ANNEX B

Argentina

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ANNEX B-1

FIRST WRITTEN SUBMISSION OF ARGENTINA

(29 August 2002)

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INTRODUCTION

In this submission, Argentina rejects the doubts raised by Brazil concerning Resolution 574/2000 of the Ministry of the Economy of the Argentine Republic on the basis of various considerations of fact and law which are presented below in two main sections as follows: Section II, dealing with the standard of review and the rules and principles of public international law applicable to the case, and Section III, which refutes the substantive arguments contained in Brazil's 41 claims.

I. BACKGROUND

1. On 21 July 2000, the Ministry of the Economy of the Argentine Republic issued Resolution No. 574, imposing definitive anti-dumping measures on imports of poultry from Brazil, classified under MERCOSUR tariff headings 0207.11.00 and 0207.12.00 for a period of three years. The Resolution was published in the Official Bulletin of the Argentine Republic of 24 July 2000.

2. On 30 August 2000, in conformity with Article 2 of the Protocol of Brasilia, Brazil requested the initiation of direct negotiations with Argentina on the application of anti-dumping duties on Brazilian poultry exports (Resolution ME 574/00).

3. On 24 January 2001, Brazil gave notice of its intention to initiate the arbitral proceedings laid down in Article 7 of the Protocol of Brasilia.

4. On 21 May 2001, the dispute was settled by the award of the MERCOSUR Ad Hoc Arbitral Tribunal set up to rule on the *dispute between the Federative Republic of Brazil and the Argentine Republic on "Imposition of Anti-dumping Duties on Exports of Whole Poultry from Brazil (Res. 574/2000 of the Ministry of the Economy of the Argentine Republic)."* In accordance with Article 22 of the Protocol of Brasilia, following the award, the Arbitral Tribunal issued a clarification thereof on 18 June 2001.

5. On 7 November 2001, Brazil requested consultations with Argentina under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), including Article 17.4 thereof, and Article 19 of the Agreement on Implementation of Article VII of the GATT 1994 (Agreement on Customs Valuation), in respect of Resolution ME 574/00.

6. On 10 December 2001, consultations were held in Geneva between the delegations of the two countries.

7. On 25 February 2002, the Government of Brazil, pursuant to Article XXII of the GATT 1994, Article 6 of the DSU and Article 17 of the Anti-Dumping Agreement, requested the establishment of a panel.

8. On 17 April 2002, the Dispute Settlement Body established the Panel that was to examine the claims of the Government of Brazil. The Panel was constituted on 27 June 2002.

II. PRELIMINARY ARGUMENTS: RELEVANT RULES AND PRINCIPLES OF PUBLIC INTERNATIONAL LAW APPLICABLE TO THIS PROCEEDING

II.1 STANDARD OF REVIEW

9. Argentina agrees that there is a separate standard of review[1] in the case of Article 17.6 of the Anti-Dumping Agreement. However, the recognition of a different standard cannot be understood as an acknowledgement of the existence of the presumption of bad faith in international relations, let alone entitle Brazil to make an accusation against Argentina on the basis of such a presumption. On the contrary, the principle of good faith "informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements."[2]

10. Contrary to what Brazil has said[3], Argentina did not act in bad faith, but conducts its international relations according to the "pervasive"[4] principle of good faith that underlies all treaties.

11. Brazil puts forward a generic argument without identifying the instances in Argentina's investigation in which it considers that Argentina did not act in good faith, and without substantiating its assertions in this respect. Accusations of a generic nature are out of place in a WTO proceeding in which, ultimately, the law must be applied to the identified facts of the case.

12. Argentina considers that Brazil's arguments should be rejected: indeed, in none of the paragraphs under the heading "Anti-Dumping Agreement Standard of Review" does Brazil substantiate those arguments – it merely sets forth allegations which it fails to develop.

13. Argentina also rejects Brazil's argument[5] that the Argentine Government improperly established the facts and conducted a non-objective and biased evaluation of the facts so as to favour the interests of the domestic industry in a manner inconsistent with the provisions of the Anti-Dumping Agreement. Here once again, Brazil fails to provide evidence substantiating its assertion that the evaluation was "non-objective" or that the investigation was biased.

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[1] The peculiarity of the Anti-Dumping Agreement as the only one of the Agreements that contains a specific standard for the review of provisional or definitive anti-dumping measures or price agreements when they are challenged under the DSU was recognized in Panel Report WT/DS24/R of 8 November 1996: "We note that the ATC does not establish a standard of review for panels, contrary, for example, to the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, where Article 17.6 defines the standard of review that panels have to apply when reviewing cases arising under that Agreement. We further note that the DSU does not contain a provision mandating a specific standard of review", (paragraph 7.8, page 74).

Similarly, the Report of the Appellate Body in *Argentina – Safeguard Measures on Imports of Footwear* (WT/DS121/AB/R) of 14 December 1999 asserts that: "We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels. The only exception is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement".

[2] Report of the Appellate Body in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (United States – Hot-Rolled Steel)*, WT/DS184/AB/R adopted on 23 August 2001, paragraph 101.

[3] First written submission of Brazil, paragraph 31.

[4] Report of the Appellate Body in *United States – Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/AB/R) adopted on 20 March 2000, paragraph 166: " … This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith ... ".

[5] First written submission of Brazil, paragraph 28.

14. Similarly, Argentina notes that according to Article 17.6 (ii), the Panel "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law". That is to say, according to the Vienna Convention on the Law of Treaties, the correct way to proceed is to examine the ordinary meaning of the provision in its context and in the light of its object and purpose. Contrary to Brazil's unsubstantiated statement[6], the principle of good faith is at the basis of the rule *pacta sunt servanda*, i.e. treaties must be performed by the parties to them in good faith.

15. Similarly, Argentina also considers that the failure by Brazil to identify the case of bad faith which it attributes to Argentina seriously impairs its ability to defend itself under Article 3.10 of the DSU, according to which, if a dispute arises, the parties must engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". Thus, in *United States – Tax Treatment for "Foreign Sales Corporations"*[7], the Appellate Body maintained that: "By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes."

II.2 OTHER PRINCIPLES AND RULES OF PUBLIC INTERNATIONAL LAW APPLICABLE TO THE CASE

16. Brazil's claim also contradicts general principles of international law and disregards relevant rules of interpretation of WTO obligations. In this connection, Argentina would like to point out that Brazil's conduct in omitting any reference to the arbitral award relating to the same complaint in the framework of MERCOSUR, in which its claims were not upheld, is contrary to the principle of good faith in the fulfilment of agreements and in the actions of States. Brazil is now trying to reverse this negative result, rearguing its case under the WTO Dispute Settlement Understanding.

17. Argentina also wonders whether by omitting any reference to the fact that the case had already previously been discussed and settled in the framework of MERCOSUR, Brazil may have abused its rights under the WTO Agreements.

18. Argentina and Brazil are not only WTO Members, but also States party to MERCOSUR, and as such, cannot ignore the legal framework and the particular relationship resulting from the integration process. The existence of this legal framework and the adjudications of its dispute settlement system must be taken into account by the Panel when acting in accordance with the DSU. This fits in with the obligation contained in Article 3.2 of the DSU to clarify the existing provisions of the agreements in accordance with the customary rules of interpretation of public international law.

19. Both Argentina and Brazil, as States party to MERCOSUR, have assumed a set of commitments based on the Treaty of Asunción for the creation of the Southern Cone Common Market and the Protocol of Brasilia for the Settlement of Disputes (Protocol of Brasilia)[8] intended to resolve conflicts between States parties. These instruments are particularly relevant because Brazil's

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[6] First written submission of Brazil, paragraph 31.

[7] Report of the Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations"* (WT/DS108/AB/R) adopted on 20 March 2000, paragraph 166.

[8] Treaty for the Creation of a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, signed on 26 March 1991, which entered into force on 29 November 1991 and was notified under the GATT/WTO on 5 March 1992. Protocol of Brasilia for the Settlement of Disputes, signed on 17 December 1991. Available on: http:/www.mercosur.org.uy

complaint against Argentina in this case has already been addressed[9] and settled through the procedure regulated by those regional agreements.

20. Brazil's decision to resort to the Protocol of Brasilia mechanism as the appropriate framework for the settlement of the dispute, added to the fact that this was not the first instance of dispute settlement at the regional level – three awards had already been made previously between Argentina and Brazil[10] – implies full acceptance of the MERCOSUR legal framework and acceptance of the dispute settlement procedure *in totum*, including the unappealable and definitive nature of its awards.[11] Brazil has been consistent in repeatedly accepting the MERCOSUR dispute settlement system and its consequences, the arbitral awards. This is not an isolated practice, but a procedure regulated by a Protocol currently in force that has been applied in a total of eight cases since 1999[12],

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[9] Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the dispute between the Federative Republic of Brazil and the Argentine Republic regarding the imposition of anti-dumping measures on exports of whole poultry from Brazil (Res. 574/2000) of the Ministry of the Economy of the Argentine Republic. Date: 21 May 2001.

[10] I. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the dispute on communications Nos. 37 of 17 December 1997 and 7 of 20 February 1998 from the Department of Foreign Trade Operations (Decex) of the Secretariat for Foreign Trade (Secex): Application of restrictive measures to reciprocal trade. Date: 28 April 1999.

II. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the complaint of the Argentine Republic against the Federative Republic of Brazil on subsidies for the production and exportation of pork. Date: 27 September 1999.

III. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the application of safeguard measures to textile products (Res. 861/99) by the Ministry of the Economy and Public Works and Services. Date: 10 March 2000.

Available on: http:/www.mercosur.org.uy

[11] Articles 8 and 21 of the Protocol of Brasilia:

"Article 8: The State Parties declare that they recognize as obligatory, *ipso facto* and without need of a special agreement, the jurisdiction of the Arbitral Tribunal which in each case is established to hear and resolve all controversies which are referred to in the present Protocol."

"Article 21:

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."

(See Annex ARG-XXXII)

[12] I. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the dispute on communications Nos. 37 of 17 December 1997 and 7 of 20 February 1998 of the Department of Foreign Trade Operations (Decex) of the Secretariat for Foreign Trade (Secex): Application of restrictive measures to reciprocal trade. Date: 28 April 1999.

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III. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the application of safeguard measures to textile products (Res. 861/99) of the Ministry of the Economy and Public Works and Services. Date: 10 March 2000.

IV. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the dispute between the Federative Republic of Brazil and the Argentine Republic regarding the imposition of anti-dumping duties on exports of whole poultry from Brazil (Res. 574/2000) of the Ministry of the Economy of the Argentine Republic. Date: 21 May 2001.

seven of which have involved Brazil and five of which have involved disputes between Argentina and Brazil. The Panel cannot ignore this fact and the legal consequences associated with an arbitral award by an international tribunal.

21. Brazil's complaint within the framework of the WTO contradicts: (a) its consistent practice, as a MERCOSUR State party since 1991, of fulfilling the commitments it has assumed and having recourse to the dispute settlement procedure provided for under the Protocol of Brasilia and reaffirmed through the signature of the Protocol of Olivos[13]; (b) its consistent and unequivocal practice of accepting the scope of the arbitral awards, of which there have been eight thus far, seven of them involving Brazil either as complainant or respondent.

22. Argentina concludes that:

- For the purposes of clarifying the scope of the obligations *in casu*, account must be taken of the regulatory framework and the consequences of the fact that the Protocol of Brasilia was applied in the dispute at issue;

- in the alternative, the principle of estoppel and the consequences thereof are applicable to this dispute, since Brazil has consistently and unequivocally behaved in such a way as to lead Argentina to a conviction in respect of trade dispute settlement between the two parties in the framework of MERCOSUR and respect for the scope of the rulings.

II.3 PLEADINGS PERTAINING TO THIS SECTION

23. As Argentina has pointed out, the omission by Brazil of any reference to the dispute previously discussed and settled by another international tribunal clearly reveals that the current submission of the case to the WTO reflects an abusive exercise by Brazil of its rights.

24. Moreover, in the light of the international commitments in force, Brazil's prior and subsequent practice of accepting the framework of MERCOSUR for the discussion and settlement of trade disputes with Argentina as a fellow MERCOSUR State party, and given the terms under which the dispute was brought, Brazil's complaint in the framework of the WTO has given rise to an estoppel situation for which Brazil is liable under the DSU.

V. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the dispute brought by the Eastern Republic of Uruguay against the Argentine Republic concerning restrictions on access to the Argentine market of bicycles of Uruguayan origin. Date: 29 September 2001.

VI. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the dispute brought by the Eastern Republic of Uruguay against the Federative Republic of Brazil concerning the prohibition on imports of remoulded tyres from Uruguay. Date: 9 January 2002.

VII. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the dispute brought by the Argentine Republic against the Federative Republic of Brazil concerning barriers to the importation of Argentine phytosanitary products into the Brazilian market. Failure to incorporate Resolutions GMC Nos. 48/96, 87/96, 149/96, 156/96 and 71/98, preventing their entry into force in MERCOSUR. Date: 19 April 2002.

VIII. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the dispute between the Republic of Paraguay and the Eastern Republic of Uruguay concerning the application of the IMESI (*Impuesto específico interno* – Specific Internal Tax) on the sale of cigarettes. Date: 21 May 2002.

Complete texts of the above-mentioned awards available on: http:/www.mercosur.org.uy

[13] Protocol of Olivos for dispute settlement in MERCOSUR, signed on 18 February 2002 by the four MERCOSUR States parties (not yet in force). Complete text of the Protocol of Olivos available on: http:/www.mercosur.org.uy

25. For the above reasons, and considering in particular that Brazil's complaint involves challenging a measure which is identical in the current dispute to the measure at issue in the dispute within the framework of MERCOSUR, Argentina requests the Panel to refrain from ruling on the 41 claims of alleged inconsistency of the Argentine regulations with the Anti-Dumping Agreement contained in paragraph 549 of Brazil's first written submission, and consequently to reject the requests contained in paragraph 550 of that submission.

26. In case the Panel should reject these pleadings and consider that it must rule on all of Brazil's claims, Argentina has provided substantive justification in respect of each one of those claims in Section III below.

III. SUBSTANTIVE CLAIMS

III.1 INITIATION OF THE INVESTIGATION

III.1.1 CLAIMS 1 AND 5: CONSISTENCY WITH ARTICLE 5.2

27. Brazil claims that the information provided by CEPA in its application for the initiation of an investigation – in respect of the required adjustment of normal value in view of differences in physical characteristics – was not backed by the documentation (Claim 1) and that the normal value and the export price were calculated on the basis of different periods (Claim 5).

Text of Article 5.2

The relevant part of Article 5.2 stipulates as follows:

> *"An application under paragraph 1 shall include evidence of (a) dumping; (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:* (Emphasis added)
>
> *(…)*
>
> *(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;*
>
> *(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3."*

Argentine claim

28. Contrary to what Brazil contends in its Claims 1 and 5, the applicant provided all of the necessary evidence with respect to the normal value and the export value 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.

29. We agree with Brazil, given that Article 5.2 so requires, that the applicant must provide evidence – and not simple allegations or assertions – of dumping injury to the domestic industry and a causal link, as set forth in the various subparagraphs of Article 5.2.

30. However, Article 5.2 also stipulates that the applicant shall provide, with its applications, such information as is reasonably available to it on: the applicant and the domestic industry where applicable (Article 5.2(i)), the like product (5.2(ii)), prices – normal value and export value (Article 5.2(iii)) and the evolution of the volume of dumped imports, their effects, consequences and influence, both on the injury and on the causal link (Article 5.2(iv)).

31. In Argentina's view, when Article 5.2 states that: "[t]he application shall contain such information as is reasonably available to the applicant … ", it is anticipating the difficulties that domestic producers might encounter in their efforts to obtain documentary evidence of the situation at issue in their complaint.

32. It should be noted that the applicant supplied, with its application, the documentation that was available to it. The implementing authority cannot impose upon domestic producers requirements so stringent that they would effectively block their access to such proceedings. The above-mentioned provision in Article 5.2 provides applicants with access to proceedings of this kind in keeping with the right of parties to defend themselves; to require evidence that was beyond their reach would be to deny them that right.

33. In Argentina's view, the standards of evidence applied during the stage running from the submission of the application to the declaration of initiation of the investigation are revised upwards at later stages of the proceeding with the possible involvement of the producers-exporters concerned and other interested parties.

34. In other words, 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, which conducts a thorough investigation once the initiation has been decided. As stated in the Agreement, simple assertion of dumping, injury and causal link, unsubstantiated by relevant evidence within the limits of the information reasonably available to the applicant, is not sufficient. The authority examines the accuracy and adequacy of the evidence for the sole purpose of determining whether the initiation of an investigation is justified. Once the investigation has been initiated, the respondent companies as well as the importers have the right to defend themselves at every stage of the proceeding.

35. One of the reasons why the Anti-Dumping Agreement allows Members as much as 12 to 18 months to conduct an investigation is the complexity and detail involved in analysing, verifying and evaluating objectively the evidence that all of the participants are called upon to submit during the proceedings, in order to determine whether or not the situation justifies the imposition of anti-dumping duties in conformity with the Agreement.

36. In other words, in the course of the proceedings, the evidence initially supplied by the applicant and the evidence supplied subsequently are compared against the evidence provided by the respondent companies and the other interested parties, verified on site, where necessary, by the

implementing authority, in order to carry out an objective evaluation and arrive at reasoned conclusions.

37. There are clearly two different standards under the Agreement as regards, *inter alia*, the quality and quantity of evidence to be submitted. On the one hand, there is the evidence to be supplied with the application for initiation which, according to the Agreement, is the evidence reasonably available to the applicant; and, on the other hand, there is the evidence to be supplied once the investigation stage has begun. Likewise, as stipulated in the Agreement itself, the standard of examination of the evidence required of the authority in deciding on the initiation of an investigation must clearly be different from the standard of evaluation and analysis required of the same authority in respect of the evidence supplied by all of the interested parties throughout the investigation *vis-à-vis* the substantive requirements for reaching a conclusion of dumping, injury, and causal link during the investigation stage.

38. We recall, in this respect, the Panel's statement[14] in *Guatemala - Cement I*, in which it cites the case *United States – Measures Affecting Imports of Softwood Lumber from Canada*:[15]

> *"In analysing further what was meant by the term 'sufficient evidence', the Panel noted that* ***the quantum and quality of evidence to be required of an investigating authority prior 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*** *…."*[16] (Emphasis added)

39. The Agreement does not require the applicant to provide evidence in the application that is not reasonably available to it; indeed, evidence concerning normal value and export value *par excellence* are ultimately in the hands of the respondent companies and their importers. Nor, consequently, does the Agreement require the authority to evaluate evidence that is not yet in its hands, since that evidence will be supplied during the course of the proceedings.

40. It should be borne in mind that although Article 5.2 stipulates that the applicant must provide evidence of dumping, injury and causal link, it does not imply that the evidence supplied in itself should determine the existence of dumping, injury and causal link, but rather that the evidence, even if the Article itself does not say so, should be of **alleged** dumping, injury and causal link, **forming minimum grounds justifying the initiation of an investigation**. This interpretation is supported by an analysis of the context of the Article and the object and purpose of the Agreement. Any other interpretation would imply that an investigation was not necessary, since the evidence supplied with the application would be definitive. This would be illogical and would contradict the Agreement itself.

41. Article 1 of the Anti-Dumping Agreement establishes, as a principle that informs the Agreement, that: "[a]n anti-dumping measure shall be applied only under circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement … ".

42. The requirements for "initiated" must obviously be different from the requirements for the application of a definitive measure. This is why an investigation can be initiated, provisional duties applied, and a decision possibly taken not to impose a definitive measure.

43. It should also be pointed out that the Argentine implementing authority places at the disposal of applicants for the initiation of an investigation of alleged dumping a **"model form"** listing all of

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[14] *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico* (WT/DS60/R), Report of the Panel, paragraphs 7.55 and 7.56.

[15] SCM/162.

[16] *Idem*, paragraph 332.

the evidence that these must provide under Article 5.2 of the Anti-Dumping Agreement. The Anti-Dumping Agreement has been incorporated in the Argentine legal system in its totality. Thus, the model forms meet the requirements established by Article 5.2 and its subparagraphs. The applicant filled in the form and provided annexes containing the required evidence.

44. Argentina would like to recall in this respect a statement by the Panel in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*:

> *" … Article 5.2* ***does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations****. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application,* ***we cannot read the text of Article 5.2 as requiring such an analysis in the application itself****."*[17] (Emphasis added)

45. Consequently, Argentina repeats that contrary to what Brazil contends in its Claims 1 and 5, the applicant provided all of the necessary evidence with respect to normal value and export value as well as the relevant evidence to make the necessary adjustments for a fair comparison between the two values.

46. With respect to normal value, the evidence was supplied by the CENTRO DE EMPRESAS PROCESADORAS AVICOLAS (CEPA) based on a publication (JOX) containing values for the product on the Brazilian domestic market. These values were adjusted by CEPA to bring the product sold on the Brazilian domestic market into line with the product sold in Argentina, from which the head and feet are removed.

47. To adjust for differences affecting price comparability, due account was taken of the information provided by the applicant, as explained in the relevant technical report.

48. In Section I, folios 27 to 34, 37, 38, 43 and 44[18], the applicant provides information on the price of poultry (with feet, head and giblets) in São Paulo and the respective weight/meat ratio (recorded in the Directorate's report of the initiation of the investigation).

49. In accordance with Article 5.2, the authority made all of the necessary adjustments on the basis of the information and documentation "reasonably available to the applicant" supplied with the application.

50. In other words, the applicant provided the information reasonably available to it with respect to normal value, adding a publication by JOX *Asesoría Agropecuaria* (Agricultural Consultants*)*. The evidence provided is a representative value taken from a specialized publication for a given period. It is perfectly acceptable to provide a specialized publication as evidence, given that CEPA could hardly be expected to provide the sales invoices of Brazilian exporters for the Brazilian domestic market under the exact conditions of comparison that the Agreement itself requires. The majority of Argentine importers are distributors, wholesalers or major wholesale operators. This is why CEPA supplied, as evidence of normal value, the data contained in what is recognized as a serious specialized publication which reflected – within an acceptable margin of approximation in this instance – the same levels of commercial sales.[19]

51. Having provided evidence in the application within an appropriate margin of approximation in the form of a comparable price for a like product destined for consumption in the country of origin, it was unnecessary to make any market-related adjustments in order to carry out a fair comparison,

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[17] WT/DS132/R, Report of the Panel, paragraph 7.76.
[18] Annex ARG-I.
[19] See folio 170 of the File.

since the price data making up the evidence offered as normal value and the export prices supplied by the applicant corresponded to the same level of trade. Both prices refer to the starting-point in the marketing chain, so that with respect to that point, the comparability of the two was not affected. Thus, the requirements of the Agreement for the determination of dumping during the stage prior to the initiation of the investigation were met.

52. The applicant provided a report from JOX *Asesoría Agropecuaria* which states that " … the prices for poultry as recorded in our information bulletin refer to chilled poultry with feet, head and giblets."[20]

53. Accordingly, given that poultry is exported to Argentina without feet and head, CEPA provided an annex to Note 220/97 containing the calculation required to make a fair adjustment between poultry with feet and head sold on the Brazilian domestic market and the poultry exported to Argentina.

54. We stress that none of the subparagraphs of Article 5.2 state that the applicant must provide all of the evidence required under Articles 2 and 3 with its application for the initiation of an investigation.

55. In this connection, we cite the Panel Report in *Guatemala – Cement II*:

> *" … **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 …*
>
> *Consistent with our discussion above, **we consider that, although these provisions of Article 2 do not 'apply' as such to initiation determinations**, they are certainly relevant to an investigating authorities' consideration as to whether sufficient evidence of dumping exists to justify the initiation of an investigation."*[21] (Emphasis added)

56. 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, since it is obvious that the information on imports published by the official bodies in the country of the applicant (export price) would be reasonably available to any applicant. In other words, it is clear and reasonable that **the quantity and quality of information available to the applicant on normal sales value in the domestic market of the country of origin of the anti-dumping investigation should not be the same as for the export price.**

57. For the above reasons, Argentina submits that, in accordance with GATT/WTO precedent, for the purposes of the initiation the applicant provided the necessary evidence of dumping, injury and causal link in compliance with Article 5.2 of the Anti-Dumping Agreement, and that consequently, Claims 1 and 5 of Brazil are without foundation.

III.1.2 CLAIMS 2, 4, 6 AND 8: CONSISTENCY WITH ARTICLE 5.3

58. Brazil claims that by accepting the applicant's calculation to adjust normal value (Claim 2), by establishing export prices based only on export transactions with prices below normal value

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[20] See folio 180 of the File.

[21] *Guatemala – Definitive Anti-dumping Measures on Grey Portland Cement from Mexico* (WT/DS156/R), Report of the Panel, paragraphs 8.35 and 8.36.

(Claim 4), by calculating dumping margins between the normal value and the export price based on sales that were not made at as nearly as possible the same time (Claim 6) and given that the data on dumping and injury cover different periods (Claim 8), Argentina acted inconsistently with Article 5.3 of the Anti-Dumping Agreement.

Text of Article 5.3

> *"The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."*

Argentine argument

59. Contrary to Brazil's contentions with respect to Claims 2, 4, 6 and 8, Argentina submits that the implementing authority examined the accuracy and adequacy of the evidence provided by the applicant and concluded that it was sufficient to justify the initiation of the investigation.

60. Article 5.3 simply requires the investigating authority to examine the accuracy and adequacy of the evidence submitted by the applicant. In other words, the investigating authority must verify whether the evidence comes from a source that is backed by supporting documentation and whether it serves to prove that the requirements laid down in Article 5.2 of the Anti-Dumping Agreement have been met in such a way as to enable the implementing authority to determine the existence of **sufficient evidence to justify the initiation of an investigation.**

61. Thus, Article 5.3 of the Anti-Dumping Agreement does not impose any obligation on the authority to conduct, at that stage, a thorough investigation to establish the existence of dumping, injury and causal link, but rather, the obligation to examine the evidence provided in terms of its accuracy and adequacy.

62. Once the investigation has been initiated in accordance with the Agreement, the authorities have 12 months or a maximum of 18 months to compare the evidence submitted by the applicant against the evidence submitted by all of the interested parties, and to satisfy themselves as to its truth.

63. It must be borne in mind that the procedure leading from the application for initiation of the investigation to the decision as to whether the investigation is warranted is an *inaudita parte* procedure in which the respondents have not yet taken part or been able to provide evidence to counter the evidence provided by the applicant.

64. Similarly, the standard of "sufficient" evidence to justify the initiation of an investigation is considerably lower than the standard required for the decision to apply a preliminary or definitive measure.

65. As stated by the Chairman of the Panel in *United States – Measures Affecting Imports of Softwood Lumber from Canada*, cited by the Panel in *Guatemala – Cement I*:

> *" … A number of questions arose regarding particular aspects of the evidence addressed by the US Department of Commerce …* ***However, the Panel had to take into account that it was not reviewing a determination of the existence of subsidy, injury and causality, but a finding that sufficient evidence of these elements existed to warrant an investigation … [T]he threshold required by Article 2.1 of the Agreement for initiation of a countervailing duty investigation was such that the Panel could not properly find that the United States initiation in this case was***

inconsistent with that Article, having regard to the standard of review."[22] (Emphasis added)

66. Again, in *Guatemala – Cement I*, the Panel cited the *United States – Softwood Lumber* as follows:

> *"In analysing further what was meant by the term 'sufficient evidence', the Panel noted that* ***the quantum and quality of evidence to be required of an investigating authority prior 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 …*** *"*[23]

- **Concerning Brazil's claim that the implementing authority acted inconsistently with Article 5.3 by accepting the applicant's calculation to adjust normal value (Claim 2), we wish to make the following remarks:**

67. Resolution ex-SCI No. 349/91 concerning the form for the submission of an application for the initiation of an anti-dumping investigation grants the information provided by the applicant therein the status of affidavit. It should be pointed out in this connection that the implementing authority analysed the information on file when deciding to initiate the investigation. This is demonstrated by its effort to gather additional evidence on the basis of the official registers of import transactions, and to take account of that data and reflect its analysis thereof in its technical report.

68. It should be recalled, moreover, that Article 5.2 of the Agreement stipulates that "the application shall contain such information as is reasonably available to the applicant … ". Bearing this in mind, Argentina proceeded in conformity with Articles 2 and 5.3 of the Anti-Dumping Agreement. Due account was taken, in establishing price comparability, of the adjustments for which there was enough evidence to warrant their consideration, and adjustments were made at this stage of the proceedings on the basis of the evidence on file.

69. Once the application had been declared acceptable, during the stage prior to the initiation of the investigation, the technical bodies conducted an analysis of all of the documentation submitted.

70. Now, as regards the evidence of normal value taken for the initiation of the investigation, what was used was a publication by the consulting firm JOX of 30 June 1997 (Section I, folio 27)[24] referring to poultry with feet, heads and giblets; i.e. the reference is to sales prices on the domestic market of the product under investigation, since the said publication falls within the period under analysis at that stage.

71. As regards the statement in paragraph 77 of Brazil's submission that the information provided by JOX referred exclusively to prices of chilled poultry sold in Sao Paolo, with head, feet and giblets, for one day in 1997, we note that the implementing authority, upon examining the accuracy and adequacy of that evidence, began by taking account of the fact that JOX is a specialized publication providing an average representative value reflecting the state of the São Paulo market. That market is one of Brazil's most representative markets which, like Buenos Aires, is a large urban centre which reflects domestic consumption patterns.

72. The Agreement stipulates that identical or like products should be used for the purposes of comparison. If like products are used, adjustments may have to be made where appropriate.

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[22] Letter from the Chairman of the Panel to the Chairman of the GATT Committee on Subsidies and Countervailing Measures (SCM/163) of 19 February 1993.

[23] WT/DS60/R, Report of the Panel, paragraph 7.55.

[24] See the folios cited in Annex ARG-I.

However, the ultimate appropriateness of such adjustments is part of the investigation process. Indeed, the final part of Article 2.4 states that the implementing authority shall indicate to the parties in question what information is necessary to ensure a fair comparison.

73. It is in this light that we must consider the mentioned physical differences between the poultry sold on the São Paulo market, for which there was sufficient evidence of value to warrant the initiation of the investigation, and the comparable value for the determination of probable dumping justifying, together with the existence of injury and a causal link, the initiation of an investigation.

74. Likewise, data from a specialized publication on a like product in a representative market of origin (poultry with head and feet on the São Paulo market) is sufficient and adequate as evidence for the purposes of considering the initiation of the requested investigation. This evidence is not meant (and should not be meant) to prove that the totality of the product in the market of origin is identical to the product at issue, but rather, in accordance with the Agreement, to provide adequate and comparable information for the purposes of proving the existence of elements justifying, from the point of view of the dumping, the initiation of the investigation.

75. The physical differences between the product in the market of origin and the product exported to Argentina warranted, in the opinion of the implementing authority, an adjustment to eliminate possible differences affecting price comparability as stipulated in Article 2.4 of the Agreement. This is why the implementing authority decided that it was necessary to make a fair adjustment to allow for the difference between poultry sold in São Paulo with feet and head, and poultry exported by Brazil to Argentina, without feet or head.

76. It is also the responsibility of the implementing authority, as established in Article 5.3 of the Agreement, to determine whether the evidence provided is sufficient to justify the initiation of an investigation. Here, the implementing authority, bearing in mind the provisions of the Agreement relating to price comparability and adjustments, considered that since Article 5.3 of the Anti-Dumping Agreement did not define "sufficient evidence", the determination that the evidence supplied for that stage of the proceeding constituted "sufficient evidence" depended on its satisfying the implementing authority, on the understanding that the said evidence was subject to the condition precedent of a positive outcome of the overall review conducted.

- **Concerning Brazil's claim that the implementing authority acted inconsistently with Article 5.3 by establishing export prices based only on export transactions with prices below normal value (Claim 4), we would like to make the following remarks:**

77. Article 5.3 of the Agreement lays down the obligation to examine the accuracy and adequacy of the evidence provided in the application to determine whether it is sufficient to justify the initiation of the investigation. As explained previously, the implementing authority acted consistently with Article 5.3.

78. Brazil's statement that the selection of data by Argentina was inappropriate and biased for the purposes of establishing export prices and subsequently comparing them with the normal value in order to establish alleged dumping which, together with injury and a causal link, would justify the initiation of the investigation, is untrue. The implementing authority analysed the import transactions in an attempt to determine which of them corresponded closest to the product under investigation, and it did so for the sole purpose of calculating the most appropriate and comparable export price possible at this pre-initiation stage. Moreover, it worked out an average of the appropriate transactions, without in fact making any selection which might distort the difference between the export value and the normal value.

79. The technical department concerned examined the import transactions identified in the source in question with a view to determining which ones corresponded closest to the product under investigation so that the calculation of the export price could be as precise as possible.

80. The Report on the Initiation of the Investigation (Section IV, folios 471-518)[25] contains the margins of dumping established on the basis of the average for export transactions to Argentina involving the product under investigation. Consideration was given in this connection to average exports for the period January-August 1997. The alleged margins of dumping calculated in points 3, 4 and 7 of the Report were established for the purpose of conducting an additional analysis of the case at issue.

81. That analysis did not alter the conclusions on alleged dumping reached by the technical department. The methodology set forth in the Anti-Dumping Agreement having been applied, it was in fact unaffected by the additional analysis that Brazil calls into question.

- **Concerning Brazil's claim that the implementing authority acted inconsistently with Article 5.3 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 (Claim 6) and that the data on dumping and injury covers different periods (Claim 8), we would like to make the following remarks:**

82. Article 5.3 requires the implementing authority to examine the accuracy and adequacy of the evidence provided in the application to determine whether it is sufficient to justify the initiation of an investigation. There is no indication of any time requirements in respect of the export prices and the normal value.

83. The Argentine implementing authority acted consistently with the fair comparison requirement in Article 2.4 of the Agreement with respect to the determination, in keeping with the standard applicable to the initiation of an investigation, of the possible existence of dumping that would warrant, pending fulfilment of the requirement of sufficient evidence of injury and causal link, the initiation of the investigation.

84. The basis for comparison was established in the light of the evidence reasonably available to the applicant, bearing in mind that this evidence was appropriate for proceeding with the initiation. Once the investigation was open, and with the help of the evidence from the other interested parties, the implementing authority was able to have access to elements in keeping with the requirements of the Agreement for the purposes of making its provisional and definitive determinations.

85. As regards the time lapse between the data on dumping and the data on injury, Brazil's interpretation is biased and tendentious to say the least.

86. The Authority, acting in accordance with Article 5.2, examined the evidence submitted by the applicant, i.e. the evidence available to the applicant. Argentina interprets Article 5.3 as requiring an examination of the documentation submitted and a determination of whether it is sufficient, in accordance with the standards required at that stage. The authority should not be expected to meet a standard in respect of that examination similar to the standard required once the investigation has been initiated.

87. At that stage, the implementing authority is entitled to resort to on-site verifications of the information submitted by the exporters. This procedure is not provided for during the stage prior to initiation of the investigation. Moreover, the authority is limited by Article 5.5 of the Anti-Dumping Agreement which, unless the government of the respondent country has been notified of the existence

[25] See Exhibit BRA-2.

of an application, does not permit any publicizing thereof before the investigation has been declared open. Thus, the authority's power to investigate is restricted by the risk of violating Article 5.5 of the Anti-Dumping Agreement.

88. Finally, reverting to the evidence required by the Anti-Dumping Agreement in order to act on a request for the initiation of an investigation, the existence of dumping was established by the evidence recorded in Section IV, folio 471 of the DCD's Report on the Feasibility of Initiating an Investigation[26] of 7 January 1998; thus, evidence of the three elements having been produced, i.e. injury, dumping and causal link, the corresponding Administrative Act was issued in the form of Resolution SICyM No. 11 of 20 January 1999[27], published in the Official Bulletin on 25 January 1999, declaring the initiation of the investigation.

III.1.3 CLAIM 9: CONSISTENCY WITH ARTICLE 5.7

89. Brazil claims that Argentina acted inconsistently with Article 5.7 by not considering, in the decision whether or not to initiate the investigation, the data collected for dumping simultaneously with the data collected for injury.

Text of Article 5.7

The relevant part of Article 5.7 stipulates that:

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

Argentine argument

90. The determination of injury caused by dumped imports must be based on objective evidence and must involve an objective examination of "the consequent impact of these imports on domestic producers of such products". Brazil over-emphasizes the element of simultaneousness that may emerge from the provisions of the Agreement. The time lapse between the entry of the dumped imports and the impact that can be assessed as injury or threat thereof (in the indicated sequence) depends on the elements that cause the enterprises producing the like product to the imported product to react in the face of dumped imports, elements which may involve a time-lag which, far from precluding the possibility of action for unfair competition, supports that possibility.

91. In this case, Argentina was dealing with an initiation for threat of injury in which the existence of a dumped import price resulted in parameters that pointed to the existence of the conditions required for an affirmative determination of threat of injury during the phase prior to the initiation of the investigation.

92. As explained in the technical report prior to initiation, the business cycle of the industry at issue – the poultry industry – is approximately six months (including the incubation of chicks), so that price and quantity signals from the first half of 1997 would have an impact on indicators in the industry during the months following that period.

93. Thus, while prices in the domestic industry up to the first half of 1997 (i.e. during the period for which dumping was demonstrated) did not show signs of being significantly affected, prices for the sample domestic enterprises showed a steady decline after June 1997 in the absence of any factors other than the price gap between the price of imports on the domestic market and the price of the like domestic product, and the steady fall in average f.o.b. import prices from Brazil starting in 1997.

[26] *Idem.*
[27] See Exhibit BRA-7.

94. Moreover, Record (*Acta*) No. 464 of the CNCE Board[28] prior to the initiation of the investigation points out that "[t]he prices of the sample of domestic enterprises showed a decline in 1997 that will have to be analysed, should an investigation be initiated, in an ongoing context of declining prices of inputs and fluctuations in substitute products, such as bovine meat".

95. The Record adds: " … which could explain why up to 1997, domestic sales increased in spite of the dumping in that year, but by the first half of 1998 the rate of growth in domestic sales had already declined"[29] *in the context of a growth trend in the market share of Brazilian imports*.

III.1.4 CLAIMS 3, 7 AND 31: CONSISTENCY WITH ARTICLE 5.8

96. Brazil claims that Argentina violated Article 5.8 by failing to reject the application which, according to Brazil, was not based on evidence of dumping, pursuant to claims 1 and 2 (Claim 3) and pursuant to claims 5 and 6 (Claim 7), and by failing to reject the initiation of the investigation as soon as the CNCE determined that there was no injury in Record No. 405 (Claim 31).

Text of Article 5.8

The relevant passage of Article 5.8 stipulates that:

> *"5.8 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 … "*

Argentine argument

97. Bearing in mind what was stated above with respect to Claims 1, 2, 5 and 6, Brazil's arguments with respect to Claims 3 and 7 are without foundation; indeed, since the applicant had provided all of the documentation available to it, which was examined for accuracy and adequacy, there was no reason for the implementing authority to reject it.

98. What was provided was relevant evidence, and not merely allegation or conjecture as Brazil tries to demonstrate. The competent authority took account of the documentation submitted, which was duly analysed by the competent technical bodies. Moreover, it should be recalled that Article 5.2 of the Agreement stipulates that "[t]he application shall contain such information as is reasonably available to the applicant … ".

99. Thus, it can rightly be said that, as already mentioned, the implementing authority considered the information and documentation available in the file when deciding on the initiation of these proceedings.

100. As regards Brazil's claim that Argentina should have rejected the application for initiation of the investigation, we note that Article 38 of Decree 2121/94 entitles the investigating authority to grant the applicant a period of time to amend or complete the application should it contain any errors or omissions. This is linked, then, to the fact that an application may lack a particular item of information that is required or contain a clerical error. If so, the implementing authority informs the applicant accordingly so that within a set period of time, the errors or omissions can be corrected or remedied.

101. In this particular case, Brazil states that Argentina, faced with the determination made by the CNCE in Record No. 405 should, pursuant to the above-mentioned Article, have filed the case. In the

[28] See Exhibit BRA-6, point V, page 4.
[29] *Idem.*

light of the clarification of the actual meaning of Article 38 invoked by Brazil and the considerations of fact and law set forth below, there is no way that Argentina, acting in conformity with the law, could have filed the case.

102. The applicant, as emerges from the file, submitted updated information in keeping with the requirements of the application of 17 February 1998. As a result, the Legal Department of the Ministry of the Economy and Public Works and Services determined that " … in view of the fact that the information submitted by the *Centro de Empresas Procesadoras Avícolas* (CEPA) in file No. 061-001196/98 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 … " (folio 2302 of File CNCE No. 43/97).[30]

103. The examination of the new information submitted, far from conflicting with Argentine law, is expressly provided for in Article 60 of the Regulations to the National Law on Administrative Procedures (RLNPA), which stipulates that the competent body (in this case, which involves injury, the CNCE) shall intervene once again in the proceedings if any new developments occur or come to its knowledge. In the case at issue, the additional submission by the applicant introduced new items of evidence which called for a further intervention by the CNCE at the request of the competent bodies and in strict conformity with the law.

104. It should also be stressed that during the stage prior to the initiation of the investigation, third party rights are not affected, the only relationship being between the applicant and the implementing authority. Thus, Brazil, which as interested party in the investigation had access to all of the folios making up the file, will have noted that during the period of time between the applicant's submission and the decision to initiate, a number of proceedings took place. In light of the above considerations, the suggested filing of the case would have been contrary to administrative law and would have adversely affected individual rights of the applicant with all of the administrative consequences that such an act would entail.

105. In this connection, Article 5.5 of the Anti-Dumping Agreement is also applicable: "The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation … ".

106. Thus, paragraph 38 cited above is applicable where the implementing authority, having detected errors or omissions, has asked the applicant to correct or remedy them. Indeed, if the applicant does not do so within the time-period indicated by the authority, the case must be filed.

107. In the case at issue, however, within a specific period of time, the applicant provided updated information that warranted analysis and led to the determination set forth in Record No. 469.

108. Consequently, and in the light of the above-mentioned provisions, until the competent authority has expressly ruled on the initiation of the investigation on the basis of an overall analysis of each and every one of the elements on file, the case should not be filed.

III.2 CONDUCT OF AN ANTI-DUMPING INVESTIGATION – EVIDENTIARY AND PUBLIC NOTICE REQUIREMENTS

III.2.1 CLAIM 10: CONSISTENCY WITH ARTICLE 12.1

109. In paragraph 188 of its submission, Brazil claims that Argentina failed to notify seven Brazilian exporters when it was satisfied that there was sufficient evidence to justify the initiation of

[30] See Annex ARG-II.

an anti-dumping investigation. Brazil claims that, by not notifying these exporters when the investigation was initiated, Argentina acted inconsistently with Article 12.1 of the Anti-Dumping Agreement.

Text of Article 12.1

> *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 and a public notice shall be given.* (Emphasis added)
>
> According to Article 6.11, "interested parties" include:
>
> (*i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;*
>
> *(ii) the government of the exporting Member; and*
>
> *(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.*

Argentina's argument

110. Argentina submits that the investigating authorities have 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 the exporting Member, namely Brazil. Indeed, it would have been impossible to notify parties whose interest in the investigation was not known.

111. By Resolution SICyM No. 11/99 of 20 January 1999, published in the Official Journal of 25 January 1999, the Secretary for Industry, Trade and Mining announced the **initiation of the investigation** (Section VI, folios 712 to 715).[31]

112. By Note SSCE No. 121 of 1 February 1999[32], notification of the initiation of the investigation was made to the Chargé d'Affaires of the Federative Republic of Brazil in the Argentine Republic, requesting his 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"* (Section VI, folios 729 to 731).

113. The Note also specifies that *"a hearing will be held on 25 February 1999 for consultations regarding the scope of the ongoing investigation and to deliver questionnaires to the participants … . The Government of the Argentine Republic urges this diplomatic representation to take full cognizance of the aforementioned proceedings*". Lastly, the Note expresses readiness to remain at the Brazilian Government's disposal for any additional information that might be required.

[31] See Exhibit BRA-7.
[32] See Annex ARG-III.

114. By Notes SSCE Nos. 122/99 and 123/99[33] of 1 February 1999, notification of the initiation of the investigation was also sent by the Under-Secretariat for Foreign Trade to the Under-Secretary for American Economic Integration and the Under-Secretary for International Economic Negotiations, with a view to informing Argentina's diplomatic representation in the Federative Republic of Brazil and the Permanent Mission of the Argentine Republic to the International Organizations in Geneva, Switzerland, and to ensuring that the aforementioned Resolution was communicated to the relevant Committee (Section VI, folios 736 to 747).

115. In addition, on 16 February 1999, by Notes DCD Nos. 273-000139/99, 273-000138/99, 273-000144/799, 273-000137/99, 273-000140/99 and 273-000141/99[34], the producers/exporters **Avipal S.A. Avicultura e Agropecuaria**, **Frigorífico Nicolini Ltda., Seara Alimentos S.A.** and **Frangosul S.A., Agro Avícola Industrial** were invited to present all the evidence they considered relevant for the proper conduct of the investigation (Section VI, folios 759 and 760; Section VI, folios 757, 758, 769 and 770; Section VI, folios 755 and 756; and Section VI, folios 761 to 764, respectively).

116. Finally, on 25 February 1999, a **hearing** was held for the parties potentially interested in participating in the proceedings, at which DCD officials responded to questions from those who attended.

117. It should be emphasized that, the above notwithstanding, no representative of the Government of the Federative Republic of Brazil attended the hearing, as stated in the record of 25 February 1999 (Section VI, folio 828).[35]

118. It must be underlined, moreover, that Argentina recently learned of the interest of the other seven exporters cited in paragraph 190 of Brazil's submission (Cooperativa Central de Laticinios do Parana (CCLP), Catarinense, Chapecó, Minuano, Perdigão, Comaves and Penabranca), via a questionnaire answered by INTERAMERICANA COMERCIAL S.R.L., in which the company asks that information be sought from those enterprises as well.[36]

119. This is why, deeming the matter to be relevant to the investigation, Argentina acceded to the request made by the importer INTERAMERICANA COMERCIAL S.R.L. By Notes DCD Nos. 273-001062/99, 273-001063/99, 273-001064/99, 273-001065/99, 273-001066/99 and 273-001067/99 of 15 September 1999[37], the DCD asked the Brazilian producers Chapecó, Minuano, Perdigão, Catarinense, CCLP and Comaves to specify the price per kg. of poultry actually paid in the Brazilian market by wholesalers over the period January 1998–January 1999. For the purposes of orderly data presentation, a questionnaire for exporters/producers was sent to those producers, together with instructions on how to fill in the document, contrary to Brazil's statement in Claim 11, paragraph 202, which is addressed separately (Section LIII, folios 2369 and 2370; Section LII, folios 2367 and 2368; Section LII, folios 2361 and 2362; and Section LII, folios 2363 and 2364).

120. Hence, Brazil's claim that Argentina failed to meet its obligation to notify the exporters is without foundation and utterly tendentious.

III.2.2 CLAIMS 11 TO 14: CONSISTENCY WITH ARTICLE 6

121. By way of introduction and regarding the question of violation of Article 6 of the Agreement, it should be pointed out that, in order to help to guide interested firms and parties, the implementing

[33] See Annex ARG-IV.
[34] See Annex ARG-V.
[35] SeeAnnex ARG-VI.
[36] See Annex ARG-VII.
[37] Annex ARG-VIII attached.

authority rapidly provides them with questionnaires and forms. These specify any information and documentation relevant to the purposes of an investigation.

122. Therefore, even though the Brazilian Government had not singled out specific exporters, the implementing authority, to ensure the full participation of the producers/exporters and having determined the adequacy of the request made by the importer INTERAMERICANA COMERCIAL S.R.L., asked *inter alia* that specific Brazilian companies and institutions, including Comaves, Catarinense, Minuano, Chapecó and Perdigão, be requested to submit reports on actual sales, prices per kg. of poultry actually paid, and so forth (File No. 061-003264 of 21 April 1999, Section X, folio 1007).[38] By Note DCD No. 273-000832/99, the DCD accordingly asked INTERAMERICANA COMERCIAL S.R.L. to provide a list of addresses for the aforementioned firms (Section XXIV, folio 2000).[39]

123. The above-mentioned enterprise duly presented a list giving the particulars and domicile of the firms in question (File No. 061-007231/99 of 12 August 1999, Section XXVII, folio 2296).[40]

124. Reports were thus requested from the following exporters (Section LII, folios 2361, 2363, 2365, 2367, 2369 and 2371):[41]

- COOPERATIVA CENTRAL DE LATICINIOS DO PARANA, by Note DCD No. 273-001066/99
- COOPERATIVA CENTRAL OESTE CATARINENSE LTDA., by Note DCD No. 273-001065/99
- CHAPECO CIA INDUSTRIAL, by Note DCD No. 273-001062/99
- CIA MINUANO DE ALIMENTOS, by Note DCD No. 273-001063/99
- PERDIGÃO INDUSTRIAL, by Note DCD No. 273-001064/99
- COMAVES INDUSTRIA E COMERCIO DE ALIMENTOS LTDA, by Note DCD No. 273-001067/99

As can be seen from the above, the implementing authority sought to offer the widest possible opportunity for participation; moreover, it granted a series of additional deadlines upon good cause shown by those requesting extensions and took account of various participants' difficulties in gathering and actually producing evidence.

III.2.2.1 CLAIM 11: CONSISTENCY WITH ARTICLE 6.1.1

125. Brazil claims that Argentina acted inconsistently with Article 6.1.1. by failing to give seven Brazilian exporters at least 30 days to reply to the dumping questionnaires supplied by the DCD. Brazil also claims that the CNCE never notified these seven exporters and never provided them with the injury questionnaires.

[38] See Annex ARG-VII.
[39] See Annex ARG-IX.
[40] See Annex ARG-X.
[41] See Annex ARG-VIII.

Text of Article 6.1.1

> *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.*

Argentina's argument

126. Argentina submits that it has not violated Article 6.1.1, because it not only granted the Brazilian exporters a **period of more than 30 days** to reply to the DCD's questionnaires but also duly acceded to their requests for extension by granting them whenever practicable.

127. As regards the seven exporters referred to in Brazil's submission, it should be reiterated that, contrary to Brazil's claim, the investigating authorities provided them with the questionnaire for exporters/producers, together with instructions on how to fill in the document.

128. On 25 February 1999, a **hearing** was held for the parties potentially interested in participating in the proceedings, at which DCD officials responded to questions from those who attended.

129. The date of 29 March 1999 was set for the presentation of the relevant forms and questionnaires and the submission of evidence by the firms involved to the DCD.

130. The successive applications for extension of the deadline for the submission of evidence are listed by way of example:[42]

- Application by SADIA S.A. for an extension of the deadline for submission of its questionnaire; granted by the DCD (File No. 061-002094/99 of 15 March 1999, folio 930).

- Application by FRANGUSOL S.A. for an extension of the deadline for submission of its questionnaire; granted by the DCD (File No. 061-002101/99 of 15 March 1999, folio 931).

- Application by FRIGORIFICO NICOLINI LTDA. for an extension of the deadline for submission of its questionnaire; granted by the DCD (File No. 061-002102/99 of 15 March 1999, folio 934).

- Application by AVIPAL S.A. for an extension of the deadline for submission of its questionnaire; granted by the DCD (File No. 061-002140/99 of 16 March 1999, folio 935).

131. The above examples bear witness to the authorities' determination, throughout the proceedings, to offer interested parties the broadest possible opportunity not only to participate but also to gather the information needed to ensure an accurate final determination.

132. Upon expiry of the new deadline for the presentation of the DCD's questionnaires and the provision of evidence regarded as relevant, the firms involved in the investigation submitted the documentation, which was incorporated in the report on evidence adduced prior to the production of evidence stage (Section XXII, folios 1771 to 1806).

[42] See Annex ARG-XI.

133. The following replies were also received from the seven Brazilian producers (CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and Penabranca) to whom the questionnaires had been delivered by Notes DCD Nos. 273-001062/99, 273-001063/99, 273-001064/99, 273-001065/99, 273-001066/99 and 273-001067/99 of 15 September 1999, in response to a request from INTERAMERICANA COMERCIAL S.R.L.:[43]

> Responding to the DCD's request, Cooperativa Central De Laticinios Do Parana LTDA. stated on 18 October 1999 that it had made **no** exports to Argentina of the product at issue during the period January 1998–January 1999 (File No. 061-009759/99, Section LIII, folio 2387).[44]
>
> COOPERATIVA OESTE CATARINENSE LTDA. requested an extension of the deadline for the submission of additional information and provided the following documentation (File No. 061-010463/99, Sections LIII to LIX, folio 2405):[45]
>
> Annex I – Identification of the producer/exporter. Confirmation of conformity for the purposes of verification.
>
> Annex II – Identification of the product at issue. Technical specifications and copies of labels attached.
>
> Annex III – List of importers in Argentina and third countries of the goods under investigation.
>
> Annex IV – Information on the producer/exporter market. Unit of measure: tonne.
>
> Annex V – Summary of productor/exporter sales. Whole, frozen, eviscerated poultry. Unit of measure: tonne.
>
> Annex VI – Summary of producer/exporter sales. Whole, frozen, eviscerated poultry. Unit of measure: US$ mil.
>
> Additional information: History of the *Cooperativa*, profile, business name, lists of addresses of parent company and branches, main input suppliers, organizational and managerial aspects, functional chart of the management, distribution channels in the domestic, foreign and Argentine markets, list of the company's products, technical specifications of the products at issue, and statements of assets for the financial periods 1997 and 1998.
>
> Annex VII – Actual exports to Argentina by transaction (including documentary evidence).
>
> Annex VIII – Sales in the domestic market for 1998 and January 1999, disaggregated by transaction.
>
> Annex IX – Exports to third countries.
>
> Annex X – Cost structure of imported goods.
>
> Annex XI – Cost structure of exported goods.

[43] See Annex ARG-VIII.
[44] See Annex ARG-XXVI.
[45] See Annex ARG-XII.

The *Cooperativa* supplied both confidential and non-confidential data, along with a non-confidential summary.

It also provided a description of the manufacturing process of the product at issue, and a fluxogram.

The *Cooperativa's* request for extension was granted (Section LIX, folios 2416 and 2417).[46]

On 28 October 1999, CHAPECO COMPANHIA INDUSTRIAL DE ALIMENTOS (Cascavel plant) informed the DCD that it had made **no** sales to Argentina during the period under investigation (File No. 061-010656/99, Section LIX, folio 2418).[47]

On 9 November 1999, MINUANO DE ALIMENTOS requested an extension of the deadline for the submission of information (File No. 061-010773/99, Section LIX, folio 2419).[48] On 18 November 1999, the DCD extended the requested deadline until 22 November 1999 (Note DCD No. 273-001409/99, Section LIX, folios 2429 and 2430).[49] **The Brazilian firm had submitted no information by the time the deadline expired.**

On 18 November 1999, COMAVES INDUSTRIA E COMERCIO DE ALIMENTOS LTDA requested an extension of the deadline for the submission of information (File No. 061-011200/99, Section LIX, folio 2446).[50] On 7 December 1999, the DCD extended the deadline until 13 December 1999 (Note DCD No. 273-001487/99, Section LIX, folios 2487 and 2488).[51] **The Brazilian firm had submitted no information by the time the deadline expired.**

On 11 November 1999, the Brazilian exporter PENABRANCA requested an extension of the deadline for the submission of information on the price per kg. of poultry actually paid in the Brazilian market (File No. 061-010864/99, Section LIX, folio 2421).[52] On 18 November 1999, the DCD extended the deadline until 29 November 1999 (Note DCD No. 273-001406/99, Section LIX, folios 2423 and 2424).[53] **The Brazilian firm had submitted no information by the time the deadline expired.**

The Brazilian firm PERDIGÃO AGROINDUSTRIAL never responded, not even to request an extension of the deadline.

By Notes DCD Nos. 273-001309/99, 273-001317/99 and 273-001318/99 dated 4 November 1999, and Nos. 273-001319/99 and 273-001321/99 dated 8 November 1999[54], the Brazilian firms COOPERATIVA CENTRAL OESTE CATARINENSE LTDA. CHAPECO CIA INDUSTRIAL, CIA MINUANO DE ALIMENTOS, PERDIGÃO AGROINDUSTRIAL and COMAVES INDUSTRIA E COMERCIO DE ALIMENTOS were informed of the provisions of Law No. 19.549 on Administrative Procedures and Regulatory Decrees Nos. 1759/72 and 1883/91, regarding submissions to the National Public Administration.

[46] See Annex ARG-XIII.
[47] See Annex ARG-XIV.
[48] See Annex ARG-XV.
[49] See Annex ARG-XVI.
[50] See Annex ARG-XVII.
[51] See Annex ARG-XVIII.
[52] See Annex ARG-XIX.
[53] See Annex ARG-XX.
[54] See Annex ARG-XXI.

134. In view of the foregoing, and contrary to Brazil's claim in paragraph 211 of its submission, Argentina submits that the investigating authorities granted the Brazilian exporters a deadline longer than that specified in the Agreement to reply to the DCD's questionnaires, having due regard for the exporters' requests for extensions, which were granted whenever practicable, pursuant to Article 6.1.1.

135. With respect to paragraph 212 of Brazil's submission, claiming that seven exporters never received the CNCE's injury questionnaire, it should be pointed out that the CNCE delivered the questionnaire to only eight exporters in full conformity with the provisions of Article 6.1, the scope of which appears to be exaggerated by Brazil. Indeed, in the words of the relevant section of Record No. 576:[55] *"Moreover, the exports to Argentina notified by the Brazilian enterprises that replied to the CNCE's 'Questionnaire for Exporters' accounted for more than half of all imports of whole, eviscerated poultry from Brazil ... ."*

136. Argentina therefore considers that the implementing authority satisfied the Article 6.1.1 requirement. Moreover, Brazil never challenged the circumstance now being complained of in its various statements in the course of the investigation.

III.2.2.2 CLAIM 12: CONSISTENCY WITH ARTICLE 6.1.2

137. Brazil claims that Argentina acted inconsistently with Article 6.1.2 by failing promptly to make available to the other interested parties participating in the investigation evidence presented in writing by the interested parties.

Text of Article 6.1.2

> *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.*

Argentina's argument

138. Contrary to Brazil's claim, the Argentine authorities fulfilled the obligation in Article 6.1.2 in that they promptly made available to the interested parties participating in the investigation evidence presented in writing by the other interested parties. This is demonstrated by the fact that, once the investigation had started, the Argentine authorities 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. Thus, authorized interested parties could at all times consult the file and obtain a copy thereof, that is, not only of the application itself but also of all the other records on file.

139. Brazil therefore incorrectly asserts, in paragraph 216 of its submission, that seven Brazilian exporters participated in the investigation for eight months, unbeknown to themselves, before they were notified thereof. As Argentina points out in connection with the question of consistency with Article 12.1 (Claim 10), the investigating authorities recently learned of the interest of the other seven exporters cited by Brazil in paragraph 216 of its submission (Cooperativa Central de Laticinios do Parana (CCLP), Catarinense, Chapecó, Minuano, Perdigão, Comaves and Penabranca), via the questionnaire answered by INTERAMERICANA COMERCIAL S.R.L, in which the company asks that information be sought from those enterprises as well.

140. The Argentine authorities could hardly have made available to the seven Brazilian exporters evidence presented in writing by the other interested parties participating in the investigation if those exporters were not part of the investigation. Argentina's only obligation was promptly to make

[55] See Exhibit BRA-14.

available to the other interested parties participating in the investigation evidence presented in writing by one interested party – and so Argentina did.

141. Argentina deplores the fact that the Brazilian Government, which was indeed informed prior to the initiation of the investigation and was a party with an interest therein from the outset, did not advise the Argentine authorities of the interest of those firms or suggest that it would be advisable for the latter to participate in the proceedings.

142. Even so, immediately after being apprised of the above, Argentina, in the interest of due process and seeking to obtain relevant information in order to ensure full consistency of its decisions with the legal provisions in force, asked the Brazilian producers CCLP, Catarinense, Chapecó, Minuano, Perdigão and Comaves to specify the price per kg. of poultry actually paid in the Brazilian market by wholesalers over the period January 1998–January 1999 and sent them the questionnaire for exporters/producers together with instructions on how to fill in the document, for the purposes of orderly data presentation (Section LIII, folios 2369 to 2372; Section LII, folios 2365 to 2368; folios 2361 and 2362; folios 2363 and 2364).[56]

143. In addition, and contrary to Brazil's claim[57], it should be emphasized that the replies received from those exporters clearly show that two of the seven enterprises (CCLP and CHAPECO) made no exports to Argentina during the period under investigation, while the other four (Minuano, Comaves, Penabranca and Perdigão) stated that they had no interest in the investigation.

144. Indeed, in response to the DCD's request, Cooperativa Central de Laticinios do Parana LTDA. (CCLP) and CHAPECO COMPANHIA INDUSTRIAL DE ALIMENTOS (Cascavel plant) informed the DCD on 18 October 1999 and 28 October 1999, respectively, by means of Files Nos. 061-009759/99 and 061-010656/99, that they had made **no** exports to Argentina of the product at issue over the period January 1998–January 1999 (Section LIII, folio 2387[58] and Section LIX, folio 2418).[59]

145. By Files Nos. 061-010773/99, 061-011200/99 and 061-010864/99 of 9 November 1999, 18 November 1999 and 11 November 1999[60], respectively, MINUANO DE ALIMENTOS, COMAVES INDUSTRIA E COMERCIO DE ALIMENTOS LTDA. and PENABRANCA requested an extension of their deadlines for submitting information. By Notes DCD Nos. 273-001409/99 of 18 November 1999, 273-001487/99 of 7 December 1999 and 273-001406/99 of 18 November 1999, the DCD granted the extensions requested to 22 November 1999 in the first case, 13 December 1999 in the second, and 29 November 1999 in the third.[61] **By the time the deadlines expired, however, none of those enterprises had submitted any information.** The Brazilian firm PERDIGÃO AGROINDUSTRIAL never responded, not even to request an extension.

146. Argentina deems that it has thus given all the interested parties the opportunity to present in writing all the evidence they regard as relevant. However, if the parties with a supposed interest in the investigation did not participate, it was they – and not the implementing authority – that failed to defend their own interests.

147. This is why Argentina maintains that it would have been difficult for the investigating authorities to make the evidence presented by the interested parties promptly available to the

[56] See Annex ARG-VIII.

[57] Submission of Brazil, paragraph 219: " … they exported the subject merchandise to Argentina in the period of investigation … ".

[58] See Annex ARG-XXVI.

[59] See Annex ARG-XIV.

[60] See Annexes ARG-XVII and XIX.

[61] See Annexes ARG-XVIII and XX.

enterprises in question, given that the latter did not even join as interested parties. Argentina therefore submits that it acted consistently with Article 6.1.2.

III.2.2.3 CLAIM 13: CONSISTENCY WITH ARTICLE 6.2

148. Brazil claims that Argentina acted inconsistently with Article 6.2 by failing to give the interested parties full opportunity to defend their interests.

Text of Article 6.2

The relevant section of Article 6.2 provides that:

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

Argentina's argument

149. Contrary to Brazil's claim, all the interested parties had full opportunity to defend their interests throughout the investigation and, by giving them that opportunity, the investigating authorities satisfied the obligation laid down in Article 6.2.

150. Argentina agrees with paragraph 222 of Brazil's submission that Article 6.2 does not provide specific guidance as to what steps investigating authorities should take in practice. In the light of the facts set forth below, Argentina deems that it has met the Article 6.2 requirement.

151. As already mentioned in relation to the question of consistency with Article 6.1.3 (Claim 14), 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, and any other party that considered itself as having an interest therein could present itself at the investigation with such a request. In the specific case of the exporters, the practice is for their governments and the latter's importer-clients to advise ex officio that anti-dumping proceedings have been initiated in the country of origin of the product under investigation.

152. Hence the way in which the Argentine 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. Argentina consequently deems irrelevant the arguments put forward by Brazil in support of its Article 6.2 claim concerning "impairment of the right of defence".

153. In addition to the above, the authorities' determination, throughout the proceedings, to offer interested parties the broadest possible opportunity not only to participate but also to gather the information needed to ensure an accurate final determination is evidenced by the record of submissions made by the participating firms and the conclusions reached on the basis of those submissions. Thus, the information supplied by the exporters SADIA S.A., AVIPAL S.A., FRIGORIFICO NICOLINI LTDA. and SEARA ALIMENTOS S.A. led to a determination of their respective individual margins of dumping.

154. The work done by the Technical Department in requesting and putting together all this documentation can be seen from the following notifications:[62]

- Note DCD No. 273-001460/99 of 3 December 1999 – SEARA ALIMENTOS S.A.

[62] See Annex ARG-XXII.

- Note DCD No. 273-001461/99 of 3 December 1999 – FRIGORIFICO NICOLINI LTDA.

- Note DCD No. 273-001462/99 of 3 December 1999 – SADIA S.A.

155. In the other cases, the implementing authority had to gather the information from other sources.

156. As regards the other firms examined by the implementing authority (DA GRANJA AGROI, SADIA CONCORDIA, ACAUA INDUSTRIA, FELIPE AVICOLA, VENETO and LITORAL ALIMENT), Argentina reiterates that there was no additional information or sufficient supporting documentation, despite the numerous requests made by the implementing authority. The following are cited as examples:[63]

- Note DCD No. 273-001319/99 – PERDIGÃO AGROINDUSTRIAL

- Note DCD No. 273-001406/99 – PENABRANCA AVICULTURA S.A.

- Note DCD No. 273-001409/99 – COMPANHIA MINUANO DE ALIMENTOS

- Note DCD No. 273-001487/99 – COMAVES IND. E COM. DE ALIMENTOS LTDA.

- File No. 061-008834/99 from the COOPERATIVA CENTRAL OESTE CATARINENSE requesting an extension of the deadline.

157. In broad terms, it should be emphasized that while detailed analysis of the questionnaires provides an approximate picture of companies' trade operations, the supporting documentation is the key source for determining prices, tax adjustments and levels of trade. It is also the basis on which the implementing authority is empowered to verify information on the spot.

158. In a further unsubstantiated statement in paragraph 222 of its submission, Brazil claims that Argentina acted inconsistently with Article 6.2 by notifying the investigation and requesting a response to the injury questionnaires eight months after the initiation of the investigation. That statement is incorrect. Brazil's assertion in paragraph 222 obviously refers once again to the seven exporters which Brazil contends had an interest in the investigation.

159. It should be pointed out in this connection that the obligation to give public notice and to notify the interested parties (exporter or foreign producer) applies only to parties known to have an interest in the investigation (Argentina reiterates its statement in respect of Article 12.1; Claim 10). Indeed, it would have been impossible to notify parties whose interest therein was not known. Argentina also reiterates that it was Brazil itself that had the most obvious opportunity of informing all Brazilian producers of the existence of this investigation and/or of advising the Argentine Government of the existence of such producers. An investigation is opened on the basis of knowledge of each known exporter or foreign producer as notified by the applicant and, once the opening of the investigation has become public, the responsibility of ensuring that all potential actors participate in that investigation does not lie solely with the implementing authority.

160. In a dumping case in which the matter at issue is the competitive behaviour of foreign producers and/or exporters, the direct consequence of delivering the notification to initiate to the

[63] See Annexes ARG-XXI, XX, XVI, XVIII and XIII.

Government of the interested exporting Member is that knowledge pertaining to the sphere in which foreign producers operate may be protected. That notion is embodied, *inter alia*, in Article 6.1.3.

161. Such was not the case of the interests of the seven exporters, as amply noted and documented by Argentina in its discussion of the question of consistency with Article 6.1.2 (Claim 12). In the light of the foregoing, Argentina deems that the investigating authorities have fulfilled the Article 6.2 requirement.

III.2.2.4 CLAIM 14: CONSISTENCY WITH ARTICLE 6.1.3

162. Brazil claims that Argentina acted inconsistently with Article 6.1.3 by not providing the text of the written application to the Brazilian exporters and the Government of Brazil as soon as the investigation was initiated.

Text of Article 6.1.3

> *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.* (Emphasis added)
>
> [*]The footnote reads as follows:
>
> It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

Argentina's argument

163. Contrary to Brazil's claim, the Argentine authorities satisfied the requirements of Article 6.1.3 by providing the Brazilian exporters and the Brazilian Government with the full text of the written application as soon as the investigation was initiated.

164. Brazil claims that the Argentine authorities acted inconsistently with Article 6.1.3 in that they failed to transmit the application to the known exporters and to the authorities of the exporting country. In this connection, it should be emphasized that, in its Spanish version, the Article lays down the obligation to "*facilitar*" ("provide"). The Argentine authorities satisfied that obligation by making the records of the proceedings available to authorized interested parties. Argentina fails to understand why Brazil concludes that the term "facilitar" means "to send", and considers Brazil's interpretation to be erroneous.

165. 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.

166. Argentina consequently considers the claim concerning "curtailment of the right of defence" in paragraph 230 of Brazil's submission to be inadmissible, since Brazil's diplomatic representation in Argentina had available to it, at all times, the full records covering the initiation and entire duration of the investigation, pursuant to Article 6.1.3.

167. Moreover, 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.

From the moment notification appeared in the Official Bulletin, interested parties *with accredited status were able to gain immediate access to the records of the proceedings.*

168. Therefore, the way in which the written application and access for interested parties was provided by the Argentine authorities clearly does not impair the parties' right of access to the records and even less their right of defence.

169. Moreover, once the Argentine authorities had initiated the investigation, notification was given, by Note SSCE No. 121 of 1 February 1999[64], to the Brazilian Chargé d'Affaires in Argentina, pursuant to Article 6 of the Anti-Dumping Agreement. The Note clearly shows that Argentina expects the Brazilian Government to cooperate "*in identifying the interested producers/exporters in this investigation and providing them with the attached requests for information, in order that they could supply the Argentine Government with the details requested on the product under investigation*".

170. The Note further states that "*a hearing will be held on 25 February 1999 for consultations regarding the scope of the ongoing investigation and to deliver questionnaires to the participants … . The Government of the Argentine Republic urges this diplomatic representation to take full cognizance of the aforementioned proceedings*". Lastly, the Note expresses readiness to remain at the Brazilian Government's disposal for any additional information that might be required.

171. The above notwithstanding, no representative of the Brazilian Government attended the hearing, as stated in the record of 25 February 1999 (Section VI, folio 828)[65], nor is there any record of the presence of any interested party at the hearing. Brazil can hardly claim today that its right of defence was impaired.

172. Furthermore, Argentina fails to understand how the Brazilian Government calculates the deadline for notifying initiation of the investigation, since Resolution SICyM No. 11/99 of 20 January 1999 was published in the Official Bulletin of 25 January 1999, namely the date on which the countdown was to begin.

173. Considering that the Brazilian authorities were notified on 1 February 1999, it can be established that five working days had elapsed and not 12, as Brazil erroneously maintains in paragraph 237 of its submission.

174. Once again, Argentina is surprised to see how Brazil repeatedly seeks to mislead the Panel by misinterpreting not only the Agreement but also the practical steps taken by Argentina's implementing authority.

III.2.3 CLAIMS 15, 16, 17 AND 21: CONSISTENCY WITH ARTICLES 6.8 (ANNEX II), 6.9 AND 12.2.2

175. Brazil claims that Argentina acted inconsistently with Article 6.8 and Annex II 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 the applicant (Claim 15). Brazil likewise claims that Argentina acted inconsistently with Article 12.2.2 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 the applicant (Claim 16). Brazil further claims that Argentina acted inconsistently with Article 6.8 and Annex II by disregarding the export price data provided by the Brazilian exporters, and resorting to the export price information provided by the Secretariat for

[64] See Annex ARG-III.
[65] See Annex ARG-VI.

Agriculture, Fisheries and Food (Claim 17). Lastly, Brazil claims that Argentina acted inconsistently with Article 6.9 by failing to inform the Brazilian exporters of the essential facts (Claim 21).

Text of Article 6.8

> *In cases in which 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 the facts available. The provisions of Annex II shall be observed in the application of this paragraph.*

Text of Annex II, paragraphs 3, 6 and 7

> The relevant section of paragraph 3 provides that:
>
> *3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made….*
>
> *6. 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.*
>
> *7. If 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.*

Text of Article 6.9

> *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.*

Text of Article 12.2.2

> *A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for*

the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

Argentina's argument

176. Contrary to Brazil's claim, the DCD based its conclusions on " … [a]ll information which is verifiable, which is appropriately submitted … ", pursuant to Annex II, paragraph 3, of the Anti-Dumping Agreement.

177. In order to examine the information, the Argentine authorities send questionnaires containing all the elements needed to conduct an accurate analysis with a view to determining the existence or absence of dumping, and specify the need for supporting documentation to substantiate the questionnaire information and to allow those replying to add all further elements they deem to be of interest. The parties enjoy similar rights throughout the investigation procedure.

178. The implementing authority obviously cannot examine claims put forward by the parties without supporting documentation that can be verified. Since "verifiable" means "that can be checked", this can only be done on the basis of supporting documentation for which it is possible to do so.

179. Brazil specifically challenges the adjustment made to the normal value of 9.09 per cent used by the authority in its final determination. The adjustment is indeed based on the method of calculation provided by the applicant, but the validity thereof was confirmed by the absence of any objection supported by verifiable evidence – not by mere allegations. The additional documents provided by various Brazilian firms on 20 April 1999 (File No. 061-003243/99, Section IX, folio 999)[66] and by the diplomatic representation of the Federative Republic of Brazil are mere arguments unsubstantiated by technical data. The appropriateness of the adjustment is further demonstrated by the fact that these documents do not question the need for such adjustment.

180. Likewise, there was no supporting documentation whatsoever regarding the incidence of freezing and/or chilling at the time of determining the normal value of the product at issue, despite the points made in the submission by the ABEF (Brazilian Chicken Producers and Exporters Association) (File No. 061-012582/99, Section LXVI, folio 2507)[67], which, once again, are simple statements regarding the issues under consideration.

181. In view of the foregoing, Argentina considers that the Panel should reject the claims put forward by Brazil, which appears to have a biased view of the investigation. Proof that the action taken by the Argentine authority was both appropriate and consistent with the Agreements resides in the determination that led to the exclusion of the exporting firms Frigorifico Nicolini and Seara from the anti-dumping measure, precisely because those firms not only claimed that they did not engage in dumping but also – and this is the important point – because they supplied all the information required, along with the corresponding supporting documentation.

182. Likewise, as regards the producers/exporters Sadia and Avipal, it was possible to determine an individual margin of dumping consistent with the data that they themselves had provided and substantiated.

183. Hence the implementing authority did not discriminate in any way between the firms. On the contrary, its primary objective was to act in conformity with the letter of the Anti-Dumping Agreement.

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[66] See Annex ARG-XXIII.
[67] See Annex ARG-XXIV.

184. Argentina therefore fails to understand Brazil's claim of inconsistency with Article 12.2.2, which stipulates that " … *shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures* … ", since both the Report on Action Taken and the Report on the Final Determination of the Margin of Dumping, throughout the text and under different headings, dealt in detail with each of the submissions by the producing-exporting enterprises in order to reach a reasoned conclusion as to the implementing authority's motives for excluding submissions that lacked sufficient supporting documentation or were made after the deadline had expired.

185. Regarding Article 12.2.2, it should be pointed out that, in the Report on Action Taken prior to the closure of the period for obtaining evidence, dated 4 January 2002 (Section LXIII, folio 2757), the DCD made available to the parties all the essential facts on which it intended to base its final decision. This is evidenced by the DCD's notes of 5January 2000 (Section LXII, folios 2860 to 2880)[68] informing all the parties of the end of the stage for producing evidence and inviting them to consult the records of the proceedings and to submit pleadings if they so wished, all of which demonstrates compliance with the requirements of the Agreement.

III.2.4 CLAIMS 18, 19, 20 AND 22: CONSISTENCY WITH ARTICLES 12.2.2, 6.8 (ANNEX II) AND 6.10

186. Brazil claims that Argentina acted inconsistently with Article 12.2.2 by failing to adequately explain in the final determination its decision to disregard the export price data provided by the exporters, and to resort to the export price data provided by the Secretariat for Agriculture, Fisheries and Food (Claim 18). Brazil also claims that Argentina acted inconsistently with Article 6.8 and Annex II, paragraphs 3, 5 and 7, by disregarding all normal value information submitted by Frangosul and Catarinense and resorting to the information provided by the applicant (Claim 19). Brazil further claims that Argentina acted inconsistently with Article 12.2.2 by failing to adequately explain in the final determination its decision to disregard all normal value information submitted by Frangosul and Catarinense, and to resort to the information provided by the applicant (Claim 20). Lastly, Brazil claims that Argentina acted inconsistently with Article 6.10 by failing to establish individual margins of dumping for Frangosul and Catarinense (Claim 22).

Text of Article 6.8

In cases in which 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 the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Text of Annex II, paragraphs 3, 5 and 7

The relevant section of paragraph 3 provides that:

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made …

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.

[68] See Annex ARG-XXV.

> *7. If 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.*

Text of Article 12.2.2

> *A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.*

Text of Article 6.10

> *The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.*

Argentina's argument

187. For the purposes of the final determination of the margin of dumping, the implementing authority analysed and examined all the information before it that was consistent with the principles enshrined in the Agreement, i.e. information that was properly provided within the required time-frame and was accompanied by proper evidence.

188. This is in line with the above statement regarding the record of submissions made by the participating firms and the conclusions reached on the basis of those submissions. Thus, the information supplied by the exporters was the source used for determining the respective margins of dumping for SADIA S.A., AVIPAL S.A., FRIGORIFICO NICOLINI LTDA. and SEARA ALIMENTOS S.A.

189. As was duly pointed out in the Final Report, the data received from the producer/exporter COOPERATIVA CENTRAL OESTE CATARINENSE LTDA. was presented on an aggregate basis, without any supporting documentation.

190. In the case of the exporter Frangosul – the relevant details in the following paragraphs notwithstanding – several notifications (Notes DCD Nos. 273-001181/99 of 12 October 1999 and

273-001182/99 of 12 October 1999)[69] were sent to the company with a request to provide the lists of *Notas fiscales* (tax receipts), in order to establish a statistical sample of the formalities required under the Law on Administrative Procedures. A reminder was sent on 18 November 1999 (Notes DCD Nos. 273-001412/99 and 273-001413/99).[70] Two diskettes, without supporting documentation, arrived after the deadline had expired.

191. As regards the other firms examined by the implementing authority (Comaves, Da Granja Agroi, Sadia Concordia, Minuano de Alimentos, Acaua Industria, Felipe AVICOLA, PERDIGÃO AGROIN, VENETO, CHAPECO CL and LITORAL ALIMENT), Argentina reiterates that there was no additional information or sufficient supporting documentation, despite numerous requests by the implementing authority.

192. In broad terms, it should be mentioned that while detailed analysis of the questionnaires provides an approximate picture of companies' trade operations, the supporting documentation is the key source for determining prices, tax adjustments and levels of trade.

193. Special mention should be made of the incorporation of the Report on Action Taken prior to the closure of the period for obtaining evidence, which contains details on the status of information on file in the proceedings.

194. Lastly, as regards the question concerning the period considered for determining the margin of dumping, it should be emphasized that the implementing authority is entitled to request all information deemed relevant for clarifying the facts under investigation, it being understood that the authority analyses all data on file in the proceedings.

195. Argentina acted consistently with the requirements of Annex II of Agreement, and particularly paragraph 7 thereof, to the extent that it proceeded with *" … with special circumspection …* ", basing its conclusions on a *" … check [of] the information from other independent sources at their disposal, such as … official import statistics ... ".*

196. Finally, as a reminder and renewed proof of the authority's determination to gather additional information from the exporting firms, the submissions by Frangosul and Catarinense and the DCD notes requesting information and/or clarification from them are listed below:[71]

- On 27 April 1999, Frangosul presented, by means of File No. 061-003502/99 (power of attorney) drafted in Portuguese, the questionnaire **minus Annex VIII (sales in the Brazilian domestic market)**, the profile of the company, the production process and balance sheets. It also presented a monthly list of domestic sales by company branch, indicating initial and final invoices but without specifying dates, amounts per unit, total amounts, kgs, types of goods, etc. (Section 11, folio 1022).

- The company chose to present only **invoices for exports to the Argentine market**, omitting to include those requested by the DCD (Sections 11, 12, 13, 14 and 15).

- On 10 May 1999, FRANGOSUL provided a translation of the aforementioned power of attorney (File No. 061-003924/99, Section 21, folio 1618).

- On 11 May 1999, it presented the company's balance sheet (File No. 061-003952/99, Section 21, folio 1620).

[69] See Annex ARG-XXVII.
[70] See Annex ARG-XXVIII.
[71] See Annex ARG-XXIX. See also Annex ARG-XXVII.

- Note DCD No. 273-000837/99 of 12 July 1999 requests FRANGOSUL to supply the following information (Section 25, folios 2076 and 2077):

  1. Translation of the exhibit concerning exports to Argentina (Annex VII).

  2. Supporting documentation for domestic sales (Annex VIII).

  3. Exports to third countries.

  4. Translation of FRANGOSUL'S leaflets.

- On 28 July 1999, FRANGOSUL requested an extension of the deadline (File No. 061-006626/99, Section 26, folio 2107), which was granted for a maximum period of 15 days (Note DCD No. 273-000912/99, Section 27, folio 2274).

- On 19 August 1999, FRANGOSUL presented the following information (File No. 061-007466/99, Section 28, folio 2304):

  1. Translation of the commercial invoices (exhibit) for actual exports to Argentina (Annex VII).

  2. Exports to third countries (Annex IX) representing the five most important markets for the goods in question.

  3. Translation of the new leaflets for Frangosul products.

  4. Regarding invoices for sales in the Brazilian domestic market, Frangosul explains: *"Supporting documentation for sales in the domestic market (Annex VIII). In view of the daily number of invoices drawn up by our sales branches (estimated at over 140 invoices a day and more than 320,000 a year), it is not feasible to send copies of all invoices for domestic sales. This is why on 27 April 1999 we presented File No. 061-003502 containing a list of invoices for our domestic sales. The invoices are at the disposal of the Argentine authorities should they wish to verify them or request specific documents for spot checks."*

- On 1 September 1999, Frangosul presented the invoices of sales to the Argentine market (File No. 061-007964/99, Section 52, folio 2326).

- By Notes DCD Nos. 273-001181/99 and 273-001182/99 of 12 October 1999, the DCD requested a list of invoices, as the one presented by Frangosul was incomplete (no dates, quantities, prices, etc.) (Section 53, folios 2382 to 2385). The DCD explains:

  "*The aforementioned lists give only the numbers of* Notas fiscales *for the period under investigation. They specify the month and the branch but not details such as dates, quantities, prices, discounts, tax, freight, etc., which are highly useful for the conduct of the current proceedings*".

  "*Owing to the difficulty in documenting and substantiating all the transactions made during the period under investigation because of the large number of transactions per day, we would ask you to provide the lists of* Notas fiscales *showing all the transactions made over the period January 1998–end January 1999. This will be*

used for statistical sampling and we will subsequently ask you to supply the corresponding supporting documentation".

197. Although the aforementioned Note DCD No. 273-001181/99 did not specify a deadline for presenting the requested documentation, in such cases Law No. 19.549 on Administrative Procedures applies on a residual basis, pursuant to the following provision of Article 76 of Decree No. 2121/94: "*The procedure for the imposition of anti-dumping and countervailing duties by the implementing authorities specified in this regulation shall be governed, on a residual basis, by the Law on Administrative Procedures and its regulations*". In this respect, Article 1(e)(4) of Law No. 19.549 stipulates the following: *"Where no special time period has been set for the conduct of proceedings, notifications and summons, the serving of orders and subpoenas and replies to communications, hearings and reports, the said period shall be ten days*".

- By Notes DCD Nos. 273-001412/99 and 273-001413/99, the DCD reiterated the request it had made in Note DCD No. 273-001181/99 (Section 59, folios 2435 to 2438).

- Finally, on 30 December 1999 Frangosul presented a diskette containing – according to the company – the list of *Notas fiscales* (File No. 061-012882/99, Section 63, folio 2756).[72]

198. All the above shows that FRANGOSUL did not submit any documentation regarding sales prices in the Brazilian domestic market. Its questionnaire was accompanied by a list of invoice numbers pertaining to certain branches of the company, but the list was incomplete because it did not include the information needed to analyse sales in the Brazilian domestic market. Frangosul therefore did not provide any of the items required in Annex VIII of the exporters' questionnaire. The DCD accordingly requested it to supply that information. FRANGOSUL responded as follows: *"In view of the daily number of invoices drawn up by our sales branches (estimated at over 140 invoices a day and more than 320,000 a year), it is not feasible to send copies of all invoices for domestic sales. This is why on 27 April 1999 we presented File No. 061-003502 containing a list of our invoices for our domestic sales. The invoices are at the disposal of the Argentine authorities should they wish to verify them or request specific documents for spot checks."*

199. As an example, part of the information sent by FRANGOSUL along with its questionnaire, in response to the Annex VIII requirement (sales in the Brazilian domestic market), is detailed below.

DECEMBER 1998

Invoices	Branch 01	Branch 02	Branch 04	Branch 13	Branch 42	Branch 43	Branch 59	Branch 67	Branch 69	Branch 71	Branch 72	Branch 73
Initial	32239/S	38204/S	5425/S	35090/S	19552/S	22439/S	19657/S	37618/S		1762/s	908/M1	801/M1
Final	35373/S	42179/S	5501/S	38332/S	21838/S	24337/S	21940/S	43064/S		1963/s	1192/M1	1017/M1

200. FRANGOSUL contradicts itself in stating that it was impossible to submit invoices for sales in the Brazilian domestic market because of the number of invoices issued daily by all of its branches. In this connection, it should be noted that ALTHOUGH THE COMPANY DID NOT PRESENT A SINGLE INVOICE FOR SALES IN THE BRAZILIAN DOMESTIC MARKET, IT WAS INDEED ABLE TO PROVIDE SOME 600 INVOICES FOR EXPORTS TO ARGENTINA.

[72] See Annex ARG-XXX.

201. The foregoing shows that FRANGOSOL never presented any supporting documentation for domestic sales and that its final submission arrived beyond the deadline for analysing the information – the Report on Action Taken being dated 4 January 2002.

202. Concerning the submission made by CATARINENSE on 3 November 1999 (File No. 061-010463/99, Sections LIII to LIX, folio 2405, sheets 1 to 1198)[73], it should be pointed out that the company did not have authorized legal status in conformity with Law No. 19.549 on Administrative Procedures. In that submission, Catarinense requested a 20-day extension of the deadline for presenting information (Section LIII, folio 2405, sheet 3). The extension was granted by Note DCD No. 273-001321/99 (Section LII, folios 2416 and 2417)[74] and the company made no subsequent requests for further extension.

203. Lastly, as regards CATARINENSE'S submission, the company failed to provide the Annex VIII information (sales in the Brazilian domestic market). The only supporting documentation was a list of invoices and invoices for exports to Argentina. This was the only submission made, no subsequent submissions having been received. As regards the delay in delivering the questionnaire to Catarinense, reference is made to Argentina's arguments regarding Claims 10 to 14.

204. The above details show that not once in the course of the proceedings did the Brazilian producer/exporter firms present any formal claims – not to mention any supporting documentation pointing to disagreement with the DCD – thus seemingly endorsing the DCD's description.

205. As a final comment on Brazil's claims, Argentina points out that on-the-spot verification is a procedure that is left to the discretion of the investigating authority. Indeed, the Anti-Dumping Agreement does not impose such a procedure but imposes the obligation to seek means of verifying the accuracy of the information and documentation submitted, thus triggering the investigation procedure. Moreover, since on-the-spot verification is not the only means of checking information adduced in an investigation, the authority has discretionary power to conduct such verifications as it deems necessary and relevant in the case at issue.

206. Lastly, and in this connection, it proved equally impossible in the case of FRANGOSUL to carry out a verification on the spot, either because the documentation presented did not warrant such a procedure, or – as in the case of the data on sales in the Brazilian domestic market – because no documentation was presented, making it impracticable to perform on-the-spot verifications.

III.3 CONDUCT OF THE INVESTIGATION AND FINAL DETERMINATION

III.3.1 CLAIM 23: CONSISTENCY WITH ARTICLE 2.4

207. Brazil claims that Argentina acted inconsistently with Article 2.4 by not making due allowance for freight when determining the normal value in the case of SADIA and AVIPAL.

Text of Article 2.4

The relevant section of Article 2.4 provides the following:

" … *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."*

[73] See Annex ARG-XII.
[74] See Annex ARG-XIII.

Argentina's argument

208. With regard to the comparison made for the enterprise SADIA S.A., the following comments should be made:

209. In paragraphs 372 to 374 of its submission, Brazil contends that Argentina did not take into account the information provided on 20 April 1999 in Annex VIII to the reply to the questionnaire when the questionnaire sent to the exporter was returned. In paragraph 374, in particular, Brazil claims that "In its normal value calculation, the DCD failed to make the freight reductions as reported in Sadia's 20 April 1999 response to the questionnaire".

210. It is true that the DCD did not make the freight reductions mentioned by the party. But in this case, the implementing authority did not make any error or omission. The adjustment for freight could not be made because it had not been properly documented. In Annex VIII to the reply to the questionnaire sent to the exporter, SADIA provided a purely illustrative general estimate of freight deductions. The information used to calculate the normal value, however, was based on an analysis of all the invoices provided by the enterprise in accordance with the sample used by the implementing authority, which were not accompanied by any details concerning freight charges to be deducted, neither as an attachment to the invoices nor as part thereof.

211. Thus, it would have been improper for the DCD to make any specific deduction – with a decisive and significant impact on price comparability – that:

(a) Was not contained in the documentary evidence provided;

(b) had been submitted in a general way – even though in the form of an amount deductible from the unit value of the goods - and in fact represented an average for an extended period of time, the minimum being one year, as can be seen in Annex VIII accompanying the reply to the Questionnaire by the exporter SADIA, rather than a definite value to be charged to or deducted from the goods and for which there was supporting documentation in due form.

212. As regards the comparison in the case of the enterprise AVIPAL S.A., the following comments should be made:

213. In the case of this enterprise, the DCD used the best available information in order to compare the two prices, inasmuch as it used the information provided by the enterprise itself in its submission dated 12 August 1999 (Section 27, folio 2297)[75] to determine the normal value. After receiving this submission, on 12 October 1999, the Implementing Authority, in Note No. 273-001180/99[76] (Section 53, folio 2380) requested the firm AVIPAL S.A. to provide data on its transactions and supporting documentation.

214. The information requested by the implementing authority was not only submitted belatedly on 21 December 1999 – i.e. two months later – but was not complete (Section 60, folio 2505)[77]. In its aforementioned submission, the company provided the list of transactions requested on a magnetic medium (*notas fiscales* (tax receipts), January 1998-January 1999), together with a spreadsheet showing the amounts that should be deducted from prices. The information was not only transmitted without the proper translation required by the provisions of the Law on Administrative procedure (Law No. 19.549, Article 28), but also without the supporting documentation that would have enabled the DSD to verify the accuracy of what had been stated.

[75] See Annex ARG-XXXIII.
[76] See Annex ARG-XXXI.
[77] See Annex ARG-XXXIV.

215. Furthermore, the party's delay in sending the list made it impossible for the DCD to ask for the invoices that may have been necessary based on a sample, as was done in the case of SADIA.

216. As a result, the authority used the information for which there was documentary evidence, namely, the invoices provided by the firm in the submission in File No. 061-007241/99 of 12 August 1999 – Section 27, folio 2297.[78]

217. It is important to note that the information used was therefore that provided by the enterprise, which could have decided not only to transmit the information required in due time but could also have attached the relevant supporting documentation, as it had previously done.

218. Based on the foregoing, Argentina considers that there is no justification for Brazil's claim that the implementing authority did not make due allowance for the adjustments it should have made, and neither is there any justification for the statement that the companies SADIA and AVIPAL convincingly demonstrated the need to do this.

219. The DCD not only acted in accordance with the requirement clearly spelt out in Article 2.4, but throughout the investigation the criteria used were made perfectly clear.

220. According to Article 2.4: *"Due allowance shall be made in each case, **on its merits**, for differences which affect price comparability … "* This clearly shows that the obligation of a party conducting an investigation to make due allowance for differences that might affect price comparability is not an absolute obligation. It depends on whether the various factors and circumstances claimed by the parties with a view to affecting the price comparison made by the investigating authority *have sufficient merit* to be taken into account, leaving the authority to determine whether or not the factors put before it are relevant.

III.3.2 CLAIM 24: CONSISTENCY WITH ARTICLE 2.4

221. Brazil claims that Argentina acted inconsistently with Article 2.4 by not making due allowance for differences in taxes, freight charges and financial costs in the normal value established for all the other exporters.

Text of Article 2.4

The relevant section of Article 2.4 states the following:

"*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*."

Argentina's argument

222. Brazil claims that the DCD sent two notes to the firm JOX *Assesoría Agropecuaria* requesting clarification of the taxes in the publication used for the preliminary determination and that, despite the persistence shown in requesting this information, it later decided not to use it to make the price deductions which, according to Brazil, should have been made from the normal value.

223. Before replying to Brazil's claim, Argentina wishes to clarify that, although the DCD did indeed send the two notes mentioned by Brazil to JOX requesting clarification of the taxes and other

[78] See Annex ARG-XXXIII.

commercial clauses contained in the publication included in the file, the two notes were not in the same terms, as Brazil contends.

224. The first note referred to by Brazil, of 25 June 1999 - Section 22, folio 1808, Note No. 273-000788/99 – is the original note requesting clarification, whereas the second, sent one month later, on 27 July 1999, DCD Note No. 273 – 000883/99 – Section 25, folio 2091[79], is a note in response to another note from JOX dated 2 July 1999 in which the latter requests the DCD to transmit a copy of the note requiring clarification.

225. Argentina considers it necessary to reaffirm the criterion used to interpret the obligation to make due allowance for differences that might affect price comparability in a procedure, as laid down in Article 2.4.

226. As stated when responding to Claim 23, Argentina considers that Article 2.4 determines the criteria to be used in order to ensure that comparisons between the export price and the normal value are made in a fair and equitable manner.

227. The first obligation on the parties is to be found in the first sentence of the Article and although Argentina considers that there is no order of precedence among the various sentences, there are different levels of detail which, following a line that runs from the general to the more specific, qualify the criteria to be taken into account in the comparison.

228. For example, the first sentence of Article 2.4 states that the comparison must be fair. The second sentence is more specific and lays down a minimum criterion for the comparison in order to meet this requirement: the values to be compared must represent the same level of trade, normally the ex-factory level. Subsequently, the Article prescribes that, based on an evaluation of each particular case, due allowance must be made for differences which affect price comparability and it describes some of the factors to be taken into account, without seeking to provide an exhaustive list, and which meet the requirement that it must be demonstrated that these differences have to be taken into account because they affect price comparability.

229. It is precisely because the comparison must be fair, which requires that it should be at the same level of trade, that the deductions communicated by JOX were not taken into account. If this had been done, 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 value of the goods.

230. Regarding Brazil's claim in paragraph 392 of its submission, it should be noted that in this case the information submitted by five exporters on 26 August 1999 was disregarded by the DCD because it was inaccurate. The table presented by the exporters is in fact incorrect. This can clearly be seen simply by trying to reconstruct the final price on the basis of the price obtained after making the suggested deductions.

231. For the foregoing reasons, we consider that the Panel should reject Brazil's claim that Argentina acted inconsistently with Article 2.4 by not making due allowance for differences in taxation, freight charges and financial costs in the normal value established for all other exporters, as Argentina not only acted within the limits imposed by the legislation in force but also took into account and weighed up all the information provided by the parties in each case and, as prescribed in Article 2.4, it evaluated the adequacy of each item of information according to its merits, with special emphasis on the existence of evidence that would allow it to verify each item.

[79] See Annex ARG – XXXV.

III.3.3 CLAIM 25: CONSISTENCY WITH ARTICLE 2.4

232. Brazil claims that Argentina acted inconsistently with Article 2.4 by improperly taking into account the alleged physical differences between the product sold in Brazil and that exported to Argentina in order to establish the normal value.

Text of Article 2.4

The relevant section of Article 2.4 states the following:

> "*Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions in terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability*."

Argentina's argument

233. Brazil bases this claim on the fact that the DCD took into account the statement by CEPA (the applicant), in its request for the opening of an investigation that the poultry sold in both countries was not the same as that exported to Argentina, which did not have feet or heads, whereas the poultry for the domestic market had both heads and feet, without verifying the accuracy of the information submitted to it.

234. Brazil therefore contends that, by making an adjustment when it was not necessary, the DCD went beyond its obligation to take due account of the information submitted by the parties and failed to examine its accuracy or adequacy.

235. Argentina once again argues that Brazil's claim regarding application of Article 2.4 is based on arguments that were only partly substantiated during the conduct of the investigation, which was accessible without restrictions to the Government of Brazil itself, the exporters and other interested parties, throughout its duration. Consequently, Brazilian exporting enterprises could not have been unaware of the fact that part of the applicant's submission was the Annex to Note 220/97, which explained the differences between the products sold in both countries, as well as a proposal on the type of adjustment that should be made in order to be able to compare the prices on an equal footing.

236. If Brazilian producers/exporters considered that the alleged differences were not correct, therefore, they had ample opportunity throughout the administrative procedure that was the basis for the investigation to draw attention to the error unequivocally, but they did not do so.

237. Moreover, JOX *Ascesoría Agropecuaria* clarified that the chilled poultry is usually sold in the São Paulo region with feet and heads, as stated in the Note dated 1 August 1997, contained in the file on Folio 177 and forming part of Exhibit BRA-1. In the second point of the second paragraph of a Note of 23 June 1999[80], the company Jox also informed the implementing authority that:

> "*The chilled poultry sold in the State of São Paulo includes heads and feet, unless indicated otherwise, in which case the prices should be around 10 per cent higher*"

238. Argentina therefore considers that inasmuch as:

(a) The authority that conducted the investigation was given proof of a physical difference that clearly affected the price comparability to be carried out as part of the procedure;

[80] Exhibit BRA-32.

(b) this proof was also accompanied by an appropriate method for making the necessary adjustment in order to compare prices, and, still more importantly;

(c) during the investigation the Brazilian exporters did not expressly deny that there was a physical difference between the products or reject the proposed method for making the adjustment, which was criticized by exporters although they did not at any time give reasons for the criticism or make any alternative proposals for the comparison;

the implementing authority complied with Article 2.4 of the Anti-Dumping Agreement, which provides that due allowance must be made for all the differences that might affect a fair comparison, when it made the adjustment based on the method proposed.

239. On the basis of the foregoing, Argentina considers that it had to make an adjustment in order to be able to compare the prices. As already stated, this view is backed up by the letters and clarifications from JOX, which have always been part of the evidence contained in the file and, if they had considered it appropriate, the Brazilian exporters could have proposed rectifications; however, they did not do so.

240. Consequently, the Panel is requested to find that Brazil's claim that Argentina acted inconsistently with Article 2.4 because there was no difference that might affect comparability is inadmissible and that, as shown, it was necessary to make an adjustment so that a fair comparison of prices could be made; that despite having manifold opportunities to do so, the interested parties never questioned the need to make the adjustment for physical differences in the product - indeed they only questioned the methodology, without proposing any alternative methodology, and not the actual need to make the adjustment.

III.3.4 CLAIM 26: CONSISTENCY WITH ARTICLE 2.4

241. Brazil claims that Argentina acted inconsistently with Article 2.4, imposing an unreasonable burden of proof on SADIA, AVIPAL and FRANGOSUL by not defining the period of the investigation and allowing exporters to submit information on dumping for the years 1996 to 1999, when the investigation period was subsequently established as January 1998 to January 1999.

Text of Article 2.4

The relevant section of Article 2.4 states the following:

"The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties … ".

Argentina's argument

242. Argentina does not share the views expressed by Brazil in this claim and totally rejects the idea of an alleged imposition by Argentina of an unreasonable burden of proof on Brazilian exporters, a claim which Brazil tries to substantiate by stating that:

(a) The investigation period was not automatically defined at the time the investigation was initiated;

(b) the normal value was only based on invoices presented by the parties and, considering the large volume of sales on the domestic market, this had the effect of imposing an excessive burden of proof on Brazilian exporters.

243. The Anti-Dumping Agreement does not define the period for collecting information or for the investigation itself. The implementing authority therefore has discretion to request the documentation it deems necessary in order to determine dumping, and may require further information when this is necessary to guarantee due process to the interested parties. It should be noted that this attention to the interests of the parties is used as an argument on the grounds that it represents an "unreasonable burden", with implicit reference to an intention to prejudice exporters.

244. Brazil's argument contradicts what has been said throughout this submission, in that the complaint in some cases has been that the implementing authority did not request more information. Whenever the implementing authority has sought further information for a particular purpose, Brazil complains that the information requested represents an "unreasonable burden on exporters".

245. As an example of the special attention paid by the implementing authority to this aspect, it should be emphasized that, precisely because of the comments made by the parties to the effect that, the large volume of operations by enterprises on the local market made it difficult for them to provide written evidence of all the transactions, the authority only requested the submission of evidence for those operations chosen on the basis of a statistical sample drawn up for the purpose of not imposing an unreasonable burden on exporters.

246. In any event, throughout the procedure, Brazil's producers/exporters did not complain of the burden of information requested by the DCD in relation to the provisions of Article 6.1.3 of the Anti-Dumping Agreement.

247. The difficult balance which Brazil tries to impose on Argentina in defining the volume and type of information to be requested does not appear to be in line with an article such as Article 6, paragraphs 1 and 2, and other related articles in which the Agreement seeks to give the parties the right of legitimate defence which Argentina was careful to give them during this procedure.

III.3.5 CLAIM 27: CONSISTENCY WITH ARTICLE 2.4.2

248. Brazil claims that Argentina acted inconsistently with Article 2.4.2 by incorrectly establishing the normal value for SADIA, AVIPAL and FRANGOSUL solely on the basis of transactions in the domestic market for which invoices were submitted rather than all the transactions contained in the list sent to the DCD. Brazil also claims that the DCD established the margin of dumping for SADIA and AVIPAL by comparing the weighted average of a statistical sample with the weighted average of prices of all export transactions.

Text of Article 2.4.2

The relevant section of Article 2.4.2 states the following:

"*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.*"

Argentina's argument

249. Although the authority established a measure for AVIPAL and SADIA based on a sample, it has been shown that this sample, inasmuch as it was calculated on the basis of a statistically correct methodology/formula, was indicative of the overall sales in the domestic market. The sample was accompanied by the relevant supporting documentation.

250. Consequently, it is difficult to understand the injury claimed by Brazil in that the documentation submitted by the enterprises was used for the sample.

III.3.6 CLAIMS 32 AND 33: CONSISTENCY WITH ARTICLES 3.1, 3.4, 3.5 AND 12.2.2

251. Brazil claims that Argentina acted inconsistently with Article 3.1, 3.4 and 3.5 by using different periods to evaluate the relevant economic factors and indices listed in Article 3.4 and, according to Brazil, this nullifies the final determination of injury based on positive evidence and an objective evaluation (Claim 32). Brazil also argues that Argentina acted inconsistently with Article 12.2.2 by failing to explain in the final determination why the relevant economic factors and indices listed in Article 3.4 were based on different periods (Claim 33).

Text of Article 3.1, 3.4 and 3.5 and Article 12.2.2

"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.*

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6."

Argentina's argument

252. The initiation of the investigation was prompted by the appraisal of threat of injury. The CNCE therefore considered, as is customary, the possibility of analysing the trend in imports for the first half of 1999. In this connection, it should be emphasized that both international rules and relevant practices in this area provide that, in cases of threat of injury, it is possible to undertake an analysis beyond the period of the investigation in order to find out whether or not there is a growing trend in imports and, as a result, give the investigation a more substantial factual basis. (For example, Mexican legislation specifically allows the period of the investigation to be extended after it has been initiated).

253. In respect of the period under investigation, the National Foreign Trade Commission therefore used information for the three full years and the remaining months prior to the initiation of the investigation for the determination of injury and, when analysing whether or not there was a threat of injury, it requested information for the months following the decision to initiate the investigation so as to note trends in this particular case import trends, and their effect on market shares and prices.

254. Moreover, 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, both for imports and for all apparent consumption variables.

255. As legal evidence of the above and to anticipate Brazil's objection, we refer to Record No. 576 itself, in which the Commission duly stated: " … *it should be noted that, if there had been no agreement on volumes and prices between Brazilian exporters and Argentine producers, in 1998 imports would have increased even more and, subsequent to the investigation period, in the first half of 1999, the upward trend would have continued* … ".

256. In paragraph 427 of its submission, Brazil asserts that Argentina failed to respect Article 3.1 of the Agreement and that the determination of injury was not based on an objective examination of the factors listed in that Article. It then puts forward a number of linguistic considerations through which – on the basis of the English text of the Article – it seeks to refute the analysis made by the CNCE, indicating that it was subjective.

257. This calls for the following comments:

(a) Also in regard to the meaning of the words used, "objective" is something "belonging or relating to the object itself and not to our way of thinking or feeling"[81] whereas subjective is something "relating to our way of thinking or feeling and not to the object itself"[82]. It would therefore appear that Argentina agrees with this terminological distinction.

(b) However, there is no way that the Commission's determination can be seen as "imaginary", "partial", "distorted" or discretional. Nor, as the various instruments resulting from the investigation procedure show, were different parameters used to analyse the indicators.

[81] See "*Diccionario de la Lengua Española de la Real Academia Española*", twenty-first edition, Madrid, 1992, page 1459.

[82] See "*Diccionario de la Lengua Española de la Real Academia Española*", twenty-first edition, Madrid, 1992, page 1911.

258. With regard to Brazil's statement in paragraphs 432 and 433, Argentina strictly complied with the provision in Article 12.2.2 by means of the public notice provided through the publication in the Official Journal of the MEYOSP Resolution.

259. In addition to the administrative act called a Resolution, by which the public is informed of the decision adopted, any report by the competent technical authorities and determinations adopted as a result are available to all parties interested by the investigation that have come forward and are accredited in the file.

260. As an illustration, in this particular case, Record No. 576 has 30 folios which, added to the 122 in the corresponding technical report (GEGE/ITDF No. 03/99) bring the total to 152 folios. This is why Argentina, in conformity with the provisions in Article 12.2.2, published in the Official Journal the Resolutions which contain, in the recitals, the conclusions of the various authorities involved in the investigation.

261. Argentina's methodology was made public on several occasions at the WTO (particularly in the Ad Hoc Group on Implementation) and was supported by several Members because it is impossible to publish in an official medium all the instruments and reports by technical bodies that are used as a basis for the adoption of final decisions by the higher authorities.

262. One relevant precedent adopted by the Panel was in the *Guatemala – Cement* dispute, where it is stated that:

> *"Mexico claims that Guatemala's notice of initiation did not meet the standard of 'adequate information' because it did not contain adequate information on the basis on which dumping was alleged in the application nor adequate information summarising the factors on which the allegation of injury, in this case threat of material injury, was based, as required by Article 12.1.1.*
>
> *Guatemala responds that the public notice as supplemented by the report of the Directorate of Economic Integration of 17 November 1995 is adequate to fulfil the requirements of Article 12.1.1. Since the file was open to the public Guatemala considered that the report from the Economic Integration Directorate was available to Mexico and contained the relevant information to comply with Article 12.1.1."*[83]

III.3.7 CLAIMS 34, 35, 36 AND 37. CONSISTENCY WITH ARTICLE 3.1, 3.2, 3.4 AND 3.5

263. Brazil claims that, by failing to exclude the imports from two Brazilian exporters from the injury analysis, Argentina did not properly consider the volume, the effect on prices and the impact of the dumped imports on the domestic industry, so Argentina acted inconsistently with Article 3.2 (Claim 34) and with Article 3.4 (Claim 36). Likewise, Brazil contends that the evaluation of the dumped imports indicates that the final injury determination was not based on positive evidence and an objective examination, as required by Article 3.1 (Claim 35). Brazil then argues that, by not excluding imports from these two Brazilian exporters from the dumped imports, Argentina had acted inconsistently with Article 3.5 in not properly considering injury in accordance with Article 3.1 and, consequently, did not properly demonstrate the causal relationship between the dumped imports and the injury to domestic industry, as required by Article 3.5 (Claim 37).

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[83] *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (WT/DS156/R) report of the Panel, paragraphs 8.90 and 8.91.

Text of the Articles

> *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.*
>
> *3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.*
>
> *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."*

Argentina's argument

264. Regarding the share of total exports by Brazil attributable to Brazilian exporters for which there is no significant margin of dumping, it should be noted that the major link between the volume of imports and injury is reflected both in the market share and in the import/production ratio. The relevance and sensitivity of these indicators when determining injury is explained below.

265. The CNCE analysed the total volume of imports investigated and concluded *"that the domestic industry producing whole eviscerated poultry suffered material injury caused by allegedly dumped imports from the Federative Republic of Brazil."*

266. In this connection, Brazil makes a wrong assumption in presuming that the implementing authority did not carry out the corresponding analyses. When analysing the causal relationship, contrary to Brazil's statement, the competent authority did take into account the determination that

there was no dumping of exports to the Argentine Republic by the Brazilian enterprises NICOLINI and SEARA.

267. As can be seen from folios 4564 and 3469 of file CNCE No. 43/97 and in ITDF No. 03/99[84], the firms NICOLINI and SEARA provided information in response to the CNCE's questionnaires for exporters. According to this information, the average f.o.b. prices of these enterprises were substantially higher than the prices for the other exports from the origin investigated, for which the competent authority determined the existence of an unfair practice. It can also be seen that the volume of exports by the aforementioned enterprises came nowhere close to the levels reached for the majority of exports from Brazil throughout the period analysed by the CNCE.

268. Record No. 576 of the CNCE concluded with regard to prices that "*the imports investigated were present on the market at prices that caused injury to the prices of like domestic products. The price of whole eviscerated poultry on the domestic market fell throughout the period and the imports investigated had an impact on this decrease. The evidence obtained during the investigation indicates that price is the decisive factor on the market and its decrease throughout the period was associated with the presence of the imports investigated and their price.*"

269. Consequently, as the average f.o.b. prices for the other imports investigated were lower than the prices of enterprises that did not practise dumping, it follows that their sale on the domestic market would inevitably yield international prices even lower than the prices determined by the CNCE in its final determination of injury.

270. In order to illustrate the above, a table and the corresponding chart have been added to this section III.3.7 which show that in 1997 and 1998 the average f.o.b. prices of imports without dumping (NICOLINI and SEARA) were 13 per cent higher than the other imports investigated. As the chart shows, this situation recurred month after month, and it can also be seen that for every month, the average monthly f.o.b. prices of imports from these firms remained, except in the case of NICOLINI in October 1997, above the average f.o.b. prices for transactions for which dumping had been determined.

271. Lastly, the fact that exports by 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. In the apparent consumption tables, which are also to be found at the end of this section III.3.7, it can be seen that dumped imports clearly represented the majority, rising in 1998 to almost 40,000 tonnes compared with 56,000 tonnes for total imports from Brazil, and that they grew at a similar rate to that for total imports from Brazil and even more rapidly in 1998 (45 per cent in the case of dumped imports and 40 per cent for all imports from Brazil).

272. Consequently, the share of dumped imports in apparent consumption rose, displacing domestic sales of the like domestic product.

273. In conclusion, Argentina points out that the above facts are apparent from the information in the files, to which both the Government of Brazil and the producing/exporting enterprises in Brazil had full access as interested parties. Consequently, there is no justification for the claims made.

[84] See exhibit BRA-14.

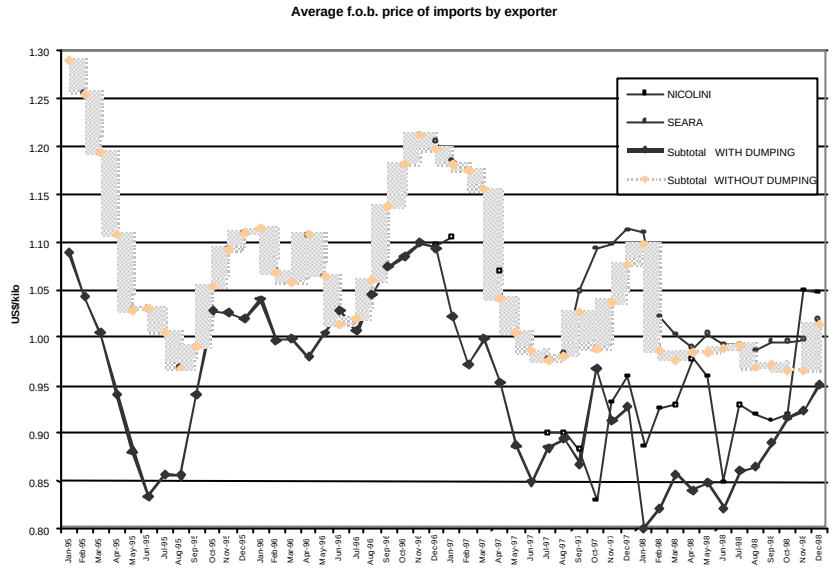
AVERAGE F.O.B. PRICES FOR IMPORTS OF WHOLE EVISCERATED POULTRY; FRESH, CHILLED OR FROZEN

In US dollars/kg.

PERIOD	BRAZIL			OTHER ORIGIN	TOTAL ORIGIN
	Total	Subtotal without DUMPING (NICOLINI + SEARA)	Subtotal with DUMPING		
Jan -95	1.12	1.29	1.09	1.13	1.12
Feb-95	1.09	1.26	1.04	1.17	1.09
Mar-95	1.05	1.19	1.01	1.21	1.05
Apr-95	0.98	1.11	0.94		0.98
May-95	0.92	1.03	0.88		0.92
Jun-95	0.89	1.03	0.83		0.89
Jul-95	0.88	1.01	0.86		0.88
Aug-95	0.89	0.97	0.86		0.89
Sep-95	0.95	0.99	0.94	1.14	0.96
Oct -95	1.03	1.05	1.03	1.14	1.04
Nov-95	1.04	1.09	1.03	1.14	1.05
Dec-95	1.04	1.11	1.02	1.14	1.05
Jan -96	1.06	1.11	1.04	0.99	1.05
Feb-96	1.02	1.07	1.00	1.10	1.03
Mar-96	1.01	1.06	1.00	1.15	1.02
Apr-96	1.01	1.11	0.98	1.12	1.01
May-96	1.02	1.06	1.00		1.02
Jun-96	1.02	1.01	1.03	1.07	1.02
Jul-96	1.01	1.02	1.01	1.07	1.02
Aug-96	1.05	1.06	1.05	1.07	1.06
Sep-96	1.09	1.14	1.07	1.07	1.09
Oct -96	1.12	1.18	1.09	2.00	1.12
Nov-96	1.13	1.21	1.10		1.13
Dec-96	1.12	1.20	1.09	1.03	1.12
Jan -97	1.07	1.18	1.02		1.07
Feb-97	1.04	1.18	0.97		1.04
Mar-97	1.05	1.16	1.00		1.05
Apr-97	0.98	1.04	0.95		0.98
May-97	0.93	1.01	0.89		0.93
Jun-97	0.88	0.99	0.85		0.88
Jul-97	0.91	0.98	0.88		0.91
Aug-97	0.91	0.98	0.89		0.91
Sep-97	0.90	1.03	0.87		0.90
Oct -97	0.98	0.99	0.97		0.98
Nov-97	0.95	1.04	0.91	1.00	0.95
Dec-97	0.98	1.08	0.93	0.93	0.98
Jan -98	0.87	1.10	0.80	1.00	0.88
Feb-98	0.90	0.99	0.82	1.00	0.90
Mar-98	0.91	0.98	0.86	1.00	0.91
Apr-98	0.90	0.98	0.84		0.90
May-98	0.91	0.98	0.85		0.91
Jun-98	0.86	0.99	0.82		0.86
Jul-98	0.89	0.99	0.86		0.89
Aug-98	0.89	0.97	0.86	0.94	0.89
Sep-98	0.91	0.97	0.89	1.01	0.91
Oct -98	0.93	0.97	0.92	0.91	0.93
Nov-98	0.95	0.97	0.92	0.91	0.95
Dec-98	0.97	1.01	0.95	0.91	0.97
1995	1.01	1.10	0.99	1.14	1.02
1996	1.06	1.12	1.04	1.07	1.06
1997	0.96	1.05	0.92	0.94	0.96
1998	0.91	0.99	0.88	0.96	0.91
Var. % 96/95	5	2	5	-6	4
Var. % 97/96	-9	-6	-11	-12	-9
Var. % 98/97	-5	-5	-5	2	-5

Reference period

Source: CNCE, based on information from INDEC



APPARENT CONSUMPTION OF WHOLE EVISCERATED POULTRY

tonnes

Period	Sales of domestic production on the domestic market	Import (1)					Apparent consumption
		Brazil			Other origin	Total	
		Total BRAZIL	Brazil without dumping	Brazil with dumping			
1995	688.725	15.317	3.660	11.657	622	15.939	704.664
1996	667.402	22.544	6.517	16.027	1.843	24.386	691.788
1997	693.641	40.128	12.845	27.283	320	40.448	734.089
1998	782.850	56.291	16.803	39.487	316	56.606	839.457
Var.% 96/95	-3	47	78	37	196	53	-2
Var.% 97/96 (2)	4	78	97	70	-83	66	6
Var.% 98/97	13	40	31	45	-1	40	14

Reference period

(1) Net variation in stocks according to information from importers.

(2) Only as of the last quarter of 1994, imports from NICOLINI exceeded 100tonnes/month.

STRUCTURE OF APPARENT CONSUMPTION OF WHOLE EVISCERATED POULTRY

Percentage

Period	Sales of domestic production on the domestic market	Import					Apparent consumption
		Brazil			Other origin	Total	
		Total BRAZIL	Brazil without dumping	Brazil with dumping			
1996	96.5	3.3	0.9	2.3	0.3	3.5	100
1997	94.5	5.5	1.7	3.7	0.0	5.5	100
1998	93.3	6.7	2.0	4.7	0.0	6.7	100

Note: The sum of the components may not correspond to the total due to differences in rounding the figures.
Source: CNCE, based on information by INDEC and contained in the reference file.

III.3.8 CLAIMS 38, 39 AND 40: CONSISTENCY WITH ARTICLES 3.4 AND 3.1, AND ARTICLE 12.2.2

274. Brazil contends that Argentina acted inconsistently with Article 3.4 by not evaluating all the relevant economic factors and indices listed in the paragraph in this Article (Claim 38) and, consequently, taking into account the foregoing alleged inconsistency, it also acted inconsistently with Article 3.1, according to Brazil, by not basing the determination of injury on positive evidence and objective evaluation (Claim 39). Brazil also argues that Argentina acted inconsistently with Article 12.2.2 by not taking into account in its final determination the evaluation of all the relevant economic factors and indices listed in Article 3.4 (Claim 40).

Text of Article 3.4 and 3.1

> *"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.*
>
> *3.1 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."*

Text of Article 12.2.2

> *"12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6."*

Argentina's argument

275. Argentina acted consistently with the provisions in the Anti-Dumping Agreement by evaluating, in respect of injury, all the factors listed in Article 3.4 and their impact on prices of the like domestic product as well as their impact on the domestic industry concerned.

276. There are no grounds for Brazil's claims regarding the absence of any analysis or evaluation of factors such as productivity, variables affecting domestic prices, the magnitude of the margin of dumping, actual and potential effects on the cash flow of the applicant firms, growth, and ability to raise capital.

277. Firstly, during the conduct of the investigation, the applicants submitted information on the productivity situation in the sector which, based on the relevant indicators for such industries, showed that, at the initiation of the investigation by the Argentine authorities, the Argentine poultry industry was on an equal footing with the Brazilian industry and also with the major producers at the global level.

278. This is reflected in Record No. 576, folios 12, 13, 14, 20 and in the Technical Report in folios 26, 28, 29, 30 and 95. These sections basically explain that the growth in productivity that resulted from the production restructuring process in the sector since the early 1990s was a response to the changes taking place in market conditions following Argentina's unilateral opening up of its economy during the period concerned, as well as the integration process taking place between Argentina and Brazil.

279. This is corroborated by the fact that CEPA's contentions in respect of the aforementioned paragraphs were not questioned during the conduct of the investigation, either by Brazilian exporting firms or by importers in the Argentine market. CEPA confirmed that the leading productivity indicators such as the number of eggs per hen to be incubated per cycle, the number of chicks born, the daily weight gain of the chickens being raised, the amount of balanced feed needed to produce 1 kilo of meat, cited in a non-exhaustive list, are similar to those in the Brazilian industry and in some cases, for example, the daily weight gain of the chickens being raised, are higher.

280. Furthermore, some of the indicators contained in the Annex are directly related to productivity, for example, the size of the labour force employed and some headings on average unit costs versus sustained increase in production (see tables 1, 11, 12, 13 and 14 of Annex I to the Technical Report).[85]

281. The Argentine industry's costs are currently comparable to those of the most competitive producers at the international level. This was achieved through a large-scale programme to restructure the industry and adapt production, in accordance with a timetable for investment amounting to over US$270 million between 1994 and 1998.[86] The major part of the investment was used to renovate, extend and equip refrigeration plants and to equip and build farms (essentially for reproduction), and to increase the capacity of the silos, incorporate new technology in plants manufacturing balanced feed, purchase incubators and automate equipment to make by-products and treat effluent, train personnel, purchase vehicles, etc.

282. Much of the investment was affected by the uncertainty caused in the local market by the importation of Brazilian products, which utilized the Argentine market as an alternative market in order to resolve problems of local or foreign demand, thereby negatively affecting price recovery inasmuch as demand remains steady in Argentina.

- **Characteristics of the Argentine poultry market:**

283. The Argentine poultry sector has traditionally been characterized by local supplies and a low export figure. Consumption of poultry meat has traditionally been seasonal in November and December, due in particular to the end-of-year festivities. The profile of demand for poultry meat, in addition to the price of the product *per se*, is closely tied to the market for red meat or beef, the main substitute given the characteristics of the Argentine market, and the trend in prices compared to the latter product is one of the key variables when analysing the trend in consumption in the poultry sector.

284. Other things being equal, as there are no significant differences in terms of quality compared with Brazilian poultry, competition is essentially based on market prices which, due to the factors set out below, are highly sensitive to minor variations in supply and have to be taken into account when evaluating both threat of injury and injury itself.

285. This is essentially due to the following:

(a) There is relatively stable demand in the market, which showed a strong upward trend in consumption as of the 1990s;

[85] See Exhibit BRA-14.
[86] See Annex ARG-XXXVI.

(b) the extent of Brazil's production capacity and the generation of exportable surpluses mean that Brazil can easily redirect its efforts to third markets when there are domestic or external imbalances, despite the large size of its own domestic market[87];

(c) the marginality, in relative terms, of Argentina's poultry market compared with the Brazilian market means that there is a high potential for price discrimination, providing cross subsidies according to the domestic market and third markets (in this connection, see the table on page 21 of Record No. 576)[88];

(d) the proximity of the Brazilian market, which means an effective lead-time of 72 hours in terms of the major consumer market, namely, the Federal Capital and the surrounding area;

(e) the absence of significant access barriers for this product because of the MERCOSUR agreement, and the foreign exchange stability throughout the 1990s resulting from the application of an exchange rate that made one Argentine peso equal to one United States dollar;

(f) the impact of Brazilian imports as price fixers on the Argentine market, even when the volume is relatively low, because of the vast potential for increasing shipments within a very short time;

(g) the technical and financial restrictions that make it difficult to keep stocks for any length of time (pages 92/94 of the Technical Report).

286. In the light of the foregoing and bearing in mind that the marketing characteristics of the product mean that fixing domestic prices is strongly affected by the price in import markets, the imbalances due to surplus supplies in the market of origin and dumped imports necessarily led to price adjustments in the domestic sector.

287. For Argentina's poultry industry, this process meant losses in actual and potential terms because the immediate arrival of dumped imports of the Brazilian product in response to the favourable situation in the domestic market had a marked effect on prices, causing them to fall and thereby affecting the recovery of an industry that had invested substantially in improving productivity.

288. The domestic price depression at a time of sustained growth in apparent consumption because of changes in consumer habits can only be explained by the existence of imports under conditions of unfair competition.

289. Brazil clearly has a vast capacity to dump exportable surpluses on the Argentine market under conditions of unfair competition because Argentina is geographically close and has the most easily accessible market.[89] For example, during the period August-September 1997, during the crisis in South East Asia, the volume exported to Argentina increased by 115 per cent, i.e. over a three-month period it rose from 2,349 tonnes to 5,082 tonnes, a figure which is approximately equal to 10 per cent of domestic production for one month or the total production over one month of firms such as San Sebastián or Rasic SA.

290. As Argentina has always contended, this increase occurred because surpluses that could not be channelled into Brazil's traditional markets were directed to alternative markets such as Argentina,

[87] See section VI.2 "MERCOSUR" in the Technical Report (exhibit BRA-14).
[88] See Exhibit BRA-14.
[89] See Annex ARG XXXVII.

which at that time was showing a marked price recovery; however, this recovery could not be sustained in the long term because of the downward pressure exerted by dumped imports from Brazil.

291. Meanwhile Brazil, whose poultry industry recorded losses of 20-25 per cent, increased its sales to Argentina by an annual percentage variation of **70.52 per cent in 1997 and 13.35 per cent in 1998**.

- **Other factors affecting the price of the domestic product:**

292. The CNCE properly considered all the factors which, in addition to imports, might have had an impact on the price of the domestic product. For this purpose, it analysed 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 (see Table No. 16 in the Technical Report).[90] In general terms, the arguments put forward by the producer-exporters and Brazil cannot be substantiated because, despite the recession in Argentina, apparent consumption of poultry meat increased steadily, so that this variable could hardly explain the downward pressure on prices. Competition from ready-prepared poultry could not be used as justification either, because not only is it a different product, but it also happens to be produced by the same firms that sell chilled or fresh poultry.

293. Nor could the trend be due to considerations related to changes in the demand profile requiring the introduction of aggressive price policies in order to retain market share, since the aforementioned increase in apparent consumption is in fact the result of a trend that began in the mid-1980s towards growing consumption of lean meat because of its better dietary and health properties in comparison with red meat.

- **Remarks concerning the effects caused by the margin of dumping:**

294. 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.

295. 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.

- **Remarks concerning the failure to analyse cash flow and the ability to raise capital:**

296. 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.

297. 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.

[90] See Exhibit BRA-14.

298. 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.

299. 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.

300. In view of the considerations of fact and of law set out above in relation to Claims 38, 39 and 40, Argentina considers that it has complied with the requirements laid down in Articles 3.1, 3.4 and 12.2.2, in other words, in its final determination it made due allowance for the evaluation of all the relevant economic factors and indices listed in Article 3.4.

III.3.9 CLAIM 41: CONSISTENCY WITH ARTICLE 4.1

301. Brazil contends that Argentina acted inconsistently with Article 4.1 by considering that 46 per cent constituted the major proportion of total domestic production of poultry in Argentina.

Text of Article 4.1

The relevant section of Article 4.1 states the following:

> *"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 …* ".

Argentina's argument

302. The definition of domestic industry was consistent with the WTO rules because Argentina considers that 46 per cent of total production is "a major proportion". Brazil's contention that "a major proportion" can only represent at least 50 per cent of the domestic industry is a subjective opinion and is not based on Article 4 of the Anti-Dumping Agreement.

303. According to Record No. 576, the firms concerned represented 46.2 per cent of the domestic industry in 1998, so the CNCE considered that it had complied with the requirement in Article 4.1 of the Anti-Dumping Agreement.

304. For the Argentine Republic, as for other WTO Members (in accordance with previous, consistent decisions in this respect), 46.2 per cent represents a major proportion because it is not simply by chance that the Anti-Dumping Agreement did not establish a fixed percentage in order to show what is meant by "major proportion".

III.4 IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES AS A RESULT OF THE ANTI-DUMPING INVESTIGATION

III.4.1 CLAIMS 28, 29 AND 30: CONSISTENCY WITH ARTICLES 9.2, 9.3 AND 12.2.2

305. Brazil claims that Argentina acted inconsistently with Article 9.2 by imposing variable anti-dumping duties that could lead to the collection of an inappropriate amount (Claim 28). For the same reason, Brazil contends that the anti-dumping duty imposed could exceed the margin of dumping established in the final determination (Claim 29). Lastly, Brazil claims that Argentina acted inconsistently with Article 12.2.2 by not explaining how the minimum export price was determined (Claim 30).

Text of Article 9.2

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. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.*."

Text of Article 9.3

9.3 "*The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.*"

Text of Article 12.2.2

12.2.2 "*A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information of the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6*."

Argentina's argument

306. Argentina acted consistently with Articles 9.2, 9.3 and 12.2.2 of the Anti-Dumping Agreement and the regulations of Law No. 24425, Decree No. 2121/94.

307. After analysing and taking into account all the information collected during the procedure, contrary to the Brazilian Government's position that Argentina did not comply with Article 9.2 and 9.3 of the Agreement, the implementing authority determined for whom it would in due time and form provide the relevant evidence containing all the necessary elements. Thus, it excluded the Brazilian producing/exporting firms NICOLINI and SEARA from the anti-dumping measure and fixed an individual dumping margin for the exporting firms AVIPAL and SADIA.

308. Although Article 9 of the Agreement does not address the methods to be used to collect the anti-dumping duties, i.e. it does not fix any methodology or give indications similar to those fixed by the Agreement in other cases, in practice, Members of the WTO apply anti-dumping duties in three ways: (a) Fixed duties in relation to an *ad valorem* tax; (b) fixed in relation to a specific amount; (c) variable.

309. Article 9.3 provides that "*[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2*". This principle is set out in detail in Article 9.3.1 and 9.3.2. Article 9.3.2, in particular, 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" (Emphasis added). In this particular case, the aforementioned Article was fully respected because Argentina used the prospective system and there was no request from the exporting firms that warranted a revision with a review to refunding the alleged duty paid in excess.

310. The refund of any duty paid in excess has been authorized since the Tokyo Round in Article 8.3 of the Anti-Dumping Code, as well as in Article 8(c) of the Anti-Dumping Code of the Kennedy Round, which are the provisions preceding Article 9.3 of the current Agreement. Article 9.3 of the current Anti-Dumping Agreement lays down the requirement that there must be a **prior request** and that "a request for a refund, duly supported by evidence, must be made by an importer of the product subject to the anti-dumping duty" (emphasis added).

311. Argentina repeats once more that there was no such request, nor did Brazil – in the claims being examined – provide proof of its contentions regarding the collection of excess anti-dumping duties.

312. Without prejudice to the foregoing which, in itself, is conclusive, Argentina deems it relevant to clarify certain issues. The system of collecting anti-dumping duties in variable amounts used by Argentina (the difference between the normal value and the declared f.o.b. value of the shipment in question), in the view of the implementing authority, is precisely designed to ensure that the anti-dumping duty effectively paid does not exceed the margin of dumping determined. For example, if the margin of dumping disappears in the course of applying the duties because the export price is aligned on the normal value, under this system the duty to be paid would be zero. As can be seen, this is perfectly consistent with the principles set out in Article 9.3.

313. If, as a result of this application, a situation arises in which the duty paid is higher than the margin of dumping determined in the investigation, the exporter is fully entitled to request a prompt refund, subject to a duly substantiated request, and the implementing authority will carry out the relevant review. Thus, it can be seen that the Agreement itself, in Articles 9.3.1 and 9.3.2, provides the "remedy" for any excess payment by allowing for a review that may lead to the payment of a refund of the amount paid in excess; so that the Agreement accepts that an amount in excess of the anti-dumping duty may be paid.

314. If Brazil's position is that a single system for payment of a fixed *ad valorem* rate should be adopted – a situation that is not provided for in the Agreement – such a system would have similar disadvantages, for example, the following: applying a fixed *ad valorem* rate on a prospective basis would mean that, even if the margin of dumping disappeared because the export price was aligned on the normal value, the anti-dumping duty would still have to be paid in the expectation that the payment in excess would be refunded once there had been a review. Moreover, combining the price aligned on the normal value with the payment of an *ad valorem* duty at a higher rate (the export price aligned on the normal value) could incite exporters to stay out of the market and, in such a situation, there would be no new imports, nor would it be possible to undertake a review that would result in a refund either. On the contrary, in such a situation, the system of paying a variable amount of anti-dumping duties would not lead to excess payment and so would be much fairer for the exporter.

315. As already explained, in practice WTO Members apply the following anti-dumping duties: (a) fixed in relation to an *ad valorem* rate; (b) fixed in relation to a specific amount; and (c) variable amounts. Canada also applies variable amounts of anti-dumping duties. Consequently, the methodology adopted by Argentina is consistent with the Anti-Dumping Agreement.

316. In accordance with Article 9.3, a minimum f.o.b. export price was fixed as an anti-dumping measure that was equivalent, and in some cases was lower than the normal value determined so "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established … ". This is shown in the table below:

Exporter	Normal value US$/kg.	Average f.o.b. price US$/kg.	Margin of dumping %	Anti-dumping measure minimum f.o.b. U$S/kg.
	A	B	(A-B)/B	
Sadia	0.9294	0.80883	14.91	0.92
Avipal	1.0896	0.94355	15.48	0.98
Other	1.0385	0.95992	8.19	0.98

317. Lastly, the simple exercise below (Tables 1, 2 and 3) shows that the calculation of the anti-dumping duty to be collected may also be above (or below) the margin of dumping determined when this is calculated as a fraction of the f.o.b. price invoiced, in other words, when a measure is fixed in "*ad valorem*" form.

- **TABLE 1**

	A	B	C	D	E
Exporter	Normal value [US$/kg.]	Average f.o.b. price [US$/kg.]	Margin of Dumping (A-B)/B [%]	Margin of Dumping (A-B) [US$/kg.]	Anti-dumping duty (A-B) [US$/kg.]
Sadia	0.93	0.81	14.91%	0.12	0.12
Avipal	1.09	0.94	15.48%	0.15	0.15
Other	1.04	0.96	8.19%	0.08	0.08

- **TABLE 2**

	A	B	C
Exporter	*Ad Valorem** (Table 1.C)	f.o.b. Price Example [US$/kg.]	Anti-dumping duty (A*B) [US$/kg.]
Sadia	14.91%	1.20	0.18
Avipal	15.48%	1.20	0.19
Other	8.19%	1.20	0.10

* The "*ad valorem*" is deemed to be equal to the dumping margin expressed as a percentage.

- **TABLE 3**

	A	B	C
Exporter	Anti-Dumping Duty (Table 2.C) [US$ /kg.]	Anti-Dumping Duty (Table 1.E) [US$ /kg.]	Variation (A-B) [US$ /kg.]
Sadia	0.18	0.12	0.06
Avipal	0.19	0.15	0.04
Other	0.10	0.08	0.02

This exercise assumes that the Brazilian exporting firms decide to export their products at a higher price (US$1.20/kg.).

As a result of this practice, it can clearly be seen that, when applying an anti-dumping measure in "*ad valorem*" form, the anti-dumping duties to be collected rise from US$0.12/kg. to US$0.18/kg., in the case of Sadia, from US$0.15/kg. to US$0.19/kg. in the case of Avipal, and from US$0.08/kg. to US$0.10/kg. for the other exporters (table 3).

In this way as well, the dumping margin established in the final determination would presumably be exceeded (table 1.D), although the difference in this case is that companies that wish to discontinue unfair competition practices by aligning their export prices on those in the domestic market, as indicated above, would still pay a duty.

318. It is thus clear that these systems, because of their particular features, are liable to generate variations or excess duties. The Agreement acknowledges this and regulates the situation by providing appropriate "remedies". Failure to use these remedies cannot be attributed to the implementing authority, as a cause of injury or violation of the Agreements in effect.

319. With regard to Brazil's contentions regarding Article 12.2.2 of the Anti-Dumping Agreement, Argentina complied with the requirements in this Agreement because both in the Report on Action Taken and the Report on the Final Determination of the Margin of Dumping, throughout the text, under different topics, each of the submissions by the producing/exporting enterprises was looked at in detail in order to reach a reasoned conclusion on the motives for which the implementing authority determined the measures to be applied including exclusion of the enterprises which met the requirements for this decision.

320. In the Report on Action Taken, which preceded the closure of the period for obtaining evidence, dated 4 January 2002 (Section LXIII, folio 2757), the DCD made available to the parties all the essential facts on which it intended to base its final decision and, on the basis of these facts, the implementing authority fixed a minimum value.

321. As Argentina has shown, Brazil has merely made allegations in this complaint and has not proved any failure to comply with the Article in question on the part of Argentina, which made the determinations on the basis of the documentation attached to the records of proceedings in conformity with the provisions of the Agreement.

IV. PLEADINGS

322. On the basis of the arguments set out in the sections above, Argentina respectfully requests the Panel to proceed as follows:

(i) Pursuant to the arguments set out in Section II and as explained in paragraphs 23, 24 and 25 of this Submission, Argentina requests the Panel to refrain from ruling on the 41 claims of inconsistency with various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) submitted by Brazil.

If the Panel should decide not to accede to Argentina's request as set out in paragraph 26 of this Submission, and in the light of the arguments developed in Section III, Argentina respectfully requests that the Panel:

(ii) Reject Brazil's claims that Resolution 574/2000 of the Ministry of the Economy of the Argentine Republic is inconsistent with:

- Article 5.2, 5.3, 5.7 and 5.8 of the Anti-Dumping Agreement;
- Article 12.1 of the Anti-Dumping Agreement;

- Article 6.1.1, 6.1.2, 6.1.3, 6.2 and 6.8, and paragraphs 5, 6 and 7 of Annex II, and Article 6.9 and 6.10 of the Anti-Dumping Agreement;
- Article 2.4 and 2.4.2 of the Anti-Dumping Agreement;
- Article 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement;
- Article 4.1 of the Anti-Dumping Agreement;
- Article 9.2 and 9.3 of the Anti-Dumping Agreement;
- the various claims related to Article 12.2.2.

(iii) Reject the request for the immediate repeal of Resolution 574/2000 imposing definitive anti-dumping duties.

ANNEX B-2

FIRST ORAL STATEMENT OF ARGENTINA

(25 September 2002)

I. INTRODUCTION

1. The Argentine Republic is grateful for the opportunity to present its arguments before the Panel in the light of Brazil's Written Submission of 8 August 2002, and to refute the doubts raised by Brazil concerning Resolution 574/2000 of the Ministry of the Economy of the Argentine Republic on the basis of various considerations of fact and law which are presented below in two main sections as follows: Section II, dealing with the standard of review and the rules and principles of public international law applicable to the case, and Section III, which refutes the substantive arguments contained in Brazil's 41 claims.

II. PRELIMINARY ARGUMENTS: RELEVANT RULES AND PRINCIPLES OF PUBLIC INTERNATIONAL LAW APPLICABLE TO THIS PROCEEDING

II.1 STANDARD OF REVIEW

2. Argentina repeats its agreement that there is a separate standard of review[1] in the case of Article 17.6 of the Anti-Dumping Agreement. However, in view of the allegations made by Brazil in paragraphs 26, 27 and 28 of its first written submission[2], Argentina wishes to question whether in all cases a presumed infringement of Article 17.6(i) may become the subject of an allegation by a party to a dispute.

3. In the view of the Argentine Republic, a literal interpretation of Article 17.6(i) of the Anti-Dumping Agreement (AD) establishes a standard of review that panels must apply in determining whether the investigating authority adequately established the facts and whether its assessment was impartial and objective. The text of the article is not meant for the Parties to the Agreement but for the Panel. There is consequently some doubt as to the possibility of according parties the right to allege infringements thereof, except where a situation of "due process" will arise.

4. In the Report on the case *"Egypt-Steel":*[3], the Panel made this same point:

> *"Furthermore, while, given our dismissal of this claim on procedural grounds, we need not rule on whether a violation of Article 17.6(i) can be the subject of a claim by a party in a dispute, we have considerable doubts in this regard. What is clear nevertheless, and in any case, is that Article 17.6(i) lays down the standard which a panel has to apply in examining the matter referred to it in terms of Article 17.5 of the AD Agreement. As such, we are of course bound by it in our consideration of the claims in this dispute"* (emphasis added)

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[1] First written submission by the Argentine Republic, 29 August 2002, paragraph 9.

[2] First written submission by Brazil, 8 August 2002.

[3] Report of the Panel on "Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey", WT/DS211/R, 8 August 2002, paragraph 7.142.

II.2. OTHER PRINCIPLES AND RULES OF PUBLIC INTERNATIONAL LAW APPLICABLE TO THE CASE

II.2.1. Content of Argentina's complaint

5. Argentina considers it timely to refute some of the arguments made in the first written submission of the EC concerning *res iudicata*[4], and to offer some clarifications.

6. First, Argentina considers inaccurate the EC statement that *"this Panel need not reach this issue because it is plain that, in any event, the requirements for the existence of res judicata are not met"* .[5]

7. In addition to reaffirming that the Argentine Republic has not argued primarily for the application of the doctrine of "Res judicata", Argentina considers that the EC's affirmation should certainly be based on demonstrating that requirements of that doctrine are not satisfied in this case. In the *"India/Autos"* case [6], the Panel maintained[7], with respect to the application of the doctrine of *res judicata* that it would first examine the applicability of the doctrine in the WTO and secondly, if it were applicable to WTO dispute settlement, whether the facts of the dispute satisfied the requirements of the doctrine.

8. As the EC indeed acknowledges, "The measure before this Panel is the same as the measure in dispute before MERCOSUR Ad Hoc Arbitral Tribunal".[8] Without prejudice to the applicability of the doctrine, Argentina believes it necessary to point out that the requirements are indeed fulfilled in this case:

- **The identity of the parties** is beyond doubt on both occasions, with an element of "added value", in that they are States party to a an integration process, namely MERCOSUR. As such, Argentina and Brazil have designed an organisational structure and agreed that their disputes would be adjudicated by means of the procedure contemplated in the Brasilia Protocol, by the same token accepting the arbitral awards in their totality, as argued by Argentina[9] and endorsed by Paraguay, another State party to MERCOSUR; in its First Written Submission.[10]

- **the identity of the measure being challenged**: Resolution 574/2000 of the Ministry of the Economy of the Argentine Republic, as stated by Argentina in its first written submission [11] and also acknowledged by the EC.[12]

- **the identity of the legal basis of the claim**: in MERCOSUR, Section II of the claim filed by Brazil (entitled FUNDAMENTAÇAO JURIDICA), has two parts: in part A (ASPECTOS PRELIMINARES), Brazil includes a paragraph 4 titled "Evolução das normas do Mercosul sobre antidumping e normas aplicáveis à utilização de medidas antidumping no comercio intrazona" containing Decisión N°11/97 according to which, as Brazil itself recognises: "o texto incorpora, portanto, todas as disciplinas da

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[4] Third party submission of the EC, 9 September 2002, paragraph 5.
[5] Third party submission of the EC, paragraph 6.
[6] WT/DS 146/R, WT/DS175/R, India - Measures affecting the Automotiv e Sector, 21 December 2001.
[7] WT/DS 146/R, WT/DS 175/R, paragraph 7.55.
[8] Third party submission of the EC, paragraph 7.
[9] First written submission of Argentina, paragraphs 18 and 19.
[10] Third party submission of Paraguay, paragraph 7.
[11] First written submission of Argentina, paragraph 16.
[12] Third party submission of the EC, paragraph 7.

> WTO sobre a matéria (não podería ser diferente)".[13] Brazil then confirms that "[d]esde 1997, a aplicação de medidas antidumping no comércio intrazona, repita-se, deve dar-se em conformidade com o Marco Normativo, o qual reflete o entendimento comum alcancado pelos Estados Parte a respeto das regras e procedimentos estabelecidos pelo Acordo Antidumping da WTO".[14] In other words, Brazil's intention was to base its claim on the alleged inconsistency of the Argentine measure with the WTO Anti-Dumping Agreement, which can be substantiated in subsection II.B "DAS INCONSISTÊNCIAS LEGAIS" and in paragraph 6."O Processo de Investigação e a Aplicação do Direito Antidumping". All throughout subsection II.B of its submission within MERCOSUR, Brazil confirms that the legal basis of its submission was the presumed WTO-inconsistency of the Argentine measure.

9. It is noteworthy that the submission of Paraguay, another State party to MERCOSUR, **is conclusive** as to the significance it attaches to Brazil's current complaint before the WTO when it states that: "Paraguay considers that, in accordance with the general principles of public international law, this case is "res judicata"[15], because it has already been brought under the dispute settlement procedure established within the framework of MERCOSUR, and under the Brasilia Protocol in particular". Paraguay further confirms: "In view of the foregoing, Paraguay considers this case as having been subject to a prior dispute settlement procedure, as recognised by both parties and resolved by a ruling that is binding on and mandatory for those parties. Hence this case should not be addressed by this Panel, for if it were, this would constitute a violation of the principles and rules of public international law and failure to abide by decisions handed down by MERCOSUR institutions, in this instance the award of an Ad Hoc Arbitral Tribunal constituted under the Brasilia Protocol."[16]

10. Argentina wishes to reiterate that Brazil's conduct in omitting any reference to the arbitral award relating to the same complaint in the framework of MERCOSUR, in which its claims were not upheld, is contrary to the **principle of good faith in the observance and application of international agreements <u>in two spheres simultaneously</u>:** the treaties and protocols signed, first within MERCOSUR, and second, in the WTO.[17]

11. In the WTO framework, the significance of the principle of good faith was elucidated in the case *United States - Shrimps*, in which the Appellate Body stated that: "... This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting …".[18]

12. Furthermore, Argentina believes that the present dispute initiated by Brazil within the WTO violates not only Article 21 of the Brasilia Protocol, which was pointed out in the submission of Paraguay[19], but also the principle of good faith in the WTO framework. For, "a State cannot be allowed to avail itself of the advantages of a treaty when convenient and to reject that treaty when

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[13] Submission of Brazil dated 16 March 2001 to the MERCOSUR Ad Hoc Arbitral Tribunal, page 22.

[14] Submission of Brazil dated 16 March 2001 within Mercosur, page 25.

[15] Third party submission of Paraguay, paragraph 5.

[16] Third party submission of Paraguay, paragraph10.

[17] First written submission of Argentina, paragraphs 16 and 17.

[18] Report of the Appellate Body, United States, Prohibition of imports of certain shrimp and shrimp products ("*United States - Shrimp*"), WT/DS58/AB/R, adopted on 6 November 1998, paragraph 158.

[19] Third party submission of Paraguay, paragraphs 6 and 10.

compliance becomes burdensome. It is of very little consequence whether the said rule is based on what is known in English law as the principle of estoppel or on the requirement of good faith. The first is but one aspect of the second".[20]

13. This estoppel-good faith binomial has also been underlined by Georg Scwarzenberger, who argues that the violation of a treaty implies an infringement of the principle of good faith that prevails in international relations.

14. The Argentine Republic reiterates[21] that Brazil's complaint within the framework of the WTO contradicts: (a) its consistent practice, as a MERCOSUR State party since 1991, of fulfilling the commitments it has assumed and having recourse to the dispute settlement procedure provided for under the Protocol of Brasilia and reaffirmed through the signature of the Protocol of Olivos; (b) its consistent and unequivocal practice of accepting the scope of the arbitral awards, of which there have been eight thus far, seven of them involving Brazil either as complainant or respondent.

15. Brazil's conduct in raising this dispute within the WTO thus displays some common features of "estoppel"- which as stated above, is closely linked to the principle of good faith -
" ... on the one hand, commitment to the responsibility born of appearances created; on the other, and in consequence, the obligation on the party subject to that responsibility to accept the risk of the reactions that its attitude or actions could elicit from another party".[22]

16. The disqualifying effect of **estoppel** therefore **annuls the validity or effectiveness of accusations that contradict one's own acts or statements.**

17. The Argentine Republic likewise considers it timely to point out that Brazil's conduct as evidenced within the MERCOSUR framework until the establishment of this Panel underscores the case for estoppel. Indeed, the States party to MERCOSUR - including Brazil of course - completed all the stages leading to the conclusion of a treaty signed on 18 February 2002, namely the Protocol of Olivos the purpose of which is to settle disputes within MERCOSUR. This Protocol includes a choice of forum provision. As the EC points out in its submission[23] and also confirmed by Paraguay,[24] the commitment assumed by Brazil with the signing of the Protocol of Olivos on 18 February 2002 is not consistent with Brazil's request for the establishment of a WTO panel submitted on 25 February 2002.[25]

18. In short, Argentina concludes that Brazil displayed consistent conduct in MERCOSUR as pertained to submitting its trade disputes with other States party to the dispute settlement procedure contemplated in the Protocol of Brasilia. Furthermore, Brazil had accepted the significance of awards under the Protocol of Brasilia itself before and after the Arbitral Award concerning poultry. Thirdly, Brazil gave yet another sign of this conduct by negotiating and signing the Protocol of Olivos in February 2002. Obviously, Brazil's conduct gave rise to rights and expectations, and more than this, a firm conviction amongst the other States Members of MERCOSUR as to Brazil's acceptance of the framework, the prosecution of the process and the scope of the awards under the terms of the legal instruments of MERCOSUR. Fourthly, Argentina emphasises that no subregional instrument provides for any possibility whatsoever of submitting a dispute that has already been resolved to successive forums - judicial or arbitral- within MERCOSUR or elsewhere. Lastly, Argentina

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[20] Lauterpacht Hersch, cited by Enrique Pecourt Garcia in *El principio del estoppel en Derecho Internacional Público. Revista Española de Derecho Internacional Público*, Madrid, 1962, pp. 107-108.

[21] First written submission of Argentina, paragraph 21.

[22] Enrique Pecourt Garcia, op.cit., p. 100.

[23] Third party submission of the EC, paragraph 17 and note 18.

[24] Third party submission of Paraguay, paragraph 8.

[25] Document WT/DS241/3, 26 February 2002.

reiterates[26] that Brazil's conduct cannot be viewed as isolated or sporadic, as there are a good many awards in which Brazil was involved whether as complainant or respondent, and accepted the award in all cases.

19. In Argentina's view, by virtue of the application of the principle of good faith[27], no interpretation given by the Panel in respect of the dispute raised by Brazil, **can overlook the existence of the arbitral award**[28] that settled the dispute within MERCOSUR and **the special relationship** between Argentina and Brazil as **States party emanating from the regional integration treaties and protocols** existing in the MERCOSUR framework. In keeping with the reasoning concerning the "customary rules of interpretation of public international law" in the cases *"United States - Standards for Reformulated and Conventional Gasoline"*[29] *and "Japan- Alcoholic Beverages"*[30], Argentina maintains that for the purposes of a full examination and depending on the context, the interpretation must take account of all the facts and factors relating to the case, within the meaning of Article 31 of the Vienna Convention on the Law of Treaties.[31]

II.2.2. Pleadings pertaining to this section

20. In the light of the above, the Argentina Republic respectfully repeats the request it made in its First Written Submission, that based on the omission by Brazil of any reference to the dispute previously discussed and settled by another international tribunal, the Panel find that the current submission of the case to the WTO reflects an abusive exercise by Brazil of its rights.

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[26] First written submission of Argentina, paragraph 20 and note 12.

[27] "Il n´en reste pas moins que les diverses méthodes d´interprétation se rattachent toutes à une règle essentielle: celle de l´interprétation de bonne foi, formulée par l´article 31, paragraphe 1, de la Convention de Vienne. Ce principe fondamental est à l´origine des divers moyens et règles utilisés pour interpréter les traités et c´est en fonction de cette exigence fondamentale que le choix entre ces différentes méthodes doit être effectué." Dinh Nguyen Quoc, Daillier Patrick and Pellet Alain, Droit International Public, 4th Edition, Libraire générale de droit et de jurisprudence (LGDJ), Paris, 1992, p.252.

[28] Award of the MERCOSUR Ad Hoc Arbitral Tribunal set up to rule on the dispute between the Federative Republic of Brazil and the Argentine Republic on "Imposition of Anti-dumping Duties on Exports of Whole Poultry from Brazil (Res. 574/2000 of the Ministry of the Economy of the Argentine Republic)." Dated 21 May 2001.

[29] Report of the Appellate Body on the case "United States - Standards for Reformulated and Conventional Gasoline", WT/DS2/AB/R, adopted on 20 May 1996.

[30] Report of the Panel on the case "Japan - Taxes on Alcoholic Beverages", WT/DS8/R, WT/DS10/R, WT/DS11/R., 11 July 1996.

[31] Vienna Convention on the Law of Treaties

Article 31 - General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

21. Similarly, Argentina reiterates that the Panel's finding cannot overlook the fact that in the light of the international commitments in force, Brazil's prior and subsequent practice of accepting the framework of MERCOSUR for the discussion and settlement of trade disputes with Argentina as a fellow MERCOSUR State party, and given the terms under which the dispute was brought, Brazil's complaint in the framework of the WTO has given rise to an estoppel situation for which Brazil is liable under the DSU.

22. For the above reasons, and considering in particular that Brazil's complaint involves challenging a measure which is identical in the current dispute to the measure at issue in the dispute within the framework of MERCOSUR, Argentina requests the Panel to refrain from ruling on the 41 claims of alleged inconsistency of the Argentine regulations with various provisions of the Agreement on the Application of Article VI of the General Agreement on Tariffs and Trade of 1994 (Anti-Dumping Agreement) contained in paragraph 549 of Brazil's first written submission, and consequently to reject the requests contained in paragraph 550 of that submission.

23. Should the Panel reject these pleadings and consider that it must rule on Brazil's claims, Argentina has set out its reasoning in the following section concerning the WTO-consistency of Resolution 574/00.

III. THE CONDUCT OF THE ANTI-DUMPING INVESTIGATION

III.1 GENERAL

24. Argentina maintains that throughout the investigation it complied with all aspects of the relevant provisions of the Anti-Dumping Agreement, though in particular as regards giving "due consideration" to all the factors that impinge on price comparability, and the provisions establishing the obligation duly to examine all the information submitted by the parties to the procedure and to fulfil the obligations of the Agreement regarding notification of the Parties.

25. Throughout all the phases of the procedure, Argentina effectively kept Brazilian exporters and the Government of that country abreast of the various actions that were taking place.

III.2 NOTIFICATIONS

26. Argentina therefore disputes the veracity of Brazil's claim of failure to notify seven Brazilian exporters in sufficiently good time to allow them to reply to the questionnaires or that the text of the application was not delivered to the exporters and to the Government of Brazil as soon as the investigation began.

27. Throughout the entire process, the Implementing Authority consistently demonstrated its readiness to provide the scope for the right of defence of the parties concerned, by all the means at its disposal and insofar as it was able.

28. Proof of this is that as the various stages of the procedure unfolded, not only did it accord all the extensions requested by the parties as shown by way of example in paragraph 130 of Argentina's First Written Submission, but it also granted the Brazilian exporters a period longer than the 30 days prescribed in the Agreement for replying to the questionnaires.

29. Argentina wishes to stress that as soon as the Implementing Authority became aware of the seven exporters whose inclusion had been requested by INTERAMERICANA COMERCIAL S.R.L., the request was granted. This is clear evidence of the readiness to open the way for participation by

all parties in the procedure and in a manner conducive to the optimum obtention of information so as to arrive at an accurate determination.

30. Argentina refutes Brazil's claim that this action amounts to lack of compliance with the Agreement, as it would have been illogical to expect the Authority to send the relevant questionnaires to those exporters, having been unaware of their existence.

31. In Argentina's opinion, this situation could have been remedied early in the investigation if the Government of Brazil had decided to participate in the investigation as soon as it had been invited and notified, i.e. from the very beginning, even ahead of the notifications in the WTO framework and the consultations under the regional agreement.

32. This is also applicable to the treatment given to the information submitted by the parties during the investigation.

33. Contrary to Brazil's allegation, Argentina duly considered all the information submitted by the parties in the course of the investigation concerning its various aspects. This was done as prescribed in Article 2.4, bearing in mind the relevance to the procedure of the information furnished, and based on the Authority's assessment of its authenticity and verifiability.

34. In keeping with Article 2.4, each party was told expressly what information was required by the Implementing Authority for the investigation in question, and it was made clear that it should be accompanied by documentary evidence that would facilitate its use and confirm it reliability.

35. Argentina wishes to make clear in this connection that whenever possible, the information supplied by the parties to the Implementing Authority was used, provided that it was verifiable.

36. Brazil nonetheless believes that, having failed to meet the Authority's request to furnish the necessary documentary proof, the Authority should have conducted an *in situ* verification, apparently as the only viable way of remedying this omission.

37. Argentina is not denying the possibility of conducting verifications under the Agreement. It wishes to make clear, however, that its interpretation of this possibility differs somewhat from that of Brazil.

38. Argentina believes that as foreseen in the same Agreement, this mechanism allows for a method of verification of the information contributed during an investigation, that must not necessarily be used by the Authority when it needs to ascertain the veracity and/or relevance of any evidence, and all the more so when the private sector has not complied with the Implementing Authority's request to submit information.

39. The possibility to undertake verifications of the kind being proposed by Brazil is foreseen in Article 6.7 of the Agreement, which establishes that:

> *"in order to verify information provided or to obtain further details, the authorities <u>may</u> carry out investigations in the territory of other Members ... "* (Emphasis added)

40. Argentina repeats that according to its interpretation, the Article provides that the decision to carry out verifications in the territory of the Member under investigation is optional for the Authority and not an obligation under the Agreement.

III.3 ESSENTIAL FACTS

41. Argentina does not consider that there has been any infringement of the obligation to inform the interested parties "of the essential facts under consideration which form the basis for the decision whether to apply definitive measures", as stated in Article 6.9 of the Anti-Dumping Agreement. On the contrary, in earlier cases, WTO precedent clearly defined the scope of obligation contained in Article 6.9, AD, and Argentina believes it has fully complied with the stipulations of that Article as was defined in WTO precedent.[32]

42. Accordingly, it is agreed that merely "giving access" to the records of the investigation to the parties did not satisfy the requirement of Article 6.9, AD, which is intended to enable the interested parties to defend their interests based on due access to the relevant information. Argentina did not contravene that purpose in the present case, for at no point in the investigation was there a cessation of the additional task of processing the records and extracting the relevant information to compose a separate report that was made available to the interested parties.

43. Contrary to Brazil's assertion, Argentina maintains that the relevant information was duly broken down and made available to the interested parties through the Report on Action Taken prior to the Closure of the Period for Obtaining Evidence (*Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa probatoria)*, dated 4 January 2002. The obligation in Article 6.9, AD entails the additional task of breaking down sufficient relevant information in good time so that the parties may have access to the data actually used. This assures the due handling of information and the right of defence of the parties.

44. That is the value that Argentina ascribes to the Report on Action Taken prior to the Closure of the Period for Obtaining Evidence, by considering it an additional procedural step, in other words, an "active step" (as the EC describes it in its submission)[33], whereby the Implementing Authority decided that all the information gathered - which would not be further expanded - was to be duly processed, broken down and ordered so as to identify the essential facts. The interested parties would then be informed that the relevant documentation was available to them (DCD Notes of 5 January 2000). In this way the right of the interested parties to defend their interests was duly safeguarded.

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[32] Report of the Panel on *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, dated 24 October 2000, paragraph 8.230:

> " … We do not accept an interpretation of Article 6.9 that would effectively reduce its substantive requirements to those of Article 6.4. In our view, an investigating authority must do more than simply provide "timely opportunities for interested parties to see all information that is relevant to the presentation of their cases … and that is used by the authorities …" in order to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures".

Similarly, the Report of the Panel on Argentina – Definitive anti-dumping measures on imports of ceramic floor tiles from Italy ("Argentina – Tiles"), WT/DS189/R, dated 28 September 2001, paragraph 6.125, stated:

> " ... the requirement to inform all interested parties of the essential facts under consideration may be complied with in a number of ways. Article 6.9 of the AD Agreement does not prescribe the manner in which the authority is to comply with this disclosure obligation. The requirement to disclose the "essential facts under consideration" may well be met, for example, by disclosing a specially prepared document summarizing the essential facts under consideration by the investigating authority or through the inclusion in the record of documents – such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters – which actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures. This view is based on our understanding that Article 6.9 anticipates that a final determination will be made and that the authorities have identified and are considering the essential facts on which that decision is to be made. Under Article 6.9, these facts must be disclosed so that parties can defend their interests, for example by commenting on the completeness of the essential facts under consideration."

[33] Third party submission of the EC, paragraph 23.

45. Argentina believes that it fully complied with the obligation under Article 6.9, AD, by means of the Report on Action Taken prior to the Closure of the Period for Obtaining Evidence, having duly identified the essential facts, in a separate procedural stage and in due time and form, so that the interested parties could defend their interests.

III.4 MAJOR PROPORTION OF THE INDUSTRY

46. Argentina submits that it does not share Brazil's view that the reference to "una proporción importante de la producción nacional" (*a major proportion of [the total] domestic production)* in Article 4.1, AD means a proportion greater than 50 per cent.

47. We believe that a categorical affirmation that Article 4.1, AD necessarily refers to at least 50 per cent cannot be accepted as valid by the WTO, and that moreover, there can be no claim here of lack of compliance of Article 4.1, AD by Argentina.

48. In the first place, the Spanish version of Article 4.1 speaks of "una proporción importante", and not of "la proporción más importante", or "la mayor proporción", or "la mayoría". We share the EC's view which notes that in the English version Article 4.1 speaks of "a major proportion" and not of "the major proportion".[34]

49. Both the Spanish and English versions of Article 4.1, AD use terms that are more limited than the categorical "mayoría" (*majority)* or "superior al 50%" *(more than 50 per cent)* that Brazil is attempting to introduce. Argentina's view is that the words used in Article 4.1, AD cannot be taken as equivalent, for example, to the stipulations of Article 5.4, AD, (which expressly provides for "más del 50 por ciento" de la producción total) *[more than 50 per cent of the total production …]*.

50. Finally, even though Argentina agrees with Brazil that 46 per cent certainly does not constitute "una mayoría" *[a majority]* - by very little - we would venture to suggest that Brazil could hardly deny, on the other hand, that 46 per cent does indeed constitute a "proporción importante que no es mayoría" *[a major proportion that is not a majority]*. Argentina believes that it has fully complied Article 4.1, AD, the purpose of which is to define the expression "domestic industry".

III.5 THE ADJUSTMENT

51. Argentina submits that the adjustment made by the Authority in accordance with the method supplied by the Petitioner must not be considered as anything but additional proof of the degree of compliance of this procedure with the Anti-Dumping Agreement.

52. In this regard, Argentina wishes to make clear its position, which was at any rate already outlined in its written submission to the Panel. As there was proof that the chickens being sold in the city of São Paulo - which formed the basis for starting the investigation - did not have their head and feet removed, unlike those being exported, the Implementing Authority was compelled to make the adjustment, because the heads and feet represent a factor that - undeniably - influences price comparability.

53. At no time did the Brazilian exporters object to the need for the adjustment. But moreover, in response to a request by the Authority for clarification, JOX sent a note[35] confirming the percentage adjustment indicated by the Petitioner. This was used by the Implementing Authority for lack of any

[34] Third party submission of the EC, paragraph 49.
[35] First written submission of Brazil, Exhibit BRA-32.

other information that was shown to be more suitable and which could have been included in the course of the investigation if the Brazilian exporters believed that the data used was not accurate.

III.6 CALCULATION OF ANTI-DUMPING DUTIES

54. The Argentine Republic insists that the system it used to impose anti-dumping duties is consistent with Article 9 of the Anti-Dumping Agreement and that it is the Agreement itself and the practice of WTO Members that underpin the possibility of applying anti-dumping duties, based on the decision of the Implementing Authority, in the following manner:

> (a) Fixed duties in relation to an *ad valorem* tax; (b) fixed in relation to a specific amount; (c) variable.

55. The system of variable amounts used by Argentina to set prospective anti-dumping duties (the difference between normal value and the FOB value declared for the shipment concerned) – Article 9.3.2, AD - is designed precisely to ensure that the anti-dumping duty actually collected does not exceed the margin of dumping determined. Hence, for example, if in the process of imposing the duties the margin of dumping should disappear because the export price has been aligned with normal value, the duty payable would be zero under this system. It is clear that this is perfectly consistent with the principle set out in Article 9.3.

56. Similarly, if the imposition of duties could possibly give rise to a situation in which the duties collected were higher than the margin of dumping determined, Articles 9.3.1 and 9.3.2 of the Agreement prescribe the way in which to correct this situation, and it can by no means be inferred that under the system applied by Argentina, the interested parties so requesting could be denied reimbursement of excess duties paid, by the means and in the manner foreseen under the applicable regulations.

57. We would like to make absolutely clear that without prejudice to the general remarks made about the system used by Argentina, in the present case, the minimum export value set for each of the exporters for whom an individual margin of dumping was determined, as well as that set for the rest of the exporters covered by the general level determined, were less than the Normal value determined for each case during the investigation. As such, while the margins of dumping determined by the Implementing Authority during the investigation were 14.91 per cent for SADIA SA, 15.48 per cent for AVIPAL SA, and 8.19 per cent for the rest, the minimum export values, which stood at USD 0.92, USD 0.98 and USD 0.98 respectively, represent a difference of 13.74 per cent, 10.05 per cent and 5.63 per cent in each specific case, *vis-à-vis* the f.o.b. values determined for each one during the procedure.

58. Article 9.3 provides that "*[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2*". In the light of the preceding paragraph and of the relevant provision of the Agreement, it can be seen that Argentina has acted in a manner consistent therewith.

59. The resort to anti-dumping duties is the remedy open to a Member in particular circumstances for correcting an unfair trade practice which, based on the findings of a prior investigation under the terms of the AD, causes injury to a sector of its domestic industry.

60. The obligation arising from Article 9.3 for any Member that imposes such duties is that the latter must not exceed the amount of the margin established in Article 2, without such margin being necessarily determined under the stipulations of Article 2.4.2, as Brazil would wish. In this regard,

Argentina shares the opinion of Canada to the effect that the margin of dumping determined during the investigation imposes no limit on the duty that may be applied to future imports.[36]

61. As can be seen, the alleged inconsistency is false, because:

(a) The AD does not prescribe WHAT system must be used to collect –anti-dumping duties;

(b) the AD itself envisages the possibility that the duty paid could in some situations diverge from the determined margin, and also includes the remedy for such a situation; and

(c) nothing in the present case suggests that any such excess duty could be withheld from Brazilian exporters.

62. Argentina wishes to draw the Panel's attention to a situation that could possibly result from an erroneous interpretation of the provisions of the Anti-Dumping Agreement pertaining to the levying of anti-dumping duties, which is obviously what Brazil is attempting to achieve.

63. If the system of variable duties were deemed to be inconsistent with the Anti-Dumping Agreement merely because in a particular context - foreseen elsewhere in the Anti-Dumping Agreement together with the remedy therefor - the duties collected were in excess of the determined margin, a Member could easily arrange for a measure taken to correct the distortions caused by an unfair trade practice to be challenged as inconsistent, simply by intensifying the unfair practice, i.e. by widening the margin of dumping involved.

64. The purpose of Article VI would be completely thwarted in this way.

IV. CONCLUSION

65. In the light of the arguments put forward in the sections above, the Argentine Republic respectfully requests of the Panel the following:

(1) That, in keeping with the reasoning developed in Section II and as already mentioned in paragraphs 20, 21 and 22 of this Submission, the Panel refrain from ruling on the 41 claims of alleged inconsistency with various provisions of the Agreement on the application of Article VI of the General Agreement on Tariffs ad Trade of 1994 (Anti-Dumping Agreement) submitted by Brazil.

66. Should the Panel decide not to accede to the above pleading by the Argentine Republic, as set out in paragraph 23 of this submission and in the light of the arguments submitted in Section II, it is respectfully requested to:

(2) Reject the Brazil's claims that Resolution 574/00 of the Ministry of the Economy of the Argentine Republic is inconsistent with:

- Articles 5.2, 5.3, 5.7 and 5.8 of the Anti-Dumping Agreement;

- Article 12.1 of the Anti-Dumping Agreement;

[36] Third party submission of Canada, page 4.

- Articles 6.1.1, 6.1.2, 6.1.3, 6.2 and 6.8, as well as paragraphs 5, 6, and 7 of Annex II, and with Articles 6.9, and 6.10 of the Anti-Dumping Agreement;

- Articles 2.4, 2.4.2, of the Anti-Dumping Agreement;

- Articles 3.1, 3.2, 3.4, 3.5 of the Anti-Dumping Agreement;

- Article 4.1 of the Anti-Dumping Agreement;

- Articles 9.2, 9.3 of the Anti-Dumping Agreement;

- As well as the various claims related to Article 12.2.2.

(3) Reject the request for the immediate repeal of Resolution 574/2000 imposing the definitive anti-dumping duties.

ANNEX B-3

SECOND WRITTEN SUBMISSION OF ARGENTINA

(17 October 2002)

The Government of Argentina would like to thank the members of the Panel for this opportunity to submit, for their consideration, its rebuttal to the arguments put forward by the Government of Brazil in the course of these proceedings.

I. INTRODUCTION

1. *"The provisions of the WTO – AD Agreement* ***(WTO Anti-Dumping Agreement)*** *were incorporated in community legislation by DEC CMC No. 11/97 (Regulatory Framework, RF). Since by definition of Article 1, the RF is in conformity with the WTO-AD Agreement, failure to comply with the former implies failure to comply with the latter. Furthermore, should the RF disciplines not be applicable for some legal reason that excludes such application, the provisions of the WTO AD Agreement would apply pursuant to Article 19 of the Protocol of Brasilia (PB) as 'applicable principles and rules of international law'. The rules of the WTO Anti-Dumping Agreement are binding for WTO Members, which include the* ***States parties to MERCOSUR****". (Emphasis added).*

2. This paragraph from Brazil's submission (paragraph 30 of the Award[1]) before the MERCOSUR Ad Hoc Arbitral Tribunal helps to understand that Brazil's "insistence" on filing a complaint at the regional level using the procedure laid down in the Protocol of Brasilia in the knowledge that there was no MERCOSUR legislation governing intra-zone dumping shows that it chose this course, in spite of the fact that Argentina repeatedly explained that the MERCOSUR should be rejected as a forum for the settlement of the dispute[2], because it wanted the dispute to be settled at the regional level, and it was only following the unfavourable ruling in that forum that it decided to bring the case before the WTO.

3. The actual Ad Hoc Tribunal set up to hear and settle the dispute brought before MERCOSUR ruled that: "In this situation, the WTO Anti-Dumping Agreement stands as an appropriate reference, not as MERCOSUR legislation, which it is not, but by virtue of Article 19 of the Protocol of Brasilia[3] as an applicable principle of international law (Cfr. Second Arbitral Tribunal, paragraphs 59 et. seq.,

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[1] "Award on poultry" – Award of the MERCOSUR Ad Hoc Arbitral Tribunal set up to rule on the dispute between the Federative Republic of Brazil and the Argentine Republic on "Imposition of Anti-Dumping Duties on Exports of whole poultry from Brazil (Res. 574/2000 of the Ministry of the Economy of the Argentine Republic)." Date: 21 May 2001.

[2] *Idem*, paragraph 80.

[3] The Protocol of Brasilia was signed by the four MERCOSUR States parties on 17 December 1991. Article 19 thereof reads as follows:

> "(1) The Arbitral Tribunal shall settle the dispute by applying: the provisions of the Treaty of Asunción, agreements concluded within the framework thereof, the decisions of the Council of the Common Market, the resolutions of the Common Market Group, and applicable principles and rules of international law.
>
> (2) This provision shall not prejudice the power of the Arbitral Tribunal to decide a Dispute *ex aequo et bono* if the parties agree thereto."

for a clarification of the concept of subsidies), in this case to shed light on the meaning and purpose of anti-dumping proceedings."[4] (Footnotes added).

4. Argentina respectfully requests the Panel to evaluate, in its analysis of the case, the fact that Brazil successively brought its complaint first before MERCOSUR, and then, in view of the unfavourable outcome, before the WTO.

5. Since Brazil's way of proceeding makes it clear that it intended to reverse the previous unfavourable ruling, Argentina repeats[5] that the Panel should bear in mind, in settling this case, that Argentina and Brazil are not only WTO Member States, but also States parties to MERCOSUR, and as such they must honour the commitments assumed in both fora. Indeed, both fora generate a set of legal relationships which bind the parties under public international law.

6. In short, Argentina considers that Brazil's conduct in bringing the dispute successively before different fora, first MERCOSUR and then the WTO, as well as the legal arguments that Brazil put forward in its submission to the Ad Hoc Arbitral Tribunal at the regional level, based not only on MERCOSUR rules, but also on the provisions of the WTO Anti-Dumping Agreement[6], 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.

7. Should the Panel reject the basis of Argentina's claim as set forth in the paragraph above, Argentina submits, in the alternative, 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, 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.

8. As argued in its first written submission, Argentina rejects the doubts raised by Brazil concerning Resolution 574/2000 of the Ministry of the Economy on the basis of various considerations of fact and law which are presented in the two main sections making up that submission, namely Section II, dealing with the rules and principles of public international law applicable to the case, and Section III, which refutes the substantive arguments contained in Brazil's 41 claims.

II. PRELIMINARY ARGUMENTS: PRINCIPLES AND RULES OF INTERNATIONAL LAW APPLICABLE TO THE CASE

II(a) Good faith – principle of estoppel

9. Brazil and Argentina assumed rights and obligations within the framework of MERCOSUR. In Argentina's view, the Panel in the current case cannot disregard the fact that the dispute was already discussed and resolved previously.

10. Moreover, in the framework of MERCOSUR it is a standing practice for all parties – obviously including Brazil – to accept the obligations deriving from the legislative framework in force, including the 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

[4] "Award on Poultry" paragraph 159.

[5] First written submission of Argentina, 29 August 2002, paragraph 18, and third party submission of Paraguay, 9 September 2002, paragraph 7.

[6] Submission by Brazil in the framework of MERCOSUR (paragraphs 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the "Award on Poultry."

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. This conduct, as corroborated by Brazil's peaceful acceptance of previous awards, not to mention the fact that in some of these cases, the conclusions have revolved around the principle of estoppel, cannot be disregarded by the Panel.

11. Contrary to what the United States has said[7], Argentina does not claim in its first written submission a breach of the Protocol of Brasilia by Brazil for the purposes of having the Panel reject its claims; rather, Argentina points out that the complaint existed, that Brazil has brought the case at issue before the WTO in the full knowledge of that fact and by virtue of the unfavourable outcome of its complaint at the regional level – and that it omits any reference to the matter.

12. Similarly, Argentina disagrees with the United States where it argues that it "also disagrees with Argentina that the Panel may apply what Argentina calls the principle of estoppel. The fact that Argentina cites 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."[8]

13. Argentina repeats[9] 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 or the advantage of the party making the statement".[10] Similarly, "[a] considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency, and shorn of the technical features to be found in municipal law.(…). Thus before a tribunal the principle may operate to resolve ambiguities and as a principle of equity and justice: here it becomes a part of the evidence and judicial reasoning."[11]

14. Firstly, with respect to the possibility for a panel to apply the principle of estoppel, Argentina can find no provision or rule whatsoever that prohibits a panel from examining, and where it deems appropriate applying, that principle.

15. Similarly, in the case *United States – Standards for Reformulated and Conventional Gasolene*[12], the report made it clear that:

> "That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law." [13]

16. In other words, the GATT and the WTO are subject to the general rules of international law.

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[7] Oral Statement of the United States at the Third-Party Session with the Panel, 26 September 2002, paragraph 4.

[8] *Idem*, paragraph 5.

[9] Intervention by the Argentine Republic at the meeting of the Panel with the Parties, 25 September 2002, paragraphs 12, 13, 14, 15 and 16.

[10] Brownlie Ian, "Principles of Public International Law", Fourth Edition, Clarendon Press. Oxford, 1990, page 641.

[11] *Idem*, page 641.

[12] Report of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasolene*, adopted on 20 May 1996.

[13] *Idem*, page 20.

The Appellate Body recognized, in *United States – Standards for Reformulated and Conventional Gasolene*, that GATT/WTO legislation forms part of international law, and hence the general principles of international law apply to the work of the panel and the Appellate Body.

17. Among the arguments put forward by the United States is the statement that no panel to date has applied a principle of estoppel.[14] In Argentina's view, this argument is devoid of any legal foundation and can be refuted empirically. It is devoid of legal foundation because the panels are called upon to apply public international law to settle the disputes brought before them. And it can be refuted empirically because the United States itself [15], in its oral submission, mentions two cases[16] in which the scope of estoppel is expressly discussed.

18. In *European Communities – Asbestos:*[17]

> "From a legal point of view, the question seems to be whether there is *estoppel* on the part of the EC because they notified the Decree or because of their statements, including those during the consultations. This would be the case if it was determined that Canada had legitimately relied on the notification of the Decree and was now suffering the negative consequences resulting from a change in the EC's position."

19. In the case *"Guatemala – Cement:*[18]

> "Guatemala uses both the concepts of 'acquiescence' and 'estoppel' in support of this argument. We note that 'acquiescence' amounts to 'qualified silence', whereby silence in the face of events that call for a reaction of some sort may be interpreted as a presumed consent. The concept of estoppel, also relied on by Guatemala in support of its argument, is akin to that of acquiescence. Estoppel 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." (Footnotes 789 and 790 omitted)

20. Argentina respectfully requests the Panel to examine the case in the light of the principle of estoppel because the current dispute brought by **Brazil before the WTO** involves the following elements:

(i) Brazil contradicts itself by **filing the complaint against Argentina first within the framework of MERCOSUR, on the understanding that it was a bilateral dispute in the framework of a regional integration scheme in which WTO anti-dumping legislation was applied, and then maintaining that the same dispute exceeded the scope of MERCOSUR;**

(ii) **taking advantage of its own contradictions** after having brought its complaint before MERCOSUR and obtained an adverse ruling, Brazil turned to the WTO in

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[14] Oral Statement of the United States at the Third-Party Session with the Panel, 26 September 2002, paragraph 6.

[15] *Idem*, paragraph 6.

[16] WT/DS135/R, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, report adopted on 5 April 2001, and WT/DS156/R, *Guatemala - Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, report adopted on 17 November 2000.

[17] WT/DS135/R, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, paragraph 8.60.

[18] WT/DS156/R, *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, paragraph 8.23.

order to reverse the unfavourable ruling contained in the arbitral award, invoking the same legislation, but acting contrary to its previous practice of respecting awards based on the Protocol of Brasilia;

(iii) **prior to[19] and following[20] this case** Brazil, through its conduct and/or silence, maintained an attitude that was clearly favourable to the acceptance of the scope of the obligations deriving from MERCOSUR, and created **favourable expectations among the other States parties with respect to the behaviour that is was reasonable** for the three remaining parties to expect from it. **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.**

21. Finally, Argentina refutes the arguments by Brazil[21] and the EC[22],and repeats[23] that it has not argued primarily for the application of the doctrine of "res judicata".

II(b) Evidence

22. In the interest of transparency and to ensure that it is possible for the Panel to make an objective assessment under Article 11 of the DSU, Argentina would like to state to the Panel that it is prepared to hand over its submissions in the MERCOSUR proceedings and invites Brazil to do likewise, thereby providing the Panel with the full evidence of the procedures that took place within MERCOSUR with respect to the subject of the current dispute.[24]

II(c) The relevant rule of public international law: Art. 31(c) of the Vienna Convention

23. Firstly, Argentina does not agree with the statement of the United States that "[b]y its plain terms, Article 3.2 is limited to the rules of interpretation used to clarify the existing provisions of the WTO Agreement."[25]

24. 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 on the Law of Treaties.

25. Article 31.3(c) of the Vienna Convention on the Law of Treaties specifically stipulates that for the purposes of interpretation, account shall be taken of " … any relevant rules of international law applicable in the relations between the parties."

26. In the words of Jiménez de Arechaga[26] "[t]his provision means that a treaty must be interpreted **within the framework of the rules of international law in force between the parties"**.

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[19] First written submission of Argentina, paragraph 20 and footnote 12.
[20] Signature of the Protocol of Olivos, expressly including a choice of forum clause.
[21] Oral Statement of Brazil, First Meeting with the Panel, 25 September 2002, paragraph 4.
[22] Third party submission of the European Communities, 9 September, paragraph 5.
[23] Intervention by the Argentine Republic at the meeting of the Panel with the parties, 25 September 2002, paragraph 7.
[24] Annex ARG-LXII - Table comparing the MERCOSUR dispute with the WTO dispute.
[25] Oral Statement of the United States at the Third-Party Session with the Panel, 26 September 2002, paragraph 7.
[26] Jiménez de Arechaga, Eduardo "El derecho internacional contemporáneo", Editorial Tecnos, Madrid 1980, page 61.

27. The same author also refers to a 1975 resolution by the International Law Institute[27] in which it is stated that: "The interpretation of a treaty must take account of all relevant rules of international law applicable between the parties at the time of implementation."

28. 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 on the Law of Treaties.

29. Argentina respectfully requests the Panel to take into consideration, for the purposes of interpretation of the current dispute under the WTO and under the terms set forth in the preceding paragraph, the rules forming part of the regulatory framework of MERCOSUR on which the ruling of the MERCOSUR Ad Hoc Tribunal was based.

II(d) Summary

30. To summarize, Argentina submits that in the case at issue, Brazil's current complaint against it under the WTO is invalid in that Brazil's conduct not only runs counter to the principle of good faith, but warrants estoppel.

31. For the reasons set forth in the preceding paragraph, the case for estoppel which the United States defines as a procedural argument and which has been recognized as such in the WTO, and which is more generally considered by doctrine to be a substantive defence should, in Argentina's view lead the Panel to refrain from ruling in the case at issue. Even if the Panel considers that estoppel in the WTO is only applicable as a procedural defence, it is more than enough to reject Brazil's substantive arguments.

32. In the alternative, if the Panel should reject the arguments set forth in the previous paragraphs, Argentina considers that the Panel should in any case refrain from making any findings or conclusions regarding the consistency and compatibility of Resolution 574/2002 with the Anti-Dumping Agreement, since the MERCOSUR regulatory framework, which includes the Protocol of Brasilia and the legal consequences of the arbitral award, are relevant rules of international law that are applicable between the parties in conformity with Article 31.3(c) of the Vienna Convention on the Law of Treaties.

III. SUBSTANTIVE ASPECTS OF THE INVESTIGATION

III(a) Article 5.2 of the Anti-Dumping Agreement

33. Argentina reaffirms what it stated in its first written submission, namely that the evidence that the applicant must provide at the initiation of the investigation must be the evidence reasonably available to it. As regards the implementing authority, the obligation contained in this Article is to determine that the evidence accompanying the application is sufficient to justify the initiation of the investigation.

This condition of sufficiency means that the evidence must contain indications that dumping has occurred, causing damage to the domestic industry. However, the detail concerning the facts put forward will always be less than the detail which emerges at a later stage from the investigation.

34. Thus, the evidence required must be of a standard that makes it possible to initiate the investigation on the basis thereof. As stated in paragraph 32 of its first written submission, Argentina

[27] *Idem*, page 63.

submits that to require of domestic producers a level of detail and knowledge in the evidence they must submit that is materially beyond their reach would amount simply to denying them any access to the proceedings.

With reference to the different standards of evidence required at the different stages of the proceedings, Argentina recalls the statements by the Panels in *United States – Measures Affecting Imports of Softwood Lumber from Canada*[28], and *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*[29], referred to in paragraphs 38 and 44 of its first written submission of 29 August 2002.

35. Brazil, which has said that it agrees with this argument by Argentina[30], nevertheless claims that in this case Argentina violated Article 5.2 because the evidence submitted by the applicant was not sufficient to determine that:

(i) The product sold in Brazil was physically different from that sold in Argentina;

(ii) the differences in physical characteristics actually affected price comparability;

(iii) the yield rate difference alleged by the applicant was correct.[31]

36. This is not the case. The evidence submitted by the applicant to the investigating authority contained sufficient data within the meaning of Article 5.2 of the Anti-Dumping Agreement that:

(i) Contrary to what Brazil claims, there were physical differences between the product (whole poultry) taken as a basis for the calculation of normal value;

(ii) since these differences affected the trade performance of the products being compared, they unquestionably affected the price comparability;

(iii) these differences called for an adjustment to enable - prior to the initiation of the investigation - a fair comparison to be conducted, for which purpose an adjustment methodology was also provided.

III(b) Article 5.7 of the AD Agreement

37. As regards Brazil's claim that Argentina failed to comply with Article 5.7 of the AD Agreement by not simultaneously considering the evidence of both dumping and injury in the decision to initiate the investigation, Argentina maintains, as it did in its first written submission, that this claim is unfounded.

38. Article 5.7 stipulates that the evidence of both dumping and injury shall be considered simultaneously **in the decision whether or not to initiate an investigation**.

39. Although in its own first written submission[32] Brazil attempts to demonstrate that Argentina violated the AD Agreement simply because the reports respectively establishing the existence of dumping and the existence of injury bear different dates, this does not in any way mean that the

[28] WT/DS236, paragraph 332.
[29] WT/DS132/R, paragraph 7.76.
[30] Oral statement of Brazil at the first meeting with the Panel, paragraph 15.
[31] Oral statement of Brazil at the first meeting with the Panel, paragraph 17.
[32] First written submission of Brazil, para. 171.

Authority, in its decision to initiate the investigation, did not simultaneously consider the evidence in both reports.

40. In this connection, Argentina draws the Panel's attention to the Third Party Submission of the United States, which states that "Brazil appears to believe that this language (i.e. that of Article 5.7) obligates a Member to ensure that its investigating authorities consider dumping and injury information from simultaneous (i.e. identical) time periods. Viewed in context, however, the term 'simultaneously' is linked to the term 'considered', not the term 'evidence'."[33]

41. Argentina concurs with the United States and reiterates the argument made in its first written submission that Brazil over-emphasizes the element of simultaneousness emerging from the provisions of the AD Agreement, interpreting the obligations in Article 5.7 in a manner that is simply incorrect.

42. Argentina repeats once again that the implementing authority, in deciding to initiate the investigation, simultaneously took account of both the injury and the dumping analysis and the causal link between the two.

III(c) Article 5.8 of the AD Agreement

43. As regards Brazil's claim that Argentina should have rejected the application for initiation of the investigation because the application had failed to demonstrate injury, Argentina reiterates the statement made in its first written submission and reaffirmed at the first meeting of the Panel with the parties. Argentina likewise reiterates its reply to question 16 of the Panel that since the applicant provided updated information in keeping with the requirements of the application, the new information had to be examined in order to determine its relevance to the ongoing proceedings.

44. As specified in the aforementioned reply, the examination of new information is expressly provided for in Article 60 of the Regulations of the National Law on Administrative Procedures (RLNPA, approved by Decree No. 1759/72 and harmonized by Decree No. 1883/91), which was duly notified to the relevant WTO Committees and stipulates that the competent body (in this case, which involves injury, the CNCE) shall intervene once again in the proceedings if any new developments occur or come to its knowledge. In the case at issue, the additional submission by the applicant introduced new items of evidence which called for a further intervention by the CNCE, at the request of the competent bodies and in strict conformity with the law.

45. Argentina wishes to lay special emphasis on the following points, duly brought to the Panel's attention with respect to the above:

(1) The information presented by the applicant supplemented that submitted at the time the case was opened; it was intended to provide the authority with data that had not been included in the initial submission and enabled the CNCE to make an affirmative determination.

(2) During the stage prior to the initiation of the investigation, third party rights are not affected.

(3) Brazil's suggestion to file the case at that stage of the investigation, with the introduction of additional information, would have adversely affected the individual rights of the applicant, in breach of the law.

[33] Third party submission of the United States, para. 3.

III(d) Article 12.1 of the AD Agreement

46. Here Argentina simply refers to its first written submission, emphasizing that it fulfilled the obligation to notify all parties known to the investigating authority. It draws attention to paragraphs 112, 113 and 114 of the text so that the Panel can verify the various documents submitted and the steps taken by Argentina in order to comply with Article 12.1.

47. As regards the claim that the exporters were notified eight months after the initiation of the investigation, it would have been impossible to do so any earlier because the authority did not learn of their existence until the firm INTERAMERICANA COMERCIAL made its submission.

The same is true of Brazil's claim under Article. 6.1.2. The Authority cannot be said to have failed to fulfil its obligations towards enterprises that did not join as interested parties.

III(e) Article 6.1.1 of the AD Agreement

48. As specified in Argentina's first written submission, the investigating authority granted all the periods stipulated in the AD Agreement to all the parties with an interest in the investigation. In addition to the procedural time-frames, however, Argentina showed every good will in allowing all the exporters sufficient time to supply the information required to properly defend their interests. This is evidenced by the successive extensions granted by the Authority in each case, as recorded in paragraphs 126 to 136 of the submission.

III(f) Article 6.2 of the AD Agreement

49. Here again, Brazil refers – as a basis for its claim that Argentina acted inconsistently with Article 6.2 – to the eight exporters involved in the investigation as a result of the request by the firm INTERAMERICANA COMERCIAL.

50. Argentina refers yet again to its first written submission and specifically paragraphs 148 to 161. It also strongly re-emphasizes that although the Brazilian Government had been notified from the very outset of the investigation, through a request for cooperation "in identifying the interested producers/exporters in this investigation and providing them with the attached requests for information…",[34] Argentina was not informed of the alleged interest[35] of the firms whose right of defence it had allegedly impaired and which were only involved in the investigation on the basis of a request by one of the parties.

III(g) Articles 6.8 and 12.2.2 of the AD Agreement

51. As regards Brazil's various claims in respect of the authority's use of the information supplied by the exporters during the investigation and the lack of proper explanation, in some cases, why certain data had been disregarded, Argentina's first written submission gives a detailed list[36] of the different types of information provided by each firm in the course of the investigation and specifies the way in which the information was used, where such use was warranted in the proceedings and met the formal requirements of Argentine legislation, of which each of the parties was duly aware.

52. In spite of the above, Argentina considers it important to revert to a number of points repeatedly raised by Brazil in connection with the use of the information and the possibility of verifying its accuracy.

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[34] First written submission of Argentina, para. 112.
[35] *Ibid*., para. 147.
[36] *Ibid*., paras. 187-206.

53. Brazil claims that the Brazilian exporters supplied all the information requested by the investigating authority and that the latter decided, for no apparent reason, to discard that information and use only the data provided by the applicant.

54. This is not the case. Indeed, Argentina has demonstrated that once the exporters had supplied the supporting evidence needed, at a minimum, to corroborate the information they had provided, that information was used.

55. As regards the export price data, Brazil claims that Argentina used the applicant's data. However, it apparently fails to mention that the information actually used by Argentina in this case was the official data from the register of the General Customs Administration, which is the body in charge of supervising and controlling all foreign trade transactions. The register serves as a database for other State, and private, bodies and contains the most detailed and accurate information available on values and prices for each transaction. Any information presented to Customs by economic agents - i.e. exporters and importers – is recorded in the form of a sworn statement.

56. In other cases such as those of FRANGOSUL and CATARINENSE, 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[37] and, in CATARINENSE's case, because the data was insufficient.[38]

57. At the risk of belabouring the point, Argentina reiterates that each time the parties supplied the information in the prescribed timely and appropriate fashion, the information was used. Argentina had to resort to other sources of information in cases where any aspect of those requirements had not been met.

58. Brazil claims, moreover, that the Authority should have conducted on-the-spot verifications of the information supplied by the exporters since they had offered it the possibility of doing so during the proceedings.

59. Argentina has repeatedly emphasized that the conduct of on-the-spot verifications is optional for the investigating authority and is not an obligation under the AD Agreement. It nevertheless considers it important to reaffirm its oral statement at the meeting of the Panel with the parties on 25 September 2002.

60. Argentina is not denying the possibility of conducting verifications under the Agreement. It wishes to make clear, however, that its interpretation of this possibility differs somewhat from that of Brazil.

61. The possibility to undertake verifications of the kind proposed by Brazil is foreseen in Article 6.7 of the Agreement, which establishes that:

> *"…the authorities <u>may</u> carry out investigations in the territory of other Members…."*
> (Emphasis added)

62. Argentina thus considers that, as foreseen in the Agreement, this mechanism allows a method of verification of the information added to the file during an investigation that does not necessarily have to be used by the authority when it needs to ascertain the truth and/or relevance of any evidence,

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[37] *Ibid*., paras. 187-200.
[38] *Ibid*., para 203.

especially when the private sector fails to comply with the implementing authority's request for information.

63. In Argentina's view, this is the most correct interpretation of Annex I, paragraph 1, which details the procedures applicable to Article 6.7 and establishes that:

> *"Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations." (Emphasis added)*

64. A joint reading of Article 6.7 and Annex I, paragraph 1, of the AD Agreement clearly reveals the discretionary nature of this mechanism, ruling out any claim as to its binding character. Its optional nature is further confirmed by paragraph 3 of that same Annex, which provides that the explicit agreement of the firms concerned should be obtained as a prerequisite to any on-the-spot investigation.

65. Brazil appears, moreover, to interpret the above possibility as an obligation to be fulfilled in addition to the timely and appropriate submission of information requested by the authority.

66. Argentina therefore refers to the relevant part Annex I, paragraph 8, which reads as follows:

> *"As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received…; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided…."*

67. As this provision shows, on-the-spot investigations do not release the interested parties from the obligation to supply the information requested by the investigating authority – especially where the authority decides to carry out an investigation visit. In other words, Brazil can hardly claim that Argentina has violated a specific rule of the Agreement when the Brazilian exporters themselves did not satisfy the obligation under the Agreement to facilitate the task that Brazil claims has not been fulfilled.

III(h) Article 2.4 of the AD Agreement

68. Brazil claims that Argentina acted inconsistently with the Article 2.4 requirement to make a fair price comparison, holding that its claim is substantiated by the different actions taken by Argentina in the course of the investigation, as outlined below. Brazil further claims that Argentina has placed an unreasonable burden of proof on the Brazilian exporters by not specifying from the outset the period for which the information was being requested.

69. Argentina reiterates that it complied, throughout the investigation, with the Article 2.4 requirement to make a fair comparison.

70. The above claims have already been extensively addressed in Argentina's first written submission. Argentina therefore repeats that it made all the adjustments it considered appropriate, insofar as it had been demonstrated that:

(a) those adjustments were necessary; and

(b) the adjustment values were correct, and not merely figures under a general heading covering a certain period of time.

71. Thus, as regards freight adjustment, which Brazil claims Argentina should have made in the case of SADIA, Argentina agrees with Brazil that adjustment would have been necessary – but only to the extent that the investigating authority had received the relevant supporting documentation in a timely and appropriate fashion. Argentina also concurs with Brazil that SADIA did provide an estimate in Annex VIII of the questionnaire sent to the exporters – but this was a purely general and aggregate estimate covering a period of one year.

72. Argentina based its normal value calculation on prices drawn from a series of invoices selected according to the random sampling method. Those documents, which the exporter was duly requested to supply, gave no indication whatsoever of the amounts to be deducted or of the items to which the deductions should apply.

73. This is why the Authority did not make the deduction requested by Brazil, because if it had applied a discount representing a general average for a given stage of the investigation, this would have distorted the price to be used. In any event, the exporter had ample opportunity, when it sent the requested invoices, to inform the Authority of any items and amounts it considered necessary to deduct or add, according to the characteristics specific to the transactions recorded in the documents.

74. As regards the adjustments which, again, Brazil claims should have been made to the normal value calculated for the "other exporters", Argentina notes Brazil's advice to the Panel not to be confused by Argentina's seemingly "hazy" arguments.[39]

75. Argentina agrees that the Panel should not be misled and therefore believes that a few points should be clarified in order to ensure that the Panel is not confused by Brazil's arguments.

76. The first point is that although Brazil claims throughout its Submission that Argentina should not have used the information supplied by JOX, it appears to contradict itself in its oral statement when it asserts that, for the purposes of the above adjustment, Argentina should also have used the information provided by the consulting firm.

77. The second point refers to Brazil's argument that, had Argentina made the aforementioned deduction on the price used to calculate normal value – even acknowledging that the f.o.b. value includes inland freight and insurance, handling, loading and unloading and warehousing, it would have been comparing prices at the same level of trade.[40]

78. Argentina does not understand the reason for Brazil's assertion. It is indeed true, as Brazil points out, that export prices do not include domestic taxes. However, the mere fact that such taxes are not included, or – if they were – that they could be deducted, does not resolve the matter of the Agreement requiring the comparison to be made preferably at ex-factory level.

79. In other words, Brazil appears to believe that it would have been sufficient, for the purposes of fair comparison within the meaning of Article 2.4, to make an adjustment to normal value and not to the f.o.b. value in order to arrive at two prices representative of the same level of trade. Had Argentina done that, however, it would have been comparing an ex-factory value (sales value of goods deposited with the vendor) with an f.o.b. value (value of goods deposited plus the costs listed in paragraph 44).

80. As regards Brazil's claim that an unreasonable burden of proof was imposed on its exporters, Argentina refers to paragraphs 242 to 247 of its first written submission.

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[39] Oral statement of Brazil – First Meeting with the Panel, para. 54.
[40] *Ibid*., para. 59.

III(i) Article 9.2 and 9.3 of the AD Agreement

81. The anti-dumping duties imposed by Argentina are in keeping with the requirements of Article 9.2 and 9.3 of the AD Agreement, which stipulate that such duties "shall be collected in the appropriate amounts in each case" and "shall not exceed the margin of dumping as established under Article 2".

82. As stated in its first written submission and reiterated in its oral intervention on 25 September 2002, Argentina uses the system of variable amounts to assess prospective anti-dumping duties.

83. Although Article 9 of the AD Agreement does not specify the modalities for applying such duties, the practice of WTO Members recognizes the system used by Argentina as one of the possible methods. Article 9.3 provides for the possibility of assessing duties on a retroactive or prospective basis and also establishes the ways in which any duties paid in excess should be corrected.

84. In this case, Brazil claims that Argentina violated Article 9.2 and 9.3 by imposing variable anti-dumping duties.

85. To uphold its Article 9.2 claim, Brazil proceeds from the assumption that if the Brazilian exporters decided to export their product to Argentina with a margin of dumping in excess of that determined during the investigation, their exports would be subject to a duty higher than that which had been established. This is not the case because, as specified in Article 2.1 of the AD Agreement:

> "...a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

86. In line with Canada's reasoning in its third party submission, Argentina wishes to make clear that the above claim is not supported by Article 9.2, which merely provides that duties shall be collected in "the appropriate amounts" – the determination thereof being established in Article 9.3.

87. As mentioned earlier, Article 9.3 establishes that the anti-dumping duty shall not exceed the margin of dumping as established under Article 2 in its entirety – and not, as Brazil erroneously contends, under Article 2.4.2, which deals with the margin of dumping during the investigation only.

88. Argentina has established anti-dumping duties and collects these duties in a manner consistent with the Agreement, i.e. they were assessed on the basis of the margin of dumping established under Article 2 and are collected pursuant to Article 9.2 and 9.3. Argentina does not deny the claim that the margin may be exceeded. The fact that such a possibility exists, however, is not sufficient for claiming that Argentina acted in a manner inconsistent with the Agreement. Indeed, if the margin had been exceeded, the exporters could have invoked Article 9.3 (if they so deemed appropriate) to request the refund of duties paid in excess, but they did not do so.

89. In view of the foregoing, Argentina reiterates its request that the Panel reject Brazil's claim of inconsistency with the above articles.

IV. PLEADINGS

90. In the light of the arguments put forward in the sections above, Argentina respectfully requests the Panel:

(1) In keeping with the reasoning developed in Section II and as stated in paragraphs 30, 31 and 32 of this submission, to refrain from ruling on the 41 claims of inconsistency with various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) submitted by Brazil.

Should the Panel decide not to accede to the above request by Argentina, as set out in Section II(d) of this submission and in the light of the arguments developed in Section III, it is respectfully requested to:

(2) Reject Brazil's claim that Resolution No. 574/2000 of the Ministry of the Economy of the Argentine Republic is inconsistent with:

- Article 5.2, 5.3, 5.7 and 5.8 of the Anti-Dumping Agreement;
- Article 12.1 of the Anti-Dumping Agreement;
- Article 6.1.1, 6.1.2, 6.1.3, 6.2 and 6.8, paragraphs 5, 6, and 7 of Annex II, and Article 6.9 and 6.10 of the Anti-Dumping Agreement;
- Article 2.4 and 2.4.2 of the Anti-Dumping Agreement;
- Article 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement;
- Article 4.1 of the Anti-Dumping Agreement;
- Article 9.2 and 9.3 of the Anti-Dumping Agreement;
- and the various claims relating to Article 12.2.2.

(3) Reject Brazil's request for the immediate repeal of Resolution No. 574/2000 imposing the definitive anti-dumping duties.

ANNEX B-4

REPLIES OF ARGENTINA TO QUESTIONS OF THE PANEL – FIRST METING

(25 September 2002)

DSU Article 18.2

To Argentina

1. 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?

Reply to the first part of the question

Yes, following the provisions of Article 18.2 of the DSU.

Reply to the second part of the question

No.

Claim 1

To both parties

2. In the view of the parties, which are the obligations under Article 5.2? In addition, would the parties agree that Article 5.2 imposes obligations on the applicant and not on the investigating authority as stated in *Guatemala – Cement II*? Please explain. In the event of agreement with the conclusions in *Guatemala – Cement II*, what recommendations should a panel reach in case that a breach of Article 5.2 ADA is found? In particular, would a recommendation that a Member bring the measure into conformity be appropriate?

Reply

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.

In fact, Article 5.2 must be read in conjunction with Article 5.3 of the Anti-Dumping Agreement, since the latter imposes on the authorities the obligation to examine the accuracy and adequacy of the evidence provided by the applicant.

To Brazil

3. Does Article 5.2 ADA require that the application contain reasonably available relevant evidence on any adjustment to be made if such adjustment is required for applicant to allege "dumping". In this regard, should such evidence identify:

(a) That an adjustment is required;

(b) the nature and extent of the adjustment;

(c) the basis/methodology for making such adjustment?

Please explain.

4. Was information on the adjustments referred to in paras. 70 and 71 of Brazil's First written submission ("FWS") 'reasonably available' to the applicant at the time of filing the application? Please explain.

To Argentina

5. Did the application contain evidence to support that: (1) the poultry sold in Brazil was physically different from the poultry sold to Argentina; (2) that the alleged physical characteristics differences affect price comparability; and (3) the alleged yield rate difference presented by petitioner between the poultry sold in Brazil and to Argentina? If so, please provide the evidence supplied in the application.

Reply

The Jox publication of 30 June 1997 – Annex ARG-I - contains information concerning "whole poultry". Specifically, it states that the prices refer to chilled poultry marketed in the city of São Paolo (Brazil), expressed in Reals, with feet, head and giblets. This "physical" difference has an impact on prices, since the difference has a value that is determined by the demand for the poultry depending on the characteristics of the markets. Similarly, the information contained in the file reveals that the product exported to Argentina is eviscerated poultry.

6. Please comment on the definition of "evidence" set forth in paragraphs 63 and 64 of Brazil's FWS. In particular, the statement by Brazil in paragraph 64 that "information provided in the application without supporting documentation does not qualify as evidence". Please explain the basis of your response with specific reference to this case.

Reply

Regarding the requested evidence, the requirement to submit such evidence is clearly stated in the legislation in force, as well as in Form No. 349 which has been valid since 12 November 1991. It is these requirements that must be met by the complainant in an alleged dumping case.

In this connection, and with specific reference to the case at issue, CEPA submitted:

(a) SYSDEC's report on imports of the product under investigation from January to June 1997, the source for which was the Directorate-General of Customs;

(b) a copy of the report by the consulting firm Jox containing prices for chilled poultry in São Paolo expressed in Reals, with head, feet and giblets, as stated in the publication itself. Since it also explains that there are differences requiring adjustments for the purposes of price comparison, the firm adds a copy of the export price statistics for poultry published by the review *Aves & Ovos* of the *Asociación Paulista de Avicultura* of April and May 1997. It also adds evidence of the legal status of CEPA, and SENASA data concerning the representativeness of CEPA, in the area of domestic poultry production.

At the same time, CEPA provided the necessary translations and authentications for each piece of documentation submitted in a foreign language as required by Law No. 19.549 on Administrative Procedures and the regulatory decree applicable on a supplementary basis to alleged dumping or subsidy procedures. Thus, the requirements laid down by the Implementing Authority in connection with the application for initiation of an investigation were met.

In this connection, Argentina agrees with the definition of "evidence" provided by Brazil in paragraphs 63 and 64 of its first written submission, keeping in mind that the elements supplied by CEPA constitute sufficient documentary evidence for the initiation of an investigation. Specifically, the evidence provided as proof of normal value consists of excerpts from specialized journals and a publication by consultants of public notoriety, both of which constitute sufficient evidence of the exact values at which the product in question is marketed.

Consequently, it is clear that the implementing authority complied with the Article 5.3 obligation and examined the " … accuracy and adequacy of the evidence provided in the application …".

Claim 2

To Argentina

7. Could Argentina please clarify what they consider to be "reasonably available" information for an applicant under Article 5.2? In this case, taking into account that Jox is a consulting company that apparently publishes data on prices of poultry regularly, does Argentina consider that information on domestic prices in Brazil from Jox concerning only one day was all the information "reasonably available to the applicant" on normal value within the meaning of Article 5.2 ADA? Please explain.

Reply

The expression " … reasonably available" in Article 5.2 expresses the notion that the applicant must supply such evidence as is available and within its reach, and by which it can demonstrate what it alleges. Such evidence will be what the applicant can obtain at that particular time by the means available to it. CEPA provided Jox, a publication which enabled it to demonstrate the values at which the product in question was being sold, and which, in addition to providing the isolated value for one day, showed the price trend in the market as well as the cause of any variations.

We also repeat what was stated in paragraph 71 of Argentina's first written submission and in the preceding reply, namely that the implementing authority, in examining the accuracy and adequacy of the evidence provided by CEPA, took account, firstly, of the fact that Jox was a specialized publication providing an average representative value reflecting the state of the São Paolo market.

That market is one of Brazil's most representative markets, and, like Buenos Aires, it is a large urban centre which reflects domestic consumption patterns.

8. Reference is made to the following portion of para. 32 of Argentina's FWS:

> **'The above-mentioned provision in Article 5.2 provides applicants with access to proceedings of this kind in keeping with the right of parties to defend themselves; to require evidence that was beyond their reach would be to deny them that right.'**

What does Argentina understand by the words "beyond their reach"? In the present case, what information was "beyond the reach" of the applicant?

Reply

It is Argentina's understanding that what the Anti-Dumping Agreement requires in connection with the application for the initiation of an investigation, i.e. what is "reasonably available to the applicant", in addition to what was stated above, is such evidence as can be obtained without imposing an excessive burden of proof on the applicant that could make the submission of an application impossible, and without placing the applicant in a situation in which knowledge of its search for information could lead to a disclosure of the investigation it intends to apply for, with the commercial implications that such disclosure could entail. Moreover, in Argentina's view, the term used in the Agreement is intended to show the difficulty involved in obtaining evidence, particularly of normal value, in this instance, a difficulty which could be aggravated depending on the characteristics of the market and the possibilities available to the applicant. Moreover, if the applicant had to resort to hiring a consultant to obtain domestic market prices in the country in question, or resort to some dubious artifice to obtain those prices, the anti-dumping procedure would be deprived of any meaning or practical relevance.

9. Please explain the process used by Argentina to receive and evaluate an application, with particular reference to any additional information that may be supplemented by the applicant. Please explain with specific reference to this case, whether:

(a) The investigating authority asked for (or received) more information, in particular on normal value, to decide on initiation;

(b) at what stage of the investigation was additional information requested/received;

(c) was the additional evidence used to determine normal value for the purpose of evaluation under Article 5.3;

(d) if the answer to (c) above is in the negative, was the additional evidence on normal value used at any later stage for determination of normal value?

Reply

To submit an application for the opening of an investigation, the applicant had to fill out form No. 349. That form explains exactly what data the applicant must provide in conformity with the requirements of Article 5.2 of the Anti-Dumping Agreement. In addition, the applicant must supply all of the supporting documentation for the information provided in the said form so that the Implementing Authority can examine the accuracy and adequacy of the "evidence provided". Thus, as regards normal value, 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.

10. Please provide a copy of the model form referred to in para. 43 of its FWS?

Form 349/91 is attached hereto as Annex ARG-XXXIX.

11. Please comment on the following paragraphs of Brazil's first oral statement:

(a) Paragraphs 21 to 23, which refer to a Panel report and allege that the investigating authority in this case did not give consideration to the impact of the possible differences on the sufficiency of the evidence submitted in the application, nor did it seek further evidence, which was clearly necessary.

Reply to question 11(a)

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.

(b) Paragraphs 24 to 25 which allege that the method used by Argentina to establish the export price and consequently the dumping margin was based only on export prices below the normal value, which in turn "would always result in a dumping margin". In this response, please explain the methodology used by Argentina in this case.

Reply to question 11(b)

The methodology used by Argentina to establish the dumping margin can be explained as follows: all of the export transactions that were below the normal value were considered, excluding those which yielded a negative dumping margin. This methodology has also been used by other WTO Members. Indeed, the stage prior to initiation requires sufficient evidence of dumping. The calculation made does not bring in economic effects on the market. What is required is the knowledge that there have been transactions involving dumping which justify, from that point of view, the initiation of an investigation.

12. Reference is made to the following portion of paragraph 50 of Argentina's FWS:

'The evidence provided is a representative value taken from a specialized publication for a given period.'

What does Argentina mean by the words 'a given period'? Does it relate to a period of one day, or longer? Please provide your response with specific reference to this case.

Reply

What Argentina means by those words is a moment in the analysis period considered by the implementing authority. At the same time, although the Jox publication provides the price for

30 June 1997, the right-hand margin of the text contains CEPA's translation of the following words: " … production on the parallel market within São Paolo 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)

13. Reference is made to the following portion of paragraph 50 of Argentine's FWS:

> **'This is why CEPA supplied, as evidence of normal value, the data contained in what is recognized as a serious specialized publication which reflected – within an acceptable margin of approximation in this instance – the same levels of commercial sales.'**

What does Argentina understand by the words 'within an acceptable margin of approximation'?

Reply

By the words "… within an acceptable margin of approximation in this instance", Argentina intended to show that the values taken for the purposes of the comparison required by the Anti-Dumping Agreement were at the same level of trade, i.e. both the normal value and the export price were at wholesale level. In view of the nature of the stage prior to initiation, a precise approximation of the levels of trade cannot be expected. During the ensuing investigation, if it takes place, it is possible to verify the equivalence of the levels of trade and make the necessary adjustments, on the basis chiefly of the information provided by the parties.

To Brazil

14. Is Brazil's claim under Article 5.3 regarding frozen/chilled adjustment dependent on a finding by the Panel that Argentina was correct to make the head/feet adjustment at the time of initiation? In other words, is Brazil arguing that if the need for a head/feet adjustment was obvious from the face of the application, then so was the need for a frozen chilled adjustment?

Claim 3

To Argentina

15. Please explain which authority (authorities) have the authority to:

(a) Accept/reject an application

(b) Initiate an investigation

(c) Conduct the investigation

(d) Decide on the application of the duty

Reply

According to the regulatory Decree in force at the time of the investigation at issue, No. 2121/94:

(a) The ex-UNDER-SECRETARIAT FOR FOREIGN TRADE (now the UNDER-SECRETARIAT FOR TRADE POLICY AND MANAGEMENT) is the competent

authority to rule on the admissibility of applications for the initiation of an investigation.

(b) The SECRETARIAT FOR INDUSTRY, TRADE AND MINING is the competent authority to rule on the initiation of an investigation.

(c) The UNDER-SECRETARIAT FOR TRADE POLICY AND MANAGEMENT and the NATIONAL FOREIGN TRADE COMMISSION are responsible for conducting proceedings with respect to injury.

(d) The MINISTRY OF PRODUCITON is the implementing authority for the application of anti-dumping duties. At the time of the investigation at issue, the competent authority was the ex-MINISTRY OF THE ECONOMY AND PUBLIC WORKS AND SERVICES.

16. Following the CNCE's finding that there was no indication of injury or threat thereof suffered by the domestic industry in Acta No. 405, did the investigation authority reject the application? In other words, was Acta No. 405 effectively closing the file on the application? Please explain.

Reply

Record No. 405 is not, *per se*, a valid instrument for closing the investigation, nor is the CNCE empowered to file the proceedings.

Similarly, it should be pointed out that the mentioned Acta No. 405 was issued on the basis of information provided by the applicant applicable as of the date of issue.

As already stated in writing, and as emerges from the file, the applicants submitted updated information in keeping with the requirements of the application on 17 February 1998. As a result, the Legal Department of the Ministry of the Economy and Public Works and Services, at the request of the then Under-Secretariat for Foreign Trade, determined that " … in view of the fact that the information submitted by the *Centro de Empresas Procesadoras Avícolas* (CEPA) in file No. 061-001196/98 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 … " (folio 2302 of File CNCE No. 43/97).

The examination of the new information submitted is expressly provided for in Article 60 of the Regulations to the National Law on Administrative Procedures (RLNPA – approved by Decree No. 1759/72, Regulatory Enactment by Decree No. 1883/91), duly notified to the relevant WTO Committees, which stipulates that the competent body (in this case, which involves injury, the CNCE) shall intervene once again in the proceedings if any new developments occur or come to its knowledge. In the case at issue, the additional submission by the applicant introduced new items of evidence which called for a further intervention by the CNCE at the request of the competent bodies and in strict conformity with the law.

It should also be repeated that during the stage prior to the initiation of the investigation, third party rights are not affected, the only relationship being between the applicant and the implementing authority. Thus, Brazil, which as interested party in the investigation had access to all of the folios making up the file, will have noted that during the period of time between the applicant's submission and the decision to initiate, a number of proceedings took place. In light of the above considerations, the suggested filing of the case would have been contrary to administrative law and would have

adversely affected individual rights of the applicant with all of the administrative consequences that such an act would entail.

In this connection, Article 5.5 of the Anti-Dumping Agreement is also applicable: "The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation…"

In the case at issue, the applicant provided updated information that warranted analysis and led to the determination set forth in Acta No. 469.

Consequently, and in the light of the above-mentioned provisions, CNCE Acta No. 405 in no way constitutes an act by which the competent authority filed the application submitted, and a further intervention by the said authority was ultimately warranted under Argentine law.

17. What time-frame is envisaged by the word "promptly" in Article 5.8 ADA? Please respond with reference to this case.

Reply

Article 5.8 of the AD Agreement stipulates that: "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 …"

Thus, it should be stressed that Argentina did not violate Article 5.8 of the AD Agreement, since until the implementing authority (then the Secretariat for Industry, Trade and Mining) issues a resolution ruling the initiation of the investigation (which is published in the *Boletín Oficial de la Nación*), the activities of the authorities do not technically fall within the confines of an "investigation". There is no way that the two "Actas" of the CNCE prior to the opening of the investigation could terminate promptly an investigation that did not exist. Thus, the scope which Argentina gives to the term "promptly" in Article 5.8 of the AD Agreement is the scope determined by the relevant domestic legislation which, on the occasion of the various notifications, was never the subject of any objection by WTO Members in this respect.

Consequently, the term "promptly" must be interpreted in the context of an investigation that has been initiated, in respect of which the necessary administrative steps must be taken for termination once the authority is certain that there is no dumping or injury to justify continuing with the procedure.

Claim 4

To Argentina

18. In paragraph 80 of its FWS, Argentina asserts that:

> **"the Report on the Initiation of the Investigation … contains the margins of dumping established on the basis of the average for export transactions to Argentina involving the product under investigation. Consideration was given in this connection to average exports for the period January-August 1997. The alleged margins of dumping calculated in points 1, 3 and 4 of the Report were established for the purpose of conducting an additional analysis of the case at issue."**

With respect to this paragraph, this Panel has the following questions:

- **Could Argentina explain the methodology used to calculate the f.o.b. export prices reported in points 1 and 2 of Section 7 (Dumping margin') of the Report relating to the Viability of the Initiation of the Dumping Investigation? With respect to the dumping calculation in point 2 of Section 7, could Argentina confirm that the import transactions that were taken into account to calculate the average export price were those contained in pages 489 to 492 of the Record (both included)?**

Reply

In point 1 of Section 7, and in this instance prior to the initiation of the investigation, Argentina took the average f.o.b. export price for the period from August-October 1996. Similarly, applying the same methodology used for point 2, it took all of the transactions that were below 1.04, as of in detail on folios 508 and 509 and the lower table at folio 509.

Regarding point 2 of section 7, for the calculation of the export price Argentina considered those import transactions that were under the normal value, which resulted in an f.o.b. export price of 0.90454.

For the purposes of Table 2 in section 7, Argentina used the details for the export transactions set forth in the Annex at folios 485 to 488. Similarly, the information used to calculate the f.o.b. export price for point 2 can be found in the Annex at folios 489 to 492.

- **Does the table included in page 10 of Section 6 of the above Report include all imports of the product subject to investigation originating in Brazil during the period January to May and August 1997? Is the total amount reported in that table (US$1,014.75/MT) the average f.o.b. export price for the product concerned imported in Argentina from Brazil during the period January to May and August 1997? Please explain.**

Reply

Yes, the table in section 6 includes all of the imports of the product under investigation, with a price ranging from US$700 to US$1,330 per ton.

- **The table in page 10 of Section 6 of the Report (folio 480) apparently includes data on f.o.b. export prices supplied by the petitioner for the period *January to May and August 1997.* In page 12 of Section 7 (page 482 of the Record), point (2) reads 'taking into account the f.o.b. export price data supplied by the petitioner for the period *January to June and August 1997* …'. In paragraph 80 of its FWS, Argentina asserts that 'consideration was given to average exports for the period *January-August 1997*.' Could Argentina kindly clarify which period has been used to calculate the average f.o.b. export price during 1997?**

Reply

The period used to determine the f.o.b. export price in this case was January to June 1997 and August 1997. The month of July was not taken into consideration because the official Argentine source the Monitoring Unit of the Secretariat for Industry, Trade and Mining, does not record any

imports. In other words, while the period considered was January to August 1997, no imports were recorded for the month of July 1997.

19. Reference is made to paragraph 79 of Argentina's FWS:

> **"The technical department concerned examined the import transactions identified in the source in question with a view to determining which ones corresponded closest to the product under investigation so that the calculation of the export price could be as precise as possible."**

What does Argentina understand by the transactions that 'corresponded closest to the product under investigation'?

Reply

In its examination, Argentina tried to determine which imports corresponded to the products under investigation, placing emphasis on the physical characteristics of the product investigated.

Claim 5

To Argentina

20. Bearing in mind Brazil's statements in paragraph 124 of its FWS, was information on normal value other than that concerning 30 June 1997 'reasonably available' to the applicant?

Reply

By Note 273-000887/99 of 29 July 1999, Section 26, folio 2103 (see Annex ARG-XL), the implementing authority asked the applicant for further information on normal value on the understanding that, with the investigation under way, it would be able to supply data, as it in fact did. This does not alter the fact that prior to initiation, the authority considered that the evidence of 30 June 1997 was the evidence reasonably available to the applicant.

Claim 6

To Brazil

21. Paragraph 136 of Brazil's FWS reads in relevant part:

> **"If authorities had examined the accuracy and adequacy of the evidence provided in the application they would have required that petitioner provide prices of poultry for the entire period under analysis in order to correctly make a fair comparison with export prices for the same period."**

In the view of Brazil, which is the 'entire period under analysis'?

Claim 9

To both parties

22. In the present case, by virtue of which legal instrument was the investigation initiated?

Reply

The investigation was initiated by Secretariat for Industry, Trade and Mining Resolution No. 1/99, published in the Official Bulletin of 25 January 1999.

23. What interpretation is given by the parties to the following excerpt from the panel report in *Guatemala – Cement II*: "we are of the view that Article 5.7 requires the investigating authority to examine the evidence before it on dumping and injury simultaneously, rather than sequentially?"

Reply

As Argentina has already stated, the simultaneous analysis stipulated in Article 5.7 requires that both analyses take place at the same time and that the elements considered in the two analyses correspond to a period that coincides sufficiently, taking into account of the differences involved in investigating dumping on the one hand and injury on the other.

Claim 10

To both parties

24. What are 'interested parties known to the investigating authorities to have an interest' within the meaning of Article 12.1 ADA?

Reply

According to Article 12.1, the implementing authority shall notify "the Member or Members … and other interested parties known to the investigating authorities to have an interest therein … and a public notice shall be given."

At the same time Article 5.2(ii), identifying the items of information to be supplied by the applicant for an investigation, includes "the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question".

Thus, it is Argentina's understanding that notification must be given to those parties that are considered interested within the meaning of Article 6.11, that are known and identified in such a way as to make such notification possible and identified it as interested parties. Both the notification to the Member country and the public notice are requirements that seek to supplement the knowledge that the implementing authority has either *per se* or on express and substantiated information from third parties.

25. When were each of the following parties notified of the initiation of the investigation: Government of Brazil, Avipal, Seara, Frigorifico Nicolini, Sadia, Fransgosul, Chapeco, Minuano, Perdigao, Catarinense, CCLP, Pena Branca, and Comaves?

Reply

In response to question 25, Argentina refers to the information contained in the tables attached hereto as Annexes ARG-XLI, ARG-XLII, ARG-XLIII, ARG-XLIV, ARG-XLV, ARG-XLVI, ARG-XLVII, ARG-XLVIII, ARG-XLIX, ARG-L, ARG-LI and ARG-LXI. Annex ARG-LXI lists, in addition, the notifications sent by the DCD to the different parties in two different stages: first, once the investigation was formally opened, and second, following the submission by the company Interamericana Comercial.

To Argentina

26. How does Argentina reconcile the fact that while exporters were listed in the Report of 7 January 1998 regarding the Viability of the Initiation of the Dumping Investigation, they appear not to have been notified?

Reply

While Argentina had received indications from a number of exporters, this did not constitute, in itself, an "identification" which made it possible to send them the relevant questionnaires. For the purposes of notification, it requested the cooperation of the Brazilian Government, which had knowledge of the application prior to the initiation of the investigation (see paragraph 112 of Argentina's first written submission). Unfortunately, the relevant information was not forthcoming, and finally, with the investigation already well advanced, it was possible to notify the exporters in question thanks to the information provided by the importing firm Interamericana Comercial, as explained in Argentina's first written submission (paragraphs 118 and 119).

We also refer to folios 3020 and 3021 of the Report on the Final Determination of the Margin of Dumping of 23 June 2000. Although there is, indeed, an obligation to notify the interested parties, Argentina took the necessary action in this respect by directly notifying those exporters that were appropriately identified for the purposes of notification and asking for the cooperation of the exporting member country. This does not, in any way, imply a shift of the burden to Brazil - it was merely an attempt to obtain, through its cooperation, the participation of Brazilian exporters during the investigation and as from its outset, as provided for in the Agreement itself.

Claim 11

To both parties

27. What is meaning of the word 'questionnaires' in Article 6.1.1. ADA? In the view of the parties, is the word 'questionnaires' confined to the questionnaires provided at the initial stage of the investigation only?

Reply

Article 6.1 sets forth the obligation to give notice of the information required to the parties, and to give them the opportunity to present, in writing, all of the relevant evidence. Article 6.1.1 points to the existence of questionnaires to be sent to foreign exporters or producers – either directly or through the representations of the exporting Member country – and stipulates a minimum of 30 days for reply, stating that preferential consideration should be given to requests for extension.

In this connection, Argentine practice, in conformity with the legislation in force, is to send questionnaires upon initiating the investigation, granting the stipulated time-period; and if, as a result of the proceedings, additional or supplementary information is required, the time-limit for the

submission of such information is directly related to the content of the requirement, and consideration is also given to requests for an extension.

To Argentina

28. Which is the nature of the requests addressed to certain Brazilian exporters on 15 September 1999? In particular, are those requests original questionnaires? Are they the same as the questionnaires sent to the other exporters earlier in the investigation? Please explain.

Reply

The implementing authority learned of the elements that enabled it to contact the other Brazilian exporters through the importing company Interamericana Comercial at an advanced stage in the proceedings, as the result of a request to seek evidence. Accordingly, the authority proceeded to ask for the said evidence which consisted, *inter alia*, of sales prices in the domestic market, export prices and costs, and for the sole purpose of responding adequately to the general requirements and enabling exporters to attach any other information that they considered important, it also provided a copy of the questionnaire forms sent out at the beginning of the investigation.

We refer as well to paragraphs 118 and 119 of Argentina's first written submission.

29. Reference is made to paragraph 135 of Argentina's first written submission:

" … it should be pointed out that the CNCE delivered the questionnaire to only eight exporters in full conformity with the provisions of Article 6.1 … "

Which are the eight exporters to which the CNCE sent the injury questionnaire? When were these questionnaires sent to those exporters? How and when did the CNCE obtain the addresses for these eight exporters? Please provide copies of the communications from the CNCE to these exporters.

Furthermore, the DCD's questionnaire was sent to five exporters: why wasn't the DCD's questionnaire sent to the same eight exporters that the CNCE sent its questionnaire to?

Reply

To answer the last question first, the DIRECTORATE OF UNFAIR COMPETITION and the NATIONAL FOREIGN TRADE COMMISSION are different bodies, the former being responsible for the determination of dumping, and the latter for the determination of injury.

Under Argentine legal procedure, the DCD and the CNCE act independently in their respective areas of competence.

On 10 February 1999, the CNCE questionnaire for exporters was transmitted to the Brazilian companies Sadia, Frangosul, Avipal, Frigorífico Nicolini and Seara (copies of the respective notes, the originals of which appear at folios 3092 to 3096 of CNCE file No. 43/97, are attached as Annex ARG-LII). As explained in Record (Acta) No. 576, " … the exports to Argentina reported by the Brazilian companies that responded to the CNCE questionnaire for exporters represented more than half of the total imports of all eviscerated poultry from Brazil for 1995, 1996, 1997 and 1998 … ".

The list of companies that replied to the said questionnaires between 22 February and 3 May, with references to the corresponding folios in file CNCE 43/97, is provided below:

QUESTIONNAIRE FOR THE EXPORTER	**REPLIED**
Seara	YES (folio 3464/82)
Frigorífico Nicolini	YES (folio 4556/68)
Avipal	YES (folio 4868/896)
Sadia	YES (folio 5296/308)
Frangosul	YES (folio 4904/61)

30. Did the invoices attached to the communication of Interamericana Commercial S.R.L. to the DCD of 21 April 1999 (EXHIBIT ARG-VII) contain the address of Comaves Industrial? Can you please provide copies of those invoices?

Reply

While the implementing authority had before it an invoice submitted by the importing company containing an alleged address for the company Comaves Industrial (Section 27, folio 2296, sheet 4), it was not clear that the company was a producing-exporting firm and that this was its current domicile. A copy of the said invoice is attached as Annex ARG-LIII.

31. We refer to your statement in paragraph 134 of your First written submission that the "investigating authorities granted the Brazilian exporters a deadline longer than that specified in the Agreement to reply to the DCD's questionnaires". Should the 30-day period provided for in Article 6.1.1 be provided from the outset when the questionnaire is first sent out, or is it sufficient to provide a lesser period at the outset, provided that the total period allowed for response is at least 30 days?

Reply

In response to this question, Argentina refers to the information provided in the tables contained in Annexes XLI to LI, and LXI.

Without prejudice to the above, we note that Argentina grants exporters the 30 days stipulated in the AD Agreement for submitting the forms, as stated in the form itself. Exporters 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.

Claim 12

To both parties

32. What is the meaning of the word "participating" in Article 6.1.2 ADA? Would the parties consider that companies that are aware of an ongoing investigation but that do not show an interest in it qualify as "parties participating in the investigation"?

Reply

In order to be able to answer this question, Argentina would ask the Panel to elaborate. However, we understand that the interested parties are those that have proven to be interested parties during the investigation itself by expressing their interest in participating.

33. What is the meaning of the word "promptly" in Article 6.1.2. ADA?

Reply

In response to this question, we refer to the last paragraph of our reply to question 35.

Claim 14

To both parties

34. What are "known exporters" within the meaning of Article 6.1.3 ADA? In particular, would producers in the exporting country that have been identified as exporters of the product concerned by the applicant in the application qualify as "known exporters"?

Reply

Argentina understands "known exporters" to be those whose domicile is known together with all of the data needed to identify them and transmit to them the relevant notifications. The authority of the Member country initiating an investigation does not necessarily have to complete information on exporters. Indeed, the AD Agreement provides for the participation of the exporting Member country as the appropriate vehicle for obtaining all of the information needed so that its producers can be informed of the existence of the investigation, including the documentation necessary to participate actively in the investigation.

35. Would the parties agree with the finding of the panel *Guatemala – cement II* that "the term 'as soon as' conveys a sense of substantial urgency" and that "as soon as" and "immediately" can be considered interchangeable terms? Please explain.

Reply

The Panel in *Guatemala – Cement II* states that "as soon as" conveys a sense of substantial urgency. It adds that the terms "as soon as" and "immediately" are interchangeable. Argentina considers that while the Panel's interpretation must be viewed in the context in which it was made, it is essential that the terms be evaluated in the complete context of the applicable legislation and domestic procedures. In the case of Argentina, the said legislation and procedures were notified to the Member countries and were not challenged.

One thing that makes a difference to the interpretation and conclusion that the terms are interchangeable is the full meaning of the context in which they appear. The context and purpose in

the *Guatemala II* case is not the same as the context and purpose we are examining in the case at issue.

Indeed, in the case at issue, the objective of the action is to try to ensure that there are no unjustified obstacles to trade between countries. In other words, to ensure that measures that are in force or investigations under way are not maintained when it is learned that they are not appropriate in the framework of the provisions of the AD Agreement.

In this case, in which there are rights that are protected by legislations, the term "as soon as" must take account of, and be consistent with the need for greater speed, on the one hand, and the need to comply with the relevant legal provisions on the other.

To Brazil

36. What is the meaning of the words "as soon as an investigation has been initiated" in Article 6.1.3 ADA? In the particular case at stake, when was the investigation initiated?

To Argentina

37. Please comment on paragraphs 42 and 43 of Brazil's first oral statement.

Reply

Regarding paragraph 42 of Brazil's first oral statement, Argentina understands the term "*facilitar*", on the basis of the accepted meaning in our language, as meaning to permit access to a thing or element that is of interest to the other party. In other words, our interpretation is not substantially different from that of Brazil, nor is it different from the interpretation used by various member states with respect to the specific matter at issue. The difference that is being sought to be introduced here applies to the way in which access to the element is "*facilitado*". The copy of the application is available to the interested parties and the government of the exporting country from the outset of the investigation and interested parties that are duly accredited under Argentine law are provided permanent access to the file to the extent possible.

Regarding paragraph 43, it should be pointed out with respect to the documentation supplied by Sadia and Frangosul (Section X, folio 1012, sheet 4) that, for example, although Sadia explains that the technical specifications for the products marketed in Brazil and Argentina are the same, in Section IX, folio 999 (Annex ARG-XXIII to Argentina's first written submission), the representative of the company Sadia, who is also the representative of Frangosul, Seara and Avipal, in a way challenges the adjustment made but without saying how it should be made.

This is why Argentina considers the simple allegations of the representative to have been insufficient – they should have been documented so that they could be verified.

Claim 15

To Brazil

38. With regard to EXHIBITS BRA-22, 23, 24 and 26, please indicate precisely where exporters reported that the poultry sold to Argentina was identical to the poultry sold in Brazil.

To Argentina

39. Brazil has asserted that the investigating authorities did not request supporting documentation for all information requested from exporters. Please comment.

Reply

Brazil's statements on this issue reflect a confusion which would appear to arise from an interpretation of the procedures determined by the particular way in which that country applies them rather than an orderly and systematic reading of the way in which the Argentine implementing authority proceeds. Firstly, it should be explained that the implementing authority follows a procedure which is notified to the parties through its legal provisions and the instructions accompanying the requests for information. Thus, the authority, as is customary and in keeping with its usual procedure, requested supporting documentation for the arguments put forward insofar as those arguments are based on documentation which is substantially in the hands of that party. This methodology is applied concurrently to all of the parties involved, and does not in fact discriminate against, or conceal anything from exporters.

Argentina did not request copies of all of the invoices, but only the supporting documentation for the arguments put forward. On the basis of the information supplied by the parties throughout the proceedings, the authority evaluates the possibility of requesting further documentation, without prejudice to what has already been requested in the questionnaire for exporters.

Claim 17

To Argentina

40. Where in its final determination, or any other document made available to interested parties, does the DCD explain why it rejected the relevant exporters' export price data?

Reply

The Report on Action Taken (folio 2757, Section 63) – EXHIBIT BRA-28 – identifies in detail what information submitted in the course of the proceedings Argentina would take into consideration in its final determination. Similarly the Report on the Final Determination (EXHIBIT RA-15) also mentions the reasons why individual determinations of margin of dumping were not made.

As stated earlier on, and as the parties are aware, the information supplied must be submitted in conformity with the formal and substantive provisions of Argentine law and with the provisions specifically set forth in the request for information. Failure to comply with these provisions means that the implementing authority cannot use the information correctly and legally for the purposes of its determinations.

Claim 19

To Brazil

41. Argentina asserts that Frangosul's normal value data was submitted out-of-time. Please comment.

Claim 20 (*inter alia*)

To Argentina

42. Regarding paragraph 190 of Argentina's first written submission, please provide copies of the "several notifications" that were sent to Frangosul "with a request to provide the lists of *Notas fiscales"* What was the deadline for Frangosul's submission of normal value data?

Reply

Regarding the copies of the "numerous *notas fiscales*" requested from Frangosul, they were attached to Argentina's first written submission as Annexes 27 and 28. However, we attach hereto Annex ARG-XLV, containing a table listing all of the notifications sent to Frangosul. See also Annex ARG-LIV, attached hereto, containing copies of the requested n*otas*.

The final deadline granted to the company Frangosul was indicated in Note DCD No. 273-001413/99, which provided for "a period of no more than five days following the reception of this note". The Note is attached hereto as Annex ARG-LV. After the granted deadline of 29 November 1999 had elapsed, the company made a submission, on 30 December 1999, containing a diskette. In other words, beyond the period of time granted by the DCD.

43. Precisely what normal value data did the DCD ask Cararinense to provide? Please provide supporting documentation.

Reply

In order to help the Panel understand this issue, we note with respect to Catarinense that the Report on the Final Determination, at folios 3053/3054, states that the information supplied on normal value is reported on an aggregate basis in Annexes V and VI, and for a longer period. It was also reported that the information had not been documented. The fact that it was provided in aggregate form made it impossible for the implementing authority to consider only what corresponded to the investigation period.

44. Please indicate where, in the DCD's Final Determination, the reasons are given for not calculating individual dumping margins for Frangosul and Catarinense?

Reply

Once again we note, with respect to Catarinense, that Report on the Final Determination (EXHIBIT BRA-15) states, at folios 3053/3054, that the information provided on normal values was reported on an aggregate basis in Annexes V and VI, and for a longer period. It was also reported that it had not been documented.

Similarly, at folio 3087, the final Report makes the following statement: "Finally, we stress that in the case of the companies Catarinense Limitada, Frangosul, Comave, Da Granja Agroi, Sadia Concordia, Minuano De Alimentos, Acaua Industria, Felipe Avicola, Agroi, Veneto, Chapeco and Litoral Alimen, 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. That being the case, the implementing authority had to fall back on the relevant legislation in force, considering, to that end, the best information that it had obtained prior to the current stage of the proceedings … ".

45. Please indicate where, in the DCD's final determination, or in any other document prepared by the DCD at that time, the reasons for not calculating individual dumping margins for Frangosul and Catarinense are provided? Did the DCD have sufficient export price data in respect of these two exporters?

Reply

We stress once again that the DCD Report on the Final Determination (EXHIBIT BRA-15) states, at folio 3087, the following: "Finally, we stress that in the case of the companies Catarinense Limitada, Frangosul, Comave, Da Granja Agroi, Sadia Concordia, Minuano De Alimentos, Acaua Industria, Felipe Avicola, Agroi, Veneto, Chapeco and Litoral Alimen, 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. That being the case, the implementing authority had to fall back on the relevant legislation in force, considering, to that end, the best information that it had obtained prior to the current stage of the proceedings … ".

With respect to Frangosul, only documentation on export prices was provided – there was no information concerning sales prices on the domestic market. It seems perfectly clear that the implementing authority did not have the necessary elements for calculating individual dumping margins given, as emerges from the Agreement, that this margin reflects the ratio between the two values and that specifically, information on sales prices in the domestic market is in the hands of the exporter. Regarding Catarinense, we refer to our reply to Question 43.

Claim 19

To Brazil

46(a). Please provide a copy of Catarinense's questionnaire response of 3 November 1999.

46(b). Argentina asserts that Frangosul's normal value data was submitted out-of-time. Please comment.

Claim 21

To Argentina

47(a). In paragraphs 340-350 if its FWS, Brazil asserts that certain information was not provided to the exporters. Please indicate precisely where, if at all, this information can be found in the authority's Report of 4 January 2000.

Reply

The Report on Action Taken (EXHIBIT BRA-28) clearly states what information was provided by each one of the exporters in the course of the proceedings, and of that information, what documentation would or would not be used for the final determination of the margin of dumping. Particularly relevant are Parts VIII, VIII.1 and VIII.3 et seq.

However, in order to help clarify this issue, we refer to the tables attached hereto as Annexes XLI to LI, and LXI.

Claim 23

To Argentina

47(b). Did the DCD Sadia to provide additional information regarding its request for "flete interno" adjustment (i.e. after Sadia provided the data set forth in Annex VIII of its questionnaire response?)

Reply

In response to Question 47(b), Argentina refers to the information contained in the table attached hereto as Annex XLIV.

48. Please provide a copy of Expediente No. 061-000739/2000, as referenced at page 95 of the DCD's final dumping determination (EXHIBIT BRA-15). Please also provide a copy of Expediente No. 061-000663/2000, referenced at page 97 of the same document.

Reply

Copies of File No. 061-000739/2000 and 061-000663/2000 are attached hereto as Annex ARG-LVI and ARG LVII respectively.

To Brazil

49. When did Avipal first request a normal value adjustment for freight charges? Did Avipal provide supporting documentation with its request? If so, please provide a copy of that supporting documentation.

50. Is Brazil's argument regarding the investigation authority's failure to use information submitted by exporters limited to adjustments for the purpose of Article 2.4, or also to other factors/claims?

Claims 23-27

To Brazil

51. Please explain precisely what evidence was in the record that you consider the investigation authorities failed to use.

To Argentina

52. Please comment on paragraphs 61 and 65 of Brazil's first oral statement.

Reply

We must begin by determining what, in the view of Members, is meant by the term "excessive burden". If carried to the extreme, the concept of excessive burden could render the request for information from the parties meaningless. The information requested might have had a different weight in proportion to the trade importance of each exporter, but it is equivalent to the information that is requested of all parties, in all investigations, information that is supplied, as in the case at issue, by a few of the producers-exporters. In any case, the exporters, like any other interested parties, were welcome to contact the implementing authority and explain that they considered the evidence they were to provide to be "excessive" (in quality and quantity), providing sufficient

justification for their claim. However, the parties did not make use, during the investigation, of the opportunity granted to them under the actual procedure, an "omission" which is now being presented to the Panel as a failure by the implementing authority to take sufficient action. Argentina would further like to explain to the Panel that it never requested, let alone required, that the exporters provide an invoice copy for "all of the sales transactions". Argentina was unable to find the part of the file that Brazil was referring to in this connection, which is not surprising, given that the request was not made.

Without prejudice to the above, Argentina would like to point out with respect to paragraph 61 that it did not consider the request for information from the producers-exporters to be an excessive burden, since certain exporters provided information that did in fact comply with the DCD's requests. Moreover, if certain exporters did in fact consider the evidence requested to be excessive, they should have informed the authority accordingly and explained that it was impossible to comply. However, at no point was this done.

At the same time, Brazil should indicate, in connection with paragraph 65, where in the file Argentina required that the exporters provide "an invoice copy for all of the sales transactions in the home market". The tables attached as Annexes XLI to LI and LXI, show exactly what requests for information were made by Argentina.

Claim 24

To Argentina

53. Certain data (regarding adjustments) submitted by Jox appears to have been rejected because if was submitted in Portuguese. If that was the case, why was the other Jox data – also submitted in Portuguese – accepted by the DCD (EXHIBITS BRA-19 and 32, regarding normal value data and the adjustment for different characteristics)?

Reply

The Jox information submitted by CEPA in File No. 61-006544/99 (Section 25 – folio 2096) (Exhibit Brazil 19) was translated following a request by the implementing authority made in Note No. 273-000887/99 (folio 2103 – Section 26) (see Annex ARG-LVIII). The translation was provided in File No. 061:006874/99 (folio 2115 – Section 26)(see Annex LIX).

As can be seen, the implementing authority considered evidence of normal value that was translated in conformity with the Law on Administrative Procedures and its regulatory Decree.

Claim 25

To Brazil

54. Please provide all of the exporters' replies to Sections B.2 and C.1.1 of the DCD's questionnaire (as set forth on "folios" 8 and 9 in EXHIBIT BRA-22).

Claim 26

To Argentina

55. Was the additional normal value data submitted by CEPA on 26 July 1999 (EXHIBIT BRA-19) relied on by the DCD for the purpose of making a final determination on dumping?

Reply

Yes, that information was considered in making the final determination, as revealed by the Report on Action Taken prior to the closure of the period for obtaining evidence, dated 4 January 1999 (folios 2809 – 2811), Part VIII.1.2.2 and in the Final Determination of the Margin of Dumping (folios 3038-3040), Part VIII.1.2.2.

56. Please comment on paragraph 59 of Brazil's oral statement.

Reply

The implementing authority carried out the adjustments to the extent that they were documented by evidence as required for that purpose under Argentine law, which was known to the parties. In this connection, the Law on Administrative Procedures and its regulatory Decree No. 1759/72 are applicable to anti-dumping procedures, on a residual basis, as stated in the regulatory Decree to Law 24425. The said Decree No. 1759/72 to the Law on Administrative Procedures stipulates in Article 28 that documents under foreign jurisdiction shall be submitted with a translation into Spanish by a certified translator. Pursuant to the said legislation and given that the documentation supplied by Jox Asesoria following an additional request by the implementing authority was not provided with a translation, and that none of the exporters provided translations, the said adjustments for inland freight and taxes were not considered.

The implementing authority made it clear that since it was aware that there were possible factors requiring adjustment, it would require information substantiated by relevant evidence, and if that evidence complied with the legislation in force, it would be considered for the purposes of its determinations. Any other approach would mean violating Argentine law, the Agreement itself and the legitimate right of all parties involved to defend their interests and be treated with equity. In the case at issue, this is clearly revealed by the fact that Brazilian exporters Sadia, Avipal, Nicolini and Ceara did submit the relevant documentation, and that evidence was considered for the purposes of making an individual determination of the margin of dumping.

Claim 27

To Argentina

57. Please explain exactly why the DCD's sample of domestic transactions (used for calculating normal value) was statistically valid. Is any such explanation contained in the DCD's final documentation, or any other document made available to interested parties? If so, where?

Reply

A sample is statistically valid with an acceptable margin of error. The fact that use was not made of the entire range of information is justified by lack of access thereto, lack of time to process it all and the need to reduce the number of errors associated with the processing of large quantities of

data. Thus, the aim is to draw inferences concerning population parameters on the basis of sample statistics. We note that the Agreement on implementation of Article VI of the GATT 1994 provides for the use of statistical methods to determine normal value.

We attach hereto the explanation provided by the DCD in the Report on the Final Determination (EXHIBIT BRA-15), folios 3046/3047.

Claims 28-30

To Argentina

58. With regard to the statement in parenthesis in the second line of paragraph 55 of Argentina's first oral statement, was the "minimum export price" determined for each exporter (for the purpose of the variable anti-dumping duty) less than, equivalent to, or more than the normal value calculated (during the investigation) for each exporter respectively?

Reply

Argentina sought to follow the suggestion made by the AD Agreement and to use a value less than the margin of dumping in the conditions established by the Agreement to ensure that trade between Members can benefit from competition without prejudice to the domestic industry.

In the case of AVIPAL, the value taken was barely less than the normal value determined during the investigation. In the case of SADIA, it was less: the normal value determined was 0.94 and the value applied was 0.92. For the other companies it was also less, the normal value determined being 1.0385 and the minimum export value applied being 0.98.

Claims 32-40

To Argentina

59. Please comment on paragraphs 69-70, and 79-82 of Brazil's first oral statement.

Reply

Paragraphs 69-70

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.

Comments on paragraphs 79-82

Paragraph 79

We repeat what we stated in our first written submission, in paragraphs 277 to 282. Argentina would like to make it clear to the Panel that the evolution of the productivity factor was

analysed specifically in Record CNCE No. 576, as was the case for all of the factors listed in the AD Agreement. Indeed, the said Record states that " … the relative stability of the number of employees in spite of the increased production would indicate higher physical labour productivity, probably due to the above-mentioned introduction of new technology." Brazil calls the attention of the Panel to the fact that the data submitted – production, employment, wages and cost structure – does not refer specifically to the productivity factor. Argentina wonders why Brazil should wish to call the Panel's attention to this issue, since the mentioned factors are those which made the CNCE's analysis possible.

Paragraph 80

Argentina repeats what it stated in paragraph 292 of its first written submission. 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 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 … ". 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)." 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." 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.

Paragraph 82

Argentina evaluated the specific accounts of the companies and the main economic and financial variables contained in the accounting and financial instruments required in connection with the corporate characteristics of the companies. It is these factors that define, among other elements, the capacity of a company to raise capital, and ultimately, its capacity for growth and investment. Contrary to what Brazil claims in paragraph 82 of its oral submission of 25 September 2002, this explanation appears in the Technical Report GEGE/ITDF 03/99 and in Record No. 576.

60. Please also comment on Brazil's assertion at paragraph 74 of its first oral statement that is "not true" that the CNCE did not take into account imports from Nicolini and Seara for the purpose of its injury determination.

Reply

With respect to this assertion, Argentina repeats what it stated in paragraphs 269-273 of its first written submission.

Claim 34

To Brazil

61. If non-dumped imports are to be excluded for the purpose of an Article 3 injury analysis, doesn't this suggest that the determination of dumping must precede the determination of injury? If so, how is a Member to ensure that evidence of dumping and injury will be considered simultaneously in conformity with Article 5.7?

Claim 34

To Argentina

62. Please explain how the investigating authorities ensure that non-dumped imports were excluded for the purpose of the injury determination.

Reply

In response to this question, Argentina refers to its reply to question 60.

Claim 38

To Argentina

63. At paragraph 278 of its FWS, Argentina refers to a number of page references. Please indicate precisely which documents these page numbers refer to. Please also indicate corresponding file page numbers (for example, page 1 of Acta No. 576 (EXHIBIT BRA-14) is page 7303 of the file). Furthermore, please indicate precisely which extracts from these pages that Argentina is referring to.

Reply

The references made by Argentina in paragraphs 278 of its first submission concerning improvements in the sector's productivity are the following:

(a) Record No. 576: page 12 (paragraph 2), page 13 (paragraph 4), page 14 (paragraph 1), page 20 (paragraphs 3 and 4)

(b) Technical Report: page 26 (paragraph 5), page 28 (paragraphs 5 and /), page 29-30 (paragraph 2) and page 95 (paragraphs 3 and 4).

64. Regarding paragraph 279 of Argentina's FWS, please indicate in which document 'CEPA confirmed that the leading productivity indicators … are similar to those in the Brazilian industry'.

Reply

The exact words used by the Centro de Empresas Procesadoras Avícolas (CEPA) in its submission at folio 7135 of File CNCE No. 43/97, dated 2 December 1999 (post-hearing submission), a copy of which is attached hereto as Annex ARG-LX, were: " … for a number of years now, there has been no difference between our productive output and that of Brazilian poultry producers …".

Claim 41

To Brazil

65. Regarding paragraph 87 of its first oral statement, is Brazil alleging that Argentina's failure to explain why it considered a percentage lower than 50 per cent "a major proportion" constitutes a violation of Article 4.1, or of some other provision of the AD Agreement? If so, please explain how this claim falls within the Panel's terms of reference.

ANNEX B-5

SECOND ORAL STATEMENT OF ARGENTINA

(26 November 2002)

I. INTRODUCTION

1. Argentina is grateful for the possibility of presenting before the Panel its arguments in the light of the second written submission of Brazil (rebuttal submission) dated 17 October 2002.

2. At this stage of the proceedings, Argentina would like to highlight – in summary form – and respond to certain arguments put forward by Brazil in its latest submission.

II. PRELIMINARY ARGUMENTS

3. Argentina repeats that it considers accusations of bad faith[1] of a generic nature such as the one made by Brazil in its first written submission to be out of place, and consequently, the Panel should reject the arguments contained in the second paragraph of the section "Anti-Dumping Standard of Review" in Brazil's second written submission.

4. It is very difficult for Argentina to understand how the use of the term "generic" can be rejected on the grounds of Brazil's attempted justification[2] whereby the listing of the 41 claims in paragraphs 3 and 4 of its first written submission, not to mention the contents of paragraphs 11 through 544 of that submission provide a greater degree of precision to the accusation of bad faith.

5. A distinction has to be drawn between the claims and the legal justifications thereof in respect of which Brazil states that "*the identification of these claims, the related facts and legal arguments are **not** general in nature and are **not** without relevance in this WTO proceeding*"[3] on the one hand, and the accusation of bad faith on the other. The alleged inconsistencies of Argentina's Resolution 574/2000 with WTO rules bear no relationship with the principle of bad faith.

II.2 THE DOCTRINE OF *RES JUDICATA*

6. Contrary to Brazil's statement[4] that "*it appears, in fact, that Argentina is suggesting that the ruling by the Mercosul Tribunal has the effect of res judicata. In the event that Argentina **is** alleging the application of res judicata* … ", Argentina repeats[5] that it has not argued for the application of the doctrine of "*res judicata*".

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[1] First written submission of Brazil, paragraph 28, page 12.

[2] Rebuttal submission of Brazil, Section III – "Ruling by MERCOSUL Ad Hoc Arbitral Tribunal", paragraph 12, page 4.

[3] *Idem.*

[4] Rebuttal submission of Brazil, Section III – "Ruling by the MERCOSUL Arbitral Tribunal", paragraph 18, page 5.

[5] Intervention by the Argentine Republic at the meeting of the Panel with the parties, 25 September 2002, paragraph 7.

7. Nevertheless, Argentina feels that it should refute the arguments put forward by Brazil in this connection in its rebuttal submission and provide a number of clarifications.

8. In the case *India – Autos*[6], the Panel stated that it would have to examine the applicability of the doctrine in the WTO, and secondly, that it would be necessary to determine whether the facts in the dispute were such as to satisfy the requirements of the doctrine.

9. However, the examination of the doctrine of *res judicata* in the case *India – Autos* was based on circumstances different from those that apply to the dispute brought by Brazil.

10. In *India – Autos* the treatment of *res judicata* referred to two successive cases: *India – Quantitative Restrictions*[7] and *India – Autos*, both settled under the WTO. And indeed, footnote 333 of the Panel Report in *India – Autos* dwells on the examination of two disputes brought under the WTO. These disputes considered claims calling for the establishment of successive panels concerning the same issue. The two cases referred to were *India – Patents*[8] and *Australia – Automotive Leather II*.[9] Both cases involved disputes brought before the WTO in which *res judicata* was deemed irrelevant since there was no identity between the parties to the disputes (*India – Patents*[10]), or there was a void in the previous decision of the Panel with respect to the matter at issue (*Australia – Automotive Leather II*).[11]

11. As Argentina has argued, the dispute brought by Brazil against Argentina under the WTO is not comparable with any of the three cases in which past panels have had the opportunity to examine the scope of the theory of *res judicata*.

12. Without prejudice to the fact that it did not invoke the applicability of the doctrine, Argentina feels that it is necessary to point out the substantial differences between the current dispute and the cases cited by the EC and Brazil in their respective submissions.

- **They are not successive complaints under the same forum**: In the case at issue, we have an arbitral award issued by a tribunal set up at the request of Brazil in the framework of MERCOSUR, and not a prior ruling within the WTO.

- **The identity of the parties** is beyond doubt if we compare the case brought before MERCOSUR and the current case before the WTO. Moreover, as Argentina has

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[6] *India – Measures Affecting the Automotive Sector* (WT/DS146/R, WT/DS175/R), 21 December 2001, paragraph 7.55.

[7] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90/R). Subsequently, complaints were brought by the United States and the EC in the case *India – Measures Affecting the Automotive Sector* (WT/DS146/R and WT/DS175/R).

[8] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS79) complaint brought by the EC.

[9] *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (WT/DS126/R), report adopted on 16 June 1999.

[10] WT/DS79. The United States had previously filed a similar complaint: *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50).

[11] In the case *Australia – Automotive Leather II* (WT/DS126/R) Australia, according to paragraph 9.14, asked the Panel to read into the DSU an implicit prohibition on multiple panels between the same parties regarding the same matter that does not exist in the text of the DSU. However, the Panel ruled that "[n]or is this a case where a complainant has sought a second panel before a first panel has completed its work with respect to the same matter because it was dissatisfied with developments in the first panel. Although the first panel in this case was established, it was never composed and thus never began its work."

pointed out, there is an element of "added value" in that both States are States party to the same integration process, namely MERCOSUR.[12]

– **There is identity of the measure being challenged**, i.e. Resolution ME 574/2000, as stated by Argentina in its first written submission[13] and also acknowledged by the EC.[14]

– **There is identity of the legal basis of the claim**: In this respect, Argentina has already pointed out[15] the high degree of similarity between the arguments made under MERCOSUR and those made under the WTO. A comparative table was included in Annex ARG-LXII which clearly illustrates the mentioned coincidences in Brazil's successive submissions in the two fora.

13. In short, despite the differences between the current dispute brought by Brazil and the cases already settled within the framework of the WTO in which *res judicata* was invoked, Argentina has decided not to argue the application of this doctrine for two basic reasons: firstly, because Argentina recognizes that in the absence of an applicable MERCOSUR regulatory framework in this area, each State Party to MERCOSUR is governed by the provisions of the Anti-Dumping Agreement[16]; and secondly, in spite of this fact Brazil, fully aware of the situation, resorted to MERCOSUR, and the Ad Hoc Tribunal proceeded to examine the case and settle it taking account, because Brazil itself included them in the regulatory framework, both in the legal grounds and in the description of legal inconsistencies, **of the articles of the Anti-Dumping Agreement which in Brazil's view were infringed by Resolution ME 574/2000**.

14. Thus, in Argentina's view the case brought before MERCOSUR and the arbitral award resulting from the complaint filed by Brazil cannot be overlooked, not because of *res judicata*, but because of the pertinence of Brazil's conduct in filing of the complaint twice successively, and because the MERCOSUR regulatory framework comes within the relevant rules applicable to the case under Article 31.3(c) of the Vienna Convention on the Law of Treaties.

II.3 OTHER PRINCIPLES AND RULES OF PUBLIC INTERNATIONAL LAW APPLICABLE TO THE CASE

15. Argentina would like to provide a few clarifications in connection with Brazil's arguments in the section "Ruling by the MERCOSUL Ad Hoc Arbitral Tribunal" of its rebuttal submission.

16. Firstly, while it is true, as Brazil maintains[17], that Article 1 of the Protocol of Brazil sets forth the scope of the Protocol, Argentina's arguments are directed towards drawing the attention of the Panel to the fact that the dispute brought by Brazil before the WTO had already been heard at the regional level, a fact which must have legal consequences in these proceedings.

17. Indeed, the Panel has a right to be informed of all precedents to the case, and Argentina stresses in that connection that it was Brazil that opted to resort to MERCOSUR to settle the dispute, that invoked and argued its claims on the basis of WTO rules and regulations in defending its case

[12] Intervention by the Argentine Republic at the first meeting of the Panel with the parties, paragraph 8.
[13] First written submission of Argentina, paragraph 16.
[14] Third party submission of the EC, paragraph 7.
[15] Intervention by the Argentine Republic at the meeting of the Panel with the parties, paragraph 8.
[16] See rebuttal submission of Argentina, paragraph 2, and paragraph 18 of this statement by Argentina at the second meeting of the Panel with the parties.
[17] Rebuttal of Brazil, Section III, "Ruling by the MERCOSUL Ad Hoc Arbitral Tribunal", paragraph 23.

before MERCOSUR, and that avoided any reference to precedent in the request for consultations, the request for the establishment of the Panel, the request for the constitution of the Panel and its first written submission before the WTO.

18. Among the "Preliminary Arguments" of its first written submission to the MERCOSUR Ad Hoc Arbitral Tribunal[18], Argentina requested that *"if it agrees with the Argentine position that there is no MERCOSUR legislation that gives the Tribunal the power to review proceedings with respect to intra-zone dumping and application of anti-dumping duties fully governed by and applied under the domestic law of a State party, the Tribunal terminate its action*." In other words, throughout the conduct of the proceedings it kept Brazil informed of its dissenting view that the matter was not being settled in the appropriate forum.

19. Nevertheless Brazil, knowing full well that the MERCOSUR regulatory framework did not include any express provision on this subject, persisted in submitting its dispute in that forum, and rather than accepting the unfavourable result, initiated proceedings before the WTO.

20. Argentina agrees with Brazil that the Ad Hoc Tribunal set up to hear the case brought by Brazil before MERCOSUR had to apply MERCOSUR regulations, but in this case it happens to be Brazil itself that has decided to include in its submission to that forum – both in the legal grounds and in the description of legal inconsistencies – the alleged violations of the WTO Anti-Dumping Agreement arising from Resolution 574/2000. In this connection, Brazil argued that *"[t]he provisions of the WTO – AD Agreement were incorporated in community legislation by DEC CMC No. 11/97 (Regulatory Framework, RF). Since by definition of Article 1, the RF is in conformity with the WTO-AD Agreement, failure to comply with the former implies failure to comply with the latter. Furthermore, should the RF disciplines not be applicable for some legal reason that excludes such application, the provisions of the WTO AD Agreement would apply pursuant to Article 19 of the Protocol of Brasilia (PB) as 'applicable principles and rules of international law'. The rules of the WTO Anti-Dumping Agreement are binding for WTO Members, which include the States parties to MERCOSUR".*[19] (Emphasis added).

21. It is particularly important in this case to point out that "[t]he tribunal confirms that it is right to apply the Protocol of Brazil in the case at issue"[20], and that, furthermore, *"[t]he Tribunal shall settle the dispute in the framework of the subject as defined above. To that end, it proposes to address and decide on the following questions in order: (…) (b) if there are no MERCOSUR regulations expressly covering this subject, what is the consequence? What legal system should apply?"*[21] The same Tribunal then goes on to state that it was resorting to the WTO Anti-Dumping Agreement, given that *"[i]n this situation, the WTO Anti-Dumping Agreement stands as an appropriate reference, not as MERCOSUR legislation, which it is not, but by virtue of Article 19 of the Protocol of Brasilia as an applicable principle of international law (Cfr. Second Arbitral Tribunal, paragraphs 59 et. seq., for a clarification of the concept of subsidies), in this case to shed light on the meaning and purpose of anti-dumping proceedings."*[22]

22. In conclusion, Argentina repeats that Brazil's conduct in bringing the same case twice successively in different fora – first in the framework of MERCOSUR, and then, faced with an unfavourable result, before the WTO – claiming violations of the same provisions of the WTO Anti-Dumping Agreement in both cases, is in breach of the principle of good faith which calls for compliance with treaties – both the agreements concluded in the framework of MERCOSUR and the

[18] Arbitral Award (paragraph 50).
[19] Submission of Brazil before MERCOSUR (reference to paragraph 30 of the Arbitral Award).
[20] Arbitral award (paragraph 101).
[21] *Idem*, paragraph 109.
[22] *Idem*, paragraph 159.

obligations assumed under the WTO; and as a result of Brazil's conduct we have a situation of estoppel.[23]

23. In this connection, Argentina rejects Brazil's arguments concerning the Protocol of Olivos.[24] Argentina repeats[25] that the Protocol of Olivos confirms Brazil's previous conduct with respect to the acceptance of awards and their scope, and from that point of view invalidates the complaint against Argentina that Brazil is now trying to substantiate on the basis of the DSU.

II.4 RELEVANT RULE OF PUBLIC INTERNATIONAL LAW

24. Argentina repeats[26] that the regulatory framework of MERCOSUR and the legal consequences deriving from the application 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 on the Law on Treaties.*

25. Argentina respectfully requests the Panel to take into consideration the actions taken and the **regulations applied within the framework of MERCOSUR**, since the fulfilment of obligations under the agreements covered by the WTO cannot be considered in isolation[27], but rather as one more element in the international regulatory system governing relations between WTO Members, which in this case are also States parties to MERCOSUR.

26. In particular, the "*Conclusions*" and "*Decision*" sections and paragraphs of the Arbitral Award[28] are of special significance in that they involve a ruling on the claims and allegations of Brazil which the Panel should take into account in determining the scope, in the case at issue, of the Argentine obligations with respect to the Anti-Dumping Agreement, refraining from ruling on them.

III. SUBSTANTIVE ASPECTS OF THE INVESTIGATION

III.1 INITIATION OF THE INVESTIGATION

27. Argentina repeats that the information submitted by the applicant to the investigating authority contained sufficient evidence within the meaning of Article 5.2 of the Anti-Dumping Agreement and that it represented what was reasonably available to the applicant.

28. Similarly, Argentina repeats 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, which conducts a thorough investigation once the initiation has been decided.

29. Argentina also repeats that there are different standards of evidence according to the different stages of the proceedings. We recall, in this respect, the statements of the panels in *United States – Measures Affecting Imports of Softwood Lumber from Canada*[29] and *Mexico – Anti-Dumping*

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[23] Rebuttal submission of Argentina, paragraph 20.
[24] Rebuttal submission of Brazil, section entitled "Ruling by the MERCOSUL Ad Hoc Arbitral Tribunal", paragraphs 32, 33 and 34.
[25] Rebuttal submission of Argentina, paragraph 20, footnote 20.
[26] *Idem*, paragraphs 28 and 29.
[27] See rebuttal submission of Argentina, paragraph 15.
[28] Arbitral Award, "III. Conclusions" and "IV. Decision".
[29] WT/DS236, paragraph 332.

Investigation of High Fructose Corn Syrup (HFCS) from the United States[30] reproduced in paragraphs 38 and 44 of our first written submission.

30. Thus, the implementing authority having examined the accuracy and adequacy of the evidence submitted, verifying that it contained indications of dumping that was causing injury to the domestic industry, it concluded that this evidence was sufficient to declare the initiation of the investigation.

31. Argentina repeats in this connection that Article 5.3 does not impose any obligation to conduct, at that stage, a thorough investigation, since the standard of "sufficient" evidence to justify the initiation of an investigation is considerably lower than the standard required for the decision to apply a preliminary or definitive measure.

32. As regards Brazil's claim that Argentina failed to comply with Article 5.7 of the AD Agreement simply because the reports respectively establishing the existence of dumping and the existence of injury bear different dates, we repeat that this difference of dates does not in any way mean that the authority, in its decision to initiate the investigation, did not simultaneously consider the evidence in both reports.

33. With respect to Brazil's claim that Argentina failed to comply with Article 5.8 of the AD Agreement in that it should have rejected the application for initiation of the investigation because the application had failed to demonstrate injury, Argentina refers to its statements in this connection in its written submissions, its oral statement and its reply to questions 16 and 17 of the Panel.

34. We repeat in this connection that with respect to the submission of new evidence, under the relevant Argentine legislation the competent authority is required to intervene once again in the proceedings if any new developments occur or come to its knowledge. In this case, the additional submission by the applicant introduced new items of evidence which called for a further intervention by the CNCE at the request of the competent bodies and in strict conformity with the law.

III.2 CONDUCT OF AN APPROPRIATE INVESTIGATION – EVIDENTIARY AND PUBLIC NOTICE REQUIREMENTS

ARTICLE 12.1

35. Argentina reaffirms that the investigating authorities acted in accordance with the requirement laid down in Article 12.1 to give public notice and to notify the interested party known to the investigating authority to have an interest therein, as well as the Government of Brazil. Indeed, we repeat that it would have been impossible to notify parties whose interest in the investigation was not known. We refer in this connection to Argentina's replies to questions 25 and 26 of the Panel.

36. Argentina reiterates that throughout the proceedings it provided the Government of Brazil with facts concerning the application through its Chargé d'Affaires in Argentina[31], with a view to obtaining its cooperation in identifying the producers-exporters interested in the investigation. Similarly, Argentina has noted that although invited[32], no representative of the Government of Brazil attended the information meeting held on 25 February 1999 to which all parties potentially interested in participating in the proceedings were invited and at which officials from the Directorate of Unfair Competition replied to questions from those who attended, nor is there any record that any interested party attended the meeting.

[30] WT/DS132/R, paragraph 7.76.
[31] Note SSCE No.121 of 1 February 1999, provided as Annex ARG-III.
[32] Record of 25 February 1999, Annex ARG-VI.

37. This is why it is difficult to understand how Brazil can try to deny any responsibility in this respect by stating in paragraph 50 of its rebuttal submission that Argentina never requested Brazil's cooperation in providing the address or contact information of the companies whose interest in the investigation was not known. Indeed, the means of exporters were mentioned, but this did not, in itself, constitute an "identification" that made it possible to send the questionnaires. As Argentina stated in its reply to question 26 of the Panel, this does not imply shifting the burden to Brazil, but rather, it represents an attempt to obtain through Brazil the participation of the Brazilian exporters during the investigation and from the outset as provided for in Article 10.

38. We reaffirm in this connection that only through the request from the company INTERAMERICANA COMERCIAL S.R.L. did Argentina learn of the interest of the seven other exporting enterprises mentioned by Brazil.[33] In fact, having determined the adequacy of the request and to ensure full participation of the producers/exporters, even though the Brazilian Government had not singled out specific exporters, the implementing authority asked certain Brazilian companies and institutions to provide reports (Comaves, Catarinense, Minuano, Chapeco and Perdiagao) concerning actual sales, prices for kilogramme of poultry actually paid, etc.[34], and asked the company INTERAMERICANA COMERCIAL S.R.L. to provide a list of addresses of those firms.[35]

ARTICLE 6.1.1

39. In keeping with the evidence already presented, Argentina reaffirms that it granted the Brazilian exporters a period of thirty days to reply to the questionnaires of the DCD. This is proven by the fact that the said questionnaires were provided during the information meeting held on 25 February 1999, with a deadline for submission to the DCD of 29 March 1999. Similarly, as has been documented, due consideration was given to the requests for extensions, which were granted whenever practicable.[36]

40. Regarding the Brazilian claims in paragraphs 59 and 60 of its rebuttal, Argentina agrees with Brazil that because of the large volume of information requested in the questionnaires, the exporters and producers relied on a minimum period of thirty days to allocate the necessary resources in order to respond.

41. However, Argentina does not understand how Brazil can adduce in this respect that there were seven exporters that did not enjoy their right of defense when, as stated in Article 143 of Argentina's first written submission, the replies to the questionnaires received from those exporters clearly show that two of them (CCLP and CHAPECO)[37] did not export to Argentina during the period under investigation, while the other four (MINUANO, COMAVES, PENABRANCA and PERDIGAO) demonstrated their lack of interest in the investigation by not providing any information whatsoever, not even following the expiry of the deadline and the extension granted.[38]

42. This is why, contrary to Brazil's claim, Argentina reaffirms that the investigating authority granted the Brazilian exporters a deadline longer than that specified in the Agreement to reply to the DCD's questionnaires, having due regard for the exporters' requests for extensions, which were granted whenever practicable, pursuant to Article 6.1.1.

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[33] Annex ARG-VII.
[34] *Idem.*
[35] Annexes ARG-VIII, IX and X.
[36] First written submission, paragraphs 130 to 132, and Annex ARG-XI.
[37] See Annexes ARG-XXVI and XIV.
[38] See Annexes ARG-VIII, XV, XVI, XVII, XVIII, XIX and XX, and first written submission, paragraph 133.

43. It also bears repeating that the CNCE delivered the injury questionnaire to five exporters, in full conformity with the provisions of Article 6.1, since the exports to Argentina notified by the Brazilian companies that replied to the CNCE questionnaire for exporters represented more than half of the total imports of whole eviscerated poultry from Brazil – so that the claim made by Brazil in paragraph 35 of its rebuttal submission is absolutely unfounded.

44. Thus, in addition to stressing that Brazil never questioned the circumstances now being complained of in its various statements in the course of the investigation, Argentina reaffirms that the implementing authority acted in full conformity with Article 6.1.1.

ARTICLE 6.1.2

45. Argentina reaffirms that the authorities acted consistently with the obligation laid down in Article 6.1.2 in that they promptly made available to the other interested parties participating in the investigation evidence presented in writing by the interested parties, and the other interested parties could at all times consult the file and obtain a copy thereof.

46. Consequently, Argentina repeats that if the parties with a supposed interest in the investigation did not participate, as stated before it was they, and not the implementing authority, that failed to defend their own interests. Indeed, it would have been impossible for the investigating authorities to place evidence presented by the interested parties at the disposal of the seven mentioned Brazilian companies, since those companies did not even join as interested parties. Thus, Argentina submits that it acted consistently with Article 6.1.2.

ARTICLE 6.2

47. In accordance with the above considerations, Argentina reaffirms that all of the interested parties had full opportunity to defend their interests throughout the investigation: they were given access to the proceedings, and their right of access to the records was in no way impaired, let alone their right of defence. Thus, the investigating authorities met the obligation laid down in Article 6.2. Moreover, the authorities allowed any party that considered itself as having an interest to present itself at the investigation, expressing that interest.

48. This determination on the part of the authorities to offer interested parties the broadest possible opportunity not only to participate in the proceedings, but also to gather the information needed to ensure an accurate final determination, is evidenced by the record of the submissions made by the participating firms and the conclusions reached on the basis of those submissions, and in particular the work of the Technical Department in requesting and putting together the documentation.[39]

49. Argentina therefore considers that the investigating authorities complied with the obligation laid down in Article 6.2.

ARTICLE 6.1.3

50. Argentina reaffirms that the competent authorities satisfied the requirements of Article 6.1.3 by providing Brazilian exporters and the Brazilian Government with the full text of the written application as soon as the investigation was initiated. In this connection, the Argentine authorities satisfied the obligation to provide by making the records of the proceedings available to the authorized interested parties. Moreover, from the moment notification of initiation of the

[39] See Annex ARG-XXII and Annexes ARG-XXI, XX, XVI, XVIII and XIII.

investigation appeared in the Official Bulletin, interested parties with accredited status were able to gain immediate access to the records of the proceedings.

51. Moreover, and notwithstanding the above, once the initiation of the investigation had been decided upon, the Argentine authorities notified that fact to the Brazilian Chargé d'Affaires in Argentina[40], pursuant to Article 6 of the Anti-Dumping Agreement.

ARTICLES 6.8 and 12.2.2

52. Regarding the treatment of the information provided by the exporters during the investigation, Argentina has repeatedly stated throughout these proceedings that this information was used to the extent that it complied with the formal requirements laid down by Argentine law, which were known to all of the parties.

53. Argentina once again repeats in this connection that the Brazilian claim that its exporters complied in supplying all of the information requested by the investigating authority, and that the investigating authority decided for no reason to reject that information and use only the information provided by the applicant, is untrue. Argentina has shown that wherever the information supplied by the exporters was accompanied by the documentary evidence needed, at a minimum, to corroborate the information they had provided, that information was used.

54. As regards the information used for export prices, Argentina reaffirms that this was official data from the General Customs Administration, which is the body responsible for supervising and controlling all foreign trade transactions. In cases such as CATERINENESE and FRANGOSUL, we repeat that the information was not used simply because, in the case of the former, what was provided was insufficient[41], while in the case of the latter, not only was the information insufficient, but it was submitted after the expiry of the deadline for its use.[42]

55. Argentina has also repeatedly stated, with respect to the claim that the authorities should have conducted on-the-spot verifications of the information provided by the exporters, that this is something which is left to the discretion of the investigating authority, and is not an obligation under the AD Agreement.

III.3 FAIR COMPARISON, INJURY, CAUSAL LINK AND PUBLIC NOTICE

ARTICLES 2.4, 3.1, 3.4, 3.5 and 12.2.2

Excessive burden of proof on exporters

56. Regarding Brazil's claim that the implementing authority imposed an excessive burden of proof on the exporters, Argentina would like to repeat what it stated in its first written submission.

57. Brazil's argument is contradictory in that the complaint in some cases has been that the implementing authority did not request more information, while in other cases the complaint was that too much information was requested. It should be noted that when the implementing authority requested further information, it was for a particular purpose relating to the determination of normal value and export value.

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[40] See Annex ARG-III.
[41] First written submission of Argentina, paragraph 203.
[42] *Idem*, paragraphs 187 to 200.

58. It should also be remembered that the implementing authority took account of the comments of the parties to the effect that the large volume of operations by enterprises on the local market made it difficult for them to provide documentary evidence of all of the transactions, and in order to avoid imposing an excessive burden on exporters, only requested the submission of evidence for those transactions chosen on the basis of a statistical sample for which it was essential to have certain basic information.

59. As regards Brazil's statement in paragraph 94 under claim 26 of its rebuttal submission, it would appear that Brazil attributes more relevance to the information on how to make a fair comparison than the evidence required to make a precise determination of normal value and export value, which needs to be done before a fair comparison can be made. Without evidence of normal value and export value from exporters, it is impossible to make a proper fair comparison considering physical differences that affect price comparability.

60. Similarly, with respect to Brazil's statement in paragraph 95 under claim 26 of its rebuttal to the effect that it did not request the information required to make a fair comparison considering physical differences, Argentina would like to point out that the exporters denied that in Brazil, poultry was sold with head and feet, but never contributed any evidence to the file to invalidate the fair comparison put forward and substantiated by the applicant. Similarly, it should be stressed that in an investigation, the parties can supply all of the information and evidence they consider relevant without its being requested by the implementing authority.

61. Concerning Brazil's claim that an excessive burden was imposed on exporters because they were asked for information for years that were not included in the investigation period, Argentina repeats that the Agreement neither defines nor limits the period for collecting information, nor does it define or limit the actual period under investigation. The implementing authority therefore has discretion to request the documentation it deems necessary for the purposes of determining the existence of dumping, and may require further information when this is necessary to guarantee due process to the interested parties.

62. In conclusion, we note that the requests for information by the authority were supported by the requirements imposed under Article 6.1 and 6.2, i.e. to guarantee the parties' right of legitimate defence. These two paragraphs also enable the interested parties to provide all of the evidence which they consider relevant in the course of the investigation, i.e. this is a right of the interested parties.

63. Regarding Brazil's statement concerning the opinion of the EC in paragraph 97 under claim 26 of its rebuttal, Argentina points out that it agrees fully with the interpretation of the Communities, and consequently we understand Brazil to have erred in claiming inconsistency with Article 2.4 under its claim 26.

64. As regards the adjustment made by the implementing authority, Argentina repeats that this was done correctly and on the basis of the evidence and the methodology provided by the applicant. Based on the evidence provided, the adjustment was clearly necessary – poultry with head and feet sold on the São Paolo market and poultry exported to Argentina without head and feet. Similarly, as we stated earlier, the Brazilian exporters did not provide any evidence to the contrary. Nor did the Brazilian exporters object to the adjustment methodology at any time during the proceedings. We repeat that at the request of the authority, the company JOX sent a note validating the percentage adjustment made by the applicant.

Use of different periods to analyse the injury factors

65. Turning to Brazil's claim that the implementing authority used different periods to evaluate some of the injury factors, Argentina repeats that the use of a longer period for the analysis of certain

factors – in a threat of injury investigation – than for other factors does not imply, *per se*, that the implementing authority conducted an evaluation of the evidence that was not objective. Argentina's position coincides with the position presented by the United States in its written submission, backed by the Panel in "*United States – Hot-Rolled Steel*".[43]

66. Contrary to what Brazil claims, Argentina considers that the CNCE acted with particular case. Argentina repeats what it said in its first written submission, mainly that the CNCE decided to analyse the trends in imports for the first half of 1999, taking as a basis both international rules and relevant practices in that area which provide that in cases of threat of injury, it is possible to undertake an analysis beyond the period of the investigation in order to find out whether there is a growing trend in imports and, as a result, give the investigation a more substantial factual basis.

67. We recall that the existence of a voluntary agreement between the parties from October 1998 to 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, both for imports and for all apparent consumption variables.

68. In this connection, we refer to Record No. 576, in which the Commission duly stated that if there had been no such agreement between the exporters and the Argentine producers, " … *in 1998 imports would have increased even more and, subsequent to the investigation period, in the first half of 1999, the upward trend would have continued* …".

Evaluation of all of the factors

69. Argentina repeats what it has said throughout these proceedings, namely that the implementing authority acted consistently with the provisions of the Anti-Dumping Agreement by evaluating, in respect of injury, all the factors listed in Article 3.4 and their impact on prices of the like domestic product as well as their impact on the domestic industry concerned.

70. We recall, in this connection, what Argentina stated in paragraph 277 of its first written submission, namely that the applicant submitted information on the productivity situation in the sector which showed that, at the initiation of the investigation, the Argentine poultry industry was on an equal footing with the Brazilian industry and also with the leading producers at the global level[44], a statement which was not questioned during the course of the investigation either by the Brazilian exporting companies or by importers in the Argentine market.

71. At the same time, we reiterate that the Argentine industry's costs are comparable to those of the most competitive producers at the international level. This was achieved through a large-scale programme to restructure the industry and adapt production[45], which was affected by the uncertainty caused in the local market by the importation of Brazilian products, particularly since Brazil utilized the Argentine market as an alternative market in order to resolve problems of local or foreign demand. We recall that the extent of Brazil's production capacity and the generation of exportable surpluses mean that Brazil can easily redirect its effort to third markets when there are domestic or external imbalances, despite the large size of its own domestic market.[46]

72. We refer, in connection with the above considerations, to paragraphs 283-285 of Argentina's first written submission, which describe the characteristics of the Argentine poultry sector as regards

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[43] WT/DS184.

[44] Record 576, folios 12, 13, 14, 20, and Technical Report, folios 26, 28, 29, 30 and 95 as well as Tables 1, 11, 12, 13 and 14 of Annex I to the Technical Report (EXHIBIT BRA-14).

[45] See Annex ARG XXXVI.

[46] See Section VI.2 ("MERCOSUR") of the Technical Report (BRA-14).

the export coefficient, consumption, demand, demand profile, comparative price behaviour[47], sensitivity to minor variations in supply, etc., as well as Brazil's status as price fixer in the Argentine market, even with relatively low volumes, owing to the enormous potential for increasing shipments on very short notice, all of which necessarily led to price adjustments for the domestic sector.

73. Argentina therefore repeats that the decline in domestic prices in a context of sustained growth in apparent consumption owing to a change in consumer habits can only be explained by the existence of imports under unfair competition.[48]

74. Regarding Brazil's claim in paragraph 113 of its rebuttal (claim 38), it is difficult to understand how Brazil can fail to see the connection between the information contained in Table 16 of the Technical Report and factors affecting domestic prices, since that Table shows the evolution of price indexes for substitute products, mainly red meat, as well as the general level of activity of price indexes in the most important sectors.[49]

75. Argentina therefore reiterates that the CNCE properly considered all of the factors which, in addition to imports, could have had an effect on the prices of the domestic product. Similarly, given the potential impact on Argentine production, bearing in mind the characteristics of the domestic market and the Brazilian market, the investigating authority correctly evaluated that margins of dumping of 8 and 14 per cent were significant.

Public notice of the final determination

76. Argentina repeats that the public notice of the final determination complied with all of the requirements of the Agreement. Article 12.2 – which introduces Article 12.2.2 of the AD Agreement – stipulates that the findings and conclusions considered material by the investigating authorities shall be published in sufficient detail. In other words, the text of Article 12.2 does not require that all of the findings and conclusions be published. Moreover, the authority has the discretion to decide which are the findings and conclusions which it considers relevant for the purposes of publication. Here, Argentina fully agrees with the interpretation by the United States[50] to the effect that not all of the factors listed in Article 3.4 must be published.

III.4 COLLECTION OF ANTI-DUMPING DUTIES

ARTICLE 9.2 and 9.3

77. Argentina reiterates, as it has maintained in the various stages of these proceedings, that the manner in which it applies and collects anti-dumping duties is consistent with the requirements of the Agreement.

78. In light of the claims in Brazil's rebuttal, however, Argentina deems necessary to make a number of comments that will give the Panel all the information it needs to reach a reasoned conclusion on the matter.

79. For clarity's sake, we propose to divide our argument on this issue into two parts, namely:

(a) we shall respond to Brazil's various claims that a violation of Article 9.2 is entirely dependent on a violation of Article 9.3; and

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[47] See the Table on page 21 of Record 576 (EXHIBIT BRA-14).
[48] See Annex ARG-XXXVII.
[49] See EXHIBIT BRA-14.
[50] Written submission by the United States as third party, paragraph 15.

(b) we shall demonstrate that Brazil's claim that Argentina applies anti-dumping duties in a manner inconsistent with the AD Agreement has no basis whatsoever.

80. Starting with point (a), Argentina concurs with Brazil that paragraphs 2 and 3 of Article 9 of the AD Agreement are closely related.[51] On the other hand, Argentina disagrees that a violation of Article 9.2 is entirely dependent on a violation of Article 9.3 of the AD Agreement.

81. The express obligation in Article 9.2 is that duties "*shall be collected in the appropriate amounts*", while Article 9.3 provides that these "*shall not exceed the margin of dumping as established under Article 2*". An anti-dumping duty could therefore hypothetically be collected in an inappropriate amount – i.e. in breach of Article 9.2 therefore – without, however, exceeding the margin of dumping established under Article 2, i.e. without violating Article 9.3.

82. Brazil's analysis, which concludes that any violation of Article 9.2 is dependent on failure to respect the limit specified in Article 9.3, stems from its interpretation that the margin referred to in Article 9.3 is that determined pursuant to Article 2.4.2, which sets out the method to be **used during the investigation phase** to determine the existence of margins of dumping. Brazil hence concludes that the Article 9.2 reference to "appropriate amounts" is the margin of dumping established during that stage in the proceedings.

83. Argentina disagrees with this interpretation, which leads it directly to point (b) of its argument. While Article 2.4.2 is clearly the only provision that explains in detail how a margin of dumping is to be established, what is just as clear is that that same Article limits the application of the provision in question to a specified period, namely "**during the investigation phase**".

84. In focusing exclusively on Articles 9.2 and 9.3 and 2.4.2, Brazil apparently fails to consider other relevant provisions of the anti-dumping regime, which not only should be analysed in order to ascertain the alleged violation but also are those which in fact contain the obligations that Brazil claims Argentina has failed to meet.

85. Contrary to Brazil's claim,[52] there is a difference between the margin of dumping determined during the investigation phase and the anti-dumping duty ultimately established as a result of the investigation. The difference is clear from a full reading and interpretation of the Article in its context, namely not only the AD Agreement in its entirety but also Article VI of the GATT 1994, the implementing provisions of which are set out in detail in the AD Agreement.

86. Article 2.1 of the AD Agreement provides that: *"For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."*

87. Article VI.1 of the GATT 1994 contains a definition of dumping similar to that in Article 2.1 of the AD Agreement. The relevant part of paragraph VI.2 likewise establishes that:

> *" ... For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."*

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[51] Second written submission of Brazil, Section VII – "Claims related to the imposition and collection of antidumping duties as a result of the antidumping investigation", paragraph 40.124, page 22.

[52] *Idem*, paragraph 127.

88. Article 9.1 of the AD Agreement stipulates that: *"The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."*

89. A reading of the Articles cited above raises a question that is crucial in evaluating Brazil's claim that Article 9.2 is dependent on Article 9.3 of the AD Agreement. The margin of dumping established during the investigation phase does not necessarily have to be equivalent to the anti-dumping duty finally established. In the decision to impose anti-dumping duties, the implementing authority is required to take account not only of irrefutable evidence that the unfair practice has taken place but also of the fact that the duty imposed as a result of the investigation is adequate to remove the injury to the domestic industry attributable to dumping. If definitive anti-dumping duties were established solely on the basis of the margin of dumping established during the investigation, the injury analysis would be irrelevant and hence the provisions of Article VI of the GATT 1994 and Article 9.1 of the AD Agreement would be devoid of all substance.

90. In paragraphs 131 et seq. of its second written submission, Brazil claims, moreover, that both Argentina and Canada erred in their interpretation regarding the absence of restriction on the anti-dumping duty collected. This is not so. Argentina recognizes that the restriction on applying anti-dumping duties is that established in Article 9.3, and nothing in Canada's written submission appears to uphold Brazil's interpretation.

91. The point on which both Argentina and Canada agree, and Brazil disagrees, is that nothing in the AD Agreement requires a Member to impose duties limited to the margin of dumping established pursuant to Article 2.4.2, that is, during the investigation phase; and, if it does so, as we said before, the implementing authority should analyse the Article in its entirety, in the light of the objectives contained in Article 9.1 of the AD Agreement and Article VI of the GATT 1994.

92. The hypothesis on which Brazil builds its rejection of Canada's argument that changes in market conditions, or exporters' improved productivity, may create a situation where prices in both markets (the exporter's domestic market and the importer's market) are reduced, is perfectly correct. On the other hand, what is equally correct is that this is but one of many hypothetical situations that could arise and that it provides no answer in respect of the other – also highly likely – situation argued by both Canada and Argentina, under which – if Brazil's claim, i.e. that anti-dumping duties are limited to the margin of dumping found during the investigation phase, were to prevail – an exporter with considerable means to exercise international price discrimination could easily disregard a Member's attempt to halt an unfair practice, while deeming the measure imposed to be inconsistent, by practising even greater dumping. Hence Argentina sees nothing in the AD Agreement to support Brazil's position.

93. The situation illustrated by Brazil could in fact easily be remedied through provisions laid down in the AD Agreement for that purpose. Article 11.2 establishes a procedure for dealing with a change in circumstances such as Brazil's example of a drop in prices in both the export and the import market. And under Article 9.3.2, exporters may request the refund of all duties paid in excess.

94. In paragraph 41 of its Rebuttal, Brazil further contends that the minimum export prices determined in Resolution 574/2000 do not qualify as anti-dumping duties, since they do not reflect the normal value and export prices as provided by the exporters and examined by the investigating authority.

95. Argentina fails to understand Brazil's grounds for such a claim. On the one hand, Brazil itself provided, as an annex to its first written submission[53], the various technical reports that were prepared by the bodies in charge of the investigation and were reportedly used by the implementing authority as a basis for determining the applicable duties.

96. On the other, Argentina has also demonstrated that, in accordance with Article VI.2 of the GATT 1994 and Article 9.1 of the AD Agreement, the minimum prices for each of the exporters subject to individual anti-dumping duties and for the "other" exporters were set in amounts lower than the margin of dumping established as a result of the investigation.[54]

97. Here again, Brazil appears to be seeking to induce the Panel to find that the system of variable amounts used by Argentina to set anti-dumping duties on a prospective basis is inconsistent with the AD Agreement.

98. Argentina is therefore compelled to repeat that the AD Agreement contains no provision as to how the Members should assess their anti-dumping duties and that, in practice, they use any of three systems.[55] Moreover, Article 9, entitled "*Imposition and Collection of Anti-Dumping Duties*", describes the manner in which those duties could be collected (on a prospective or a retrospective basis) but does not specify the system to be used by the Members for that purpose.

99. What Article 9.1 does specify is that "[i]t is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry".

100. To summarize, and on the basis of the foregoing, Argentina wishes clearly to point out that:

(i) Since Article VI of the GATT 1994 and Article 2 of the AD Agreement define what dumping is, they also define what should be considered a margin of dumping, the latter being nothing more than a manner of expressing the former, except in the case of specific provisions that apply to particular stages such as that indicated in Article 2.4.2 of the AD Agreement;

(ii) the limit imposed by Article 9.3 of the AD Agreement on the imposition of anti-dumping duties therefore refers to Article 2 in its entirety and not to Article 2.4.2, as Brazil maintains;

(iii) the anti-dumping duty imposed as a result of an investigation conducted in accordance with the AD Agreement does not necessarily have to be equivalent to the margin of dumping established during the investigation phase;

(iv) the practice of WTO Members, in the absence of specific provisions in the AD Agreement, has established the use of three systems for applying anti-dumping duties, one of them being the system of variable amounts used by Argentina.

101. Consequently, Argentina respectfully requests the Panel to find that it has acted consistently with the WTO AD Agreement in assessing and collecting the duties imposed in this case, and to reject Brazil's claim of inconsistency with Article 9.2 and 9.3.

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[53] See mainly EXHIBIT BRA-15.

[54] See first written submission of Argentina, paragraph 316, and intervention by the Argentine Republic at the first meeting of the Panel with the parties, paragraph 57.

[55] See first written submission of Argentina, paragraph 315, and intervention by the Argentine Republic at the first meeting of the Panel with the parties, paragraph 54.

IV. PLEADINGS

103. In the light of the arguments put forward in the sections above, Argentina respectfully requests the Panel:

(1) In keeping with the reasoning developed in Section II and as already mentioned in paragraph 26 of this Submission, to refrain from ruling on the 41 claims of inconsistency with various provisions of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) submitted by Brazil.

104. Should the Panel decide not to accede to the above request by the Argentine Republic, as set out in Section II:26 of this Submission and in the light of the arguments developed in Section III, it is respectfully requested to:

(2) Reject Brazil's claim that Resolution 574/2000 of the Ministry of the Economy of the Argentine Republic is inconsistent with:

- Article 5.2, 5.3, 5.7 and 5.8 of the Anti-Dumping Agreement;
- Article 12.1 of the Anti-Dumping Agreement;
- Article 6.1.1, 6.1.2, 6.1.3, 6.2 and 6.8, and paragraphs 5, 6, and 7 of Annex II, and Article 6.9 and 6.10 of the Anti-Dumping Agreement;
- Article 2.4 and 2.4.2 of the Anti-Dumping Agreement;
- Article 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement;
- Article 4.1 of the Anti-Dumping Agreement;
- Article 9.2 and 9.3 of the Anti-Dumping Agreement;

as well as the various claims relating to Article 12.2.2.

105. Reject Brazil's request for the immediate repeal of Resolution 574/2000 imposing the definitive anti-dumping duties.

ANNEX B-6

REPLIES OF ARGENTINA TO QUESTIONS FROM THE PANEL – SECOND MEETING

(28 November 2002)

Note: The Panel has referred to claim numbers for ease of reference only.

Questions to Argentina

Preliminary issues

66. 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).

Reply

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[1], 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[2], 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, displays a clear contradiction in its conduct, in which Argentina had had full confidence, both countries being member States of

[1] First written submission of Argentina, 29 August 2002, paragraphs 18-22 and corresponding footnotes.

[2] Rebuttal submission of Argentina, 17 October 2002, paragraph 20.

MERCOSUR; and Argentina is now suffering the negative impact of this change of position.[3] This fact was also raised in the submissions of the EC[4] and Paraguay[5] as third parties.

67. At para. 13 of ASS, Argentina asserts that the principle of estoppel is a general principle of international law. Is the principle of estoppel a "customary rule[] of interpretation of public international law" within the meaning of Article 3.2 of the DSU? Please explain. Is a general principle of international law the same as a rule of interpretation of international law? Please explain.

Reply

The rules of interpretation of public international law to which Article 3.2 of the DSU refers concern Article 31 of the Vienna Convention on the Law of Treaties.

Article 31 of the Vienna Convention sets forth the rules to be followed with respect to interpretation; and the rules of interpretation are applied by the adjudicating body taking account, in all cases, of the sources of law.

The sources that may be applied to interpretation are set forth in Article 38 of the Statute of the International Court of Justice, which lists, as a principal source, treaties, international custom, and the general principles of international law.

Consequently, Argentina understands the principle of estoppel, as a general principle of international law, to constitute a legitimate source to which any international tribunal called upon to settle a dispute may have recourse.

In the current dispute, it is in this light that Argentina considers that the principle of estoppel argument should be taken into account by the Panel in carrying out its functions under the DSU. This is in keeping with the obligation laid down in Article 3.2 of the DSU to clarify the existing provisions of the agreements in accordance with customary rules of interpretation of public international law.

Moreover, Argentina repeats what it stated in its second written submission[6], namely that other panels have already examined the principle of estoppel in past disputes: "*European Communities – Asbestos*"[7] and "*Guatemala – Cement*"[8].

Claim 1

68. In reply to question 6, Argentina refers to the Aves & Ovos review. If the applicant submitted more extracts from that review than are contained in Exhibit BRA-1, please provide a copy of such additional extracts. Please explain precisely how information from the Aves & Ovos review, as supplied by the applicant, supported the need for a 9.09 per cent adjustment to

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[3] 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. 30008 of 21 October 2002.

[4] Third party submission of the European Communities, 9 September 2002, paragraph 17 and footnote 17.

[5] Third party submission of Paraguay, 9 September 2002, paragraph 8.

[6] Second written submission of Argentina, 17 October 2002, paragraphs 17, 18 and 19.

[7] WT/DS135/R, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report adopted on 5 April 2001, paragraph 8.60.

[8] WT/DS156/R, *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, Report adopted on 17 November 2000, paragraph 8.23.

normal value. Furthermore, on what basis did the investigating authority assign the same value to the head and feet as to other parts of the chicken?

Reply

We stress that the review Aves & Ovos does not provide any information with respect to the 9.09 per cent adjustment carried out. The mention of the said review in Argentina's reply to question 6 of the Panel following the first meeting was made in connection with the listing of evidence provided by the applicant in its application. As regards the question concerning the basis on which the investigating authority assigned the same value to the head and feet as to the other parts of the chicken, we note once again that the head and feet were not considered to have the same value as the other parts of the animal for the purposes of assessing the adjustment. On the contrary the 9.09 per cent adjustment is the result of an evaluation of the specific recovery of heads and feet.

Claim 2

69. Regarding Argentina's reply to question 12, the Panel notes that the extract from the JOX document quoted by Argentina is included under the heading "Frango Vivo"? Is there a similar statement for eviscerated poultry? What does it meant to say that "the price remains on very firm ground"?

Reply

No, the JOX publication specifically refers to live poultry. Nevertheless, the reference to the words "production on the parallel market within São Paulo is sharply lower, so that the price remains on very firm ground" relates to the fact that live poultry is the fundamental and principle input for the product under investigation. Thus, it is perfectly reasonable, at this stage prior to the opening of the investigation, to deduce that if the price of the input remains essentially unaltered, the price of the end-product – i.e. the product under investigation – will not vary substantially.

In other words, the phrase "so that the price remains on very firm ground" means that the price would remain essentially unaltered, thus constituting an acceptable element at this stage prior to the investigation.

Claim 3

70. When did the Secretary receive Act No. 405 from the CNCE (dated 7 January 1998)? When did the Secretary receive the report from the ADPCDS (also dated 7 January 1998)?

Reply

The Secretary of Industry, Trade and Mining received Record No. 405 on 9 January 1998, and the DCD Report on Dumping on 27 January 1998.

71. Regarding the first sentence of the third paragraph of Argentina's reply to question 16, what is meant by the phrase "in keeping with the requirements of the application on 17 February 1998"? What precisely are the "requirements of the application"?

Reply

The requirements of the application are those contained in form 349 provided in Annex ARG-XXXIX. The meaning of the phrase is that on 17 February 1998, the applicants provided updated information on the basis of what was requested in the mentioned form 349. This information,

on the basis of a legal finding by the relevant ministerial department and in conformity with Law No. 19549 on Administrative Procedures, was transmitted to the CNCE with the instruction that it be analysed. The analysis resulted in the issue by the CNCE of Record No. 464 and the corresponding Technical Report.

Claim 10

72. How and when did the Authority obtain the addresses of the Brazilian exporters which were contacted in February 1999? If those addresses were obtained from a document on the record of the investigation, please provide a copy of this document.

Reply

The addresses of the producers/exporters notified in February 1999 were provided by telephone through the importers interested in the investigation. Having learned of the initiation of the investigation through the Official Bulletin, they contacted the investigating authority and provided the said addresses.

73. Please comment on para. 36 of Brazil's Second Oral Statement.

Reply

With respect to paragraph 36 of Brazil's Statement, we refer to what Argentina has already stated in connection with Article 6.1.1, namely that the parties interested in the investigation were given ample opportunity to participate, with due regard for the requests for extensions that were submitted.

Claim 11

74. Following on from Argentina's reply to question 29, was all of the information contained in the application sent to both the DCD and the CNCE, or did they only receive those parts of the application dealing with dumping and injury respectively?

Reply

Both entities received the same application, with the same information. Upon submitting an application for the initiation of an investigation, the applicant had to complete the form approved by Resolution No. 349 of the former Secretariat for Industry and Trade before the former Under-Secretariat for Foreign Trade (SSCE). In keeping with Articles 36 to 40 of Decree No. 2121/94, the application was filed with the former SSCE, which transmitted a complete copy thereof to the CNCE so that the latter could make an injury determination.

The CNCE received, on 9 September 1997, a copy of the application for the initiation of the investigation filed by CEPA with the SSCE on 2 September 1997. The two submissions are identical, and the submission transmitted to the CNCE can be found in Section I of file CNCE No. 43/1997 (folios 2 to 284). Thus, both entities had at their disposal complete copies of the application for measures submitted by CEPA.

Claim 15

75. Regarding the second sentence of Argentina's reply to question 39, what precisely is the "procedure" (for supporting documentation) followed by the investigating authority? How was an interested party to know what supporting documentation it was required to provide? Where

exactly has the "procedure" been specified? Where exactly is the request for supporting documentation set forth? Please provide copies of the relevant sources.

Reply

Regarding the procedure followed by the investigating authority to obtain supporting documentation, attached to the questionnaire are instructions explaining how it should be completed and stating that it should be accompanied by supporting documentation. At the same time, the instructions state that where it is not possible to provide supporting documentation, the source of the information should be indicated. By supporting documentation, the authority means documentation that backs the statements or arguments of the interested parties. For example, if the implementing authority is expected to make an adjustment for freight, it would be helpful for the interested party to attach the contract with the shipping company or any other documentation at its disposal which records the value or percentage that should be discounted for freight.

These instructions can be found in the first part of the questionnaire to be completed by the exporter.

A blank copy of the questionnaire for exporters is provided as Annex ARG-LXIII.

Claim 20

76. Regarding question 43, please indicate precisely what normal value data Catarinense was asked to provide. Please specify the document(s) in which the request was made. Furthermore, for what period of time was Catarinense asked to provide the relevant normal value data?

Reply

The information that the company Catarinense was asked to supply was the information requested in Note DCD No. 273-001065/99, provided by Brazil in Exhibit BRA-13, in which it can be seen that the period for which the information was requested was 1998 – January 1999. We recall in this connection that independently of the documentation requested, in the last note sent by the implementing authority – Note DCD No. 273-001321/99 provided in Exhibit BRA-27 - the companies were reminded that they were to comply with the requirements of the National Law on Administrative Procedures, particularly as regards certification of legal status, a basic prerequisite for a party to be considered in an investigation.

77. With regard to Catarinense's normal value data, Argentina asserts that those data were submitted in an aggregate form. However, it is apparently stated in Section VII.3.2 of the Final Dumping Determination that Catarinense had submitted information on sales made in the domestic market corresponding to 1998 and January 1999 disaggregated by transaction. Please comment.

Reply

As stated, in Section VII.3.2 of the Final Report on the Determination of the Margin of Dumping there is a reference to Annex VIII: "Sales in the domestic market for 1998 and January 1999, disaggregated by transaction" at folio 3023. That is, with respect to normal value for the requested period, Catarinense submitted a list of domestic market sales transactions without providing any supporting documentation and without any magnetic media. Finally, we repeat that Catarinense at no time provided any certification of legal status although this had been requested in Note DCD No. 273-001321/99.

Section VIII.1.3.3.5 of the Report on the Final Determination on the Margin of Dumping, at folios 3053/3054, states that the values reproduced at folio 3054 were obtained from the information from the exporting company in aggregate form in Annexes V and VI of the questionnaire for exporters and that it covered a longer period than that requested by the implementing authority. Thus, the processing of the information in Annexes V and VI yields the detailed values in the table appearing at folio 3054. As indicated in the footnotes to Annexes V and VI, in the case of 1999 the information was accumulated until September. We attach as Annex ARG-LXIV a copy of Annexes V and VI, as submitted by Catarinense.

78. Please comment on the first two sentences of para. 53 of Brazil's Second Oral Statement.

Reply

With respect to the first two sentences of paragraph 53, there is no contradiction whatsoever as Brazil tries to suggest, since Argentina said that the export price information was indeed provided, but since for the reasons already given the determination of normal value could not be made, the notified export prices could not be considered. In this connection, Argentina had official information on export prices for both companies which is the information that was used in the final determination.

Claim 21

79. It would seem from para. 185 of Argentina's First Written Submission that parties were informed of the 'essential facts' through the Report on Action Taken of 4 January 2002. Could Argentina confirm that this is the only instrument on the record of the investigation through which the investigating authority informed interested parties of the 'essential facts'?

Reply

Yes, the Report on Action Taken is the document by which the investigating authority informed the interested parties of the essential facts. In this connection, Argentina reaffirms what it stated in paragraph 185 of its first written submission.

80. The Panel notes Argentina's reply to question 47(a). As a follow-up question, the Panel would appreciate it if Argentina could reply the following questions:

(1) In the investigation at stake, which were the 'essential facts' informed by the investigating authority to interested parties?

(2) Where, if at all, the information referred to in paras. 340-350 of Brazil's First Written Submission and para. 87 of Brazil's Second Written Submission can be found?

In replying to these questions, Argentina is requested to point out with precision the paragraph or page number where the information is contained on the record of the investigation, if any, and to provide a copy of the relevant documents.

Reply

The essential facts are those which appear throughout the Report on Action Taken of January 2000 (folio 2757).

However, to be more precise with respect to the normal value and the export price, we refer by way of example to Section VIII.1 and VIII.1.3.3 of the said report, which explains the methodology used by Sadia for the calculation of normal value. The same is done for Avipal SA in Section VIII.1.3.3.2, which contains detailed information and a description of the methodology applied to calculate normal value for that company. Corresponding information is also provided for Nicolini (folios 2819 and 2820) and for Seara (folio 2821).

Consequently, what Brazil stated in paragraphs 340-350 of its first written submission does not correspond to reality. Indeed, the interested parties were given ample opportunity to express their views with respect to the essential facts that the authority considered for the calculation of normal value and the export price.

Concerning the copy of the essential facts report, see Exhibit BRA-28.

Claim 23

81. At para. 73 of ASS, Argentina suggests that the exporter had ample opportunity to inform the DCD of any adjustments that needed to be made when it submitted the invoices requested by the DCD. Why should Sadia have requested an adjustment for freight costs when submitting its invoices if it had already requested that adjustment in its questionnaire response?

Reply

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 "*hota fiscal*" (tax receipt) 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 "*hotas fiscales*", which did not reveal the indicative amount of the requested adjustment, were the only documentation on hand.

Attached hereto as Annex ARG-LXV is a photocopy of the invoice and a photocopy of Annexes VIII and X of the Questionnaire for Exporters.

82. Argentina has asserted that it did not grant Sadia's request for a freight cost adjustment because Sadia failed to support its request with documentary evidence. Please 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. If the Panel does not already have a copy of the relevant document, please provide a copy thereof.

Reply

The 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.

Claim 22

83. Please comment on para. 59 of Brazil's Second Oral Statement.

Reply

To begin with, it should be noted with respect to Brazil's question as to why the authority did not proceed in the same manner with Catarinense and Frangosul, that Catarinense never provided certification of legal status, i.e. it did not comply with an essential requirement that must be met by any interested party wishing to participate in the investigation in accordance with the National Law on Administrative Procedures (Law No. 19.49) which, pursuant to Article 76 of Decree No. 2121/94, applies on a residual basis in investigation proceedings.

This law was duly notified to the WTO Anti-Dumping Committee, which is why the last note sent to Catarinense, which appears in Exhibit BRA-27, states that it should comply with the requirements of the National Law on Administrative Procedures. Instead, not only did Catarinense persist in not making any submission, but as mentioned, it failed to provide certification of legal status.

In the case of Frangosul, in spite of the successive extensions granted and the numerous requests for information from the implementing authority (see the summary table for the company in question, which was transmitted to the Panel together with Argentina's replies to the questions posed following the first meeting), no information was available in connection with domestic market sales transactions, needed by the authority to determine the individual margin of dumping.

We recall in this connection that, as can be seen in the summary table for Frangosul, by Note DCD No. 272-001181/99 of 12 October 1999 and Note DCD No. 273-001412/99 of 18 November of 1999, the implementing authority asked Frangosul for the last time to provide lists of domestic market sales. In the second of these two notes, it granted a maximum of five days to do so. The purpose of this time-limit was to ensure that the implementing authority would have sufficient time to analyse and process the requested information.

However, Frangosul, once the time-limit for the submission for the information had elapsed, provided, in magnetic form only (diskette), the list of *notas fiscales*. Indeed, Frangosul failed to provide a hard copy of the list as required under the National Law on Administrative Procedures. This Law applies on a residual basis to anti-dumping proceedings pursuant to Article 76 of Decree No. 2121/94.

For the sake of clarity, we cite below Articles 7 and 15 of Decree No. 1759/72 which regulates the mentioned Law.

"*Article 7 – The identification under which a record of proceedings is initiated shall be retained throughout successive proceeding regardless of the bodies participating in them. All of the units are under obligation to provide information from a file on the basis of its initial identification.*

The title page shall indicate the body with primary responsibility for the proceedings and the time-limit for its settlement."

"Article 15 – Documents shall be typed or legibly handwritten in ink, in the national language" …The top of the page shall contain a summary of the pleadings. They shall be signed by the interested parties, or their legal representatives or attorneys. Each document, with the sole exception of the document initiating the proceedings, shall be headed by the identification of the file to which it corresponds, and where appropriate, shall contain a precise indication of the representation exercised …".

Administrative proceedings in Argentina are written.

Once again, Argentina would like to draw the Panel's attention to the numerous requests by the implementing authority to the exporting companies concerning documentation to be submitted, and is ready to provide the Panel with any documents that it may consider relevant in this respect.

Claim 24

84. In respect of claim 24, please indicate precisely (page number, paragraph number, line number) where the investigating authority gave the reasons for not making the various adjustments to the JOX domestic price data, either in the investigating authority's final determination, or in any other document prepared by the investigating authority at the time of its determination. If the Panel does not already have a copy of the relevant document, please provide a copy thereof.

Reply

At folio 3040 of the Report on the Final Determination, Section VIII.1.3, there is an explanation of the circumstances of the request for information by the implementing authority to the President of the JOX publication.

85. Did the investigating authority ask JOX to provide a Spanish translation of its letter of 3 August 1999 through which JOX had given information in Portuguese? If so, please provide a copy of the document containing that request.

Reply

The translation was not requested because it was assumed that the parties to the anti-dumping proceedings, to which the National Law on Administrative Procedures applies on a residual basis, would know what was required under that Law.

86. Please comment on para. 68 of Brazil's second oral statement.

Reply

We agree with Brazil in theory that to conduct a fair comparison, all of the appropriate adjustments need to be made both to the normal value and the export price.

However, in the case at issue, with respect to the JOX publication, the information that would have made it possible to carry out some of the adjustments that Brazil mentions did not comply with the requirements of the National Law on Administrative Procedures (Law No. 19549) in that under Article 28 of Decree No. 1759/72 regulating the said Law, documentation in a foreign language must be translated into Spanish by a registered translator.

Claim 32

87. Please indicate precisely (page number, paragraph number, line number) where the investigating authority explained why it looked at 1999 data for only certain injury factors and not others, either in the investigating authority's final determination, or in any other document prepared by the investigating authority at the time of its determination. If the Panel does not already have a copy of the relevant document, please provide a copy thereof.

Reply

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.

Claim 38

88. Please explain precisely how Table 16 of Act No. 576 (para. 292 of Argentina's first written submission) constitutes an evaluation of "factors affecting domestic prices" within the meaning of Article 3.4 of the AD Agreement. Please provide a more detailed explanation than that set forth in paragraph 74 of Argentina's second oral statement.

Reply

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 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 …".

89. Regarding Argentina's reply to question 59 concerning paragraph 80 of Brazil's first oral statement, please provide exact citations (e.g., page number, paragraph number, line number) for the various extracts from Act No. 576.

Reply

Concerning the citations referred to in paragraph 80:

- The citation "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 … " can be found in Section VIII (Conditions of Competition between the Like Product and the Imported Product), § 1, folio 7328, last paragraph, and folio 7329, first paragraph.

- The citation according to which "[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)" can be found in Section VIII (Conditions of Competition between the Like Product and the Imported Product), § 1, folio 7329, second paragraph.

- Finally, the citation "…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" can be found in Section V (State of the Domestic Industry), at folio 7318, last paragraph.

Questions to Brazil

Claim 22

90. It is stated in para. 319 of Brazil's First Written Submission that 'Frangosul and Catarinense submitted the requested information on normal value and export price, which was disregarded by the DCD without explanation.' Would Brazil agree that, if the data submitted by Frangosul and Catarinense had been disregarded in accordance with relevant provisions of the ADA, the investigating authority would not have been required to calculate an individual dumping margin for Frangosul and Catarinense? Please explain.

91. It is stated in para. 324 of Brazil's First Written Submission that 'the DCD provided no explanation, either in the final determination or in any other document on the record of the investigation, as to why, in this case, it was not possible to determine an individual margin for Frangosul and Catarinense.' Would Brazil agree that, if the investigating authority had disregarded the data submitted by Frangosul and Catarinense in accordance with relevant provisions of the ADA, it would not have been required to explain in the final determination or in any other document on the record of the investigation why an individual dumping of margin for those exporters had not been calculated?

Claim 23

92. Please comment on para. 210 of Argentina's first written submission.

Claim 24

93. Please comment on paras 77 – 79 of ASS.

Claim 27

94. Does Brazil consider that the investigating authority would have violated Article 2.4.2 if the exporters had agreed that the investigating authority could calculate normal value on the basis of those domestic transactions for which invoices had been requested?

Questions to both parties

Claim 21

95. What are 'essential facts under consideration which form the basis for the decisions whether to apply definitive measures' within the meaning of Article 6.9 ADA? In particular, would 'essential facts' cover only facts or also reasoning supporting a certain conclusion?

Reply

They are the facts upon which the implementing authority bases its conclusions.

96. At para. 8.229 of its report, the Panel in Guatemala – Cement II found that:

'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.'

Would you agree with the above finding? Please explain.

Reply

Argentina agrees with the position of the Panel in *Guatemala – Cement II* - indeed, all that is reported in the Report on Action Taken makes up the facts which will form the basis of the authority's decision, a circumstance of which the implementing authority informs the interested parties.

Claim 22

97. What do parties understand by the words "for each known exporter or producer concerned of the product under investigation" contained in the first sentence of Article 6.10? In the view of the parties, would the cited portion of the first sentence of Article 6.10 require the calculation of an individual margin of dumping for each exporter known to the investigating authority? Would that also be the case when a known exporter does not provide relevant information requested by the investigating authority? Please explain.

Reply

A condition for the determination of an individual margin of dumping for each exporter is that the exporter should be known, and should supply the documentation needed to reach such a determination.

98. In the view of the parties, would the findings in paras. 6.86 to 6.101 (both included) of the panel Argentina – Ceramic tiles be applicable to the facts in this dispute? In particular, would the following finding of the Panel be relevant to the current dispute: 'The basis of the normal value determination has no bearing on the ability to calculate an individual dumping margin for the producer whose normal value is in question'? Would the lack of information on normal value, export price or cost of production, automatically allow the non-calculation of an individual dumping of margin in accordance with Article 6.10? Please explain, identifying and providing relevant factual support to the Panel.

Reply

It does not apply to the present case, since in the arguments of the *Ceramic Tiles* case, the investigating authority, in calculating the margin of dumping, took account of circumstances relating to "cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable …". In other words, the considerations on which the Panel relied were related to the fact that the Argentine authority had decided to determine the margin of dumping on the basis of "a reasonable number of interested parties … using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, …". Thus, the findings are not applicable to this case.

ANNEX B-7

REPLIES OF ARGENTINA TO QUESTIONS OF
BRAZIL – SECOND MEETING

(26 November 2002)

Questions from Brazil to Argentina

Brazil understands that right after the investigation was initiated the DCD sent questionnaires to the Brazilian exporters Sadia, Avipal, Frangosul, Seara and Nicolini, which required export price and normal value data for the years 1996, 1997, 1998 and the months in 1999 where data was available. On 15 September 1999, the DCD sent notifications of the investigation and the questionnaires to the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and Pena Branca, requiring dumping data for the period 1998 through January 1999. With that in mind, please provide:

1. When did the investigating authority decide that the dumping period of data collection for Sadia, Avipal and Frangosul would be from January 1998 through January 1999, and not the years 1996, 1997 and 1998?

2. When did the investigating notify Sadia, Avipal and Frangosul that the dumping period of data collection would be from January 1998 through January 1999, and not the years 1996, 1997 and 1998?

Reply

1 and 2. The Brazilian exporters were informed of the period of data collection at the preliminary determination stage of the investigation.

As can be seen in the annexes to the Report on the Preliminary Determination, the implementing authority had already decided that the investigation period would be January 1998 to January 1999.

All of the exporting companies could clearly see what investigation period was being examined by the authority. In the case of AVIPAL, SADIA and FRANGOSUL, the requests for documentation by the DCD provided indications of what the investigation period to be examined would be.

Likewise, we refer to the Summary Table attached as a supplement to Argentina's replies to the questionnaire provided by the Panel following the First Meeting of the Panel with the Parties.

3. What basis did the investigating authority use to select January 1998 through January 1999 as the period of data collection for dumping purposes, as opposed to the period 1996 through 1998, indicated in the dumping questionnaires sent to Sadia, Avipal and Frangosul?

Reply

The authority based its determination of the period of investigation on the principle that the information to be submitted should correspond to a period as close as possible to the initiation of the investigation.

ANNEX B-8

COMMENTS OF ARGENTINA ON THE REPONSES OF BRAZIL TO THE PANEL'S QUESTIONS – SECOND MEETING

(28 November 2002)

Questions to Brazil

Claim 22

90. It is stated in para. 319 of Brazil's First Written Submission that 'Frangosul and Catarinense submitted the requested information on normal value and export price, which was disregarded by the DCD without explanation.' Would Brazil agree that, if the data submitted by Frangosul and Catarinense had been disregarded in accordance with relevant provisions of the ADA, the investigating authority would not have been required to calculate an individual dumping margin for Frangosul and Catarinense? Please explain.

Regarding Brazil's response to question 90, Argentina wishes to point out once again that Brazil is mistaken in claiming that FRANGOSUL and CATARINENSE submitted all the information and in therefore believing that the implementing authority was required to make an individual determination of the margin of dumping. In this connection, reference is made to Argentina's response to question 83 regarding Claim 22.

Argentina wishes to emphasize that the reply given by Brazil does not answer the question posed by the Panel. Nevertheless, Brazil attempts to justify the fact that the implementing authority should have determined the individual margin of dumping and seeks to draw an analogy with the implementing authority's handling of the information submitted by SADIA and AVIPAL.

In Argentina's view, such a comparison is not appropriate because the information supplied by SADIA and AVIPAL satisfied the requirements for it to be considered in the final determination. It should be noted that, in their submissions, neither SADIA nor AVIPAL objected to the methodology used for calculating the margin of dumping, particularly as regards the export price. Argentina therefore does not see why at this stage Brazil insists on stating its failure to understand and disagreement with the handling of the export price in the case of SADIA and AVIPAL.

In other words, when the parties had the opportunity to express their views on the methodology used by Argentina for determining the export price, SADIA and AVIPAL made no comment in that regard.

Lastly, we note that Brazil does not reply to the Panel's question; following the above reasoning, Brazil should therefore explain – as requested by the Panel in question 90 – the methodology which it believes should be used in determining the individual margin of dumping when information is disregarded for not having been submitted in accordance with the requirements of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, its Regulatory Decree No. 2121/94, the National Law on Administrative Procedures and its Regulatory Decree No. 1759/72, all of which were notified to the WTO Anti-Dumping Committee.

91. It is stated in para. 324 of Brazil's First Written Submission that 'the DCD provided no explanation, either in the final determination or in any other document on the record of the investigation, as to why, in this case, it was not possible to determine an individual margin for Frangosul and Catarinense.' Would Brazil agree that, if the investigating authority had disregarded the data submitted by Frangosul and Catarinense in accordance with relevant provisions of the ADA, it would not have been required to explain in the final determination or in any other document on the record of the investigation why an individual dumping of margin for those exporters had not been calculated?

It would not appear to make sense for the implementing authority to report that it did not intend to make an individual determination of the margin of dumping if it had already been explained that normal value and export price information would not be taken into account because of the lacunae in the documentation submitted. Hence it was obvious that there would be no determination of the individual margin of dumping, meaning that Brazil's arguments in that respect are unnecessary.

Claim 23

92. Please comment on para. 210 of Argentina's first written submission.

Argentina refers the Panel to its response to question 81 regarding Claim 23.

Claim 24

93. Please comment on paras 77 – 79 of ASS.

The Panel is referred to Argentina's response to question 86 regarding Claim 24.

Claim 27

94. Does Brazil consider that the investigating authority would have violated Article 2.4.2 if the exporters had agreed that the investigating authority could calculate normal value on the basis of those domestic transactions for which invoices had been requested?

Brazil errs in maintaining that the determination of normal value could have been distorted as a result of the use of a statistically valid sample of invoices from the exporting firms that substantiated domestic sales transactions in order to establish normal value.

Secondly, Brazil's position on the subject is, again, surprising, because this argument was not put forward by the Brazilian Government either during the course of the investigation or in its final submission. Nor did the exporters claim that the methodology for calculating normal value, on the basis of the data supplied by the exporting firms, was – as the Brazilian Government now submits – questionable or inconsistent with Article 2.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

Claim 21

95. What are 'essential facts under consideration which form the basis for the decisions whether to apply definitive measures' within the meaning of Article 6.9 ADA? In particular, would 'essential facts' cover only facts or also reasoning supporting a certain conclusion?

Argentina reiterates the response given to this question at the time.

96. At para. 9.229 of its report, the panel in *Guatemala – Cement II* found that:

> **'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.'**

Would you agree with the above finding? Please explain.

As regards Brazil's claims regarding the information submitted by FRANGOSUL and CATARINENSE in the investigation, the line of reasoning is once again wrong. In this connection, it should be mentioned that the Report on Action Taken specifies the lacunae in the information furnished by FRANGOSUL and CATARINENSE. Furthermore, the parties' right of defence was not impaired at any time, since FRANGOSUL offered comments on the content of that report in its final submission.

Lastly, the paragraph from *Guatemala – Cement II* cited by Brazil is superfluous, because Argentina made the relevant report on essential facts available to all interested parties.

Claim 22

97. What do parties understand by the words "for each known exporter or producer concerned of the product under investigation" contained in the first sentence of Article 6.10? In the view of the parties, would the cited portion of the first sentence of Article 6.10 require the calculation of an individual margin of dumping for each exporter known to the investigating authority? Would that also be the case when a known exporter does not provide relevant information requested by the investigating authority? Please explain.

It would be important for Brazil to explain how it calculates individual margins of dumping when the information submitted – as in the case of FRANGOSUL and CATARINENSE – is not consistent with the requirements of the Anti-Dumping Agreement, or in a specific case such as that of CATARINENSE, whose submission presented the added problem of the firm never having provided certification of legal status in the proceedings, as required by the National Law on Administrative Procedures, which applies on a supplementary basis to anti-dumping investigation procedures and was duly notified to the WTO.

98. In the view of the parties, would the findings in paras. 6.86 to 6.101 (both included) of the panel *Argentina – Ceramic tiles* be applicable to the facts in this dispute? In particular, would the following finding of the panel be relevant to the current dispute: 'The basis of the normal value determination has no bearing on the ability to calculate an individual dumping margin for the producer whose normal value is in question.'? Would the lack of information on normal value, export price or cost of production, automatically allow the non-calculation of an individual dumping of margin in accordance with Article 6.10? Please explain, identifying and providing relevant factual support to the Panel.

Brazil is now mentioning issues that were not raised in the course of the investigation. Moreover, it continuously insists on stating its point of view regarding the information submitted by FRANGOSUL and CATARINENSE. This is confusing the Panel with considerations that are not appropriate insofar as they do not correspond to the Panel's questions. Furthermore, Argentina has provided ample and repeated evidence as regards the nature of and the lacunae in the information supplied by these two exporting firms, during the investigation and throughout the course of these proceedings.

Once again, Argentina reiterates the need for Brazil to explain how the individual margin of dumping would be determined when the information is not in conformity with the Anti-Dumping Agreement.

Brazil's response does not apply to the paragraph cited since the analysis conducted by that particular panel refers to the sample and the data in that sample as submitted by the exporters.

Lastly, it is surprising that, in view of the numerous explanations offered by Argentina in all of its responses, Brazil still fails to understand the situation at issue, the more so since it did not report such circumstances in the course of the investigation.

ANNEX B-9

COMMENTS OF ARGENTINA ON THE SECOND ORAL STATEMENT OF BRAZIL

(26 November 2002)

I. INTRODUCTION

1. Argentina thanks the Panel for the opportunity to offer its comments on the oral statement of Brazil at the second meeting of the Panel with the parties.

2. Argentina will also comment briefly on Brazil's oral statement at the second meeting with the Panel.

II. PRELIMINARY ARGUMENTS

3. Argentina first of all wishes to provide some clarification regarding Brazil's arguments in the section entitled "Ruling by the MERCOSUL Ad Hoc Arbitral Tribunal".

4. Argentina will also provide clarifications regarding the issues raised by Brazil in connection with the current dispute before the WTO, which, as both parties have already acknowledged, is "similar"[1] to that brought in the framework of MERCOSUR.

5. Brazil itself recognizes that the object of its complaint is the alleged inconsistency of the Argentine measure with the WTO Anti-Dumping Agreement.[2] However, what Brazil fails to mention is that, in its prior submission to the MERCOSUR Ad Hoc Tribunal, it included in the MERCOSUR regulatory framework a reference to the WTO Anti-Dumping Agreement.[3]

6. As Argentina has already noted[4], the arbitral award rendered by the Ad Hoc Tribunal constituted to hear and settle the dispute brought before MERCOSUR states that the WTO Anti-Dumping Agreement stands as a reference "*(…) by virtue of Article 19 of the Protocol of Brasilia as an applicable principle of international law (…), in this case to shed light on the meaning and purpose of anti-dumping proceedings*".[5]

7. Argentina rejects Brazil's claim[6] that "[w]e have shown that the disputes are not the same" and reiterates[7] that the dispute refers to the same measure and that the legal grounds claimed by Brazil before each forum are the same.

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[1] Oral statement of Brazil at the second meeting with the Panel, 26 November 2002, paragraph 4.

[2] Oral statement of Brazil at the second meeting with the Panel, 26 November 2002, paragraph 6.

[3] *Laudo sobre pollos* (Award on poultry) – Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the dispute between the Federative Republic of Brazil and the Argentine Republic regarding the imposition of anti-dumping measures on exports of whole poultry from Brazil (Res. 574/2000 of the Ministry of the Economy of the Argentine Republic)". Date: 21 May 2001. Paragraph 30.

[4] Rebuttal submission of Argentina, 17 October 2002, paragraph 3.

[5] *Laudo sobre pollos* (Award on poultry), end of paragraph 159.

[6] Oral statement of Brazil at the second meeting with the Panel, 26 November 2002, paragraphs 7 and 12.

[7] Oral intervention by Argentina at the first meeting with the Panel, 25 September 2002, paragraph 8.

8. Argentina notes that a reading of the arbitral award – in its entirety – clarifies the scope of the paragraphs of the award cited by Brazil.[8] In Argentina's opinion, these should be read in the context of the full text of the award, and in particular section II-F-3-c) entitled "*Conclusiones sobre el modo como ha sido llevado el procedimiento antidumping*" (Conclusions regarding the conduct of the anti-dumping procedure).

9. Argentina also rejects Brazil's claim[9] regarding the principle of estoppel. It affirms that Brazil's conduct, in successively bringing the same complaint before different forums – first before MERCOSUR, and then, in view of the unfavourable outcome, before the WTO – claiming violations of the same provisions of the WTO Anti-Dumping Agreement in both forums, runs counter to the principle of good faith requiring full observance of treaties and is a case for estoppel.

10. Argentina rejects Brazil's claims[10] and affirms that the proceedings conducted in the context of MERCOSUR and the arbitral award are relevant, because the rules forming part of the MERCOSUR regulatory framework – which includes the Protocol of Brasilia and the award rendered by the Ad Hoc Tribunal – are pertinent rules applicable to the case, within the meaning of Article 3.2 of the DSU and Article 31.3(c) of the Vienna Convention on the Law of Treaties.

[8] Oral statement of Brazil at the second meeting with the Panel, 26 November 2002, paragraph 8.
[9] Oral Statement of Brazil at the second meeting with the Panel, 26 November 2002, paragraph 12.
[10] Oral Statement of Brazil at the second meeting with the Panel, 26 November 2002, paragraphs 14, 15 and 16.