EEC's response to the letter accompanying Brazil's questionnaire that the EEC would reply only after the provisional measures were withdrawn and depending on the results of the consultations on the matter.

169. With regard to the EEC's lack of co-operation during consultations, Brazil recalled that the EEC had not responded to Brazil's request for consultations under Article 3:1, and that the EEC had requested consultations with Brazil only after the imposition of the provisional duties. These consultations were delayed because the EEC wished to hold them in Geneva, while Brazil preferred to hold them in Brasilia since the responsible officials were there. In addition to the technical considerations for holding consultations in Brasilia, Brazil would have incurred high costs in terms of human and financial resources if the consultations were held in Geneva because the record of the investigation was in Brazil. Brazil had suggested to the EEC that the consultations be held in Brasilia on 25 May 1992. On that date, an official from the EEC visited the Ministry in Brasilia and requested a copy of the petition which was provided to him. However, this official had a letter which stated that since Brazil had not accepted holding meetings in Geneva, the EEC could not agree to consultations on 25 May 1992, and that the meeting on that date could not be treated as consultations. Brazil argued that the abundant documentation of this case was made available to the EEC's representative but he was not able to focus on specific aspects for clarifications.

170. Brazil said that the consultations were held later, on 23 June 1992 in Brasilia, nearly four months after the Brazilian offer of consultations to the EEC. During these consultations, however, the EEC's representative informed the Brazilian representatives that he had no specific knowledge of agricultural policies, and was not prepared to discuss the specifics of the EEC subsidies programme. Brazil thus argued that the EEC had not held genuine consultations. Moreover, just 13 days after the consultation meeting, the EEC had filed a request with the Committee for conciliation for reasons of "the failure of consultations under Article 3:2 of the Subsidies Code … [and] … Brazil's failure to respond adequately to written requests for information from the European Community." This, for reasons stated above, was not an accurate representation of the situation. Nonetheless, Brazil had not presented any objections to the EEC's requests for conciliation and the establishment of a panel.

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[50]According to Brazil, the amount of subsidization had been determined by using the same methodology as that used for the purpose of the provisional determination, and the lower rates were a consequence of more accurate information, and the determination that countervailing duties need not equal the full amount of subsidy.

171. The EEC argued that if Brazil did not consider that the EEC had co-operated sufficiently, it should have stated in the Administrative Orders that it had based its findings on the facts available, or could have said so at least in its written reply of 30 September 1992 to the EEC's questions. Brazil had not made such a claim even at the conciliation meetings.

172. Furthermore, the EEC disagreed with Brazil's contention that it had not co-operated in this case. The EEC argued that the note of 18 May 1992 from Brazil which informed the EEC about initiation of the investigation was provided more than one month after the imposition of the provisional duties. Since the EEC had not been notified that the investigation was taking place, the imposition of the provisional duties could not be linked to any alleged non-co-operation of the EEC. Regarding co-operation in the investigation pertaining to the definitive determination, the EEC argued that it had replied to the questionnaire within the stipulated time period, and Brazil had not sought any clarification or further information from the EEC. The EEC had mentioned in its response to the questionnaire that it was willing to provide additional information if requested by Brazil.

173. The EEC recalled that it had been still considering the Brazilian offer of consultations under Article 3:1 when Brazil initiated the investigation without notifying the EEC of the initiation. Subsequently, after the imposition of provisional duties about which the EEC had as yet not been officially notified, the EEC had requested consultations to be held in Geneva because the experts on procedural matters were permanently stationed in Geneva, and the consultations could have taken place quickly and without the need to send officials from Brasilia or Brussels. The issues at that time were related to procedural aspects because the EEC had just been informed about the imposition of provisional measures, and hence the discussion could have been held more rapidly in Geneva. If there was a need to refer to the record, the EEC's officials in Brasilia could have done so on the spot. Moreover, if Brazil possessed all the information that it claimed, it should have stated this information in the Administrative Orders that imposed the provisional and definitive duties, because that was what the Agreement required. Brazil did not provide such information even during the conciliation meeting of the Committee. The EEC argued that Brazil had refused consultations under Article 3:2, and had also refused to supply in writing the evidence used to justify the imposition of provisional duties, in spite of a request made by the EEC under Article 2:5 and 2:15 of the Agreement. When it became clear that Brazil would continue to refuse consultations in Geneva, the EEC agreed to hold the consultations in Brasilia on 23 June 1992 so that it could have an opportunity to at least put its point of view to the Brazilian authorities.

174. With regard to Brazil's allegation that the EEC had delayed consultations in this case, the EEC argued that Brazil took 19 days to reply to the EEC's letter of 30 April in which the EEC had stated its wish to hold bilateral consultations under Article 3:2. Meanwhile, the EEC had confirmed by its letter of 6 May 1992, its request to obtain more information and to consult on the matter. Instead of providing the information requested by the EEC, Brazil had proposed in its reply that consultations be held on 25 May 1992. In order to conduct proper consultations, the EEC required adequate information or preparation to discuss the issues. The EEC had found the discussions on 25 May 1992 useful because a number of points were discussed and the EEC had for the first time obtained trade statistics and certain portions of the complaint. However, the senior Brazilian official at that meeting was not in a position to confirm what parts of the questionnaire the EEC should reply to. The letter presented by the EEC representative to the Brazilian authorities before the meeting of 25 May 1992 merely reflected the fact that the meeting was not an Article 3:2 consultation, but was intended to be an inspection of the files and an opportunity for general discussion.

175. The EEC argued that with Brazil delaying consultations, and the provisional duties being in force, the EEC had to request a conciliation meeting of the Committee in order to protect the interests of its exporters. Moreover, it had transpired in the meetings of 25 May and 23 June 1992 that Brazil

had strong views about the conformity of its procedures with the Agreement, and the prospects of reaching a mutually agreed solution were dim.

176. Regarding Brazil's argument that the EEC's response on receiving the questionnaire showed lack of co-operation, the EEC explained that it had been unsuccessfully requesting consultations with Brazil for almost one month and had been unable to obtain any explanation of why the provisional duties had been imposed. In those circumstances, the EEC was unwilling to acknowledge receipt of the questionnaire without once again requesting consultations and protesting against Brazil's violation of Article 5:1. Therefore, the tone of the EEC's letter was rather firm. Also, the EEC was under enormous internal pressure from its exporters to get the provisional duties lifted as soon as possible. Thus, the EEC's statements in its letter of 25 May 1992 had to be considered as a normal negotiating position, which was natural in an international trade dispute. The fact that answers to the questionnaires were provided in time showed that the statement of the EEC in its letter of 25 May 1992 did not in any material way impede, prevent or affect the ability of the Brazilian investigating authorities to properly carry out their examination and respect the requirements of the Agreement. Moreover, the EEC argued that it had never concealed that it distributed the questionnaires to the exporters three days after it had received it from Brazil, and would have provided this information had it been asked earlier.

177. Brazil said that the EEC's letter dated 25 May 1992 was a much more blunt show of intimidation tactics than a "normal negotiating position, quite natural in international trade disputes". There was no "trade dispute" as such at that time. The EEC had requested consultations on 30 April 1992 and Brazil had accepted them on 19 May 1992. On 25 May 1992, the date suggested by Brazil for consultations, Brazilian authorities expected to hold consultations intended to "clarifying the situation as to matters" related to the case and to "arriving at a mutually agreed solution". However, the EEC itself decided not to consider the meeting of 25 May 1992 as the formal opening of consultations, and therefore dropped from its agenda discussions aimed at "arriving at a mutually agreed solution" which was the only point capable of giving rise to a negotiation. There was, therefore, nothing left to negotiate, and so there was no need for any "negotiating position". Brazil further argued that there should be no reason for the EEC to resort to intimidation tactics and to unreasonable demands. The issue of a lifting of provisional duties could perhaps have been considered in negotiations in the context of consultation had they been held on 25 May 1992. However, in the context of what turned out to be an "informal" meeting on 25 May 1992, it was not logical and appropriate to try to "negotiate" a reply to the Brazilian questionnaire in exchange for the lifting of the provisional duties. Brazil also said that given the enormous pressure on the EEC from its exporters to obtain a lifting of the duties, it was not understandable why the EEC delayed the negotiations in this case. It appeared to Brazil that the EEC was not interested in any mutually agreed solution to this case.

178. Brazil disagreed with the EEC's view that consultations were intended to concentrate on procedural aspects. According to Brazil, the consultations were intended to focus on the substantive aspects of the matter, and therefore, the appropriate persons to take part in the consultations were not those in Geneva but the Government experts in the dairy products trade in Brasilia. Brazil's position was that it was willing to give all necessary clarifications to the EEC through bilateral consultations but the forum for bilateral consultations was Brasilia because the documentation was available there. Regarding the EEC's point that Brazil had not provided the relevant information to the Committee at the conciliation meeting, Brazil said that there were different functions for signatories during bilateral consultations and for the Committee once the matter was brought to Geneva at the proper time for the proper reasons. All endeavours to hold fruitful consultations had to be exhausted before Brazil could provide information to the Committee. When the moment came to provide the relevant information that was on the record, Brazil did provide that information.

179. Brazil argued that it was responsible for only a short part of the delay in consultations, namely from 30 April 1992 to 19 May 1992. Brazil had replied to the EEC on 19 May 1992 and the subsequent

delay was entirely due to the EEC either on account of a failure on the part of the EEC to reply to Brazil or the EEC's insistence on holding consultations in Geneva. After the imposition of definitive duties, the EEC had requested for consultations in a letter dated 31 August 1992. Brazil had replied to this request on 30 September 1992, and the consultations were held on 5 October 1992. The delay in Brazil's reply was partially due to internal instability in the country on account of the proceedings for impeachment of the President of the Republic. However, at the consultation meeting the EEC's representatives said that they were "not prepared" to hold consultations and failed to inform Brazil that a request under Article 17 of the Agreement had already been sent to the GATT Secretariat four days earlier.

180. The EEC argued that its officials were fully authorized to consult and were fully briefed on the case for both consultation meetings with Brazilian officials under Article 3 of the Agreement on 23 June 1992 and 5 October 1992. This could be seen from the common communiqués of these consultation meetings.[51] Regarding Brazil's allegation that the EEC was "not prepared" for the consultations held after the imposition of definitive duties, the EEC argued that it was Brazil which took a month to reply to the EEC's request of 31 August 1992 for consultations. The justification provided by Brazil that the delay was due to political instability was not convincing; the EEC left it to the Panel to decide how the daily work of an administration was affected by an impeachment of the President of a nation. In light of the delay by Brazil, the EEC had already sent a request for conciliation under Article 17 of the Agreement.[52] However, immediately on receiving the Brazilian reply of 30 September, the EEC held consultation in Brasilia on 5 October 1992, but the EEC was again faced with an uncooperative attitude by the Brazilian authorities.

181. The EEC argued that it was incorrect to claim that the EEC was not interested in any mutually agreed solution in this case, in particular because the EEC had an interest in resolving the dispute as soon as possible while Brazil might have had an incentive to delay. At the meeting of 25 May 1992, the EEC's representative requested through separate letter another consultation meeting as soon as possible. This request was renewed by letter of 3 June 1992. Brazil replied by letter only on 17 June 1992. The EEC, in contrast, replied the same day to the Brazilian letter of 17 June 1992, accepting the Brazilian offer of consultations. Thus, the record showed that it was Brazil and not the EEC which had delayed consultations on both occasions relating to the provisional and definitive countervailing duties.

182. Regarding the EEC's response of 25 May 1992 to Brazil's letter accompanying the questionnaire, the EEC reiterated that its actions showed that the response was a negotiating position. The EEC did not intend to reject the questionnaire. It provided a reply within the time period specified. It sent the questionnaire to the EEC dairy associations on 21 May, i.e. immediately upon receipt of the questionnaire, and before 25 May 1992, i.e. the date of the EEC's letter to Brazil. The EEC had also drawn the attention of the dairy association to the time frame of 40 days and the parts of the questionnaire that seemed relevant in this case. The EEC's behaviour and the text of the letter (in particular paragraphs 4, 5 and 6 of the letter) showed that the EEC did not intend to reject the questionnaire but

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[51]The EEC said that this could also be seen from its notes of the meetings. Copies of the common communiqués were provided to the Panel.

[52]The common communiqué of the consultation meeting of 5 October 1992, stated in the relevant part regarding conciliation that: "The EC representative informed the Brazilian Authorities that for the absence of a reply in due time from DECEX to the questions raised in letter No. AMF/jq 613/92, and reiterated in letter No. AMF/jq 682, 23 September 1992, from the EC Delegation in Brazil, the necessary steps were taken for a conciliatory meeting to be held at the Subsidies Committee of the GATT in Geneva."

intended to reply to it, provided consultations on the provisional duties would be held as soon as possible. In fact, it was clear from the EEC's behaviour before and after the letter of 25 May 1992 that the EEC had decided to reply to the questionnaire and had already taken the appropriate steps to do so.

5. Provisional and Definitive Countervailing Duties on Certain Types of Milk

183. The EEC said that the Administrative Orders Nos. 297 and 569 had in addition to imposing measures against imports of milk powder, also imposed provisional and definitive countervailing duties on several types of milk products.[53] The provisional and definitive duty determinations contained absolutely no evidence of any material injury to domestic producers having been caused by imports of these products and their effect on prices in the Brazilian market for like products, nor of the possible impact of these imports on Brazilian producers. The EEC therefore argued that the provisional and definitive duties on these types of milk products had been imposed in violation of Articles 6:1 to 6:4 of the Agreement.

184. Brazil said that in this case the injury was found to the domestic industry producing milk powder as well as the domestic industry producing fluid milk (for details, see Section IV.4 (b) and (c)). There was adequate basis to impose countervailing measures on the products covered by the Administrative Orders. The record of the case which included all the relevant information, established that imports of subsidized milk powder from the EEC had caused lower prices in Brazil, loss of market share of domestic producers, and stagnation of investment in the domestic industry, including the certain types of milk products.

185. Providing some background information on product coverage in the different notices, Brazil explained that provisional duties were not imposed on four of the eleven tariff headings covered by the notice announcing the initiation of the investigation because there were either zero or low imports under those headings (see Section II for details). Of these four, imports under one tariff heading, i.e. 0402.29.0101, were subjected to definitive countervailing duties. The reason for this was that during first quarter of 1992, imports under tariff heading 0402.29.0101 had surged by 30 per cent above the level in the previous year.[54] Therefore, the investigating authorities decided to consider the imports under this tariff heading to be part of the category of products which caused injury to the domestic milk and milk powder industries, and included them in the decision of definitive countervailing duties.

186. The EEC said that the explanation Brazil had provided related only to imports under tariff line 0402.29.0101, and that too only regarding a surge in these imports in the first quarter of 1992. Even this explanation had been offered for the first time only before the Panel. Brazil had not mentioned any of the other requirements of Articles 6:1 to 6:4 of the Agreement in its public notices with regard to any of the several types of milk products covered by the Administrative Orders.

187. Brazil reiterated that all the relevant evidence was in the record of the investigation. Brazil also pointed out that the petitioners in this case were the domestic producers of fluid milk, and as discussed in Section IV.2 above, there was adequate basis for imposing the countervailing duties in this case.

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[53]These were tariff headings 0402.21.0101, 0402.21.0102, 0402.21.0103, 0402.21.0199, 0402.29.0101 and 0402.29.0102.

[54]Compared to 20 tonnes in 1991, these imports under the tariff heading 0402.29.0101 reached a level of 26 tonnes in the first quarter 1992.

V. ARGUMENTS PRESENTED BY THE UNITED STATES AS A THIRD PARTY

188. The United States argued that the imposition of provisional and definitive countervailing duties by Brazil in this case was inconsistent with the Agreement. Therefore, the United States requested the Panel to instruct Brazil to ensure that its procedures in this and other countervailing duty investigations were not inconsistent with those prescribed by the Agreement.

1. Provisional Countervailing Duties

189. The United States argued that it was necessary to conduct a preliminary investigation in order to be able to make the "preliminary affirmative finding" required under Article 5:1 that a subsidy existed and that there was sufficient evidence of injury. The phrase "preliminary affirmative finding" in Article 5:1 had to be interpreted consistently with the other provisions of the Agreement. Reading Article 5:1 together with Article 2:1 which provided that countervailing duties "may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Article", led to the conclusion that an investigation was a condition precedent to the imposition of any countervailing duty, provisional or definitive.[55]

190. Further, the United States said that it was aware of no evidence that suggested that Brazil had conducted a preliminary investigation before issuing its preliminary affirmative finding in this case. It appeared, instead, that Brazilian authorities had based their finding exclusively on the facts and allegations contained in the complainants' written request. This, according to the United States, would violate Article 5:1 of the Agreement. For example, the Administrative Order did not refer to any specific evidence and thus failed to provide the necessary factual basis for a finding of "sufficient evidence" of injury resulting from subsidized imports, as required by Article 5:1. Moreover, the United States argued that it appeared that Brazil had failed to comply with other substantive and procedural requirements of the Agreement. For example, Article 2:5 was violated because the EEC and the exporters concerned did not get a reasonable opportunity to provide information and present their views before the imposition of the provisional measure. Article 3:2 and the footnote thereto were violated because the EEC did not get an opportunity to consult before the measure was imposed. Article 2:15 was violated because Brazil's brief Administrative Order imposing the provisional duties fell short of the requirements of this provision.

191. For these reasons, the United States considered that the provisional duties imposed by Brazil on 9 April 1992 violated Article 5:1 of the Agreement because: the provisional duties were imposed without any preliminary investigation; the Brazilian determination of 9 April 1992 did not contain evidence that could lead to a preliminary affirmative finding of the existence of a subsidy or of sufficient evidence of injury.

2. Definitive Countervailing Duties

192. The United States argued that there was no evidence in Administrative Order No. 569 of 10 August 1992 to indicate that Brazil had made the required injury determination in accordance with the provisions of the Agreement. In the United States' view, the brief reference in Article 1(e) of Administrative Order No 569 to the volume of imports did not constitute "positive evidence" (referenced in note 17 to Article 6:1) that the volume of imports of the affected products supported a determination of injury. Furthermore, Brazil had not conducted an objective examination in determining injury because the Brazilian authorities had not considered all relevant facts before them and had not offered a reasonable

[55]In this context, the United States referred to the report of the panel on "United States - Salmon", SCM/153 of 4 December 1992, page 97, paragraph 225 (not yet adopted).

explanation of how the facts as a whole supported the authorities' determination.[56] The Brazilian authorities had not taken into account trade data contained in the reply to the questionnaire provided to the EEC, and the Administrative Order did not explain why the data showing that there had been a decrease of imports did not detract from Brazil's affirmative finding of a significant increase in the volume of imports.

193. The United States also argued that except for a brief reference to stagnation of domestic production (which was contradicted by other available data), the Administrative Order No. 569 did not make any mention of the factors listed in Article 6:3 regarding a consideration of the impact on the domestic industry. Moreover, it did not appear that the Brazilian authorities had considered any definitive data on production, consumption, profitability, capacity utilization, market share or any of the other factors required under Article 6:3. Citing the first sentence of Article 1(e) in the Administrative Order No. 569[57], the United States argued that it appeared that Brazil believed that it was sufficient to look only at import volume and prices and not at their impact on the domestic producers. This approach was inconsistent with Articles 6:1(b) and 6:3 of the Agreement.

194. The United States also argued that Brazil had not established the causal link between imports and injury as required by Article 6:4 because the effects of subsidized imports had to be measured as provided for in Articles 6:2 and 6:3, and Brazil had not met the requirements of these two Articles.

195. Thus, the United States argued that Brazil's imposition of definitive countervailing duties on imports of milk powder originating in the EEC violated Articles 6:1 to 6:4 of the Agreement because Brazil had failed to follow the required procedures under the Agreement.

VI. CONCLUSIONS

1. Introduction

196. The dispute before the Panel arose from a complaint by the EEC regarding the imposition by Brazil of provisional and definitive countervailing duties on imports of milk powder and certain types of milk from the EEC.

197. On 16 March 1992, Brazil initiated a countervailing duty investigation into imports of milk powder and certain types of milk from EEC Member States. The notice of initiation of this investigation indicated that "the investigation is opened in response to a request made by the Brazilian Milk Producers' Association …, and the Brazilian Rural Society … together representing all domestic milk producers". On 8 April 1992, Brazil imposed provisional countervailing duties on imports of milk powder and certain types of milk from the EEC. On 10 August 1992, Brazil imposed definitive countervailing duties on these imports.

198. The EEC claimed that, in imposing these provisional and definitive countervailing duties, Brazil had acted inconsistently with its obligations under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereinafter: "the Agreement").

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[56]In this context, the United States referred to the report of the panel on "United States - Salmon", paragraph 258.

[57]This sentence was "[t]he allegation of injury was found to be well-founded since imports of the products in question accounted for a large share of the domestic market."

199. Specifically, the EEC requested the Panel to find that:

(i) the provisional countervailing duties on imports from the EEC of milk powder and certain types of milk were imposed inconsistently with Articles 5:1 and 1 of the Agreement;

(ii) the definitive countervailing duties on imports of milk powder from the EEC were imposed inconsistently with the requirements of Articles 6:1-4 of the Agreement; and

(iii) the provisional and definitive countervailing duties on imports of certain types of milk from the EEC were imposed inconsistently with the requirements of Article 6 of the Agreement.

200. The EEC requested the Panel to recommend that Brazil cease to apply the countervailing duties on imports of certain types of milk and milk powder from the EEC. The EEC initially requested that the Panel also recommend that Brazil reimburse any provisional and definitive countervailing duties levied on these imports. Subsequently, the EEC indicated that it was no longer seeking such a recommendation, on the ground that it should generally be left to a signatory found to have acted inconsistently with its obligations under the Agreement to determine the means by which to bring its measure into conformity with its obligations. The EEC noted, however, that in this particular case reimbursement of duties might be the only possible way for Brazil to bring its action into conformity with the Agreement.

201. Brazil claimed that its imposition of provisional and definitive countervailing duties on imports from the EEC of milk powder and certain types was in full conformity with the provisions of the Agreement.

202. Specifically, Brazil requested that the Panel find that:

(i) the imposition of provisional countervailing duties on imports of milk powder and certain types of milk from the EEC was not inconsistent with the provisions of Article 5:1, Article 6 and Article 1 of the Agreement; and

(ii) the imposition of definitive countervailing duties on imports of milk powder and certain types of milk was not inconsistent with Article 6 of the Agreement.

203. Brazil considered that the request made by the EEC at an initial stage of the proceedings for a reimbursement of countervailing duties was not properly before the Panel. There was no reference to this matter in document SCM/155, which contained the request by the EEC for the establishment of a panel and on the basis of which the Committee had established the Panel.

204. Brazil considered that the complaint of the EEC involved only procedural issues of limited importance. In Brazil's view, the Panel should in its examination of the issues raised by the EEC take into account the difficulties encountered by Brazil, a developing country, in the deregulation of its domestic dairy sector as a result of the imports of subsidized milk powder from the EEC, the injurious effects of which had been clearly established in the investigation conducted by the Brazilian authorities. Brazil had been fair to all parties in conducting this investigation, and if it had committed any procedural errors, due in part to inexperience, such errors were harmless. Such procedural errors did not detract from the fact that the imposition of provisional and definitive countervailing duties in this case was justified by the evidence before the Brazilian authorities on the injurious effects of the subsidized imports of milk powder from the EEC.

205. The EEC disagreed with Brazil's position that this dispute involved only procedural issues and that any procedural errors committed by Brazil were harmless. The EEC considered that substantive rights under the Agreement could not be effectively guaranteed if minimum procedural requirements were not respected. Moreover, the EEC pointed out that its complaint also related to Brazil's non-compliance with substantive requirements in Article 6 of the Agreement regarding the determination of the existence of material injury.

206. Brazil also submitted that the EEC had failed to co-operate in the investigation conducted by the Brazilian authorities, which had made it necessary for the Brazilian authorities to resort to the provisions of Article 2:9 and make their findings "on the basis of the facts available" .

207. The EEC denied that it had failed to co-operate with the Brazilian authorities in this investigation and contested Brazil's reliance on such alleged non-co-operation as a basis for Brazil to invoke the provisions of Article 2:9 of the Agreement.

208. The Panel noted that, with regard to the EEC's claim on the inconsistency with Article 6 of the definitive duties imposed by Brazil on imports of milk powder, there was a discrepancy between the provisions mentioned in the EEC's request for the establishment of a panel (document SCM/155) and the provisions invoked by the EEC before the Panel. In particular, while before the Panel the EEC based this claim *inter alia* on Article 6:2, no reference to that provision appeared in paragraph 13 of document SCM/155. The Panel also noted, however, that Brazil did not argue that the issues raised by the EEC under this provision were not within the scope of the Panel's terms of reference.

209. The Panel further noted that, while the EEC had presented three separate claims, there was an overlap between the first and the third claim with regard to Brazil's imposition of provisional countervailing duties on certain types of milk (*supra*, paragraph 199). The Panel decided to examine successively the issues raised by the EEC regarding (1) the provisional countervailing duties on imports of milk powder and certain types of milk, (2) the definitive countervailing duties on imports of milk powder, and (3) the definitive countervailing duties on imports of certain types of milk.

2. Imposition by Brazil of Provisional Countervailing Duties on Imports of Milk Powder and Certain Types of Milk

210. The Panel first examined the claim of the EEC that, by imposing on 8 April 1992 provisional countervailing duties on imports of milk powder and certain types of milk from the EEC, Brazil had acted contrary to the requirements of Article 5:1 and Article 1 of the Agreement.

211. The EEC presented three main arguments in support of its claim regarding the inconsistency of these provisional countervailing duties with Article 5:1:

(i) Brazil had imposed the provisional countervailing duties without conducting a preliminary investigation;

(ii) Administrative Order No 297 - the legal instrument under which the provisional countervailing duties were brought into effect - did not present any evidence which could lead to a preliminary affirmative finding of the existence of a subsidy and injury caused by subsidized imports; and

(iii) no grounds or preliminary evidence were presented in support for the determination that provisional measures were necessary to prevent injury being caused during the investigation.

212. The EEC further argued that, because Article 1 of the Agreement required that countervailing duties be imposed "in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement", the imposition by Brazil of provisional countervailing duties in a manner inconsistent with the requirements of Article 5:1 entailed a violation of Article 1.

213. Brazil argued that the imposition on 8 April 1992 of provisional countervailing duties on imports of milk powder and certain types of milk from the EEC was in full conformity with the provisions of the Agreement. These duties had been imposed on the basis of an adequate investigation, of which all interested parties had been effectively notified. There was ample evidence to justify the imposition of the provisional countervailing duties which were deemed necessary to prevent injury being caused to the domestic industry during the investigation.

2.1 Whether Brazil acted inconsistently with Article 5:1 by making a preliminary affirmative finding without having conducted an investigation

214. The Panel first considered the EEC's contention that the preliminary affirmative finding issued by Brazil on 8 April 1992 in respect of imports of milk powder and certain types of milk from the EEC was not the result of a preliminary investigation conducted by the Brazilian authorities, and was thereby inconsistent with the requirements of Article 5:1.

215. The EEC argued that a "preliminary affirmative finding" within the meaning of Article 5:1 could not be validly based on allegations made in a petition for initiation of an investigation but had to result from a preliminary investigation in which all interested parties had to be given the opportunity to provide relevant evidence. The requirement of such a preliminary investigation followed from Article 5:1, read in conjunction with Article 2:1, and from several provisions in the Agreement (including Articles 2:3, 2:5, 2:9 and 2:15) which indicated that some time must elapse and that several procedural steps are to be taken from the initiation of an investigation before a preliminary affirmative finding could be made.

216. As support for its argument that in this case Brazil had failed to conduct a preliminary investigation before imposing provisional countervailing duties, the EEC pointed out that Brazil had not taken certain procedural steps. Brazil had not complied with its obligation under Article 2:3 to notify the EEC and its exporters of the initiation of an investigation, and with its obligation under Article 2:5 to provide the EEC and its exporters a reasonable opportunity to have access to and provide relevant information. Brazil had also failed to provide the EEC a reasonable opportunity to hold consultations, as required under Article 3:2. In addition, the EEC argued that it was apparent from the absence of any relevant evidence in the notices of initiation of the investigation and of the imposition of the provisional countervailing duties that the Brazilian authorities had relied on the allegations in the request for initiation of an investigation, without themselves conducting an investigation.

217. Brazil argued that the imposition of provisional countervailing duties on imports of milk powder and certain types of milk from the EEC was the result of a preliminary investigation, in which evidence presented in the request for initiation of an investigation had been examined in the light of other information gathered by the Brazilian authorities prior to the initiation of the investigation. The evidence which justified the imposition of countervailing duties included information on stagnation of the domestic industry, absolute and relative volumes of imports of milk powder, domestic prices, and domestic production of milk powder. The Brazilian authorities also had before them a World Bank report indicating that price controls and subsidized imports were the main cause of stagnation in the Brazilian dairy industry.

218. Brazil argued that, through the formal notice published by the Brazilian authorities on 16 March 1992, all interested parties were effectively notified of the initiation of the investigation.

Given the frequent institutionalised contacts between all segments of the Brazilian dairy industry, any interested party would have been aware of the initiation of this investigation. Exporters had not been notified individually because at the time of initiation of the investigation the exporters in question were not known to the Brazilian authorities. In any event, through their contacts with importers in Brazil these exporters were aware of the investigation. That the EEC had been formally notified of the initiation of the investigation only on 18 May 1992 did not mean that until that time the EEC was not aware of the investigation. Brazil pointed out in this regard that on 27 February 1992 it had addressed a letter to the EEC providing an opportunity for consultations.

219. In Brazil's view, any delay in the notification of the initiation of the investigation could not constitute a ground to find that the provisional countervailing duties were imposed inconsistently with Article 5:1 of the Agreement. Under Article 2:10, signatories were entitled to proceed expeditiously to the application of provisional measures, provided that an affirmative preliminary finding had been made.

220. Brazil considered that interested parties had been provided with adequate opportunities to participate in the investigation conducted by the Brazilian authorities prior to the imposition of provisional countervailing duties. The public notice of the initiation of the investigation provided interested parties the right of access to all non-confidential information on record with the investigating authorities, Interested parties also had been afforded an opportunity to make representations to the investigating authorities.

221. Regarding the EEC's argument that Brazil had not offered the EEC an opportunity for consultations under Article 3:2 before introducing the provisional duties, Brazil argued that on 27 February 1992 it had offered to hold consultations with the EEC, an offer to which the EEC had failed to respond.

222. The Panel noted that Article 5:1 provided:

> "Provisional measures may be taken only after a preliminary affirmative finding has been made that a subsidy exists and that there is sufficient evidence of injury as provided for in Article 2, paragraph 1(a) to (c). Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation."

Article 5:1 did not provide expressly that an affirmative finding under that provision must be preceded by an investigation. However, in the Panel's view, an interpretation of Article 5:1 in context with other provisions of the Agreement indicated that a preliminary affirmative finding under Article 5:1 must be the result of an investigation.

223. In this regard, the Panel noted that it followed logically from Article 2:15 that a preliminary affirmative finding within the meaning of Article 5:1 could be made only when "investigating authorities" had made "findings and conclusions" on "issues of fact and law". Furthermore Articles 2:4, 2:5 and 2:9 implied that a preliminary affirmative finding could be made only at some point in time after the initiation of an investigation, when interested signatories and interested parties have been afforded an opportunity to submit their views to the investigating authorities and to have access to the information used by the investigating authorities. Finally, Article 2:1, first sentence, generally provided that:

> "Countervailing duties may only be imposed pursuant to investigations initiated [ ] and conducted in accordance with the provisions of this Article." (footnote omitted)

224. The Panel also noted that there was no dispute between the parties as to the requirement that a preliminary affirmative finding under Article 5:1 be preceded by an investigation.

225. The Panel concluded from the first sentence of Article 2:1 that the term "investigation" under the Agreement had a specific, procedural meaning. A fact-finding process conducted by authorities of an importing signatory to determine the existence of a subsidy and the effects of subsidized imports on a domestic industry qualified as an investigation within the meaning of the Agreement only if in that process the requirements of Article 2 regarding transparency and regarding the due process rights of interested signatories and interested parties were observed.

226. Accordingly, the question to be decided by the Panel was whether, prior to reaching a preliminary affirmative finding and imposing provisional countervailing duties on imports of milk powder and certain types of milk from the EEC, the relevant Brazilian authorities had conducted an investigation, in accordance with Article 2, to establish facts regarding the existence of a subsidy and injury caused by subsidized imports.

227. As indicated in the footnote to the first sentence in Article 2:1, an investigation was initiated when a signatory took certain formal steps provided in Article 2:3. The first sentence of Article 2:3 provided:

> "When the investigating authorities are satisfied that there is sufficient evidence to justify initiating an investigation, the signatory or signatories, the products of which are subject to such investigation and the exporters and importers known to the investigating authorities to have an interest therein and the complainants shall be notified and a public notice shall be given." (emphasis added)

In examining whether Brazil had carried out an investigation in accordance with Article 2 before making its preliminary affirmative finding with regard to imports of milk powder and certain types of milk from the EEC, the Panel therefore first considered the issues raised by the EEC regarding the alleged failure of Brazil to provide a notification of the initiation of the investigation, as required under Article 2:3.

228. The following facts were not disputed between the parties: Brazil had given public notice of the initiation of the investigation on 16 March 1992 but had not at that time notified the EEC and known interested parties of the initiation of the investigation. Brazil formally notified the EEC of the initiation of this investigation in a diplomatic note dated 18 May 1992. Importers in Brazil were notified on 7 April 1992.

229. Brazil had indicated in the proceedings before the Panel that the formal notification provided by Brazil to the EEC in May 1992 constituted the notification required under Article 2:3 of the Agreement.

230. The Panel noted that a notification under Article 2:3 was to be given "when the investigating authorities are satisfied that there is sufficient evidence to justify initiating an investigation …". The Panel considered that this requirement of Article 2:3 was not met by the notification provided by Brazil to the EEC in May 1992, two months after the initiation of the investigation, and one month after the imposition of provisional countervailing duties.

231. The Panel noted Brazil's argument that through the public notice issued on 16 March 1992 all interested parties were effectively notified, or made aware, of the initiation of this investigation.

232. The Panel observed that under Article 2:3 the obligation to notify interested signatories and importers and exporters known to be interested of the initiation of an investigation was separate from, and additional to, the obligation to give public notice of the initiation of an investigation. The Panel was bound to interpret these obligations in a manner which rendered them fully effective as distinct procedural requirements, serving different purposes. These two distinct obligations reflected a clear difference between the method of informing parties with a specific interest in the investigation (foreign governments, importers and exporters known to be interested, and the complainant) and, on the other hand, the method of informing the general public. The requirement to notify other signatories and interested parties served the essential purpose of enabling these signatories and interested parties to effectively defend their interests by participating in the investigation.

233. The Panel therefore considered that a signatory could not meet its obligation under Article 2:3 regarding the notification to be provided to other signatories and interested importers and exporters merely by giving a public notice of the initiation of an investigation. The Panel was aware that Brazil had given notice of the initiation of the investigation in the official Brazilian Gazette but considered that this only indicated that Brazil had effectively complied with its obligation to give public notice within the meaning of Article 2:3. That Brazil had met its obligation to give public notice of the initiation of the investigation was irrelevant to the question of whether Brazil had complied with its obligation to notify the EEC and importers and exporters known by the Brazilian authorities to have an interest in the investigation.

234. The Panel noted that on 27 February 1992 the Brazilian authorities had addressed a letter to the representative of the EEC in Brazil. This letter mentioned a request made by the Brazilian domestic industry for the initiation of an investigation into the subsidization by the EEC of the manufacture and export to Brazil of milk powder, and into the injury caused, or likely to be caused, to domestic production in Brazil as a result of those subsidies. The letter offered the EEC "the opportunity for consultations aimed at clarifying the situation and finding a solution satisfactory to both sides" and indicated that the EEC had fifteen days from the date of the letter to express its interest in such consultations, which were to be held within one month of the date of the letter.

235. In the Panel's view, this communication from Brazil to the EEC clearly was not a notification to the EEC of the initiation of an investigation. In view of its timing and wording, this letter could only be interpreted as an offer for consultations within the meaning of Article 3:1 of the Agreement. Article 3:1 provides:

> "As soon as possible after a request for initiation of an investigation is accepted, and in any event before the initiation of any investigation, signatories the products of which may be subject to such investigation shall be afforded a reasonable opportunity for consultations with the aim of clarifying the situation as to the matters referred to in Article 2, paragraph 1 above and arriving at a mutually agreed solution."

By definition, an offer for consultations under Article 3:1 preceded a notification under Article 2:3, given that under Article 3:1 the opportunity for consultations was to be afforded "in any event before the initiation of any investigation". The letter of 27 February 1992 put the EEC on notice that the Brazilian authorities had received and were considering a request for the initiation of an investigation but could not in any way be regarded as a notification under Article 2:3 of the initiation of an investigation.

236. The Panel noted that the provisions in the Agreement regarding consultations before and during a countervailing duty investigation appeared in a distinct Article, and served a separate and distinct legal purpose, than the provisions in Article 2 regarding public notice, notification, and due process rights of interested signatories and interested parties during such an investigation. Therefore, where

a signatory had offered another signatory an opportunity for consultations under Article 3:1, prior to the initiation of an investigation, this did not detract from that signatory's obligation to notify the other signatory under Article 2:3 when it subsequently proceeded to actually initiate an investigation, irrespective of whether that other signatory had positively responded to the offer for consultations under Article 3:1.

237. The Panel was therefore of the view that Brazil's offer for consultations on 27 February 1992, and the fact that the EEC had not responded to this offer, were not relevant to the issue of Brazil's compliance with its obligation under Article 2:3 to notify the EEC of the initiation on 16 March 1992 of an investigation of imports of milk powder and certain types of milk from the EEC.

238. The Panel then turned to the argument of Brazil that exporters were aware that an investigation had been initiated through their contacts with importers in Brazil.

239. The Panel was of the view that the Agreement did not permit signatories to rely on contacts between importers and exporters as a means by which exporters are to be informed of the initiation of an investigation. Article 2:3 expressly obliged signatories to notify both exporters and importers known to the investigating authorities to have an interest in the investigation. To interpret Article 2:3 as permitting a signatory to dispense with such a notification to exporters, on the ground that it could be assumed that exporters would be made aware of an investigation through their contacts with importers, was therefore in contradiction with the express wording of Article 2:3. In the Panel's view, that both importers and exporters known to be interested were to be notified of the initiation of an investigation reflected the fact that such importers and exporters might have distinct interests in a countervailing duty investigation.

240. The Panel also observed that, according to the information provided to it by Brazil, the importers in Brazil were notified of the investigation on 7 April 1992, well after the initiation of the investigation on 16 March 1992, and only one day before the imposition of provisional measures. Therefore, even assuming arguendo that under Article 2:3 a notification to importers could be considered sufficient to inform exporters of the initiation of an investigation, in this case the notification provided by the Brazilian authorities to the importers was in any event inadequate to inform the exporters in time of the initiation of the investigation.

241. The Panel noted in this context Brazil's argument that the exporters in question were not known to the Brazilian authorities and that it was precisely for this reason that Brazil had hoped to have further consultations with the EEC. It was, however, unclear to the Panel why Brazil could not have attempted to resolve this problem by notifying the EEC of the initiation of the investigation and requesting the EEC's assistance regarding the identification of the relevant exporters to be investigated. The Panel noted that Brazil had made such a request for assistance by the EEC in May 1992 when it sent the EEC a questionnaire.

242. The Panel further considered that there was a certain contradiction between Brazil's argument that the relevant exporters were not known to the Brazilian authorities at the time of the initiation of the investigation, and Brazil's argument that there was intense interaction between "well-established exporters" and importers, which were concentrated in a relatively small number of trading companies (*supra*, paragraph 62).

243. The Panel noted Brazil's argument that a delay in the notification required under Article 2:3 did not render the imposition of provisional countervailing duties inconsistent with Article 5:1 because Article 2:10 allowed signatories to proceed expeditiously with regard to the application of provisional measures.

244. The Panel noted that Article 2:10 provided:

> "The procedures set out above are not intended to prevent the authorities of a signatory from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final findings, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement."

The Panel considered that Article 2:10 did not create an exception to the requirements contained elsewhere in Article 2, including the notification requirements in Article 2:3. The wording of this provision made it clear that any action taken by a signatory when it proceeded expeditiously must be "in accordance with the relevant provisions of this Agreement". Under the interpretation of Article 2:10 offered by Brazil, this provision could completely nullify any of the due process requirements in Article 2 of the Agreement, including as basic a requirement as the obligation to notify interested signatories and interested parties of the initiation of an investigation.

245. The Panel thus did not consider that Brazil could rely on Article 2:10 as a justification for the imposition of provisional countervailing duties on 8 April 1992 without prior notification to the EEC and interested importers and exporters of the initiation of an investigation on 16 March 1992.

246. As noted above, the EEC also alleged that Brazil had not complied with the requirements of Article 2:5 before imposing provisional countervailing duties on imports of milk powder and certain types of milk from the EEC. In the EEC's view, this was a further indication that Brazil had not conducted a preliminary investigation before making its preliminary affirmative finding.

247. The EEC alleged that Brazil had not requested any information from the parties concerned, and had not provided the EEC and the exporters with a reasonable opportunity to make their views known and provide information before imposing provisional countervailing duties. The EEC pointed in this regard to the fact that Brazil had issued a questionnaire in this investigation only in May 1992, after the imposition of provisional countervailing duties.

248. Brazil argued that the public notice of the initiation of the investigation on 16 March 1992 provided interested parties the possibility to have access to non-confidential information on record with the investigating authorities. Interested parties had the opportunity to make representations and provide information to the investigating authorities at any time during the investigation, before or after receipt of the questionnaire. Brazil also argued that in the case of the EEC export restitution schemes at issue in this investigation, which were not company specific subsidies and on which information was widely available, it was not necessary to seek information from EEC exporters for purposes of a preliminary finding.

249. Brazil more generally argued that provisional countervailing duties served to prevent injury being caused during the investigation. Such duties could be imposed under Article 5:1 when a preliminary investigation demonstrated, in light of all relevant information available with the investigating authorities, the merits of the evidence provided in the request for initiation of an investigation. Subsequent information obtained during the investigation, including information presented in replies to a questionnaire issued by the investigating authorities to the interested parties, formed the basis for a decision on the imposition of definitive duties. Therefore, in Brazil's view the fact that the EEC had received a questionnaire after the imposition of provisional countervailing duties was not in violation of Article 5:1. This questionnaire had been intended to guide the investigating authorities concerning a final determination, whereas the preliminary affirmative finding which led to the imposition of provisional countervailing duties was based on an examination of the information available to the investigating authorities at the time of the opening of the investigation. This information had not been

limited to the information presented in the request for initiation of the investigation, as alleged by the EEC.

250. The Panel noted that Article 2:5 provided in relevant part:

> "Each signatory shall ensure that the investigating authorities afford all interested signatories and all interested parties [ ] a reasonable opportunity, upon request, to see all relevant information that is not confidential (…) and that is used by the investigating authorities in the investigation, and to present in writing, and upon justification orally, their views to the investigating authorities. " (footnote omitted)

251. Regarding Brazil's characterization of preliminary findings as involving an "examination" by the authorities of the evidence provided by a petitioner in the light of other information available to the authorities at the time of the initiation of an investigation, the Panel recalled its earlier observations regarding the requirement that a preliminary affirmative finding must be based on an investigation conducted in accordance with Article 2, including the transparency and due process provisions contained in that Article (*supra*, paragraph 225). The Panel found nothing in Article 2 to suggest that the requirements regarding opportunities for interested signatories and interested parties to participate in an investigation, such as those provided for in Article 2:5, applied only during the final stage of an investigation.

252. The Panel realized that the Agreement did not specify the means by which a signatory was to comply with its obligations in Article 2:5. For example, while Article 2:5 required *inter alia* that there be an opportunity for interested signatories and interested parties to present their views in writing to the investigating authorities, the form in which such written views were to be provided was not specified. Nevertheless, the Panel considered that even during an investigation preceding a preliminary finding investigating authorities had to ensure, through the issuance of a questionnaire or otherwise, that interested signatories and interested parties could exercise their rights under Article 2:5.

253. The Panel therefore disagreed with Brazil's argument on the basis for preliminary affirmative findings, in sofar as this argument suggested that such a finding could be made without there having been an opportunity for interested signatories and interested parties to exercise their participatory rights under Article 2:5. In the Panel's view, Article 5:1 required an investigation within the meaning of Article 2 as a prerequisite for a preliminary affirmative finding, rather than merely a preliminary examination by the investigating authorities of the evidence provided by a petitioner in light of other information available to these authorities at the time of the initiation of an investigation.

254. The Panel noted that the public notice of the initiation of the investigation issued by Brazil on 16 March 1992 provided that "third parties have 20 days from the publication of this circular in the Official Gazette to declare themselves as interested parties and appoint their representatives". The notice also provided that "Interested parties that may be affected by the results of the procedure may communicate their views in writing or in hearings to the Technical Tariff Co-ordination Unit …". Finally, the notice indicated the address to which interested parties "should send any pertinent documentation".

255. It thus appeared to the Panel that at least in the public notice of the initiation of this investigation Brazil had taken certain steps to make parties that might be interested in the investigation aware of the possibility to participate in this investigation.

256. Furthermore, although the notice did not specifically mention the possibility for interested parties to have access to information used by the Brazilian authorities in this investigation, in view of the relevant

provisions of the Brazilian legislation, the Panel did not preclude that such a possibility might actually have existed.

257. While the Panel thus found that at least in the public notice of the initiation of the investigation Brazil had taken steps to inform interested parties of the manner in which they could participate in the investigation, the Panel recalled its finding that Brazil had not complied with its obligation under Article 2:3 to notify the EEC and interested parties of the initiation of this investigation. By not notifying the EEC of the initiation of an investigation, Brazil had failed to ensure that the EEC was in a position to make a timely request to exercise its rights under Article 2:5.

258. In addition, there was no information before the Panel indicating that, in the period between the initiation of the investigation and the imposition of provisional measures, Brazil had sought to communicate directly with the EEC and interested exporters with a view to enabling the EEC and the interested exporters to exercise their rights to see the information used by the Brazilian authorities and to make written submissions to these authorities.

259. Under these circumstances, the Panel considered that the fact that Brazil in the public notice of the initiation of the investigation had informed interested parties how they could participate in the investigation was not a sufficient basis to find that Brazil had complied with its obligations under Article 2:5.

260. The Panel noted Brazil's argument that, given the nature of the subsidies at issue in this investigation, it was not necessary in this case for the Brazilian authorities to seek information from exporters for purposes of making a preliminary finding.

261. The Panel considered that this argument was contradicted by the questionnaire issued by Brazil to the EEC in May 1992. The note accompanying the section of this questionnaire addressed to exporters stated:

> "It is in the interest of exporters to fill this questionnaire in the clearest and most precise way possible, and to supply the documents that substantiate their information, because the competent authorities will be in a position to formulate their provisional or definitive findings only on the basis of the available information." (emphasis added)[58]

262. More importantly, the Panel considered that the fulfilment of a signatory's obligations under Article 2:5 could not be made conditional on a case-by-case judgement on the part of the investigating authorities as to whether it was necessary to seek information from interested parties. Even if the Brazilian authorities considered that they had adequate information on the existence of export subsidies provided by the EEC, and that it was therefore not necessary to send a detailed questionnaire, it was incumbent on the Brazilian authorities under Article 2:5 to provide the EEC and its exporters with an opportunity to see the information used by the Brazilian authorities, and to submit in writing their views on such information.

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[58]Unofficial translation of the original in French which read:

> "Il est de l'intérêt des exportateurs de remplir ce questionnaire de la façon la plus claire et précise possible, et de fournir les documents prouvant leurs informations, car les autorités compétentes ne pourront formuler leurs constatations préliminaires ou definitives que sur base des informations disponibles."

263. Furthermore, the rights of interested signatories and interested exporters under Article 2:5 were not limited to issues relating to the existence and calculation of subsidies. Therefore, the EEC and its exporters were to be provided with an opportunity to make written representations not only on the existence of subsidies but also on the existence of material injury to domestic producers in Brazil caused by the subsidized imports under investigation.

264. Finally, the Panel recalled its observations on the different purposes of the due process rights in Article 2 and the consultation provisions in Article 3. In view of this distinction, the Panel considered that Brazil's offer of consultations made to the EEC on 27 February 1992, i.e. prior to the initiation of the investigation, was immaterial to the issue of Brazil's compliance with its obligations under Article 2:5 of the Agreement. The fact that the EEC had not taken up this offer could not provide a legal justification for Brazil not to take steps after the initiation of the investigation to give effect to the requirements of Article 2:5.

265. The Panel then noted the EEC's argument that the lack of evidence provided by Brazil in the notice of imposition of provisional countervailing duties was a further indication that Brazil had proceeded to impose these duties without conducting a preliminary investigation.

266. The Panel was of the view that if, as argued by the EEC, the public notice of the imposition of the provisional duties did not provide factual and legal reasons for the imposition of these duties, this by itself was not a basis to find that the Brazilian authorities had not actually conducted an investigation. In the Panel's view, the alleged lack of reasons in the public notice was more relevant to the issue of whether the evidence relied upon by Brazil was sufficient under Article 5:1 than as an indication that Brazil had not conducted an investigation.

267. The Panel noted the contention of the EEC that Brazil had not conducted any independent factual examination before proceeding to the imposition of provisional countervailing duties, and had simply relied on the allegations in the petition for initiation of an investigation as the factual basis for the imposition of the provisional countervailing duties. In the Panel's view, the Brazilian authorities might well have conducted an independent factual examination of the evidence provided by the petitioner and have taken into account other information at their disposal before introducing provisional countervailing duties. However, in so doing, they had not observed the requirements of Articles 2:3 and 2:5 of the Agreement. As a result, their factual examination did not amount to a proper investigation within the meaning of Article 2.

268. On the basis of the foregoing considerations, the Panel concluded that Brazil had acted inconsistently with Article 5:1 by reaching a preliminary affirmative finding which was not the result of an investigation conducted in accordance with the requirements of Articles 2:3 and 2:5 of the Agreement.

269. In light of this conclusion, the Panel did not find it necessary to proceed to examine the EEC's argument that Brazil had failed to provide the EEC with a reasonable opportunity for consultations under Article 3:2, as an additional argument in support of the EEC's claim that Brazil had made a preliminary affirmative finding without conducting an investigation.

270. The Panel noted that, with regard to the issues raised by the EEC under Articles 2:3 and 2:5, Brazil had invoked the concept of "harmless error". Thus, Brazil argued that the EEC had not demonstrated how it had in fact been prejudiced by the procedures followed by Brazil in this case.

271. In this respect, the Panel considered that in this case, as a result of Brazil's non-compliance with the requirements of Articles 2:3 and 2:5, the EEC and its exporters had been deprived of the opportunities to which they were entitled under Article 2 to effectively defend their interests in this

investigation. This was by itself sufficient to invalidate the preliminary affirmative finding reached by the Brazilian authorities. It was not incumbent upon a signatory whose procedural rights under Article 2 had been infringed by another signatory to demonstrate the harm caused by such an infringement. The Panel therefore rejected the position of Brazil that it was for the EEC to demonstrate that the results of this investigation would have been different had Brazil not committed its procedural errors. Without wishing to exclude that the concept of "harmless error" could be applicable in dispute settlement proceedings under the Agreement, the Panel considered that this concept was inapplicable under the circumstances of the case before it.

2.2 Whether Brazil acted inconsistently with Article 5:1 by reason of a lack of sufficient evidence in support of the preliminary affirmative finding

272. The Panel proceeded to examine the EEC's argument that the imposition of provisional countervailing duties by Brazil on imports of milk powder and certain types of milk was also inconsistent with Article 5:1 because the notice containing the preliminary affirmative finding did not present sufficient evidence of the existence of a subsidy and injury to support this finding.

273. According to the EEC, Administrative Order No. 297 of 8 April 1992, which formally imposed the provisional countervailing duties, failed to provide any explanation of the evidence on which the Brazilian authorities had based their preliminary affirmative finding. The only explanation offered in this notice of the basis for the imposition of provisional duties appeared at the end of the preamble:

> "taking account of the findings of Case No 10768.007731/91-23 and having regard to the existence of subsidies for the production and export to Brazil of the products referred to in this Order, and the resulting damage to domestic industries, …".

In the EEC's view, this statement was inadequate to meet the requirement of the Agreement that authorities explain the findings and conclusions on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor. Administrative Order No. 297 did not contain any discussion of the factors mentioned in Article 6 with regard to the determination of the existence of material injury, and did not explain the method used in the calculation of the amount of subsidization and the countervailing duty rates.

274. The EEC considered that Brazil had presented, for the first time before this Panel, certain information and arguments concerning the basis for the preliminary affirmative finding. Such information and arguments were not reflected in Administrative Order No. 297 and therefore were inadmissible. The EEC referred in this regard to the public notice requirements of Article 2:15 and to several panel reports in disputes involving anti-dumping and countervailing duty actions. In any event, in the view of the EEC even the information presented for the first time by Brazil before the Panel did not provide sufficient factual support for the imposition of provisional countervailing duties. For example, this information showed that imports of milk powder from the EEC had decreased during the period 1989-1991. Furthermore, the EEC pointed out that the reference period considered by the Brazilian authorities for purposes of the preliminary affirmative finding only comprised nine months (April - December 1991) .

275. Brazil argued that there was sufficient evidence on the existence of subsidization and injury caused by subsidized imports to proceed to the imposition of provisional countervailing duties. In the public notice of the imposition of these duties, the Brazilian authorities had made reference to the administrative record of this investigation. This record contained all documentation, statistics, technical reports and analyses used by the Brazilian authorities as the basis for their preliminary finding, and could be inspected by any interested party which properly requested access to the non-confidential part of the record.

276. Brazil denied that, as alleged by the EEC, it had presented relevant information for the first time during the proceedings before this Panel. The information in question was on record with the Brazilian investigating authorities and could have been inspected by the EEC, had it wished to do so. Brazil further argued that its domestic legislation limited the amount of information which could be disclosed in a public notice of the imposition of an import tax.

277. Brazil rejected the EEC's argument that information and arguments not reflected in the public notice of the imposition of the provisional countervailing duties were not admissible in the proceedings before the Panel. In Brazil's view, the panel reports mentioned by the EEC did not support the position that a panel could not take into account information not reflected in a public notice of the imposition of a countervailing measure. Brazil considered that this position was also in contradiction with Article 18, under which a panel was required to "review the facts of the matter" .

278. Brazil argued that, notwithstanding the lack of co-operation by the EEC, the Brazilian authorities had been able to rely on publicly available information regarding the amounts of export restitution granted to EEC exporters of whole milk powder and skimmed milk powder. The level of the provisional countervailing duties imposed was lower than what would correspond to the full amount of the export restitution, and reflected the difference between the average CIF price of imported milk powder in the investigation period (April 1991-March 1992) plus duties and import expenses incurred by the importers, and the average wholesale price of domestic milk powder in the same period.

279. Regarding the effects of the subsidized imports from the EEC, Brazil mentioned as factual support for the imposition of provisional countervailing duties: (1) the sharp increases in the volume of imports and the market share held by these imports; (2) prices of the imports, and their effect on domestic prices of milk and milk powder; and (3) severe economic problems experienced by the domestic industry, as also documented in a May 1991 World Bank report, which were exacerbated by the injurious effects of the subsidized imports from the EEC after the elimination of domestic price controls in September 1991.

280. The Panel noted that under Article 5:1 "Provisional measures may be taken only after a preliminary affirmative finding has been made that a subsidy exists and that there is sufficient evidence of injury as provided for in Article 2, paragraph 1(a) to (c)." The Panel therefore proceeded to examine what evidence of the existence of subsidization and material injury caused by subsidized imports had been cited by the Brazilian authorities when they made their preliminary affirmative finding with regard to imports of milk powder and certain types of milk.

281. The Panel noted that the text of Administrative Order No. 297 mentioned in two places the factual basis for the imposition of provisional countervailing duties. The preamble of the Order referred to:

> "… the findings of Case No. 10768.007731/91-23 and (…) the existence of subsidies for the production and export to Brazil of the products referred to in this Order and the resulting damage to domestic industries."

Article 2 of the Order stated:

> "The imposition of provisional countervailing duties is justified by: the subsidization of exports to Brazil and the need to safeguard the interests of similar domestic products during the period of inquiry."

Other than these two statements, the Panel did not find in this Order an explanation of the factual and legal reasons for the preliminary affirmative finding. The Panel noted that Brazil had not otherwise

provided a more detailed public statement of reasons at the time of the imposition of provisional countervailing duties.

282. The information and arguments presented to the Panel by Brazil regarding the reasons which had led to the preliminary affirmative finding raised the question of whether the Panel could properly take into account, in its review of the consistency with Article 5:1 of Brazil's finding, factual and legal reasons for the imposition of the provisional duties which were not stated in Administrative Order No. 297 or otherwise contained in a public statement of reasons issued by the Brazilian authorities at the time of the imposition of these provisional duties. The Panel noted the conflicting views presented on this question by the parties to the dispute.

283. In this respect, the Panel considered that its task was to review the preliminary affirmative finding as made by the Brazilian authorities. A finding by domestic investigating authorities of the existence of material injury caused by subsidized imports necessarily involved an evaluation in light of the legal standards set forth in the Agreement of factual issues, often involving evidence from which more than one conclusion could be drawn. In order for such a finding to be susceptible of meaningful review by a panel, those authorities must provide sufficient reasoning to enable a panel to determine how they have conducted such an evaluation. In other words, effective review under the dispute settlement provisions of the Agreement of a finding made by domestic investigating authorities required an adequate statement of reasons accompanying such a finding. A finding which was limited to a mere statement that the authorities had found material injury caused by subsidized imports, without an explanation of how the authorities had evaluated the evidence before them in light of the requirements of the Agreement was not susceptible of any meaningful review.

284. The importance of an adequate statement of reasons accompanying findings made by domestic investigating authorities was also evident from Article 2:15, which provided in relevant part:

> "In the case of an affirmative finding each such notice shall set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor."

285. In the Panel's view, the wording of the second sentence in Article 2:15 made it clear that a signatory could not meet the requirements of this provision by a simple announcement that it had determined that subsidized imports were causing material injury to a domestic industry. Article 2:15 had to be interpreted in light of the specific substantive requirements contained elsewhere in the Agreement regarding affirmative findings. Thus with respect to a determination of material injury, the findings and conclusions within the meaning of Article 2:15 had to relate to the factors which the investigating authorities were specifically required to consider under Article 6 of the Agreement.

286. In this respect, the Panel attached importance to the distinction between reasons and facts. The issue before the Panel was not whether a review by a panel of the consistency of a finding with the Agreement could never include a consideration of factual material not reflected in a public notice of a finding, but whether a panel could properly review such finding in the light of reasons not articulated by the investigating authorities when they made the finding. While Article 2:15 could not be interpreted to require investigating authorities to make available in a public statement of reasons each and every fact upon which they had based their findings, the key findings and conclusions drawn from such facts which constituted the reasons for the finding must be articulated in a public statement of reasons. The administrative record of an investigation did not constitute a statement of reasons but was simply a collection of documents containing facts and arguments gathered by, and presented to, the investigating authorities. It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding.

287. The Panel therefore considered that the purpose of Article 2:15 would be frustrated if in a dispute settlement proceeding under the Agreement regarding a finding made by a signatory, such signatory were allowed to refer to the administrative record of an investigation as a substitute for an adequate statement of reasons issued by that signatory at the time it made the finding. However, Article 2:15 did not preclude a panel from examining particular factual materials not actually reflected in a public notice under Article 2:15 where it could be inferred from the statement of reasons by the authorities that they had relied on such materials.

288. With regard to Brazil's argument that its domestic legislation imposed certain constraints as to the amount of information which could be provided in a public notice of the imposition of import taxes, the Panel considered that this argument did not explain why the Brazilian authorities could not have issued a publicly available statement of reasons separately from the public notice of the imposition of the provisional countervailing duties. In the Panel's view, the same consideration applied to the public notice of the imposition of the definitive countervailing duties. Moreover, the Panel noted that, unlike the public notice of the imposition of the provisional countervailing duties, the public notice of the imposition of the definitive countervailing duties in August 1992 mentioned some considerations, albeit in summary form, which had led to the affirmative finding of injury.

289. The Panel noted Brazil's argument that under Article 18 the task of a panel was "to review the facts of the matter".

290. Based on its considerations above regarding the importance of an adequate explanation of the reasons for a finding made by investigating authorities as a precondition of effective review of such a finding by a panel, and regarding the transparency requirements in Article 2:15, the Panel was of the view that its task in this case was "to review the facts of the matter", in light of the reasons for the preliminary affirmative finding stated in public by the Brazilian authorities at the time they made this finding.

291. Based on the foregoing considerations, the Panel decided that in its review of the factual basis for the preliminary affirmative finding made by Brazil, it could not have regard to factual reasons presented by Brazil to the Panel but not stated in the public notice of the finding or otherwise contained in a public statement of reasons issued by the Brazilian authorities at the time of that finding.

292. In the Panel's view, Administrative Order No. 297 could not be considered to constitute a statement of reasons sufficient to enable the Panel to determine on which factual considerations the Brazilian authorities had based their preliminary affirmative finding, and to examine those considerations in light of the relevant legal requirements of the Agreement. For example, regarding the issue of the existence of material injury, while the Order provided for the introduction of duties on imports of milk powder and imports of certain types of milk, the Order did not define the relevant domestic industry, or domestic industries. Moreover, the Order did not enable the Panel to discern whether, and how, the Brazilian authorities had examined evidence on the volume of the imports, the price effects of the imports and the consequent impact of the imports on the domestic industry or industries.

293. The Panel did not preclude that there could have been facts before the Brazilian authorities which could have constituted sufficient evidence in support of a preliminary affirmative finding. However, absent an adequate statement of reasons by the Brazilian authorities, the Panel could not find that the preliminary finding made by Brazil rested on sufficient evidence within the meaning of Article 5:1 of the existence of a subsidy and of material injury caused by subsidized imports of milk and milk powder from the EEC.

294. In this respect, the Panel did not accept Brazil's argument that the fact that the public notice of the imposition of provisional duties provided only limited information on the reasons for the finding

of the Brazilian authorities was a mere technicality by which the EEC had not been prejudiced, given that it had access to the record of the investigation. As noted above, the lack of explanation of the reasons for this finding made it impossible for the Panel to effectively review this finding in the light of the relevant requirements of the Agreement. That the EEC might have had access to the record containing the facts considered by the Brazilian authorities was irrelevant in this respect.

295. In the light of the foregoing considerations, the Panel concluded that the preliminary affirmative finding made by Brazil on 8 April 1992 with regard to imports of milk powder and certain types of milk from the EEC was inconsistent with Article 5:1 because this finding failed to provide a statement of reasons to enable the Panel to discern the legal and factual considerations which formed the basis for this finding, and to examine those considerations in light of the relevant legal requirements of the Agreement.

296. In the light of its conclusions in paragraphs 268 and 295, the Panel concluded that the imposition by Brazil on 8 April 1992 of provisional countervailing duties on imports of milk powder and certain types of milk was inconsistent with Brazil's obligations under Article 5:1 of the Agreement because:

(i) Brazil had made a preliminary affirmative finding which was not the result of an investigation conducted in accordance with Articles 2:3 and 2:5, and

(ii) the affirmative preliminary finding in Administrative Order No. 297 failed to provide a statement of reasons to enable the Panel to discern the legal and factual considerations which formed the basis for this finding, and to examine those considerations in light of the relevant legal requirements of the Agreement.

297. In light of its conclusions in the preceding paragraph, the Panel did not consider that it was necessary to make a finding on the argument of the EEC that Brazil had failed to provide reasons or evidence that the imposition of provisional measures was necessary to prevent injury being caused during the investigation.

298. The Panel considered that provisional duties imposed inconsistently with Article 5:1 were necessarily also inconsistent with Article 1 of the Agreement, which provided:

> "Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty [ ] on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement." (footnote omitted)

299. The Panel noted that Brazil had not notified the EEC of the imposition of provisional countervailing duties at the time of the imposition of these duties.

300. The Panel noted that Article 2:15 required signatories to provide notices of any finding "to the signatory or signatories the products of which are subject to such finding and to the exporters known to have an interest therein". The Panel therefore concluded that, by not forwarding to the EEC a notice of its preliminary affirmative finding made on 8 April 1992, Brazil had acted inconsistently with Article 2:15 of the Agreement.

3. Imposition by Brazil of Definitive Countervailing Duties on Imports of Milk Powder from the EEC

301. The Panel proceeded to examine the claim presented by the EEC that, by imposing on 10 August 1992 definitive countervailing duties on imports of milk powder from the EEC, Brazil had acted inconsistently with its obligations under Article 6:1-4 of the Agreement.

302. In support of this claim, the EEC argued that the analysis and evidence in Administrative Order No. 569 of 10 August, by which the definitive duties were imposed, did not meet the requirements of Article 6:1-4 with respect to the analysis of the volume of imports, the effect of the imports on domestic producers in Brazil, and factors other than the imports from the EEC as possible causes of material injury to the domestic industry.

303. Brazil submitted that the determination of injury which had led to the imposition of definitive countervailing duties on imports of milk powder from the EEC was in full conformity with the requirements of Article 6:1-4. Brazil referred to the increased volume of imports of milk powder from the EEC, the decline in domestic prices caused by these imports, the stagnation of domestic production, and the lower level of profits and investment in the domestic industry caused by the decline in domestic prices. The investigating authorities had considered factors other than the imports of milk powder from the EEC which could have caused material injury to the domestic industry but had determined that material injury was caused by the imports from the EEC and not by these other factors.

304. As in the case of the issues raised by the EEC with regard to Brazil's preliminary affirmative finding, the parties to the dispute disagreed on whether information and arguments not stated in the public notice of the final finding of the Brazilian authorities were admissible in the proceedings before the Panel.

3.1 Whether Brazil acted inconsistently with Articles 6:1 and 6:2 with respect to the analysis of the volume of imports of milk powder from the EEC

305. The Panel first examined the EEC's argument that Brazil had made a final affirmative finding which was inconsistent with Articles 6:1 and 6:2 with respect to the analysis of the volume of imports of milk powder from the EEC.

306. The EEC argued that the information presented in Administrative Order No. 569 on the volume of imports of milk powder from the EEC showed a decline in the volume of these imports, as percentage of domestic production over the period 1989-1991. Export statistics provided by the EEC to Brazil in response to the questionnaire issued by Brazil in May 1992 showed an even larger decline of the absolute volume of exports of milk powder from the EEC to Brazil over this period. Export statistics from the United Nations also showed a decline in the absolute volume of EEC exports of milk powder to Brazil during the period 1989-1991. Thus on the basis of any data, imports had declined, rather than increased significantly, as required by Article 6:2. The EEC also argued that there was a lack of clarity as to the reference period considered by the Brazilian authorities in their examination of the volume of imports of milk powder from the EEC.

307. Referring to the report of the panel in "United States - Salmon," the EEC argued that Brazil had failed to conduct an objective examination, as required by Article 6:1, by not explaining why the data on the decline in the volume of imports, especially the dramatic decline from 1989 to 1990 shown both by the data of Brazil and by the data of the EEC, did not detract from a finding of a significant increase in the volume of imports.

308. Brazil argued that the period of investigation considered by the Brazilian authorities was the period April 1991-March 1992, and that over this period imports of milk powder from the EEC had increased significantly, irrespective of the data used. The imposition of the definitive countervailing

duties had not been based on the evolution of imports over the period 1989-1991, but on the significant increase in the volume of imports during the period April 1991-March 1992.

309. Specifically, Brazil pointed out that the absolute volume of imports of milk powder from the EEC had increased significantly during 1991, and had continued to increase during the first four months of 1992. Imports of milk powder from the EEC also increased from 1990 to 1991 as share of total imports of milk powder and as share of domestic consumption in Brazil.

310. The Panel noted that the legal provisions relevant to its examination of the analysis and findings of the Brazilian authorities on the volume of imports of milk powder from the EEC were in Article 6:1 and 6:2 of the Agreement. Article 6:1 provides:

> "A determination of injury [ ] for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products [ ] and (b) the consequent impact of these imports on domestic producers of such products." (footnotes omitted)

Article 6:2 provides:

> "With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing signatory. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing signatory, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

311. In its analysis of whether Brazil had acted inconsistently with Articles 6:1 and 6:2 of the Agreement with regard to the consideration of the volume of imports of milk powder from the EEC, the Panel based itself on the following statement in paragraph (e) of Administrative Order No. 569, as rectified on 20 August 1992:

> "The allegation of injury was found to be well-founded since imports of the products in question accounted for a large share of the domestic market. Total milk powder imports originating in the EEC represented 22.6%, 9.8% and 20.4% of domestic production in 1989, 1990 and 1991 respectively. Full cream milk powder represented, [respectively], 15.7%, 3.4% and 5% of domestic production in those years; imports of skimmed milk powder represented 39.2%, 33.2% and 78% of the domestic production in those years, thus contributing to the stagnation of domestic production. This was the result of the low international prices of the EEC product, which are made possible by subsidies at origin. The prices taken into consideration were, in the case of domestic prices, those supplied by the Brazilian Association of Milk Derivatives' Industries and, in the case of milk powder imports from the EEC, those supplied by the CIEF (the economic and tax information department of the Federal Treasury)."

312. For the reasons explained elsewhere in this Report in connection with the Panel's analysis of the preliminary affirmative finding made in April 1992 by the Brazilian authorities, the Panel was of the view that in its review of the final determination in Administrative Order No. 569 it could not properly take account of reasons presented by Brazil before the Panel but not discernible either from

the text of Administrative Order No. 569 or from a statement of reasons issued in a different form by the Brazilian authorities at the time of their final finding. For the Panel to take into account such considerations would be tantamount to allowing a Party to modify and rationalize its determination *ex post facto*.

313. In this context, the Panel noted that, although paragraph (b) of the Administrative Order indicated that the period of investigation was April 1991-March 1992, the explanation in paragraph (e) clearly covered the period 1989-1991. This paragraph provided no indication that the Brazilian authorities had attached particular significance to developments with respect to import volume during the period April 1991-March 1992. The Panel further noted in this respect that paragraph (e) did not contain any discussion of the absolute volume of imports as a relevant factor in the injury determination of the Brazilian authorities. Leaving aside the fact that Brazil was not always consistent in referring to the evolution of the volume of imports in the first three or in the first four months of 1992, the Panel noted that no data on absolute import volume in 1990, 1991 and the first months of 1992 were provided in this paragraph, nor could it otherwise be inferred from this paragraph that the Brazilian authorities had relied on the increase in absolute volume of imports from 1990 to 1991, and in the first months of 1992, in determining that subsidized imports of milk powder from the EEC were causing material injury to the domestic industry in Brazil.

314. Moreover, paragraph (e) of Administrative Order No. 569 also did not mention as relevant considerations the increase in the volume of imports as share of domestic consumption, or as share of total imports of milk powder. The volume of imports was discussed in this paragraph exclusively in relative terms, as a share of domestic production in Brazil.

315. The Panel therefore decided that, in examining the consistency with Articles 6:1 and 6:2 of the analysis and findings of the Brazilian authorities of the volume of imports of milk powder as a factor in their injury determination, it could have regard only to the considerations stated in paragraph (e) of Administrative Order No. 569 regarding the volume of these imports relative to domestic production over the period 1989-1991, and that it could not take account of Brazil's arguments regarding (1) the increase in the absolute volume of imports of milk powder from 1990 to 1991, which continued in the first four months of 1992, (2) the increase in the volume of imports of milk powder relative to domestic consumption, and (3) the increase in the volume of imports from the EEC relative to total Brazilian imports of milk powder.

316. The Panel noted that the first sentence of Article 6:2 indicated that a signatory was not precluded from analyzing the volume of imports relative to domestic production, rather than in absolute terms. That Brazil had considered the volume of imports as a share of domestic production was therefore not by itself inconsistent with Article 6:2.

317. Given that, with regard to the volume of subsidized imports, Article 6:2 required signatories to consider "whether there has been a significant increase in subsidized imports", the Panel examined whether in this case the Brazilian authorities had considered the relative volume of imports of milk powder from the EEC for purposes of determining whether these imports had increased significantly.

318. The Panel noted in this regard that the presentation in paragraph (e) of Administrative Order No. 569 of the data on imports of milk powder from the EEC relative to domestic production over the period 1989-1991 was preceded by the following sentence:

> "The allegation of injury was found to be well-founded since imports of the products in question accounted for a large share of the domestic market." (emphasis added)

Thus, read in context, the statements in this paragraph regarding the imports of milk powder as percentage ratios of domestic production reflected an analysis of the significance of the level of those imports throughout the period 1989-1991, rather than an analysis of the significance of any increase in the volume of those imports.

319. In this respect the Panel further noted that, although paragraph (e) contained data from which it could be concluded that total imports of milk powder from the EEC, relative to domestic production had increased from 1990 to 1991, there was nothing in this paragraph to indicate that, in examining the rôle of the imports in causing injury to domestic producers, the Brazilian authorities had attached significance to this increase in import volume, as distinguished from the level of import penetration throughout the period 1989-1991.

320. In this latter regard, the Panel was of the view that, had the Brazilian authorities relied on the increase in the relative volume of imports from the EEC from 1990 to 1991, it would in any event have been incumbent upon them to explain the significance of that increase against the background of the overall decline in the relative import volume over the period 1989-1991. In Administrative Order No. 569 the Brazilian authorities based their conclusion regarding the volume of imports of milk powder on the period 1989-1991. Had the Brazilian authorities relied on the increase of the volume of imports from 1990 to 1991, an objective examination within the meaning of Article 6:1 of whether a significant increase of the import volume had occurred would have required them to take account of all facts relating to the evolution of the import volume over the period 1989-1991, including the overall decline in the relative import volume from 1989 to 1991, and to explain why this overall decline of the import volume did not detract from a finding of a significant increase in the relative volume of imports, based on the evolution of the import volume during the period 1990-1991.

321. Therefore, without necessarily taking the view that as a matter of law the data in paragraph (e) of Administrative Order No. 569 could not have constituted positive evidence of a significant increase in the volume of imports of milk powder from the EEC, the Panel considered that the analysis of the import volume offered by the Brazilian authorities was inadequate to meet the requirement of Article 6:2 that authorities consider "whether there has been a significant increase in subsidized imports…" and the requirement of Article 6:1 of an objective examination. The text of the paragraph made it clear that the Brazilian authorities had considered the level of the relative import volume, but did not make it clear that they had considered whether there had been a significant increase in the import volume. There was nothing in this paragraph indicating whether the Brazilian authorities considered the increase from 1990 to 1991 to be significant, and whether, in determining that this increase was significant, they had taken into account the overall decline of the relative import volume from 1989 to 1991.

322. The Panel concluded on the basis of the considerations in the preceding paragraphs that the final finding made by the Brazilian authorities of material injury caused by subsidized imports of milk powder from the EEC was inconsistent with the requirements of Articles 6:1 and 6:2 with regard to the analysis of the volume of these imports.

3.2 Whether Brazil acted inconsistently with Articles 6:1 and 6:3 with respect to the analysis of the impact of the subsidized imports of milk powder on domestic producers

323. The Panel proceeded to examine the EEC's argument that the imposition by Brazil of definitive countervailing duties on imports of milk powder from the EEC was inconsistent with the requirements of Articles 6:1 and 6:3 as a result of Brazil's failure to consider the impact of these imports on domestic producers in Brazil.

324. According to the EEC, the issue of the impact of the volume and prices of the allegedly subsidized imports of milk powder from the EEC on domestic producers in Brazil was not addressed

in Administrative Order No. 569. Apart from a vague reference to stagnation of domestic production, the Order did not deal with any of the factors mentioned in Article 6:3 with respect to the examination of the impact of imports on the domestic industry. In the EEC's view, even the reference to the stagnation of domestic production was in contradiction with data showing that domestic production of milk powder increased by 9 per cent from 1989 to 1991. The EEC further submitted that it appeared from the text of the Administrative Order, and from the position taken by Brazil in bilateral consultations following the imposition of the definitive duties, that for the Brazilian authorities the concept of material injury to a domestic industry was synonymous with the presence of a large market share of imports in conjunction with a price difference between imported and domestic products.

325. The EEC argued that most of the evidence and arguments presented to the Panel by Brazil regarding the impact of the imports of milk powder on domestic producers were not admissible, on the ground that such evidence and arguments were not part of the explanation provided by the Brazilian authorities in Administrative Order No. 569. In any event, the EEC considered that even the evidence and arguments provided by Brazil to the Panel did not meet the requirements of Articles 6:1 and 6:3.

326. Brazil argued that the imposition of definitive countervailing duties on imports of subsidized milk powder from the EEC was in accordance with the requirements of Articles 6:1 and 6:3. The information on the factors mentioned in Article 6:3 was on record with the Brazilian investigating authorities, and could have been consulted by the EEC had it shown an interest in doing so.

327. Brazil explained that in considering the impact of the subsidized imports of milk powder from the EEC, the Brazilian investigating authorities had distinguished between the milk powder sector and the fluid milk sector, and between formal and informal markets. Imports of milk powder were sold in rehydrated form in the higher priced formal market where they competed directly with domestic fluid milk and caused depression of domestic prices of fluid milk. This price depression had two adverse effects on domestic producers in Brazil. First, it forced domestic producers of fluid milk to convert part of their production into milk powder. The costs associated with this conversion negatively affected the cash flow of these producers. Second, the depression of fluid milk prices caused some of the domestic production of fluid milk to be diverted from the formal market to the lower priced informal market where, because of the lower cost structure, producers hoped to achieve a higher return.

328. Brazil stated that the reference in paragraph (e) of Administrative Order No. 569 to a stagnation of domestic production related to domestic production of fluid milk, not domestic production of milk powder. From 1990 to 1991, domestic production of fluid milk had increased by only 3.4 per cent. Moreover, the increase in production was directed entirely to the informal market, while production in the formal market remained at the same level as in 1990. With regard to the increased domestic production of milk powder, Brazil argued that the reduction of idle capacity in the milk powder sector was the result of the increased supply of rehydrated imported milk power which forced domestic producers of fluid milk to convert part of their production into milk powder. The injury suffered by the milk powder industry due to the increased imports of milk powder from the EEC expressed itself in the operating and financing costs associated with the increased stocks of milk powder.

329. Brazil further mentioned as considerations taken into account by the Brazilian authorities in examining the impact of the imports of milk powder on domestic producers, the decline in the producer prices of milk from 1990 to 1991, which negatively affected investment and productivity growth, the difference in per capita income earned by agricultural workers in Brazil and the EEC, and the increase of imports of skimmed milked powder as percentage of domestic production.

330. The Panel noted that Article 6:3 provided:

> "the examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

331. Consistent with its approach explained elsewhere in this Report, the Panel based its analysis of whether Brazil had acted inconsistently with Article 6:3 on the considerations expressed by the Brazilian authorities in Administrative Order No. 569.

332. The Panel found that the only reference in this Order to a factor relating to the impact on domestic producers of the imports of milk powder from the EEC was the statement in paragraph (e) of the Order regarding the stagnation of domestic production, caused by low international prices of imports of milk powder from the EEC.

333. The Panel noted that the list of factors mentioned in Article 6:3 in this provision was illustrative in nature, and the last sentence made it clear that the provision did not prejudge the weight to be given to any particular factor mentioned in the provision. At the same time, Article 6:3 clearly required investigating authorities to conduct in each case a comprehensive analysis of "all relevant economic factors and indices having a bearing on the state of the industry". The Panel was of the view that to consider only the stagnation of domestic production in the analysis of the impact of imports on the domestic industry was inconsistent with this comprehensive character of the examination required under Article 6:3.

334. The Panel further noted that, in response to the argument of the EEC that the reference to the stagnation of domestic production in paragraph (e) was in contradiction with data showing that domestic production of milk powder had actually increased by 9 per cent from 1989 to 1991, Brazil had argued that the statement on the stagnation of domestic production related to production of <u>fluid milk</u>, and not to production of <u>milk powder</u>.

335. The Panel recalled that paragraph (e) of Administrative Order No. 569 read, in relevant part:

> "Total milk powder imports originating in the EEC represented 22.6%, 9.8% and 20.4% of domestic production in 1989, 1990 and 1991 respectively. Full cream milk powder represented, respectively. Full cream milk powder represented 15.7%, 3.4% and 5.0% of domestic production in those years; imports of skimmed milk powder represented 39.2%, 33.2% and 78% of the domestic production in these years, <u>thus contributing to the stagnation of domestic production</u>. This was the result of the low international prices of the EEC product, which are made possible by subsidies at origin." (emphasis added)

Given that the statement on the stagnation of domestic production followed statements referring to imports of <u>milk powder</u> as percentage of domestic production, it was in the Panel's view unclear that this stagnation of domestic production related to production of <u>fluid milk</u>, rather than production of <u>milk powder</u>.

336. Moreover, because the Order did not provide a clear definition of the relevant domestic like product and domestic industry concepts, the Panel was faced with serious problems in understanding the rationale offered by the Brazilian authorities when they linked the low international prices of milk powder to this stagnation of domestic production.

337. Administrative Order No. 569, read as a whole, did not clearly define the relevant domestic like product and domestic industry. The preamble of the Order mentioned the existence of "damage to domestic industries" (emphasis added). Article 1 of the Order imposed countervailing duties on imports of "the products identified below and originating in the European Economic Community", which "products" included milk powder and certain types of milk. Article 1(a) of the Order explained that the organizations which lodged the request for initiation of the countervailing duty investigation represented "all domestic milk producers". Article 1(c) of the Order provided that "The domestic product has the same characteristics as the imported product.".

338. From these statements, it was unclear whether the Brazilian authorities had treated fluid milk and milk powder as two separate like products, corresponding to two separate domestic industries, or whether they had considered that fluid milk and milk powder constituted one like product, corresponding to a single domestic industry consisting of domestic producers of fluid milk and domestic producers of milk powder. The reference to the injury to "domestic industries" in the preamble would tend to support the former interpretation, whereas the statement that "The domestic product has the same characteristics as the imported product" would tend to support the latter interpretation.

339. The Panel noted that if, as argued by Brazil, the stagnation of domestic production caused by the low international prices of milk powder was meant to refer to domestic production of fluid milk, the Brazilian authorities logically must have considered that there was one domestic industry consisting of producers of fluid milk and producers of milk powder. However, in that case, it was difficult to understand why in the preamble of the Order the Brazilian authorities mentioned the existence of injury to "domestic industries". Moreover, paragraph (e) failed to explain how the low international prices of imports of milk powder caused stagnation of domestic production of fluid milk. In addition, if, as argued by Brazil, the stagnation of domestic production referred to domestic production of fluid milk, this would mean that paragraph (e) contained no discussion of any indicators of the state of the milk powder producing segment of the industry. On the other hand, if the stagnation of domestic production referred to domestic production of milk powder, this would mean that paragraph (e) failed to provide any discussion of factors relating to the condition of domestic producers of fluid milk, even though the petitioners were said to represent all domestic producers of milk.

340. In light of the foregoing considerations, the Panel concluded that the analysis and findings of the Brazilian authorities regarding the impact of the imports of milk powder from the EEC were inconsistent with the requirements of Article 6:3 because:

(i) the considerations in Administrative Order No. 569 did not permit the Panel to find that the Brazilian authorities had carried out a comprehensive analysis of "all relevant economic factors and indices having a bearing on the state of the industry" ;

(ii) the Order did not adequately explain the reference to "stagnation of domestic production" as an indicator of injury caused by the subsidized imports of milk powder from the EEC, as a result, in particular, of the lack of definition of the relevant domestic industry or domestic industries in relation to which the Brazilian authorities had examined the existence of material injury.

3.3 Whether Brazil had acted inconsistently with the requirements of Article 6:4 in its analysis of the causal relationship between the subsidized imports of milk powder and material injury to a domestic industry

341. The Panel proceeded to consider the argument of the EEC that Brazil's final affirmative finding in Administrative Order No. 569 was inconsistent with the requirements of Article 6:4.

342. In the EEC's view, the inconsistency of the final finding with Article 6:4 resulted from the fact that the finding was inconsistent with Articles 6:2 and 6:3 (referred to in the footnote to Article 6:4). Furthermore, while Article 6:4 contained an obligation to demonstrate that injury is caused through the effects of the subsidized imports and that injury caused by other factors shall not be attributed to subsidized imports, Brazil had not considered factors other than the imports of milk powder from the EEC which might be causing material injury to Brazilian domestic producers. In this latter regard, the EEC referred to the volumes and prices of imports of milk powder from third countries, and to the structural adjustment process in the Brazilian industry following the relaxation of domestic price controls.

343. Brazil argued that, although the investigating authorities were aware that other factors might be causing material injury to the domestic industries, they were satisfied that the imports of milk powder from the EEC, by themselves, were a clear cause of material injury to the domestic industries. Brazil noted in this regard the loss of market share of domestic producers, the increased market share of the subsidized imports, the displacement of domestic fluid milk into the informal market and to milk powder factories, and the decline in domestic prices.

344. The Panel noted that Article 6:4 provided:

> "It must be demonstrated that the subsidized imports are, through the effects [ ] of the subsidy, causing injury within the meaning of this Agreement. There may be other factors ( ) which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports." (footnotes omitted)

It logically followed from footnote 19 ad Article 6:4 that, where a signatory made an affirmative injury determination which did not satisfy the requirements of Articles 6:2 and 6:3, such determination of injury was thereby also inconsistent with the first sentence of Article 6:4

345. The Panel noted in addition that Administrative Order No. 569 provided no indication that the Brazilian authorities had considered the possible role of factors other than the imports of milk powder from the EEC, such as imports from third countries. No mention was made of such factors in the text of the Order. Given this absence of any discussion of such other factors in the text of the Order, the Panel could not satisfy itself that Brazil had acted consistently with the requirements of the second sentence of Article 6:4.

346. The Panel concluded that Brazil's final affirmative finding on imports of milk powder from the EEC was inconsistent with the requirements of Article 6:4 because:

(i) the finding was inconsistent with the requirements of Article 6:2 with respect to the analysis by the Brazilian authorities of the volume of the imports of milk powder from the EEC, and inconsistent with Article 6:3 with respect to the analysis by the Brazilian authorities of the impact of the imports on domestic producers, and

(ii) in view of the absence of any discussion in Administrative Order No. 569 of the possible role of factors other than the imports of milk powder from the EEC, the Panel could not satisfy itself that the Brazilian authorities had acted consistently with the requirements of the second sentence of Article 6:4

347. In light of its conclusions in paragraphs 322, 340 and 346, the Panel concluded that, in imposing on 10 August 1992 definitive countervailing duties on imports of milk powder from the EEC, Brazil had acted inconsistently with its obligations under the Agreement because the final affirmative finding which served as the basis for the imposition of these duties was inconsistent with Articles 6:1-4 of the Agreement. The Panel also concluded that in imposing these duties, Brazil had acted inconsistently with its obligations under Article 1 of the Agreement.

4. Imposition by Brazil of Definitive Countervailing Duties on Imports on Certain Types of Milk from the EEC

348. The Panel considered the claim presented by the EEC that, in imposing definitive countervailing duties on imports of certain types of milk from the EEC, Brazil had acted inconsistently with its obligations under Article 6 of the Agreement.

349. The Panel noted that Administrative Order No. 569 imposed definitive countervailing duties on imports of certain types of milk, in addition to countervailing duties on imports of milk powder from the EEC. However, while there was some discussion on the volume and effects of imports of milk powder, the Panel did not find in this Order any discussion of the volume of imports of milk, the effects of these imports on domestic prices of milk, and the consequent impact of the imports of milk on domestic producers of like products. Furthermore, as analyzed above, it was not clear from this Order that, as argued by Brazil, the reference made to stagnation of domestic production as an indication of injury related to domestic production of milk, rather than production of milk powder. In this context the Panel also recalled its observations in paragraphs 335 to 339 regarding the lack of a clear definition of the relevant like product, and the relevant domestic industry or industries in relation to which the Brazilian authorities had analyzed the effects of the imports of milk powder.

350. The Panel concluded that the final affirmative finding with regard to imports of certain types of milk was inconsistent with the requirements of Articles 6:1-4, because Administrative Order No. 569 did not enable the Panel to satisfy itself that the Brazilian authorities had considered the volume of imports of milk, their effect on domestic prices of the like product, and the consequent impact of imports of milk on domestic producers of like products. The Panel also concluded that in imposing definitive countervailing duties on certain types of milk, Brazil had acted inconsistently with its obligations under Article 1 of the Agreement.

5. Harmless Error

351. The Panel noted Brazil's characterization of the EEC's complaint as merely involving issues of a procedural nature, in respect of which Brazil had only committed harmless errors, and Brazil's argument that the panel should consider these procedural issues against the background of the evidence before the Brazilian authorities of the injurious effects of the subsidized imports from the EEC.

352. The Panel recalled its conclusions that, in imposing provisional and definitive countervailing duties on imports of milk powder and certain types of milk from the EEC, Brazil had acted inconsistently with certain essential procedural requirements of the Agreement. As explained in paragraph 271, the Panel did not accept Brazil's view that these procedural infringements amounted to no more than harmless error. Furthermore, the Panel recalled its conclusions that the reasons provided by the Brazilian authorities at the time of their preliminary and final affirmative findings did not permit the Panel to

satisfy itself that Brazil had complied with substantive obligations under the Agreement, such as those in Article 6.

353. The Panel considered that its task was to determine whether the findings made by the Brazilian authorities were in conformity with the relevant procedural and substantive requirements of the Agreement. Accordingly, in drawing the conclusions in the preceding paragraph, the Panel did not prejudge the issue of whether Brazil, had it properly respected the procedural requirements of the Agreement and adequately explained the reasons for its preliminary and final findings, could have validly imposed provisional and definitive countervailing duties on imports of milk powder and certain types of milk from the EEC.

6. Alleged Failure of the EEC to Co-operate with the Brazilian Authorities in the Investigation

354. The Panel noted that the parties disagreed on the issue of whether the EEC had adequately co-operated with the Brazilian authorities in their investigation.

355. Brazil argued that it had not received adequate co-operation from the EEC in this investigation, and that as a result the Brazilian authorities had to resort to the provisions of Article 2:9 of the Agreement and make their findings "on the basis of the facts available". The EEC rejected Brazil's contention regarding the alleged lack of co-operation in this investigation and Brazil's reliance on the provisions in Article 2:9 of the Agreement.

356. In this context, the parties presented conflicting views on the lack of a response of the EEC to Brazil's offer of 27 February 1992 for consultations; the causes of the delay in the consultations held subsequently; the allegedly inadequate response of the EEC to the questionnaire issued by the Brazilian authorities in May 1992; the refusal of the EEC to distribute the questionnaire to its exporters, and the lack of any response to the questionnaire from the EEC exporters.

357. The Panel attached importance to adequate co-operation between signatories with respect to countervailing duty investigations. However, the Panel noted that the Agreement did not contain a legal requirement for a signatory whose products were subject to an investigation conducted by another signatory to co-operate with such other signatory. When a signatory failed to co-operate with another signatory which was conducting an investigation, the only possible legal consequence of such non-co-operation under the Agreement was that it could entitle the signatory conducting the investigation to make findings " on the basis of the facts available", as provided in Article 2:9.

358. The Panel therefore examined whether in the case before it the alleged lack of co-operation of the EEC could have entitled Brazil to invoke Article 2:9 of the Agreement and, if so, whether this would have implications for any of the conclusions reached by the panel in previous sections of the Report.

359. The Panel first considered whether the alleged lack of co-operation of the EEC as evidenced by its attitude *vis-à-vis* Brazil's offer for consultations made on 27 February 1992, and its attitude during consultations held between the parties subsequent to the imposition of provisional duties, could have entitled Brazil to have recourse to the provisions of Article 2:9 when it made its final affirmative finding in August 1992.

360. The Panel noted that Article 2:9 provided:

> "In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings [ ], affirmative or negative, may be made on the basis of the facts available."

Given the wording of Article 2:9, the Panel considered that the alleged unwillingness of the EEC to engage promptly in bilateral consultations could not provide a possible justification for the invocation by Brazil of this provision. When a signatory did not take up opportunities for bilateral consultations under Article 3, it did not thereby "refuse access to, or otherwise (..) not provide, necessary information within a reasonable period or significantly impede the investigation". Article 2:9 was relevant only in the context of an investigation initiated and conducted in accordance with Article 2. Brazil's offer for bilateral consultations, made on 27 February 1992, i.e. before the initiation of the investigation on 16 March 1992, and the EEC's lack of response to that offer, could therefore not constitute a ground for the invocation by Brazil of Article 2:9.

361. The Panel also did not consider that the apparent disagreement between the parties on the date and venue of bilateral consultations in April-May 1992 was relevant as a possible ground for invocation by Brazil of its rights under Article 2:9. Brazil had requested the EEC and its exporters to provide information through a questionnaire sent on 18 May 1992. Brazil could possibly have relied on Article 2:9 in sofar as responses to this questionnaire were inadequate or untimely. In contrast, the fact that the EEC and Brazil had encountered difficulties in agreeing on a date and venue for bilateral consultations under Article 3 could not logically be a basis for Brazil to resort to Article 2:9.

362. In sum, while the Panel realized that this investigation might perhaps have taken a different course if the EEC had responded promptly to Brazil's offer for consultations of 27 February 1992, it did not consider that this lack of a prompt response, and the disagreement between the parties on the timing and venue of bilateral consultations after the imposition of provisional duties, could in any way have justified reliance by Brazil on the provisions of Article 2:9.

363. The Panel then considered whether the alleged inadequacy of the EEC's responses to the questionnaire issued by Brazil in May 1992 could have entitled Brazil to invoke Article 2:9 and, if so, how this would affect the conclusions of the Panel in previous parts of the Report.

364. The Panel considered, after a review of the responses provided by the EEC, that these responses were incomplete in certain respects. The Panel further noted that there was no indication in the information before it that any EEC exporters had provided responses to this questionnaire.

365. However, the Panel recalled that its findings regarding the imposition by Brazil of the definitive countervailing duties were based on the provisions of Article 6 regarding the determination of injury. The Panel considered that the possible inadequacies in the replies to the questionnaire, particularly in respect of questions relating to the existence and amount of subsidies, had no bearing on the Panel's considerations regarding the deficiencies in the analysis conducted by the Brazilian authorities with regard to the volume of imports, the impact of the imports on domestic producers, and the possible role of factors other than the imports from the EEC.

366. The Panel concluded, based on the foregoing considerations, that the allegedly inadequate co-operation by the EEC in the investigation conducted by the Brazilian authorities did not alter the findings reached by the Panel in previous sections of this Report with respect to the inconsistency with the Agreement of Brazil's imposition of provisional and definitive countervailing duties on imports of milk powder and certain types of milk from the EEC.

367. The Panel noted that the EEC had originally requested the Panel to recommend that the Committee request Brazil to (a) immediately lift the countervailing duty order and (b) reimburse the countervailing duties levied inconsistently with its obligations under the Agreement. Subsequently the EEC had informed the Panel that it maintained its request on the lifting of the order but withdrew its request on reimbursement noting that "it should be left to the Signatory concerned to determine the means by which it should bring its practice, it found contrary to the Agreement, into conformity with its provisions". The EEC did not explain why this principle should only apply to the issue of reimbursement and not to that of the lifting of the order, but noted that "in this particular case reimbursement may be the only way for Brazil to bring its action into conformity with its obligations under the Agreement". Against this background the Panel decided to limit itself to the recommendation set out below.

VIII. SUMMARY OF CONCLUSIONS AND RECOMMENDATION

368. The Panel concluded that:

(i) the imposition by Brazil of provisional countervailing duties on imports of milk powder and certain types of milk was inconsistent with Brazil's obligations under Articles 5:1 and 1 of the Agreement;

(ii) the imposition by Brazil of definitive countervailing duties on imports of milk powder from the EEC was inconsistent with Brazil's obligations under Articles 6:1-4 and 1 of the Agreement; and

(iii) the imposition by Brazil of definitive countervailing duties on imports of certain types of milk from the EEC was inconsistent with Brazil's obligations under Articles 6:1-4 and 1 of the Agreement.

369. The Panel recommends that the Committee request Brazil to bring its measures into conformity with its obligations under the Agreement. The Panel suggests that the Committee request Brazil to cease applying the countervailing duty on imports of milk powder and certain types of milk from the EEC.

ANNEX 1

I/63/93-EN

Administrative Order No. 297 of 8 April 1992

The Minister of Economic Affairs, Finance and Planning, pursuant to Article 1(II) and (V) of Decree No. 80 of 5 April 1991 and to Articles 27 and 29 of Resolution 00-1227 of 14 May 1987 of the former Customs Policy Committee, also pursuant to Law No. 8174 of 30 January 1991 and to Decree No. 174 of 10 July 1991, and to Administrative Orders Nos. 974 of 16 October 1991 of the Ministry of Economic Affairs, Finance and Planning (MEFP) and 444 of 17 October 1991 of the National Economic Secretariat; taking account of the findings of Case No. 10768.007731/91-23 and having regard to the existence of subsidies for the production and export to Brazil of the products referred to in this Order, and the resulting damage to domestic industries, hereby lays down:

Article 1

A provisional countervailing duty is hereby established in the form of an additional import tax, which shall be calculated by applying the *ad valorem* rates set out below to imports of the products described below and originating in the European Economic Community.

Product	Countervailing duty *ad valorem* rate
0402.10.0100 - Milk in powder granules or other solid forms, of a fat content, by weight, not exceeding 1.5%, partially or completely skimmed, excluding modified milk for infants' food	52%
0402.10.0200 - Milk in powder granules or other solid forms, of a fat content, by weight, not exceeding 1.5%, skimmed for industrial use or animal feed	52%
0402.21.0101 - Whole or full cream milk, with a fat content of not less than 26%	31%
0402.21.0102 - Partially or completely skimmed milk, excluding modified milk for infants' food; with a fat content of less than 26%	52%
0402.21.0103 - Skimmed milk, for industrial use or for animal feed	52%

Product	Countervailing duty *ad valorem* rate
0402.21.0199 - Other	52%
0402.29.0102 - Other partially or completely skimmed milk, excluding modified milk for infants' food, with a fat content not exceeding 26%	52%

Article 2

The imposition of provisional countervailing duties is justified by: the subsidization of exports to Brazil and the need to safeguard the interests of similar domestic products during the period of enquiry.

Article 3

This Administrative Order shall enter into force on the date of its publication in the Official Gazette of Brazil and shall remain in force for four months, in accordance with Article 29 of Resolution No. 00-1227 of 14 May 1987 of the Customs Policy Committee.

Marcílo Marques Moreira

ANNEX 2

COUNTERVAILING DUTY

MEFP Administrative Order No. 569 of 10 August 1992

The Minister of Economic Affairs, Finance and Planning, pursuant to Article 1(II) and (V) of Decree No. 80 of 5 April 1991 and to Articles 31 and 34 of Resolution 00-1227 of 14 May 1987 of the former Customs Policy Committee, also pursuant to Law No. 8174 of 30 January 1991 and to Decree No. 174 of 10 July 1991, and to Administrative Orders Nos. 974 of 16 October 1991 of the Ministry of Economic Affairs, Finance and Planning (MEFP) and 444 of 17 October 1991 of the National Economic Secretariat (SNE); taking account of the findings of Case No. 10768.007731/91-23 and having regard to the existence of subsidies for the production and export to Brazil of the products referred to in this Order, and the resulting damage to domestic industries, hereby lays down:

Article 1

A countervailing duty is hereby imposed in the form of an additional import tax, which shall be calculated by applying the *ad valorem* rates set out below to imports of the products identified below and originating in the European Economic Community:

Product	Countervailing duty *ad valorem* rate
0402.10.0100 - Milk in powder granules or other solid forms, of a fat content, by weight, not exceeding 1.5%, partially or completely skimmed, excluding modified milk for infants' food	20.7%
0402.10.0200 - Milk in powder granules or other solid forms, of a fat content, by weight, not exceeding 1.5%, skimmed for industrial use or animal feed	20.7%
0402.21.0101 - Whole or full cream milk, with a fat content of not less than 26%	20.7%
0402.21.0102 - Partially or completely skimmed milk, excluding modified milk for infants' food, with a fat content of less than 26%	20.7%
0402.21.0103 - Skimmed milk, for industrial use or for animal feed	20.7%
0402.21.0199 - Other	20.7%
0402.29.0101 - Other whole or full cream milk with a fat content of not less than 26%	20.7%

Product	Countervailing duty *ad valorem* rate
0402.29.0102 - Other partially or completely skimmed milk, excluding modified milk for infants' food, with a fat content of less than 26%	20.7%

The grounds for the opening of enquiries are as follows:

(a) An enquiry was opened under MEFP/SNE/DECEX Circular No. 083 of 16 March 1992 following a request by the Brazilian Milk Producers' Association, Rua Bento Freitas, 178-9 , and the Brazilian Rural Society, Rua Formosa, 367-19 , Sao Paulo, representing all domestic milk producers.

(b) The period of enquiry extended concerned the twelve months prior to the date of publication of DECEX Circular No. 83 of 16 March 1992, namely April 1991-March 1992.

(c) The domestic product has the same characteristics as the imported product.

(d) The value of the export "refunds" laid down by Commission Regulation (EEC) No. 1513/92 of 11 June 1992 was used to extrapolate the value of the subsidies.

(e)* The allegation of injury was found to be well-founded since imports of the products in question accounted for a large share of the domestic market. Total milk powder imports originating in the EEC represented 22.6 per cent, 9.8 per cent and 20.4 per cent of domestic production in 1989, 1990 and 1991 respectively. Full cream milk powder represented 19.0 per cent, 4.8 per cent and 7.5 per cent of domestic production in those years; imports of skimmed milk powder represented 19.9 per cent, 12.9 per cent and 30.9 per cent of domestic production in those years, thus contributing to the stagnation of domestic production. This was the result of the low international prices of the EEC product, which are made possible by subsidies at origin. The prices taken into consideration were, in the case of domestic prices, those supplied by the Brazilian Association of Milk Derivatives' Industries and, in the case of milk powder imports from the EEC, those supplied by the CIEF (the economic and tax information department of the Federal Treasury).

Article 2

The Treasury shall be responsible for the collection or release of any security provided for imports in the period of application of the provisional countervailing duty imposed under MEFP Administrative Order No. 297 of 29 April 1992, in accordance with Articles 30 and 35 of Resolution 00-1227 of 14 May, amended by Article 1 of Resolution No. 00-1582 of 17 February 1989, of the former Customs Policy Committee.

Article 3

This Order shall enter into force on the date of its publication in the Official Gazette of Brazil and remain in force for five years.

*See *supra*, footnote 7 for the rectification of the data in this paragraph, published on 20 August 1992.

ANNEX 3

INVESTIGATION INTO SUBSIDIES

DECEX Circular No. 83

The Director of the Foreign Trade Department (DECEX) of the Ministry of Economic Affairs, Finance and Planning, acting in accordance with Article 10 of Decree No. 80 of 5 April 1991 and Article 12 of Resolution No. 00-1227 of 14 May 1987 of the former Customs Policy Committee, also pursuant to Law No. 8174 of 30 January 1991 and to Decree No. 174 of 10 July 1991, and to Administrative Orders Nos. 974 of 16 October 1991 of the Ministry of Economic Affairs, Finance and Planning (MEFP) and 444 of 17 October 1991 of the National Economic Secretariat; taking account of the findings of case No. 10768.007731/91-23 and having regard to the existence of sufficient indication of subsidies for the production and export to Brazil of the products referred to in this Order, and of resulting damage from such practices, has decided as follows:

1. An investigation shall be opened into the existence of subsidies and injury, and into the causal relationship between them, in respect of the manufacture of milk powder by the European Economic Community and its export to Brazil. The products under investigation fall under the following headings of the Brazilian Customs Tariff Code (TAB):

0402.10.0100 - Milk in powder granules or other solid forms, of a fat content, by weight, not exceeding 1.5%, partially or completely skimmed, excluding modified milk for infants' food

0402.10.0200 - Milk in powder granules or other solid forms, of a fat content, by weight, not exceeding 1.5%, skimmed for industrial use or animal feed

0402.10.9900 - Other

0402.21.0101 - Whole or full cream milk, with a fat content of not less than 26%

0402.21.0102 - Partially or completely skimmed milk, excluding modified milk for infants' food, with a fat content of less than 26%

0402.21.0103 - Skimmed milk, for industrial use or for animal feed

0402.21.0199 - Other

0402.29.0101 - Other whole or full cream milk, with a fat content of not less than 26%

0402.29.0102 - Other partially or completely skimmed milk, excluding modified milk for infants' food, with a fat content not exceeding 26%

0402.29.0103 - Other skimmed milk, for industrial use of animal feed

0402.29.0199 - Other

1.1 The date of the start of the investigation shall be the date of publication of this circular in the Brazilian Official Gazette.

2. The following additional information is hereby made public.

Summary of the grounds for opening an investigation:

(a) Petition: the investigation is opened in response to a request made by the Brazilian Milk Producers' Association, Rua Bento Freitas, 178-9 , and the Brazilian Rural Society, Rua Formosa, 367-19 , Sao Paulo, together representing all domestic milk production.

(b) Allegation of subsidies: this is mainly based on the following programmes supported by the EEC:

- programme of support for production and for the domestic industry and programme of export refunds, which promotes exports by covering the difference between EEC support prices and international prices or prices on the market to which the product is exported.

(c) Allegation of injury: this is based on the disruption of Brazilian production as a result of the low international prices of the EEC product, which are made possible by the existence of subsidies at origin.

3. Article 12(1) and (2) of Resolution CPA No. 00-1227/87 lays down that third parties have 20 days from the publication of this circular in the Official Gazette to declare themselves as interested parties and appoint their representatives.

4. Interested parties that may be affected by the results of the procedure may communicate their views in writing or in hearings to the Technical Tariff Co-ordination Unit of DECEX (Article 19 of Resolution CPA 00-1227/87).

5. All written or oral communications concerning the procedure that is the subject of this circular must be in the Portuguese language.

6. Interested parties should send any pertinent documentation (four copies) to the Technical Tariff Co-ordination Unit, MEFP, Avenida Presidente Antonio Carlos 375-11 , sala 1.111, Rio de Janeiro-RJ, CEP:20020

16 March 1992, published on 17 March 1992