

**ARGENTINA – DEFINITIVE ANTI-DUMPING DUTIES  
ON POULTRY FROM BRAZIL**

*Report of the Panel*

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## I. INTRODUCTION

1.1 On 7 November 2001, Brazil requested consultations with Argentina pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), Article XXII of the *General Agreement on Tariffs and Trade 1994* (the "*GATT 1994*"), Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*AD Agreement*"), including Article 17.4 thereof, and Article 19 of the *Agreement on Implementation of Article VII of GATT 1994* (the "*Agreement on Customs Valuation*") concerning the Argentine anti-dumping measures imposed in respect of imports of poultry from Brazil.<sup>1</sup> Argentina and Brazil held consultations on 10 December 2001, but failed to settle the dispute.

1.2 On 19 November 2001, the European Communities requested, pursuant to Article 4.11 of the *DSU*, to be joined in the consultations.<sup>2</sup>

1.3 On 25 February 2002, Brazil requested the establishment of a panel pursuant to Article XXII of the *GATT 1994*, Article 17 of the *AD Agreement* and Article 6 of the *DSU*.<sup>3</sup>

1.4 At its meeting on 17 April 2002, the Dispute Settlement Body (the "*DSB*") established this Panel in accordance with Article 6 of the *DSU* to examine the matter referred to the *DSB* by Brazil in document WT/DS241/3. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS241/3, the matter referred by Brazil to the *DSB* in that document, and to make such findings as will assist the *DSB* in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 17 June 2002, Brazil requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the *DSU*. This paragraph provides:

"If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the *DSB* and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the *DSB* shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request".

1.6 On 27 June 2002, the Director-General accordingly composed the Panel as follows:<sup>4</sup>

Chairman: Mr. Harsha V. Singh

Members: Ms. Enie Neri de Ross  
Mr. Michael Mulgrew

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<sup>1</sup> WT/DS241/1.

<sup>2</sup> WT/DS241/2.

<sup>3</sup> WT/DS241/3.

<sup>4</sup> WT/DS241/4.

1.7 Canada, Chile, the European Communities, Guatemala, Paraguay and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties on 25-26 September 2002 and 26 November 2002. It met with the third parties on 26 September 2002.

1.9 The Panel submitted its interim report to the parties on 25 February 2003. The Panel submitted its final report to the parties on 8 April 2003.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition by Argentina of anti-dumping measures on imports of poultry from Brazil.

2.2 On 2 September 1997, the Centro de Empresas Procesadoras Avícolas (the "CEPA") filed an application for the initiation of an anti-dumping investigation with the Under-Secretariat for Foreign Trade (the "SSCE"), which subsequently became the Under-Secretariat for Industry, Trade and Mining (the "SSICM"). CEPA alleged that imports of poultry from Brazil into Argentina were taking place at dumped prices and that these imports represented a threat of material injury to the domestic industry.<sup>5</sup> On 23 September 1997, the National Foreign Trade Commission (the "CNCE") issued an opinion regarding the representativeness of the domestic industry and, on 21 November 1997, the SSCE accepted the application presented by CEPA.

2.3 On 7 January 1998, the Department of Unfair Trading Practices and Safeguards (the "APCDS"), which subsequently became the Directorate of Unfair Competition (the "DCD"), concluded in its Report on the Feasibility of Initiating an Investigation (the "Report of 7 January 1998") that there was sufficient evidence of dumping to justify initiating an investigation.<sup>6</sup> On that same date, the CNCE determined in Record No. 405 that there was not sufficient evidence of injury or threat of injury to justify the initiation of an investigation.<sup>7</sup> On 17 February 1998, CEPA presented new and updated information to the Secretariat for Industry, Trade and Mining (the "SICyM").<sup>8</sup> On 18 June 1998, the General Directorate for Legal Affairs (the "DGAJ") of the Ministry of the Economy and Public Works and Services (the "MEyOSP"), at the request of the then Under-Secretariat for Foreign Trade, determined that "... in view of the fact that the information submitted by ... CEPA ... was not evaluated by the National Foreign Trade Commission when ruling on injury to the domestic industry in Record No. 405/98, this Directorate-General considers that before proceeding any further, the said National Commission should be asked to intervene once again in order to rule on the items submitted ...".<sup>9</sup> Following an examination of the new evidence submitted by CEPA, the CNCE determined in Record No. 464 of 22 September 1998 that there was sufficient evidence of threat of injury to justify the initiation of the investigation.<sup>10</sup>

2.4 On 20 January 1999, the Secretary for Industry, Trade and Mining (the "Secretary") decided to initiate the anti-dumping investigation concerning poultry from Brazil.<sup>11</sup> A Notice of Initiation of the anti-dumping investigation was published in the Official Bulletin on 25 January 1999.

2.5 The CNCE and the DCD sent, on 10 and 16 February 1999, respectively, letters to five Brazilian exporters (i.e., Sadia S.A. ("Sadia"), Avipal S.A. Avicultura e Agropecuaria ("Avipal"),

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<sup>5</sup> Exhibit BRA-1.

<sup>6</sup> Exhibit BRA-2.

<sup>7</sup> Exhibit BRA-3.

<sup>8</sup> Exhibit BRA-4.

<sup>9</sup> Exhibit BRA-5.

<sup>10</sup> Exhibit BRA-6.

<sup>11</sup> Exhibit BRA-7.

Frigorífico Nicolini Ltda. (“Nicolini”), Seara Alimentos S.A. (“Seara”), and Frangosul S.A. Agro Avícola Industrial (“Frangosul”)) *inter alia* notifying them of the initiation of the investigation.<sup>12</sup>

2.6 On 28 June 1999, the CNCE issued its preliminary affirmative injury determination.<sup>13</sup> On 6 August 1999, the DCD issued its preliminary affirmative dumping determination.<sup>14</sup> On 20 August 1999, the SSCE issued its preliminary affirmative determination on causal link between the allegedly dumped imports and the injury to the domestic industry.<sup>15</sup> No provisional measures were imposed.

2.7 On 15 September 1999, various Brazilian exporters, namely Cooperativa Central de Laticínios do Paraná (“CCLP”), Cooperativa Central Oeste Catarinense Ltda. (“Catarinense”), Chapecó Cia. Industrial (“Chapecó”), Cia. Minuano de Alimentos (“Minuano”), Perdigão Agroindustrial (“Perdigão”), and Comaves Industria e Comércio de Alimentos Ltda. (“Comaves”), were contacted by the DCD, and were provided with the same questionnaire sent by the DCD to other exporters on 16 February 1999.<sup>16</sup>

2.8 On 23 December 1999, the CNCE issued its final affirmative injury determination.<sup>17</sup> The DCD issued its final affirmative dumping determination on 23 June 2000.<sup>18</sup> The dumping margins found for Sadia, Avipal and all other exporters were 14.91 per cent, 15.48 per cent and 8.19 per cent, respectively. No dumping margin was found with regard to Nicolini and Seara. On 17 July 2000, the SSICM issued its final affirmative determination of causal link between the dumped imports and the injury to the domestic industry.<sup>19</sup>

2.9 Based upon the final dumping, injury and causal link determinations, the Ministry of Economics (the “ME”), formerly the MEyOSP, issued Resolution No. 574 of 21 July 2000, imposing definitive anti-dumping measures on imports of poultry from Brazil for a period of three years.<sup>20</sup> Such measures took the form of specific anti-dumping duties to be collected as the absolute difference between the f.o.b. price invoiced in any one shipment and a designated “minimum export price” also fixed in f.o.b. terms, to be applied whenever the former price was lower than the latter. A “minimum export price” of US\$0.92 per kilogram was established for Sadia, and US\$0.98 per kilogram for Avipal and all other exporters. No measures were imposed on the Brazilian exporters Nicolini and Seara because they were found not to be exporting poultry at dumped prices. Resolution No. 574 was published in the Official Bulletin of 24 July 2000.

2.10 On 30 August 2000, in conformity with Article 2 of the MERCOSUR Protocol of Brasilia, Brazil requested the initiation of direct negotiations with Argentina on Resolution No. 574. On 24 January 2001, Brazil gave notice of its intention to initiate the arbitral proceedings provided for in Article 7 of the Protocol of Brasilia. A MERCOSUR Ad Hoc Arbitral Tribunal made its award on 21 May 2001. In accordance with Article 22 of the Protocol of Brasilia, following the award, the Arbitral Tribunal issued a clarification thereof on 18 June 2001.

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<sup>12</sup> Exhibits BRA-8 and BRA-9.

<sup>13</sup> Exhibit BRA-10.

<sup>14</sup> Exhibit BRA-11.

<sup>15</sup> Exhibit BRA-12.

<sup>16</sup> Exhibit BRA-13.

<sup>17</sup> Exhibit BRA-14.

<sup>18</sup> Exhibit BRA-15.

<sup>19</sup> Exhibit BRA-16.

<sup>20</sup> Exhibit BRA-17.

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### A. BRAZIL

3.1 In its first written submission, Brazil requested that the Panel:

- (a) find that Argentina has acted inconsistently with the *AD Agreement* as per the claims below:
- Petitioner's application presented a calculation to adjust normal value in view of alleged physical characteristic differences between poultry sold to Argentina and poultry sold in Brazil. The application did not offer relevant evidence of such differences contrary to the requirement set out in Article 5.2 (Claim 1). By accepting petitioner's adjustment calculation, Argentina failed to examine the accuracy and adequacy of the evidence presented in the application pursuant to Article 5.3 (Claim 2), and to reject the application as provided in Article 5.8 (Claim 3);
  - Argentina acted inconsistently with Article 5.3 (Claim 4) by establishing export prices based only on export transactions with prices below normal value;
  - Petitioner's application presented export price and normal value data for different periods. Specifically, the application presented normal value data for only one day in 1997 (30 June 1997), which cannot be considered relevant evidence to establish normal value pursuant to Article 5.2 (Claim 5). By calculating a dumping margin by making a comparison between export price and normal value in respect of sales that were not made at as nearly as possible the same time and by establishing normal value for only one day in 1997, Argentina failed to examine the accuracy and adequacy of the evidence provided in the application as required by Article 5.3 (Claim 6), and to reject the application pursuant to Article 5.8 (Claim 7);
  - By comparing different periods of data collected for dumping and injury, Argentina incorrectly examined the evidence provided in the application, violating Article 5.3 (Claim 8);
  - Argentina has acted inconsistently with Article 5.7 (Claim 9) by not considering, in the determination whether or not to initiate the investigation, the data collected for dumping simultaneously with the data collected for injury;
  - Argentina failed to notify seven Brazilian exporters when it was satisfied that there was sufficient evidence to justify the initiation of the anti-dumping investigation. By not notifying these exporters when the investigation was initiated, Argentina acted inconsistently with Article 12.1 (Claim 10);
  - Argentina failed to give the seven Brazilian exporters at least 30 days to reply to the dumping questionnaires provided by the DCD in a *prima facie* violation of Article 6.1.1 (Claim 11). Moreover, the CNCE never notified these seven exporters and never provided them with the injury questionnaire;
  - Argentina also failed to promptly make available to the seven Brazilian exporters evidence presented in writing by the other interested parties involved in the investigation, in violation of Article 6.1.2 (Claim 12);

- By failing to give the seven exporters the required time to respond to the questionnaires and not promptly making available to these exporters the evidence presented in writing by the other interested parties involved in the investigation, Argentina did not give these exporters full opportunity for the defence of their interests as required by Article 6.2 (Claim 13);
- Argentina acted inconsistently with Article 6.1.3 (Claim 14) by not providing the text of the written application to the Brazilian exporters and to the Government of Brazil as soon as the investigation was initiated;
- Argentina acted inconsistently with Article 6.8 and Annex II (Claim 15) by disregarding the responses submitted by Brazilian exporters with respect to the description of the product sold to Argentina and in Brazil, and resorting to the normal value adjustment calculation provided by petitioner in the application;
- Argentina acted inconsistently with Article 12.2.2 (Claim 16) by failing to adequately explain in the final determination its decision to disregard the information provided by the exporters regarding the product description and to use instead the normal value adjustment proposed by petitioner;
- Argentina acted inconsistently with Article 6.8 and Annex II (Claim 17) by disregarding the export price data provided by the Brazilian exporters, and resorting to the export price information provided by the Argentinean Livestock Directorate of the Secretariat for Agriculture, Livestock, Fisheries and Food;
- Argentina acted inconsistently with Article 12.2.2 (Claim 18) by failing to adequately explain in the final determination its decision to disregard the export price data provided by the Brazilian exporters, and to resort to the export price data provided by the Argentinean Livestock Directorate of the Secretariat for Agriculture, Livestock, Fisheries and Food;
- Argentina acted inconsistently with Article 6.8 and Annex II (Claim 19) by disregarding all normal value information submitted by two Brazilian exporters, and resorting to the information provided by petitioner;
- Argentina acted inconsistently with Article 12.2.2 (Claim 20) by failing to adequately explain in the final determination its decision to disregard all normal value information submitted by two Brazilian exporters, and to resort to the information provided by petitioner;
- Argentina failed to inform the Brazilian exporters of the essential facts under consideration which formed the basis for the decision whether to apply definitive measures, thereby preventing the Brazilian exporters from adequately defending their interests, contrary to the requirement set forth in Article 6.9 (Claim 21);
- Argentina failed to establish individual margins of dumping for two Brazilian exporters, as required by Article 6.10 (Claim 22);
- Argentina acted inconsistently with Article 2.4 (Claim 23) by not making due allowance for differences in freight in the normal value established for two Brazilian exporters;

- Argentina acted inconsistently with Article 2.4 (Claim 24) by not making due allowance for differences in taxation, freight and financial cost in the normal value established for all other exporters;
- Argentina acted inconsistently with Article 2.4 (Claim 25) by incorrectly making allowances to normal value based on alleged physical characteristic differences between the product sold in Brazil and Argentina;
- Argentina acted inconsistently with Article 2.4 (Claim 26) by imposing an unreasonable burden of proof on three Brazilian exporters by not determining the dumping period of investigation and, thus, allowing these exporters to submit dumping information for the years 1996 through 1999, when the dumping period of investigation was later determined as from January 1998 through January 1999;
- Argentina acted inconsistently with Article 2.4.2 (Claim 27) by establishing a dumping margin based on an incorrect comparison between the export price and the normal value for two Brazilian exporters. Argentina established normal value based only on internal market transactions for which invoices were presented, instead of determining normal value based on all the reported transactions in the internal market for the period. The DCD established the margins of dumping for these two Brazilian exporters on the basis of a comparison of a weighted average statistical sample of normal value with a weighted average of prices of all comparable export transactions;
- Argentina has acted inconsistently with Article 9.2 (Claim 28) and Article 9.3 (Claim 29) by imposing a variable anti-dumping duty that can exceed the margin of dumping established in the final determination;
- Argentina acted inconsistently with Article 12.2.2 (Claim 30) by failing to provide how the “minimum export price” was established in the determination to impose definitive anti-dumping duties;
- Argentina acted inconsistently with Article 5.8 (Claim 31) by failing to reject the application and promptly terminate the investigation, as soon as the CNCE determined in Record No. 405 that there was insufficient evidence of injury or threat of injury to justify the initiation of the investigation;
- By using different periods to evaluate the relevant economic factors and indices listed in Article 3.4, Argentina failed to make a final injury determination based on positive evidence and involving an objective examination as provided for in Articles 3.1, 3.4 and 3.5 (Claim 32);
- Argentina acted inconsistently with Article 12.2.2 (Claim 33) by failing to explain in the final determination why the CNCE examined the relevant economic factors and indices listed in Article 3.4 based on different periods;
- The injury analysis in the final determination did not exclude the imports of two Brazilian exporters, even though the DCD considered that these were not “dumped imports”. By not excluding the imports of these two Brazilian exporters from the “dumped imports”, the CNCE did not properly consider the volume of the “dumped imports”, the effect of the “dumped imports” on prices,

and the impact of the “dumped imports” on the domestic industry, as provided for in Articles 3.2 (Claim 34) and 3.4 (Claim 36). The flawed evaluation of the “dumped imports” indicates that the final injury determination was not based on positive evidence and did not involve an objective examination as required by Article 3.1 (Claim 35);

- By not excluding the imports from these two Brazilian exporters from the “dumped imports”, Argentina failed to properly consider injury as prescribed in Article 3.1, and, consequently, did not properly demonstrate the causal link between the “dumped imports” and the injury to the domestic industry as provided for in Article 3.5 (Claim 37);
  - Argentina acted inconsistently with Articles 3.4 (Claim 38) and 3.1 (Claim 39) by failing to evaluate all the relevant economic factors and indices listed in Article 3.4;
  - Argentina acted inconsistently with Article 12.2.2 (Claim 40) by failing to adequately provide and consider in the final determination the evaluation of all relevant economic factors and indices listed in Article 3.4;
  - Argentina has acted inconsistently with Article 4.1 (Claim 41) by considering that 46 per cent constituted the major proportion of the total domestic production of poultry in Argentina and, thus, qualified as the domestic industry; and
  - By determining dumping, injury and causal link inconsistently with the provisions of the *AD Agreement*, Argentina has acted inconsistently with Article VI of *GATT 1994* and Article 1 of the *AD Agreement*.
- (b) recommend that the DSB request Argentina to bring these actions into conformity with *GATT 1994* and the *AD Agreement*;
- (c) suggest ways in which Argentina could implement the Panel’s recommendations, as provided in Article 19.1 of the *DSU*; and
- (d) suggest that, in light of the numerous outcome-decisive violations of the *AD Agreement* that Argentina immediately repeal Resolution No. 574/2000 imposing definitive anti-dumping duties on eviscerated poultry from Brazil.<sup>21</sup>

B. ARGENTINA

3.2 In its first written submission, Argentina requested that the Panel:

- (a) refrain from ruling on the forty-one claims of inconsistency with various provisions of the *AD Agreement* submitted by Brazil.

If the Panel should decide not to accede to the above request, Argentina requested that the Panel:

- (b) reject Brazil's claims that Resolution No. 574/2000 of the Ministry of the Economy of Argentina is inconsistent with:

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<sup>21</sup> Brazil's first written submission, paras. 549 and 550.

- Articles 5.2, 5.3, 5.7 and 5.8 of the *AD Agreement*;
  - Article 12.1 of the *AD Agreement*;
  - Articles 6.1.1, 6.1.2, 6.1.3, 6.2 and 6.8, and paragraphs 3, 5, 6 and 7 of Annex II, and Articles 6.9 and 6.10 of the *AD Agreement*;
  - Articles 2.4 and 2.4.2 of the *AD Agreement*;
  - Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement*;
  - Article 4.1 of the *AD Agreement*;
  - Articles 9.2 and 9.3 of the *AD Agreement*;
  - Article 12.2.2 of the *AD Agreement*.
- (c) reject the request for the immediate repeal of Resolution No. 574/2000 imposing definitive anti-dumping duties.<sup>22</sup>

#### **IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties, as contained in their submissions to the Panel, are attached as Annexes (see List of Annexes, page vi).

4.2 The parties' answers to questions both from the Panel and from the other party, and their comments on each other's answers, are also attached as Annexes (see List of Annexes, page vi).

#### **V. ARGUMENTS OF THE THIRD PARTIES**

5.1 The arguments of the third parties, Canada, Chile, the European Communities, Guatemala, Paraguay and the United States, are set out in their submissions to the Panel and are attached to this Report as Annexes. The third parties' answers to the Panel's questions are also attached as Annexes (see List of Annexes, page vi).

#### **VI. INTERIM REVIEW**

6.1 The Panel issued the draft descriptive (factual and argument) sections of its report to the parties on 20 December 2002 in accordance with Article 15.1 of the DSU. Both parties offered written comments on the draft descriptive sections on 13 January 2003. The Panel noted all these comments and amended the draft descriptive part where appropriate. The Panel issued its Interim Report to the parties on 25 February 2003 in accordance with Article 15.2 of the DSU. On 11 March 2003, both parties requested that the Panel review precise aspects of the Interim Report. Neither of the parties requested an interim review meeting. On 18 March 2003, both parties submitted written comments on the other party's written requests for interim review. The Panel carefully reviewed the arguments made, and addresses them below, in accordance with Article 15.3 of the DSU.<sup>23</sup>

##### **A. PREVIOUS MERCOSUR PROCEEDINGS**

6.2 Argentina asked the Panel to include a reference to the prior MERCOSUR proceedings in Section II (Factual Aspects) of the Report. Brazil asked the Panel to reject this request. Having considered carefully the arguments of the parties, we have included a reference to the prior MERCOSUR proceedings in Section II (Factual Aspects) of the Report.

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<sup>22</sup> Argentina's first written submission, para. 322.

<sup>23</sup> Section VI of this Report entitled "Interim Review" therefore forms part of the findings of the final panel report, in accordance with Article 15.3 of the DSU.



6.3 Concerning paragraphs 7.35 and 7.36 of the Interim Report (paras 7.35 and 7.36 of the final Report), Argentina referred to the Appellate Body report in *United States – Tax Treatment for "Foreign Sales Corporations"*<sup>24</sup> to invoke a "principle of good faith with respect to the objective presentation of the facts of a dispute".<sup>25</sup> We note that the Appellate Body in that case was referring to the requirement for both complaining and responding Members "to comply with the requirements of the *DSU* (and related requirements in other covered agreements) in good faith".<sup>26</sup> However, since Argentina has not argued that Brazil failed to comply with any requirements of the *DSU* (or related requirements in other covered agreements) in bringing these proceedings, good faith compliance with those requirements is not an issue in the present case. The Appellate Body report in *US – FSC* is therefore not relevant in the present case.

6.4 Argentina made a number of comments regarding paragraphs 7.38 and 7.39 (paras. 7.38 and 7.39 of the final Report). However, we saw nothing in Argentina's comments that caused us to make any changes to the Report.

6.5 In light of an issue raised by Argentina, we have deleted footnote 52 of the Interim Report.

6.6 Concerning para. 7.41 of the Interim Report (para. 7.41 of the final Report), Argentina asserted that the MERCOSUR ruling should be taken into account "for the purposes of interpretation of the current dispute" (emphasis in original). However, Argentina still failed to point to any element of the MERCOSUR ruling that would require the Panel to interpret specific provisions of the WTO agreements in a particular way. Argentina effectively wanted the Panel to "interpret" the WTO agreements in such a way that it follows the MERCOSUR ruling and finds against Brazil. This, however, would go beyond the mere interpretation of specific WTO provisions: it would be tantamount to requiring the Panel to rule in a particular way. This argument was already addressed in para. 7.41 of the Interim Report.

## B. CLAIM 10

6.7 Brazil made a number of comments regarding the scope of the Panel's findings under this Claim. In particular, Brazil asserted that our findings should include Catarinense. We have amended our findings to resolve the issues raised by these comments.

## C. CLAIM 11

6.8 Brazil asserts that the Panel erred by stating in the Interim Report that Brazil initially claimed that Penabranca was notified by the DCD on 15 September 1999 and that only at a subsequent stage did Brazil assert that there was no evidence on the record indicating that the DCD ever contacted or notified the exporter Penabranca of the investigation. Brazil refers to footnotes 18 and 78 of Brazil's first written submission which provide that "from the documents of the investigation to which Brazil had access to, Brazil was not able to find the DCD's notification to the Brazilian exporter Penabranca". As a result, we made changes to our characterization of Brazil's presentation of evidence regarding Penabranca.

6.9 Argentina disagrees with certain views expressed by the Panel in para. 7.143 of the Interim Report. First, we understand Argentina to argue that the requests for information sent to certain Brazilian exporters on 15 September 1999 cannot be considered to be "questionnaire[s]" within the meaning of Article 6.1.1 of the *AD Agreement*. Although we slightly amended para. 7.143 of the

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<sup>24</sup> Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("US – FSC"), WT/DS108/AB/R, adopted 20 March 2000.

<sup>25</sup> Argentina's comments to the Interim Report of the Panel, para. 5.

<sup>26</sup> *US – FSC*, *supra*, note 24, para. 166.

Interim Report, this does not affect our conclusion that those requests were "questionnaires" within the meaning of Article 6.1.1. We also understand Argentina to argue that it never stated "that the total time-period for the [reply of] questionnaire responses was 30 days including the extension."<sup>27</sup> As a result, we made changes in respect of paras. 7.144 and 7.145 of the Interim Report. The abovementioned changes resulted in the bulk of paras 7.143, 7.144 and 7.145 of the Interim Report being deleted. The remnants of these paragraphs are set forth in para. 7.140 of the final Report.

D. CLAIM 13

6.10 Brazil identified an inconsistency in the Interim Report between the scope of the Panel's Article 6.2 findings and the Panel's treatment of Penabranca under other claims. We have addressed this inconsistency by modifying the Panel's treatment of Penabranca in Claims 10, 11 and 12.

6.11 Brazil also raised general concerns regarding the Panel's treatment of one of its Article 6.2 claims. Upon close inspection of Brazil's Request for Establishment of a panel, we find that the specific Article 6.2 claim at issue falls outside our terms of reference. We have modified our findings accordingly.

E. CLAIM 17

6.12 Argentina points to an inconsistency in the Panel's review of the DCD's treatment of data submitted by Catarinense in the context of Claims 17 and 19 (paras. 7.189 and 7.190 of the Interim Report / paras 7.187 and 7.188 of the final Report). Argentina asserts that, to the extent that the Panel found that the DCD was entitled to reject Catarinense's normal value data because it had failed to comply with an accreditation obligation, the Panel should also find that the DCD was entitled to reject Catarinense's export price data for the same reason. Brazil, on the other hand, requests us to affirm the conclusion in para. 7.190 of the Interim Report (para. 7.188 of the final Report).

6.13 We have examined carefully Argentina's comments, and agree that Catarinense's failure to comply with the relevant accreditation obligation should cause us to reject both Claims 17 and 19 regarding that exporter. We have amended our findings regarding Claim 17 accordingly (see para. 7.184 of the final Report).

6.14 Brazil requested us to verify whether the investigating authority had requested Catarinense to provide the information to have authorized legal status / accreditation. We consider that the correspondence referred to by Brazil in Exhibit BRA-27 shows that the DCD informed Catarinense of the need to comply with certain domestic procedures set forth in Law No. 19,549 and Decrees No. 1759/72 and 1883/91.<sup>28</sup> Brazil further asserts that Argentina's argument that Catarinense's export data was disregarded because of lack of accreditation constitutes *ex post* rationalization.<sup>29</sup> We do not agree with Brazil. In this regard, we note that the Report of 4 January 2000<sup>30</sup> and the Final

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<sup>27</sup> Argentina's comments to the Interim Report of the Panel, para. 17.

<sup>28</sup> Brazil also claimed that Catarinense was not informed that this was the reason why its questionnaire response was being rejected, contrary to para. 6 of Annex II. We note, however, that Brazil did not invoke Annex II, para. 6, in the context of Claim 17 during the Panel proceedings (see paras 282 – 290 of Brazil's first written submission).

<sup>29</sup> We understand Brazil to make such request with respect to Claims 17 and 19. (Brazil's comments to Argentina's request for review of the Interim Report, para. 32) We consider that this is a comment which Brazil should have raised in its own request for review of the Interim Report, which Brazil did not do. We consider that for this reason alone we are precluded from examining it. In any case, we note that in para. 6.14 *supra* we state that the Report of 4 January 2000 and the Final Affirmative Dumping Determination contain statements that the investigating authority informed Catarinense of the requirements under Law 19,549 and Decrees 1759/72 and 1883/91 with respect to submissions to the Administration.

<sup>30</sup> Exhibit BRA-28, p. 2795.

Affirmative Dumping Determination<sup>31</sup> contain statements that the investigating authority informed Catarinense of the requirements under Law 19,549 and Decrees 1759/72 and 1883/91 with respect to submissions to the Administration.

6.15 Brazil argues that, by using the export price found for all other exporters instead of the individual export price found for Catarinense, the authority failed to use special circumspection in basing its export price findings on a secondary source of information. We note that Argentina did not determine an individual margin of dumping for Catarinense (contrary to Article 6.10 of the *AD Agreement* (Claim 22)). Since Argentina was not entitled to use an "all other exporters" rate for Catarinense, we see no need to consider whether or not Argentina exercised special circumspection in doing so.

F. CLAIM 21

6.16 Brazil requests the Panel to reverse its findings in para. 7.231 of the Interim Report (para. 7.229 of the final Report). Brazil bases such request on the fact that a party needs to know what information is not ultimately going to be used in the final determination by the investigating authority in order to provide reasons and arguments in its defence.<sup>32</sup> However, we see nothing in Brazil's comments that would cause us to change our interpretation of the plain meaning of Article 6.9 of the *AD Agreement*.

G. CLAIM 22

6.17 Argentina asserts that none of the paragraphs of Annex II to the *AD Agreement* establishes an obligation to determine an individual margin of dumping in cases in which the exporters have not cooperated in the investigation. For this reason, Argentina asserts that, when an investigating authority must resort to applying the rules of Annex II owing to lack of cooperation on the part of the interested party, the general rule laid down by Article 6.10 of the *AD Agreement* no longer applies. In particular, Argentina asserts that the general rule imposed by Article 6.10 does not apply to Catarinense, an exporter which was found by the Panel not to have accredited legal status in the context of the investigation before the Argentine authorities. With respect to Argentina's comments, Brazil asserts that the fact that an exporter has not submitted the relevant and appropriate information to establish normal value and export price does not exclude the authority's obligation under Article 6.10 to calculate an individual margin of dumping.

6.18 We fully addressed the relationship between Articles 6.10, on the one hand, and 6.8 and Annex II to the *AD Agreement*, on the other, in paras. 7.217 and 7.218 of the Interim Report (paras. 7.215 and 7.216 of the final Report). We see nothing in Argentina's comments that would cause us to amend our findings and conclusion with respect to this claim.

H. CLAIM 27

6.19 Argentina made a number of comments regarding the Panel's findings under Claim 27. In short, Argentina accepts the Panel's finding "with respect to the obligation to consider all of the transactions carried out in the ordinary course of trade to calculate the normal value", but challenges the Panel's finding of violation. Argentina submits that all the relevant domestic transactions are considered if a statistically valid sample is used.

6.20 Although there may be circumstances where an investigating authority may find it useful to use statistically valid samples of domestic sales transactions for the purpose of establishing normal

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<sup>31</sup> Exhibit BRA-15, p. 3025.

<sup>32</sup> Brazil's comments to the Interim Report of the Panel, para. 44.

value, such sampling is not envisaged by the plain meaning of Article 2.4.2, read in light of Article 2.2.1. Accordingly, we see no reason to change our findings on this matter.

## I. CLAIMS 28 - 30

6.21 With respect to Claims 28 – 30, Brazil stated that it was not claiming that variable anti-dumping duties were *per se* inconsistent with Articles 9.2 and 9.3 of the *AD Agreement*. We have amended our report accordingly.

6.22 Brazil also made other arguments in support of its Claims 28 – 30. While these additional arguments resulted in some minor changes to the Panel's reasoning, the findings and conclusions of the Panel remain unchanged.

6.23 We note that Brazil seeks to suggest that our findings would enable a Member to "calculate a dumping margin in the investigation and apply any duty it saw fit".<sup>33</sup> This is plainly not the case, since the amount of duty to be collected must never exceed the relevant margin of dumping. The fact that the Panel finds that variable anti-dumping duties need not be limited to the margin of dumping established in the investigation does not mean that a Member may apply any variable anti-dumping duty it sees fit.

## VII. FINDINGS

7.1 This case raises issues concerning the initiation of the anti-dumping investigation on poultry from Brazil, the conduct of that investigation, and the imposition of final measures. Before addressing Brazil's claims, we shall first examine two preliminary issues raised in these proceedings, and then consider a number of general issues relevant to these proceedings.

### A. PRELIMINARY ISSUES

7.2 Argentina has raised two preliminary issues.<sup>34</sup> The first concerns the disclosure of written statements under Article 18.2 of the *DSU*. The second concerns earlier MERCOSUR dispute settlement proceedings regarding the anti-dumping measure at issue.

#### 1. Disclosure of Written Statements – Article 18.2 of the *DSU*

##### (a) Arguments of the parties / third parties

7.3 By letter dated 8 August 2002, Brazil informed the Panel that it had received a request from a non-party Member for a non-confidential summary of the information contained in its submission that could be disclosed to the public. Brazil informed the Panel that it had classified as non-confidential the volume containing the text of its first submission, while the four volumes containing the exhibits to the first submission would be treated as confidential. Brazil stated that it would make the first (non-confidential) volume of its first written submission available to the public, after providing Argentina an opportunity to indicate whether that volume should be revised to exclude any information deemed to be confidential.

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<sup>33</sup> Brazil's comments to the Interim Report of the Panel, para. 73.

<sup>34</sup> Argentina could be understood to have raised an additional preliminary issue, concerning standard of review, in paras. 9-15 of Section II.1 of its first written submission. Unlike the two preliminary issues which we do address, however, there is no request for a ruling on that additional issue in the pleadings set forth in Section IV of Argentina's submission (Section IV only requests a ruling in respect of paras. 23-25 of Section II, which do not pertain to the issue raised in Section II.1). Accordingly, we consider that Argentina has not requested any ruling in respect of the comments on standard of review set forth in paras. 9-15 of Section II.1 of its first written submission.

7.4 By letter dated 15 August, Argentina objected to Brazil's decision to make the entirety of its first written submission (excluding exhibits) available to the public. Argentina submitted that a Member is only entitled by Article 18.2 of the *DSU* to disclose written statements of its positions. It is not entitled to disclose the entirety of its written submissions to the panel, since such submissions should remain confidential. According to Argentina, Article 18.2 of the *DSU* draws a clear distinction between "written submissions" and position "statements". Argentina did not allege that any of the information that Brazil proposed to make available was confidential.

7.5 On 21 August 2002, Brazil informed the Panel that it had made its first written submission (excluding those volumes containing exhibits) available to the public. Brazil noted that Argentina had not raised any issues regarding the confidentiality of information that Brazil had initially proposed to make available. Regarding the interpretation of Article 18.2 of the *DSU*, Brazil asserted *inter alia* that the *DSU* does not define the limit or scope, length, shape, form, or content of "statements" that may be disclosed by a party to a dispute. Brazil asserted that in the present case the relevant "statements" were identical to Brazil's first written submission minus exhibits.

7.6 On 23 August 2002, Canada submitted that Argentina's interpretation of Article 18.2 of the *DSU* was inconsistent with the spirit of transparency informing the operations of the WTO and the dispute settlement mechanism. Canada also asserted *inter alia* that Argentina's distinction between "written submission" and "statement" was formalistic, since a Member may consider that the most authoritative "statement" of its position in a WTO dispute was to be found in its written submissions.

7.7 On 27 August 2002, Argentina asserted that "if the Panel understands that the terms 'written submissions' and 'statements' in Article 18.2 of the *DSU* have the same meaning, Argentina would be ready to accept such interpretation". On the same date, Argentina asked the Panel to express its "view" on this matter.

7.8 On 9 September 2002, in its third party submission, the United States requested that the Panel decline to provide views on the proper interpretation of Article 18.2 of the *DSU*. The United States argued *inter alia* that Article 18.2 of the *DSU* falls outside the Panel's terms of reference, and that the Panel would effectively be providing an interpretation of that provision, contrary to the exclusive authority of the Ministerial Conference and General Council under Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* ("*WTO Agreement*") to interpret that Agreement.

7.9 On 26 September 2002, during the Panel's first substantive meeting with the parties, Argentina stated that it did not oppose Brazil's right to make its first written submission available to the public. However, Argentina considered that Brazil should not have made its first written submission available to the public so early in the Panel proceedings. Argentina asserted that, consistent with paragraph 11 of the Panel's working procedures (whereby the parties' submissions shall be included in the Panel report), Brazil's first written submission should only have been made public once the Panel's report was published.

7.10 Following Argentina's statement during the Panel's first substantive meeting with the parties, the Panel put the following question to Argentina:

"Argentina stated at this morning's meeting that it was not opposed, as a matter of principle, to Brazil having made its first written submission available to the public. Instead, Argentina was concerned with the timing of Brazil's action. Does this mean that Argentina accepts that a Member may make its written submissions to a panel available to the public at some point in time without infringing Article 18.2 of the *DSU*? Would Brazil violate *DSU* Article 18.2 if it made its written submissions available to the public after the Panel issued its final report?"

7.11 Argentina replied "Yes, following the provisions of the Article 18.2 of the DSU" to the first part of the Panel's question, and "No" to the second part thereof.<sup>35</sup>

(b) Evaluation by the Panel

7.12 Before addressing the substance of the preliminary issue raised by Argentina, we shall first examine the US argument that we should decline to rule on the matter raised by Argentina. By virtue of Article 1.1 of the *DSU*, the provisions of the *DSU* apply to all WTO dispute settlement proceedings, subject to certain special or additional rules and procedures on dispute settlement identified in Appendix 2 to the *DSU*. The provisions of the *DSU* therefore apply in all cases, whether or not they are mentioned in a Member's request for establishment of a panel. Indeed, we are not being asked to rule on whether a measure identified in the request for establishment is consistent with Article 18.2 of the *DSU*. Rather, we are being asked to make such rulings in respect of Article 18.2 of the *DSU* as are necessary to manage procedural aspects of these proceedings. By ruling in respect of Article 18.2 of the *DSU*, we are simply acting in conformity with Article 1.1 of the *DSU*.<sup>36</sup> We are not purporting to make an interpretation within the meaning of Article IX:2 of the *WTO Agreement*. Accordingly, we reject the US argument that the Panel should decline to rule on the matter raised by Argentina.

7.13 This issue concerns Article 18.2 of the *DSU*, which provides that:

"Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."

7.14 On substance, we agree with Canada that Argentina's interpretation<sup>37</sup> of Article 18.2 of the *DSU* results in a formalistic distinction between the terms "written submission" and "statement". In doing so, Argentina negates that a party's written submissions to a panel necessarily contain statements of that party's positions. In our view, the first two sentences of Article 18.2 of the *DSU* should not be read in formalistic isolation of one another. Read together, and in context of one another, the first two sentences of Article 18.2 of the *DSU* mean that while one party shall not disclose the submissions of another party, each party is entitled to disclose statements of its own positions, subject to the confidentiality requirement set forth in the third sentence of Article 18.2 of the *DSU*. We recall that a party's written submissions to a panel necessarily contain statements of that party's positions. In our view, therefore, disclosing submissions to a panel is one way for a party to disclose statements of its positions. If a party chooses to make public the totality of the statements of its own position contained in its written submission, it is entitled to do so, provided the confidentiality requirement of the third sentence of Article 18.2 of the *DSU* is respected. Since Argentina has not

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<sup>35</sup> Argentina replied by fax on 22 October 2002.

<sup>36</sup> We note that other panels have similarly made rulings on procedural matters under the *DSU*. For example, the panel in *US – FSC (Article 21.5 – EC)* ruled on third party access to rebuttal submissions in light of Article 10.3 of the *DSU* (Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities ("US – FSC (Article 21.5 – EC)"),* WT/DS108/RW, adopted 29 January 2002, Section VI.A). Although the substance of that panel's ruling was reversed by the Appellate Body, the ability of the panel to make rulings in respect of Article 10.3 of the *DSU* was not challenged. (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, WT/DS108/AB/RW, adopted 29 January 2002, para. 252)

<sup>37</sup> We are referring to the arguments set forth in Argentina's submission of 15 August 2002.

argued that Brazil violated its confidentiality obligation, we do not consider that Brazil's decision to disclose the entirety of the statements of position contained in its first written submission to the Panel (excluding exhibits) was inconsistent with Article 18.2 of the *DSU*.<sup>38</sup>

7.15 Furthermore, we note that, by the time of our first substantive meeting with the parties, Argentina was no longer arguing that Brazil was not entitled to make the entirety of its written submissions to the Panel available to the public during the Panel proceedings. Implicitly, therefore, Argentina ultimately agreed that Brazil was entitled to make its written submission available to the public pursuant to Article 18.2 of the *DSU*. Although Argentina argued that Brazil should not have done so until after publication of the Panel's report, we find no basis for this argument in Article 18.2 of the *DSU*. Article 18.2 sets no temporal limits on Members' rights and obligations under that provision. Nor do we find any basis for this argument in paragraph 11 of the Panel's Working Procedures, which concerns the preparation of the descriptive part of the Panel's report.<sup>39</sup> We see nothing in this provision which would impose any limits on rights accruing to Members under Article 18.2 of the *DSU*.

7.16 In conclusion, we do not consider that Brazil's decision to disclose the entirety of the statements of position contained in its first written submission to the Panel (excluding exhibits) was inconsistent with Article 18.2 of the *DSU*.

## 2. Previous Mercosur Proceedings

7.17 Argentina has raised a preliminary issue concerning the fact that, prior to bringing WTO dispute settlement proceedings against Argentina's anti-dumping measure, Brazil had challenged that measure before a MERCOSUR Ad Hoc Arbitral Tribunal. Argentina requests that, in light of the prior MERCOSUR proceedings, the Panel refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings. In the alternative, Argentina asserts that the Panel should be bound by the ruling of the MERCOSUR Tribunal.

### (a) Arguments of the parties / third parties

7.18 Argentina considers that Brazil's conduct in bringing the dispute successively before different fora, first MERCOSUR and then the WTO, constitutes a legal approach that is contrary to the principle of good faith and which, in the case at issue, warrants invocation of the principle of estoppel. Argentina is not invoking the principle of *res judicata*. In the alternative, Argentina submits that in view of the relevant rule of international law applicable in the relations between parties pursuant to Article 31.3(c) of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"),<sup>40</sup> in the light of Article 3.2 of the *DSU* the Panel cannot disregard, in its consideration and substantiation of the present case brought by Brazil, the precedents set by the proceedings in the framework of MERCOSUR.

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<sup>38</sup> In support of its position, Brazil also relied on the last sentence of Article 18.2 of the *DSU*. Since we reject the preliminary issue raised by Argentina on the basis of the first two sentences of Article 18.2 of the *DSU*, there is no need for us to consider arguments pertaining to the last sentence of that provision.

<sup>39</sup> Paragraph 11 of the Panel's Working Procedures provides that "[t]he descriptive part of the Panel's report will include the procedural and factual background to the present dispute. There will be no description of the main arguments of the parties and third parties as such. Instead, the Panel will attach the parties' submissions (including first and second written submissions, written versions of the first and second oral statements, and each parties' replies to questions from the other party and from the Panel) to its report. Upon request of a party, specific portions of a submission designated by that party as confidential at the time of its submission will not be included in the submission attached to the Panel's report."

<sup>40</sup> Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

7.19 Argentina asserts that, in the framework of MERCOSUR, it is a standing practice for all parties – including Brazil – to accept the obligations deriving from the legislative framework in force, including the MERCOSUR Treaty of Asunción and the Protocol of Brasilia. In Argentina's view, a State party is not acting in good faith if it first has recourse to the mechanism of the integration process to settle its dispute with another State party and then, dissatisfied with the outcome, files the same complaint within a different framework, making matters worse by omitting any reference to the previous procedure and its outcome.

7.20 Argentina asserts that the essential elements of estoppel are "(i) a statement of fact which is clear and unambiguous; (ii) this statement must be voluntary, unconditional, and authorized; (iii) there must be reliance in good faith upon the statement ... to the advantage of the party making the statement".<sup>41</sup> Argentina submits that Brazil's previous conduct with respect to the acceptance of awards, confirmed by the signature of the Protocol of Olivos, invalidates the complaint against Argentina that Brazil is now trying to substantiate on the basis of the *DSU*. Argentina submits that there is no provision or rule that prohibits a WTO panel from examining, and where it deems appropriate applying, the principle of estoppel. Argentina asserts that estoppel is a principle of international law and, according to the Appellate Body in *US – Gasoline*, there is "a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."<sup>42</sup> Argentina asserts that WTO panels are called upon to apply public international law to settle the disputes brought before them, and that previous panels have addressed the principle of estoppel.

7.21 Argentina's alternative argument is based on Article 31.3(c) of the *Vienna Convention*. Argentina submits that Article 3.2 of the *DSU* provides a rule of interpretation for the Panel, and WTO legal practice has confirmed that rule by referring to Articles 31 and 32 of the *Vienna Convention*. Argentina asserts that, in accordance with Article 31.3(c) of the *Vienna Convention*, the interpretation of a treaty must take account of all relevant rules of international law applicable between the parties at the time of implementation. In Argentina's view, the regulatory framework of MERCOSUR and the legal consequences deriving from the implementation of the Protocol of Brasilia by the Ad Hoc Arbitral Tribunal in the case at issue are relevant rules of public international law within the meaning of Article 31.3(c) of the *Vienna Convention*, such that the Panel is bound by earlier MERCOSUR rulings regarding the measure at issue.

7.22 Brazil submits that the principle of estoppel is not applicable in the present case, in part because the dispute before the MERCOSUR Tribunal was grounded on a different legal basis from the dispute before this Panel. In any event, Brazil asserts that the principle of estoppel means that "a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly."<sup>43</sup> As noted by the panel in *EEC (Member States) – Bananas I*, "estoppel could only result from the express, or in exceptional cases implied, consent of such parties or of the CONTRACTING PARTIES".<sup>44</sup> According to Brazil, the simple fact that it had brought a similar dispute to the MERCOSUR Tribunal does not represent that Brazil has consented not to bring the current dispute before the WTO, especially when the dispute before this Panel is based on a different legal basis than the dispute brought before the MERCOSUR Tribunal. Brazil asserts that the MERCOSUR Protocol of Olivos on Dispute Settlement, signed on 18 February 2002, cannot be raised here as an implicit or express consent by Brazil to refrain from bringing the present case to the WTO dispute settlement, again because the object of the earlier MERCOSUR proceedings was different from the object of the present WTO proceedings.

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<sup>41</sup> I. Brownlie, *Principles of Public International Law* (Clarendon Press, 1990), p. 641.

<sup>42</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("US – Gasoline"), WT/DS2/AB/R, adopted 20 May 1996, p. 20, DSR 1996:I, 29.

<sup>43</sup> *Black's Law Dictionary* (West Publishing Co., 1990), p. 551.

<sup>44</sup> Panel Report, *EEC – Member States' Import Regimes for Bananas* ("EEC (Member States) – Bananas I"), 3 June 1993, unadopted, DS32/R.



Furthermore, the Protocol of Olivos does not apply to disputes that have already been concluded under the Protocol of Brasilia.

7.23 Regarding Argentina's reference to Article 3.2 of the *DSU*, Brazil asserts that Article 3.2 deals exclusively with the clarification of the existing provisions of the WTO agreements and does not provide that a previous ruling by an international tribunal constrains a WTO panel's interpretation of a WTO agreement. In fact, Article 3.2 requires a WTO panel to consider a claim brought by a Member with respect to a violation of a covered agreement in order to preserve that Member's rights under that agreement.

7.24 Furthermore, Brazil notes that contrary to Argentina's allegations, Brazil has not engaged in an abusive exercise of its rights under the WTO agreements<sup>45</sup>, nor has its conduct been contrary to good faith by not mentioning in the first submission the ruling by the MERCOSUR Tribunal.<sup>46</sup> Brazil did not refer to that ruling simply because it believed that it had no relevance to this case, since the claims currently before the Panel are not the same as the claims that were before the MERCOSUR Tribunal.

7.25 Chile, as a third party, asserts that Brazil is entitled to bring the present case before the WTO because the issues raised are different from the issues previously raised in MERCOSUR dispute settlement proceedings.

7.26 The European Communities, as a third party, asserts that Article 3.2 of the *DSU* is not relevant to these proceedings, since it is concerned exclusively with the interpretation of the WTO agreements, and not with the sources of WTO law. The European Communities submits that it is difficult to see how the interpretation of the provisions of MERCOSUR law made by the Ad Hoc Arbitral Tribunal could become relevant, in accordance with the rules laid down in Articles 31 and 32 of the *Vienna Convention*, for the interpretation of the provisions of the *AD Agreement* at issue in this dispute.

7.27 The European Communities does not consider it necessary to take a position on the issue of whether a Member would abuse its right to a panel under the *DSU* and, hence, act inconsistently with Article 3.10 if it were to request the establishment of a panel in violation of the principle of estoppel.<sup>47</sup> Indeed, this Panel need not reach this issue because, in any event, Brazil's conduct is not contrary to that principle. As noted by the panel in *EEC (Member States) – Bananas I*, estoppel can only "result from the express, or in exceptional cases implied consent of the complaining parties".<sup>48</sup> The facts alleged by Argentina are not sufficient to conclude that Brazil has "consented", whether explicitly or implicitly, not to bring this dispute before the WTO. The Protocol of Brasilia contains no provision which limits in any manner the right of the parties to request a panel under the WTO agreements with respect to a measure that has already been the subject of a dispute under that Protocol.<sup>49</sup> Thus, the

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<sup>45</sup> Argentina's first written submission, para. 23.

<sup>46</sup> *Id.*, para. 16.

<sup>47</sup> The European Communities notes that the panel in *India – Autos* suggested that a Member may be estopped from requesting the establishment of a panel with respect to a matter which has been the subject of a mutually agreed solution. (Panel Report, *India – Measures Affecting the Automotive Sector ("India – Autos")*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, footnote 364)

<sup>48</sup> Panel Report, *EEC (Member States) – Bananas I*, *supra*, note 44, para 361. See also Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico ("Guatemala – Cement II")*, WT/DS156/R, adopted 17 November 2000, footnote 791: "it is clear that not any silence can be considered to constitute consent".

<sup>49</sup> Unlike the more recent Protocol of Olivos on Dispute Settlement, which provides in its Article 1.2 that:

mere fact that Brazil requested first the establishment of an Ad Hoc Arbitral Tribunal under the Protocol of Brasilia does not amount to a renunciation by Brazil to bring a dispute settlement action under the WTO agreements. Similarly, the mere fact that Brazil did not consider it necessary to take dispute settlement action under the WTO agreements following the arbitration rulings issued in a number of other cases cited by Argentina cannot be construed as an implicit renunciation by Brazil to its right under the WTO agreements to take such action in this case.

7.28 Paraguay, as a third party, considers that, in accordance with the general principles of public international law, this case is *res judicata* because it has already been brought under the dispute settlement procedure established within the framework of MERCOSUR, and under the Brasilia Protocol in particular. In this regard, Article 21<sup>50</sup> of the Brasilia Protocol clearly establishes the unappealable and binding nature of awards rendered by the Ad Hoc Arbitral Tribunal, which are deemed to be *res judicata* – a principle that should prevail in addressing this case.

7.29 Paraguay also refers to the MERCOSUR Protocol of Olivos which, although not yet in force, allows MERCOSUR members to choose the forum in which they wish disputes to be settled, with the restriction constituted by the exclusion clause, which stipulates that once a procedure has been initiated in one forum, this precludes resorting to any of the other forums provided for in the Protocol.

7.30 The United States, as a third party, asserts that the MERCOSUR dispute settlement rules are not within the Panel's terms of reference. Article 7.1 of the *DSU* makes quite clear that a Panel's role in a dispute is to make findings in light of the relevant provisions of the "covered agreements" at issue. The Protocol of Brasilia is not a covered agreement, and Argentina has not claimed that Brazil's actions with respect to the Protocol breach any provision of a covered agreement. Rather, Argentina's claim appears to be that Brazil's actions could be considered to be inconsistent with the terms of the Protocol. A claim of a breach of the Protocol is not within this Panel's terms of reference, and there are no grounds for the Panel to consider this matter. Argentina may, however, be able to pursue that claim under the MERCOSUR dispute settlement system.

7.31 Furthermore, the United States submits that Argentina's reliance on the principle of estoppel appears to relate to Brazil's obligations under MERCOSUR rather than to any provision of the *DSU*

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"Las controversias comprendidas en el ámbito de aplicación del presente Protocolo que puedan también ser sometidas al sistema de solución de controversias de la Organización Mundial de Comercio o de otros esquemas preferenciales de comercio de que sean parte individualmente los Estados Partes del MERCOSUR, podrán someterse a uno u otro foro a elección de la parte demandante. Sin perjuicio de ello, las partes en la controversia podrán, de común acuerdo, convenir el foro.

Una vez iniciado un procedimiento de solución de controversias de acuerdo al párrafo anterior, ninguna de las partes podrá recurrir a los mecanismos establecidos en los otros foros respecto del mismo objeto ..."

The Protocol of Olivos was signed on 18 February 2002 and has not entered into force yet. According to the European Communities, the question might be raised whether the request for the establishment of the panel made by Brazil on 25 February 2002, i.e., after the signature of the Protocol of Olivos, was consistent with Brazil's obligation under Article 18 of the *Vienna Convention* not to defeat the object and purpose of a signed treaty prior to its entry into force. However, Article 50 of the Protocol of Olivos appears to suggest that it does not apply to disputes already decided in accordance with the Protocol of Brasilia.

<sup>50</sup> Article 21 reads as follows:

1. The decisions of the Arbitral Tribunal cannot be appealed, and are binding on the State Parties to the controversies from the moment the respective notification is received and will be deemed by them to have the effect of *res judicata*.
2. The decisions should be complied with within a time-limit of fifteen (15) days, unless the Arbitral Tribunal fixes a different time-limit."

or the other covered agreements. As a result, the matter is not within the Panel's terms of reference and the Panel has no basis for making the requested finding. The United States also disagrees with Argentina that the Panel may apply what Argentina calls the principle of estoppel. The fact that Argentina cites to no textual basis for its request reflects the fact that Members have not consented to provide for the application of any such principle of estoppel in WTO dispute settlement. The term estoppel appears nowhere in the text nor does Argentina cite to any provision which in substance provides Argentina the type of defence it asserts. The United States also notes that the lack of any textual basis is reflected in the fact that no panel to date has applied a principle of estoppel. Moreover, there is no basis for attempting to import into WTO dispute settlement proceedings legal concepts with no grounding in the *DSU*. The lack of any textual basis is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past. In *EEC (Member States) – Bananas I*, for example, the panel stated that estoppel can only "result from the express, or in exceptional cases implied, consent of the complaining parties."<sup>51</sup> In *EC – Asbestos* and *Guatemala – Cement II*, by contrast, the panels stated that estoppel is relevant when a party "reasonably relies" on the assurances of another party, and then suffers negative consequences resulting from a change in the other party's position.<sup>52</sup> According to the US, these inconsistencies illustrate the dangers of seeking to identify purportedly agreed-upon legal concepts beyond the only source all Members *have* agreed to – the text of the *DSU* itself.

7.32 Finally, the United States asserts that Argentina's citation of Article 3.2 of the *DSU* in support of its position is misplaced. By its plain terms, Article 3.2 is limited to the rules of *interpretation* used to clarify the existing provisions of the WTO agreements. Argentina's request that the Panel refuse to consider Brazil's claims does not present an issue of the proper interpretation of a provision of the WTO agreements.

(b) Evaluation by the panel

7.33 This preliminary issue concerns the principles of good faith and estoppel. It also relates to Article 3.2 of the *DSU* and Article 31.3(c) of the *Vienna Convention*.<sup>53</sup>

7.34 Argentina asserts that Brazil failed to act in good faith by first challenging Argentina's anti-dumping measure before a MERCOSUR Ad Hoc Tribunal and then, having lost that case, initiating WTO dispute settlement proceedings against the same measure. For the following reasons, however, we find that the preconditions for a finding that Brazil failed to act in good faith are not met.

7.35 The Appellate Body recently stated in *US – Offset Act (Byrd Amendment)* that "there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith."<sup>54</sup> There are circumstances, therefore, in which a panel could find that a Member had failed to act in good faith. It is clear to us, however, that such findings should not be made lightly. In *US – Offset Act (Byrd Amendment)* the Appellate Body found that:

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<sup>51</sup> See Third Party Submission of the European Communities, citing Panel Report, *EEC (Member States) – Bananas I*, *supra*, note 44, para. 361.

<sup>52</sup> The United States refers to the Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products ("EC – Asbestos")*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, para. 8.60 (citations omitted); Panel Report, *Guatemala – Cement II*, *supra*, note 48, paras. 8.23-24. The United States asserts that one could also argue that these panels are describing the concept of "detrimental reliance."

<sup>53</sup> Argentina has made it clear that it is not invoking the principle of *res judicata*. Even though Paraguay considers this principle relevant to these proceedings, Paraguay, as a third party, does not have the right to determine the scope of any preliminary issues to be examined by us.

<sup>54</sup> Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 ("US – Offset Act (Byrd Amendment)")*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 297.

"Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion."<sup>55</sup>

7.36 On the basis of the abovementioned Appellate Body finding, we consider that two conditions must be satisfied before a Member may be found to have failed to act in good faith. First, the Member must have violated a substantive provision of the WTO agreements. Second, there must be something "more than mere violation". With regard to the first condition, Argentina has not alleged that Brazil violated any substantive provision of the WTO agreements in bringing the present case. Thus, even without examining the second condition, there is no basis for us to find that Brazil violated the principle of good faith in bringing the present proceedings before the WTO.

7.37 Argentina has also argued that Brazil is estopped from pursuing the present WTO dispute settlement proceedings. Argentina asserts that the principle of estoppel applies in circumstances where (i) a statement of fact which is clear and unambiguous, and which (ii) is voluntary, unconditional, and authorized, is (iii) relied on in good faith. We asked Argentina to explain exactly how it considers that these three conditions are satisfied in this case. In particular, we asked Argentina to identify the relevant "statement of fact" made by Brazil, and to describe how Argentina had relied on it in good faith.<sup>56</sup> Argentina replied:

"Firstly, Argentina considers that Brazil's conduct in successively filing its case and activating dispute settlement proceedings in different fora, first in MERCOSUR and then in the WTO – particularly in view of the precedents described in Argentina's first written submission<sup>1</sup>, i.e. recourse to the dispute settlement mechanism under the Protocol of Brasilia to settle conflicts with other MERCOSUR States parties and compliance with the content and scope of the arbitral awards in all of the disputes – provides statements of fact which meet the requirement of being clear, unambiguous, voluntary, unconditional and authorized, the essential elements of estoppel under the definition provided in paragraph 13 of Argentina's submission.

In paragraph 20 of its rebuttal submission<sup>2</sup>, Argentina sets out the elements which are present in the current dispute brought by Brazil before the WTO. Among these elements, the last sentence of subparagraph (iii) of paragraph 20 states that: "Consequently Brazil's previous conduct with respect to the acceptance of awards, confirmed by the signature of the Protocol of Olivos, invalidates the complaint against Argentina that Brazil is now trying to substantiate on the basis of the DSU."

Moreover, the fact that Brazil signed the Protocol of Olivos on 18 February 2002 – by which it expressly accepted the choice of forum clause – and then, seven days later, on 25 February 2002, requested the establishment of a Panel in the current dispute,

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<sup>55</sup> *Id.*, para. 298.

<sup>56</sup> Question 66 from the Panel reads: "Regarding para. 13 of Argentina's second submission ("ASS"), what was the "statement of fact" (point I) allegedly made by Brazil? Please explain how Argentina relied in good faith upon that alleged statement (point III)".

displays a clear contradiction in its conduct, in which Argentina had had full confidence, both countries being member States of MERCOSUR; and Argentina is now suffering the negative impact of this change of position.<sup>3</sup> This fact was also raised in the submissions of the EC<sup>4</sup> and Paraguay<sup>5</sup> as third parties.<sup>57</sup>

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<sup>1</sup> First written submission of Argentina, 29 August 2002, paragraphs 18-22 and corresponding footnotes.

<sup>2</sup> Rebuttal of Argentina, 17 October 2002, paragraph 20.

<sup>3</sup> In fact, Argentina has already approved the Protocol of Olivos. On 9 October 2002, the National Congress adopted the Protocol of Olivos by Law 25,663, promulgated by the Executive through Decree 2091/02 of 18 October 2002 and published in Official Bulletin of the Republic of Argentina No. 30,008 of 21 October 2002.

<sup>4</sup> Third party submission of the European Communities, 9 September 2002, paragraph 17 and footnote 17.

<sup>5</sup> Third party submission of Paraguay, 9 September 2002, paragraph 8.

7.38 We do not consider Argentina's response sufficient to establish that the three conditions it identified for the application of the principle of estoppel are fulfilled in the present case.<sup>58</sup> Regarding the first condition identified by Argentina, we do not consider that Brazil has made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute settlement proceedings. In this regard, we note that the panel in *EEC (Member States) – Bananas I* found that estoppel can only "result from the express, or in exceptional cases implied consent of the complaining parties".<sup>59</sup> We agree. There is no evidence on the record that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR. Nor does the record indicate exceptional circumstances requiring us to imply any such statement. In particular, the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean that Brazil implicitly waived its rights under the *DSU*. This is especially because the Protocol of Brasilia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure. We note that Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia.<sup>60</sup> Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure.

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<sup>57</sup> Argentina's reply to Question 66 from the Panel.

<sup>58</sup> The United States has argued that there is no basis for a WTO panel to apply the principle of estoppel. Since we find that the conditions identified by Argentina for the application of the principle of estoppel are not present, we do not consider it necessary to determine whether or not we would have had the authority to apply the principle of estoppel if the relevant conditions had been satisfied. Nor do we consider it necessary to determine whether the three conditions proposed by Argentina are sufficient for the application of that proposal.

<sup>59</sup> Panel Report, *EEC (Member States) – Bananas I, supra*, note 44, para 361. See also Panel Report, *Guatemala – Cement II, supra*, note 48, footnote 791: "it is clear that not any silence can be considered to constitute consent".

<sup>60</sup> Article 50 of the Protocol of Olivos provides that "disputes underway initiated in accordance with the Protocol of Brasilia will continue to be exclusively governed by that Protocol until the dispute has been concluded".

7.39 Regarding the third condition, we note that Argentina failed to quote the entirety of the relevant author's text. Quoted in full, the third condition reads "there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement".<sup>61</sup> Citing the same author, another panel has asserted that "[e]stoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped', that is precluded".<sup>62</sup> In our view, merely being inconvenienced by alleged statements by Brazil is not sufficient for Argentina to demonstrate that it was induced to act in reliance of such alleged statements. There is nothing on the record to suggest to us that Argentina actively relied in good faith on any statement made by Brazil, either to the advantage of Brazil or to the disadvantage of Argentina. There is nothing on the record to suggest that Argentina would have acted any differently had Brazil not made the alleged statement that it would not bring the present WTO dispute settlement proceedings. In its abovementioned response to Question 66, which was specifically addressing this issue, Argentina simply stated that it "is now suffering the negative impact of [Brazil's] change of position" (regarding its earlier practice of not pursuing WTO cases following MERCOSUR rulings in respect of the same subject-matter), without explaining further the nature of that "negative impact". Argentina's vague assertion regarding "negative impact" is not sufficient to demonstrate that it was induced to act in reliance on the alleged statement by Brazil, and that it is now suffering the negative consequences of the alleged change in Brazil's position. For these reasons, we reject Argentina's claim that Brazil is estopped from pursuing the present WTO dispute settlement proceedings.

7.40 Argentina argues in the alternative that if the Panel finds that Brazil is entitled to bring the present WTO dispute settlement proceedings, then the Panel is bound by the earlier MERCOSUR ruling on the measure at issue in this case. Argentina asserts that the earlier MERCOSUR ruling is part of the normative framework to be applied by the Panel as a result of Article 31.3(c) of the *Vienna Convention*, whereby "relevant rules of international law applicable in the relations between the parties" shall be taken into account for the purpose of treaty interpretation. Argentina asserts that the provisions of the *Vienna Convention* are applicable in the present proceedings by virtue of Article 3.2 of the *DSU*, which provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law".

7.41 We note that Article 3.2 of the *DSU* is concerned with international rules of treaty interpretation. Article 31.3(c) of the *Vienna Convention* is similarly concerned with treaty interpretation. However, Argentina has not sought to rely on any law providing that, in respect of relations between Argentina and Brazil, the WTO agreements should be interpreted in a particular way. In particular, Argentina has not relied on any statement or finding in the MERCOSUR Tribunal ruling to suggest that we should interpret specific provisions of the WTO agreements in a particular way. Rather than concerning itself with the interpretation of the WTO agreements, Argentina actually argues that the earlier MERCOSUR Tribunal ruling requires us to rule in a particular way. In other words, Argentina would have us apply the relevant WTO provisions in a particular way, rather than interpret them in a particular way. However, there is no basis in Article 3.2 of the *DSU*, or any other provision, to suggest that we are bound to rule in a particular way, or apply the relevant WTO provisions in a particular way. We note that we are not even bound to follow rulings contained in adopted WTO panel reports<sup>63</sup>, so we see no reason at all why we should be bound by the rulings of

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<sup>61</sup> See footnote 41 *supra*.

<sup>62</sup> Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.23.

<sup>63</sup> See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("Japan – Alcoholic Beverages II"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14, DSR 1996:I, 125.

non-WTO dispute settlement bodies. Accordingly, we reject Argentina's alternative arguments regarding Article 31.3(c) of the *Vienna Convention*.<sup>64</sup>

7.42 In light of the above, we decline Argentina's request that, in light of the prior MERCOSUR proceedings, the Panel refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings. We also decline Argentina's alternative request that we consider ourselves bound by the ruling of the MERCOSUR Tribunal.

B. GENERAL ISSUES

1. Standard of Review

7.43 Article 17.6 of the *AD Agreement* sets forth the special standard of review applicable to anti-dumping disputes. With regard to factual issues, Article 17.6(i) provides:

“in its assessment of the facts of the matter, the panel shall determine whether the **authorities’ establishment of the facts was proper** and whether their **evaluation of those facts was unbiased and objective**. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;” (emphasis added)

7.44 Assuming that we conclude that the establishment of the facts with regard to a particular claim in this case was proper, we then may consider whether, based on the evidence before the Argentine authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the Argentine authorities reached on the matter in question.<sup>65</sup>

7.45 Article 17.6(i) requires us to assess the facts to determine whether the investigating authorities' own establishment of the facts was proper, and to assess the investigating authorities' own evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the *AD Agreement* establishes that we are to examine the matter based upon “the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.”

7.46 With respect to questions of the interpretation of the *AD Agreement*, Article 17.6(ii) provides:

“the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the **Agreement admits of more than one permissible interpretation**, the panel shall find the authorities’ measure to be in **conformity with**

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<sup>64</sup> Even if Argentina had relied on the MERCOSUR Tribunal ruling to argue that particular provisions of the WTO Agreement should be interpreted in a particular way, it is not entirely clear that Article 31.3(c) of the *Vienna Convention* would apply. In particular, it is not clear to us that a rule applicable between only several WTO Members would constitute a relevant rule of international law applicable in the relations between the “parties”.

<sup>65</sup> We note that this is the same standard as that applied by the panels in *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* (“US – Stainless Steel”), WT/DS179/R, adopted 1 February 2001; and *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup*, (“Mexico – Corn Syrup”), WT/DS132/R and Corr.1, adopted 24 February 2000.

**the Agreement if it rests upon one of those permissible interpretations.”**  
(emphasis added)

7.47 Article 17.6(ii) requires us to apply the customary rules of interpretation of treaties, which are reflected in Articles 31-32 of the *Vienna Convention*. Article 31 of the *Vienna Convention* provides that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. This is no different from the task of all panels in interpreting the text of the WTO agreements pursuant to Article 3.2 of the *DSU*. What Article 17.6(ii) of the *AD Agreement* adds is an instruction that, if this process of treaty interpretation leads us to the conclusion that the interpretation of the provision in question put forward by the defending party is permissible, we shall find the measure in conformity if it is based on that permissible interpretation.

7.48 Finally, as mentioned below, Argentina has presented arguments before us in support of the investigating authorities' decisions which we could not find on the record of the investigation before us. This raises the question of whether *ex post* rationalization should be taken into account in order to assess Argentina's compliance with the provisions of the *AD Agreement*. We note that the *Argentina – Ceramic Tiles* panel expressed its view that:

"Under Article 17.6 of the AD Agreement we are to determine whether the DCD established the facts properly and whether the evaluation performed by the DCD was unbiased and objective. In other words, we are asked to review the evaluation of the DCD made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made."<sup>66</sup> (emphasis in original, footnote not included)

7.49 We agree with the approach followed by that panel. Thus, we do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority.

## **2. Burden of Proof**

7.50 In WTO dispute settlement proceedings, the burden of proof rests with the party that asserts the affirmative of a particular claim or defence.<sup>67</sup> The complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the WTO agreements, which the respondent must refute.<sup>68</sup> In these Panel proceedings, we thus observe that it is for Brazil, which has challenged the

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<sup>66</sup> Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* ("Argentina – Ceramic Tiles"), WT/DS189/R, adopted 5 November 2001, para. 6.27.

<sup>67</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, p. 337 *et seq.*

<sup>68</sup> We note the statement of the Appellate Body in *Korea – Dairy* that: "We find no provision in the DSU or in the Agreement on Safeguards that requires a Panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence." (Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy"), WT/DS98/AB/R, adopted 12 January 2000, para. 145) The Appellate Body confirmed this view in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/AB/R, adopted



consistency of Argentina's measure, to bear the burden of demonstrating that the measure is not consistent with the relevant provisions of the *AD Agreement*. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.<sup>69</sup> In this respect, therefore, it is also for Argentina to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. The role of the Panel is not to make the case for either party, but it may pose questions to the parties "in order to clarify and distil the legal arguments".<sup>70</sup> In addition, we consider that both parties generally have a duty to cooperate in the proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.<sup>71</sup> We must draw inferences on the basis of all of the relevant facts of record, including, for example, where a party refuses to provide relevant information.<sup>72</sup>

C. CLAIMS CONCERNING THE INITIATION OF THE INVESTIGATION / ALLEGED PROCEDURAL VIOLATIONS DURING THE COURSE OF THE INVESTIGATION

**1. Sufficiency of Evidence to Justify Initiation of the Investigation – Claims 2, 4, 6 and 8**

7.51 These claims concern the investigating authority's decision that there was sufficient evidence under Article 5.3 of the *AD Agreement* to justify initiating an investigation on imports of poultry from Brazil. Since the investigating authority's decision to initiate was based on the information contained in the application, Brazil's claims are concerned with the investigating authority's treatment of information contained in that application.

(a) Arguments of the parties

(i) *Claim 2*

7.52 Brazil claims that there was not sufficient evidence for the investigating authority to have made an adjustment to normal value to reflect alleged differences in physical characteristics between the poultry sold in Argentina and Brazil respectively. Brazil asserts that there was not sufficient evidence to support the applicant's claim that poultry sold in Brazil differed from that sold in Argentina because the former included head and feet whereas the latter did not. Brazil also argues that the applicant did not demonstrate that the alleged difference in physical characteristics affected price comparability. Finally, Brazil asserts that there was no evidence to support the accuracy and adequacy of the yield rates used by the investigating authority at the time of initiation to calculate the amount of the adjustment for the alleged differences in physical characteristics.

7.53 Argentina rejects Brazil's claim on the basis of the finding of the panel in *Guatemala – Cement I*<sup>73</sup> that "the quantum and quality of evidence to be required of an investigating authority prior

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5 April 2001, para. 134: "In our view a panel is not required to make a separate and specific finding in each and every instance that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case."

<sup>69</sup> See footnote 67, *supra*.

<sup>70</sup> Appellate Body Report, *Thailand – H-Beams*, *supra*, note 68, para. 136.

<sup>71</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 190.

<sup>72</sup> *Id.*, para. 203; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, paras. 173-174.

<sup>73</sup> Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, 3797.

to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination". Argentina asserts that the investigating authority made the adjustment on the basis of evidence submitted by the applicant in the form of information published by JOX Assessoria Agropecuaria S/C Ltda. ("JOX"), a Brazilian consulting firm specialized in the farming sector, regarding sales of poultry in São Paulo. According to Argentina, the JOX information indicated that chilled poultry was sold in São Paulo with head and feet. Argentina states that JOX is a specialized publication reflecting the state of the São Paulo market, and that São Paulo is a large urban centre which reflects domestic consumption patterns throughout Brazil.

(ii) *Claim 4*

7.54 Brazil claims that the investigating authority excluded export prices that were above the normal value, and established the export price for purposes of initiation based only on those transactions that were below the normal value. In the view of Brazil, by doing so, the investigating authority incorrectly established the export price and, consequently, made a skewed comparison of the export price with the normal value, in establishing the margin of dumping. Brazil asserts that an investigating authority should decide whether or not to initiate on the basis of all the evidence presented in the application. Brazil argues that, under Article 2.4.2 of the *AD Agreement*, investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions, and not only those export transactions for which prices are below the normal value. The methodology used by the investigating authority resulted in the establishment of an incorrect export price and in an unfair comparison between the export price and the normal value, contrary to the requirements in Articles 2.4 and 2.4.2. Finally, Brazil asserts that Argentina's decision to initiate the investigation pursuant to this method was based on a biased and non-objective evaluation of the facts before it.

7.55 Argentina asserts that the investigating authority analysed the import transactions in an attempt to determine which of them corresponded closest to the product under investigation. Argentina asserts that the investigating authority did so for the sole purpose of calculating the most appropriate and comparable export price possible at the pre-initiation stage. In other words, Argentina claims that it only excluded those export transactions which were not "like" the product under investigation. Furthermore, Argentina asserts that the investigating authority worked out an average of the appropriate transactions, without in fact making any selection which might distort the difference between the export price and the normal value. According to Argentina, the Report of 7 January 1998 contains the margins of dumping established on the basis of the average price of export transactions to Argentina involving the product under investigation.

(iii) *Claim 6*

7.56 Brazil asserts that the Argentine authorities determined normal value for the purpose of initiation on the basis of information for one day only, while export price data covered several months. Brazil argues that Article 5.3, read in conjunction with Article 2.4, requires that a fair comparison be made between the export price and the normal value in respect of sales made at as nearly as possible the same time. Brazil asserts that, had the investigating authority examined the accuracy and adequacy of the evidence provided in the application, it would have required the petitioner to provide normal value data for the entire period under analysis in order to correctly make a fair comparison with export prices for the same period. In addition, Brazil asserts that the investigating authority went beyond the scope of the data provided in the application and extended the period for the export transactions, in order to establish the export price. This, in the view of Brazil, clearly indicates that the investigating authority did not rely on the information provided in the application to determine that there was sufficient evidence of dumping to justify the initiation of the investigation. Brazil concludes that, by not accurately examining the evidence in the application and

by adding export price information not provided in the application to determine the initiation of the investigation, Argentina acted inconsistently with Article 5.3 of the *AD Agreement*.

7.57 Argentina asserts that Article 5.3 does not impose any requirements in respect of the time-periods for which export price and normal value data must be available. Argentina alleges that the investigating authority acted consistently with Article 2.4. Argentina contends that the basis for comparison was established in the light of the evidence reasonably available to the applicant and submitted in the application. Argentina argues that the investigating authority should not be expected to meet a standard in respect of the examination required by Article 5.3 similar to the standard required once the investigation has been initiated.

(iv) *Claim 8*

7.58 Brazil argues that, due to the different data collection periods for dumping and injury used in the application, the investigating authority could not have found that there was sufficient evidence of causal link between the dumped imports on June 1997 and the threat of injury on June 1998. Brazil argues that, in order to verify that there was threat of injury from dumped imports, the dumping data collected and analyzed should have been extended until June 1998.

7.59 Argentina argues that the investigating authority should not be expected to meet a standard in respect of the examination required by Article 5.3 similar to the standard required once the investigation has been initiated.

(b) *Evaluation by the Panel*

7.60 These claims raise the issue of whether or not the investigating authority complied with the requirements of Article 5.3 of the *AD Agreement*, as interpreted in light of Article 2, when deciding to initiate its investigation on the basis of the information contained in the application. In addressing this issue, we shall adopt an approach similar to that of previous panels which have examined claims under Article 5.3 of the *AD Agreement*.<sup>74</sup> Thus, in accordance with our standard of review, we shall determine whether or not an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence of dumping, injury and causal link to justify the initiation of an anti-dumping investigation. In making this determination, Article 5.3 requires the investigating authority to examine the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authority's determination whether there is sufficient evidence to justify the initiation of an investigation. However, it is not merely the fact of the accuracy and adequacy of the evidence *per se* which is the legal standard under Article 5.3, but the *sufficiency* of that evidence. In analysing the sufficiency of evidence, we agree with a previous panel that statements and assertions unsubstantiated by any evidence do not constitute sufficient evidence within the meaning of Article 5.3.<sup>75</sup>

7.61 Although Brazil's claims are based on Article 5.3 of the *AD Agreement*, they also raise issues regarding the relationship between Article 5.3 and other provisions of the *AD Agreement*, especially Article 2 thereof.<sup>76</sup> We note that this issue was addressed by the panel in *Guatemala – Cement II* in the following terms:

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<sup>74</sup> Panel Report, *Mexico – Corn Syrup*, *supra*, note 65, paras. 7.91-7.110; Panel Report, *Guatemala – Cement II*, *supra*, note 48, paras. 8.29-8.58.

<sup>75</sup> Panel Report, *Guatemala – Cement II*, *supra*, note 48, paras. 8.51-8.53.

<sup>76</sup> Brazil's first written submission, paras. 102-104 (Claim 4); para. 132 (Claim 6); and paras. 149 and 155 (Claim 8).

“although there is no express reference to evidence of dumping in Article 5.3, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. In other words, Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation. Thus, reading Article 5.3 in the context of Article 5.2, the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation. We further observe that the only clarification of the term "dumping" in the AD Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. This analysis is done not with a view to making a determination that Article 2 has been violated through the initiation of an investigation, but rather to provide guidance in our review of the Ministry's determination that there was sufficient evidence of dumping to warrant an investigation. We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.<sup>794,77</sup>

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<sup>794</sup> On this question we concur fully with the reasoning of the *Guatemala - Cement I* panel when they state that:

"In our view, the reference in Article 5.2 to "dumping" must be read as a reference to dumping as it is defined in Article 2. This does not, of course, mean that the evidence provided in the application must be of the quantity and quality that would be necessary to make a preliminary or final determination of dumping. However, evidence of the relevant **type** is, in our view, required in a case such as this one where it is obvious on the face of the application that the normal value and export price alleged in the application will require adjustments in order to effectuate a fair comparison. At a minimum, there should be some recognition that a fair comparison will require such adjustments." *Guatemala - Cement I*, WT/DS60/R, para. 7.64 (emphasis in original)

7.62 We fully agree with the findings of that panel, and shall follow the same approach in the present case. In order to determine whether there is sufficient evidence of dumping, an investigating authority cannot entirely disregard the elements that configure the existence of that practice as outlined in Article 2. We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the *quantity* and *quality* that would be necessary to support a preliminary or final determination. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.

7.63 With these considerations in mind, we now turn to the examination of the claims put forward by Brazil.

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<sup>77</sup> Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.35.

(i) *Claim 2*

7.64 The primary issue raised by Claim 2 is whether or not there was sufficient evidence before the investigating authority at the time of initiation to warrant an adjustment for differences in physical characteristics between the eviscerated poultry sold in Argentina and that sold in Brazil. This issue goes to the heart of the claim that there was insufficient evidence to justify initiation, since the investigating authority would not have found dumping had it not made the adjustment for the alleged differences in physical characteristics. Brazil's claim also challenges the investigating authority's conclusion regarding the amount of the adjustment made.

7.65 We recall that, in order to determine whether there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. In a claim concerning adjustments, paragraph 4 of Article 2 is of particular relevance. Article 2.4 provides in relevant part:

“A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in (...) physical characteristics...”

7.66 We further note that the issue before us is not whether Argentina was required to make an adjustment for differences in physical characteristics in deciding to initiate, but whether it was entitled to do so.

7.67 We turn now to the examination of Brazil's first argument. Brazil claims that the normal value data contained in the application only related to sales in São Paulo. According to Brazil, even if that data indicated that poultry was sold in São Paulo with head and feet, that did not mean that poultry was sold throughout Brazil with head and feet. Argentina asserts that São Paulo is a large urban centre, and that sales in São Paulo are therefore representative of consumption patterns throughout Brazil. Brazil does not deny that São Paulo is a large urban centre. We recall that, at the time of initiation, an investigating authority is not required to possess evidence of dumping of the quantity (or quality) that it would need to support a preliminary or final determination. In our view, it is sufficient for an investigating authority to base its decision to initiate on evidence concerning domestic sales in a major market of the exporting country subject to the investigation, without necessarily having data for sales throughout that country.

7.68 Brazil also argues that the investigating authority incorrectly accepted a statement by JOX (attached to the application) as evidence that poultry sold in São Paulo contained head and feet. We have examined the relevant statement, and find that it clearly indicates that the JOX domestic price data provided by the applicant, and relied on by the investigating authority at the time of initiation, concerned poultry sold in São Paulo with head and feet. Since Brazil has not disputed Argentina's assertion that JOX was a specialized publication reflecting the state of the São Paulo market, we see no reason why the investigating authority was not entitled to rely on the JOX statement.

7.69 Brazil further argues that the investigating authority did not have sufficient evidence that the alleged differences in physical characteristics affected price comparability. This issue is closely linked to Brazil's claim against the amount of the adjustment made by the investigating authority. In light of our finding on that claim below, we do not consider it necessary to rule on Brazil's argument concerning the lack of evidence on price comparability.

7.70 Regarding the amount of the adjustment, Brazil notes that the 9.09 per cent adjustment made by the investigating authority at the time of initiation was calculated on the basis of yield rates<sup>78</sup> set forth in the application. The applicant stated that the yield rate for poultry sold (with head and feet) in Brazil was 88 per cent, whereas the yield rate for poultry sold in Argentina (without head and feet) was 80 per cent. Brazil asserts that the applicant failed to submit any evidence in support of those yield rates. In response to Question 5 from the Panel, Argentina stated that the evidence supporting the use of 88 and 80 per cent yield rates was contained in a JOX report included in the application.<sup>79</sup> However, upon close examination we find that the relevant JOX report does not contain any such evidence. Indeed, the JOX report makes no reference to yield rates whatsoever.

7.71 In response to an additional question from the Panel, Argentina asserted that:

"The adjustment made by the implementing authority for the differences between the poultry sold in Brazil and poultry sold in Argentina was included by the applicant when submitting the application, and applied by the authority as from the initiation of the investigation on the understanding that the said information was what was reasonably available to the applicant, that it was reasonable and that the implementing authority did not have knowledge of any elements to suggest that it should not be considered. Having evaluated the said information, the authority did not consider that it was necessary to request additional information in that respect in view of the standards applicable to the information to be considered at that stage of the investigation."<sup>80</sup>

7.72 This suggests that, according to Argentina, the investigating authority was entitled to make an adjustment on the basis of the yield rate information included in the application simply because the information "was reasonable and ... the implementing authority did not have knowledge of any elements to suggest that it should not be considered." We cannot accept this approach because, as we noted above, statements and assertions unsubstantiated by any evidence do not constitute sufficient evidence within the meaning of Article 5.3. In light of the lack of evidence to support the yield rates included in the application, and consequently the adjustment to be made, we fail to see how an unbiased and objective investigating authority could have considered the yield rate information available at the time of initiation adequate to support a 9.09 per cent adjustment to normal value.

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<sup>78</sup> The yield rate refers to the amount of eviscerated poultry obtained from live poultry. According to the applicant, out of 1 kg of live poultry sold in Brazil (including head and feet), 880 gm of eviscerated poultry is obtained (including giblets (heart, stomach, neck and liver), head and feet). This amounts to a yield rate of 88 per cent. According to the applicant, the yield rate for poultry exported to Argentina was less, because sales to Argentina did not include head and feet. Thus, out of 1 kg of live poultry exported to Argentina, only 800 gm of eviscerated poultry (including giblets, but no head or feet) is obtained. This gives a yield rate of 80 per cent for poultry exported to Argentina.

<sup>79</sup> It appeared from Argentina's reply to Question 6 of the Panel that supporting information for the adjustment could be found in a publication by Aves & Ovos, included in the application. However, in its reply to Question 68 of the Panel, Argentina asserts that that publication does not provide any information with respect to the 9.09 per cent adjustment carried out. We also take into account the following reply of Argentina:

"as far as normal value is concerned, the evidence considered was the JOX publication of 30 June 1997 accompanying the application, there being no additional requests by the implementing authority in that respect." (Argentina's reply to Question 9 of the Panel)

This statement confirms our finding that the APCDS did not have at the time of initiation any other evidence supporting the application other than that examined by us. We recall that we examined the application and did not find any evidence in it supporting the alleged yield rates of eviscerated poultry.

<sup>80</sup> Argentina's reply to Question 11(a) of the Panel.

7.73 In light of the above, we find that the investigating authority did not have adequate information at the time of initiation to make an adjustment to normal value of 9.09 per cent. Accordingly, although we have rejected Brazil's arguments regarding the adequacy of the evidence concerning the need for an adjustment to normal value to reflect differences in physical characteristics between the poultry sold in Brazil and Argentina respectively, we uphold Brazil's claim regarding the adequacy of the information concerning the amount of that adjustment. We therefore find that Argentina violated Article 5.3 of the *AD Agreement* by determining that it had sufficient evidence of dumping to initiate an investigation, because its determination of dumping was based on an adjustment to normal value for which it did not have adequate evidence.<sup>81</sup>

(ii) *Claim 4*

7.74 Brazil asserts that the investigating authority only took into account export prices less than normal value when calculating the margin of dumping for the purpose of initiation. Brazil submits that this methodology was not in conformity with Article 5.3, read in conjunction with Article 2.4.2 of the *AD Agreement*.

7.75 At the time of initiation, the APCDS calculated four margins of dumping.<sup>82</sup> In its first written submission, Argentina stated that the decision to initiate was based on the second margin of dumping calculated by the APCDS, and that the three remaining margins were used for additional analysis.<sup>83</sup> In response to part of Question 18 from the Panel, Argentina stated that "[t]he period used to determine the f.o.b. export price in this case was January to June 1997 and August 1997." Since this was the period covered by the second margin of dumping calculated by the APCDS, this would confirm Argentina's statement that the decision to initiate was based on the second of the four margins calculated by the APCDS. Accordingly, for the purpose of analysing Brazil's claim, we shall focus on the second margin of dumping calculated by the APCDS, since this was the margin on which the decision to initiate the investigation was based.

7.76 The starting point for the APCDS calculation of the second margin of dumping was the totality of export transactions recorded in official import statistics for the period January to June 1997 and August 1997. As a first step, the investigating authority discarded export transactions which did not concern products "like" the product under investigation.<sup>84</sup> Second, the investigating authority excluded those export transactions with a price that was higher than or equal to the normal value (USD/Kg. 1.044).<sup>85</sup> Third, a weighted average export price was calculated using only those transactions with a price lower than the normal value. Accordingly, the weighted average export price was not based on the totality of comparable export transactions.

7.77 In examining the compatibility of this methodology with Article 5.3, read in light of Article 2.4.2, we note the following statement by the Appellate Body in *EC – Bed Linen*:

"By 'zeroing' the 'negative dumping margins', the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities

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<sup>81</sup> We note Brazil's assertion that there would have been no margin of dumping had the relevant adjustment not been made. (Brazil's reply to Question 3 of the Panel)

<sup>82</sup> Exhibit BRA-2, p. 12 and 13.

<sup>83</sup> Argentina's first written submission, para. 80.

<sup>84</sup> Argentina's reply to Question 19 of the Panel.

<sup>85</sup> Argentina's reply to Question 11(b) of the Panel.

did *not* establish 'the existence of margins of dumping' for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2."<sup>86</sup> (emphasis in original)

7.78 We agree with the Appellate Body's analysis. We note that the Appellate Body was primarily addressing the practice of "zeroing". The practice adopted by Argentina in the present case is more egregious than zeroing, because it does not merely fix the value of comparisons involving certain export transactions at zero, but totally excludes certain export prices from the weighted average, so that the weighted average export price used by the investigating authority is even lower than it would be through zeroing. We are in no doubt that, if zeroing is inconsistent with Article 2.4.2, then Argentina's practice of totally disregarding certain export transactions would also be inconsistent with Article 2.4.2 because it does not compare the weighted average normal value with the weighted average of prices of all comparable export transactions. In our view, the use of such a practice would not allow an objective and impartial investigating authority to properly conclude that there was sufficient evidence of dumping to justify the initiation of an investigation.

7.79 Argentina asserts that the methodology used by the APCDS has also been used by other WTO Members.<sup>87</sup> Even assuming for the sake of argument that Argentina is correct, this argument is nevertheless irrelevant. In this dispute, we must determine the conformity of Argentina's methodology (and not that of other WTO Members) in light of the relevant provisions of the *AD Agreement*.

7.80 Argentina also argues that "[w]hat is required [at the time of initiation] is the knowledge that there have been transactions involving dumping which justify, from that point of view, the initiation of an investigation."<sup>88</sup> We understand Argentina to argue that, in order to initiate, an investigating authority need only satisfy itself that there has been some dumping, in the sense that certain transactions were dumped. We disagree. We recall that, "in order to determine whether or not there is sufficient evidence of dumping for the purpose of initiation, an investigating authority cannot entirely disregard the elements that configure the existence of [dumping] outlined in Article 2".<sup>89</sup> A determination of dumping should be made in respect of the product as a whole, for a given period, and not for individual transactions concerning that product. An investigating authority therefore cannot disregard export transactions at the time of initiation simply because they are equal to or greater than normal value. Disregarding such transactions does not provide a proper basis for determining whether or not there is sufficient evidence of dumping to justify initiation.

7.81 In light of the above, we find that Argentina violated Article 5.3 of the *AD Agreement* by initiating its investigation without a proper basis to conclude that there was sufficient evidence of dumping to justify initiation.

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<sup>86</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("EC – Bed Linen"), WT/DS141/AB/R, adopted 12 March 2001, para. 55.

<sup>87</sup> See footnote 85, *supra*.

<sup>88</sup> *Ibid.*

<sup>89</sup> Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.35.



(iii) *Claim 6*

7.82 The APCDS established the normal value on the basis of a JOX publication setting forth the prices of poultry for one day – 30 June 1997 – while the export price covered a period of several months in 1997.<sup>90</sup> The issue before us is whether a comparison between a normal value for one day and an export price for a period of several months constitutes a proper basis for determining whether or not there is sufficient evidence of dumping to justify the initiation of an investigation.

7.83 We recall that, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of that practice as outlined in Article 2. In particular, we note that Article 2.4 requires that a fair comparison be made between the export price and the normal value in respect of sales "made at as nearly as possible the same time". In interpreting the term "made at as nearly as possible the same time" in the context of Article 2.4, we consider it useful to refer to the following finding of the *US – Stainless Steel* panel:

"we consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same time requires *as a general matter* that the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same." (emphasis in original)<sup>91</sup>

7.84 The above finding concerns a definitive determination of a margin of dumping, while the present claim concerns a pre-initiation determination of sufficient evidence of dumping. At the time of initiation an investigating authority does not need to be in possession of the same quantity and quality of evidence that would be necessary to support a preliminary or final determination of dumping. However, since evidence of the same *type* is required upon initiation as for a preliminary or final determination, in our view there should be a substantial degree of overlap in the periods considered in order for the comparison of normal value and export price to be fair within the meaning of Article 2.4. We consider however that Article 5.3, read in light of Article 2.4, cannot be interpreted to require that data on normal value and export price cover identical periods of time. Otherwise, the quantity of evidence of dumping required upon initiation would be the same as that required for a preliminary or final determination of dumping. Thus, we consider that an investigating authority might comply with the requirements in Article 5.3 even though the periods chosen for the comparison of a weighted average normal value and a weighted average export price are not identical.

7.85 For a product such as eviscerated poultry, in respect of which there are many transactions taking place on a daily basis, we are not persuaded that domestic sales data for one day provides sufficient overlap with export price data for several months for the purpose of Article 5.3. Argentina asserts that the domestic price for one day was indicative of the trend in prices of poultry sold in São Paulo over a longer period of time. If that had been true, the use of normal value for one day may well have been consistent with Article 5.3. However, Argentina has not pointed to any evidence in the record suggesting that the investigating authority actually considered normal value evidence for one day to be indicative of the trend in domestic poultry prices. Furthermore, we note that the evidence relied on by Argentina (to claim that price data for one day was indicative of a trend in

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<sup>90</sup> We note that the APCDS calculated four different margins of dumping based on *four* different export prices. We also observe that the determination of the existence of sufficient evidence on dumping was based on a comparison between the normal value for 30 June 1997 and the export price for the period January to June 1997 and August 1997, as discussed in para. 7.75 *supra*. Bearing this in mind, under this claim we will examine whether a comparison between information on normal value for 30 June 1997 and data for export price for January to June 1997 and August 1997 meets the requirements of Article 2.4 of the *AD Agreement*.

<sup>91</sup> Panel Report, *US – Stainless Steel*, *supra*, note 65, para. 6.121.

prices) related to live, and not eviscerated, poultry.<sup>92</sup> Although Argentina argued in these proceedings that stability in the pricing of an input (live poultry) would result in stability in the pricing of the finished product (eviscerated poultry), it has failed to identify any evidence to suggest that, at the time of initiation, the investigating authority considered that stable pricing for live poultry would lead to stable pricing for eviscerated poultry. Accordingly, Argentina's argument must be rejected.

7.86 We therefore uphold Brazil's claim that Argentina violated Article 5.3 of the *AD Agreement* by initiating the investigation without sufficient evidence of dumping to justify initiation.

(iv) *Claim 8*

7.87 Brazil argues that the periods used for the purpose of the dumping and injury determinations at the time of initiation did not coincide and, hence, a causal link could not have properly been established.

7.88 We are of the view that it would only be necessary for us to examine this claim if the investigating authority had had sufficient evidence of dumping and injury – the two elements needed to carry out the causal link determination – to justify the initiation of the investigation against eviscerated poultry from Brazil. However, we recall that in our view the investigating authority did not have sufficient evidence of dumping to justify the initiation of that investigation. Having reached this conclusion, it is not necessary for us to examine Brazil's claim concerning causation.

(c) *Conclusion*

7.89 For the reasons set forth above, we find that Argentina acted inconsistently with Article 5.3 of the *AD Agreement* by determining that there was sufficient evidence of dumping to justify the initiation of an investigation.

## **2. Sufficiency of the Application – Claims 1 and 5**

(a) *Arguments of the parties*

(i) *Claim 1*

7.90 Brazil asserts that Argentina violated Article 5.2 of the *AD Agreement* by initiating its investigation on the basis of an application that did not meet the requirements of that provision. Brazil asserts that Article 5.2 requires that an application include "evidence" of dumping, injury and the causal relationship between the dumped imports and the alleged injury. Brazil further asserts that an allegation or information provided in the application, without supporting documentation, does not qualify as evidence under Article 5.2. In the view of Brazil, the application which led to the initiation of the investigation against eviscerated poultry from Brazil did not contain evidence to support an adjustment for physical characteristics claimed by the applicant. Brazil acknowledges that the application contained a JOX report dated 30 June 1997, which allegedly supported the applicant's request for an adjustment. Brazil identifies several problems with the JOX report. Brazil argues that that report does not constitute evidence that justifies the adjustment. Brazil also asserts that no evidence was presented showing that price comparability would be affected and that the yield rate proposed by the petitioner was justified.

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<sup>92</sup> See Argentina's reply to Question 12 of the Panel: "the right-hand margin of the text [of the Report of JOX of 30 June 1997] contains CEPA's translation of the following words: " ... production on the parallel market within São Paulo is sharply lower, so that the price remains on very firm ground...". In other words, the quotation did not vary much, but rather remained stable." (emphasis added)

7.91 Argentina asserts that the applicant provided all of the necessary evidence with respect to the normal value and the export price as well as the relevant evidence for the adjustments needed in order to make a fair comparison between the normal value and the export value. Argentina also asserts that the applicant supplied, with its application, the documentation that was available to it. Argentina also contends that the applicant for the initiation of an investigation is not required to prove beyond all doubt the existence of dumping, injury and causal link, since the final determination of these elements is the responsibility of the investigating authority. With regard to the adjustment issue, Argentina asserts that the applicant submitted the JOX report with information regarding domestic prices of eviscerated poultry in Brazil. In the view of Argentina, the evidence provided is a representative value taken from a specialized publication for a given period. Bearing in mind that the JOX report mentioned that eviscerated poultry was sold in Brazil with head and feet and that poultry exported to Argentina did not contain head and feet, Argentina concluded that it was necessary to make an adjustment for physical characteristic differences.

7.92 Brazil agrees with Argentina that the quantum and quality of evidence required prior to initiation has to be necessarily less than that required for a final determination. However, Brazil asserts that relevant evidence of the "type" needed to justify initiation is the same as that needed to make a preliminary or final determination of dumping, although the quality and quantity is less.

(ii) *Claim 5*

7.93 Brazil argues that the data presented by the petitioner in the application, and used to calculate the dumping margin, was inconsistent with Article 5.2 in two ways. First, Brazil asserts that, because the normal value and the export price information provided were for transactions which were not made at as nearly as possible the same time, the application failed to include sufficient evidence of dumping as required in Article 5.2. Because in the view of Brazil the timing of the sales transactions may have implications in respect of the comparability of prices of export and home market transactions, it argues that the establishment of normal value based on one single day (30 June 1997) cannot be used as a parameter for a fair comparison with the export price determined for two periods of time with more than thirty days each (one for January through June 1997 and the other for August 1997), neither of which included the one day used to establish the normal value. Second, Brazil argues that normal value information for all of 1996 and 1997 was reasonably available to the petitioner in view of the fact that on 26 July 1999 it provided updated information on normal value for the period 1998 through January 1999.

7.94 Apart from the general comments referred to in para. 7.91 *supra*, Argentina asserts that Article 5.2 does not require the applicant to provide evidence of normal value in respect of the entire period for which evidence of export value was provided. In the view of Argentina, it is clear and reasonable that the quantity and quality of information available to the applicant on prices in the market of the exporting country should not be the same as for the export price.

(b) *Evaluation by the Panel*

7.95 We recall that we have concluded that the APCDS's determination that there was sufficient evidence of dumping to justify the initiation of an investigation was inconsistent with Article 5.3. For this reason, we do not consider it necessary to rule on Brazil's Article 5.2 claims regarding the sufficiency of the application.

7.96 Although we do not consider it necessary to make findings on Brazil's Article 5.2 claims, we do note that the parties' submissions raised the issue of the extent – if any – to which Article 5.2 imposes obligations on Members, as opposed to applicants. We therefore asked the parties for their views on this matter. Brazil replied:

"Article 5.2 of the Anti-Dumping Agreement requires an application to include evidence of dumping, injury and causal link. Specifically, the application must contain information required in items (i) through (iv) of Article 5.2. We cannot presume from the language in Article 5.2 that these obligations are imposed on the applicant. Relevant part of Article 5.2 provides that:

“(...) Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph(...)”. (emphasis added)

The consideration of sufficient evidence to meet the requirements of the paragraph in Article 5.2 is made by the investigating authority and not by the applicant. After all, the applicant is not the one to consider whether the evidence it submitted in the application is sufficient to meet the requirements of Article 5.2.

Furthermore, the WTO and its Agreements provide for obligations and rights of Members of the WTO. Consequently, the Anti-Dumping Agreement also imposes obligations on Members of the WTO and not on specific interested parties in an investigation. We cannot, therefore, infer that the obligations under Article 5.2 are obligations of the applicant and not the investigating authority.

Under Article 5.2 of the Agreement, the investigating authority must check the application to see whether the information required by that Article is present in the application. In order for an investigating authority to accept an application it must consider whether information and evidence in the application is sufficient to meet the requirements set forth in items (i) through (iv) of Article 5.2. At a subsequent stage, and once the application has been considered and accepted by the authority as meeting the requirements in Article 5.2, Article 5.3 of the Agreement imposes another obligation on the investigating authority. This obligation is the examination of the accuracy and adequacy of the evidence provided in the application to determine whether it is sufficient to justify the initiation of the investigation."<sup>93</sup> (emphasis in original)

7.97 Argentina replied:

"It is Argentina's understanding that the Agreement imposes obligations on Members. In principle, Article 5.2 imposes an obligation on Members with respect to the information that is required to be provided with the application for the initiation of an investigation. In other words, Article 5.2 lays down the requirements governing what the sector wishing to file an application for the initiation of an investigation must provide with its application."<sup>94</sup>

7.98 Thus, both parties agree that Article 5.2 imposes obligations on Members. Without ruling on this matter, we do not exclude the possibility that Article 5.2 could oblige Members to verify that applications contain evidence, and not mere assertion, of dumping, injury, and causal link. In particular, in cases where applicants propose adjustments to normal value, Article 5.2 could oblige Members to verify that such adjustments are supported by evidence, rather than mere assertion. A consequence of this obligation may be that applications not meeting the requirements of Article 5.2

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<sup>93</sup> Brazil's reply to Question 2 of the Panel.

<sup>94</sup> Argentina's reply to Question 2 of the Panel.

are rejected. Although Members may choose to correct any deficiencies in an application,<sup>95</sup> they are not obliged to do so.

### **3. Failure to Reject the Application – Claims 3, 7 and 31**

7.99 These claims are made under Article 5.8 of the *AD Agreement*. Claims 3 and 7 concern the issue of whether or not the application should have been rejected for lack of sufficient evidence of dumping. Claim 31 concerns the issue of whether or not the application should have been rejected for lack of sufficient evidence of injury.

(a) Arguments of the parties

(i) *Claims 3 and 7*

7.100 In Claims 3 and 7, Brazil contends that the application contained no substantial evidence to support the APCDS's adjustment for differences in physical characteristics, or the yield rate used to make that adjustment. Nor did it contain sufficient evidence to establish normal value. In view of that, Brazil argues that the application should have been rejected because there was insufficient evidence of dumping to justify proceeding with the investigation. According to Brazil, failure to reject the application constituted a violation of Article 5.8 of the *AD Agreement*.

7.101 Argentina asserts that, since the applicant had provided all of the documentation available to it and the documentation was examined for accuracy and adequacy by the investigating authority, there was no reason for the implementing authority to reject the application.

(ii) *Claim 31*

7.102 Brazil asserts that the CNCE issued a determination (Record No. 405) dated 7 January 1998 to the effect that the application contained insufficient evidence of injury to justify the initiation of an investigation. Brazil submits that, in accordance with Article 5.8 of the *AD Agreement*, the application should have been rejected at that time, because that was the point when the investigating authority was "satisfied" that there was not sufficient evidence of injury to justify proceeding with the case.

7.103 Argentina asserts that, following the CNCE determination contained in Record No. 405, the applicant submitted new evidence. Argentina points to Article 60 of the Regulations to the National Law on Administrative Procedures which stipulates that the competent body shall intervene once again in proceedings if any new developments occur or come to its knowledge. Argentina also points to an opinion from the Legal Department of the MEyOSP which stated that, before proceeding any further, the Secretary should ask the CNCE to intervene once again in order to rule on the sufficiency (from the perspective of injury) of the new information submitted by the applicant. In light of the above, Argentina concludes that the Argentine authorities would not have acted in conformity with internal law if they had rejected the application following the CNCE determination in Record No. 405 and, hence, had not examined the new evidence submitted by the applicant on 17 February 1998. In addition, Argentina asserts that, apart from being contrary to domestic administrative law, the rejection of the application and closing of the file in January 1998 (pursuant to the conclusions set forth in Record No. 405) would have adversely affected the individual rights of the applicant with all of the administrative consequences that such an act would entail.

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<sup>95</sup> Panel Report, "*Guatemala – Cement I*, *supra*, note 73, para. 7.53.

(b) Evaluation by the Panel

7.104 We begin by analysing Claim 31.

(i) *Claim 31*

7.105 In order to resolve Claim 31, we must determine whether, following CNCE's 7 January 1998 conclusion in Record No. 405 that there was not sufficient evidence of injury to justify the initiation of the investigation, the application should have been rejected.

7.106 Article 5.8 of the *AD Agreement* reads in relevant part as follows:

"An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."

7.107 Argentina operates a bifurcated anti-dumping system, as explained in more detail in para. 7.122 *infra*. Thus, while the DCD (formerly the APCDS) investigates issues of dumping, the CNCE investigates issues of injury. This division of labour applies both at the time of the (pre-initiation) review of the application, and during any subsequent investigation. Although only the Secretary has the authority to decide whether or not to initiate an investigation,<sup>96</sup> the Secretary cannot decide to initiate an investigation if either the CNCE or the DCD/APCDS have found that there is insufficient evidence of injury or dumping, respectively, to justify the initiation of an investigation. In the case at hand, the CNCE issued Record No. 405 on 7 January 1998 to the effect that the application did not contain sufficient evidence of injury to justify the initiation of an investigation.<sup>97</sup> The CNCE's determination was received by the Secretary on 9 January 1998.<sup>98</sup> We recall that, faced with a negative assessment of the application by the CNCE, the Secretary is precluded from initiating an investigation. Accordingly, from the time that the Secretary received the CNCE's negative assessment of the application, the Secretary should have been satisfied that there was not sufficient evidence on injury to justify proceeding with the case.<sup>99</sup> Thus, in accordance with Article 5.8, the Secretary should have rejected the application "as soon as" it received CNCE Record No. 405 dated 7 January 1998. Rather than doing so, however, the Secretary kept the file open, subsequently deciding to initiate the investigation following the submission of additional information by the applicant. The Secretary therefore failed to meet the requirements of Article 5.8 of the *AD Agreement*.

7.108 Argentina argues that rejection of the application "as soon as" the CNCE's negative assessment was received would have been contrary to domestic administrative law, and would have adversely affected the individual rights of the applicant, with all of the administrative consequences that such an act would entail.<sup>100</sup> This does not affect our conclusion that Argentina acted inconsistently with Article 5.8 in this case. We consider that a WTO Member's domestic law does not excuse that Member from fulfilling its obligations under the WTO agreements. In acceding to the WTO, Argentina undertook to be bound by the rules contained in the *AD Agreement*, and our mandate is to review Argentina's compliance with those rules. Any failure to respect Article 5.8 may not be justified on the basis of inconsistent provisions of domestic law. Article XVI:4 of the *WTO Agreement* explicitly provides that each Member "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". We note

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<sup>96</sup> Argentina's reply to Question 70 of the Panel.

<sup>97</sup> Exhibit BRA-3.

<sup>98</sup> See *supra*, note 96.

<sup>99</sup> There is no evidence on the record that the Secretary sought additional information from the applicant at this stage, or even that the Secretary would have had the authority to do so.

<sup>100</sup> Argentina's reply to Question 16 of the Panel.

that a similar view was expressed by the *Guatemala – Cement II* panel.<sup>101</sup> Regarding Argentina's comment that rejection of the application in January 1998 would have adversely affected the individual rights of the applicant, we note that there is nothing in the *AD Agreement* that would have prevented the applicant from filing an additional application after rejection of its original application. For this reason, we reject the argument that the individual rights of the applicant would have been negatively affected by the rejection of the application in January 1998.

7.109 In light of the above, we find that, by failing to reject the application "as soon as" the negative assessment from the CNCE was received, the Secretary violated Article 5.8 of the *AD Agreement*.

(ii) *Claims 3 and 7*

7.110 Brazil's Claims 3 and 7 are dependent on a finding of violation under Claims 1, 2, 5 and 6. In other words, Brazil asserts that, if the investigating authorities' treatment of the application and decision to initiate constitute violations of Articles 5.2 and 5.3 of the *AD Agreement*, then it should never have initiated the investigation in the first place, and should instead have rejected the application in accordance with Article 5.8.

7.111 We recall that we have concluded in para. 7.89 *supra* that Argentina violated Article 5.3 of the *AD Agreement* by determining that there was sufficient evidence of dumping to justify the initiation of an investigation. Since the factual basis for Claims 3 and 7 is identical to that for Claims 2 and 6, and since we have already found that those factual circumstances constitute a violation of Article 5.3, it is not necessary to address Brazil's Claims 3 and 7.

(c) *Conclusion*

7.112 In light of the above, we find that Argentina acted inconsistently with its obligations under Article 5.8 in failing to reject the application "as soon as" the Secretary received the CNCE's negative assessment (in the form of record No. 405) on 9 January 1998.

#### **4. Simultaneous Examination of the Evidence and Failure to Reject the Application – Claim 9**

(a) *Arguments of the parties / third parties*

7.113 Brazil asserts that the time-periods covered by data used for the purpose of examining whether there was sufficient evidence of dumping and injury to justify the initiation of the investigation were different. Brazil alleges that while the period covered to establish sufficient evidence of dumping included portions of 1996 and 1997, the period taken into account to establish sufficient evidence of injury ended in June 1998. In the view of Brazil, the use of different data collection periods for dumping and injury in the decision to initiate the investigation was inconsistent with Article 5.7 of the *AD Agreement* in two ways. First, Brazil asserts that the collection period for dumping should have been extended to include all of the period considered for injury purposes, i.e., until June 1998. In the view of Brazil, the fact that different periods were considered indicates that the dumping and injury evidence was not considered simultaneously in the decision whether or not to initiate the investigation. Second, Brazil asserts that Argentina failed to comply with Article 5.7 by not considering the evidence of both dumping and injury simultaneously in the same decision to initiate the investigation. Brazil argues that the APCDS determined that there was sufficient evidence of dumping in its report of 7 January 1998. Brazil asserts that the CNCE determined that there was sufficient evidence of threat of injury to justify the initiation on 22 September 1998, following its review of additional information submitted by the applicant. In the view of Brazil, this shows that the

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<sup>101</sup> Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.83.

evidence of injury was considered more than eight months after the dumping evidence, in breach of Article 5.7 of the *AD Agreement*. Brazil argues that, for Argentina to have met the requirement in Article 5.7, a new dumping determination taking into account the additional dumping information presented by the applicant on 17 February 1998 should have occurred on 22 September 1998, the date when the CNCE decided that there was sufficient evidence of threat of material injury.

7.114 Argentina argues that the fact that the dates of the reports in which the APCDS and the CNCE found sufficient evidence of dumping and threat of injury are different does not mean that, at the moment of deciding on the initiation of the investigation, the Argentine authorities did not consider simultaneously the evidence of dumping and injury.

7.115 The United States, as a third party, argues that Brazil's argument is based on a misinterpretation of the term "simultaneously" as this term is used in Article 5.7. In the view of the United States, when viewed in context, the term "simultaneously" in Article 5.7 is linked to the term "considered", not the term "evidence". Thus, in the view of the United States, the obligation in Article 5.7 is to consider the evidence of dumping and injury simultaneously (for example, in concurrent investigations), not to consider evidence of dumping and injury collected from simultaneous (or identical) time-periods.

(b) Evaluation by the Panel

7.116 The issue before us is whether Argentina violated Article 5.7 by not considering simultaneously evidence of both dumping and injury in the decision whether or not to initiate an investigation. Brazil raises two main arguments in support of its claim. First, the periods covered by data used to determine whether there was sufficient evidence of dumping and injury to justify the initiation of the anti-dumping investigation were different. Second, Brazil argues that the requirement of Article 5.7 could not have been met because the Argentine authorities considered evidence of injury and dumping at different times.

7.117 Article 5.7 provides in relevant part:

"The evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation..."

7.118 In our view, Article 5.7 imposes a procedural obligation on the investigating authority to examine the evidence before it of dumping and injury simultaneously, rather than sequentially, *inter alia* in the decision whether or not to initiate an investigation. We are of the view that Article 5.7 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3 of the *AD Agreement*. We note that a previous panel has expressed a similar view on this matter.<sup>102</sup>

7.119 We turn to Brazil's first argument. Brazil asserts that the periods covered by data used to determine whether there was sufficient evidence of dumping and injury to justify the initiation of the investigation were different. In other words, Brazil seems to argue that Article 5.7 requires a Member to ensure that its investigating authorities consider evidence of dumping and injury from simultaneous time-periods. We disagree with Brazil's interpretation. Consistent with our view expressed in para. 7.118 *supra*, we recall that Article 5.7 imposes only a procedural obligation on the part of the authorities of the importing Member. We do not consider that Article 5.7 imposes obligations of a

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<sup>102</sup> The panel in *Guatemala – Cement II* expressed its view that "Article 5.7 requires the investigating authority to examine the evidence before it on dumping and injury simultaneously, rather than sequentially" and that "the fulfilment of this requirement is [not] conditioned in any way on the substantive nature of that evidence." (emphasis added) (Panel Report, *Guatemala – Cement II, supra*, note 48, para. 8.67)



substantive nature. In essence, Brazil argues that evidence of dumping and injury must cover simultaneous periods. We consider that this argument concerns the substantive nature of the evidence considered by the authorities in the decision whether or not to initiate an investigation, rather than the timing of the consideration itself. Brazil's argument therefore falls outside the scope of the obligation contained in Article 5.7. We therefore reject Brazil's first argument.

7.120 The second argument put forward by Brazil is that the requirement of Article 5.7 could not have been met because the Argentine authorities considered evidence of injury and dumping at different times. We recall that the CNCE initially found in January 1998 that the application did not contain sufficient evidence of injury, whereas the APCDS found that it did contain sufficient evidence of dumping. As a result of the CNCE's determination, the applicant submitted additional, updated evidence of both dumping and injury in February 1998. While the Secretary referred the additional, updated evidence of injury to the CNCE, it did not refer the additional, updated evidence of dumping to the APCDS. Thus, when the CNCE found in September 1998 that the additional, updated evidence of injury was sufficient to justify initiation, that finding was based on more recent data than the APCDS's January 1998 determination (based on dumping data contained in the original application) that there was sufficient evidence of dumping. Since Brazil's argument concerns the timing of the consideration of evidence of dumping and injury, it is in principle covered by the scope of the procedural obligation contained in Article 5.7. We must now determine whether or not Argentina complied with that obligation. In addressing this issue, we shall first determine what constitutes "the decision whether or not to initiate an investigation", and then examine whether evidence of dumping and injury was simultaneously considered in that decision.

7.121 Brazil argues that there were in fact two decisions for the purposes of Article 5.7: one by the APCDS in January 1998, and another by the CNCE in September 1998. Argentina argues that there was only one decision whether or not to initiate the investigation, and that it was taken by the Secretary on 20 January 1999.<sup>103</sup> Argentina acknowledges that this decision is based on the determinations on dumping and injury received by the Secretary from the APCDS and the CNCE, respectively. At the outset, we consider that "the decision whether or not to initiate an investigation" must be a decision that occurs before, or at the same time as, the moment of initiation of an investigation, because the purpose of the decision is to determine whether or not to initiate an investigation. We further note that Article 5.7 uses the term "decision" in singular form rather than plural. We believe that this means that there is normally one decision in which the relevant authority of the importing Member determines whether or not to initiate an investigation. We consider that it is *only* in this decision, and *not* in other decisions, that the relevant investigating authority must simultaneously consider the evidence of dumping and injury.

7.122 Having said that, we must examine the relevant facts of the present dispute. Brazil's argument is that the requirement of Article 5.7 could not have been met because the Argentine authorities considered evidence of injury and dumping at different times. In order to understand how the Argentine system works, we posed various questions to Argentina.<sup>104</sup> Argentina explained that it has a bifurcated system, in which the APCDS – currently the DCD – and the CNCE examine dumping and injury, respectively. Consistent with this separation, at the pre-initiation stage those two agencies examine separately the evidence available and determine whether there is sufficient evidence of dumping and injury, respectively, to justify the initiation of an investigation. These separate determinations are sent by both agencies to the authority in charge of deciding whether or not to initiate an investigation, which is the Secretary. Taking into account the explanations received from the parties, it is clear to us that the Secretary is the authority entitled to decide whether or not to initiate an anti-dumping investigation in Argentina. In this regard, we note that Article 37 of Decree No. 2121/94 provides in relevant part "the Under-Secretariat for Foreign Trade and the National

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<sup>103</sup> Exhibit BRA-7.

<sup>104</sup> Questions 15, 22 and 23.

Commission for Foreign Trade (...) shall submit their conclusions to the Secretary for Foreign Trade for a decision on the opening of the investigation to be taken...".<sup>105</sup> Brazil acknowledges that "the MEOSP [is] the authority that issued the decision to initiate the investigation."<sup>106</sup> If the MEyOSP – through the Secretary – is the authority entrusted to decide whether or not to initiate an investigation, then it is with respect to the Secretary's decision whether or not to initiate an investigation against poultry from Brazil that the evidence of dumping and injury should have been considered simultaneously. Brazil's argument that the requirement of Article 5.7 could not have been met because the APCDS and the CNCE considered evidence of injury and dumping at different times must therefore be rejected, because the APCDS and CNCE's determinations were not subject to the requirements of Article 5.7. Provided the Secretary, who is the relevant authority, considered the evidence of dumping and injury simultaneously in his decision to initiate, the requirement of Article 5.7 is met. Brazil has not argued that the Secretary failed to meet this requirement.

7.123 Finally, Brazil argued that, for Argentina to have met the requirement in Article 5.7, a new dumping determination taking into account the updated information presented by the applicant in February 1998 should have been made on 22 September 1998 (which was the date on which the CNCE issued its determination regarding the additional injury data submitted by the applicant in February 1998).<sup>107</sup> We do not agree with Brazil. We recall that Article 5.7 does not impose obligations of a substantive nature. To the extent that this argument concerns the substance of the decision, it must therefore be rejected. Nevertheless, even if that argument were of a procedural nature, we recall that the Secretary is *the* authority entrusted to decide whether or not to initiate an investigation and hence it is the Secretary's decision – and not that of the CNCE or the APCDS – that must be considered the "decision whether or not to initiate an investigation" within the meaning of Article 5.7. In light of the above, we find that Argentina did not violate Article 5.7 of the *AD Agreement* simply because the APCDS and CNCE determinations on dumping and injury, respectively, were issued at different times.

(c) Conclusion

7.124 For the foregoing reasons, we reject Brazil's claim that Argentina acted inconsistently with Article 5.7 by not considering, in the decision whether or not to initiate the investigation, the evidence of dumping and injury simultaneously.

## 5. Failure to Notify Known Exporters – Claim 10

(a) Arguments of the parties

7.125 Brazil asserts that Article 12.1 requires that, in addition to a public notice, a notification (to certain interested parties and the exporting Member) be given when the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation. The public notice was given when Resolution No. 11 was issued announcing the initiation of the investigation on 25 January 1999. Brazil asserts that it was notified of the initiation on 1 February 1999. Five Brazilian exporters (Avipal, Frangosul, Nicolini, Sadia, and Seara) were also notified of the initiation through communications from the CNCE and the DCD dated 10 and 16 February 1999, respectively. Brazil asserts that another group of seven exporters (Catarinense, CCLP, Chapecó, Comaves, Minuano, Penabranca and Perdigão) were only notified of the initiation of the investigation in September 1999, even though at least five of those seven exporters were known to the CNCE and the APCDS in January 1999. In this regard, Brazil notes that the Report of 7 January 1999 listed ten Brazilian

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<sup>105</sup> Document notified by Argentina and available in the WTO website (<http://www.wto.org>) under reference G/ADP/N/1/ARG/1 / G/SCM/N/1/ARG/1.

<sup>106</sup> Brazil's reply to Question 22 by the Panel.

<sup>107</sup> *Ibid.*

exporters, including Catarinense, Chapecó, Comaves, Minuano and Perdigão. Brazil argues that the September 1999 notification to these seven exporters did not comply with the requirement under Article 12.1 because it was not made "when the authorities [were] satisfied that there [was] sufficient evidence to justify the initiation of an anti-dumping investigation".

7.126 Argentina asserts that Resolution No. 11 initiating the investigation was published in the Official Bulletin on 25 January 1999. Argentina asserts that it notified Brazil of the initiation of the investigation through a Note dated 1 February 1999 addressed to the Mission of Brazil in Argentina. In this communication, Argentina requested the cooperation of the Brazilian authorities "in identifying the interested producers/exporters in that investigation." Argentina asserts that the DCD notified the exporters Avipal, Frangosul, Nicolini, Sadia and Seara of the initiation of the investigation on 16 February 1999. Argentina asserts further that, through the questionnaire response of an importer dated 21 April 1999, it learned of the interest of seven other Brazilian exporters in the investigation. These exporters were Catarinense, CCLP, Chapecó, Comaves, Minuano, Penabranca and Perdigão. Argentina asserts that the importer requested that the Argentine authorities contact those exporters. As a result of this request, the DCD contacted Catarinense, CCLP, Chapecó, Comaves, Minuano and Perdigão on 15 September 1999 and requested information from them. Argentina argues that the investigating authority satisfied the Article 12.1 requirement of public notice and notification to interested parties (exporter or foreign producer) known to have an interest, such as the Government of Brazil, and that it would have been impossible to notify parties whose interest in the investigation was not known. Argentina asserts that it requested the assistance of the Government of Brazil in informing potential interested parties of the initiation of the investigation. Argentina argues that notification must be given to those parties that are considered interested within the meaning of Article 6.11, and that are known and identified in such a way as to make such notification possible and identified as interested parties. Regarding Brazil's statement that Argentina implicitly acknowledged that it knew of certain exporters by listing them in the Report of 7 January 1998, Argentina stated that those exporters had not been sufficiently identified to allow the relevant questionnaires to be sent to them.

7.127 Brazil asserts that Article 12.1 imposes the obligation to notify interested parties on the investigating authorities of the importing Member, and not the authorities of the exporting Member. Brazil notes that Argentina tries to share this obligation with Brazil when it states that it notified the Brazilian authorities and requested their cooperation to identify the producers and exporters. Brazil asserts that it never received any communication from the Argentine authorities requesting such information concerning the five specific exporters identified in the Report of 7 January 1998. Brazil further argues that Argentina's argument that the authority must notify only those parties that consider themselves interested in the investigation, within the meaning of Article 6.1.1, is untenable. Brazil asks how a party can present itself as an interested party if it does not even know that an investigation has been initiated? In the view of Brazil, that is exactly why Article 12.1 requires the authority to notify interested parties known to them.

(b) Evaluation by the Panel

7.128 The issue before us is whether or not Argentina complied with its notification obligations under Article 12.1 of the *AD Agreement* in respect of Catarinense, CCLP, Chapecó, Comaves, Minuano, Penabranca and Perdigão. As always, we start with the relevant provision in the *AD Agreement*, which in this case is Article 12.1. This provides in relevant part:

"When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified..."

7.129 Article 12.1 requires the authorities of the importing Member to notify the initiation of an investigation to the WTO Member or Members the products of which are subject to such investigation. Article 12.1 also requires those authorities to notify "other interested parties known to the investigating authorities to have an interest" in the investigation. As far as the timing of the notification is concerned, Article 12.1 provides that the notification shall take place when the authorities of the importing Member are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5.

7.130 In addressing this issue, we must first establish whether or not the relevant exporters were "interested parties" in the meaning of Article 12.1. If they were, we must then examine whether or not their interest was known to the investigating authority.

7.131 The phrase "interested parties" is defined in Article 6.11 of the *AD Agreement*. We consider that it is appropriate to be guided by the definition set forth in Article 6.11 since that definition is expressly provided for the purposes of the *AD Agreement* as a whole, including therefore Article 12.1. According to Article 6.11(i), exporters or foreign producers of a product subject to investigation constitute "interested parties". In an attachment to CEPA's application of 2 September 1997, a table sourced from the Associação Paulista de Avicultura listed Catarinense, CCLP, Chapecó, Comaves, Minuano, Penabranca and Perdigão as exporters to Argentina of whole poultry.<sup>108</sup> Accordingly, based on the evidence before it at the time of initiation, there is a *prima facie* case that those exporters were "interested parties" within the meaning of Article 6.11 and, therefore, Article 12.1. By definition, "interested parties" necessarily have an interest in the investigation. The evidence before the investigating authority at the time of initiation further establishes *prima facie* that those exporters' interest was known to the investigating authority, since those exporters were expressly identified in that evidence. There is therefore *prima facie* evidence that those exporters were "interested parties known to the investigating authorities to have an interest" in the investigation. Accordingly, there is a *prima facie* case that those exporters should have been notified in accordance with Article 12.1.

7.132 Argentina asserts that it was not able to notify those exporters because the requisite contact details were not available to its authorities. In support, Argentina refers to a letter dated 1 February 1999 to the Brazilian Embassy in Argentina, in which the authorities requested Brazil's cooperation "in identifying the interested producers/exporters in this investigation and providing them with the attached requests for information, in order that they should supply the Argentine Government with the details requested on the product under investigation".<sup>109</sup> In our view, this letter does not support Argentina's argument that it could not make an Article 12.1 notification to the above-mentioned exporters because it did not have the requisite contact details. Instead, this letter demonstrates to us that the Argentine authorities failed to treat the above-mentioned exporters as "known ... to have an interest" in the investigation. If it had treated them thus, the letter would have specifically identified those exporters, and specifically requested contact details for them. Instead, the letter contained only a general request for assistance, without any reference to the specific exporters at issue. We accept that there may be circumstances in which an investigating authority may not have sufficient information to allow it to notify all interested parties known to have an interest in an investigation. In this sense, the fact that an exporter is "known" by the investigating authority to have an interest in an investigation does not necessarily mean that sufficient details concerning the exporter are "known" to the investigating authority such that it may make the Article 12.1 notification. In other words, knowledge of an exporter's interest in an investigation does not necessarily imply knowledge of contact details regarding that exporter. In such circumstances, however, we consider that the nature of the Article 12.1 notification obligation is such that the investigating authority should make all reasonable efforts to obtain the requisite contact details. Sending a letter with only a

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<sup>108</sup> Exhibit BRA-1, p. 190.

<sup>109</sup> Exhibit ARG-III, p. 729-730.

very general request for assistance, without specifying the exporters for which contact details are required, does not satisfy the need to make all reasonable efforts.

7.133 Argentina also submits that "the initiation of an investigation is a general administrative procedure and published as such in the Official Journal, which constitutes sufficient notification of general scope".<sup>110</sup> In other words, Argentina suggests that, by fulfilling the requirement to publish a notice of initiation of an investigation, it has fulfilled the obligation to notify. We do not agree. Article 12.1 clearly imposes two separate obligations, one to notify and another to give public notice. These separate obligations must both be fulfilled in any given investigation. We therefore reject Argentina's argument.

7.134 We have concluded that Catarinense, CCLP, Chapecó, Comaves, Minuano, Penabranca and Perdigoão should have been notified in accordance with Article 12.1. Although questionnaires were sent to some of these exporters on 15 September 1999, we do not understand Argentina to argue that this communication constitutes notification for the purpose of Article 12.1. In any event, we are of the view that a communication made approximately eight months after initiation would not satisfy the requirements of Article 12.1. Article 12.1 provides that notification must be made "when" the authorities are satisfied that there is sufficient evidence to justify initiation. The word "when" is defined *inter alia* as "as soon as".<sup>111</sup> Thus, Article 12.1 requires notification *as soon as* the authorities are satisfied that there is sufficient evidence to justify initiation. A notification made approximately 8 months after initiation clearly does not satisfy this requirement of expediency.

(c) Conclusion

7.135 In light of the above, we conclude that Argentina violated Article 12.1 of the *AD Agreement* by failing to notify Catarinense, CCLP, Chapecó, Comaves, Minuano, Penabranca and Perdigoão of the initiation of the investigation.

**6. Failure to Give 30 Days to Reply to the Questionnaire / Failure to Provide the Injury Questionnaire – Claim 11**

(a) Arguments of the parties

7.136 Brazil alleges that Argentina violated Article 6.1.1 of the *AD Agreement* because (i) the investigating authority gave CCLP, Catarinense, Chapecó, Comaves, Minuano, Perdigoão and Penabranca only 20 days to reply to the questionnaire and (ii) these exporters never received the injury questionnaire issued by the CNCE.

7.137 Argentina acknowledges that the DCD contacted certain Brazilian exporters on 15 September 1999.<sup>112</sup> In these communications, the DCD requested those Brazilian exporters to submit evidence on, *inter alia*, sales prices in the domestic market, export prices and costs.<sup>113</sup> Argentina asserts that the DCD sent the questionnaire forms for the sole purpose of responding adequately to the general requirements and enabling exporters to attach any other information that they considered important.<sup>114</sup> According to Argentina, only one of those seven exporters, Catarinense, provided a reply to the questionnaire. Argentina alleges that it not only granted the Brazilian

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<sup>110</sup> Argentina's first written submission, para. 167.

<sup>111</sup> *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 1595.

<sup>112</sup> Argentina's first written submission, paras. 127, 133, and 134.

<sup>113</sup> Argentina's reply to Question 28 of the Panel.

<sup>114</sup> *Ibid.*

exporters a period of more than 30 days to reply to the questionnaires, but also acceded to their requests for extension by granting them whenever practicable.<sup>115</sup>

(b) Evaluation by the Panel

7.138 This claim concerns communications allegedly sent to the following seven exporters: CCLP, Catarinense, Chapecó, Comaves, Minuano, Penabranca and Perdigão. There are two issues before us. First, we will have to determine whether the DCD failed to give certain specific Brazilian exporters 30 days to reply to the dumping questionnaire it sent to them.<sup>116</sup> The second issue before us concerns whether the CNCE's injury questionnaire should also have been sent to the seven exporters identified by Brazil.

7.139 We start our analysis of the first issue by examining the text of Article 6.1.1 of the *AD Agreement*:

"Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable." (footnote in original omitted)

7.140 On its face, Article 6.1.1 is straightforward. In accordance with the first sentence of that provision, exporters or foreign producers receiving questionnaires used in an anti-dumping investigation must be given *at least* 30 days for reply. Since the second sentence of Article 6.1.1 envisages extensions of the 30-day period provided for in the first sentence of Article 6.1.1, that 30-day period is an absolute minimum that must be granted to exporters from the outset. In other words, any extension is in addition to the initial (minimum) 30-day period provided for in the first sentence.

7.141 Brazil claims that the requests for information that Catarinense, CCLP, Chapecó, Comaves, Minuano and Perdigão received on 15 September 1999 constitute questionnaires falling within the scope of Article 6.1.1, and that there was a violation of that provision because the exporters were only provided 20 days to respond to those questionnaires. Argentina does not deny that on 15 September 1999 it requested information from those exporters. According to Argentina, the information requested "consisted, *inter alia*, of sales prices in the domestic market, export prices and costs."<sup>117</sup> Nor does Argentina deny that it sent those exporters a copy of the questionnaire sent out to other exporters / foreign producers at the beginning of its investigation. Argentina asserts that it did so "for the sole purpose of responding adequately to the general requirements and enabling exporters to attach any other information that they considered important."<sup>118</sup> Only one of the exporters contacted on 15 September 1999 responded to the DCD's request for information. That exporter did so by responding to the 11 sections of the questionnaire attached to the DCD's request for information. That exporter therefore clearly understood that it had been asked to respond to the

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<sup>115</sup> Argentina's first written submission, para. 134.

<sup>116</sup> With respect to Penabranca, Brazil asserted that this exporter was notified by the DCD on 15 September 1999 and was given 20 days to reply to the questionnaire. However, Brazil asserted that from the documents of the investigation to which it had access, it was unable to find the DCD's notification to Penabranca. Brazil therefore failed to provide copies of any documentation sent by the Argentine authorities to Penabranca. We recall that, being the complainant, Brazil is obliged to present a *prima facie* case of violation. Brazil has not shown us – nor referred us to – any document on the record which proves that Penabranca was given only 20 days to reply to the questionnaire. Thus, we consider that Brazil has not presented a *prima facie* case that the DCD failed to give Penabranca at least 30 days to respond to the DCD's dumping questionnaire.

<sup>117</sup> Argentina's reply to Question 28 of the Panel.

<sup>118</sup> Argentina's reply to Question 28 of the Panel. See also Exhibit BRA-13, and Sections VII.3.1 to VII.3.6 of Exhibit BRA-15.

DCD's questionnaire. In these circumstances, we consider that the requests for information sent to Brazilian exporters on 15 September 1999 were in the form of "questionnaire[s]" within the meaning of Article 6.1.1 of the *AD Agreement*.

7.142 With respect to the time given to CCLP, Catarinense, Chapecó, Comaves, Minuano, and Perdigão to reply to the questionnaires, we should note that there is some uncertainty regarding Argentina's argument on this issue. On the one hand, in response to Question 31 from the Panel, Argentina stated that "[e]xporters have a right to the 30 days, and the 30 days are granted. The alternative examined by the Panel of initially granting a lesser period and then increasing the number of days to 30 does not reflect the system applied by Argentina. What the Argentine authority stated was that in addition to the 30 days, it granted the requested extensions. It is understood that the time-limits granted for responding to the requests should be in keeping with the nature and complexity of those requests. Thus, the initial 30-day period for replying in full to the basic investigation questionnaire at the outset is appropriate." On the other hand, the communications sent to those Brazilian exporters show that they were given 20 days to send their replies to the investigating authority.<sup>119</sup> This has not been denied by Argentina. Based on the facts before us, we are therefore in no doubt that the DCD only allowed an initial period of 20 days for the relevant questionnaire responses.

7.143 Argentina also argues that the period allowed for the relevant questionnaire responses was sufficient for the purpose of Article 6.1.1 because only one of the exporters contacted by the DCD on 15 September 1999 (i.e., Catarinense) replied to the questionnaire; the others either did not export the product concerned to Argentina (i.e., CCLP and Chapecó) or did not show an interest in the investigation and did not submit any information (i.e., Comaves, Minuano, and Perdigão).<sup>120</sup> We fail to see the relevance of this fact. The requirement in the first sentence of Article 6.1.1 is that exporters or producers shall be given at least 30 days to reply to the questionnaire, irrespective of whether or not they actually choose to do so.

7.144 Since the DCD failed to allow the exporters contacted on 15 September 1999 an initial period of at least 30 days to respond to the questionnaires sent by the DCD, Argentina failed to comply with the requirement set forth in the first sentence of Article 6.1.1.

7.145 The second question before us is whether or not Article 6.1.1 of the *AD Agreement* required the CNCE to send its injury questionnaire to the seven exporters identified by Brazil.<sup>121</sup> We read the first sentence of Article 6.1.1 to mean that if questionnaires are sent to exporters or foreign producers, they shall be given at least 30 days for reply. The first sentence of that Article does not, however, address which questionnaires should be sent to exporters or foreign producers. Accordingly, the failure to send a particular questionnaire to exporters or foreign producers does not constitute a violation of Article 6.1.1.

7.146 Finally, Argentina asserts that Brazil did not challenge in the course of the investigation the circumstances which form the basis of the claim before us.<sup>122</sup> However, the fact that an argument was not raised in the context of the investigation, in particular an argument relating to a violation of a procedural provision in the *AD Agreement*, does not preclude a party from raising it at a later stage in

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<sup>119</sup> Exhibit BRA-13.

<sup>120</sup> Argentina's first written submission, para. 133 and Argentina's second oral statement, para. 41.

<sup>121</sup> We note that, in para. 212 of its first written submission, Brazil asserts that '[t]he CNCE never notified these seven exporters of the investigation...' However, we do not understand that Brazil is claiming that Argentina acted in violation of Article 6.1.1 of the *AD Agreement* on the basis that the CNCE never notified the initiation of the investigation to those seven exporters. In our view, any such claim would be unfounded as Article 6.1.1 is clearly not a provision concerned with the notification of the initiation of an investigation.

<sup>122</sup> Argentina's first written submission, para. 136 and Argentina's second oral statement, para. 44.

a WTO panel proceeding.<sup>123</sup> We note that Argentina has not argued that this issue is not properly before us, or that it falls outside our terms of reference.

(c) Conclusion

7.147 In light of the foregoing, we conclude that Argentina violated Article 6.1.1 of the *AD Agreement* because it failed to give Catarinense, CCLP, Chapecó, Comaves, Minuano, and Perdigão at least 30 days to reply to the DCD's dumping questionnaire. We further conclude that Argentina did not violate Article 6.1.1 of the *AD Agreement* by not sending the CNCE's injury questionnaire to the exporters identified by Brazil.

**7. Failure to Make Evidence Available Promptly to Certain Brazilian Exporters – Claim 12**

(a) Arguments of the parties

7.148 Brazil alleges that, because the DCD and the CNCE did not inform Catarinense, CCLP, Comaves, Chapecó, Minuano, Penabranca and Perdigão of the initiation of the investigation and of the need to submit responses, those seven exporters did not have evidence that was presented in writing by other interested parties made promptly available to them. In the view of Brazil, evidence could not be made readily or immediately available to these exporters if they were notified to participate eight months after the investigation had been initiated and after a preliminary determination of dumping, injury and causal link had been made. Brazil further argues that companies that are aware of an ongoing investigation qualify as "interested parties participating in the investigation", even if they do not show an interest in the investigation. Brazil asserts that Catarinense, CCLP, Comaves, Chapecó, Minuano, Perdigão and Penabranca were *not* aware of the ongoing investigation until they were notified by the authorities, eight months after it had been initiated.

7.149 Argentina replies that the DCD and the CNCE met the requirement in Article 6.1.2 because they promptly made available to the interested parties participating in the investigation evidence presented in writing by other interested parties. Argentina asserts that the DCD and the CNCE could hardly have made available evidence presented in writing by the other interested parties participating in the investigation to the seven Brazilian exporters if those exporters were not part of the investigation. Argentina's obligation was to make available promptly to the other interested parties participating in the investigation evidence presented in writing by one interested party, which Argentina asserts the DCD and the CNCE did.

(b) Evaluation by the Panel

7.150 The issue before us is whether the investigating authorities were required to make available evidence presented by other interested parties to Catarinense, CCLP, Comaves, Chapecó, Minuano, Penabranca and Perdigão.

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<sup>123</sup> In this regard, we note that an argument similar to that raised by Argentina before us was examined by two GATT panels, namely *US – Norwegian Salmon AD* and *US – Norwegian Salmon CVD*. In both cases, the panels did not find any basis to refuse to consider a claim by a signatory in dispute settlement merely because the subject matter of the claim had not been raised before the investigating authorities under domestic law. (Panel Report, *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*US – Norwegian Salmon AD*"), adopted 27 April 1994, BISD 41S/I/229, para. 349 and Panel Report, *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*US – Norwegian Salmon CVD*"), adopted 28 April 1994, BISD 41S/II/576, paras. 218)



7.151 Article 6.1.2 of the *AD Agreement* reads as follows:

"Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation." (emphasis added)

7.152 We understand Article 6.1.2 to impose an obligation on investigating authorities to make evidence available promptly to other interested parties participating in the investigation.

7.153 We note that Article 6.1.2 does not refer to "interested parties" but to "interested parties participating in the investigation." Thus, the term "interested parties" is qualified by the term "participating".<sup>124</sup> In our view, had the drafters intended to extend the obligation imposed by Article 6.1.2 to all interested parties as defined in Article 6.11 of the *AD Agreement*, they would not have included the term "participating". We must first determine what the ordinary meaning of the term "participating" is. We note that Article 6.1.2 uses the term "parties participating in the investigation." The ordinary meaning of the term "participate" is "share or take part (in)".<sup>125</sup> This definition of the term "participating" suggests to us that, in order to participate in an investigation, a party must undertake some action.<sup>126</sup> In our view, the mere knowledge by an interested party of an ongoing investigation does not make that party an interested party "participating in the investigation" within the meaning of Article 6.1.2 unless it actively takes part in the investigation. Thus, we have to examine in light of the record before us whether the exporters identified by Brazil were actively taking part in the investigation. In this regard, Brazil asserts that those exporters were not even aware of the investigation until they were contacted by the DCD on 15 September 1999.<sup>127</sup> We consider that, if they were not even aware of the investigation, they could not possibly have participated in that investigation within the meaning of Article 6.1.2 of the *AD Agreement*.<sup>128</sup> Since the relevant exporters were not "participating" in the investigation, the investigating authority was not required to promptly make evidence presented in writing by other interested parties available to them.

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<sup>124</sup> Bearing in mind the text of Article 6.1.2, we cannot agree with an interpretation of Article 6.1.2 which ignores the term "participating in the investigation."

<sup>125</sup> *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 996.

<sup>126</sup> For the purposes of Article 6.1.2, we are of the view that the term "interested parties" should be interpreted in light of Article 6.11 of the *AD Agreement*. Thus, we find that the term "interested parties" in Article 6.1.2 includes "an exporter or foreign producer (...) of a product subject to investigation", such as the Brazilian exporters Catarinense, CCLP, Comaves, Chapecó, Minuano, Penabranca and Perdigão.

<sup>127</sup> "Brazil reaffirms that the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and PenaBranca were not aware of the ongoing investigation until they were notified by the authorities, eight months after it had been initiated." (emphasis in original) (Brazil's reply to Question 32 of the Panel) We recall that Brazil has failed to produce any evidence that Penabranca was contacted by the DCD on 15 September 1999 (see note 116 above). However, this is not relevant to the issue of whether or not Penabranca was participating in the investigation.

<sup>128</sup> Brazil argues that, if an investigating authority fails to notify a foreign producer or an exporter of the initiation of the investigation, the requirement set forth in Article 6.1.2 cannot possibly be met. We disagree, since the beneficiaries of the obligation in Article 6.1.2 are different from the beneficiaries of the obligation in Article 12.1. Whereas Article 6.1.2 applies in respect of interested parties "participating in the investigation", Article 12.1 applies in respect of interested parties "known to the investigating authorities to have an interest" in the investigation. Thus, a violation of Article 12.1 does not automatically entail a violation of Article 6.1.2. The fact that interested parties were not participating in the investigation because they were not notified of the initiation of the investigation does not change the fact that the beneficiaries of the obligations in Articles 12.1 and 6.1.2 are different. We consider that the Brazilian exporters were not aware of the investigation because they had not been notified in accordance with Article 12.1 of the *AD Agreement*. We recall that separate findings have been reached under Claim 10 in para. 7.135 *supra* with respect to this matter.

(c) Conclusion

7.154 For the foregoing reasons, we reject Brazil's claim that Argentina violated Article 6.1.2 by failing to promptly make available to Catarinense, CCLP, Comaves, Chapecó, Minuano, Penabranca and Perdigoão evidence presented in writing by other interested parties involved in the investigation.

**8. Interested Party's Right to Defend Its Interests – Claim 13**

(a) Arguments of the parties

7.155 Brazil argues that Catarinense, CCLP, Comaves, Chapecó, Minuano, Penabranca and Perdigoão did not have a full opportunity to defend their interests in violation of Article 6.2 of the *AD Agreement*. Brazil asserts that those exporters were only given 20 days to reply to the questionnaire, in breach of Article 6.1.1. Brazil further asserts that the CNCE did not notify those exporters of the initiation of the investigation, nor provide them with injury questionnaires. Finally, Brazil argues that, since those exporters were not notified of the investigation and of the need to submit replies to the questionnaire until eight months after the initiation of the investigation, evidence presented by other interested parties was not made available promptly to them.

7.156 Argentina replies that, once the investigation had started, Argentina made available the documentation relating to the proceedings at issue to interested parties such as the exporters and the Brazilian authorities. Argentina asserts that authorized interested parties could consult the file and obtain a copy thereof at all times. Any other party that considered itself as having an interest therein could present itself at the offices of the investigating authority with a request to consult the file. Regarding the issue of sending the notification of the initiation to certain exporters on 15 September 1999, Argentina argues that the obligation to give public notice and to notify the interested parties applies only to parties known to have an interest in the investigation. Argentina asserts that it would have been impossible to notify parties whose interest therein was not known. In this regard, Argentina asserts that the investigating authority notified the Government of Brazil of the initiation of the investigation and requested its cooperation in order to identify the interested producers/exporters. Argentina asserts that the Brazilian authorities did not inform the investigating authority of the alleged interest of the exporters which were notified on 15 September 1999 and whose right of defence was, according to Brazil, impaired. Argentina concludes that the way in which the investigating authorities provided access to the proceedings for interested parties clearly did not in any way impair the right of access to the records and even less the right of defence.

(b) Evaluation by the Panel

7.157 Brazil has raised three claims under Article 6.2 of the *AD Agreement*. One claim concerns the alleged failure by the CNCE to notify certain exporters and provide them with the injury questionnaire sent to other exporters. Upon close examination, we find that there is no reference to this claim in Brazil's Request for Establishment of this Panel.<sup>129</sup> Accordingly, this claim falls outside our terms of reference.

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<sup>129</sup> The relevant part of Brazil's Request for Establishment (document WT/DS241/3, Section B.4) provides:

"The DCD failed to give the legally required time for some of the exporters to respond to the questionnaires. The DCD also failed to promptly make available to these Brazilian exporters, evidence presented in writing by other interested parties. By not giving these exporters sufficient time to respond to the questionnaires and by not promptly making available the evidence presented by other interested parties, the DCD did not give these exporters full

7.158 With regard to the two Article 6.2 claims that are within our terms of reference, the issue before us is whether Catarinense, CCLP, Comaves, Chapecó, Minuano, Penabranca and Perdigão did not have a full opportunity for the defence of their interests because (a) the DCD did not give them at least 30 days to reply to the dumping questionnaire, and (b) the DCD and the CNCE did not make available promptly to them evidence presented by other interested parties.

7.159 Article 6.2 of the *AD Agreement* provides in relevant part:

"Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."

7.160 The parties agree that, while Article 6.2 clearly imposes a general duty on investigating authorities to ensure that interested parties have a full opportunity throughout an anti-dumping investigation for the defence of their interests, it provides no specific guidance as to what steps investigating authorities must take in practice.<sup>130</sup> We agree.<sup>131</sup> We also agree with previous panels<sup>132</sup> and the Appellate Body<sup>133</sup> in that we do not consider it necessary for us to address claims under Article 6.2 when we have already made findings concerning the conduct allegedly violating Article 6.2 under other, more specific provisions of the *AD Agreement*.

7.161 Accordingly, we shall only consider Brazil's claims under Article 6.2 to the extent that we have not made findings regarding the factual situation at issue under other provisions of the *AD Agreement* which specifically address that situation. Regarding Brazil's argument that the DCD did not give CCLP, Catarinense, Chapecó, Comaves, Minuano, Penabranca and Perdigão at least 30 days to reply the dumping questionnaire, we recall that we made findings under Article 6.1.1.<sup>134</sup> We have also made findings regarding Brazil's contention that the DCD and the CNCE did not make available promptly to Catarinense, CCLP, Comaves, Chapecó, Minuano, Penabranca and Perdigão evidence presented by other interested parties under Article 6.1.2.<sup>135</sup> Accordingly, we have already made findings regarding the factual situations forming the basis of Brazil's Article 6.2 claims under other provisions of the *AD Agreement* which specifically address those factual situations.

(c) Conclusion

7.162 For the foregoing reasons, we consider that it is not necessary for us to make separate findings with respect to Brazil's Article 6.2 claims.

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opportunity to defend their interests in this investigation, thereby violating **Articles 6.1.1, 6.1.2 and 6.2.**" (emphasis in original)

<sup>130</sup> Brazil's first written submission, para. 222 and Argentina's first written submission, para. 150.

<sup>131</sup> We note that a similar view was expressed by the *Guatemala – Cement II* panel. (Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.162)

<sup>132</sup> See e.g., Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.162 and Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities ("US – 1916 Act (EC)")*, WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, para. 6.76.

<sup>133</sup> The Appellate Body stated in *EC – Bananas III (Ecuador)* that "[a]lthough Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures." (Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by Ecuador ("EC – Bananas III (Ecuador)")*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:III, 1085, para. 204).

<sup>134</sup> See paras. 7.138-7.146 *supra*.

<sup>135</sup> See paras. 7.150-7.153 *supra*.

**9. Failure to Provide the Full Text of the Written Application in a Timely Manner – Claim 14**

(a) Arguments of the parties

7.163 Brazil argues that the investigating authority failed to provide the text of the application to the exporters and to the Government of Brazil, thus making it impossible for the exporters to prepare arguments in the defence of their interests and to devise a strategy to defend against the allegations made by petitioner in the application. Brazil argues that the requirement under Article 6.1.3 of the *AD Agreement* with respect to known exporters and authorities of the exporting Member cannot be met by simply making the application available to the exporters and to the authorities of the exporting Member. In the view of Brazil, that requirement can only be met if the investigating authority *actively* provides the full text of the written application to the exporting Member and to the exporters involved in the investigation. Brazil asserts that its interpretation of the obligation imposed by Article 6.1.3 is confirmed by the fact that the same provision requires that the text of the application be "made available" to "other interested parties involved." In the view of Brazil, if the requirement imposed on the investigating authority was to be understood as being the same for the exporters and exporting Member as that for other interested parties, there would be no need for the use of different language in Article 6.1.3 of the *AD Agreement*. Brazil also argues that, even if "provide" had to be interpreted as "make available", the investigating authority would have violated Article 6.1.3 because the notification that the full text of the written application was available was not sent "as soon as an investigation has been initiated."

7.164 Argentina replies that Article 6.1.3 does not require an investigating authority "enviar", i.e., to "send", the full text of the application but "facilitar", i.e., to "provide", it to the known exporters and to the authorities of the exporting Member. Argentina asserts that, once the investigation was initiated, it made the records of the proceedings available to authorized interested parties. In so doing, Argentina states that it met the requirement set forth in Article 6.1.3. Argentina asserts that, considering that the Brazilian authorities were notified on 1 February 1999 and the notice of initiation of the investigation against poultry from Brazil was published in the Official Bulletin on 25 January 1999, the notification to the Government of Brazil took place five working days after the date of initiation of the investigation.

7.165 Brazil asserts that the word "facilitar" in the Spanish version of Article 6.1.3 of the *AD Agreement* should be understood to mean "proporcionar o entregar", a definition which is entirely compatible with that of the verb to "provide" in the English version of the *AD Agreement*.

(b) Evaluation by the Panel

7.166 The issue before us concerns the interpretation of the obligation imposed by the term "provide" in the first sentence of Article 6.1.3.

7.167 The text of Article 6.1.3 reads as follows:

"As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5." (footnote in original omitted)

7.168 The obligation in Article 6.1.3 is clear. Subject to the proviso of protection of confidential information, investigating authorities must *provide* the text of the written application to the known

exporters and to the authorities of the exporting Member. They must also *make it available*, upon request, to other interested parties. This obligation applies as soon as the investigation has been initiated.

7.169 Argentina is of the view that it satisfied its "obligation [under Article 6.1.3 of the *AD Agreement*] by making the records of the proceedings available to authorized interested parties."<sup>136</sup> In the view of Argentina, the term "*facilitar*" means "to permit access to a thing or element that is of interest to the other party".<sup>137</sup> In other words, in the view of Argentina the verb to "provide" in Article 6.1.3 has the meaning of permitting access to a thing or element that is of interest to the other party. We note that the term "provide" is defined as, *inter alia*, "supply; furnish".<sup>138</sup> "Provide" might consequently be understood as supply or furnish the text of the application. Bearing this definition in mind, we consider that the term "provide" would require a positive action on the part of the investigating authority akin to that of furnishing or supplying something (i.e., the full text of the application) to someone (i.e., known exporters and authorities of the exporting Member). Therefore, we cannot agree with Argentina that the term "provide" in the English text of the *AD Agreement* or "*facilitar*" in its Spanish text can be interpreted as meaning "permitting access". In our view, an investigating authority cannot comply with the obligation to "provide the (...) application (...) to the known exporters and to the authorities of the exporting Member" simply by permitting them access to that application.

7.170 Our interpretation is confirmed by the words chosen by the drafters of Article 6.1.3. In this regard, we note that Article 6.1.3 provides for two different obligations, depending on the party concerned. Article 6.1.3 provides that the full text of the written application must be *provided* to the known exporters and to the authorities of the exporting Member. With respect to other interested parties involved, that provision imposes the obligation on the investigating authority to *make the application available* to those other interested parties. In our view, with the use of different verbs in the first sentence of Article 6.1.3, "provide" on the one hand and "make available" on the other, the drafters intended to impose different obligations on investigating authorities depending on the party concerned. The first obligation requires a positive action on the part of the investigating authority, while the second envisages only a passive act.

7.171 Argentina argues further that it understands the term "*facilitar*" in the Spanish text of Article 6.1.3, on the basis of the accepted meaning in Spanish, as meaning to permit access to a thing or element that is of interest to the other party.<sup>139</sup> "*Facilitar*" is defined *inter alia* as "proporcionar o entregar", i.e. to "give".<sup>140</sup> The term "*facilitar*" in the Spanish text might therefore be understood to require giving the full text of the written application to the known exporters and to the authorities of the exporting Member. This is consistent with our conclusion of the meaning of the term "provide" in the English text of the *AD Agreement*. This conclusion is again confirmed by the choice of the words of the drafters in the Spanish text of Article 6.1.3. We found that the obligation imposed on the investigating authority with respect to known exporters and the authorities of the exporting countries is to "*facilitar*" the full text of the application. By contrast, regarding other interested parties involved, Article 6.1.3 provides that "*las autoridades lo [el texto completo de la solicitud escrita] pondrán a disposición de las otras partes interesadas intervinientes que lo soliciten*", i.e., the authorities shall make it [the full text of the application] available, upon request, to other interested parties involved. An analysis of the Spanish text of Article 6.1.3 therefore does not support Argentina's position. For this reason, the argument of Argentina must fail.

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<sup>136</sup> Argentina's first written submission, paras. 164 and 165.

<sup>137</sup> Reply of Argentina to Question 37 of the Panel.

<sup>138</sup> *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 1102.

<sup>139</sup> Argentina's reply to Question 37 of the Panel.

<sup>140</sup> *Diccionario de la Lengua Española* (Espasa Calpe, 1992), p. 943.

7.172 We must next examine whether Argentina actively "provided" the full text of the application to the known exporters and the Brazilian authorities. Brazil asserts that the investigating authority never provided known Brazilian exporters and the Brazilian authorities the full text of the application.<sup>141</sup> Argentina asserts that "[t]he Argentine authorities satisfied that obligation by making the records of the proceedings available to authorized interested parties."<sup>142</sup> Through this statement, Argentina acknowledges that the investigating authority merely made the full text of the written application available to the known exporters and to the Brazilian authorities. This, however, does not meet the requirement to actively "provide" the written application in the sense of Article 6.1.3. Finally, we examined the record of the investigation as presented to us.<sup>143</sup> We found no indication that the Argentine authorities provided the text of the application to known exporters and the authorities of Brazil. We consider therefore that Argentina did not provide the full text of the application to the known Brazilian exporters and to the authorities of the exporting Member.

(c) Conclusion

7.173 Having determined that Argentina did not actively provide the full text of the written application to known Brazilian exporters and to the Brazilian authorities, we find that Argentina acted inconsistently with its obligation under Article 6.1.3 of the *AD Agreement*.

## 10. Use of Facts Available – Claims 15, 17 and 19

7.174 These claims concern the DCD's use of "facts available" within the meaning of Article 6.8 of the *AD Agreement*, and relate to the DCD's rejection of certain data submitted by exporters.

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<sup>141</sup> Brazil's first written submission, para. 230. See also, Brazil's replies to Questions 34, 35 and 36 from the Panel.

<sup>142</sup> Argentina's first written submission, para. 164. In the same vein, para. 165 reads as follows:

'Once the investigation had started, Argentina made available to the interested parties – *inter alia* the exporters, importers and the authorities of the country concerned – the documentation relating to the proceedings at issue. Authorized interested parties could thus consult the file and obtain a copy thereof at all times, that is, not only of the application itself but also of all the other records on file.' (emphasis added)

<sup>143</sup> In particular, we examined a communication dated 1 February 1999 sent by the DCD to the Mission of Brazil in Argentina (Exhibit ARG-III) as well as communications sent by the CNCE and the DCD to the Brazilian exporters Avipal, Frangosul, Nicolini, Sadia and Seara on 10 and 16 February 1999, respectively (Exhibits BRA-8 and BRA-9). Even if these communications had enclosed the full text of the written application, which they did not, Argentina would have been found to have acted in violation of Article 6.1.3 of the *AD Agreement* because, with regard to *those five known exporters*, Argentina would have failed to provide the full text of the application as soon as the investigation had been initiated, as mandated by Article 6.1.3 of the *AD Agreement*. We note that the communications were sent more than *15 days* after the publication of the initiation of the investigation in the Official Bulletin (25 January 1999). We agree with the view expressed by the *Guatemala – Cement II* panel that:

"given the nature of the obligation in Article 6.1.3 [the] sending (...) of the application even 8 days after the initiation of investigation is not adequate to fulfill the requirement that it be done "as soon as an investigation has been initiated."" (Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.104)

(b) Arguments of the parties

(i) *Claim 15*

7.175 Brazil challenges the DCD's determination that there were differences in the physical characteristics of poultry sold in Brazil and Argentina respectively, despite Avipal, Frangosul and Sadia informing the DCD through their questionnaire responses that poultry sold to Argentina was identical to the poultry sold in Brazil. Brazil asserts that Catarinense only reported a difference in respect of broiler poultry, in the sense that its broiler poultry sold in Argentina did not contain head and feet, while its broiler poultry sold in Brazil contained head but not feet. Brazil asserts that the relevant information was submitted by the exporters within a reasonable period and that the DCD did not question the exporters on that information. Brazil alleges that the questionnaire did not specify that information on the product description required supporting documentation. In addition, Brazil asserts that, throughout the investigation, the DCD never requested any supporting information in order to verify the product description reported by those exporters.

7.176 Argentina asserts that it based its findings on all information which was verifiable and appropriately submitted. Argentina acknowledges that the exporters and the Brazilian authorities commented on the justification of the adjustment for physical characteristic differences. However, Argentina asserts that those arguments were unsubstantiated by technical data. Argentina also contends that the appropriateness of the adjustment is further demonstrated by the fact that those comments do not question the need for such adjustment. Argentina also acknowledges that the DCD received comments concerning the incidence of freezing and/or chilling at the time of determining the normal value for the product concerned. However, Argentina alleges that those comments were not supported with evidence either.

7.177 Brazil refers to the *Argentina – Ceramic Tiles* panel finding that an investigating authority may not disregard information and resort to facts available on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided unless the investigating authority has clearly requested that the party provide such supporting documentation. Reading the general instructions in the questionnaire, Brazil does not believe that the DCD provided sufficient information on the precise supporting documentation that it expected to receive from the exporters regarding product description / product differences. Brazil also asserts that submitting supporting documentation for all the information provided in the questionnaire response would impose an unreasonable burden on the exporters and make it impossible for them to reply within the 30-day period.

(ii) *Claim 17*

7.178 This claim concerns the DCD's rejection of export price data reported by four exporters. Brazil asserts that Avipal, Catarinense, Frangosul and Sadia submitted information on export price in their questionnaire responses. Brazil contends that the last two companies submitted export price data for individual export transactions, with respective invoices. In so doing, Brazil argues that the four exporters have provided information to the best of their abilities and have never refused to cooperate with the investigating authority. In spite of the above, Brazil asserts that information on export prices submitted by those exporters was rejected and information from the Secretariat for Agriculture, Fisheries and Food was used instead as a source to determine their export prices.

7.179 Argentina states that each time the parties supplied the information in the prescribed timely and appropriate fashion, the information was used. Argentina further asserts that the DCD had to resort to other sources of information in cases where any aspect of those requirements had not been met. With respect to Catarinense and Frangosul, Argentina asserts that the information was not used simply because, in Frangosul's case, the data provided was insufficient and was submitted after the

deadline that would have permitted its use had expired<sup>144</sup> and, in Catarinense's case, because the data was insufficient.<sup>145</sup>

7.180 According to Brazil, Argentina "explains, for the first time, that the information provided by Frangosul and Catarinense was not used simply because in Frangosul's case the information submitted was insufficient and outside the deadline, and in the case of Catarinense because the information was considered insufficient." Brazil also asserts that this explanation given by Argentina seems to contradict Argentina's own response that Frangosul provided supporting documentation for the export prices reported in the investigation.

(iii) *Claim 19*

7.181 This claim concerns the DCD's decision not to use normal value submitted by two exporters. Brazil asserts that information required in order to determine normal value was submitted by Catarinense and Frangosul. However, it was not used by the DCD. To the extent that Argentina may argue that the information was not received within the deadlines established by the authority, Brazil asserts that a reasonable period will not be commensurate with the pre-established deadlines if the investigating authority has not acted in a reasonable, objective and impartial manner. In this regard, Brazil asserts that Frangosul was subject to 'an excessive burden' in having to present dumping data from 1996 to 1999. Brazil also notes that Frangosul invited the investigating authority to verify the information in its response. Brazil contends that the late reply to the questionnaire by Catarinense was due to the fact that it was notified of the existence of the investigation approximately eight months after its initiation. Brazil also takes issue with the fact that the normal value used instead was for chilled poultry *with* head and feet. This in the view of Brazil was wrong because Catarinense and Frangosul had reported to have sold the product in the domestic market *without* head and feet.

7.182 Argentina asserts that the DCD analysed and examined all the information before it that was consistent with the principles enshrined in the *AD Agreement*, i.e., information that was properly provided within the required time-frame and was accompanied by proper evidence. Argentina alleges that, as was pointed out in the Final Affirmative Dumping Determination, the data received from Catarinense was presented on aggregate basis, without any supporting documentation. Moreover, Argentina asserts that Catarinense did not have authorized legal status. Regarding Frangosul, Argentina asserts that this exporter never presented any supporting documentation for domestic sales and that its final submission arrived beyond the deadline for analysing the information.

(c) Evaluation by the Panel

(i) *Claim 15*

7.183 We note that the facts relating to Claim 15 are substantially identical to those which form the basis of our finding in respect of Claim 25. Since we concluded under Claim 25 that those facts gave rise to a violation of Article 2.4 of the *AD Agreement*, it is not necessary for us to rule on those same facts in the context of Claim 15.

(ii) *Claim 17*

7.184 The issue before us is whether the DCD was entitled to disregard export price data submitted by Avipal, Catarinense, Frangosul and Sadia. With respect to Catarinense, we find at paras. 7.190-7.193 below that the DCD was entitled to reject normal value data submitted by that exporter because it had failed to comply with an accreditation obligation. For the same reason, we find that the DCD

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<sup>144</sup> Argentina's first written submission, paras. 187-200.

<sup>145</sup> *Id.*, para. 203.



was also entitled to reject the export price data submitted by that exporter. We therefore reject Brazil's Claim 17 in respect of Catarinense.

7.185 With regard to the DCD's treatment of the export price data submitted by Avipal, Frangosul and Sadia, we first note that Article 6.8 of the *AD Agreement* governs the use by an investigating authority in an anti-dumping investigation of the "facts available". That Article provides as follows:

"In case any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of facts available. The provisions of Annex II shall be observed in the application of this paragraph."

7.186 Paragraphs 5 and 7 of Annex II to the *AD Agreement* are also relevant to our examination of this claim. They provide as follows:

"5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

(...)

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

7.187 In examining the record before us, we find that Avipal, Frangosul and Sadia did submit information on export prices.<sup>146</sup> Argentina asserts that it was justified in disregarding information which was not submitted in a timely manner, or in the appropriate fashion.<sup>147</sup> Argentina also argued during these proceedings that "[t]he implementing authority obviously cannot examine claims put forward by the parties without supporting documentation that can be verified."<sup>148</sup> We asked Argentina to prove that the investigating authority based its rejection of the relevant export price data on these reasons. Argentina replied that the explanation could be found in the Report of 4 January 2000 and in the Final Affirmative Dumping Determination, without pointing to any particular statement therein.<sup>149</sup> We therefore examined these documents, in particular Sections V.3 (Submissions made by Foreign Companies), VII.3 (Analysis of the Submissions made by Brazilian Exporting Companies after the Initiation of the Investigation) and VIII.2 (Elements for the Determination of the f.o.b. Export Price) thereof. We could not find in any of those sections references to any of the reasons provided by Argentina which could justify the DCD's decision to

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<sup>146</sup> Exhibit BRA-15, Sections V.3.1 (Sadia), V.3.2 (Avipal), V.3.5 (Frangosul) and VII.3.2 (Catarinense).

<sup>147</sup> We note that, in particular, Argentina asserts that Frangosul's export data was insufficient and was submitted after the deadline.

<sup>148</sup> Argentina's first written submission, para. 178. See also Argentina's second written submission, paras. 54-56.

<sup>149</sup> Argentina's reply to Question 40 of the Panel.

disregard the export price data received from Avipal, Frangosul and Sadia.<sup>150</sup> In light of these circumstances, we consider that Argentina's arguments concerning the reasons why the DCD rejected the export price data submitted by Avipal, Frangosul and Sadia constitute *ex post* rationalization which we should not take into account for the purpose of determining whether the Argentine authorities complied with their obligations under Article 6.8.<sup>151</sup>

7.188 In light of the above, we uphold Brazil's claim that Argentina violated Article 6.8 in rejecting the export price data submitted by Avipal, Frangosul and Sadia.

(iii) *Claim 19*

7.189 This claim concerns the DCD's rejection of normal value data submitted by Catarinense and Frangosul.

- *Catarinense*

7.190 Based on the record before us, we note that Catarinense was contacted by the DCD on 15 September 1999. Argentina acknowledges that it sent Catarinense a copy of the original questionnaire, to which Catarinense replied on 3 November 1999. Brazil asserts that information on normal value submitted by Catarinense should have been used as a basis for the determination of the normal value for this exporter. Argentina argues that the DCD was justified in disregarding data submitted by Catarinense because (a) this exporter had not accredited itself in accordance with domestic legislation,<sup>152</sup> and (b) information on domestic prices was submitted in aggregated form and without supporting documentation.<sup>153</sup>

7.191 We will examine first Argentina's argument that Catarinense had not accredited itself in accordance with domestic legislation. Argentina argues that, in accordance with Law No. 19,549 on Administrative Procedures, a company must have authorized legal status in order to appear before the

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<sup>150</sup> The only reason that we could find in the Final Affirmative Dumping Determination for the rejection of the exporters' data and the use of data provided by the Livestock Directorate of the Secretariat for Agriculture, Livestock, Fisheries and Food instead is that the DCD considered it appropriate to determine the f.o.b. export price based on information from the Livestock Directorate because it came from the most detailed and complete source. (Exhibit BRA-15, Section VIII.2.3) We do not consider that such a justification or reasoning provided by the DCD is sufficient to meet the requirements of Article 6.8. In particular, such reasoning does not indicate that the relevant exporters significantly impeded the investigation. Nor does it indicate that the relevant exporters refused access to, or otherwise did not provide, necessary information within a reasonable period.

<sup>151</sup> In the same vein, we note that the panel in *Argentina – Ceramic Tiles* found when examining a claim raised under Article 6.8:

"(...) Under Article 17.6 of the AD Agreement we are to determine whether the DCD established the facts properly and whether the evaluation performed by the DCD was unbiased and objective. In other words, we are asked to review the evaluation of the DCD made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made." (emphasis in original, footnote not included) (Panel Report, *Argentina – Ceramic Tiles*, *supra*, note 66, para. 6.27)

<sup>152</sup> Argentina's first written submission, para. 202.

<sup>153</sup> *Id.*, para. 189.

DCD.<sup>154</sup> We note that the DCD informed that exporter that it had to have authorized legal status in conformity with Law No. 19,549 on 8 November 1999.<sup>155</sup> There is no evidence on the record to suggest that Catarinense pursued this matter with the DCD, or made any other attempt to comply with the accreditation obligation. The issue before us is therefore whether the DCD was justified in disregarding data submitted by Catarinense on the basis that it did not have authorized legal status. We do not find any provision in the *AD Agreement* which expressly disallows an investigating authority from imposing basic procedural requirements such as accreditation. We observe that paragraph 3 of Annex II to the *AD Agreement* provides that "[a]ll information which is (...) appropriately submitted so that it can be used in the investigation without undue difficulties (...) should be taken into account when determinations are made." We consider that the reference to the terms "appropriately submitted" is designed to cover *inter alia* information which is submitted in accordance with relevant procedural provisions of WTO Members' domestic laws. In our view, paragraph 3 of Annex II to the *AD Agreement* can be interpreted to mean that information not "appropriately submitted" in accordance with relevant procedural provisions of WTO Members' domestic laws may be disregarded. In the circumstances of this case, we consider that information submitted by Catarinense was not "appropriately submitted" within the meaning of paragraph 3 of Annex II to the *AD Agreement* because Catarinense had not complied with Argentina's accreditation requirements. Accordingly, the DCD was entitled to reject that information.

7.192 Citing a finding of the *Guatemala – Cement II* panel, Brazil argues that the DCD did not act in a reasonable, objective and impartial manner with respect to Catarinense. We disagree, since the DCD explicitly reminded Catarinense of the need to comply with the accreditation requirement. Brazil also refers to paragraphs 5 and 7 of Annex II to the *AD Agreement* in support of its claim. However, we fail to see how Catarinense could be said to have "acted to the best of its ability" (Annex II, paragraph 5), since it failed to respond in any way to the DCD's letter of 8 November 1999. Nor do we see the relevance of paragraph 7 of Annex II, since Brazil has failed to explain how the exercise of "special circumspection" by the DCD would have remedied the fact that Catarinense failed to comply with Argentina's accreditation requirement.

7.193 Nor can we agree with Brazil that normal value data provided by Catarinense was more accurate than the normal value data provided by the applicant on account of the particular product characteristics. In our view, once data from the exporter cannot be used in accordance with Article 6.8 and Annex II to the *AD Agreement*, an investigating authority is entitled to use information from other sources, including the applicant. The fact that, as argued by Brazil, information supplied by the applicant on normal value concerns a product (poultry with head and feet) which is not identical to that exported by Catarinense (poultry without head and feet) in our view does not impede the investigating authority's use of the applicant's information as long as a fair comparison is made. Brazil has not argued under this claim that the comparison was not fair. For this reason, we must reject Brazil's argument.

- *Frangosul*

7.194 We note that Frangosul was first contacted by the DCD on 16 February 1999. This exporter submitted a reply to the questionnaire on 27 April 1999, after the deadline initially provided by the DCD. With respect to normal value, Frangosul submitted information on sales in the domestic market corresponding to years 1996, 1997, 1998 and the first three months of 1999, reported on a monthly basis.<sup>156</sup> On 12 July 1999, the DCD requested documentation supporting sales made in the domestic market. On 19 August 1999, Frangosul replied that it was not possible to send copies of all invoices.

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<sup>154</sup> Exhibits ARG-XIII and BRA-28, p. 2795.

<sup>155</sup> Exhibit ARG-XIII.

<sup>156</sup> There is no indication that, at that point in time, Frangosul informed the DCD that the high number of invoices impeded it to submit more detailed information and supporting documentation.

Frangosul referred to the list of invoices already provided in its questionnaire response. On 12 October 1999, the DCD requested Frangosul to submit a list of invoices covering all transactions in the domestic market during the period of investigation.<sup>157</sup> In this communication, it is stated that the list of invoices submitted in the questionnaire response was incomplete. Frangosul failed to respond within the applicable deadline.<sup>158</sup> On 18 November 1999, the DCD renewed its request.<sup>159</sup> The required list was submitted by Frangosul on 30 December 1999, outside the second deadline established in DCD's communication of 18 November 1999.<sup>160</sup>

7.195 Brazil asserts that Frangosul did submit the information "within a reasonable period". In support of its claim, Brazil cites the following portion of the *US – Hot-Rolled Steel* panel report:

"The AD Agreement establishes that facts available may be used if necessary information is not provided within a reasonable period. What is a "reasonable period" will not, in all instances be commensurate with pre-established deadlines set out in general regulations. We recognize that in the interest of orderly administration investigating authorities do, and indeed must establish deadlines. However, a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied."<sup>161</sup>

7.196 In light of this report, Brazil asserts that "Article 6.8 suggests a degree of flexibility by authorities that involves consideration of all of the circumstances of a particular case." (emphasis in original)<sup>162</sup> We agree with Brazil. However, in examining the facts in this case we are of the view that Frangosul did not submit "the necessary information within a reasonable period".<sup>163</sup> First, we note that there is no indication on the record that Frangosul informed the DCD of the difficulties of submitting documentary evidence regarding all domestic transactions until approximately seven months after the initiation of the investigation (19 August 1999). Other exporters, namely Avipal, Nicolini, Sadia and Seara, instead informed the investigating authority of such difficulties much earlier in the investigation.<sup>164</sup> We consider that Frangosul could and should have been aware of that problem much before 19 August 1999, and hence should have informed the DCD much before that date. Brazil argues that what is a "reasonable period" for the submission of data to an investigating authority will not, in all instances, be commensurate with pre-established deadlines set out in general regulations. We agree. However, we recall that the *AD Agreement* imposes a deadline for the conclusion of an investigation in Article 5.10. We consider that, if an investigation is to be completed in conformity with the timeframe provided for in Article 5.10, deadlines are indeed necessary, as recognized by the *US – Hot-Rolled Steel* panel. In the case at stake, we note that a complete list of all domestic sales transactions was requested on 12 October 1999. As no reply was received within the

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<sup>157</sup> Argentina's first written submission, para. 197 and Brazil's reply to Question 41 of the Panel.

<sup>158</sup> We note Argentina's argument that, in the absence of a specific deadline being contained in the communication sent to Frangosul, the general deadline provided for in Law No. 19,549 applies. Thus, the deadline for the submission of the information requested through that communication was 10 days.

<sup>159</sup> See *supra* note 157.

<sup>160</sup> Exhibit ARG-XXX.

<sup>161</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")*, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R, at para. 7.54. The Appellate Body upheld the Panel's findings with respect to Article 6.8 and Annex II of the *AD Agreement*. (Appellate Body Report, *US – Hot-Rolled Steel*, WT/DS184/AB/R, adopted 23 August 2001, para. 240)

<sup>162</sup> Brazil's reply to Question 41 of the Panel.

<sup>163</sup> We note that Brazil has not argued before us that the information requested by the DCD was not "necessary" within the meaning of Article 6.8. We consider that it was, as the determination of the normal value depended on it.

<sup>164</sup> Exhibit BRA-28, ps. 2773 (Sadia), 2777 (Avipal), 2781 (Nicolini) and 2783 (Seara).

deadline provided, the DCD sent a reminder on 18 November 1999. Again, we note that the response was not provided within the second deadline set by the DCD. As Brazil acknowledges, the response to the 12 October request was finally submitted to the DCD on 30 December 1999,<sup>165</sup> i.e., more than two months after that list had been requested. Brazil asserts before us that "Frangosul had to go back and collect specific information for the period January 1998 through January 1999, which sometimes meant manually having to search the many invoices (over 320.000) to find the information requested by the authority." To the extent that Brazil's argument is that, following the DCD's request of 12 October 1999, Frangosul had informed the DCD that it could not submit the data requested by that authority due to the large number of domestic sales transactions involved, we consider that Brazil's argument shall be rejected because we have not found any indication on the record before us that Frangosul made that argument in response to the DCD's request of 12 October. However, we note that an argument similar to that raised by Brazil before us is contained in a Frangosul communication sent in response to a DCD request dated 12 July 1999 in which the investigating authority requested Frangosul to submit "supporting documentation for all the sales transactions in the domestic market...".<sup>166</sup> (emphasis added) Taking this into account, we consider that the statement of Frangosul referred to by Brazil relates to another (previous) request of the DCD regarding the submission of *supporting documentation*, and not the DCD's 12 October request for a list of domestic sales transactions. This conclusion is bolstered by the fact that the statement referred to by Brazil is contained in a document which predates the DCD's request of 12 October 1999. Hence, we consider that the argument presented by Brazil before us does not justify Frangosul's belated submission of the list of domestic sales transactions. As Brazil has not presented any other justification for that belated submission, and bearing in mind all the circumstances of this particular case, we are of the view that Frangosul did not submit necessary information within a "reasonable period" as set forth in Article 6.8. For the same reasons, we find that the information was not supplied "in a timely fashion" within the meaning of paragraph 3 of Annex II.

7.197 As in the case of Catarinense, Brazil refers to paragraphs 5 and 7 of Annex II in support of its claim. Bearing in mind the facts as described in para. 7.196 *supra*, in particular Frangosul's belated reply to the DCD's request of 12 October 1999, we cannot consider that Frangosul acted to the best of its ability in the sense of Annex II, paragraph 5. Nor do we see how "special circumspection" in the sense of Annex II, paragraph 7, would have required the DCD to accept Frangosul's normal value data given the circumstances set forth above. Brazil argues that the normal value data provided by Frangosul was more accurate than the normal value data provided by the applicant on account of the particular product characteristics. An identical argument has been examined in para. 7.193 *supra* concerning Catarinense. For the reasons set forth in that paragraph, we also reject this argument.

(d) Conclusion

7.198 For the foregoing reasons, we uphold Brazil's Claim 17 that Argentina violated Article 6.8 in rejecting the export price data submitted by Avipal, Frangosul and Sadia. We reject Brazil's Claim 19 that Argentina violated Article 6.8, and paragraphs 3, 5 and 7 of Annex II to the *AD Agreement* by not using the normal value data reported by Catarinense and Frangosul. We make no findings in respect of Brazil's Claim 15.

**11. Failure to Provide a Public Notice of Conclusion of an Investigation – Claims 16, 18 and 20**

7.199 These claims raise issues under Article 12.2.2 of the *AD Agreement*. They concern alleged omissions from Argentina's public notice of conclusion of the investigation.

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<sup>165</sup> See *supra*, note 162.

<sup>166</sup> *Ibid.*

(a) Arguments of the parties

(i) *Claim 16*

7.200 According to Brazil, Article 12.2.2 mandates that a public notice of conclusion of the investigation contain, or otherwise make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures. In the view of Brazil, the established margins of dumping as well as a full explanation of the reasons for the methodology used in their establishment and comparison of normal value and export price are considered as relevant information. In spite of this obligation, Brazil asserts that the DCD provided no explanation of why it made an adjustment to normal value for differences in the physical characteristics of poultry sold in Brazil and that sold in Argentina, even though the product description provided by certain exporters indicated that such differences did not exist.

7.201 Argentina argues that the Report of 4 January 2000 and the Final Affirmative Dumping Determination, "throughout the text and under different headings," dealt in detail with each of the exporters' submissions in order to reach a reasoned conclusion as to the investigating authority's motives for excluding submissions that lacked sufficient supporting documentation or were made after the deadline had expired.

(ii) *Claim 18*

7.202 Brazil asserts that, contrary to Article 12.2.2, the public notice of conclusion contained no explanation of why the investigating authority did not establish export price based on the information provided by Sadia, Avipal, Frangosul and Catarinense.

7.203 As in the case of Claim 16, Argentina argues that the Report of 4 January 2000 and the Final Affirmative Dumping Determination, "throughout the text and under different headings," dealt in detail with each of the exporters' submissions in order to reach a reasoned conclusion as to the investigating authority's motives for excluding submissions that lacked sufficient supporting documentation or were made after the deadline had expired.

(iii) *Claim 20*

7.204 Brazil claims that the public notice of conclusion did not adequately explain why the DCD did not use normal value submitted by Frangosul and Catarinense.

7.205 Similar to Claim 16, Argentina argues that the Report of 4 January 2000 and the Final Affirmative Dumping Determination, "throughout the text and under different headings," dealt in detail with each of the exporters' submissions in order to reach a reasoned conclusion as to the investigating authority's motives for excluding submissions that lacked sufficient supporting documentation or were made after the deadline had expired.

(b) Evaluation by the Panel

7.206 In examining similar claims, the *Guatemala – Cement II* panel expressed its view that:

"the issue of Guatemala's compliance with the transparency obligations deriving from its decision to impose definitive anti-dumping measures on imports of cement from Mexico would only be relevant if the decision to impose the measure itself had been consistent with the AD Agreement. Therefore, having found that Guatemala infringed the substantive provisions of the AD Agreement in their decision to impose an anti-dumping measure in this case, we consider that it is not necessary for us to

rule on whether Guatemala complied with its transparency obligations under Article 12.2 and 12.2.2 with respect to the imposition of a measure already found not to be consistent with Guatemala's WTO obligations."<sup>167</sup>

7.207 We agree with that panel. In our view, it is not necessary to determine whether a Member complied with the transparency requirements of Article 12.2.2 in imposing an anti-dumping measure if that measure has already been found to violate various substantive provisions of the *AD Agreement*. Since we have already found that Argentina's anti-dumping measure is inconsistent with various substantive provisions of the *AD Agreement*, it is not necessary for us to determine whether or not Argentina complied with the transparency requirements of Article 12.2.2 in imposing that measure.

(c) Conclusion

7.208 For the foregoing reasons, we do not consider it necessary to make any findings on Claims 16, 18 and 20.

## 12. Calculation of an Individual Margin of Dumping – Claim 22

(a) Arguments of the parties

7.209 Brazil asserts that the investigating authority did not calculate individual dumping margins for Catarinense and Frangosul in spite of the fact that these companies submitted data on normal value and export price within a reasonable period of time. Brazil asserts that the investigating authority did not provide an explanation, either in the final determination or in any other document on the record of the investigation, as to why, in this case, it did not determine an individual dumping margin for Catarinense and Frangosul. In the view of Brazil, by failing to determine an individual margin of dumping for those two exporters, and by applying instead the dumping rate for “all others”, Argentina acted inconsistently with the general rule set forth in Article 6.10 of the *AD Agreement*.

7.210 Argentina disagrees with Brazil's presentation of the facts. With respect to Catarinense, Argentina submits that, as stated in the Final Affirmative Dumping Determination, the data received from the exporter was presented on an aggregate basis, without any supporting documentation. According to Argentina, Catarinense failed to provide information on sales in the Brazilian market. Argentina asserts that the only supporting documentation that Catarinense submitted was a list of invoices for exports to Argentina. In the case of Frangosul, Argentina asserts that several notifications were sent to the exporter with a request to provide the lists of *Notas fiscales* (invoices), in order to establish a statistical sample. Argentina asserts that a reminder was sent to the exporter on 18 November 1999. According to Argentina, two diskettes containing data with respect to domestic sales, without supporting documentation, arrived after the expiry of the deadline. Argentina notes that, in the Final Affirmative Dumping Determination, the DCD stated that:

"Finally, we stress that in the case of the companies Catarinense Limitada, Frangosul, Comave [sic], Da Granja Agroi, Sadia Concordia, Minuano De Alimentos, Acaua Industria, Felipe Avicola, Agroi, Veneto, Chapeco and Litoral Alimen [sic], the implementing authority did not have sufficient additional information or supporting documentation to enable it to reach an individual final determination of the margin of dumping."<sup>168</sup>

7.211 Brazil notes that the DCD also disregarded the export price data submitted by the exporters Sadia and Avipal. Nevertheless, it still calculated individual margins of dumping for those two

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<sup>167</sup> Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.291.

<sup>168</sup> Argentina's reply to Question 44 of the Panel and Exhibit BRA-15.

exporters. Brazil fails to see the reason why the DCD proceeded differently with respect to the information provided by Frangosul and Catarinense. Brazil further asserts that the fact that an exporter has not submitted the relevant and appropriate information to establish normal value and export price does not exclude the authority's obligation under Article 6.10 to calculate an individual margin of dumping for that exporter.<sup>169</sup>

(b) Evaluation by the Panel

7.212 The issue before us is whether, in light of the facts in this dispute, Article 6.10 of the *AD Agreement* required the DCD to determine separate dumping margins for the exporters Catarinense and Frangosul.

7.213 Article 6.10 provides in relevant part:

"The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." (emphasis added)

7.214 We agree with the view expressed by the *Argentina – Ceramic Tiles* panel that Article 6.10, first sentence, imposes a general obligation on investigating authorities to calculate individual margins of dumping for each known exporter or producer concerned of the product under investigation.<sup>170</sup>

7.215 Argentina argues that, for the requirement of Article 6.10 to apply, the exporter or producer concerned should supply the documentation needed to determine an individual margin of dumping.<sup>171</sup> We see no such obligation in the text of Article 6.10. In our view, Article 6.10 is purely procedural in nature, in the sense that it imposes a procedural obligation on the investigating agency to determine individual margins of dumping for each known exporter or producer concerned of the product under investigation. Article 6.10 is *not* concerned with substantive issues concerning the determination of individual margins, such as the availability of the relevant data. Such issues are addressed by provisions such as Articles 2 and 6.8 of the *AD Agreement*. In this regard, we note that the *Argentina – Ceramic Tiles* panel found that:

"the provisions of Article 2 concerning the determination of dumping and Article 6.8 *AD Agreement* concerning facts available are intended to allow the investigating authority to complete the data with regard to a particular exporter in order to determine a dumping margin in case the information provided is unreliable or necessary information is simply not provided. It is precisely because of Articles 2 and 6.8, among others, that it will remain possible to determine an individual margin of dumping for each exporter on the basis of facts."<sup>172</sup>

7.216 We agree. The fact that an investigating authority does not receive any information from an exporter, or only receives partial information, or information that is not usable or is unreliable, should not prevent the calculation of an individual margin of dumping for that exporter, since the substantive provisions in the *AD Agreement* referred to in para. 7.215 *supra* expressly allow investigating authorities to complete the data with regard to a particular exporter in order to determine a dumping margin in case the information provided is unreliable or necessary information is simply not provided. We therefore reject Argentina's argument that "a condition for the determination of an individual

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<sup>169</sup> Brazil's second oral statement, para. 59 and Brazil's reply to Question 90 of the Panel.

<sup>170</sup> Panel Report, *Argentina – Ceramic Tiles*, *supra*, note 66, para. 6.89.

<sup>171</sup> Argentina's reply to Question 97 of the Panel.

<sup>172</sup> Panel Report, *Argentina – Ceramic Tiles*, *supra*, note 66, footnote 96.



margin of dumping for each exporter is that the exporter should (...) supply the documentation needed to reach such a determination."<sup>173</sup>

(c) Conclusion

7.217 In light of the above, we conclude that Argentina violated Article 6.10 of the *AD Agreement* by not determining an individual margin of dumping for Catarinense and Frangosul.

**13. Essential Facts – Claim 21**

(a) Arguments of the parties / third parties

7.218 Brazil claims that Argentina violated Article 6.9 of the *AD Agreement* by failing to inform all interested parties of the essential facts under consideration which formed the basis of the decision that a definitive anti-dumping duty should be applied. In particular, Brazil argues that the investigating authority failed to inform interested parties that certain domestic and export sales price data was not going to be used for the purpose of establishing normal value and export price. Brazil also asserts that the investigating authority failed to inform interested parties of the reasons why that information was not used.

7.219 Argentina asserts that, through the DCD's Report of 4 January 2000, the investigating authority informed the parties of all the essential facts on which it intended to base its final decision.

7.220 The European Communities, as a third party, does not take a position on whether, under the facts of this case, the measure is consistent with Article 6.9 of the *AD Agreement*. The European Communities argues that Article 6.9 entails a positive action by the investigating authorities, and requires the authorities to actively disclose those essential facts on which the decision whether to apply definitive measures is based. Referring to the *Guatemala – Cement II* panel, the European Communities asserts that mere access to the file is not sufficient, unless the file contains a disclosure document specifically prepared by the authorities which clearly identifies the "essential facts".

(b) Evaluation by the Panel

7.221 This claim raises the issue of whether certain alleged "essential facts" identified by Brazil should have been disclosed to interested parties pursuant to Article 6.9 of the *AD Agreement*.

7.222 Article 6.9 of the *AD Agreement* reads as follows:

"The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

7.223 The first sentence of Article 6.9 therefore imposes the obligation on investigating authorities to inform interested parties of the essential facts which form the basis for the decision whether to apply definitive measures. We emphasise that the Article 6.9 obligation applies only in respect of (1) "essential facts" which (2) form the basis for the decision whether to apply definitive measures. In our view, facts which do not form the basis for the decision whether to apply definitive measures cannot be considered to be "essential facts" within the meaning of Article 6.9 of the *AD Agreement*.<sup>174</sup>

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<sup>173</sup> See *supra*, note 171.

<sup>174</sup> In examining this issue, we took into account, and agree with, the following finding of the *Guatemala – Cement II* panel:

7.224 Brazil claims that Argentina violated Article 6.9 by failing to inform interested parties of the "essential fact" that certain normal value and export price data reported by the exporters was not going to be used in the final determination. In our view, however, the fact that certain normal value or export price data is not going to be relied on in making a final determination is not a fact which forms the basis for the decision whether to apply definitive measures. While we accept that the normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures, the fact that certain normal value and export price data is not going to be used is not. In this regard, the fact that interested parties may not have been informed that certain normal value and export price data was not going to be used in the final determination should perhaps have been addressed by Brazil in the context of Article 6.8 of the *AD Agreement*.

7.225 Brazil also claims that Argentina violated Article 6.9 by failing to inform interested parties of the reasons why the investigating authority failed to use certain domestic and export sales price data reported by exporters. In our view, however, the failure to inform an interested party of a reason does not equate to failure to inform an interested party of an essential fact. The word "fact" is defined *inter alia* as "a thing that is known to have occurred, to exist or to be true", whereas a "reason" is a "motive, cause or justification".<sup>175</sup> We do not believe that the ordinary meaning of the word "fact" would support a conclusion that Article 6.9, when using the term "fact", refers not only to "facts" in the sense of "things which are known to have occurred, to exist or to be true", but also to "motives, causes or justifications".

7.226 Brazil asserted in response to Question 95 from the Panel that:

"It is important to note that the term "facts" is also present in Article 17.6(i) of the Agreement. According to Article 17.6(i), "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective (...)". Under that Article, "facts" is not merely the data established and evaluated by the authority but also the reasoning supporting a certain conclusion in establishing a fact.

Accordingly, we understand that in Article 6.9 the phrase "essential facts" covers the data collected and the reasoning supporting a certain conclusion made by an authority in establishing the facts. The conclusion made by an authority relates to the authority's establishment of the facts. For example, it is not sufficient for an authority to simply state that it has disregarded the normal value submitted by a certain exporter based on Article 6.8 of the Agreement. The authority must inform the reasons why certain information was disregarded pursuant to Article 6.8." (emphasis in original)

7.227 We do not consider that this response supports Brazil's claim. First, Article 17.6(i) of the *AD Agreement* distinguishes between (1) the establishment of facts and (2) the evaluation of facts. In our view, a reason is part of the evaluation of a fact, and not the fact itself. Second, we agree with Brazil that an investigating authority must inform interested parties why certain information is disregarded.

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"An interested party will not know whether a particular fact is "important" or not unless the investigating authority has explicitly identified it as one of the "essential facts" which form the basis of the authority's decision whether to impose definitive measures." (Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.229)

<sup>175</sup> *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 482.

However, as Brazil itself notes in the last two sentences cited above, that obligation is found in Article 6.8 (through Annex II, para. 6),<sup>176</sup> and not in Article 6.9.

7.228 Brazil also relies on the *Argentina – Ceramic Tiles* panel in support of its claim.<sup>177</sup> We consider that our conclusion is entirely compatible with the finding of the *Argentina – Ceramic Tiles* panel. In our view, that panel concluded that factual information – rather than reasoning – represents the "essential facts" which form the basis for the decision whether to apply definitive measures. In particular, that panel found that "petitioner and secondary source information, rather than exporters' information, represented (with respect to the existence of dumping) the essential facts which formed the basis for the decision whether to apply definitive measures".<sup>178</sup> This shows clearly that that panel defined "essential facts" in terms of factual information, rather than reasoning.

7.229 We recall that the scope of the obligation set forth in Article 6.9 is limited to (1) "essential facts" which (2) form the basis for the decision whether to apply definitive measures. Since some of the elements identified by Brazil are not "essential facts", and the remainder are facts which do not "form the basis for the decision whether to apply definitive measures", we reject Brazil's claim that Argentina failed to inform interested parties of "the essential facts under consideration which form the basis for the decision whether to apply definitive measures".

(c) Conclusion

7.230 In light of the foregoing, we reject Brazil's claim that Argentina has violated Article 6.9 of the *AD Agreement*.

D. CONDUCT OF THE INVESTIGATION AND FINAL AFFIRMATIVE DETERMINATION

**1. Failure to Make an Adjustment for Freight Costs – Claim 23**

(a) Arguments of the parties

7.231 Brazil's Claim 23 concerns the DCD's failure to make freight cost adjustments to the normal value of both Sadia and Avipal. Brazil claims that Argentina violated Article 2.4 of the *AD Agreement* because the DCD failed to adjust Sadia and Avipal's normal value for freight costs reported by those exporters. Brazil asserts that the freight cost adjustment was claimed by Sadia in Annex VIII, Section C of its questionnaire response of 20 April 1999. Brazil asserts that Avipal claimed a freight cost adjustment in its supplementary questionnaire response dated 21 December 1999.

7.232 Argentina asserts that the DCD did not make the freight adjustment requested by Sadia because the adjustment was not sufficiently proven. In particular, freight costs were not stipulated in the sample invoices submitted by the exporter, nor otherwise properly documented. Instead, Sadia merely submitted a figure representing average freight costs over an extended period of time, rather

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<sup>176</sup> Para. 6 of Annex II provides as follows:

"If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations."

<sup>177</sup> Brazil's first written submission, paras. 346-348.

<sup>178</sup> Panel Report, *Argentina – Ceramic Tiles*, *supra*, note 66, para. 6.127.

than transaction-by-transaction freight costs. In this regard, Argentina provided the following response to Question 81 from the Panel:

"Argentina reaffirms what it said in paragraphs 210 and 211 of its first written submission. Indeed, Sadia replied to the questionnaire item concerning internal freight, but never provided any supporting documentation for that item. Nor do the invoices submitted provide any indication of the percentage and/or amount of the adjustment to be made.

In other words, although in Annex X Sadia provided a US\$/Ton value to be discounted for freight, and also did so in Annex VIII – Sales in the domestic market – these values were presented in annualized form without any supporting documentation that would have enabled the authority to verify whether they corresponded to the reality and hence carry out the said adjustment.

In this connection, a "*nota fiscal*" (invoice) from SADIA has been provided showing clearly that the box corresponding to cost of freight does not contain any figure at all. And the box corresponding to "*frete por conta*" contains the indication "1", which corresponds to "*emitente*".

The kind of supporting documentation to which we refer in this case would be, for example, a contract between Sadia and a shipping company or any other documentation from the company which clearly indicates the amount to be discounted for freight. We insist that the "*notas fiscales*", which did not reveal the indicative amount of the requested adjustment, were the only documentation on hand.

(...)"

7.233 Argentina asserts that Avipal's request for a freight cost adjustment was made too late in the proceedings, was not accompanied by supporting documentation, and was not provided with the proper Spanish translation.

(b) Evaluation by the Panel

7.234 Brazil's claim concerns the DCD's failure to make freight cost adjustments to the normal value of both Sadia and Avipal. Brazil's claim is based on Article 2.4 of the *AD Agreement*, which provides in relevant part that:

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." (footnote omitted)

7.235 As noted by the panel in *Argentina – Ceramic Tiles*, "Article 2.4 places the obligation on the investigating authority to make due allowance, in each case on its merits, for differences which affect price comparability...".<sup>179</sup> Argentina has not argued that it would not have been appropriate in principle to make the adjustment for freight costs. This is entirely reasonable, since it seems to us that under normal circumstances there is an obvious inconsistency with Article 2.4 if an investigating

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<sup>179</sup> *Id.*, para. 6.113.

authority compares f.o.b. export prices with "delivered" domestic prices, because such a comparison would not be made at the same level of trade. We shall now examine the reasons why, according to Argentina, the DCD was entitled not to make the freight cost adjustment.

7.236 Regarding Sadia, Argentina asserts that it was entitled not to adjust for freight costs because Sadia reported its freight costs on an annualized basis, without supporting documentation. We see nothing in the DCD's questionnaire that would exclude specific forms of reporting, including "annualization". Nor has Argentina identified anything in the questionnaire that would exclude such reporting. Since the questionnaire did not exclude "annualized" reporting, and since there is nothing on the record to explain why "annualized" reporting might be considered unreasonable, the fact that Sadia reported freight costs on an "annualized" basis is not sufficient reason for the DCD not to make any freight cost adjustment.

7.237 Regarding Argentina's argument that Sadia failed to submit supporting documentation for any freight cost adjustment, the Panel asked Argentina to "indicate precisely (page number, paragraph number, line number) where the investigating authority explained the reason for rejecting Sadia's request in its final determination, or in any other document prepared by the investigating authority at the time of its determination".<sup>180</sup> Argentina replied that "[t]he relevant explanation can be found in Section VIII.1.3.3.1 of the Report on Action Taken. In that report, the DCD identified the information that it would use for the determination of normal value, which did not include any adjustment for freight." In reviewing the relevant section of the DCD's final determination, we find no reference to Sadia's alleged failure to provide supporting documentation. Argentina's explanation is therefore *ex post* rationalization which we are bound to ignore in examining this claim. Although Argentina's reply to Question 82 seems to suggest that the absence of documentary evidence should be inferred from the fact that the DCD failed to make the freight cost adjustment requested by Sadia, there is no basis for us to make any such inference. There could be a any number of reasons why the DCD failed to make the adjustment requested by Sadia, and the purpose of this claim is to determine whether or not the DCD was entitled to do so.

7.238 In any event, we note that in response to Question 81 from the Panel, Argentina acknowledged<sup>181</sup> that at least one sales invoice supplied by Sadia referred to freight charged to "emittente", i.e., the supplier.<sup>182</sup> Thus, Sadia had supplied some documentary evidence in support of its request for a freight cost adjustment, since the relevant invoice clearly indicated that freight costs were incurred by the supplier, i.e., Sadia, and not the customer. In light of the requirement in Article 2.4 that investigating authorities make due allowance, in each case on its merits, for differences which affect price comparability, we consider that this documentary evidence should have caused the DCD to seek further clarification from Sadia on this issue. The documentary evidence was in any event sufficient to prevent the DCD from concluding that Sadia had failed to provide any supporting evidence for its freight cost adjustment. On the contrary, there was documentary evidence on the record indicating that Sadia did incur freight costs in respect of domestic sales. We are therefore not persuaded by Argentina's justification for not accepting Sadia's request for a freight cost adjustment.

7.239 Regarding Avipal, Argentina submits that its request for a freight cost adjustment was rejected because it was not supported by documentary evidence, was not fully translated into Spanish, and was tardy. Concerning the issues of translation and tardiness, we find no reference to such considerations in the DCD's final determination. Nor has Argentina provided us with any evidence from the time of the DCD's determination to suggest that such factors caused the DCD to reject Avipal's request for a freight cost adjustment. In the absence of such evidence, Argentina's arguments

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<sup>180</sup> Question 82 from the Panel.

<sup>181</sup> See para. 7.232 *supra*.

<sup>182</sup> See Exhibit BRA-29, p. 6.

concerning translation and tardiness constitute *ex post* rationalization, and therefore provide no basis for us to decide on the issue before us. Concerning the absence of supporting documentation, we note that the first paragraph of page 65 of the Final Affirmative Dumping Determination indicates that the DCD only made those adjustments which it could verify. We understand this to be an assertion by the DCD that it would only make those adjustments for which it had supporting documentation. In examining the substance of Brazil's claim, we find that there is nothing on the record to suggest that Avipal had supplied any documentary evidence in support of its request for a freight cost adjustment. There is therefore a clear distinction between the factual circumstances surrounding the freight cost adjustment requests made by Sadia and Avipal.<sup>183</sup> Accordingly, we find that the DCD was entitled to reject the freight cost adjustment requested by Avipal.

(c) Conclusion

7.240 To conclude, we find that the DCD acted in violation of Article 2.4 of the *AD Agreement* by failing to make the freight cost adjustment to normal value requested by Sadia.

**2. Failure to Make Various Adjustments for Differences Reported by JOX – Claim 24**

(a) Arguments of the parties

7.241 This claim concerns the DCD's use of domestic sales data obtained from JOX for the purpose of establishing normal value for certain Brazilian exporters. Brazil claims that Argentina violated Article 2.4 of the *AD Agreement* because the DCD compared the JOX data (normal value) with export price without adjusting for differences reported by JOX in respect of tax, finance costs, sales commission and freight costs.

7.242 During the course of these proceedings, Argentina made two arguments in defence of the DCD's decision not to make the requested adjustments to normal value. First, Argentina asserted that the JOX domestic sales data was not adjusted to ensure that normal value and export price were compared at the same level of trade. If the adjustments had been made, the comparison would have been – improperly – between an ex-factory price for the normal value and an f.o.b. export price, because there was no identical information on the deductions to be made from the export price of the goods. Second, Argentina submitted that details of the relevant adjustments were submitted by JOX in Portuguese, whereas the Law No. 19,549 on Administrative Procedures and Article 28 of Implementing Decree No. 1759/72 provide that foreign-language submissions to the investigating authority must be translated into Spanish by a registered translator.

7.243 Regarding Argentina's level-of-trade argument, Brazil asserts that even the use of an f.o.b. normal value (i.e., at the same level of trade as the f.o.b. export price) would have required adjustments / deductions for differences in tax and finance costs, because the f.o.b. export price does not include taxes and finance costs.<sup>184</sup>

7.244 Regarding the submission of data by JOX in Portuguese, Brazil asserts that the relevant information was submitted by JOX in response to a request made by the DCD, and not by the Brazilian exporters or petitioner.<sup>185</sup> JOX is a private entity, not related to the Brazilian Government or any of the Brazilian exporters subject to the investigation. Thus, JOX did not constitute an "interested part[y]" within the meaning of Article 6.11 of the *AD Agreement*, and was therefore under no

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<sup>183</sup> Furthermore, Avipal's request was made very late in the proceedings, on 21 December 1999 (even though its initial questionnaire response was submitted in April 1999), thereby limiting the time available for the DCD to revert to Avipal on this issue.

<sup>184</sup> See Brazil's reply to Question 93 from the Panel.

<sup>185</sup> See Brazil's comments on Argentina's reply to Question 85 from the Panel.

obligation to respond to the Argentinean authorities, much less to provide a translation of its response in Spanish.

(b) Evaluation by the Panel

7.245 As noted above, Argentina has submitted two arguments (i.e., level of trade and language) in support of the DCD's decision not to make certain adjustments to the JOX data used to establish normal value for certain exporters. There is no evidence before us to suggest that the first argument, concerning level of trade, was relied on by the DCD at the time of its decision. That argument therefore constitutes *ex post* rationalization which we are unable to consider.

7.246 Regarding the choice of language by JOX, we note that the JOX data first became relevant to the investigation because it was relied on by the applicant for the purpose of establishing normal value in its application. The DCD subsequently had recourse to the JOX data for the purpose of establishing normal value for certain exporters when it determined that those exporters had not submitted domestic sales data sufficient for the purpose of establishing normal value. The DCD requested clarification from JOX regarding the possible need for adjustments on 25 June 1999. Although the official language of the DCD's investigation was Spanish, JOX replied to the DCD in Portuguese (reply received by the DCD on 3 August 1999). JOX informed the DCD that the JOX domestic sales data available to the DCD included various sales taxes (14.65 per cent in total), finance costs (depending on sales terms), sales commissions (0.5 to 1 per cent) and freight costs (depending on geographic location).

7.247 We note, therefore, that JOX only presented details regarding adjustments to the relevant sales data in response to a request from the DCD. JOX did not have any interest in the proceedings. There is nothing on the record before us to suggest that JOX was an "interested part[y]" within the meaning of Article 6.11 of the *AD Agreement*. Nor is there any evidence that JOX sought to participate in the DCD's investigation as an interested party. In such circumstances, we fail to see why Brazilian exporters should be penalized (because the non-adjusted normal value would have led to a higher margin of dumping) by JOX's failure to submit the relevant information in Spanish, or by the DCD's failure to procure its own translation of that information. The DCD was seeking the information from JOX because the DCD was going to use the JOX data as the basis for normal value, and because it was aware of the likely need to make adjustments to the JOX data. The fact that JOX, which was not an interested party, and not itself taking part in the investigation, failed to respond in Spanish does not absolve the DCD from its obligations under Article 2.4. To the extent that the DCD was seeking clarification from JOX for its own purposes, we consider that the onus was on the DCD to procure its own Spanish translation of JOX's submission.

7.248 We also note that, as demonstrated *inter alia* in respect of Claim 25 below, the DCD relied in part on the same JOX document – in Portuguese – to increase normal value to reflect alleged differences in the physical characteristics of poultry sold in Brazil and that sold in Argentina.<sup>186</sup> To the extent that the DCD was able to rely on JOX's Portuguese document to make an upward adjustment to normal value, we see no reason why the DCD was similarly not able to rely on the same JOX document to make other, downward adjustments to normal value. Such conduct is not indicative of the actions of an objective and impartial investigating authority.

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<sup>186</sup> The DCD also relied on a second JOX document submitted by the applicant, which had been translated from Portuguese into Spanish.

(c) Conclusion

7.249 In light of the above, we find that the Argentine investigating authority violated Article 2.4 of the *AD Agreement* by failing to make adjustments when comparing the export price with normal value established on the basis of JOX domestic sales data.

**3. Differences in Physical Characteristics Justifying an Adjustment – Claim 25**

7.250 This claim concerns a 9.09 per cent upward adjustment of normal value made by the DCD to reflect alleged differences in the physical characteristics of poultry sold in Brazil and poultry exported to Argentina. The DCD found that poultry was sold in Brazil with head and feet, whereas poultry was exported to Argentina without head and feet. The DCD concluded that the yield rate (per kg) for poultry sold in Brazil was therefore higher than that for poultry exported to Argentina. Since the alleged difference in yield rates was 9.09 per cent, the DCD increased normal value by that margin.

(a) Arguments of the parties

7.251 Brazil claims that the 9.09 per cent adjustment was inconsistent with Article 2.4 of the *AD Agreement* because, for the most part, there is no difference between poultry sold in Brazil and poultry exported to Argentina. According to Brazil, most exporters / producers sell in both markets eviscerated poultry without head and feet. Brazil submits that this fact was evident from the questionnaire responses submitted by exporters: Sadia, Avipal and Frangosul indicated in their questionnaire responses that they sold the same poultry in Argentina and Brazil, whereas Catarinense reported differences in respect of broiler (but not griller) poultry only. Catarinense reported that broilers were sold in Brazil without the feet but with the head, whereas broilers exported to Argentina had neither head nor feet.

7.252 Argentina asserts that the Brazilian exporters did not expressly deny the need for an adjustment for differences in physical characteristics during the investigation (although Argentina acknowledges that the exporters criticized the amount of the adjustment). Argentina also asserts that it received evidence from JOX to the effect that poultry was sold with head and feet in Brazil. In particular, a note from JOX received on 3 August 1999 reads: "Except otherwise stated, refrigerated chicken sold in São Paulo includes feet and head. The price of (refrigerated chicken without feet and head) should be 10 per cent higher".<sup>187</sup>

(b) Evaluation by the Panel

7.253 This claim concerns the DCD's decision to increase all exporters' normal values by 9.09 per cent to reflect alleged differences in the physical characteristics of poultry sold in Brazil and Argentina respectively.<sup>188</sup> Since Brazil does not dispute that such an adjustment would have been necessary if indeed there had been differences between poultry sold in Brazil and Argentina respectively, we shall resolve this issue by examining whether or not the DCD properly found that such differences existed.

7.254 As a starting-point, we note that the DCD's record contained evidence to the effect that there were differences between poultry sold in Brazil and poultry exported to Argentina. The DCD was in possession of a document from JOX (received 3 August 1999) indicating that certain poultry sold in

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<sup>187</sup> Exhibit BRA-32.

<sup>188</sup> Unlike the similar claim under Article 5.3 (Claim 2), Brazil's Claim 25 only challenges the need for – but not the amount of – the adjustment made by the DCD during the course of the investigation.



Brazil included head and feet.<sup>189</sup> In that document, JOX stated that "[e]xcept otherwise stated, refrigerated chicken sold in Sao Paulo includes feet and head".

7.255 However, there was also evidence on the record indicating that at least certain exporters sold an identical product in both Brazil and Argentina. In particular, Section A, Annex II, of Sadia's questionnaire responses (i.e., both the original and supplemental responses) described the product sold in both Brazil and Argentina in identical terms (namely "whole poultry with giblets").<sup>190</sup> The product description in the equivalent section of Avipal's questionnaire response<sup>191</sup> also did not distinguish between domestic and export sales. Both these exporters' questionnaire responses suggested, therefore, that they sold the same product in both Brazil and Argentina.

7.256 Section A, Annex II, of Frangosul's original questionnaire response also drew no distinction between domestic and export products.<sup>192</sup> Furthermore, Frangosul's supplementary questionnaire response included a product brochure stating that both broiler and griller poultry did not contain head or feet. Thus, Frangosul's questionnaire response not only indicated that it sold the same products in Brazil and Argentina, but also demonstrated that those products did not include head and feet.

7.257 Only one exporter, Catarinense, reported any difference between the products sold in Brazil and Argentina. Catarinense's questionnaire response reported that broilers sold in Brazil included head but not feet, whereas broilers exported to Argentina contained neither head nor feet.

7.258 Furthermore, we note that the Government of Brazil objected to the DCD's adjustment for differences in physical characteristics in a letter dated 19 January 2000.<sup>193</sup> Brazil stated that the adjustment was "absurd", since poultry was sold in the same condition in Brazil as it was in Argentina.

7.259 In light of the above, we are of the view that the record did not provide sufficient basis for the DCD to conclude that there were differences in the physical characteristics of all poultry sold in Brazil and Argentina respectively. Only one exporter's questionnaire response suggested that some form of adjustment may be necessary. Other exporters' questionnaire responses indicated that the same product was sold in both Brazil and Argentina. Despite the possibility of an adjustment alluded to in the above-mentioned JOX document, the substance of the exporters' questionnaire responses, and the observations of the Government of Brazil, should have precluded an objective and impartial investigating authority from concluding, on the basis of the JOX document alone, that there were differences in the physical characteristics of poultry sold in Brazil and Argentina respectively. At the very least, the conflicting evidence should have caused the DCD to pursue this matter further with the exporters.

(c) Conclusion

7.260 For the above reasons, we find that the DCD violated Article 2.4 of the *AD Agreement* by increasing all exporters' normal values by 9.09 per cent to reflect alleged differences in the physical characteristics of poultry sold in Brazil and Argentina.

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<sup>189</sup> See *supra*, note 187.

<sup>190</sup> Exhibit BRA-22.

<sup>191</sup> Exhibit BRA-23.

<sup>192</sup> Exhibit BRA-24.

<sup>193</sup> Letter from the Brazilian Embassy in Buenos Aires to the Argentine authorities (Exhibit BRA-39).

#### 4. Period of Collection of Dumping Data – Claim 26

(a) Arguments of the parties / third parties

7.261 Brazil asserts that the DCD violated Article 2.4 of the *AD Agreement* because it did not inform exporters of the period of investigation for dumping until nine months after initiation of the investigation, during which time exporters were faced with the unreasonable burden of submitting domestic and export sales data for 1996-1998 and the months of 1999 for which data was available.

7.262 Argentina asserts that the *AD Agreement* does not regulate the period for which dumping data may be collected. Argentina denies that the DCD imposed an unreasonable burden on exporters by requesting an excessive amount of data. Indeed, Argentina submits that it calculated normal value on the basis of a limited sample of invoices precisely so that exporters would not need to produce a large volume of invoices.

7.263 The European Communities submits that Brazil's claim is not covered by the scope of Article 2.4 of the *AD Agreement*. The European Communities asserts that, as recently recalled by the panel report in *Egypt – Steel Rebar*, Article 2.4 is concerned exclusively with the comparison between the normal value and the export price.<sup>194</sup> It does not apply to the determination of the normal value and the export price. The European Communities suggests that the relevant provisions of the *AD Agreement* for examining the issue raised by Brazil are Article 6.1 and the first paragraph of Annex II.

(b) Evaluation by the Panel

7.264 This claim concerns the fixing of the period of investigation by the investigating authority. It does not concern the comparison between normal value and export price. We recall the finding by the panel in *Egypt – Steel Rebar* that:

"In short, Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value."<sup>195</sup>

7.265 The report of the *Egypt – Steel Rebar* panel was adopted during the course of these Panel proceedings. We agree with that panel's finding that Article 2.4 imposes obligations in respect of the comparison between normal value and export price. In our view, Article 2.4 does not impose obligations in respect of the fixing of the period of investigation by the investigating authority, which is the object of Brazil's Claim 26.

(c) Conclusion

7.266 In light of the above, we reject Brazil's Claim 26.

#### 5. Sampling of Domestic Sales Transactions – Claim 27

7.267 This claim concerns the comparison methodology used by the DCD to calculate margins of dumping for Sadia and Avipal.

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<sup>194</sup> Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* ("Egypt – Steel Rebar"), WT/DS211/R, adopted 1 October 2002, para. 7.335.

<sup>195</sup> *Ibid.*

(a) Arguments of the parties

7.268 Brazil claims that the DCD acted in violation of Article 2.4.2 because, although Sadia and Avipal reported all relevant domestic sales transactions, the DCD did not take into account all domestic sales when comparing the weighted average normal value with the weighted average export price. In other words, Brazil claims that the DCD violated Article 2.4.2 by comparing the weighted average export price with only a weighted average statistical sample of normal value.

7.269 Argentina asserts that the sample of domestic sales transactions used by the DCD for the purpose of establishing a weighted average normal value was statistically valid, and based on documentation provided by the exporters.

(b) Evaluation by the Panel

7.270 Article 2.4.2 provides that:

"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.271 Article 2.4.2 provides that an investigating authority should normally calculate a margin of dumping by comparing normal value and export price either on a weighted average basis, or transaction-to-transaction. In the event that a weighted average comparison is used, Article 2.4.2 provides for the comparison of "a weighted average normal value" with a weighted average of prices of all comparable export transactions. Brazil claims that Argentina violated Article 2.4.2 because, instead of calculating weighted average normal values for Sadia and Avipal on the basis of all of those exporters' domestic sales transactions, the DCD calculated weighted averages of a statistical sample of the domestic transactions reported by them. This raises the issue of whether or not a Member must include all domestic sales transactions when establishing "a weighted average normal value" for the purpose of Article 2.4.2.<sup>196</sup>

7.272 In examining what is meant by "a weighted average normal value", we attach particular importance to the meaning of the term "normal value". We note that Article 2.1 of the *AD Agreement* refers to normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.1 therefore defines normal value in terms of domestic sales transactions in the exporting Member (although Article 2.2 provides that alternative methods to establish normal value may be used in certain circumstances).<sup>197</sup> Article 2.1

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<sup>196</sup> We note that the panel in *Egypt – Steel Rebar* found that Article 2.4 "has to do with ensuring a fair comparison (...) of export price and normal value. Thus, we find that it does not apply to the investigating authority's establishment of normal value as such..." (see footnote 194 *supra*). Although we examine the present issue in light of the provisions of Article 2 governing the establishment of normal value, we are not examining the establishment of normal value *per se*. Rather, we are examining the weighted average normal value established by the investigating authority for the purpose of comparison with the weighted average export price.

<sup>197</sup> These methods are not relevant in the present proceedings, since the DCD established normal value on the basis of domestic sales transactions.

does not specify, however, whether or not all domestic sales transactions need be included. This issue is addressed by Article 2.2.1, which sets out the conditions to be met before domestic sales may be treated as not in "the ordinary course of trade", and therefore excluded for the purpose of establishing normal value in accordance with Article 2.1. Article 2.2.1 states that domestic sales "may be disregarded in determining normal value only if" the relevant conditions are met. We understand these provisions to mean that there are only specific circumstances in which domestic sales transactions may be excluded from normal value. We consider that these provisions constitute relevant context for interpreting the phrase "a weighted average normal value", since they indicate that "a weighted average normal value" is a weighted average of all domestic sales other than those which may be disregarded pursuant to Article 2.2.1 of the *AD Agreement*.

7.273 We do not consider that our interpretation is undermined by the fact that Article 2.4.2 refers to a weighted average normal value, and not the weighted average normal value. In our view, use of the word "a" simply means that there are various ways of establishing a weighted average.<sup>198</sup> It does not mean that there are various ways of establishing normal value.

7.274 Nor do we consider that our interpretation is undermined simply by the fact that Article 2.4.2 does not refer to weighted average normal value in terms of all domestic transactions, whereas for the purpose of weighted average export price Article 2.4.2 specifies that prices of all comparable export transactions shall be included. We believe that the strict rules in Article 2 regarding the determination of normal value require that, in the usual case,<sup>199</sup> normal value should be established by reference to all domestic sales of the like product in the ordinary course of trade. There would be no need to stipulate the circumstances in which domestic transactions may be excluded from normal value if there were no general obligation to otherwise include all domestic transactions in normal value.

7.275 In the present case, the DCD established weighted average normal values on the basis of statistical samples of domestic sales transactions. The DCD did not establish weighted average normal values on the basis of all domestic sales transactions other than those it was entitled to exclude under Article 2.2.1.

(c) Conclusion

7.276 In light of the above, we find that the DCD acted in violation of Article 2.4.2 by failing to compare the weighted average export price with a proper weighted average normal value.

## 6. Injury Determination – Claim 32

7.277 This claim concerns the consistency of the CNCE's injury determination with Articles 3.1, 3.4 and 3.5 of the *AD Agreement*.

(a) Arguments of the parties

7.278 Brazil claims that the CNCE's injury determination was inconsistent with Article 3.1 of the *AD Agreement* because it reviewed certain injury factors on the basis of January 96 – December 98 data, but other injury factors on the basis of January 96 – June 99 data. In other words, some injury factors were analysed in light of 1999 data, whereas others were not. Brazil submits that a violation of Article 3.1 necessarily gives rise to a violation of Articles 3.4 and 3.5. Brazil also argues that Argentina violated Article 3.5 because the period of review for dumping ended in January 1999,

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<sup>198</sup> "Weighted average" is defined as "an average in taking which each component is multiplied by a factor chosen to give it its proper importance" (<http://www.oed.com>). The weighted average may vary, therefore, depending on the factor chosen.

<sup>199</sup> That is to say, in the case where normal value is based on domestic transactions.

whereas the period of review for injury ended in June 1999. According to Brazil, the investigating authority should not have attributed injury found to exist in June 1999 to dumped imports from January 1999.

7.279 Argentina asserts that the CNCE took 1999 injury data into account because the investigation was initiated on the basis of a threat of injury, and an investigation of an alleged threat of injury requires the examination of the most recent data possible. Argentina also asserts that the existence of a voluntary agreement between "the parties" between October 1998 and March 1999 meant that it was necessary to analyse imports without the effects produced by that agreement, so the analysis was extended until June 1999.

7.280 In addition, Argentina provided the following response to Question 87 from the Panel:

"Lines 1 to 6 in the second paragraph of Section V (State of the Domestic Industry) of Record No. 576 of 23 December 1999, which appears in CNCE File No. 43/1997 (folio 7313), clearly state that:

"The 'period under analysis' corresponds to the period from January 1996 to December 1998. For certain variables, such as domestic production, prices, imports, national exports and apparent consumption, data is included for the first half of 1999. Data for 1995 is provided for reference purposes. Variations for the first half of 1999 are against the same period for the previous year." (emphasis added)

Nevertheless, Argentina reiterates what it stated in its two previous submissions, and for a better understanding of the overall context, we repeat our reply that:

"First of all, there is no obligation to analyse any indicator outside the period established by the authorities as the investigation period.

In accordance with international practice in certain countries, Argentina considered a number of variables accessible to the public in order to double check the trends observed during the investigation period. If we were to insist on the constant updating of all indicators during the investigation, as Brazil seems to suggest in this case, the investigation would be endless. We repeat that this is not the objective of the AD Agreement, nor is it the practice of those countries which, like Argentina, examine certain relevant indicators of reference data."

It should be noted that the determination of threat of injury was based on the period from January 1996 to December 1998, and the other data, as stated in previous replies and in the Record in question, was used for reference purposes."<sup>200</sup>

7.281 Brazil provided the following comments on Argentina's response:

"In responding to the Panel's question, Argentina fails to provide where the investigating authority explained why it looked at 1999 data for only certain injury factors and not others. The passage referred to by Argentina clearly states that the data corresponding to the year 1995 is used by way of reference. However, that same

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<sup>200</sup> See Argentina's reply to Question 87 of the Panel.

passage does **not** provide that the data corresponding to the first semester of 1999 is used by way of reference. What that passage provides is that the data for the variables national production, prices, imports, national exports and apparent consumption corresponding to the first semester of 1999 were included in the period of injury analysis. Had the authority intended to use the data for the first semester of 1999 merely as reference, the authority would have clearly stated this in the final determination, just as it did with the data for the year 1995. In this investigation, the Argentinean authority considered a certain period of injury analysis for the factors production, prices, imports, exports and apparent consumption and considered another period of injury analysis for the remaining Article 3.4 factors." (emphasis in original, footnotes omitted)<sup>201</sup>

(b) Evaluation by the Panel

7.282 Articles 3.1, 3.4 and 3.5 provide that:

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

3.4 The examination of the impact of the dumped imports 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, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

7.283 Argentina does not deny that the CNCE only reviewed 1999 data for certain injury factors. Article 3.1 requires an "objective" examination of injury. In our view, there is a *prima facie* case that an investigating authority fails to conduct an "objective" examination if it examines different injury factors using different periods. Such a *prima facie* case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors). Since the

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<sup>201</sup> See Brazil's comments to Argentina's reply to Question 87 of the Panel.

CNCE only examined 1999 data for certain injury factors, we find *prima facie* that the CNCE failed to conduct an objective examination of injury. We shall now consider whether or not Argentina has rebutted that *prima facie* case.

7.284 Argentina asserted in reply to Panel Question 87 that 1999 data was used for certain injury factors to "double check the trends". However, although the final determination refers to 1995 data being used for "reference purposes", it does not refer to 1999 data being used for this purpose. Argentina also argued before the Panel that the CNCE needed to review 1999 data because it was examining the existence of a threat of injury. However, there is nothing in the CNCE's final determination, or any evidence on the record, to suggest that these explanations constitute anything other than *ex post* rationalization which we are precluded from taking into consideration. In any event, even if there were good reasons for the CNCE to review injury data for 1999, this does not explain why the CNCE considered 1999 data for certain injury factors only, and not all of them. Argentina has failed to provide any justification as to why 1999 data was only used for certain, but not all, injury factors. Although Argentina's response to Question 87 from the Panel could perhaps be understood to mean that 1999 data was only available for certain injury factors ("Argentina considered a number of variables accessible to the public"), no such explanation was contained in the CNCE's final injury determination, or in any other document on the record before us. Furthermore, the fact that 1999 data for the remaining injury factors may not have been available to the public does not necessarily mean that such data was not available to the investigating authority. Accordingly, Argentina has failed to rebut the presumption that the CNCE conducted a subjective examination of the relevant injury factors.

7.285 In light of the above, we find that the CNCE acted inconsistently with Article 3.1 of the *AD Agreement* by only examining 1999 data for certain injury factors.

7.286 Brazil asserts that the abovementioned violation of Article 3.1 would also constitute a violation of Articles 3.4 and 3.5. In this respect, Brazil appears to consider that Articles 3.4 and 3.5 also require investigating authorities to conduct an objective examination of injury and causation. That part of Brazil's Claim 32 concerning an alleged violation of Article 3.4 is based on exactly the same facts underpinning our finding of violation of Article 3.1. According to the logic of Brazil's claim, therefore, if Argentina were to bring its measure into conformity with Article 3.1, it would also bring its measure into conformity with Article 3.4. Accordingly, there is no need for us to examine that part of Claim 32 concerning Article 3.4 of the *AD Agreement*.

7.287 That part of Claim 32 concerning Article 3.5 is not based on the same facts as Brazil's arguments concerning Articles 3.1 and 3.4. It is therefore necessary for us to address Brazil's arguments concerning Article 3.5. Brazil's arguments relate to the fact that the periods of review used for the separate dumping and injury determinations did not end at the same point in time. We note, however, that there is nothing in the *AD Agreement* to suggest that the periods of review for dumping and injury must necessarily end at the same point in time. Indeed, since there may be a time-lag between the entry of dumped imports and the injury caused by them, it may not be appropriate to use identical periods of review for the dumping and injury analyses in all cases. Furthermore, we note that the issue of periods of review has been examined by the Anti-Dumping Committee. It has issued a recommendation to the effect that, as a general rule, "the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, **and should include the entirety of the period of data collection for the dumping investigation**" (emphasis added).<sup>202</sup> It would appear, therefore, that the period of review for injury need only "include" the entirety of the period of review for dumping.

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<sup>202</sup> Recommendation concerning the periods of data collection for anti-dumping investigations, G/ADP/6, adopted by the Committee on Anti-Dumping Practices on 5 May 2000.

There is nothing in the Anti-Dumping Committee's recommendation to suggest that it should not exceed (in the sense of including more recent data) the period of review for dumping.<sup>203</sup>

(c) Conclusion

7.288 For the above reasons, we uphold Brazil's Claim 32 in respect of the violation of Article 3.1 of the *AD Agreement*. We make no findings in respect of Article 3.4, and we reject that part of Brazil's Claim 32 based on Article 3.5 of the *AD Agreement*.

**7. Failure to Explain Why the CNCE Examined 1999 Data for Certain Injury Factors but Not Others – Claim 33**

7.289 Brazil's Claim 33, concerning Article 12.2.2 of the *AD Agreement*, is based on the same factual circumstances as the preceding Claim 32.

(a) Arguments of the parties

7.290 Brazil submits that Argentina violated Article 12.2.2 of the *AD Agreement* because the CNCE's final determination on injury did not explain why the CNCE examined 1999 data for certain injury factors but not for others.

7.291 Argentina submits that all relevant information was made public through published resolutions, and was available in the record to interested parties.

(b) Evaluation by the Panel

7.292 In essence, Brazil claims that a violation of Article 12.2.2 follows automatically from the abovementioned violation of Article 3.1 (Claim 32). In other words, just as the CNCE violated Article 3.1 by failing to explain why it considered 1999 data for some factors but not for others, so the absence of any such explanation in the final determination constitutes a violation of Article 12.2.2 of the *AD Agreement*.

7.293 We note that two adopted panel reports have already examined the application of the procedural provisions of Article 12.2.2 to factual circumstances which have already been found to be in violation of substantive provisions of the *AD Agreement*.<sup>204</sup> Those panels found that it was not necessary to make findings under Article 12.2.2 in such circumstances. We agree with those panels. If the CNCE's injury determination was substantively inconsistent with the relevant legal obligations, the adequacy of the public notice of the CNCE's findings on injury is immaterial.

(c) Conclusion

7.294 For the above reasons, we do not consider it necessary to examine Brazil's Claim 33.

**8. Failure to Exclude the Effect of Non-Dumped Imports in the Injury Determination – Claims 34 – 37**

7.295 These claims concern the meaning of the term "dumped imports" in Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement*.

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<sup>203</sup> We note that even when different periods of review are applied in respect of dumping and injury, there is still an obligation under Article 3.5 to establish a causal link between the injury and dumped imports.

<sup>204</sup> Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.291 and Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.259.



(a) Arguments of the parties / third parties

7.296 Brazil claims that Argentina violated Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement* by including the effect of non-dumped imports in its injury determination. These non-dumped imports were exported / produced by Nicolini and Seara, which were found by the DCD not to be dumping. According to Brazil, Article 3 only allows Members to take into account the injurious effects of dumped imports.

7.297 Argentina submits that, when analysing causal link, the CNCE did take into account the fact that imports from Nicolini and Seara were not dumped. The average f.o.b. prices of these enterprises were substantially higher than the prices of other exports found to have dumped. Furthermore, the volume of imports from Nicolini and Seara came nowhere close to the levels reached by the majority of exports from Brazil throughout the period analysed by the CNCE. The CNCE found that price was the decisive factor on the market, and that the decrease in domestic prices throughout the period of investigation was caused by the price of dumped imports. Had the CNCE excluded imports from Nicolini and Seara, the average f.o.b. price of imports taken into account by the CNCE would have been even lower, thereby accentuating the causal link between imports and injury to the domestic industry. In this regard, Argentina submitted evidence to the Panel showing that in 1997 and 1998 the average f.o.b. prices of imports from Nicolini and Seara were 13 per cent higher than the other imports investigated. In addition, the fact that imports from Nicolini and Seara did not have the major share in any year during the period investigated by the CNCE implied that no radical changes could be expected in the volume and share of the other imports investigated. Imports from exporters / producers found to have dumped represented the majority of imports, rising in 1998 to almost 40,000 tonnes compared with 56,000 tonnes for total imports from Brazil, and with the volume of dumped imports increasing more rapidly than the volume of total imports in 1998. Consequently, the share of dumped imports in apparent consumption rose, displacing domestic sales of the like domestic product.

7.298 The European Communities opposed Brazil's interpretation of Article 3. The European Communities suggested that an anti-dumping investigation is country-specific, rather than exporter-specific, so that once certain imports from an exporting country are found to be dumped, an investigating authority is entitled to treat all imports from that country as dumped.

(b) Evaluation by the Panel

7.299 Brazil's claims are based on Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement*. Brazil asserts that the CNCE violated these provisions by including the effects of non-dumped imports (i.e., imports from exporters / foreign producers found by the DCD not to have dumped) in its injury analysis. In examining these claims, we must first determine whether or not the term "dumped imports" in the relevant provisions of Article 3 of the *AD Agreement* excludes imports from producers / exporters found not to have dumped. If it does, we must determine whether or not the CNCE excluded non-dumped imports from Nicolini and Seara when making its final determination on injury.

7.300 We consider that a determination of dumping is made with reference to a product from a particular producer/exporter. If a particular producer/exporter has been found not to have dumped, then we see no basis for including that producer/exporter's imports in the category of "dumped imports". We note that the term "dumped imports" was interpreted by the panel in *EC – Bed Linen*, and by the subsequent panel reviewing India's recourse to Article 21.5 of the *DSU* regarding the EC's implementation of the results of the original proceeding.

7.301 The *EC – Bed Linen* panel found that "all imports from any producer/exporter found to be dumping may be considered as dumped imports for purposes of injury analysis".<sup>205</sup> Although this finding does not resolve the issue of whether imports from producers / exporters found not to be dumping may be considered as "dumped imports", that panel observed that

"It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. In such a case, it is our view that the imports attributable to such a producer/exporter may not be considered as "dumped" for purposes of injury analysis."<sup>206</sup>

7.302 In the implementation proceedings under Article 21.5 of the *DSU*, the panel "agree[d] fully"<sup>207</sup> with the preceding observation of the *EC – Bed Linen* panel, and in turn found that:

"the question of which imports are to be considered dumped is readily answered – 'dumped imports' are all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* is calculated. This was the decision of the original Panel in this dispute, rejecting the argument that the imports attributable to a single producer found to be dumping should be divided into two categories – 'dumped' and 'not-dumped' sales transactions."<sup>208</sup>

7.303 We agree with the findings of the *EC – Bed Linen* and the *EC – Bed Linen (Article 21.5 – India)* panels, and with the abovementioned observation by the *EC – Bed Linen* panel. On the basis of the ordinary meaning of the text, we find that the term "dumped imports" refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated. The term "dumped imports" excludes imports from producers / exporters found in the course of the investigation not to have dumped.

7.304 We recall that the DCD found that imports from Nicolini and Seara were not dumped. Our finding regarding the meaning of the term "dumped imports" therefore means that the CNCE should have excluded imports from Nicolini and Seara when examining the potentially injurious effects of "dumped imports" on the domestic industry. We shall now examine whether or not the CNCE did so.

7.305 There is nothing on the record before us or in the CNCE's final injury determination to suggest that the CNCE excluded imports from Nicolini and Seara from its injury analysis. Indeed, it would have been unlikely that CNCE could have excluded Nicolini and Seara's imports (by virtue of their being non-dumped) since the CNCE's injury determination preceded by six months the DCD's determination that Nicolini and Seara were not dumping. In other words, the CNCE could not have excluded imports from Nicolini and Seara from its injury analysis, since it did not know at the time of its injury analysis that imports from those exporters / producers were not dumped.

7.306 Furthermore, Argentina has not argued that imports from Nicolini and Seara were excluded from the CNCE's injury analysis. Rather, Argentina has focused on the effects of the inclusion of Nicolini and Seara imports in the CNCE's injury analysis, suggesting that the finding of injury would have been aggravated had those imports been excluded because the average f.o.b. price of imports would have decreased. While Argentina made arguments to the Panel regarding average f.o.b. import

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<sup>205</sup> *Id.*, para. 6.137.

<sup>206</sup> *Id.*, para. 6.138.

<sup>207</sup> Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC – Bed Linen (Article 21.5 – India)*"), WT/DS141/RW, 29 November 2002 (reports of the panel and Appellate Body not yet adopted), para. 6.131.

<sup>208</sup> Panel Report, *EC – Bed Linen (Article 21.5 – India)*, *supra*, note 207, para. 6.133.

prices excluding imports from Nicolini and Seara, it failed to identify anything in the record to the effect that the CNCE considered such arguments during its injury analysis. The same is true of Argentina's arguments to the Panel regarding the Nicolini and Seara's share of total imports. Thus, even if such arguments were relevant for the purpose of determining whether or not relevant imports from Nicolini and Seara were excluded from the CNCE's injury analysis – a fact of which we are not at all convinced – such arguments constitute *ex post* rationalization which we are bound not to consider. In any event, we consider that, consistent with a proper interpretation of the term "dumped imports", imports from Nicolini and Seara should have been excluded outright from the CNCE's injury analysis. It is clear from the record that CNCE failed to do this.

(c) Conclusion

7.307 In light of the above, we find that the CNCE violated Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement* by including imports from Nicolini and Seara in its injury analysis, even though such imports had been found by the DCD to be non-dumped.

**9. Failure to Examine Each of the Injury Factors and Indices Having a Bearing on the State of the Domestic Industry – Claims 38 - 40**

7.308 These claims concern the issue of whether or not the CNCE examined each of the injury factors set forth in Article 3.4 of the *AD Agreement*. Brazil submits that the CNCE failed to do so, thereby violating Articles 3.1, 3.4 and 12.2.2 of the *AD Agreement*.

(a) Arguments of the parties / third parties

7.309 Brazil submits that the CNCE violated Articles 3.1 and 3.4 of the *AD Agreement* by failing to examine each of the injury factors and indices having a bearing on the state of the domestic industry set forth in Article 3.4. In particular, Brazil asserts that the CNCE failed to examine actual and potential decline in productivity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, growth, the ability to raise capital or investments. Brazil further asserts that failure to address each of the Article 3.4 injury factors also constitutes a violation of the public notice requirement set forth in Article 12.2.2 because not all of the Article 3.4 injury factors were referred to or evaluated in the CNCE's injury determination.

7.310 Argentina submits that the CNCE did evaluate the injury factors identified by Brazil. Argentina refers to the inclusion of factors relating to productivity in the CNCE's injury determination, and provides a summary of the characteristics of the Argentine poultry market, of factors affecting domestic prices, and the effects of the margin of dumping. Argentina also explains why the CNCE did not need to analyse cash flow and the ability to raise capital, claiming that it correctly focused on liquidity and the "break-even point" instead.

7.311 The United States asserts that a violation of Article 3.4 would not necessarily constitute a violation of Article 12.2.2, since Article 12.2.2 only requires publication of findings and conclusions on issues of fact and law considered material by the investigating authorities. Thus, if certain Article 3.4 factors are not material to a given case, they need not be included in the Article 12.2.2 publication, as long as the lack of materiality is at least implicitly apparent from the final determination.

(b) Evaluation by the Panel

7.312 We shall first examine Brazil's Claim 38, concerning the application of Article 3.4 of the *AD Agreement*. We shall then examine Claims 39 and 40, concerning Articles 3.1 and 12.2.2, respectively.

7.313 Article 3.4 of the *AD Agreement* provides that:

"The examination of the impact of the dumped imports 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, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

7.314 It is well-established in WTO dispute settlement proceedings that an investigating authority must analyse each of the factors enumerated in Article 3.4. We note that both the *EC – Bed Linen* panel, and the *Mexico – Corn Syrup* panel to which it referred, have found that Article 3.4 is a mandatory provision, that every Article 3.4 factor must be considered, and that the nature of the investigating authority's consideration must be apparent.<sup>209</sup> We agree, and shall now examine whether or not the CNCE complied with these requirements in respect of the specific Article 3.4 factors identified by Brazil, namely actual and potential decline in productivity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, growth, and the ability to raise capital or investments.

(i) *Productivity*

7.315 Argentina asserts that the CNCE made a number of considerations regarding productivity, including the following statement in the CNCE's final injury determination:

"Generally speaking, the relative stability of the number of employees in spite of the increases in production would indicate higher physical labour productivity, probably due to the above-mentioned introduction of new technology."<sup>210</sup>

7.316 In our view, this statement is sufficient to demonstrate that the CNCE considered productivity, and found that productivity increased as a result of the introduction of new technology. This statement alone, therefore, is sufficient for the purposes of Article 3.4 of the *AD Agreement*.<sup>211</sup> Accordingly, we reject Brazil's claim that the CNCE failed to consider productivity.

(ii) *Factors affecting domestic prices*

7.317 Argentina asserts that the CNCE considered factors affecting domestic prices by analysing the trend in the price index for substitute products, mainly red meat, as well as the general level of activity and price indexes in the most important relevant sectors. In this regard, Argentina provided the following response to part of Question 59 from the Panel:

"Regarding the fact that Brazil fails to find an evaluation of other factors affecting the price of whole eviscerated poultry during the investigation period, we note that this evaluation appears both in CNCE Record No. 576 and in the Technical Report. Indeed, regarding the evolution of the price of a substitute product – red meat – the

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<sup>209</sup> See Panel Report, *EC – Bed Linen*, *supra*, note 204, para. 6.159, and Panel Report, *Mexico – Corn Syrup*, *supra*, note 65, para. 7.128.

<sup>210</sup> Exhibit BRA-14, Record No. 576, page 13.

<sup>211</sup> For this reason, we do not consider it necessary to conduct a detailed examination of the other instances in which Argentina claims that the CNCE considered productivity. We note, however, that in some instances Argentina has pointed to CNCE statements on production, which is not the same as productivity.

said Record states the following: "An econometric exercise was conducted which showed that for the period from January 1995 to June 1999, the price of the product on the domestic market depended on the volume of imports for the previous month, the price of the imported product and the price of bovine meat. The inclusion of the price of maize in the mentioned model did not produce satisfactory results, indicating that the considerable variability of the price of whole eviscerated poultry does not coincide with the price of maize. Nevertheless, both variables showed similar patterns ... " [Record No. 576, pages 24 and 25]. This analysis was based on the elements set forth in the Technical Report at folios 7371/2 and 7491/507. CNCE Record No. 576 also refers to the analysis of the evolution of the general level of activity, stating that "[t]he economic recession did not particularly affect the consumption of whole eviscerated poultry, which continued to increase (in 1998 it increased by 14 per cent)." [Record No. 576, page 25] Finally, with respect to relative prices, CNCE Record No. 576 states that "...with regard to the price of industrial goods taken as a whole and of bovine meat - represented respectively by the Wholesale Industrial Price Index for Manufactured Goods and the simple average of the consumer price indices for fresh bovine meat, front and hind cuts - followed the same trend as the sales revenue described above, although in the case of bovine meat, the annual variations reflected a stronger decrease in 1998 as a result of the increase in the price of bovine meat recorded that year." [Record No. 576, page 14] The above analysis was supported by the information provided in the Technical Report, in particular Table No. 16 at folio 7474 and the description at folio 7410. Regarding Table No. 16 of the Technical Report, Argentina notes that according to Brazil it contains only the average sales revenue for poultry, when in fact it also provides the relative prices mentioned above."<sup>212</sup>

7.318 In addition, Argentina provided the following response to Question 88 from the Panel regarding Table 16 of Record No. 576:

"Table No. 16, which belongs to Technical Report GEGE/1TDF No. 03/99 and is an integral part of Record No. 576, provides the average sales revenue for one kilogram of eviscerated poultry, fresh or chilled, and the relative prices of the comparable product, with regard to the price of industrial goods taken as a whole and of bovine meat – represented respectively by the Wholesale Industrial Price Index for Manufactured Goods and the simple average of the consumer price indices for fresh bovine meat, front and hind cuts.

The comparison made with respect to the Wholesale Industrial Price Index for Manufactured Goods was based on the need to assess whether the price of the product in question was following the same trend as the other manufactured goods.

With regard to the second index, Argentina has traditionally been a consumer of red meat, so that it was considered appropriate to use this index to analyse the impact of variations in that product on poultry meat as from a certain degree of substitution between bovine meat and poultry meat.

As can be seen from the table, the two relative prices analysed followed the same trend as average sales revenue for the product in question, although in the case of the price in relation to the simple average for bovine meat the annual variations reflected a stronger decrease in 1998 as a result of the increase in the price of bovine meat recorded that year. Indeed, as indicated in the Market Chapter of Technical Report

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<sup>212</sup> See Argentina's reply to Question 59 of the Panel.

GEGE/ITDF No. 03/99, Section VI.5 (Recent evolution of the market), folio 7371, paragraph 3: "During 1998 there was a further increase in the demand for poultry as a result of the substitution effect following the sharp increases in the price of bovine meat, which reached its peak in the middle of 1998. No decline in the consumption of poultry was recorded following the subsequent fall in the price of bovine meat. This because the market perception is that the price of poultry is so low that it is even pushing the price of bovine meat downwards".

Consequently Article 3.4 was clearly taken into consideration where it provides that "[t]he examination of the impact of the dumped imports 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, including ... factors affecting domestic prices ...".<sup>213</sup>

7.319 In our view, the above extracts from the CNCE's final determination on injury (Record No. 576 and the accompanying Technical Report) clearly indicate that the CNCE did consider factors affecting domestic prices, by considering the trend in poultry prices relative to the trend in the price of substitute products. Accordingly, we reject Brazil's claim that the CNCE failed to consider factors affecting domestic prices.

(iii) *Magnitude of the margin of dumping*

7.320 The only arguments made by Argentina concerning the CNCE's consideration of the magnitude of the margin of dumping for the purpose of Article 3.4 of the *AD Agreement* are contained in the following two paragraphs taken from Argentina's first written submission:

"In a situation where, in addition to the factors already explained regarding the characteristics of the Argentine market, there is a fixed exchange rate and a recession, the impact of unfair practices such as dumping can be felt all the more strongly, even with relatively small margins. This is particularly true when commodities are the reference product and the price variable is the essential factor in competition.

Consequently, bearing in mind the above explanations concerning Brazil's potential to generate surpluses under conditions of unfair competition, margins of 8-14 per cent are significant and were evaluated thus by the investigating authority because of their potential impact on Argentine production."<sup>214</sup>

7.321 We note that Argentina has failed to indicate where such arguments are set forth in the CNCE's Record No. 576, or to point us to any other document in which the CNCE is alleged to have considered such arguments. Such arguments therefore constitute *ex post* rationalization which we are precluded from taking into account. In any event, we note that Argentina's reference to dumping margins of 8 – 14 per cent concerns the margins calculated by the applicant in its application. They are not the margins calculated by the DCD during the investigation. Furthermore, the CNCE completed its injury analysis (on 23 December 1999) six months before the DCD completed its dumping investigation (on 23 June 2000), so we do not see how the CNCE could have taken the magnitude of the margin of dumping into account in its injury analysis.

7.322 For the above reasons, we uphold Brazil's claim that Argentina violated Article 3.4 of the *AD Agreement* because the CNCE failed to consider the magnitude of the margin of dumping in its analysis of the impact of the dumped imports on the domestic industry.

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<sup>213</sup> See Argentina's reply to Question 88 of the Panel.

<sup>214</sup> See Argentina's first written submission, paras. 294-295.

(iv) *Actual and potential negative effects on cash flow, growth, ability to raise capital, or investments*

7.323 Argentina's most detailed arguments concerning the CNCE's alleged analysis of cash flow, growth, the ability to raise capital and investments were contained in its first written submission:

"A few words, to begin with, on the terms of financing for companies in Argentina, where the capital market has never been an important source, apart from occasional exceptions such as occurred in the 1990s, a fact which is to a large extent reflected in the accounting legislation.

At the legislative level, pursuant to Article 299 of Law No. 19550, companies are obliged to submit a "Statement of the Origin and Utilization of Funds" which, unlike the cash flow statement within the strict meaning of financial accounting, is not a detailed breakdown of the cash flow situation but simply a synthetic description of the elements that have led to increases or decreases in funds. These headings, therefore, in no way allow any conclusions to be drawn regarding cash flow trends.

Taking account of the above, the indicators which make it possible to undertake such an analysis in terms of the reference variable would be liquidity and the breakeven point, which were analysed in a consistent manner in the Technical Report attached to Record No. 576.

Lastly, in relation to paragraph 296 above and the financing mechanisms in this sector, none of the applicants is quoted on the stock exchange or has utilized the capital market, so that irrespective of the rules in force, the cash-flow analysis requirement is not relevant and cannot be met."<sup>215</sup>

7.324 Argentina therefore argues that, because of the particular statutory and market circumstances in which Argentine poultry producers operate, certain Article 3.4 factors were not relevant to the state of the domestic industry. However, we find no reference to this explanation in any of the documentation prepared by or for CNCE (i.e., neither in the CNCE's final injury determination nor in the Technical Report attached thereto). For this reason, we are bound to treat these arguments as *ex post* rationalization that we are precluded from taking into account. Leaving such arguments aside, there is nothing on the record to suggest to us that the CNCE considered cash flow, growth, ability to raise capital, or investments. Furthermore, we recall that both the *Mexico – Corn Syrup* and *EC – Bed Linen* panels found that that "while the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors."<sup>216</sup> We agree with that finding, and note that there is nothing on the record to suggest that the CNCE excluded those factors because it had found that such factors were not relevant or did not weigh significantly in its decision on injury. We therefore find that the CNCE failed to consider these factors, in violation of Article 3.4 of the *AD Agreement*.

7.325 In Claim 39, Brazil argues that our finding in the preceding paragraph that Argentina violated Article 3.4 should necessarily lead us to conclude that Argentina also violated Article 3.1 of the *AD Agreement*. Argentina does not respond to this argument. In our view, there is an obvious connection between paragraphs 1 and 4 of Article 3. Article 3.1(b) requires "an objective examination of ... the consequent impact of the[] imports on domestic producers" of the relevant products. Article 3.4

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<sup>215</sup> *Ibid.*, paras. 296-299.

<sup>216</sup> See Panel Report, *EC – Bed Linen*, *supra*, note 204, para. 6.162, and Panel Report, *Mexico – Corn Syrup*, *supra*, note 65, para. 7.129.

provides that "[t]he examination of the impact of the dumped imports 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 ...". We consider that "[t]he examination of the impact of dumped imports" referred to in Article 3.4 is precisely the same "objective examination of ... the consequent impact of the[] imports" referred to in Article 3.1(b). Thus, to the extent that a Member failed to conduct a proper "examination of the impact of dumped imports" for the purpose of Article 3.4, that Member also failed to conduct an "objective examination of ... the consequent impact of the[] imports" within the meaning of Article 3.1(b). Accordingly, since we have found that Argentina violated Article 3.4 of the *AD Agreement*, we also find that Argentina violated Article 3.1(b) thereof.

7.326 Brazil further claims (Claim 40) that a violation of Article 3.4 would automatically violate the procedural requirements of Article 12.2.2. As noted above in respect of Claim 33, once the CNCE's injury determination is found to be inconsistent with the relevant legal requirements, findings concerning the adequacy of the CNCE's notice become immaterial.<sup>217</sup> Accordingly, it is neither necessary nor appropriate for us to examine this claim.

(c) Conclusion

7.327 For the above reasons, we find that Argentina violated Articles 3.1(b) and 3.4 by failing to evaluate all of the economic factors and indices enumerated in Article 3.4 of the *AD Agreement*. We do not consider it necessary to address Brazil's Claim 40.

## 10. Domestic Industry – Claim 41

7.328 This claim concerns the definition of the term "domestic industry" contained in Article 4.1 of the *AD Agreement*.

(a) Arguments of the parties / third parties

7.329 Brazil notes that Article 4.1 defines the term "domestic industry" as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes "a major proportion" of the total domestic production of those products. Brazil submits that the reference in Article 4.1 to "a major proportion" means "the majority", or the greater part in relation to the whole (i.e., 50+ per cent). Brazil submits that Argentina violated Article 4.1 because the CNCE defined the domestic industry as – and collected injury data for – those producers whose collective output constitutes 46 per cent – and therefore less than the majority – of total domestic production.

7.330 Argentina argues that Article 4.1 deliberately failed to define exactly what is meant by "a major proportion". Argentina denies that "a major proportion" must be greater than 50 per cent, and notes that the practice of other Members supports Argentina's interpretation.

7.331 The United States asserts that Article 4.1 merely contains a definition of "domestic industry", and does not impose any obligation on Members. The United States also asserts that "a major proportion" does not necessarily mean "the majority", but may also mean "unusually important, serious, or significant". The United States further argues that the drafters of the *AD Agreement* were quite explicit when they intended to impose a majority requirement for a particular obligation, such as the 50 per cent standing requirement in Article 5.4.

7.332 According to the European Communities, the phrase "major proportion" does not mean the majority of the domestic production, but rather an important part thereof, which may be less than

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<sup>217</sup> See para. 7.293 *supra*.



50 per cent. The European Communities relies on the same definition of "major proportion" as does the United States. The European Communities also notes that Article 4.1 refers to "a" major proportion, and not "the" major proportion, suggesting that there may be more than one major proportion.

7.333 The European Communities further asserts that its interpretation is supported by Article 5.4, which provides that an investigation shall not be initiated unless the authorities determine that the application has been made "by or on behalf of the domestic industry". Article 5.4 goes on to state that:

"[t]he application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of the total production of the like product produced by the domestic industry."

7.334 The European Communities asserts that, in accordance with Article 5.4, an application may be considered to have been made "on behalf of the domestic industry" even if the producers which support it represent less than 50 per cent of the domestic production. The term "domestic industry" has the same meaning throughout the *AD Agreement*. If a number of producers which accounts for less than 50 per cent of the domestic production may, in certain circumstances, be considered to constitute "a major proportion" of the domestic production for the purposes of Article 5.4, then the same should be true also for the purposes of the other provisions of the *AD Agreement*. Moreover, it would be illogical to allow the opening of an investigation on the basis of an application filed by producers which represent less than 50 per cent of the domestic production only to conclude subsequently that the injury suffered by those producers does not, by reason of the percentage of the domestic production accounted by those producers, amount to injury to the "domestic industry".

7.335 The European Communities also argues that, even if "a major proportion" does mean the majority (i.e., 50+ per cent), this does not necessarily mean that an investigating authority's injury determination must evaluate data concerning the majority of domestic producers. In the first place, if a domestic producer which is part of the domestic industry fails to co-operate in the investigation, as indeed happened in the case under consideration, the authorities may, in accordance with the provisions of Article 6.8 and Annex II, resort to "facts available" in order to establish whether such producer has been injured. For that purpose, the relevant "facts available" may include the data collected from other producers which have co-operated in the investigation. Second, when assessing the state of the domestic industry, the authorities may resort to sampling techniques. In other words, the investigating authorities may consider that data for some domestic producers are representative of the state of the whole of the domestic industry. The possibility to use sampling techniques is expressly envisaged in Article 6.10 with respect to the dumping determination. There is no reason why similar sampling techniques should not be allowed also for the purposes of the injury determination, subject to the general requirement of Article 3.1 that the determination of injury must be based on "positive evidence" and involve an "objective examination" of the relevant facts.

7.336 Brazil rejects the US argument that Article 4.1 does not impose any obligation on Members. Brazil submits that Article 4.1 requires Members to interpret the term "domestic industry" consistently with the definition set forth in that provision. Brazil also rejects the EC argument concerning the Article 5.4 standing requirements, on the basis that nothing in Article 5.4 equates "producers expressly supporting the application" to the "domestic industry".

(b) Evaluation by the Panel

7.337 Article 4.1 provides in relevant part:

"For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ..."

7.338 We must first determine whether or not Article 4.1 imposes any obligation on Members, i.e., whether or not Argentina could be found to have acted inconsistently with Article 4.1 (as opposed to any other provision of the *AD Agreement*) by using a definition of "domestic industry" other than that prescribed by Article 4.1. We note that Article 4.1 provides that the term "domestic industry" "shall" be interpreted in a specific manner. In our view, this imposes an express obligation on Members to interpret the term "domestic industry" in that specified manner. Thus, if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1.

7.339 Having found that Article 4.1 does contain an obligation that Argentina could potentially have violated, we must now determine whether or not it did so by defining the "domestic industry" as producers of 46 per cent of total domestic production. In particular, we must consider whether or not the phrase "a major proportion" means that the "domestic industry" must include domestic producers whose collective output constitutes the majority, i.e., 50+ per cent, of domestic total production.<sup>218</sup>

7.340 Regarding the ordinary meaning of the phrase "major proportion", Brazil asserts that the term "major proportion" is synonymous with "major part", which in turn is defined as "the majority".<sup>219</sup> Brazil submits that "the majority" is understood to mean "the greater number or part". Brazil submits that 46 per cent of total domestic production cannot be considered as the greater part of 100 per cent of total domestic production. The European Communities and the United States assert that the word "major" does not necessarily mean "majority", but may also mean "unusually important, serious, or significant".<sup>220,221</sup>

7.341 In considering these different dictionary definitions, we note that the word "major" is also defined as "important, serious, or significant".<sup>222</sup> Accordingly, an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible.<sup>223</sup> Indeed, this approach is entirely consistent with the

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<sup>218</sup> We note that this claim is not concerned with the issue of whether an investigating authority may immediately define the "domestic industry" in terms of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production", without first seeking to include in the "domestic industry" all domestic producers as a whole of like products.

<sup>219</sup> Brazil relies on *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995).

<sup>220</sup> *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993).

<sup>221</sup> The EC also argued that its interpretation was supported by Article 5.4 of the *AD Agreement*. We are not convinced by this argument, because the Article 5.4 standard relates to the standing of applicants, and not the definition of the domestic industry. Furthermore, Article 5.4 does not mean that the application is necessarily filed "by" the domestic industry if it is supported by domestic producers accounting for 25 per cent of domestic production. In such a case, one cannot exclude the possibility that the application was merely filed "on behalf of" – rather than "by" – the domestic industry. It is illogical to suggest that an application could have been filed both "by" and "on behalf of" a single domestic industry. Thus, domestic producers accounting for 25 per cent of domestic production do not necessarily constitute the "domestic industry", contrary to the view expressed by the EC.

<sup>222</sup> *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 822.

<sup>223</sup> We recall that, in accordance with Article 17.6(ii) of the *AD Agreement*, if an interpretation is "permissible", then we are compelled to accept it.

Spanish version of Article 4.1, which refers to producers representing "una proporción importante" of domestic production. Furthermore, Article 4.1 does not define the "domestic industry" in terms of producers of the major proportion of total domestic production. Instead, Article 4.1 refers to producers of a major proportion of total domestic production. If Article 4.1 had referred to the major proportion, the requirement would clearly have been to define the "domestic industry" as producers constituting 50+ per cent of total domestic production.<sup>224</sup> However, the reference to a major proportion suggests that there may be more than one "major proportion" for the purpose of defining "domestic industry". In the event of multiple "major proportions", it is inconceivable that each individual "major proportion" could – or must – exceed 50 per cent. This therefore supports our finding that it is permissible to define the "domestic industry" in terms of domestic producers of an important, serious or significant proportion of total domestic production. For these reasons, we find that Article 4.1 of the *AD Agreement* does not require Members to define the "domestic industry" in terms of domestic producers representing the majority, or 50+ per cent, of total domestic production.

7.342 There is nothing on the record to suggest that, in the circumstances of this case, 46 per cent of total domestic production is not an important, serious or significant proportion of total domestic production. Accordingly, we reject Brazil's claim that Argentina violated Article 4.1 of the *AD Agreement* by defining "domestic industry" in terms of domestic producers representing 46 per cent of total domestic production.

7.343 Finally, Brazil has argued that if the *AD Agreement* provides no specific benchmark for what would constitute a major proportion of total domestic production, then the investigating authorities are under the obligation to expressly elucidate how they found that a percentage lower than 50 per cent could be considered a major proportion.<sup>225</sup> However, we see no basis for any such obligation in Article 4.1 of the *AD Agreement*.

(c) Conclusion

7.344 In light of the above, we conclude that Argentina did not violate Article 4.1 by defining domestic industry in terms of domestic producers accounting for 46 per cent of total domestic production.

## 11. Imposition of Variable Duties – Claims 28 - 30

7.345 The present case concerns the imposition through Resolution No. 574/2000 of variable anti-dumping duties on poultry from Brazil. Claims 28-30 are concerned primarily with the consistency of variable anti-dumping duties with Article 9 of the *AD Agreement*.

(a) Arguments of the parties / third parties

7.346 Brazil claims that Argentina violated Articles 9.2 and 9.3 by imposing a variable anti-dumping duty that can exceed the margin of dumping established by the DCD during its investigation, and that can therefore be collected in "inappropriate" amounts (Claims 28 and 29). This is because the duty is based on the difference between the invoiced f.o.b. price and a "minimum export price" calculated for each exporter found to have dumped and, depending on the amount of the invoiced f.o.b. price for a given import transaction, this difference (and therefore the resultant duty) can sometimes exceed the margin of dumping calculated for the relevant exporter during the investigation. Brazil submits that anti-dumping duties shall not exceed the margin of dumping established during the investigation (in accordance with Article 2 of the *AD Agreement*). Brazil's argument is based on the

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<sup>224</sup> If Article 4.1 had referred to "the" major proportion, we may have been required to accept Brazil's interpretation of Article 4.1.

<sup>225</sup> Brazil's first oral statement, para. 87.

reference in Article 9.3 to “the margin of dumping as established under Article 2”. Brazil asserts that the only provision of Article 2 concerning the establishment of a margin of dumping is Article 2.4.2, which refers to the margin of dumping established “during the investigation phase”. According to Brazil, therefore, the “margin of dumping” referred to in Article 9.3 must be the margin of dumping established “during the investigation phase”. According to Brazil, the “minimum export price” determined in Resolution No. 574/2000 does not qualify as a dumping margin established under Article 2, since it does not reflect the normal value and export price as provided by the exporters and examined by the investigating authority in the investigation. Brazil asserts that a Member may not assume that the normal value established during the investigation remains unchanged at some future point in time when duties are collected. Brazil submits that market circumstances leading to a change in export price are also likely to lead to a change in normal value. Brazil also asserts that Argentina violated Article 12.2.2 because it failed to explain in its decision to impose an anti-dumping duty how and why it established the “minimum export prices” (Claim 30).

7.347 Argentina submits that the *AD Agreement* does not regulate the type of anti-dumping duties that Members may impose. Argentina asserts that Members have in practice imposed three different types of duty: fixed *ad valorem* duties, fixed specific duties, and variable duties. Argentina asserts that, when duties are imposed prospectively (as Argentina has done), Article 9.3.2 provides for the refund of duties collected in excess of the margin of dumping. Argentina notes that no refund has been requested by Brazilian exporters, so no duty has been collected in excess of the margin of dumping. Argentina also asserts that it imposed a variable duty precisely to ensure that the amount of duty would not exceed the margin of dumping: if export prices became aligned with normal value, no duty would be collected. Argentina further submits that even the use of fixed *ad valorem* duties – which Brazil would have had Argentina impose – can sometimes cause duties to exceed the margin of dumping, because the actual margin of dumping may be lower than that established during the investigation. Argentina asserts that it complied with Article 12.2.2 because the various published determinations referred to submissions made by exporters, and because all essential facts were disclosed to interested parties.

7.348 Canada would have the Panel reject Brazil's claim. Regarding the relationship between Articles 9.2 and 9.3, Canada asserts that an amount of duty permitted under Article 9.3 is “appropriate” for the purpose of Article 9.2. Canada rejects Brazil's argument that a duty must not exceed the margin of dumping established during the investigation. According to Canada, nothing limits the relevant margin of dumping to a static amount found during the period of investigation. Canada asserts that Brazil's approach would undermine the object and purpose of the *AD Agreement* and *GATT* Article VI, which is to provide a mechanism to address unfair trade situations where products are sold at prices below their normal value. In particular, Brazil's approach would allow exporters to dump (after imposition of an anti-dumping measure) at even greater margins than they did during the course of the investigation, without the importing Member being able to impose a level of duty in excess of the margin of dumping found during the investigation. Canada asserts that this undermining of the object and purpose of the *AD Agreement* and *GATT* Article VI would be prevented if Members were entitled to impose duties commensurate with the margin of dumping prevailing at the time the duties are collected. According to Canada, while Members may choose to apply a rate of duty equal to the margin of dumping found in the original investigation, nothing in Article 9.3 compels them to do so.

7.349 The European Communities asserts that the margin of dumping referred to in Article 9.3 need not necessarily be that calculated during the investigation. The European Communities notes that Article 9.3 permits the collection of duties on a retrospective basis, which necessarily entails the calculation of a margin of dumping outside the original period of investigation. The European Communities submits that Brazil's claim would mean that the application of variable anti-dumping duties, or the application of any kind of specific duties, is *per se* inconsistent with Article 9.2. The European Communities disagrees with Brazil since, with the exception of checking for a *de minimis*

margin of dumping under Article 5.8, the *AD Agreement* does not require that dumping margins be expressed as a percentage of the export price. Nor does it prescribe any particular type of duties.

7.350 The European Communities submits that the collection of variable duties equal to the difference between the normal value established for the investigation period and the export prices of the shipments made after the imposition of the duties is expressly contemplated in Article 9.4 of the *AD Agreement*. Article 9.4 (ii) lays down rules to calculate the “all-others” rate where the duties applied to the exporters included in the sample are calculated on the basis of prospective normal values. It presupposes, therefore, that the use of such prospective normal values is not inconsistent *per se* with the *AD Agreement*, including with Articles 9.2 and 9.3.

(b) Evaluation by the Panel

7.351 We shall first consider Brazil's Claims 28 and 29, which are based on paragraphs 2 and 3 of Article 9 of the *AD Agreement*, respectively. According to those provisions:

"9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. (...)

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

7.352 Sub-paragraphs 1 – 3 of Article 9.3 provide that:

"9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided." (footnote omitted)

7.353 In examining Brazil's claims, we also consider it necessary to have regard to Article 9.4 of the *AD Agreement*, which provides that:

"9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6."

7.354 We begin by examining Brazil's claim that the variable anti-dumping duties at issue are inconsistent with Article 9.3 because they are collected by reference to a margin of dumping established at the time of collection (i.e., the difference between a "minimum export price", or reference normal value, and actual export price). Brazil claims that duties must not exceed the margin of dumping established during the investigation. Brazil asserts that "[f]rom the moment the anti-dumping duty is imposed until a review of the imposition of that duty is made, the only margin of dumping available, calculated pursuant to Article 2, is the margin assessed in the investigation, found in the final determination, and informed to all interested parties through a public notice, as provided in Article 12.2 of the *AD Agreement*."<sup>226</sup>

7.355 In addressing this claim, we note that nothing in the *AD Agreement* explicitly identifies the form that anti-dumping duties must take. In particular, nothing in the *AD Agreement* explicitly prohibits the use of variable anti-dumping duties. Brazil's Claim 29 is based on Article 9.3 of the *AD Agreement*. As the title of Article 9 of the *AD Agreement* suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected. Our understanding that Article 9.3 is concerned primarily with duty assessment is confirmed by the fact that the broadly equivalent provision in the *SCM Agreement* (i.e., Article 19.4) refers to the "lev[y]ing" of duties, and footnote 51 to that provision states that "levy' shall mean the definitive or final legal **assessment or collection** of a duty or tax" (emphasis added).<sup>227</sup> When viewed in this light, it is not obvious that – as

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<sup>226</sup> Brazil's second written submission, para. 127.

<sup>227</sup> The Tokyo Round *AD Agreement* is also instructive, since Article 8.3 of that Agreement stated "[t]he amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. **Therefore**, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as

Brazil effectively argues – Article 9.3 prohibits variable anti-dumping duties by ensuring that anti-dumping duties do not exceed the margin of dumping established during “the investigation phase” pursuant to Article 2.4.2. Neither the ordinary meaning of Article 9.3, nor its context (i.e., subparagraphs 1-3), supports that view. If Article 9.3 were designed to prohibit the use of variable customs duties, presumably that prohibition would have been clearly spelled out.

7.356 Brazil relies on Article 2.4.2 of the *AD Agreement* to support its argument that anti-dumping duties may not exceed the margin of dumping established during the investigation. Article 2.4.2 provides in relevant part that “the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by comparison of normal value and export prices on a transaction-to-transaction basis.” Brazil asserts that because Article 9.3 refers to the margin of dumping “as established under Article 2”, and because the only provision of Article 2 governing the establishment of a margin of dumping is the abovementioned extract from Article 2.4.2, which refers to the “investigation phase”, the margin of dumping relevant for the purpose of Article 9.3 is that established “during the investigation phase”. Brazil submits that the margin of dumping is established based on the information collected and examined during the investigation and, in that sense, dumping margins are restricted to the investigation period, as set out in Article 2.4.2 of the *AD Agreement*.

7.357 We consider that Brazil's principal argument misinterprets the reference to “margin of dumping” in Article 9.3. Based on that language, Brazil focuses entirely on Article 2.4.2, and the reference to the “investigation phase” in that provision. However, Article 9.3 does not refer to the margin of dumping established “under Article 2.4.2”, but to the margin of dumping established “under Article 2”. In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely consistent with the introductory clause of Article 2, which sets forth a definition of dumping “for the purpose of this Agreement ...”. In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4. Thus, the fact that Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping “during the investigation phase” is not determinative of the issue before us, since other provisions of Article 2 do not contain that limitation.<sup>228</sup>

7.358 Our view that Brazil misinterprets the reference to “margin of dumping” in Article 9.3 is supported by the fact that the first sentence of Article 8.3 of the Tokyo Round *AD Agreement* also referred to “the margin of dumping as established under Article 2”, even though there was no equivalent of Article 2.4.2 of the *AD Agreement* in the Tokyo Round *AD Agreement*. Under the Tokyo Round *AD Agreement*, therefore, the reference to the “margin of dumping as established under Article 2” must have meant the provisions of Article 2 generally. We see no reason why the same does not remain true of the equivalent provision of the *AD Agreement*. If the drafters of the *AD*

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possible” (emphasis added). This provision clearly demonstrates that the general requirement that anti-dumping duties shall not exceed the margin of dumping is concerned with duty assessment.

<sup>228</sup> Taken literally, Brazil's argument concerning Article 2.4.2 would mean that Article 2.4.2 is the only provision of Article 2 that applies in the context of Article 9.3. This is because Brazil notes that Article 9.3 refers to the “margin of dumping as established under Article 2”, and that Article 2.4.2 is the only provision of Article 2 that refers to the establishment of a “margin of dumping”. We cannot accept such an approach, however, since it would mean that the provisions of Article 2 governing sales not made in the ordinary course of trade and fair comparisons etc. would not apply in the context of Article 9.3. Although Brazil has asserted that its argument should not be understood in this way (Brazil's second written submission, para. 136), this is the inevitable result of Brazil attaching such prominence to the words “margin of dumping” in Article 9.3.

*Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2". This is not what Article 9.3 says.

7.359 Brazil's interpretation is also contradicted by the immediate context of Article 9.3. In particular, by interpreting Article 9.3 to mean that anti-dumping duties may not be collected in excess of the margin of dumping established during the initial investigation, Brazil misunderstands the significance of Article 9.4(ii) of the *AD Agreement*, which refers to circumstances "where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value". In our view, Article 9.4(ii) is describing the use of variable anti-dumping duties, which are calculated by comparing actual (i.e., at the time of collection) export price with a prospective normal value. Since Article 9.4(ii) expressly envisages the imposition of variable anti-dumping duties, there is no basis for us to find that Argentina's recourse to variable duties (calculated on the basis of "minimum export prices" used as prospective normal values) is necessarily inconsistent with Article 9.3 of the *AD Agreement*.<sup>229</sup>

7.360 We note Brazil's argument that Article 9.4(ii) "refers to cases where duties are assessed on a retrospective basis".<sup>230</sup> However, we see no basis for concluding that *retrospective* duty assessment involves the use of a *prospective* normal value. To the contrary, retrospective duty assessment involves the use of an actual normal value established at the time of duty assessment.

7.361 Further contextual support for our approach to Article 9.3 is found in Article 9.3.1, which envisages the collection of anti-dumping duties on a retrospective basis. By definition, the retrospective collection of duties presupposes the calculation of dumping margins on the basis of information for individual shipments or for time-periods outside of the initial investigation period. Furthermore, in emphasising the importance of the margin of dumping established during the investigation, we consider that Brazil has diminished the contextual importance of the refund mechanism provided for in respect of prospective anti-dumping duties. The first sentence of Article 9.3.2 provides that "[w]hen the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the **actual** margin of dumping shall normally take place within 12 months ..." (emphasis added). Thus, Article 9.3.2 provides for a refund of anti-dumping duties collected in excess of the actual margin of dumping. The word "actual" is defined *inter alia* as "existing now; current".<sup>231</sup> Accordingly, we understand that the Article 9.3.2 refund mechanism would include refunds of anti-dumping duties paid in excess of the margin of dumping prevailing at the time the duty is collected. This therefore further undermines Brazil's argument that the only margin of dumping relevant until such time that there is an Article 11.2 review is the margin established during the investigation. If the basis for duty refund is the margin of dumping prevailing at the time of duty collection, we see no reason why a Member should not use the same basis for duty collection. Brazil has noted that refunds do not imply modification of the duty, and are only available if requested by the importer.<sup>232</sup> While these points may be correct, they do not change the fact that the refund mechanism operates by reference to the margin of dumping prevailing

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<sup>229</sup> We note that the measure at issue calculates anti-dumping duty liability by comparing actual export price with a "minimum export price", which is slightly lower than the normal value established during the investigation. Accordingly, it may not be entirely appropriate to state that the Argentine collection mechanism involves the use of a prospective "normal value". It does, however, involve the use of a prospective reference price, which in our view is sufficient to bring it within the scope of Article 9.4(ii). To conclude otherwise would elevate form over substance, since it would mean that the collection of variable duties calculated by reference to a prospective normal value is permitted, whereas the collection of lower duties by reference to a reference price lower than the normal value established during the investigation is not.

<sup>230</sup> Brazil's second written submission, para. 149.

<sup>231</sup> *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 14.

<sup>232</sup> Brazil's second written submission, para. 141.



at the time of duty collection. It is this aspect of the refund mechanism that renders it contextually relevant to the issue before us. Accordingly, we see no reason why it is not permissible<sup>233</sup> for a Member to levy anti-dumping duties on the basis of the actual margin of dumping prevailing at the time of duty collection.

7.362 Brazil also asserts that Argentina was not entitled to collect duties on the basis that the normal value calculated during the investigation remained constant thereafter, without considering any possible changes in the prices in the internal market. According to Brazil, it is not unlikely that changes in market conditions or exporter's improvement in productivity create a situation where the price of the product, in the internal market and the export market, is reduced. In other words, if there is a change in export price, there may also be a change in normal value. Again, we disagree. First, because we have already noted that Article 9.4(ii) refers to the use of a prospective normal value. Second, because even fixed *ad valorem* duties collected on a prospective basis are collected on the assumption that both normal value and export price (and therefore the margin of dumping) established in the investigation will not change. In any event, a properly designed variable duty system would include a refund mechanism consistent with Article 9.3.2, and would provide for an Article 11.2 changed circumstances review.

7.363 Finally, in support of its argument that the margin of dumping referred to in Article 9.3 is that established during the period of investigation, Brazil asked what would be the purpose of establishing a margin of dumping in the initial investigation if that margin did not circumscribe the amount of duties that could subsequently be collected.<sup>234</sup> Without intending to provide a comprehensive response to this question, we note that, in accordance with Article 5.8 of the *AD Agreement*, there shall be immediate termination of an investigation if the margin of dumping is *de minimis*. Accordingly, one of the principal reasons for establishing a margin of dumping in the investigation is to ensure compliance with Article 5.8.

7.364 For the above reasons, we find that the variable anti-dumping duties at issue are not inconsistent with Article 9.3 simply because they are collected by reference to a margin of dumping established at the time of collection (i.e., the difference between a "minimum export price", or reference normal value, and actual export price).<sup>235</sup> Since Brazil has not argued that any of the anti-dumping duties actually collected by the Argentine authorities exceeded the margin of dumping (prevailing at the time of duty collection), we reject Brazil's Claim 29.

7.365 Turning to Brazil's Claim 28, which is based on Article 9.2 of the *AD Agreement*, we note that Canada has asserted that an anti-dumping duty that is in conformity with Article 9.3 is necessarily "appropriate" within the meaning of Article 9.2. Brazil agrees with this approach, arguing that "a violation of Article 9.2 is entirely dependent on a violation of Article 9.3".<sup>236</sup> We note that Article 9.3 contains a specific obligation regarding the amount of anti-dumping duty to be imposed, whereas Article 9.2 employs far more general language in referring to the collection of duties in "appropriate" amounts. In particular, Article 9.2 provides no guidance on what an "appropriate" amount of duty may be in a given case. In the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 (i.e., not exceeding the margin of dumping) would be "appropriate" within the meaning of Article 9.2. Since we have already found that Argentina's variable anti-dumping duties are not inconsistent with Article 9.3, and since Brazil has not adduced

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<sup>233</sup> We use this term with particular regard to the Article 17.6(ii) standard of review.

<sup>234</sup> Brazil's second written submission, para. 133.

<sup>235</sup> The scope of this finding is of course limited to the circumstances of the case at hand, which concerns initial duty imposition, and not Article 9.3.2 refund or Article 11 review proceedings.

<sup>236</sup> Brazil's second written submission, para. 124.

any additional evidence to the effect that the amount of the anti-dumping duties was not "appropriate", we reject Brazil's Claim 28.

7.366 Brazil further claims (Claim 30) that Argentina violated Article 12.2.2 of the *AD Agreement* because Resolution No. 574/2000 failed to explain how Argentina calculated the "minimum export prices". In our view, once an anti-dumping measure is found to be inconsistent with the substantive provisions of the *AD Agreement*, findings concerning the adequacy of the DCD's notice become immaterial.<sup>237</sup> Accordingly, since we have found that Resolution No. 574/2000 is inconsistent with various substantive provisions of the *AD Agreement*, it is not necessary for us to examine this claim.

(c) Conclusion

7.367 In light of the above, we conclude that Argentina did not violate Articles 9.2 and 9.3 of the *AD Agreement* by imposing variable anti-dumping duties. In addition, we conclude that it is not necessary for us to examine Brazil's Claim 30.

E. VIOLATION OF ARTICLE VI OF GATT 1994 AND ARTICLE 1 OF THE *AD AGREEMENT*

(a) Arguments of the parties

7.368 Brazil considers that Argentina has acted inconsistently with Article VI of the *GATT 1994* and Article 1 of the *AD Agreement*, which only permit anti-dumping measures to be applied under the circumstances provided for in Article VI and pursuant to investigations initiated and conducted in accordance with the *AD Agreement*. Brazil asserts that, because the claims set forth in Section III.A *supra* of this report indicate the violation of various provisions under the *AD Agreement*, Article VI of the *GATT 1994* and Article 1 of the *AD Agreement* are consequently violated.

(b) Evaluation by the Panel

7.369 In examining this issue, we note that a panel "need only address those issues which must be addressed in order to resolve the matter in issue in the dispute."<sup>238</sup> We note that Brazil's claims under Article 1 of the *AD Agreement*, and Article VI of *GATT 1994*, are dependent claims, in the sense that they depend entirely on findings that Argentina has violated other provisions of the *AD Agreement*. There would be no basis to Brazil's claims under Article 1 of the *AD Agreement*, and Article VI of *GATT 1994*, if Argentina were not found to have violated other provisions of the *AD Agreement*. In light of the dependent nature of Brazil's claims under Article 1 of the *AD Agreement*, and Article VI of *GATT 1994*, we see no useful purpose to deciding them.<sup>239</sup> In particular, deciding such dependent claims will provide no additional guidance as to the steps to be undertaken by Argentina in order to implement our recommendation regarding the violations on which they are dependent.

(c) Conclusion

7.370 In light of the foregoing, we consider it unnecessary to examine Brazil's claims under Article VI of the *GATT 1994* and Article 1 of the *AD Agreement*.

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<sup>237</sup> See para. 7.293 *supra*.

<sup>238</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, *supra*, note 67, p. 19.

<sup>239</sup> We note that a similar approach was followed by the panels *Guatemala – Cement II* (Panel Report, *Guatemala – Cement II*, *supra*, note 48, para. 8.296) and *US – DRAMS* (Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* ("US – DRAMS"), WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, para. 6.92).

## VIII. CONCLUSIONS AND RECOMMENDATION

### A. CONCLUSIONS

#### 8.1 In light of our findings above, we conclude that:

- (a) Argentina has acted inconsistently with its obligations under:
  - (i) Article 5.3 of the *AD Agreement* by determining that there was sufficient evidence of dumping to initiate an investigation (Claims 2, 4 and 6);
  - (ii) Article 5.8 of the *AD Agreement* by failing to reject the application and promptly terminate the investigation, as soon as the authorities concerned were satisfied that there was not sufficient evidence of injury or threat thereof to justify the initiation of the investigation (Claim 31);
  - (iii) Article 12.1 of the *AD Agreement* by failing to notify several exporters known to the investigating authority to have an interest in the investigation when that authority was satisfied that there was sufficient evidence to justify the initiation of the anti-dumping investigation (Claim 10);
  - (iv) Article 6.1.1 of the *AD Agreement* by failing to give several exporters at least 30 days to reply to the dumping questionnaires provided by the investigating authority (Claim 11);
  - (v) Article 6.1.3 of the *AD Agreement* by not providing the text of the written application to the known exporters and to the Government of Brazil as soon as the investigation was initiated (Claim 14);
  - (vi) Article 6.8 and Annex II of the *AD Agreement* by disregarding the export price data submitted by certain exporters (Claim 17);
  - (vii) Article 6.10 of the *AD Agreement* by failing to establish individual margins of dumping for two exporters (Claim 22);
  - (viii) Article 2.4 of the *AD Agreement* by not making due allowance for differences in freight costs in the normal value established for an exporter (Claim 23);
  - (ix) Article 2.4 of the *AD Agreement* by not making due allowance for differences in taxation, freight and financial costs in the normal value established for several exporters (Claim 24);
  - (x) Article 2.4 of the *AD Agreement* by increasing all exporters' normal values by 9.09 per cent to reflect alleged differences in the physical characteristics of poultry sold in Argentina and Brazil (Claim 25);
  - (xi) Article 2.4.2 of the *AD Agreement* by establishing a dumping margin for two exporters on the basis of an inaccurate weighted average normal value (Claim 27);
  - (xii) Article 3.1 of the *AD Agreement* by failing to make an objective examination of injury when using different periods to evaluate the relevant economic factors and indices listed in Article 3.4 (Claim 32);

- (xiii) Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement* by including non-dumped imports from two exporters in its injury analysis (Claims 34-37); and
  - (xiv) Articles 3.1 and 3.4 of the *AD Agreement* by failing to evaluate all the relevant economic factors and indices listed in Article 3.4 (Claims 38 and 39).
- (b) Argentina has not acted inconsistently with its obligations under:
- (i) Article 5.7 of the *AD Agreement* by not considering simultaneously, in the determination whether or not to initiate the investigation, the evidence of both dumping and injury (Claim 9);
  - (ii) Article 6.1.2 of the *AD Agreement* in not making available promptly to certain Brazilian exporters evidence presented in writing by the other interested parties involved in the investigation (Claim 12);
  - (iii) Article 6.8 and Annex II of the *AD Agreement* by disregarding normal value data submitted by two exporters (Claim 19);
  - (iv) Article 6.9 of the *AD Agreement* by not informing the exporters of the essential facts under consideration which formed the basis for the decision whether to apply definitive measures (Claim 21);
  - (v) Article 2.4 of the *AD Agreement* in fixing the period of investigation for dumping (Claim 26);
  - (vi) Articles 9.2 and 9.3 of the *AD Agreement* by collecting variable anti-dumping duties on the basis of "minimum export prices" (Claims 28 and 29);
  - (vii) Article 4.1 of the *AD Agreement* by defining the domestic industry in terms of domestic producers accounting for 46 per cent of total domestic production of poultry in Argentina (Claim 41).
- (c) We have concluded that it is not necessary for us to make findings in respect of Brazil's Claims 1, 3, 5, 7, 8, 13, 15, 16, 18, 20, 30, 33, and 40. We also consider it unnecessary to examine Brazil's claims under Article VI of the *GATT 1994* and Article 1 of the *AD Agreement*.

## B. NULLIFICATION OR IMPAIRMENT

8.2 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Argentina has acted inconsistently with the provisions of the *AD Agreement*, it has nullified or impaired benefits accruing to Brazil under that Agreement.

## C. RECOMMENDATION

8.3 Brazil requests that we exercise our discretion under Article 19.1 of the *DSU* to suggest ways in which Argentina could implement our recommendation. Specifically, Brazil requests us to suggest that Argentina repeal Resolution No. 574/2000 imposing definitive anti-dumping measures on

eviscerated poultry from Brazil "in light of the numerous outcome-decisive violations of the AD Agreement."<sup>240</sup>

8.4 In considering Brazil's request, we first recall that Article 19.1 of the *DSU* provides in relevant part that:

"When a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body *may suggest ways in which the Member concerned could implement the recommendations*". (emphasis added; footnotes omitted)

8.5 Therefore, by virtue of Article 19.1 of the *DSU*, panels have discretion ("may") to suggest ways in which a Member could implement the relevant recommendation. Clearly, however, a panel is not required to make a suggestion should it not deem it appropriate to do so.

8.6 We have determined that Argentina has acted inconsistently with its obligations under the *AD Agreement* in its imposition of anti-dumping duties on imports of eviscerated poultry from Brazil. We have found these violations to be of a fundamental nature and pervasive.

8.7 In light of the nature and extent of the violations in this case, we do not perceive how Argentina could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Argentina repeal Resolution No. 574/2000 imposing definitive anti-dumping measures on eviscerated poultry from Brazil.

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<sup>240</sup> Brazil's first written submission, para. 550.