

## ANNEX A

### Brazil

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## ANNEX A-1

### FIRST WRITTEN SUBMISSION OF BRAZIL

(8 August 2002)

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## I. INTRODUCTION

1. This submission sets forth Brazil's challenge to the imposition by Argentina of definitive anti-dumping measures on imports of poultry from Brazil, classified under Mercosul tariff line 0207.11.00 and 0207.12.00. Various actions related to the initiation, conduct and imposition of these definitive measures are inconsistent with Argentina's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of GATT 1994 ("Anti-Dumping Agreement").

2. The anti-dumping measures on poultry were imposed following an investigation and determinations made by the Comisión Nacional de Comercio Exterior ("CNCE") and the Dirección de Competencia Desleal ("DCD"). These two agencies share the responsibility for administering the anti-dumping law and investigation procedures in Argentina, with the DCD determining the existence of dumping and calculating dumping margins and the CNCE determining whether the domestic industry has been injured by the allegedly dumped imports.

3. The dumping investigation conducted by the DCD and the imposition of definitive measures have violated Articles 2, 5, 6, 9, 12 and Annex II of the Anti-Dumping Agreement. Brazil's claims, as set out in this submission, regarding the dumping investigation and the imposition of definitive measures are summarized as follows:

- Petitioner's application presented a calculation to adjust normal value in view of alleged physical characteristic differences between poultry sold to Argentina and poultry sold in Brazil. The application did not offer relevant evidence of such differences contrary to the requirement set out in Article 5.2 (**Claim 1**). By accepting petitioner's adjustment calculation, Argentina failed to examine the accuracy and adequacy of the evidence presented in the application pursuant to Article 5.3 (**Claim 2**), and to reject the application as provided in Article 5.8 (**Claim 3**).
- Argentina acted inconsistently with Article 5.3 (**Claim 4**) by establishing export prices based only on export transactions with prices below normal value.
- Petitioner's application presented export price and normal value data for different periods. Specifically, the application presented normal value data for only one day in 1997 (30 June 1997), which cannot be considered relevant evidence to establish normal value pursuant to Article 5.2 (**Claim 5**). By calculating a dumping margin by making a comparison between export price and normal value in respect of sales that were not made at as nearly as possible the same time and by establishing normal value for only one day in 1997, Argentina failed to examine the accuracy and adequacy of the evidence provided in the application as required by Article 5.3 (Claim 6), and to reject the application pursuant to Article 5.8 (Claim 7).
- By comparing different periods of data collected for dumping and injury, Argentina incorrectly examined the evidence provided in the application, violating Article 5.3 (Claim 8).
- Argentina has acted inconsistently with Article 5.7 (Claim 9) by not considering, in the determination whether or not to initiate the investigation, the data collected for dumping simultaneously with the data collected for injury.
- Argentina failed to notify seven Brazilian exporters when it was satisfied that there was sufficient evidence to justify the initiation of the anti-dumping investigation. By not notifying these exporters when the investigation was initiated, Argentina acted inconsistently with Article 12.1 (Claim 10).

- Argentina failed to give the seven Brazilian exporters at least 30 days to reply to the dumping questionnaires provided by the DCD in a prima facie violation of Article 6.1.1 (Claim 11). Moreover, the CNCE never notified these seven exporters and never provided them with the injury questionnaire.
- Argentina also failed to promptly make available to the seven Brazilian exporters evidence presented in writing by the other interested parties involved in the investigation, in violation of Article 6.1.2 (Claim 12).
- By failing to give the seven exporters the required time to respond to the questionnaires and not promptly making available to these exporters the evidence presented in writing by the other interested parties involved in the investigation, Argentina did not give these exporters full opportunity for the defense of their interests as required by Article 6.2 (Claim 13).
- Argentina acted inconsistently with Article 6.1.3 (Claim 14) by not providing the text of the written application to the Brazilian exporters and to the Government of Brazil as soon as the investigation was initiated.
- Argentina acted inconsistently with Article 6.8 and Annex II (Claim 15) by disregarding the responses submitted by Brazilian exporters with respect to the description of the product sold to Argentina and in Brazil, and resorting to the normal value adjustment calculation provided by petitioner in the application.
- Argentina acted inconsistently with Article 12.2.2 (Claim 16) by failing to adequately explain in the final determination its decision to disregard the information provided by the exporters regarding the product description and to use instead the normal value adjustment proposed by petitioner.
- Argentina acted inconsistently with Article 6.8 and Annex II (Claim 17) by disregarding the export price data provided by the Brazilian exporters, and resorting to the export price information provided by the Argentinean agency the Dirección de Ganadería, Secretaría de Agricultura, Ganadería, Pesca y Alimentación (“Ganadería”).
- Argentina acted inconsistently with Article 12.2.2 (Claim 18) by failing to adequately explain in the final determination its decision to disregard the export price data provided by the Brazilian exporters, and to resort to the export price data provided by the Argentinean agency Ganadería.
- Argentina acted inconsistently with Article 6.8 and Annex II (Claim 19) by disregarding all normal value information submitted by two Brazilian exporters, and resorting to the information provided by petitioner.
- Argentina acted inconsistently with Article 12.2.2 (Claim 20) by failing to adequately explain in the final determination its decision to disregard all normal value information submitted by two Brazilian exporters, and to resort to the information provided by petitioner.
- Argentina failed to inform the Brazilian exporters of the essential facts under consideration which formed the basis for the decision whether to apply definitive measures, thereby preventing the Brazilian exporters from adequately defending their interests, contrary to the requirement set forth in Article 6.9 (Claim 21).

- Argentina failed to establish individual margins of dumping for two Brazilian exporters, as required by Article 6.10 (Claim 22).
- Argentina acted inconsistently with Article 2.4 (Claim 23) by not making due allowance for differences in freight in the normal value established for two Brazilian exporters.
- Argentina acted inconsistently with Article 2.4 (Claim 24) by not making due allowance for differences in taxation, freight and financial cost in the normal value established for all other exporters.
- Argentina acted inconsistently with Article 2.4 (Claim 25) by incorrectly making allowances to normal value based on alleged physical characteristic differences between the product sold in Brazil and to Argentina.
- Argentina acted inconsistently with Article 2.4 (Claim 26) by imposing an unreasonable burden of proof on three Brazilian exporters by not determining the dumping period of investigation and, thus, allowing these exporters to submit dumping information for the years 1996 through 1999, when the dumping period of investigation was later determined as from January 1998 through January 1999.
- Argentina acted inconsistently with Article 2.4.2 (Claim 27) by establishing a dumping margin based on an incorrect comparison between the export price and the normal value for two Brazilian exporters. Argentina established normal value based only on internal market transactions for which invoices were presented, instead of determining normal value based on all the reported transactions in the internal market for the period. The DCD established the margins of dumping for these two Brazilian exporters on the basis of a comparison of a weighted average statistical sample of normal value with a weighted average of prices of all comparable export transactions.
- Argentina has acted inconsistently with Article 9.2 (Claim 28) and Article 9.3 (Claim 29) by imposing a variable anti-dumping duty that can exceed the margin of dumping established in the final determination.
- Argentina acted inconsistently with Article 12.2.2 (Claim 30) by failing to provide how the “minimum export price” was established in the determination to impose definitive anti-dumping duties.

4. The injury investigation and the final determination by the CNCE violated Articles 3, 4, 5 and 12 of the Anti-Dumping Agreement. Brazil’s claims, as set out in this submission, regarding the injury investigation and the imposition of definitive measures are summarized as follows:

- Argentina acted inconsistently with Article 5.8 (**Claim 31**) by failing to reject the application and promptly terminate the investigation, as soon as the CNCE determined in Acta No. 405 that there was insufficient evidence of injury or threat of injury to justify the initiation of the investigation.
- By using different periods to evaluate the relevant economic factors and indices listed in Article 3.4, Argentina failed to make a final injury determination based on positive evidence and involving an objective examination as provided for in Article 3.1, 3.4 and 3.5 (**Claim 32**).

- Argentina acted inconsistently with Article 12.2.2 (**Claim 33**) by failing to explain in the final determination why the CNCE examined the relevant economic factors and indices listed in Article 3.4 based on different periods.
- The injury analysis in the final determination did not exclude the imports of two Brazilian exporters, even though the DCD considered that these were not “dumped imports”. By not excluding the imports of these two Brazilian exporters from the “dumped imports”, the CNCE did not properly consider the volume of the “dumped imports”, the effect of the “dumped imports” on prices, and the impact of the “dumped imports” on the domestic industry, as provided for in Articles 3.2 (**Claim 34**) and 3.4 (**Claim 36**). The flawed evaluation of the “dumped imports” indicates that the final injury determination was not based on positive evidence and did not involve an objective examination as required by Article 3.1 (**Claim 35**).
- By not excluding the imports from these two Brazilian exporters from the “dumped imports”, Argentina failed to properly consider injury as prescribed in Article 3.1, and, consequently, did not properly demonstrate the causal link between the “dumped imports” and the injury to the domestic industry as provided for in Article 3.5 (**Claim 37**).
- Argentina acted inconsistently with Articles 3.4 (**Claim 38**) and 3.1 (**Claim 39**) by failing to evaluate all the relevant economic factors and indices listed in Article 3.4.
- Argentina acted inconsistently with Article 12.2.2 (**Claim 40**) by failing to adequately provide and consider in the final determination the evaluation of all relevant economic factors and indices listed in Article 3.4.
- Argentina has acted inconsistently with Article 4.1 (**Claim 41**) by considering that 46 per cent constituted the major proportion of the total domestic production of poultry in Argentina and, thus, qualified as the domestic industry.

5. By determining dumping, injury and causal link inconsistently with the provisions of the Anti-Dumping Agreement, Argentina has acted inconsistently with Article VI of GATT 1994 and Article 1 of the Anti-Dumping Agreement.

6. In light of these violations by Argentina, which Brazil will demonstrate in detail in this submission, Brazil requests that the Panel issue the findings and recommendations set forth in Part IV of this submission.

## **II. PROCEDURAL BACKGROUND FOR DISPUTE SETTLEMENT IN THIS CASE**

7. On 7 November 2001, the Government of Brazil requested consultations with the Government of Argentina pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), Article XXII of GATT 1994, Article 17 of the Anti-Dumping Agreement, and Article 19 of the Agreement on Implementation of Article VII of GATT 1994 (“Agreement on Customs Valuation”), concerning the definitive anti-dumping measures on imports of poultry from Brazil.<sup>1</sup>

8. Consultations were held in Geneva on 10 December 2001. Even though consultations allowed a better understanding of the issue, they did not lead to a mutually agreed solution.

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<sup>1</sup> *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil: Request for Consultations by Brazil*, WT/DS241/1 (12 Nov. 2001).



9. On 25 February 2002, the Government of Brazil requested the establishment of a panel pursuant to Article XXII of GATT 1994, Article 6 of the DSU, and Article 17 of the Anti-Dumping Agreement, and requested that the panel have standard terms as provided for in Article 7 of the DSU.<sup>2</sup>

10. At its 17 April 2002 meeting, the Dispute Settlement Body (“DSB”) established a panel to examine the complaints of the Government of Brazil. The Panel was composed on 27 June 2002.<sup>3</sup>

11. The Panel’s terms of reference, pursuant to Article 7 of the DSU, were set as follows:

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

### III. FACTUAL BACKGROUND

12. On 2 September 1997, the Centro de Empresas Procesadoras Avícolas (“CEPA”)<sup>4</sup> filed an application for an anti-dumping investigation with the Subsecretaria de Comercio Exterior (“SSCE”) alleging that imports of poultry from Brazil were being exported to Argentina at dumped prices and that these imports represented a threat of material injury to the domestic industry.<sup>5</sup> On 23 September 1997, the CNCE issued an opinion regarding the representativeness of the domestic industry and, on 21 October 1997, the SSCE accepted the application presented by CEPA.

13. On 7 January 1998, the Área de Prácticas Comerciales Desleales y Salvaguardias (“APCDS”) concluded in its report regarding the viability of the initiation of the investigation that there was unfair trade practice in the form of dumping into the Argentinean market of poultry from Brazil.<sup>6</sup>

14. On 7 January 1998, the CNCE determined in Acta No. 405 that there was not sufficient evidence of injury or threat of injury to justify the initiation of an investigation. In that determination, the data considered was for the period January 1994 through June 1997, taking into account data for the year 1993 as a reference year.<sup>7</sup>

15. More than one month after the CNCE determined that there was insufficient evidence of injury or threat of injury to justify the initiation of the investigation, CEPA presented on 17 February 1998 new and updated information to Secretaria de Industria Comercio y Minería (“SICM”).<sup>8</sup> On 18 June 1998, the Dirección General de Asuntos Jurídicos (“DGAJ”) sent letter to SSCE stating that the new and updated information presented by CEPA had not been examined when CNCE issued its determination in Acta No. 405 and, thus, DGAJ requested that the CNCE take into account the new information and provide a new determination.<sup>9</sup>

16. On 22 September 1998, the CNCE determined in Acta No. 464 that there was sufficient evidence of threat of injury to justify the initiation of the investigation. The new injury determination

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<sup>2</sup> Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil: Request for the Establishment of a Panel by Brazil, WT/DS241/3 (26 Feb. 2002).

<sup>3</sup> Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil: Constitution of the Panel Established at the Request of Brazil, WT/DS241/4 (5 Jul. 2002).

<sup>4</sup> Throughout this submission CEPA is also referred to as the petitioner.

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

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

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

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

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

considered CEPA's updated information for the period January 1994 through June 1998, taking into account data for the year 1993 as a reference year.<sup>10</sup>

17. On 20 January 1999, the Ministerio de Economía y Obras y Servicios Públicos ("MEOSP") issued Resolution No. 11, a public notice announcing the initiation of the anti-dumping investigation on imports of poultry from Brazil.<sup>11</sup>

18. On 10 February 1999, the CNCE sent letters to the Brazilian exporters Sadia S.A. ("Sadia"), Avipal S.A. Avicultura e Agropecuaria ("Avipal"), Frigorífico Nicolini Ltda. ("Nicolini"), Seara Alimentos S.A. ("Seara"), and Frangosul S.A. Agro Avícola Industrial ("Frangosul") communicating of the initiation of the investigation and requesting that they provide responses to the questionnaires sent by the CNCE, which is separate from the one sent by the SSCE.<sup>12</sup> On 16 February 1999, the SSCE sent letters to the five Brazilian exporters inviting them to participate in a hearing on 25 February 1999 for consultations regarding the initiation of the dumping investigation and for receipt of the questionnaires.<sup>13</sup>

19. On 28 June 1999, the CNCE issued a preliminary affirmative injury determination.<sup>14</sup> On 6 August 1999, the DCD issued a preliminary affirmative dumping determination.<sup>15</sup> On 20 August 1999, the SSCE issued a preliminary affirmative determination on causal link between the alleged dumped imports and the injury caused by these imports on the domestic industry.<sup>16</sup> No provisional measures were imposed.

20. On 15 September 1999, the DCD sent letters to seven Brazilian exporters: Cooperativa Central de Laticínios do Paraná ("CCLP"), Cooperativa Central Oeste Catarinense Ltda. ("Catarinense"),<sup>17</sup> Chapecó Cia. Industrial ("Chapecó"), Cia. Minuano de Alimentos ("Minuano"), Perdigão Agroindustrial ("Perdigão"), Comaves Industria e Comércio de Alimentos Ltda. ("Comaves"), and Pena Branca S.A. ("Pena Branca"),<sup>18</sup> that had not been notified of the investigation, inviting them to provide responses to the questionnaire.<sup>19</sup> In this letter, the DCD established, for the first time, the data collection period of the investigation from January 1998 through January 1999.

21. On 23 December 1999, the CNCE issued a final affirmative injury determination.<sup>20</sup> Six months after the final injury determination was issued, the DCD issued a final affirmative dumping determination on 23 June 2000.<sup>21</sup> On 17 July 2000, the SSCE issued a final affirmative determination of causal link between the alleged dumped imports and the injury caused by these imports on the domestic industry.<sup>22</sup>

22. Based upon the final dumping, injury and causal link determinations, the MEOSP issued Resolution No. 574 of 21 July 2000, imposing definitive dumping measures on imports of poultry

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

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

<sup>12</sup> See, Exhibit BRA-8.

<sup>13</sup> See, Exhibit BRA-9. From the documents of the investigation to which Brazil had access to, Brazil was not able to find the SSCE's notification of 16 February 1999 to the Brazilian exporter Sadia.

<sup>14</sup> See, Exhibit BRA-10.

<sup>15</sup> See, Exhibit BRA-11.

<sup>16</sup> See, Exhibit BRA-12.

<sup>17</sup> Catarinense is also known as Aurora.

<sup>18</sup> From the documents of the investigation to which Brazil had access to, Brazil was not able to find the DCD's notification to the Brazilian exporter Pena Branca.

<sup>19</sup> See, Exhibit BRA-13.

<sup>20</sup> See, Exhibit BRA-14.

<sup>21</sup> See, Exhibit BRA-15.

<sup>22</sup> See, Exhibit BRA-16.

from Brazil for a period of three years.<sup>23</sup> Such measures took the form of specific anti-dumping duties to be collected as the absolute difference between the FOB price invoiced in any one shipment and a designated “minimum export price” also fixed in FOB terms, to be applied whenever the former price is lower than the latter. The “minimum export price” established for each exporter was US\$ 0,92 per kilogram for Sadia, US\$ 0,98 per kilogram for Avipal, and US\$ 0,98 per kilogram for all other exporters. The Brazilian exporters Nicolini and Seara did not have dumping measures applied since they were found not to be exporting poultry at dumped prices. The public notice also set forth the dumping margins found for Sadia (14.91 per cent), Avipal (15.48 per cent) and all other exporters (8.19 per cent)

#### **IV. LEGAL ARGUMENTS**

##### **A. ANTI-DUMPING AGREEMENT STANDARD OF REVIEW**

23. The standard of review to be applied by a Panel in examining disputes arising under the Anti-Dumping Agreement is set forth in Article 17.6 of that Agreement. More specifically, Article 17.6 addresses issues relative to the assessment of facts in an investigation and issues relative to the interpretation of the Anti-Dumping Agreement.

24. With regard to factual issues, Article 17.6(i) provides that:

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

25. Article 17.6(i) addresses the Panel’s assessment of an authority’s establishment and evaluation of the facts. It is a two part standard of review, instructing that the Panel: (1) determine whether the authorities establishment of the facts was proper; and, (2) whether their evaluation of those facts was unbiased and objective.

26. First, to assess whether the facts were properly established involves determining whether the investigating authorities collected relevant and reliable information concerning the issue to be decided. In this particular case, the Panel should first determine whether the Government of Argentina collected, evaluated, and processed facts during the investigation in a manner consistent with the rules provided under the Anti-Dumping Agreement, and, thus, established the facts in a “proper” manner.

27. Second, the Panel should determine whether the Government of Argentina evaluated those facts in an unbiased and objective manner. In this regard, the Panel should consider whether based on the evidence before the Argentinean investigating authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the Argentinean investigating authorities reached on the matter in question. In that context, the Panel should examine whether all the evidence was considered, including facts which might detract from the decision actually reached by the investigating authorities.

28. The Government of Brazil does not ask the Panel to determine whether another conclusion is possible from the facts that were made available to the Argentinean authorities in the underlying investigation. The factual arguments in this case go directly to the Argentinean Government’s improper establishment of the facts and the non-objective and biased evaluation of the facts so as to

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<sup>23</sup> See, Exhibit BRA-17.

favor the interests of the domestic industry in a manner inconsistent with the provisions of the Anti-Dumping Agreement.

29. With regard to issues of interpretation of the Anti-Dumping Agreement, Article 17.6(ii) provides that:

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

30. The first sentence of this provision instructs the Panel to “interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law”. The Appellate Body has repeatedly instructed that Panels are to consider interpretation of the WTO Agreements, including the Anti-Dumping Agreement, in accordance with the principles set out in the Vienna Convention on the Law of Treaties (“Vienna Convention”). Thus, the Panel should first look at the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. The Panel may consider, as supplementary means of interpretation, the preparatory work of the provision, that is, the negotiating history. The Panel should then evaluate whether the Argentinean interpretation is one that is “permissible” in light of the customary rules of interpretation of international law. If that is not the case, the Panel should reject the interpretation, and the challenged action should be considered inconsistent with the Anti-Dumping Agreement.

31. The Government of Brazil contends that the Argentinean measures challenged in this case are not permissible under the interpretative rules of the Vienna Convention. The Government of Argentina has completely ignored certain legal standards or provisions under the Anti-Dumping Agreement, or acted inconsistently with the relevant provisions beyond any permissible legal interpretation. These aspects of Argentinean practice rest upon interpretation of the Anti-Dumping Agreement that do not reflect good faith and cannot be considered as permissible interpretations.

## B. INITIATION OF THE ANTI-DUMPING INVESTIGATION

### 1. Articles 5.2, 5.3, 5.7 and 5.8

32. Ten claims follow from the facts described below and the legal text of the Anti-Dumping Agreement:

**Claim 1:** Petitioner’s application presented a calculation to adjust normal value based on alleged differences in the physical characteristics of poultry sold to Argentina and poultry sold in Brazil. According to petitioner, the poultry sold to Argentina do not include head and feet and the poultry sold in Brazil include head and feet. As a consequence of this difference, petitioner alleged that the yield rate of eviscerated poultry sold to Argentina is 80 per cent of the live poultry and the yield rate of eviscerated poultry sold in Brazil is 88 per cent of the live poultry. Petitioner presented a calculation where 9.09 per cent is to be applied to the normal value to compensate for the difference between the two products.

Violation of Article 5.2 is based on the fact that the application submitted by petitioner offered no evidence to support: (1) that the poultry sold in Brazil was physically different from the product sold to Argentina; (2) that such alleged physical differences affected price comparability; and (3) that the yield rate of poultry sold in Brazil and to Argentina, as alleged by petitioner in the application, was correct.

**Claim 2:** By accepting petitioner's calculation to adjust normal value, which was unsubstantiated by relevant evidence, Argentina failed to examine the accuracy and adequacy of the evidence presented in the application and to determine that there was insufficient evidence to justify the initiation, as required by Article 5.3.

**Claim 3:** Pursuant to claims 1 and 2, Argentina failed to reject the application based on insufficient evidence of dumping to justify proceeding with the case, as provided in Article 5.8.

**Claim 4:** Argentina acted inconsistently with Article 5.3 by establishing export prices based only on export transactions with prices below normal value.

**Claim 5:** Petitioner's application presented export price and normal value data based on different periods. Specifically, the application presented normal value for only one day in the period, 30 June 1997. The export price data presented in the application was for January through May 1997 and August 1997. The fact that the export price and normal value data presented in the application were not for sales made at as nearly as possible the same time and that the normal value presented in the application was for only one day in 1997 cannot be considered sufficient relevant evidence to meet the requirements of Article 5.2.

**Claim 6:** By calculating a dumping margin by making a comparison between export price and normal value in respect of sales that were not made at as nearly as possible the same time and by establishing normal value for only one day in 1997, Argentina failed to examine the accuracy and adequacy of the evidence presented in the application. Thus, Argentina acted inconsistently with Article 5.3 by determining that there was sufficient evidence to justify the initiation of the investigation.

**Claim 7:** Pursuant to claims 5 and 6, Argentina failed to reject the application based on insufficient evidence of dumping to justify proceeding with the case, as provided in Article 5.8.

**Claim 8:** For purposes of initiation, the data collected for the dumping analysis was from January through May 1997 and the data collected for the injury analysis was from January 1994 through June 1998. Argentina incorrectly examined the evidence provided in the application by not examining the additional dumping data submitted by petitioner for the period July 1997 through June 1998, and thus violated Article 5.3.

**Claim 9:** Argentina has acted inconsistently with Article 5.7 by not considering, in the determination whether or not to initiate the investigation, the data collected for dumping simultaneously with the data collected for injury.

**Claim 31:** Argentina acted inconsistently with Article 5.8 by failing to reject the application and promptly terminate the investigation, as soon as the CNCE determined in Acta No. 405 that there was insufficient evidence of material injury or threat of material injury to justify the initiation of the investigation.

(a) Facts

33. On 7 January 1998, the DCD issued a determination to initiate the dumping investigation on imports of poultry from Brazil.<sup>24</sup> In that determination, the DCD established normal value and export price as follows.

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<sup>24</sup> See, Exhibit BRA-2.

*Normal Value*

34. The DCD established normal value according to the information provided by petitioner in the application. Petitioner established normal value based on prices published by the Brazilian company JOX Assessoria Agropecuária S/C Ltda. (“JOX”)<sup>25</sup> on 30 June 1997, for chilled poultry, with head and feet, for the São Paulo wholesale market. The normal value was, thus, established upon prices for only one day in 1997, June 30.<sup>26</sup>

35. The prices published by JOX, and used by Petitioner to establish the normal value were for: (1) fresh poultry sold in the São Paulo distribution market that varied from R\$1,05 to R\$1,12 (average of R\$1,085); (2) fresh poultry sold in the São Paulo wholesale market that varied from R\$1,00 to R\$1,077 (average of R\$1,0385); and, (3) fresh poultry sold in the São Paulo greater wholesale that varied from R\$0,98 to R\$1,00 (average of R\$0,99). The normal value was obtained by the simple average of these prices (R\$ 1,0378), which was converted into US dollars (US\$ 0,957).<sup>27</sup>

36. The table below indicates how the DCD established the normal value:

<b>Product</b>	<b>\$Real</b>	<b>US\$</b>
Fresh Poultry Distribution	1,085	1,00
Fresh Poultry Wholesale	1,0385	0,958
Fresh Poultry Greater Wholesale	0,990	0,913
<b>Average</b>	<b>1,0378</b>	<b>0,957</b>

Source: Page 9 of Exhibit BRA-2.

Adjustment to Normal Value

37. Based on the price above, the DCD made an adjustment to normal value, proposed by petitioner, to account for differences in the physical characteristics of the product sold in Brazil and to Argentina.

38. According to the suggested adjustment, the average weight of the live poultry raised in Brazil is 2.250 kgs. Petitioner alleged, without presenting any evidence, that the yield of the product in Brazil is 88 per cent and, therefore, out of 1 kg of live poultry 880 gm of eviscerated poultry is obtained, with giblets (heart, stomach, neck and liver), and with head and feet. Petitioner also alleged that the yield of the product sold to Argentina differs from the yield obtained in Brazil. In Argentina the yield of the product is 80 per cent, considering that head and feet are discarded. Petitioner’s conclusion was that out of a live poultry weighing 2.250 kgs, for every 1kg, 800 gm of eviscerated poultry is obtained that can actually be sold in the Argentinean market. According to petitioner, the yield rate difference occurs because poultry is sold to Argentina without head and feet while poultry is sold in Brazil with head and feet.<sup>28</sup>

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<sup>25</sup> JOX is a privately owned firm dedicated to providing support market information to the farming industry. JOX produces reports that follow the behaviour of the following markets: eggs, poultry, swine, bovine meat, soybean, and corn. The Brazilian Government and the Brazilian exporters subject to the investigation at issue have no association or participation in JOX.

<sup>26</sup> See, Pages 7 and 8 of Exhibit BRA -2.

<sup>27</sup> See, Page 9 of Exhibit BRA-2.

<sup>28</sup> See, Page 9 of Exhibit BRA-2.

39. Petitioner presented the following adjustment based on this allegation:

Weight of Live Poultry	Yield in Brazil	Eviscerated Poultry sold in Brazil	Yield in Argentina	Eviscerated Poultry Sold in Argentina	Difference
(A)	(B)	(C)=(A) x (B)	(D)	(E)=(A) x (D)	(F) = (C) - (E)
2.250 Kg	88%	1.980 Kg	80%	1.800 Kg	0.180 Kg

Source: Page 9 of Exhibit BRA-2.

40. Petitioner alleged that this yield difference represents 9.09 per cent less poultry that can be sold to Argentina and, therefore, an equivalent adjustment must be made to the normal value price.<sup>29</sup>

41. Petitioner's calculation, which was accepted and used by the DCD, was the following:

Difference in Yield	Eviscerated Poultry in Brazil	Adjustment
(A)	(B)	(C) = (A) ÷ (B) x 100
0.180 Kg	1.980 Kg	9.09%

Source: Page 9 of Exhibit BRA-2.

42. In order to compare the prices of poultry sold in Brazil (normal value) with the prices of poultry sold to Argentina (export price), the DCD would have to add 9.09 per cent to the price of poultry sold in Brazil to compensate for the fact that poultry in Argentina is sold without head and feet, while poultry in Brazil is sold with head and feet. Petitioner presented no evidence to support this allegation.

43. Based on the proposed adjustment calculation, the DCD established a normal value of US\$1.044 per kilogram according to the calculation below.

Normal Value of Poultry US\$/kg	Adjustment	Adjustment to Normal Value of Poultry US\$/kg	Adjusted Normal Value of Poultry US\$/kg
(A)	(B)	(C) = (A) x (B)	(D) = (A) + (C)
0.957	9.09%	0.087	1.044

Source: Page 9 of Exhibit BRA-2.

#### *Export Price*

44. The DCD established the export price of the subject merchandise sold in Argentina based on data offered by petitioner for the period of January through May 1997 and August 1997.<sup>30</sup> The source for the export price information submitted by CEPA came from Sysdec and was exclusively for frozen poultry sold in Argentina, under Mercosul tariff line 0207.12.00,<sup>31</sup> as shown in the table below:

<sup>29</sup> See, Page 9 of Exhibit BRA-2.

<sup>30</sup> See, Page 10 of Exhibit BRA-2.

<sup>31</sup> See, Exhibit BRA-1.

Period	Volume of Imports – Ton	Value of Imports – US\$	Average US\$/Ton
January 1997	1,688.01	1,856,202.30	1,099.64
February 1997	1,351.76	1,420,448.69	1,050.81
March 1997	2,091.13	2,220,081.50	1,061.67
April 1997	859.22	862,237.89	1,003.51
May 1997	40.00	40,600.00	1,015.00
Subtotal	6,030.12	6,399,570.38	1,061.27
August 1997	2,847.14	2,608,635.66	916.23
<b>Total</b>	<b>8,877.26</b>	<b>9,008,206.04</b>	<b>1,014.75</b>

Source: Page 10 of Exhibit BRA-2.

45. Out of the information presented by petitioner, the DCD considered that a significant portion of the imports of poultry from Brazil were entering at dumped prices, that is, at prices lower than the price of eviscerated poultry sold in the domestic market of Brazil (normal value).<sup>32</sup>

46. The DCD considered that these export prices, below normal value, represented 34.24 per cent of the total volume of imports from January through May 1997 and 28.86 per cent of the total value for the same period.<sup>33</sup>

47. Without justification, the DCD presented a table indicating the export price for the period January through May 1997 for transactions for which the price was below the established normal value.<sup>34</sup>

Period	Volume – Tons	Value – US\$	Weighted Average US\$/Ton
January 1997	414.37	369,244.86	891.10
February 1997	376.99	307,233.77	814.97
March 1997	495.43	406,077.69	819.65
April 1997	738.21	723,892.40	980.60
May 1997	40.00	40,600.00	1,015.00
<b>Total</b>	<b>2,065.00</b>	<b>1,847,048.72</b>	<b>894.45</b>

Source: Page 11 of Exhibit BRA-2.

48. In the determination, the DCD explained that of the export prices presented for the month of August 1997, 97.97 per cent came into Argentina at prices below the normal value average.<sup>35</sup>

49. By adding the export transactions below normal value in the month of August 1997 to the imports of poultry below normal value for the period January through May 1997, the DCD concluded that 54.68 per cent of the volume (4,854.24 tons) and 48.74 per cent of the value (US\$ 4,390,836.38) of imports of poultry from Brazil were coming in at dumped prices.<sup>36</sup>

<sup>32</sup> See, Page 10 of Exhibit BRA-2.

<sup>33</sup> See, Page 10 of Exhibit BRA-2.

<sup>34</sup> See, Page 11 of Exhibit BRA-2.

<sup>35</sup> See, Page 11 of Exhibit BRA-2.

<sup>36</sup> See, Page 11 of Exhibit BRA-2.



Period	Tons	Portion of Total Imports	US\$	Portion of Total Imports	Weighted Average US\$/Ton
	(A)		(B)		(C)=(B) ÷ (A)
Jan-May & Aug 1997	4,854.24	54.68%	4,390,836.38	48.74%	904.54

Source: Page 11 of Exhibit BRA-2.

50. The DCD also used data provided by the Argentinean agency Delegación II – Unidad Informatica (“DUI”) of the SSCE to establish the export price. The data provided by that agency was for the period of August through October 1996.<sup>37</sup>

51. Once again, the DCD considered that a significant portion of the imports for that period were entering at dumped prices, that is, at prices lower than the price of eviscerated poultry sold in the domestic market of Brazil (normal value).<sup>38</sup>

52. According to the DCD, 26.62 per cent of the volume and 23.47 per cent of the value of eviscerated poultry imported from Brazil during the period of August through October 1996 was at dumped prices.<sup>39</sup>

Period	Tons	Portion of Total Imports	US\$	Portion of Total Imports	Weighted Average US\$/Ton
Aug-Oct 1996	1,207.915	26.62%	1,162,809.10	23.47%	962.66

Source: Page 12 of Exhibit BRA-2.

#### *Dumping Margin*

53. Based on the normal value presented by petitioner and the export price presented by petitioner and by the DUI, the DCD calculated two dumping margins.

54. The first margin considered the normal value as the price of chilled poultry, with head and feet, sold in the São Paulo wholesale market on 30 June 1997. The aforementioned adjustment calculation, to account for the allegation that all poultry in Brazil was sold with head and feet, was made to this normal value. This margin considered export prices to be the prices of imports below normal value of frozen poultry from Brazil for the period of August through October 1996.<sup>40</sup>

Normal Value US\$/Kg	Average FOB Price US\$/Kg	Dumping Margin
(A)	(B)	(C)=(A) ÷ (B)
1.044	0.9627	8.45%

Source: Page 12 of Exhibit BRA-2.

55. The second margin considered normal value to be the price of chilled poultry, with head and feet, sold in the São Paulo wholesale market on 30 June 1997. Again, the aforementioned adjustment calculation, to account for the allegation that all poultry in Brazil was sold with head and feet, was made to this normal value. For the second margin, the DCD established the export price as the price

<sup>37</sup> See, Pages 11 and 12 of Exhibit BRA-2.

<sup>38</sup> See, Page 11 of Exhibit BRA-2.

<sup>39</sup> See, Pages 11 and 12 of Exhibit BRA-2.

<sup>40</sup> See, Page 12 of Exhibit BRA-2.

of imports below normal value of frozen poultry from Brazil for the period of January through May 1997 and August 1997.<sup>41</sup>

<b>Normal Value US\$/Kg</b>	<b>Average FOB Price US\$/Kg</b>	<b>Dumping Margin</b>
(A)	(B)	(C)=(A) - (B)
1.044	0.904536	15.42%

Source: Page 12 of Exhibit BRA-2.

56. The determination to initiate the dumping investigation further provided other margin calculations, without explanation or purpose. One considered the lowest FOB export price in January 1997, as presented by petitioner, and the normal value established for 30 June 1997, as indicated above.<sup>42</sup> The other, considered the lowest FOB export price in the months of August and September 1996, as presented by the DUI, and the normal value established for 30 June 1997.<sup>43</sup>

<b>Normal Value US\$/Kg</b>	<b>Lowest FOB Price in Jan. 1997 US\$/Kg</b>	<b>Dumping Margin</b>
(A)	(B)	(C)=(A) - (B)
1.044	0.76512	36.45%

Source: Page 13 of Exhibit BRA-2.

<b>Normal Value US\$/Kg</b>	<b>Lowest FOB Price in Aug/Sept 1996 US\$/Kg</b>	<b>Dumping Margin</b>
(A)	(B)	(C)=(A) - (B)
1.044	0.880	18.64%

Source: Page 13 of Exhibit BRA-2.

### *Injury*

57. On 7 January 1998, the CNCE determined in Acta No. 405 that there was not sufficient evidence of injury or threat of injury to justify the initiation of an investigation.<sup>44</sup> The data collection period for the injury analysis was from January 1994 through June 1997, taking into account data for the year 1993 as a reference year.<sup>45</sup>

58. On 17 February 1998, more than one month after the CNCE determined that there was insufficient evidence of injury or threat of injury to justify the initiation of an investigation, CEPA presented new and updated injury information to SICM.<sup>46</sup> On 18 June 1998, the DGAJ sent a letter addressed to the SSCE stating that the new and updated information presented by CEPA had not been examined at the time the CNCE issued its determination in Acta No. 405. The DGAJ requested and directed the CNCE to take into account the new information and to provide a new determination.<sup>47</sup>

59. On 15 July 1998, the SSCE sent a letter addressed to the CNCE for the agency to examine and make a determination based on the new information presented by CEPA.<sup>48</sup> On 24 July 1998, the CNCE requested update of the information presented on February 17 1998, setting a deadline to

<sup>41</sup> See, Page 12 of Exhibit BRA-2.

<sup>42</sup> See, Pages 12 and 13 of Exhibit BRA-2.

<sup>43</sup> See, Page 13 of Exhibit BRA-2.

<sup>44</sup> See, Page 9 of Exhibit BRA-3.

<sup>45</sup> See, Page 5 of Exhibit BRA-3.

<sup>46</sup> See, Exhibit BRA-4.

<sup>47</sup> See, Exhibit BRA-5.

<sup>48</sup> See, Exhibit BRA-18.

submit the updated information by 10 August 1998.<sup>49</sup> On 14 August 1998, the CNCE sent a letter to CEPA granting an extension to present the requested information until 20 August 1998.<sup>50</sup> On 26 August 1998, the CNCE sent another letter to CEPA setting 2 September 1998 as the new deadline to present the information requested on their 24 July 1998 letter.<sup>51</sup> On 1 September 1998, CEPA presented the information requested by the CNCE.

60. On 22 September 1998, the CNCE determined in Acta No. 464 that there was sufficient evidence of threat of injury to justify the initiation of the investigation.<sup>52</sup> The data collection period for the new injury analysis was from January 1994 through June 1998, taking into account data for the year 1993 as a reference year.<sup>53</sup>

(i) ***Claim 1: Inconsistency with Article 5.2 of the Anti-Dumping Agreement***

***Text of Article 5.2***

61. Article 5.2 governs the contents of an application for initiation of an anti-dumping investigation. The subsequent paragraphs of Article 5.2 list certain specific information regarding a series of factors, which must be included in the application. The text of Article 5.2 of the Anti-Dumping Agreement provides in part that:

“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) 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:

(...)

(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.”

***Legal Argument Relative to Claim 1***

62. The chapeau of Article 5.2 requires that an application must include “evidence” of dumping, injury, and the causal relationship between the two.

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<sup>49</sup> See, Exhibit BRA-18.

<sup>50</sup> See, Exhibit BRA-18.

<sup>51</sup> See, Exhibit BRA-18.

<sup>52</sup> See, Exhibit BRA-6.

<sup>53</sup> See, Page 8 of the “Actualización Informe Técnico Previo a la Apertura” in Exhibit BRA-6.

63. In order to evaluate what kind of information is considered as “evidence”, which must be included in an application to initiate an investigation, we turn to the ordinary meaning of the term “evidence”. “Evidence” is defined as “the available facts, circumstances, etc. supporting or otherwise a belief, proposition, etc., or indicating whether or not a thing is true or valid”.<sup>54</sup> More specifically, in a legal context, “evidence” is the “information given personally or drawn from a document etc. and tending to prove a fact or a proposition”.<sup>55</sup>

64. From the above interpretation of the term, Brazil understands that an allegation or information provided in the application, without supporting documentation, does not qualify as “evidence”. Our understanding comes from the language in Article 5.2 that further qualifies the type of information that is needed in an application. Article 5.2 provides that “simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph”.

65. Thus, an assertion or allegation made by petitioner in the application does not meet the requirement in Article 5.2 for a viable application. A proposition or allegation made by petitioner in an application must be accompanied by supporting documentation or information in order to qualify as “evidence”. More specifically, Brazil believes that information drawn from a document tending to prove a fact or proposition is the type of information required in an application.

66. With respect to the dumping evidence, the application must include “evidence” 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.

67. In the instant case, the application offered no “evidence” to support: (1) that the poultry sold in Brazil was physically different from the poultry sold to Argentina; (2) that the alleged physical characteristic differences affect price comparability; and, (3) the alleged yield rate difference presented by petitioner between the poultry sold in Brazil and to Argentina.

68. In the application, petitioner alleged that the poultry sold in Brazil is physically different from the poultry sold to Argentina. To support this allegation, petitioner attached a report by the Brazilian company JOX, where prices of a kilogram of chilled poultry in São Paulo could be identified. Petitioner further stated that these prices were in Real (Brazilian currency), occurred in three alternatives, and corresponded to prices of “poultry with feet, head and giblets”, according to the fax provided by JOX and attached to the application.<sup>56</sup> Then, petitioner affirmed that this difference obligated a calculation to homogenize the comparisons between the prices of poultry sold to Argentina and in Brazil and attached an adjustment calculation.

69. The JOX price report was for chilled poultry sold in São Paulo for 30 June 1997. The fax provided by JOX contained the following explanation regarding its published price of poultry:

“Pursuant to your letter of 30 July 1997, we inform you that the poultry quotations in our report refer to chilled poultry with head, feet and giblets.”<sup>57</sup>

70. The information provided by JOX referred exclusively to prices of chilled poultry, sold in São Paulo, with head, feet and giblets, for one day in 1997. This information did not provide or affirm that all poultry sold in Brazil contain head and feet. It simply stated that the prices published by JOX are for chilled poultry with head and feet. Petitioner did not demonstrate or provide evidence that all poultry sold in Brazil contains head, feet and giblets. Thus, the application did not include

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<sup>54</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 467.

<sup>55</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 467.

<sup>56</sup> See, Exhibit BRA-1.

<sup>57</sup> See, Exhibit BRA-1.

information or evidence of prices at which the product in question is sold when destined for consumption in Brazil.

71. In fact, JOX price publication referred only to chilled poultry and not to frozen poultry. The normal value information provided by petitioner in the application was for chilled poultry, while the information provided in the application to establish export price was for frozen poultry. Petitioner provided no explanation or evidence that frozen poultry was not sold in Brazil and that, thus, the prices for chilled poultry were the correct prices to be used in the establishment of normal value and in the fair comparison analysis. It is clear that the normal value information provided in the application lacked evidence as to the prices of frozen poultry in Brazil.

72. Furthermore and in accordance with petitioner's reasoning for the adjustment calculation, petitioner should have also suggested, and the investigating authority should have considered, an adjustment to compensate for the fact that the price of poultry used to establish normal value was different (chilled poultry) from the price of poultry used to establish the export price (frozen poultry). No such adjustment was presented and the investigating authority did not inquire about such differences.

73. Moreover, JOX price publication and its explanation of the prices published in its report did not mention whether poultry sold with and poultry sold without head and feet present price differences. No "evidence" was presented by petitioner to support that the alleged physical characteristic difference affects price comparability and, therefore, would warrant an adjustment in the price of poultry in Brazil (normal value). In the application, petitioner made a simple assertion, unsubstantiated by any "evidence", that the alleged physical characteristic differences affect price comparability and that the normal value should, thus, be adjusted.

74. Furthermore, petitioner attached an adjustment calculation to compensate for differences in the physical characteristics of the poultry sold to Argentina and in Brazil, which assumed that the yield rate of the eviscerated poultry sold in Brazil was 88 per cent of the live poultry and that the yield rate of the eviscerated poultry sold to Argentina was 80 per cent of the live poultry. Petitioner based its adjustment calculation on these figures without producing any "evidence" to support the alleged yield rate differences.

***(ii) Claim 2: Inconsistency with Article 5.3 of the Anti-Dumping Agreement***

***Text of Article 5.3***

75. Article 5.3 of the Anti-Dumping Agreement imposes an obligation on the investigating authority in initiating the investigation. Article 5.3 provides that:

"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"

***Legal Argument Relative to Claim 2***

76. Based on Article 5.3, the investigating authorities must examine the accuracy and adequacy of the evidence provided in the application to determine whether that evidence is sufficient to justify the initiation of an investigation.

77. As mentioned above, the information provided by JOX referred exclusively to prices of chilled poultry, sold in São Paulo, with head, feet and giblets, for one day in 1997. Petitioner used this information as evidence to establish normal value, as if this information represented the overall price of poultry sold in Brazil. The information in the JOX price publication did not provide or affirm

that all poultry sold in Brazil contains head, feet and giblets. Thus, the evidence presented did not correspond to prices at which the product in question was sold when destined for consumption in Brazil. Brazil considers that the price information provided by JOX was not sufficient evidence to make an adjustment to the price of poultry in Brazil and, thus, was not sufficient to justify the initiation of the investigation.

78. With respect to what constitutes “sufficient evidence” to justify the initiation of an anti-dumping investigation, Brazil agrees with the standard set by the Panel in *Mexico – HFCS*:

“With respect to the question of whether the evidence may be deemed sufficient under the AD Agreement for purposes of initiation, we note the findings of the Panel in *Guatemala – Cement*, which took into account the reasoning of the Panel in *United States – Softwood Lumber*. We recognize that, because the Appellate Body reversed the *Guatemala – Cement* Panel’s conclusion on the issue of whether the dispute was properly before it, that Panel’s conclusions in this regard have no legal status. However, the Panel’s report sets out a standard that we consider instructive in this case:

“7.54. What constitutes “sufficient evidence” to justify the initiation of an anti-dumping investigation is not defined in the ADP Agreement. In this case, of course, we are bound by the requirements of Article 17.6(i) of the ADP Agreement as the standard of review applicable to our examination of the Ministry’s decision to initiate. Article 17.6(i) provides:

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

7.55 The Panel in *United States – Measures Affecting Imports of Softwood Lumber From Canada* considered much the same questions as faces us here in a dispute challenging the self-initiation of a countervailing duty investigation, on the basis, inter alia, of allegedly insufficient evidence to warrant initiation. The Panel observed:

“In analyzing 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. At the same time, it appeared to the Panel that “sufficient evidence” clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just “any evidence”. In particular, there had to be factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required elements

of subsidy, subsidized imports, injury and causal link between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements."<sup>58</sup>

79. Even though the quantum and quality of evidence to be required of an investigating authority for purposes of initiating an investigation is less than that required of that authority to make a preliminary or final determination, the "sufficient evidence" needed to justify the initiation of an investigation has to be more than mere allegation.

80. In the present case, petitioner tried to make the explanation presented by JOX, that the price published in its report for chilled poultry with head and feet, into evidence that all poultry sold in Brazil is chilled and includes head and feet. The investigating authority incorrectly accepted the explanation provided by JOX as evidence that all poultry sold in Brazil is chilled and contains head and feet.

81. Petitioner also alleged that it was necessary to compensate this difference in physical characteristic and assumed such differences affect price comparability. The investigating authority accepted petitioner's allegation as true, even though no evidence was presented to support that the alleged physical differences affect price comparability.

82. From the allegation that the physical differences affect price comparability, petitioner presented a calculation to adjust normal value based on differences in yield rate of eviscerated poultry sold in those markets. Petitioner alleged that the yield rate of eviscerated poultry sold in Brazil is 88 per cent of the live poultry and that the yield rate of eviscerated poultry sold to Argentina is 80 per cent of the live poultry. The investigating authority accepted petitioner's calculation even though no evidence was presented to support these yield rates.

83. In the instant case, Brazil does not request that the Panel evaluate anew the evidence and information before the investigating authorities at the time it decided to initiate. Rather, we agree with the Panel in *Guatemala – Cement I* that the Panel is to:

"(...) examine whether the evidence relied on by the Ministry was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify the initiation of an investigation."<sup>59</sup> (emphasis added)

84. In this case, the insufficient evidence presented or the lack of evidence thereof indicates that an unbiased and objective investigating authority would have found that petitioner's allegations in the application were not supported by sufficient evidence to justify the initiation of an investigation.

85. The Panel in *Guatemala – Cement I* further stated that:

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<sup>58</sup> Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, 28 January 2000, WT/DS132/R, at para. 7.94 (adopted on 21 November 2001) ("*Mexico – HFCS*"). The Panel's findings on the Claim related to Article 5.3 were not appealed.

<sup>59</sup> *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, 19 June 1998, WT/DS60/R, at para. 7.57 (adopted on 25 November 1998) ("*Guatemala – Cement I*"). The Appellate Body reversed the Panel's conclusion in *Guatemala – Cement I* on the issue of whether the dispute was properly before it. *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, 2 November 1998, WT/DS60/AB/R, at para. 90 (adopted on 25 November 1998) ("*AB – Guatemala – Cement I*").

“In our view, in assessing whether there is sufficient evidence of dumping to justify the initiation, an investigating authority may not ignore the provisions of Article 2 of the ADP Agreement. Article 5.2 of the Agreement requires an application to include sufficient evidence of “dumping” and Article 5.3 requires a determination that there is “sufficient” evidence to justify the initiation. Article 2 of the ADP Agreement sets forth the technical elements of a calculation of dumping, including the requirements for determining normal value, export price, and adjustments required for a fair comparison. In our view, the reference in Article 5.2 to “dumping” must be read as a reference to dumping as it is defined in Article 2. This does not, of course, mean that the evidence provided in the application must be of the quantity and quality that would be necessary to make a preliminary or final determination of dumping. However, evidence of the relevant **type** is, in our view, required in a case such as this one where it is obvious on the face of the application that normal value and export price alleged in the application will require adjustments in order to effectuate a fair comparison. At a minimum, there should be some recognition that a fair comparison will require such adjustments”<sup>60</sup> (emphasis added by the Panel)

86. In order for the DCD to have accepted that an adjustment to normal value was warranted, it should have required that relevant evidence of the type of poultry sold in Brazil and to Argentina be presented in the application. In that respect, we again cite the Panel in *Guatemala – Cement I*:

“(…)The subject matter, or **type**, of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of dumping, although the quality and quantity is less. (...)”<sup>61</sup> (emphasis added by the Panel)

87. In the instant case, the JOX publication for prices of chilled poultry sold in São Paulo with head, feet and giblets for 30 June 1997 was not representative of normal value prices of frozen poultry sold in Brazil and, thus, did not qualify as the type of evidence needed to justify the initiation of an investigation. Furthermore, petitioner presented no evidence to support that the normal value price of poultry in Brazil was different from the export price of Brazilian poultry sold to Argentina. Petitioner’s proposed adjustment to normal value price took into account a yield rate for eviscerated poultry sold in those markets that was not supported by any evidence. Based on these facts, Argentinean authorities failed to examine the accuracy and adequacy of the evidence provided in the application when they decided that there was sufficient evidence of normal value in the application to justify the initiation of an investigation.

88. In that sense, the Panel in *Guatemala – Cement II* provided an appropriate conclusion as to the imposition of Article 5.3 on investigating authorities:

“We would like to emphasize that we do not expect investigating authorities at the initiation phase to ferret out all possible differences that might affect the comparability of prices in an application or perform or request complex adjustments to them. We do however expect that, when from the face of an application it is obvious that there are substantial questions of comparability between the export and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those

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<sup>60</sup> *Guatemala – Cement I*, at para. 7.64.

<sup>61</sup> *Guatemala – Cement I*, at para. 7.77.



differences on the sufficiency of the evidence of dumping or seek such further evidence as might be necessary to do so.”<sup>62</sup> (emphasis added)

89. In the present case, the investigating authority neither gave consideration as to the impact of the possible differences on the sufficiency of the evidence presented nor did it seek further evidence as it clearly was necessary to do so.

90. Furthermore, Article 5.3 requires that the investigating authority examine the accuracy and adequacy of the evidence that is, in fact, provided in the application. In the present case, no evidence was presented by petitioner to support the allegation: (1) that the alleged physical characteristic differences between the poultry sold to Argentina (without head and feet) and the poultry sold in Brazil (with head and feet) affect price comparability that would warrant an adjustment in the price of poultry in Brazil (normal value); and, (2) that the yield rate presented by petitioner and used to calculate the adjustment to normal value was accurate.

**(iii) Claim 3: Inconsistency with Article 5.8 of the Anti-Dumping Agreement**

***Text of Article 5.8***

91. The relevant part of Article 5.8 of the Anti-Dumping Agreement sets forth 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 (...)”

***Legal Argument Relative to Claim 3***

92. As stated under the legal arguments relative to claims 1 and 2, petitioner offered no substantial evidence in the application to support the allegation: (1) that there exists physical characteristic differences between the poultry sold to Argentina and the poultry sold in Brazil; (2) that the alleged physical characteristic differences affect price comparability; and, (3) that the yield rate difference alleged by petitioner to calculate the adjustment to normal value was accurate.

93. Petitioner based its allegation on the prices published by the Brazilian company JOX for chilled poultry, with head and feet, sold in the São Paulo wholesale market. The DCD accepted petitioner’s alleged adjustment to normal value without examining the adequacy and accuracy of the evidence presented in the application. In fact, the investigating authority accepted petitioner’s suggested calculation to normal value even though no evidence was presented to support the allegation that the physical differences between the product sold in Brazil and to Argentina affect price comparability and that the yield rate proposed by the petitioner and used in the adjustment calculation was accurate.

94. Pursuant to claims 1 and 2, by not having rejected the application due to insufficient evidence to justify proceeding with the case, Argentina has violated Article 5.8 of the Anti-Dumping Agreement.

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<sup>62</sup> *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, 24 October 2000, WT/DS156/R, at para. 8.40 (adopted on 17 November 2000) (“*Guatemala – Cement II*”).

(iv) *Claim 4: Inconsistency with Article 5.3 of the Anti-Dumping Agreement*

*Text of Article 5.3*

95. Article 5.3 of the Anti-Dumping Agreement provides that:

“The authorities shall examine the accuracy and adequacy of the evidence presented in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.”

*Legal Argument Relative to Claim 4*

96. In the determination to initiate the dumping investigation, the DCD calculated export price from the data offered by petitioner for the period of January through May 1997 and August 1997 and the data provided by the DUI for the period of August through October 1996.

97. From that data, the DCD considered that a significant portion of the imports of poultry from Brazil were entering at dumped prices, that is, at prices lower than the price of eviscerated poultry in the domestic market of Brazil (normal value). Without justification, the DCD excluded the export prices for the import transactions, which were above the normal value and established the export price for purposes of initiation based only on the transactions, which were below the normal value.

98. By doing so, the DCD incorrectly established the export price and, consequently, made a skewed comparison of the export price with the normal value, in establishing the margin of dumping.

99. According to Article 5.3, authorities must consider, based on the evidence presented in the application, whether there is sufficient evidence that indicates the existence of dumping and injury to the domestic industry that would justify the initiation of an investigation. Thus, to determine whether there is an indication of dumping and injury, authorities must base their determination on the evidence presented in the application.

100. By selecting certain export transactions from the total export transactions presented by petitioner in the application, authorities failed to examine the accuracy and adequacy of all the evidence that was presented in the application, pursuant to Article 5.3 of the Anti-Dumping Agreement.

101. Article 5.3 specifically requires the investigating authority to examine the “accuracy and adequacy of the evidence presented in the application...”. In this claim, Brazil does not argue that Argentina failed to “examine” evidence outside the scope of the application. What is argued here is that Argentina was obligated, consistent with the Agreement, to base its determination on its assessment of the facts of the matter which were before it.

102. Furthermore, Article 5.3 requires authorities to examine the accuracy and adequacy of the evidence in the application in order to determine whether there is sufficient evidence of dumping, injury and causal link to justify the initiation of an investigation. Examination of the dumping evidence, as provided in Article 5.3, introduces the concept of “dumping” as defined in Article 2 of the Anti-Dumping Agreement.

103. In particular, Article 2.4 establishes how a fair comparison between export price and normal value is made and Article 2.4.2 provides for how margins of dumping must be established. Article 2.4.2 states in part that:

“(...) the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal

value with a weighted average of prices of all comparable export transactions (...)”  
(emphasis added)

104. Under this method, authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions, and not only those export transactions for which prices are below the normal value.

105. By excluding the export transactions, for which prices were at or above the normal value price, in determining whether there was sufficient evidence of dumping, the investigating authority adopted a method that would always result in a dumping margin. This method adopted by the Argentinean authorities resulted in the establishment of an incorrect export price and in an unfair comparison between the export price and the normal value, contrary to the requirements in Articles 2.4 and 2.4.2.

106. Our understanding of Article 2.4.2 comes from the following reasoning by the Appellate Body in *AB - EC – Bed Linen*:

“(…) Here, we emphasize that Article 2.4.2 speaks of “all” comparable export transactions. As explained above, when “zeroing”, the European Communities counted as zero the “dumping margins” for those models where the “dumping margin” was “negative”. As the Panel correctly noted, for those models, the European Communities counted “the weighted average export price to be equal to the weighted average normal value ... despite the fact that it was, in reality, higher than the weighted average normal value.” By “zeroing” the “negative dumping margins”, the European Communities, therefore, did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where “the negative dumping margins” were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did not establish “the existence of margins of dumping” for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions – that is, for all transactions involving all models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is not a “fair comparison” between export price and normal value, as required by Article 2.4 and Article 2.4.2.”<sup>63</sup>  
(emphasis added)

107. Similar to what happened in that case, here the Argentinean authorities, by excluding the export prices that were at or above the normal value, did not fully take into account the entirety of the prices of the export transactions and treated the excluded transactions as if they were less than what they really were. This method not only inflated the dumping margin but also disregarded the evidence presented in the application.

108. Argentina’s decision to initiate the investigation pursuant to this method was based on a biased and non-objective evaluation of the facts before it, inconsistent with the standard in Article 17.6(i) of the Anti-Dumping Agreement.

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<sup>63</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, 1 March 2001, WT/DS141/AB/R, at para. 55 (adopted on 12 March 2001) (“*AB – EC – Bed Linen*”).

109. Because the method adopted by the Argentinean authorities in the establishment of the export price, the comparison between export price and normal value and in the establishment of a dumping margin did not fully take into account the prices of all the comparable export transactions reported in the application, Argentina violated Article 5.3 of the Anti-Dumping Agreement.

(v) ***Claim 5: Inconsistency with Article 5.2 of the Anti-Dumping Agreement***

***Text of Article 5.2***

110. Pertinent language of Article 5.2 provides that:

“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) 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: (...)”

***Legal Argument Relative to Claim 5***

111. Petitioner presented in the application data with different periods for export price and normal value. Normal value was based on the price of chilled poultry, with head and feet, sold in the São Paulo wholesale market for only one day in 1997, June 30. Export price was based on the export price data from Sysdec statistics for the period January through May 1997 and August 1997. The data presented by petitioner in the application, and used to calculate a dumping margin, was inconsistent with Article 5.2 in at least two different ways.

112. First, because the normal value and export price information provided were for transactions which were not made at as nearly as possible the same time, the application failed to include sufficient evidence of “dumping” as required in Article 5.2.

113. Article 5.2 of the Anti-Dumping Agreement requires an application to include sufficient evidence of “dumping”. The reference in Article 5.2 to “dumping” introduces the concept of “dumping” as defined in Article 2 of the Anti-Dumping Agreement. Article 2 is the provision that sets forth the technical elements of a calculation of dumping, including the requirements for determining normal value, export price, and adjustments required for a fair comparison. Article 2.1 of the Anti-Dumping Agreement provides the following definition of the term “dumping”:

“For the purposes 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 destined for the consumption in the exporting country”. (emphasis added)

114. The succeeding provisions in Article 2 set forth, in detail, information and methodologies to be used in the determination of whether “dumping” exists. In particular, Article 2.4 of the Anti-Dumping Agreement sets out how a fair comparison between normal value and export price is to be made. The *chapeau* of Article 2.4 provides in part that:

“A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. (...)” (emphasis added)

115. Article 2.4 requires that a fair comparison be made “in respect of sales made at as nearly as possible the same time.” From the language in Article 2.4 , it is clear that the timing of the sales transactions may have implications in respect of the comparability of prices of export and home market transactions.

116. In the instant case, the normal value presented in the application was for only one day in 1997 (June 30), while the export price data presented covered the prices of export transactions for a period of six months in 1997 (January through May 1997 and August 1997). The establishment of normal value based on one single day (30 June 1997) cannot be used as parameter for a fair comparison with the export price determined for two periods of time with more than 30-days each (one for January through May 1997 and the other for August 1997), none of which included the one day used to establish the normal value.

117. Because prices can vary for a certain period, a comparison between an average of the export prices for a much longer period with only one price for normal value cannot be considered a fair comparison. According to Article 2.4, for a fair comparison to occur and for “dumping” to be established, export price and normal value have to be compared “in respect of sales made at as nearly as possible the same time”. In order to have complied with the “dumping” evidence requirement in Article 5.2, petitioner should have presented normal value information for an equivalent period of time as that presented for the export price data.

118. Furthermore, Article 2.4.2 of the Anti-Dumping Agreement provides the basis of comparison between normal value and export price in establishing the existence of “dumping” margins. Relevant part of Article 2.4.2 states that:

“(…) the existence of margins of dumping (…) shall normally be established on the basis of a comparison of a weighted average normal value with a weighed average of prices of all comparable export transactions or by comparison of the normal value and export prices on a transaction-to-transaction basis”. (emphasis added)

119. In order to understand the meaning of Article 2.4.2, the term “comparable” has to be defined. According to plain text interpretation, “comparable” means to “be able to be compared”, “fit to be compared” or “worth comparing”.<sup>64</sup> The term “compare” is defined as to “express similarities in”, “estimate the similarity or dissimilarity of”, or “be equal or equivalent to”.<sup>65</sup>

120. Therefore, a fair comparison between export price and normal value must be made on the basis of comparable transactions, that is, transactions that are fit to be compared or equivalent transactions.

121. One cannot estimate similarity or dissimilarity or assess the relation between two elements if one does not establish the basis for such comparison. That basis is established in Article 2.4, which requires that the comparison be made “in respect of sales made at as nearly as possible the same time”.

122. The determination of the normal value based on prices for one single day in 1997 cannot be used as basis for a fair comparison in the establishment of whether or not there exists a dumping margin.

123. Brazil understands that even though evidence provided in the application is not the same, in terms of quantity and quality, as that necessary to make a preliminary or final determination of

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<sup>64</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 269.

<sup>65</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 270.

dumping, evidence of the relevant type of information is required in a case where the normal value presented in the application is based on a single price for the year.

124. Second, Article 5.2 requires that the application contain normal value and export price information “as is reasonably available to the applicant”. In that regard, Brazil understands that normal value information for all of 1996 and 1997 was reasonably available to the petitioner. However, petitioner only provided in the application normal value information for one day in 1997 (June 30). Brazil believes petitioner had access to normal value information for all of 1996 and 1997 in view of the fact that petitioner provided on 26 July 1999 updated information on normal value for the period 1998 through January 1999. That spreadsheet presented normal value price information for three days in each of the twelve months of 1998 and two days in January 1999.<sup>66</sup> The normal value information was accompanied by the respective daily JOX price publication.

125. This demonstrates that JOX poultry price publication was reasonably available to petitioner and that normal value information for all of 1996 and 1997 could have been submitted in the application, since that information too was reasonably available. However, petitioner decided to include only normal value information for one day in 1997, June 30.

126. By not providing in the application information that was reasonably available to petitioner, the requirement set forth in Article 5.2 was not satisfied.

(vi) ***Claim 6: Inconsistency with Article 5.3 of the Anti-Dumping Agreement***

***Text of Article 5.3***

127. 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”

***Legal Argument Relative to Claim 6***

128. Regarding Claim 6, under Article 5.3 of the Anti-Dumping Agreement, the Panel should first consider the requirements of Article 5.2 concerning the evidence and information that must be contained in the application for initiation of a dumping investigation.

129. As stated in Claim 5 of this submission, petitioner presented in the application data with different periods for export price and normal value. Normal value was based on the price of chilled poultry, with head and feet, sold in the São Paulo wholesale market for 30 June 1997, and export price was established for the period January through May 1997 and August 1997.

130. In the determination to initiate the dumping investigation, the DCD established normal value based on the normal value data presented in the application for chilled poultry, with head and feet, sold in the São Paulo wholesale market for 30 June 1997. The DCD established export price based on the data offered by petitioner for the period January through May 1997 and August 1997 and the export data provided by the Argentinean agency DUI for the period August through October 1996.

131. The DCD failed to examine the accuracy and adequacy of the evidence provided in the application when it found that there was sufficient evidence to establish normal value and, thus, the existence of dumping, to justify the initiation of the investigation.

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<sup>66</sup> See, Exhibit BRA-19.

132. First, in assessing whether there is sufficient evidence of “dumping” in the application to justify the initiation, the investigating authority may not ignore the provisions of Article 2 of the Anti-Dumping Agreement, which defines and provides for the determination of “dumping”. In particular, Article 2.4 of the Anti-Dumping Agreement requires that a fair comparison be made between the export price and the normal value in respect of sales made at as nearly as possible the same time.

133. Had the DCD examined the accuracy and adequacy of the evidence provided in the application, it would have realized that the normal value data in the application was for only one day in 1997 (June 30) and that the export price data provided was for a period of six months in 1997 (January through May 1997 and August 1997). Because prices vary over a period of time, a fair comparison must be made in respect of sales made at as nearly as possible the same time. The normal value data submitted in the application was for a period that was not equivalent to the period of the export price data provided in the application.

134. Furthermore, the authorities went beyond the scope of the data provided in the application and extended the period for the export transactions, in order to establish the export price. In the determination to initiate the investigation, the DCD established the export price based on data covering a period of nine months (six months of data provided by petitioner and three months of data provided by the DUI). Thus, the normal value was established in accordance with the information presented in the application (price of chilled poultry on 30 June 1997) but the export price was established based on the information presented by petitioner (January through May 1997 and August 1997) and the information provided by the DUI (August through October 1996). This clearly indicates that the investigating authority did not rely on the information provided in the application to determine that there was sufficient evidence of “dumping” to justify the initiation of the investigation.

135. In addition, the authority determined that there was sufficient evidence of dumping based on export price and normal value information in respect of sales that were not made at as nearly as possible the same time.

136. Brazil understands that even though evidence provided in the application is not the same, in terms of quantity and quality, as that necessary to make a preliminary or final determination of dumping, evidence of the relevant type of information is required in a case where the normal value presented in the application is based on a single price for the year. 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.

137. Second, because petitioner presented normal value information for only one day in 1997, the evidence in the application did not fulfill the requirement of Article 5.2 that petitioner include information in the application that is reasonably available to it. As indicated in the arguments relative to Claim 5, petitioner could have presented normal value information for all of 1996 and 1997 from the available JOX publication. However, petitioner only presented normal value information for one day in the period.

138. By not accurately examining the evidence in the application and by adding export price information not provided in the application to determine the initiation of the investigation, the DCD acted inconsistently with Article 5.3 of the Anti-Dumping Agreement.

**(vii) Claim 7: Inconsistency with Article 5.8 of the Anti-Dumping Agreement**

***Text of Article 5.8***

139. Article 5.8 of the Anti-Dumping Agreement sets forth 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 (...)”

***Legal Argument Relative to Claim 7***

140. Pursuant to claims 5 and 6 above, petitioner presented in the application insufficient evidence to establish normal value. This evidence was necessary to indicate the existence of dumping. Based on the insufficient normal value evidence presented by petitioner, the DCD incorrectly decided to initiate the investigation without examining the accuracy and adequacy of the evidence presented in the application.

141. In view of the lack of evidence to support the normal value alleged by petitioner in the application, the DCD failed to reject the application and, thus, violated Article 5.8 of the Anti-Dumping Agreement.

***(viii) Claim 8: Inconsistency with Article 5.3 of the Anti-Dumping Agreement***

***Text of Article 5.3***

142. 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”

***Legal Argument Relative to Claim 8***

143. The dumping found in the determination to initiate the investigation was based on: (1) the price of poultry sold in Brazil on 30 June 1997 (normal value); and, (2) the price of imports of poultry into Argentina from Brazil for the period August through October 1996, January through May 1997 and August 1997 (export price).

144. The injury found in the determination to initiate the investigation was based on data for the period January 1994 through June 1998.

145. Regarding the data collection period for injury, the CNCE first examined injury in Acta No. 405 based on the data collected for the period January 1994 through June 1997. Based on the data for that period, Acta No. 405 did not find sufficient evidence of injury or threat of injury to the domestic industry. When the CNCE rectified its determination in Acta No. 464, the data collection period for the injury analysis was extended by one year and went from January 1994 through June 1998. Acta No. 464 found sufficient evidence of threat of injury to justify the initiation of the investigation.

146. In the causal link determination to initiate the investigation, the SICM explained that the APCDS based its dumping determination on elements included in the application that originally corresponded to information for the period of January through June 1997.<sup>67</sup> The SICM further pointed out that subsequent to the dumping determination, petitioner provided additional, updated information including data for all of 1997 and the first semester of 1998.<sup>68</sup> However, the additional

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<sup>67</sup> See, Page 2 of Exhibit BRA-20.

<sup>68</sup> See, Page 4 of Exhibit BRA-20.



data was submitted by petitioner<sup>69</sup> on 17 February 1998, more than one month after the APCDS determined the existence of dumping on 7 January 1998.<sup>70</sup> The dumping determination to initiate the investigation was never updated to take into account petitioner's new information.

147. The different data collection periods for dumping and injury considered by the investigative authorities in the decision to initiate indicate that the Argentinean authorities failed to examine the accuracy and adequacy of the evidence provided in the application in its determination that there was sufficient evidence of causal link to justify the initiation of the investigation.

148. Article 5.3 of the Anti-Dumping agreement requires authorities to examine the accuracy and adequacy of the evidence provided in the application, in order to determine whether there is sufficient evidence to justify the initiation of an investigation. Clearly, from the facts stated above, the APCDS did not consider petitioner's new information submitted on 17 February 1998 and, accordingly, did not update its dumping determination to initiate the investigation. Thus, the investigative authorities failed to examine the accuracy and adequacy of the evidence provided in the application.

149. Article 5.3 also refers to the sufficient "evidence" (in the application) that is needed to justify the initiation of an investigation. The "evidence" mentioned in Article 5.3 is that provided in Article 5.2, which states that:

"An application (...) shall include evidence of (a) dumping, (b) injury (...) and (c) a causal link between the dumped imports and the alleged injury. (...)" (emphasis added)

150. Because the APCDS did not update its dumping determination to initiate the investigation with the new information provided by petitioner on 17 February 1998, the SICM could not have found that there was sufficient evidence of causal link between the dumped imports on June 1997 and the threat of injury on June 1998.

151. In Acta No. 405, the CNCE did not find sufficient evidence of injury or threat of injury to the domestic industry for the period January 1994 through June 1997. Since Acta No. 405 found that there was not sufficient evidence of injury or threat of injury, it is fair to assume that the dumping found by the APCDS, for the period of January through June of 1997, was not causing injury or threat of injury to the domestic industry on June 1997.

152. The new information provided by petitioner on 17 February 1998 was the basis for the CNCE's new injury determination in Acta No. 464. Based on the data collection period of January 1994 through June 1998, Acta No. 464 found sufficient evidence of threat of injury to justify the initiation of the investigation. However, the dumping determination had not been updated with the new information provided by petitioner.

153. By not considering the new information provided by petitioner in the dumping analysis, how could the APCDS determine that, in fact, there was dumping? Furthermore, if the dumping found for the period January through June 1997 was not causing injury or threat of injury to the domestic industry on June 1997, how could the SICM determine that the dumping found for the period January through June 1997 was causing threat of injury on June 1998?

154. In order to verify that there was threat of injury from the imports at dumped prices, the dumping data collected and analyzed would also have to have been extended until June 1998. The DCD did not examine whether there was dumping in the second semester of 1997 and/or the first semester of 1998.

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<sup>69</sup> See, Exhibit BRA-4.

<sup>70</sup> See, Exhibit BRA-2.

155. For that purpose, Article 3.7 of the Anti-Dumping Agreement provides a good basis for what facts and circumstances are needed in regarding the existence of threat of material injury.

“A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.”

156. More specifically, Article 3.7 indicates that the change in circumstances, which would create a situation in which the dumping would cause injury, must be clearly foreseen and imminent. Footnote 10 of Article 3.7 provides as example “convincing reason to believe that there will be in the near future substantially increased importation of the product at dumped prices.”

157. In the present case, Acta No. 405 established that until June 1997 there was no sufficient evidence of injury or threat of injury. From June 1997 until June 1998, there was no foreseen and imminent change in circumstances that created a situation in which the dumped imports in June 1997 were causing threat of injury to the domestic industry in June 1998 (end of the data collection period for the injury analysis).

158. Contrary to Article 5.3, the DCD and the SICM failed to examine the accuracy and adequacy of the evidence provided in the application by not examining the additional dumping data submitted by petitioner for the period July 1997 through June 1998. By comparing different periods for dumping and injury, the SICM failed to make an accurate and adequate examination of the causal link evidence provided in the application.

***(ix) Claim 9: Inconsistency with Article 5.7 of the Anti-Dumping Agreement***

***Text of Article 5.7***

159. Articles 5.7 of the Anti-Dumping Agreement sets forth that:

“The evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation, starting on a date no later than the earliest date on which in accordance with the provisions of the Agreement provisional measures may be applied.”

***Legal Argument Relative to Claim 9***

160. The data collection period for dumping was established by the DCD as 30 June 1997 for normal value, and August through October 1996, January through May 1997 and August 1997 for export price. The data collection period for injury was established by the CNCE from January 1994 through June 1998.

161. With respect to the data collection period for injury, the CNCE first examined injury in Acta No. 405 based on the data collected for the period January 1994 through June 1997. Based on the data for that period, Acta No. 405 did not find sufficient evidence of injury or threat of injury to the domestic industry. When the CNCE rectified its determination in Acta No. 464, the data collection period for the injury analysis was extended by one year and went from January 1994 through June 1998. Acta No. 464 found sufficient evidence of threat of injury to justify the initiation of an investigation.

162. In the causal link determination to initiate the investigation, the SICM explained that the APCDS based its dumping determination on elements included in the application that originally corresponded to information for the period of January through June 1997. The SICM further pointed out that subsequent to the dumping determination, petitioner provided additional, updated information including data for all of 1997 and the first semester of 1998. However, the additional data was submitted by petitioner on 17 February 1998, more than one month after the APCDS determined the existence of dumping on 7 January 1998. The dumping determination to initiate the investigation was never updated to take into account petitioner's new information.

163. The different data collection periods for dumping and injury considered by the Argentinean authorities in the decision to initiate the investigation was inconsistent with Article 5.7 in at least two different ways.

164. First, and as shown above, the data collected for the dumping analysis went only until June 1997. The CNCE determined that there was sufficient evidence of threat of injury from the injury data collected until June 1998.

165. CNCE's Acta No. 405 established that there was no material injury or threat of material injury to the domestic industry for the period January 1994 through June 1997. Thus, the dumping found on June 1997 was not causing injury or threat of injury on June 1997. In order to verify that there was threat of injury on June 1998 from the imports at dumped prices, the data collection period for the dumping analysis would also have to have been extended until June 1998.

166. The CNCE's new injury determination in Acta No. 464 found threat of injury to the domestic industry based on the new data presented by petitioner for the second semester of 1997 and the first semester of 1998. The dumping period, which was examined by the DCD for purposes of the initiation, did not consider petitioner's new information provided on 17 February 1998 and only took into account prices until June 1997.

167. From the facts above, how could the SICM have found threat of injury on June 1998 if the dumped imports on June 1997 were not causing injury or threat of injury on June 1997? This could only have happened if the APCDS had updated its dumping analysis to take into account petitioner's new information, which the APCDS did not.

168. The different periods examined by the DCD and the CNCE in determining whether there was sufficient evidence of dumping and injury, indicates that the dumping and injury evidence was not considered simultaneously in the decision whether or not to initiate the investigation.

169. Second, Argentina failed to comply with Article 5.7 of the Anti-Dumping Agreement by not considering the evidence of both dumping and injury simultaneously in the same decision to initiate the investigation.

170. According to the facts, the APCDS determined in its report of 7 January 1998 that there was sufficient evidence of dumping in the export transactions of poultry from Brazil into Argentina. On 22 September 1998, the CNCE determined in Acta No. 464 that there was sufficient evidence of threat of injury to justify the initiation of the investigation. On 20 January 1999, the MEOSP issued Resolution No. 11, a public notice announcing the initiation of an anti-dumping investigation on imports of poultry from Brazil.

171. As shown in the paragraph above, the evidence of dumping and injury were considered at different times. Sufficient evidence of dumping was determined on 7 January 1998 and sufficient evidence of threat of injury was determined on 22 September 1998, more than eight months after the dumping consideration. To this regard, Article 5.7 of the Anti-Dumping Agreement sets forth that:

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

172. Article 5.7 of the Anti-Dumping Agreement mandates that in the decision to initiate an investigation, the investigating authority consider the evidence of dumping and injury simultaneously. According to plain language interpretation, the term “simultaneous” is defined as “occurring or operating at the same time”.<sup>71</sup>

173. In the present case, the authorities considered the evidence of injury more than eight months after the dumping evidence was considered, which cannot be interpreted as being considered at the same time.

174. Based on the arguments above, Argentina has violated Article 5.7 of the Anti-Dumping Agreement by not considering the evidence of dumping and injury simultaneously in the decision to initiate the investigation.

**(x) Claim 31: Inconsistency with Article 5.8 of the Anti-Dumping Agreement**

***Text of Article 5.8***

175. The relevant part of Article 5.8 of the Anti-Dumping Agreement sets forth 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 (...)”

***Legal Argument Relative to Claim 31***

176. Article 5.8 requires the investigating authorities to reject the application as soon as the investigating authorities are satisfied that there is not sufficient evidence of dumping or injury.

177. According to the plain text meaning of the term “satisfied” and the interpretation of Article 5.8, authorities shall reject an application when the evidence provided therein does not “adequately meet, fulfill or comply with conditions”<sup>72</sup> that indicate that dumping or injury exist.

178. When the CNCE issued Acta No. 405, it had no doubt from the evidence presented in the application that there was no injury or threat of injury to justify the initiation. Acta No. 405 provided an examination and the reasoning why the conditions to meet the necessary injury standard were not met.

179. Brazil affirms that the CNCE’s negative injury determination in Acta No. 405 was the moment which the CNCE was “satisfied” that there was not sufficient evidence of injury to justify proceeding with the case and, therefore, the CNCE should have promptly rejected the application.

180. More specifically, we do not believe that Acta No. 405 was merely an opportunity given by the Argentinean authority for petitioner to provide more information and amend the application. If the CNCE wanted petitioner to provide more information, the CNCE should have sent a letter, requesting petitioner to do so, similarly to what it had previously done.<sup>73</sup> Instead, the CNCE issued a

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<sup>71</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1294.

<sup>72</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1226.

<sup>73</sup> See, Exhibit BRA-18.

determination based on the evidence presented in the application that the imports of poultry were not injuring or threatening to injure the domestic industry.

181. From the moment the CNCE determined that there was insufficient evidence to justify the initiation of the investigation, the CNCE should have rejected the application and waited for the domestic industry to submit a new application with revised and updated information for both injury and dumping.

182. Furthermore, Article 5.8 requires that the investigating authority reject the application "promptly as soon as" it is satisfied that there is not sufficient evidence to justify proceeding with the case. In that respect, Article 5.8 requires that the rejection of the application be carried out or performed without delay. However, instead of rejecting the application, as required by Article 5.8, the CNCE was requested to examine the new information submitted by CEPA more than 30 days after the negative injury determination was issued. As provided in the facts related to this claim, Acta No. 405 was issued on 7 January 1998 and petitioner presented new and updated information to SICM on 17 February 1998, more than a month after the CNCE issued the negative injury determination to initiate the investigation.

183. To this regard, we point out language found in the Argentinean Anti-Dumping Regulation (Decree No.2121/94) that provides timeframes for the rejection of an application by the investigating authorities:

“Art. 38 - The competent authority shall notify the petitioner of any error or omission in the application within 30 business days of presentation of the application. The petitioner shall have 15 business days from the date of the notification to provide the corrections. If the petitioner does not provide the requested corrections within this period, the application shall be rejected without any further proceedings.”<sup>74</sup>

184. The Argentinean Anti-Dumping Regulation in effect during the investigation established that if petitioner did not provide the requested corrections within the period of notification, the application must be rejected without any further proceedings.

185. According to the facts related to these claims, the CNCE requested on 24 July 1998 that CEPA update the information presented on 17 February 1998. CEPA presented the requested information on 2 September 1998, a period in excess of the 15-day requirement set out in Article 38 of the Decree No. 2121/94.

186. Brazil does not contend that Acta No. 405 was a notification or opportunity given to petitioner to provide corrections to the application. Acta No. 405 was the moment that the CNCE arrived at a decision or conclusion that the evidence in the application indicated that there was no injury or threat of injury to the domestic industry. Once the CNCE was satisfied that there was not sufficient evidence of injury to justify the initiation of the investigation, it should have rejected the application without delay as required in Article 5.8 of the Anti-Dumping Agreement.

187. If Argentina understands that Acta No. 405 was a notification or opportunity given to petitioner to amend an error or omission in the application, then the Argentinean authorities did not comply with the timeframe required in its own anti-dumping regulations to reject the application.

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<sup>74</sup> See, Exhibit BRA-21.

C. CONDUCT OF THE ANTI-DUMPING INVESTIGATION – EVIDENTIARY AND PUBLIC NOTICE REQUIREMENTS

1. Article 12.1

188. **Claim 10:** Argentina failed to notify seven Brazilian exporters when it was satisfied that there was sufficient evidence to justify the initiation of an anti-dumping investigation. By not notifying these exporters when the investigation was initiated, Argentina acted inconsistently with Article 12.1 of the Anti-Dumping Agreement.

(a) Facts

189. On 20 January 1999, the MEOSP issued Resolution No. 11/1999 announcing the initiation of the anti-dumping investigation on imports of poultry from Brazil.<sup>75</sup> On 10 February 1999, the CNCE sent letters to five Brazilian exporters Sadia, Avipal, Nicolini, Seara, and Frangosul communicating of the initiation of the investigation and requesting that they provide responses to the questionnaires sent by the CNCE.<sup>76</sup> On 16 February 1999, the SSCE sent letters to the same five Brazilian exporters inviting them to participate in a hearing on 25 February 1999 for consultations regarding the initiation of the dumping investigation and for receipt of the questionnaires.<sup>77</sup>

190. On 15 September 1999, the DCD sent letters to other Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves, and Pena Branca notifying of the investigation and requesting that they provide responses to the questionnaire.<sup>78</sup> The CNCE never notified nor provided its questionnaire to these exporters.

(i) *Claim 10: Inconsistency with Article 12.1 of the Anti-Dumping Agreement*

*Text of Article 12.1*

191. Article 12.1 provides as follows:

“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.”

*Legal Argument Relative to Claim 10*

192. Article 12.1 is a general provision that requires public notice and notification to interested parties known to the investigating authorities.

193. The first part of Article 12.1 establishes a time reference for when the authorities should give public notice and notify the Member and interested parties. This time reference is set for the moment when the authorities are satisfied that there is sufficient evidence to justify the initiation of the investigation.

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<sup>75</sup> See, Exhibit BRA-7.

<sup>76</sup> See, Exhibit BRA-8.

<sup>77</sup> See, Exhibit BRA-9.

<sup>78</sup> See, Exhibit BRA-13. From the documents of the investigation to which Brazil has access to, Brazil was not able to find the DCD's notification to the Brazilian exporter Pena Branca.

194. Brazil understands that a public notice was given when Resolution No. 11/99 was issued announcing the initiation of the investigation. However, Article 12.1 requires that in addition to a public notice, a notification be given when the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation. Notification of the initiation of the investigation to the Member the products of which are subject to such investigation was given on 10 February 1999, when the CNCE sent the letter to the five Brazilian exporters and on 16 February 1999, when the SSCE sent letters to the five Brazilian exporters.

195. However, the other seven exporters, that were also participating in the investigation, were notified of the initiation and of the need to submit responses to the questionnaire eight months after the investigation had been initiated. Notification occurred on 15 September 1999, when the DCD sent letters to the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and Pena Branca requesting their responses to the questionnaire.

196. In light of this delay, Brazil believes that the notification to the seven exporters did not comply with Article 12.1 because it was not made once the investigation was initiated.

197. The second part of Article 12.1 establishes who has to be notified: the Members of the product of which are subject to the investigation and other interested parties known to the investigating authorities to have an interest therein. According to Article 6.11 of the Anti-Dumping Agreement, “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” (emphasis added)

198. Thus, the exporters or foreign producers of a product subject to investigation must be notified of the initiation.

199. More specifically, the second part of Article 12.1 requires that the investigating authority notify other known parties to have an interest in the initiation. Out of the seven exporters notified by the DCD on 15 September 1999, at least five (Comaves, Catarinense, Minuano, Chapecó and Perdigão) were known to the investigating authority at the time the investigation was initiated. Brazil knows this to be a fact because on 7 January 1998, the APCDS concluded, in its report regarding the viability of the initiation of the investigation, that there was dumping into the Argentinean market of poultry exports from Brazil. This report listed ten Brazilian exporters, among them Comaves, Catarinense, Minuano, Chapecó, and Perdigão, five of the seven Brazilian exporters that were notified eight months after the investigation had initiated.<sup>79</sup>

200. Furthermore, Argentinean authorities and Argentinean importers of poultry from Brazil, who were also participating in the investigation, knew who the Brazilian exporters of poultry were for the dumping period of investigation.

201. In view of the fact that the seven Brazilian exporters were notified of the investigation eight months after it had been initiated and that these exporters were interested parties known to the

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<sup>79</sup> See, Page 5 of Exhibit BRA-2.

investigating authorities, Argentina has incurred in a *prima facie* violation of Article 12.1 of the Anti-Dumping Agreement.

## 2. Articles 6.1.1, 6.1.2, 6.1.3 and 6.2

202. The following four claims arise from the facts described below:

**Claim 11:** Argentina failed to give the seven Brazilian exporters at least 30 days to reply to the dumping questionnaires provided by the DCD in a *prima facie* violation of Article 6.1.1. Moreover, the CNCE never notified these seven exporters and never provided them with injury questionnaires.

**Claim 12:** Argentina also failed to promptly make available to the seven Brazilian exporters evidence presented in writing by the other interested parties involved in the investigation, in violation of Article 6.1.2.

**Claim 13:** By failing to give the seven exporters the required time to respond to the questionnaires and not promptly making available to these exporters the evidence presented in writing by the other interested parties involved in the investigation, Argentina did not give these exporters full opportunity for the defense of their interests as required by Article 6.2.

**Claim 14:** Argentina acted inconsistently with Article 6.1.3 by not providing the text of the written application to the Brazilian exporters and to the Government of Brazil as soon as the investigation was initiated.

### (a) Facts

203. On 20 January 1999, the MEOSP issued Resolution No. 11/1999 announcing the initiation of the anti-dumping investigation on imports of poultry from Brazil.<sup>80</sup> On 10 February 1999, the CNCE sent letters to the Brazilian exporters Sadia, Avipal, Nicolini, Seara, and Frangosul communicating the initiation of the investigation and requesting that they provide responses to the questionnaires sent by the CNCE.<sup>81</sup> On 16 February 1999, the SSCE sent letters to the five Brazilian exporters inviting them to participate in a hearing on 25 February 1999 for consultations regarding the initiation of the dumping investigation and for receipt of the questionnaires.<sup>82</sup> The DCD and the CNCE never provided the text of the written application to the five Brazilian exporters and to the Government of Brazil as soon as the investigation was initiated.

204. On 28 June 1999, the CNCE issued in Acta No. 531 an affirmative preliminary injury determination.<sup>83</sup> On 6 August 1999, the DCD issued an affirmative preliminary dumping determination.<sup>84</sup> On 20 August 1999, the SSCE issued an affirmative preliminary determination of causal link between dumping and the injury to the domestic industry.<sup>85</sup>

205. On 15 September 1999, eight months after the investigation was initiated, the DCD sent letters to seven other Brazilian exporters: CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves, and Pena Branca, notifying of the investigation and requesting that they provide responses to the questionnaire.<sup>86</sup> The letter sent by the DCD to the seven Brazilian exporters required that they provide responses to the questionnaire for the period of January 1998 through January 1999 within

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<sup>80</sup> See, Exhibit BRA-7.

<sup>81</sup> See, Exhibit BRA-8.

<sup>82</sup> See, Exhibit BRA-9.

<sup>83</sup> See, Exhibit BRA-10.

<sup>84</sup> See, Exhibit BRA-11.

<sup>85</sup> See, Exhibit BRA-12.

<sup>86</sup> See, Exhibit BRA-13.



20 days from receipt of the notification.<sup>87</sup> The CNCE never notified or provided injury questionnaires to these seven exporters. Moreover, the DCD and the CNCE never provided the text of the written application to these exporters.

(i) ***Claim 11: Inconsistency with Article 6.1.1 of the Anti-Dumping Agreement***

***Text of Article 6.1.1***

206. Article 6.1.1 provides that:

“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 applicable.”

***Legal Argument Relative to Claim 11***

207. Article 6.1.1 of the Anti-Dumping Agreement is the only evidentiary provision in the Agreement that establishes a specific timeframe for the accomplishment of an obligation. The first part of Article 6.1.1 requires that the investigating authority give at least 30 days for exporters or foreign producers to respond to the questionnaires.

208. As explained before in this submission, two agencies share the responsibility for administering the anti-dumping law and investigation procedures in Argentina: the DCD is in charge of the dumping investigation and the CNCE is in charge of the injury investigation.

209. The anti-dumping investigation was initiated on 20 January 1999, when the MEOSP issued Resolution No. 11/1999. The anti-dumping investigation was on imports of poultry from Brazil and, therefore, directed to all Brazilian producers and exporters of the subject merchandise. However, only five Brazilian producers/exporters of the subject merchandise were notified of the initiation of the investigation and the need to provide responses to questionnaires. These notifications to the five Brazilian exporters were sent by the CNCE on 10 February 1999 and by the DCD on 16 February 1999.

210. On 15 September 1999, eight months after the investigation had been initiated, the DCD sent notifications of the investigation and the need to respond to questionnaires to CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves, and Pena Branca, Brazilian producers/exporters of the subject merchandise that were already included in the investigation without knowledge of the investigation.

211. The DCD’s notification to these seven Brazilian exporters requested that they provide responses to the questionnaire within 20 days from receipt of the notification. The timeframe required by the DCD in the notification was on its face contrary to the 30-day period required for responses to questionnaires, provided in the first part of Article 6.1.1 of the Anti-Dumping Agreement.

212. The CNCE never notified these seven exporters of the investigation and the need to provide responses to the questionnaire. In fact, these seven exporters never received the injury questionnaire.

213. By not giving these seven Brazilian exporters at least 30 days to reply to the dumping questionnaire and by not providing the injury questionnaire to these exporters to respond to, Argentina failed to comply with Article 6.1.1 of the Anti-Dumping Agreement.

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<sup>87</sup> See, Exhibit BRA-13.

**(ii) Claim 12: Inconsistency with Article 6.1.2 of the Anti-Dumping Agreement**

**Text of Article 6.1.2**

214. The text of Article 6.1.2 provides that:

“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.”

**Legal Argument Relative to Claim 12**

215. Article 6.1.2 of the Anti-Dumping Agreement provides that evidence presented by one interested party shall be “made available promptly” to other interested parties.

216. Without knowing, CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves, and PenaBranca, participated in the investigation for eight months before they were notified of the investigation and the need to provide responses to the questionnaire.

217. Because the DCD and the CNCE did not inform them of the investigation and of the need to submit responses, these seven exporters did not have evidence that was presented in writing by other interested party made promptly available to them.

218. With regards to the term “made available promptly”, we agree with the Panel’s interpretation in *Guatemala – Cement II* that on its face, Article 6.1.2 does not necessarily require that one have access to the file to comply with this provision.<sup>88</sup> The Panel in that case provided examples of how evidence can be made available in an investigation without parties having access to the files. For example, an investigating authority can require each interested party to serve its submissions on all other interested parties; or, an investigating authority can undertake to provide copies of each interested party’s submission to other interested parties.

219. However, because the seven exporters had not been notified of the initiation of the investigation or given the questionnaires to respond, but were in any event included in the investigation because they exported the subject merchandise to Argentina in the period of investigation, they did not even know that evidence had been presented by the other interested parties in the investigation, much less that they should, or could, have had access to that evidence.

220. Furthermore, Article 6.1.2 mandates the investigating authorities to make the evidence available “promptly”. According to textual interpretation, the term “promptly” means “to make or do readily or at once”.<sup>89</sup> Brazil considers that evidence could not be made readily or immediately available to these exporters if they were notified to participate eight months after the investigation had already initiated and a preliminary determination of dumping, injury and causal link had already been made.

**(iii) Claim 13: Inconsistency with Article 6.2 of the Anti-Dumping Agreement**

**Text of Article 6.2**

221. Relevant portion of Article 6.2 sets forth that:

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<sup>88</sup> *Guatemala – Cement II*, at para. 8.133.

<sup>89</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1096.

“Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defense of their interests (...)”

***Legal Argument Relative to Claim 13***

222. Article 6.2 imposes a general duty on investigating authorities to ensure that interested parties have a full opportunity throughout an anti-dumping investigation for the defense of their interests. Even though Article 6.2 does not provide specific guidance as to what steps investigating authorities must take in practice, Brazil considers that notification of the investigation and the request to submit responses to the injury questionnaire eight months after the investigation has initiated is a violation of Article 6.2.

223. First, the seven exporters were given a 20-day deadline to submit their responses to the dumping questionnaire, contrary to the required 30-day deadline provided in Article 6.1.1.

224. Furthermore, the CNCE did not notify any of the seven exporters of the investigation and did not provide them with injury questionnaires. Therefore, these exporters did not have any opportunity for the defense of their interests.

225. Second, because the seven Brazilian exporters were only notified of the investigation and the need to present responses to the dumping questionnaires eight months after the investigation had been initiated, the seven exporters did not have evidence presented by the other interested parties promptly available to them.

226. These facts indicate that the seven Brazilian exporters did not have full opportunity to defend their interests in a clear violation of Article 6.2 of the Anti-Dumping Agreement.

***(iv) Claim 14: Inconsistency with Article 6.1.3 of the Anti-Dumping Agreement.***

***Text of Article 6.1.3***

227. Article 6 of the Anti-Dumping Agreement provides for the evidentiary requirements in an anti-dumping investigation. Specifically, Article 6.1.3 sets forth that:

“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.”

***Legal Argument Relative to Claim 14***

228. The language of Article 6.1.3 sets out a timeframe for authorities to provide the full text of the written application to the known exporters and to the authorities of the exporting Member. Argentina failed to meet this timeframe requirement by never providing the text of the application to the exporters or to the Government of Brazil.

229. With respect to our understanding of Article 6.1.3, Brazil makes reference to the case *Guatemala – Cement II*, where the Panel provided explanation of the purpose and function of Article 6.1.3, by considering that:

“(…) Timely access to the application is important for the exporters to enable preparation of the arguments in defense of their interests before the investigating authorities.”<sup>90</sup> (emphasis added)

That Panel further clarified that:

“(…) Since deadlines in the timetable of an investigation are counted from the date of initiation it is critical that the investigating authority provide the text of the application “as soon as an investigation has been initiated”, for the exporter to be able to devise a strategy to defend the allegations it is being confronted with.”<sup>91</sup> (emphasis added)

230. Regarding the instant claim, the Argentinean authorities never provided the text of the written application to the Government of Brazil and the exporters, making it impossible for the exporters to prepare arguments in the defense of their interests and to devise a strategy to defend the allegations made by petitioner in the application.

231. During consultations, Brazil in its communication of 5 December 2001 to Argentina presented questions regarding the investigation. In particular, the following question regarding Article 6.1.3 was presented:

**Question 25:**

**Please explain why Authorities did not provide the full text of the written application to the known exporters and the Brazilian authorities as soon as the investigation was initiated.**

Argentina responded on 11 January 2002 by stating that:

“By means of note ex-SSCE No. 121 of 1 February 1999, notification of the initiation of the investigation was made to the Head of the Brazilian Business in Argentina, Ministro Consejero Pedro Motta, requesting cooperation in identifying the interested producers/exporters in the investigation and delivery of the respective questionnaires sent with that intent by the technical area (“área técnica”).

Notification of the initiation of the investigation was also sent to the Subsecretary of American Economic Integration, Ambassador Alfredo Morelli by means of note ex-SSCE No. 122/99 and the ex-Subsecretary of International Economic Negotiations, Ambassador Eduardo Sadous, both notifications were sent on 1 February 1999.

Once the investigation was initiated, Argentina made available to the interested parties, among them the exporters, the importers and the authorities of the country in question, the proceedings that generated the investigation in question. At all times, the interested parties had the opportunity to see the administrative file and to obtain a copy of it, not only of the application but also of all the proceedings that make up the investigation.” (emphasis added)

232. Based on the response provided by Argentina during consultations, the application was “made available” to the interested parties once the investigation was initiated. Brazil understands that Argentina’s response that it “made the application available” does not meet the requirement set forth in Article 6.1.3, which requires the investigating authority “to provide” the application.

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<sup>90</sup> *Guatemala – Cement II*, at para. 8.102.

<sup>91</sup> *Guatemala – Cement II*, at para. 8.102.

233. Article 6.1.3 mandates authorities “to provide” the full text of the written application. In this context, the verb “to provide” is a synonym of the verb “to supply”.<sup>92</sup> It is our understanding that Argentina was obligated to supply the Government of Brazil and the exporters with the full text of the written application. Argentina’s position that the verb “to provide” could be understood to mean that authorities were only required “to make available” the full text of the written application once the investigation was initiated is incorrect. Article 6.1.3 carefully differentiates the obligation that the investigating authorities have with the exporters and the exporting Member from the obligation the investigating authorities have with other interested parties. In the first case, the investigating authority must actively “provide” the full text of the written application to the exporting Member and to the exporters involved in the investigation. In the second case, the investigating authorities must “make available”, upon request, the full text of the written application to other interested parties. Brazil believes that if the requirement imposed on the investigating authority was to be understood as being the same for the exporters/exporting Member as that for the other interested parties, there would be no need for the use of different language in Article 6.1.3

234. Furthermore and still based on Argentina’s response during consultations, even if the term “to provide” could be understood by the Panel as a synonym of “to make available”, which in this case it cannot, Argentina’s response that it notified Brazilian Authorities on 1 February 1999 of the initiation of an investigation does not mean that Argentina made the full text of the written application “available” at that time.

235. Even under the assumption that the notification to initiate contained language that the full text of the written application was “available” for all interested parties, the notification of the initiation still occurred on 1 February 1999, 12 days after the investigation was initiated, and not “as soon” as the investigation was initiated, as required by Article 6.1.3 of the Anti-Dumping Agreement.

236. Our understanding of the timeframe provided by the term “as soon as” in Article 6.1.3 comes from the conclusion by the Panel in *Guatemala – Cement II*. In that case, the Panel concluded that:

“(…) Having determined that Guatemala sent the full text of the application at the earliest 8 days after initiation of the investigation. We are of the view that given the nature of the obligation in Article 6.1.3 sending the application even 8 days after the initiation of investigation is not adequate to fulfill the requirement that it be done “as soon as an investigation has been initiated.””<sup>93</sup> (emphasis added)

237. Brazil understands that if the Panel in *Guatemala – Cement II* concluded that 8 days after the initiation was not adequate to fulfill the requirement in Article 6.1.3; in this case, a period of 12 days after the initiation should also be considered not adequate to fulfill the requirement in Article 6.1.3 of the Anti-Dumping Agreement.

### 3. Articles 6.8, 6.10, 12.2.2 and Annex II

238. Seven claims arise from the facts described below and from the legal requirements of the Anti-Dumping Agreement:

**Claim 15:** Argentina disregarded the responses submitted by Brazilian exporters with respect to the description of the product sold to Argentina and in Brazil, and applied the normal value adjustment provided by petitioner in the application. Argentina’s application of adverse facts available was inconsistent with Article 6.8 and paragraphs 3, 6 and 7 of Annex II.

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<sup>92</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1102.

<sup>93</sup> *Guatemala – Cement II*, at para. 8.104.

**Claim 16:** 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 petitioner.

**Claim 17:** Argentina disregarded all export price data provided by Brazilian exporters, and resorted to the export price data provided by the Argentinean agency *Ganaderia*. Argentina's application of adverse facts available was inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II.

**Claim 18:** 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 Brazilian exporters, and to resort to the export price information provided by the Argentinean agency *Ganaderia*.

**Claim 19:** Argentina disregarded all normal value information submitted by Frangosul and Catarinense, and resorted to the information provided by petitioner. Argentina's application of adverse facts available was inconsistent with Article 6.8 and paragraphs 3, 5 and 7 of Annex II.

**Claim 20:** 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 resort to the information provided by petitioner.

Claim 22: Argentina failed to establish individual margins of dumping for Frangosul and Catarinense, as required by Article 6.10.

(a) Facts

*Brazilian Exporters' Response to the Questionnaire*

239. On 7 January 1998, the DCD issued a determination to initiate the dumping investigation on poultry from Brazil.<sup>94</sup> In that determination, the DCD established normal value according to the information provided in the application and made an adjustment to normal value, proposed by petitioner, to account for differences in the physical characteristics of the product sold in Brazil and to Argentina.<sup>95</sup>

240. Petitioner alleged that an adjustment to normal value was warranted because in Brazil eviscerated poultry is sold with giblets (heart, stomach, neck and liver), with head and feet, and in Argentina eviscerated poultry is sold without head and feet.<sup>96</sup>

241. Petitioner further alleged that to fairly compare the prices of poultry sold in Brazil (normal value) to the prices of poultry sold in Argentina (export price), the DCD would have to add 9.09 per cent to the price of poultry sold in Brazil to compensate for the fact that poultry in Argentina is sold without head and feet and poultry in Brazil is sold with head and feet. Petitioner's normal value adjustment was based on the prices published by the Brazilian company JOX on 30 June 1997, for chilled poultry, with head and feet, for the São Paulo wholesale market.<sup>97</sup>

242. Annex II of Section A of the dumping questionnaire for the producer/exporter, requested that the exporters provide a complete product description with technical specifications for each model/type/code for the merchandise sold in the internal market and for the merchandise exported to Argentina.<sup>98</sup> Question 2 of Section B (sales to Argentina) of the questionnaire requested that the

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<sup>94</sup> See, Exhibit BRA-2.

<sup>95</sup> See, Pages 8, 9, 12 and 13 of Exhibit BRA-2.

<sup>96</sup> See, Pages 7 and 8 of Exhibit BRA-2.

<sup>97</sup> See, Pages 8 and 9 of Exhibit BRA-2.

<sup>98</sup> See, Exhibits BRA-22, 23, 24 and 25.

producer/exporter identify by model/type/code if the merchandise exported to Argentina was identical or similar to the merchandise sold in the internal market. Question 2 further requested that, in the event the merchandise was not identical, the producer/exporter identify the technical differences and how these differences influence the export price.

#### Sadia

243. On 20 April 1999, Sadia submitted the questionnaire response, providing sales information for the home market and for Argentina for the period 1996 through 1998 and January and February of 1999.<sup>99</sup> In Annex II of Section A of the questionnaire, Sadia described the product as whole, frozen, eviscerated poultry with giblets.<sup>100</sup> More specifically, Sadia reported the product for the internal market as whole, frozen, eviscerated poultry, with giblets, box of 18kg – individual weight of 1.750 to 2.750 kg; and the product for Argentina as whole, frozen, eviscerated poultry, with giblets box of 18kg – individual weight of 1.700 to 2.700 kg.<sup>101</sup> According to Sadia's response there were no differences in the physical characteristics for the products sold to Argentina and in Brazil.

244. On 28 April 1999, Sadia submitted a supplemental response to the questionnaire.<sup>102</sup> In this response, Sadia indicated in the supplemental information relative to Annex V of Section A, that whole, frozen, eviscerated poultry, without giblets, was sold to the internal market but not to Argentina during the period of January 1996 through February 1999.<sup>103</sup> The DCD never requested additional, specific information regarding the description of the product sold to Argentina and in Brazil.

#### Avipal

245. On 21 April 1999, Avipal submitted a diskette with the questionnaire response, providing sales information for the home market and for Argentina for the period 1996 through 1998 and January and February of 1999.<sup>104</sup>

246. On 7 May 1999, Avipal submitted a hard copy of the non-confidential information in the questionnaire response.<sup>105</sup> In Annex II of Section A of that questionnaire response, Avipal described the product as whole, frozen, eviscerated poultry. Avipal further divided the product into two types: (i) broiler (with giblets) containing a plastic package with neck without head, gizzard and liver; and, (ii) griler (without giblets).<sup>106</sup> In Annex V of that response, Avipal reported that both broiler and griler type poultry were sold to Argentina and Brazil.<sup>107</sup> According to Avipal's response, there were no differences in the physical characteristics for the product sold to Argentina and in Brazil. The DCD never requested additional, specific information regarding the description of the product sold to Argentina and in Brazil.

#### Frangosul

247. On 27 April 1999, Frangosul submitted the questionnaire response, providing sales information for the home market and Argentina for the period 1996 through 1998 and January through March of 1999.<sup>108</sup> In Annex II of Section A of the questionnaire, Frangosul described the product as

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<sup>99</sup> See, Exhibit BRA-22.

<sup>100</sup> See, Exhibit BRA-22.

<sup>101</sup> See, Exhibit BRA-22.

<sup>102</sup> See, Exhibit BRA-22.

<sup>103</sup> See, Exhibit BRA-22.

<sup>104</sup> See, Exhibit BRA-23.

<sup>105</sup> See, Exhibit BRA-23.

<sup>106</sup> See, Exhibit BRA-23.

<sup>107</sup> See, Exhibit BRA-23.

<sup>108</sup> See, Exhibit BRA-24.

whole, frozen, eviscerated poultry, with giblets (broiler type), and whole, frozen, eviscerated poultry, without giblets (griler type).<sup>109</sup> Both broiler and griler type poultry were sold to Argentina and in Brazil.

248. On 19 August 1999, Frangosul also attached a product brochure to its response (in English and Spanish), describing the types of products produced and sold.<sup>110</sup> According to the description in the brochure, griler type poultry is fresh, frozen poultry, white or yellow skin, fully eviscerated, headless and feetless, without giblets; and, broiler type poultry is fresh, frozen poultry, white skin, fully eviscerated, headless and feetless, with giblets.<sup>111</sup> Based on Frangosul's response, the exporter did not sell poultry with head and feet and there were no differences in the physical characteristics for the product sold to Argentina and in Brazil. The DCD never requested additional, specific information regarding the description of the product sold to Argentina and in Brazil.

#### Catarinense

249. On 15 September 1999, the DCD sent a letter to Catarinense notifying of the investigation and requesting that it provide responses to the questionnaire for the producer/exporter.<sup>112</sup>

250. On 20 October 1999, Catarinense requested an extension of the deadline to submit the questionnaire response.<sup>113</sup> On 3 November 1999, Catarinense provided the questionnaire responses.<sup>114</sup> In Annex II of Section A of the questionnaire, Catarinense described the product as whole, frozen poultry with (broiler) and without giblets (griler).<sup>115</sup> For the export market, the broiler type poultry (with giblets) contains liver, gizzard and neck. For the internal market, the broiler type poultry (with giblets) contains liver, gizzard, paws,<sup>116</sup> head and neck. The griler type poultry sold to Argentina and in Brazil do not contain giblets.<sup>117</sup> Catarinense reported that it sold broiler and griler type poultry in the home market and that the broiler type poultry sold in the home market contained head but not feet.<sup>118</sup> The DCD never requested additional, specific information regarding the description of the product sold to Argentina and in Brazil.

#### *Final Dumping Determination*

251. On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>119</sup>

#### Normal Value

252. In the final dumping determination, the DCD established the following non-adjusted normal values for the Brazilian exporters: for Sadia, US\$ 0,852; for Avipal, US\$ 0,9988; and, for Frangosul and Catarinense the same as that applied to all other exporters, US\$ 0,9519.<sup>120</sup> To these values found in the final dumping determination, the DCD made an adjustment of 9.09 per cent in order to find the adjusted normal value to compensate for the alleged difference that poultry in Brazil is sold with head

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<sup>109</sup> See, Exhibit BRA-24.

<sup>110</sup> See, Exhibit BRA-26.

<sup>111</sup> See, Exhibit BRA-26.

<sup>112</sup> See, Exhibit BRA-13.

<sup>113</sup> See, Page 38 of Exhibit BRA-28.

<sup>114</sup> See, Exhibit BRA-25.

<sup>115</sup> See, Exhibit BRA-25.

<sup>116</sup> The term "paw" is not the same as the term "feet". In Spanish, "paw" is "garra" and the term "feet" is "pata". "Paws" are the lower extremity of poultry's "feet", not the "feet" themselves. See, Exhibit BRA-34.

<sup>117</sup> See, Exhibit BRA-25.

<sup>118</sup> See, Exhibit BRA-25.

<sup>119</sup> See, Exhibit BRA-15.

<sup>120</sup> See, Pages 55, 63, and 65 of Exhibit BRA-15.



and feet and poultry to Argentina is sold without head and feet.<sup>121</sup> The DCD followed petitioner's adjustment calculation as proposed in the application, which was unsubstantiated by relevant evidence, and disregarded the responses of the exporters.

### Export Price

253. The DCD established export price based on the import information from the Argentinean agency *Ganaderia* and disregarded all export price data submitted by the Brazilian exporters.<sup>122</sup>

#### *(i) Claim 15: Inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement*

##### *Text of Article 6.8 and Annex II*

254. Article 6.8 of the Anti-Dumping Agreement governs the use of "facts available" by an investigating authority in an anti-dumping investigation. It allows investigating authorities to resort to the use of "facts available" under specific circumstances. Article 6.8 provides:

"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."

Annex II sets out additional conditions and considerations relevant to the application of facts available in a particular case.

The relevant portion of Paragraph 3 of Annex II provides that:

"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. (...)"

Paragraph 6 of Annex II requires that the investigating authority immediately inform the supplying party of the reasons for not accepting evidence or information. Paragraph 6 requires that:

"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."

Paragraph 7 of Annex II establishes that:

"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

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<sup>121</sup> See, Pages 55, 63, 65, 67 and 69 of Exhibit BRA-15.

<sup>122</sup> See, Pages 76, 77 and 104 of Exhibit BRA-15.

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 favorable to the party than if the party did cooperate.”

### *Legal Argument Relative to Claim 15*

255. The conditions for applying “facts available” under Article 6.8 are straightforward. If an interested party: (i) “refuses access to” necessary information within a reasonable period; (ii) “otherwise does not provide” necessary information within a reasonable period; or (iii) “significantly impedes the investigation”, the investigating authority may make determinations on the basis of the facts available.

256. As shown in the facts related to these claims, the exporters Sadia, Avipal and Frangosul reported that the poultry sold to Argentina was identical to the poultry sold in Brazil. The Brazilian exporter Catarinense reported that from the two types of poultry sold (broiler and griler), there was a difference in the broiler type poultry sold to Argentina and in Brazil. The broiler type poultry sold to Argentina did not contain head and feet, while the broiler type poultry sold in Brazil contained head but not feet.

257. Sadia, Avipal, Frangosul and Catarinense did not refuse access or failed to make available this information within a reasonable period, nor did these exporters significantly impede the investigation. These responses were provided as responses to the DCD’s dumping questionnaire, submitted within reasonable time for evaluation by the investigating authority.

258. The DCD failed to take into account these responses and applied the normal value adjustment calculation even though, according to the exporters’ responses, this adjustment was not warranted.

259. In particular, Paragraph 3 of Annex II provides that all information which is subject to verification, appropriately provided and done so in a timely fashion should be taken into account when determinations are made.

260. In the present case, the product description information appropriately submitted by the exporters, and in a timely fashion, was not taken into account in the final determination.

261. With respect to the application of facts available and Paragraph 3 of Annex II, Brazil agrees with the reasoning set forth by the Panel in *United States – Hot Rolled Steel Products*, that:

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

In this regard, we note that paragraph 3 of Annex II, which provides, in pertinent part “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, (...) should be taken into account when determinations are made.” Particularly where information is actually submitted in time to be verified, and actually could be verified, we consider that it should generally be accepted, unless to

do so would impede the ability of the investigating authority to complete the investigation within the time limits established by the Agreement. Such might be the case, for instance, if an entire questionnaire response were submitted only just before the time scheduled for verification. However, in this case, it seems clear that the information could have been verified and used, but was instead rejected as untimely. One of the principle elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the “first-best” information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps “second-best” facts. This does not however, justify refusing to consider information simply because it submitted outside a pre-determined time-period, if it is submitted within a period that is reasonable under the circumstances – that is, a period that allows the information to be verified and used in the determination, due account being taken of the time limits in the AD Agreement for completing the investigation and the time needed for the investigating authority to do so. We consider it significant, in this case, that the information submitted past the deadline, but before verification, was not new information concerning such matters as prices, costs, or adjustments that had never previously been provided, and which would require extensive verification (...)”<sup>123</sup> (emphasis added)

262. In the instant case, Sadia, Avipal and Frangosul reported that there were no differences in the physical characteristics of the poultry sold to Argentina and in Brazil. More specifically, these responses were submitted in April of 1999, more than one year before the DCD issued its final affirmative dumping determination, on 23 June 2000. The information provided by the exporters could have been verified and used, since it was submitted within a reasonable period for the investigating authority to do so.

263. Catarinense reported the difference in the broiler type poultry sold to Argentina and to Brazil on 3 November 1999, approximately seven months prior to the final affirmative dumping determination. Brazil recalls that Catarinense was only notified of the investigation on 15 September 1999, eight months after the investigation had been initiated.

264. With respect to Catarinense’s response, Brazil points out that the exporter reported that it sold both griler (without giblets) and broiler (with giblets) type poultry to Argentina and in Brazil. However, the DCD chose to apply the normal value adjustment to all of the poultry sales in Brazil even though some of these sales did not warrant an adjustment because they were sales of griler type poultry, that is, poultry sold without head and feet.

265. Furthermore, the DCD’s normal value adjustment took into account a yield rate of eviscerated poultry based on the allegation that poultry in Brazil was sold with head and feet. According to the information provided by Catarinense, the broiler type poultry sold in Brazil contained head but did not contain feet. Thus, the yield rate proposed in the adjustment calculation presented by petitioner for poultry sold in Brazil was inconsistent with the yield rate of poultry sold by Catarinense in Brazil. In Catarinense’s case, the DCD should have considered these facts in establishing an adjustment to normal value for the purpose of making a fair comparison.

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<sup>123</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, 28 February 2001, WT/DS184/R, at paras. 7.54 and 7.55 (“*United States – Hot Rolled Steel Products*”). The Appellate Body upheld the Panel’s findings with respect to the United States inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement in its application of facts available. *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, 24 July 2001, WT/DS184/AB/R, at para. 240 (adopted on 23 August 2001) (“*AB – United States – Hot Rolled Steel Products*”).

266. The DCD did not request further specific information from the exporters on the alleged differences in the physical characteristics of the poultry sold to Argentina and in Brazil. The DCD simply rejected exporters' information and used the adjustment proposed by petitioner in the application.

267. In this respect, Brazil turns to the Panel's consideration in *Guatemala – Cement II* on the interpretation of Article 6.8 of the Anti-Dumping Agreement:

“(…) We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner (…)<sup>124</sup> (emphasis added)

268. Brazil believes that in the present case the DCD did not act in a reasonable, objective and impartial manner. The DCD had access to the information provided by exporters regarding the product description long before the final determination was issued. Had the DCD questions regarding the exporters' reported information it should have asked them during the investigation, but it did not. The exporters did not refuse or did not fail to provide the necessary information for the DCD to consider whether an adjustment to normal value was warranted. The DCD simply ignored and disregarded the information reported by the exporters.

269. As provided in Paragraph 6 of Annex II, if evidence or information is not accepted the investigating authority must inform the reasons why it has not been accepted and should give an opportunity for the party to provide further explanations within a reasonable period. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of the evidence or information provided should be given in any published determination.

270. That was not the case for Sadia, Avipal, Frangosul and Catarinense. The DCD never requested specific information on the product description of the poultry sold in Brazil and to Argentina. Had the DCD any questions or doubts regarding the information reported by these exporters that would justify the rejection of this information, the DCD should have requested clarifications on the issue and given the opportunity for exporters to provide explanations during the investigation. The DCD did not do so.

271. Because Sadia, Avipal, Frangosul and Catarinense provided the necessary information for the DCD to conclude that there was no need to adjust the normal value for these exporters, the DCD did not have to base its finding of normal value on facts available, which in this case was the information provided by petitioner in the application.

272. Even if the DCD had to base its finding with respect to normal value on information from a secondary source, which is not the case, Paragraph 7 of Annex II instructs the investigating authority to do so with special circumspection.

273. Brazil affirms that the DCD did not base its finding that normal value warranted adjustment on special circumspection or careful consideration of the information supplied in the application. Had it done so, the DCD would have requested additional information and clarification regarding the type and physical characteristics of the product sold to Argentina and in Brazil and would have checked the information provided in the application with information from other independent sources. The DCD never raised the issue during the investigation.

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<sup>124</sup> *Guatemala – Cement II*, at para. 8.251.

(ii) ***Claim 16: Inconsistency with Article 12.2.2 of the Anti-Dumping Agreement***

***Text of Article 12.2.2***

274. Article 12 governs the contents of public notices issued in the course of an anti-dumping investigation. It provides, in pertinent part:

“12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or the Members the product of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) The names of the suppliers, or when this is impracticable, the supplying countries involved;
- (ii) A description of the product which is sufficient for customs purposes;
- (iii) The margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2.
- (iv) Considerations relevant to the injury determination as set out in Article 3;
- (v) The main reasons leading to the determination.

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 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.”

***Legal Argument Relative to Claim 16***

275. The question presented to the Panel is whether any reasoning has been provided in the final determination, sufficient to satisfy the requirements of Article 12.2.2 of the Anti-Dumping

Agreement, explaining why the DCD did not use Sadia, Avipal, Frangosul and Catarinense's information on the description of the products sold to Argentina and in Brazil.

276. The questionnaire responses submitted by Sadia, Avipal and Frangosul indicated no difference between the poultry sold to Argentina and in Brazil. The Brazilian exporter Catarinense reported that from the two types of poultry sold (broiler and griler), there was a difference in the broiler type poultry sold to Argentina and in Brazil. The broiler type poultry sold to Argentina did not contain head and feet, while the broiler type poultry sold in Brazil contained head but not feet.

277. During the investigation, the DCD did not request further specific information as to the physical characteristics of the product sold to Argentina and in Brazil, and whether such differences affected price comparability between the poultry sold in those markets.

278. In the final determination, the DCD applied the adjustment calculation to normal value provided by petitioner in the application, without providing explanation as to why the information presented by the exporters on the description of the product sold to Argentina and in Brazil were not accepted and, thus, disregarded.

279. In the case of an affirmative determination providing for the imposition of a definitive duty, Article 12.2.2. mandates that a public notice of conclusion of the investigation contain, or otherwise make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures. Included as relevant information are the established margins of dumping and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2.

280. According to the final dumping determination, the DCD adjusted normal value, to account for alleged physical characteristic differences between the products sold to Argentina and in Brazil, in order to make a fair comparison between the export price and normal value. The DCD provided no explanation on why it did not consider exporters' information on the product description that indicated that no adjustment to normal value was needed to make a fair comparison between the export price and the normal value. The DCD simply applied the normal value adjustment calculation as proposed by petitioner in the application.

281. By not providing this information, Argentina has incurred in a *prima facie* violation of Article 12.2.2 of the Anti-Dumping Agreement.

**(iii) Claim 17: Inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement**

***Text of Article 6.8***

282. Article 6.8 provides that:

“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.”

The relevant provisions in Annex II are transcribed below.

Paragraph 3 of Annex II provides in part that:

“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. (...)”

Paragraph 5 of Annex II sets forth that:

“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.”

***Legal Argument Relative to Claim 17***

283. In the final determination, the DCD established export price for all Brazilian exporters based on the import information from the Argentinean agency Ganaderia.

284. Sadia provided export price information of poultry sold to Argentina for the period 1996 through February 1999.<sup>125</sup> Avipal provided export price information of poultry sold to Argentina for the period 1996 through March 1999.<sup>126</sup> Frangosul provided export price information for individual export transactions of poultry sold to Argentina from January 1996 through March 1999, with respective invoices.<sup>127</sup> Catarinense provided export price information for individual transactions of poultry sold to Argentina from January 1998 through January 1999, with respective invoices.<sup>128</sup>

285. As stated above, Article 6.8 limits the use of facts available to the following circumstances: (i) cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period, or (ii) cases in which any interested party significantly impedes the investigation.

286. In this case, the exporters neither refused nor failed to provide the information on export price within a reasonable period. Frangosul and Catarinense even provided the export price information for individual export transactions to Argentina with the respective invoices.

287. Paragraph 3 of Annex II directs the authorities to consider, when determinations are made, all information, which is verifiable and appropriately submitted. More importantly, Paragraph 5 of Annex II explicitly provides that 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.

288. In this respect, Sadia, Avipal, Frangosul and Catarinense have provided information to the best of their abilities and have never refused to cooperate with the DCD. Moreover, the Panel should take into account that the DCD only determined the period of investigation nine months after the investigation had been initiated. During those nine months, Sadia, Avipal and Frangosul provided information on normal value and export price in excess of the period of investigation,<sup>129</sup> which was later defined as from January 1998 through January 1999.<sup>130</sup> The DCD originally did not establish the period of investigation for dumping purposes and exporters had to present export price and normal value information for 1996, 1997, 1998 and the months where data was available for 1999.<sup>131</sup>

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<sup>125</sup> See, Exhibit BRA-22 and Pages 18 and 43 of Exhibit BRA-15.

<sup>126</sup> See, Exhibit BRA-23 and Pages 22 and 45 of Exhibit BRA-15.

<sup>127</sup> See, Exhibit BRA-24 and Pages 29 and 49 of Exhibit BRA-15.

<sup>128</sup> See, Exhibit BRA-25 and Pages 38 and 39 of Exhibit BRA-15.

<sup>129</sup> See, Exhibits BRA-22, 23 and 24.

<sup>130</sup> See, Exhibits BRA-13 and 26.

<sup>131</sup> See, Pages 18, 22 and 29 of Exhibit BRA-15.

289. The exporters never refused to provide such information even though the burden was excessive. With that in mind, the responses may not have been submitted in exactly the form or with the content expected, or desired, by the DCD, but they were nevertheless submitted. To that regard, Brazil recalls that Paragraph 5 of Annex II provides that the mere fact that the information provided may not be ideal in all respects, does not justify the authorities from disregarding it.

290. By completely disregarding all the export price information provided by the exporters and applying, instead, the information from *Ganaderia*, Argentina has acted inconsistently with Article 6.8 and Paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.

**(iv) Claim 18: Inconsistency with Article 12.2.2 of the Anti-Dumping Agreement**

***Text of Article 12.2.2***

291. Article 12.2.2 provides for what information must be included in the public notice of conclusion in the case of an affirmative determination providing for the imposition of a definitive duty. It provides, in pertinent part:

“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 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.”

***Legal Argument Relative to Claim 18***

292. The question presented to the Panel is whether any reasoning has been provided in the final determination, sufficient to satisfy the requirements of Article 12.2.2 of the Anti-Dumping Agreement, regarding why the DCD did not use Sadia, Avipal, Frangosul and Catarinense’s export price information.

293. In the final determination, the DCD established export price for all Brazilian exporters based on the import information from the Argentinean agency *Ganaderia* and disregarded the export price reported by Sadia, Avipal, Frangosul and Catarinense.

294. The DCD limited its explanation of the use of the export price information by stating that:

“For this stage of the proceeding and observant of the most complete and detailed source of information, the DCD considers appropriate to use the FOB export value derived from the Dirección de Ganaderia, Secretaria de Agricultura, Ganaderia, Pesca y Alimentación, listed for each company (...)<sup>132</sup>”

295. No further explanation was given as to why the export price information reported by the exporters was not accepted.

296. Article 12.2.2 specifically requires that the notice or report contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or

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<sup>132</sup> See, Pages 76 of Exhibit BRA-15.



claims made by the exporters and importers. Among the relevant information described in Article 12.2.1 are the established margins of dumping and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value.

297. Contrary to Article 12.2.2 of the Anti-Dumping Agreement, no explanation was given as to why the DCD did not establish the export price based on the information provided by exporters.

(v) ***Claim 19: Inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement***

***Text of Article 6.8***

298. Article 6.8 provides that:

“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.”

Paragraph 3 of Annex II provides that:

“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. (...)”

Paragraph 5 of Annex II sets forth that:

“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.”

Paragraph 7 of Annex II:

“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 favorable to the party than if the party did cooperate.”

***Legal Argument Relative to Claim 19***

299. Pursuant to the facts related to these claims, Frangosul submitted the questionnaire responses, including normal value data on 27 April 1999. On 19 August 1999, Frangosul provided explanation that the great volume of sales in the home market did not make it possible for it to provide copies of invoices for each transaction. Frangosul in this response invited the DCD to verify in loco or to choose a sample of the transactions, so that it could provide invoice copies of the selected

transactions.<sup>133</sup> On 12 October 1999, the DCD sent a letter to Frangosul requesting a new list of invoices for the period covering January 1998 through January 1999, so that the DCD could pick out sample transactions it wanted documentation from.<sup>134</sup> On 30 December 1999, Frangosul presented the list of invoices in diskette.<sup>135</sup> On 5 January 2000, the DCD sent a letter to Frangosul informing of the end of the stage to produce evidence.<sup>136</sup> The DCD never selected the transactions for which it wanted Frangosul to provide invoice copies.

300. With respect to the responses provided by Catarinense, Brazil recalls that the DCD notified the exporter of the investigation on 15 September 1999, eight months after the investigation initiated. On 20 October 1999, Catarinense requested an extension of the deadline to submit the questionnaire response. On 3 November 1999, Catarinense provided the questionnaire response with a list of the transactions in the internal market for the period January 1998 through January 1999. On 8 November 1999, the DCD sent a letter to Catarinense granting the extension of the deadline until 8 November 1999.<sup>137</sup> Brazil observes that the DCD sent the letter granting Catarinense the extension on the same day of the end of the deadline granted. After this date, the DCD did not request further information from Catarinense.

301. On 23 June 2000, the DCD issued the final dumping determination without taking into account the normal value information provided by Frangosul and Catarinense in the investigation and, thus, did not establish normal value for these two exporters. Instead, the DCD applied to Frangosul and Catarinense the normal value assigned for all other exporters based on the information provided by petitioner on 26 July 1999.<sup>138</sup> Petitioner presented a spreadsheet with an updated normal value calculation for 1998 through 1999 based on prices published by JOX. Petitioner's calculation used prices from three reference dates for each month of the period January 1998 through January 1999. The prices were for chilled poultry, with head and feet, sold in the São Paulo wholesale market.

302. Article 6.8 of the Anti-Dumping Agreement limits the cases in which facts available may be used. These cases occur when any interested party refuses access to or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation. Throughout the entire investigation Frangosul and Catarinense cooperated with the DCD in providing the information requested.

303. If the DCD considered that the normal value information was not submitted within the deadlines established by the authority and, thus, was not submitted within a reasonable period, Brazil recalls that a "reasonable period" will not, in all instances, be commensurate with the pre-established deadlines set out in general regulations, particularly if the investigating authority has not acted in a reasonable, objective, and impartial manner.

304. To that regard, Brazil recalls that Frangosul was subject to an excessive burden in presenting dumping data from 1996 through 1999, a period outside the investigating period of January 1998 through January 1999. With respect to Catarinense's response, the exporter submitted the information requested by the DCD even though it was notified of the investigation eight months after the investigation had been initiated. All of these actions by the investigating authority indicate that the DCD did not act in a reasonable, objective and impartial manner.

305. Furthermore, in the case of Frangosul, the exporter invited the DCD to verify the information provided in its response.

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<sup>133</sup> See, Exhibit BRA-26.

<sup>134</sup> See, Exhibit BRA-26.

<sup>135</sup> See, Exhibit BRA-26.

<sup>136</sup> See, Exhibit BRA-26.

<sup>137</sup> See, Exhibit BRA-27.

<sup>138</sup> See, Pages 55 and 104 of Exhibit BRA-15.

306. Paragraph 3 of Annex II provides that all information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, and which is supplied in a timely fashion, should be taken into account when determinations are made. The fact that Frangosul submitted normal value information in time to be verified, and actually could be verified, indicates that the DCD should have considered and accepted the normal value information.

307. Paragraph 5 of Annex II also instructs authorities that information provided may not always be ideal in all respects and that this should not be the reason for disregarding the information if the interested party has acted to the best of its ability.

308. As a final note, the DCD did not have to base its finding with respect to normal value for Frangosul and Catarinense on information provided by petitioner, since it had available information submitted by Frangosul and Catarinense. Petitioner's normal value for all other exporters was established based on prices published by JOX for chilled poultry, with head and feet, sold in the São Paulo wholesale market. According to Frangosul and Catarinense's responses, the normal value reported was for frozen poultry, without head and feet.<sup>139</sup> No doubt the normal value provided by the two exporters was more accurate than the normal value provided by petitioner.

309. In that sense, Paragraph 7 of Annex II instructs the investigating authority to use information from a secondary source, including information with respect to normal value, with special circumspection.

310. Even though Frangosul and Catarinense had appropriately provided normal value information, the DCD decided to use petitioner's normal value information, which was based on the price of poultry with different characteristics than that reported by the two exporters. To that effect, Brazil believes that the DCD failed to use special circumspection when it decided to apply the normal value from a secondary source.

**(vi) Claim 20: Inconsistency with Article 12.2.2 of the Anti-Dumping Agreement**

***Text of Article 12.2.2***

311. Article 12.2.2 provides that:

“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 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.”

***Legal Argument Relative to Claim 20***

312. The question presented to the Panel is whether any reasoning has been provided in the final determination, sufficient to satisfy the requirements of Article 12.2.2 of the Anti-Dumping

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<sup>139</sup> See, Exhibits BRA-24 and 25. We observe that the Brazilian exporter Catarinense reported that the broiler type poultry sold in the home market (Brazil) contained head but not feet.

Agreement, regarding why the DCD did not use Frangosul and Catarinense's normal value information.

313. In the final determination, the DCD did not establish normal value for Frangosul and Catarinense. In fact, the DCD did not establish an individual margin of dumping for these two exporters, even though they provided information on normal value and export price.

314. The only explanation given by the DCD for not using the information provided by Frangosul and Catarinense was that the authority did not count on additional information or sufficient supporting documentation that would make it possible for it to proceed with a final determination of an individual dumping margin.<sup>140</sup>

315. No further explanation was given to why the normal value information reported by the exporters was not accepted.

316. Article 12.2.2 specifically requires that the notice or report 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. Among the relevant information described in Article 12.2.1 are the established margins of dumping and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value.

317. Contrary to Article 12.2.2 of the Anti-Dumping Agreement, no explanation was given for the reasons why none of the normal value information provided Frangosul and Catarinense were used in the establishment of the normal value.

*(vii) Claim 22: Inconsistency with Article 6.10 of the Anti-Dumping Agreement*

*Text of Article 6.10*

318. Article 6.10 provides as follows:

“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 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 questions which can reasonably be investigated.”

*Legal Argument Relative to Claim 22*

319. As demonstrated in the facts related to these claims, Frangosul and Catarinense were known producers/exporters of the subject merchandise under investigation. Both Frangosul and Catarinense submitted the requested information on normal value and export price, which was disregarded by the DCD without explanation. Instead, the DCD decided to apply facts available and used the information for normal value submitted by petitioner and the information for export price provided by the Argentinean agency SENASA,<sup>141</sup> in order to establish the dumping margin for all other exporters. The dumping margin applied to all other exporters was applied to Frangosul and Catarinense, even though these exporters appropriately submitted normal value and export price data requested by the

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<sup>140</sup> See, Page 76 of Exhibit BRA-15.

<sup>141</sup> See, Page 104 of Exhibit BRA-15.

DCD within a reasonable period. Pursuant to these facts, the DCD was required to determine an individual margin of dumping for Frangosul and Catarinense.

320. The first sentence of Article 6.10 sets forth a general rule that authorities must determine an individual margin of dumping for each known exporter or producer of the product under investigation.

321. The second sentence of Article 6.10 of the Anti-Dumping Agreement permits an investigating authority to deviate from the general rule, in cases where the number of exporters, producers, importers or types of products involved is so large as to make such determination impracticable, by allowing the investigating authorities to “limit their examination either to a reasonable number of interested parties or products by using samples (...) or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated”.

322. Brazil indicates that the second sentence of Article 6.10 of the Anti-Dumping Agreement, which is the exception to the rule set on the first part of that Article, is only applicable when the number of exporters, producers, importers or types of products involved in an investigation is so large as to make an individual margin determination impracticable.

323. Brazil affirms that this was not the case at issue. The argument that the number of known Brazilian producers and exporters of poultry involved in the investigation was so large as to make an individual margin of dumping determination impracticable was never raised by the DCD during the investigation. In that regard, subparagraph 1 of Article 6.10 provides that such selection “shall preferably be chosen in consultations with and with the consent of the exporters, producers or importers concerned”. The DCD did not at any time during the investigation indicate, consult with, or request the consent of the Brazilian producers/exporters concerned that it would make a selection of exporters in accordance with Article 6.10. In fact, the DCD sent dumping questionnaires for Frangosul and Catarinense to respond to, in a clear indication that the investigating authority had the intention of examining the information provided by these two exporters.

324. In addition, 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. The DCD failed to provide any evaluation of the facts on the record that could have formed the basis for such a conclusion, indicating that the DCD failed to perform an objective and an unbiased evaluation of the facts which, under the applicable dumping standard of review, the Panel is requested to review.

325. By failing to determine an individual margin of dumping for Frangosul and Catarinense and by applying, instead, the rate established for all other exporters, Argentina has acted inconsistently with the general rule set forth in Article 6.10 of the Anti-Dumping Agreement.

#### 4. Article 6.9

326. **Claim 21:** Argentina failed to inform the Brazilian exporters of the essential facts under consideration which formed the basis for the decision whether to apply definitive measures, thereby preventing the Brazilian exporters from adequately defending their interests, contrary to the requirement in Article 6.9 of the Anti-Dumping Agreement.

##### (a) Facts

327. On January 4, 2000, the DCD issued the memorandum *Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa Probatoria*, the report prior to the end of the evidence-producing stage of the dumping investigation.<sup>142</sup> In item VIII of such report, the DCD provided a technical

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<sup>142</sup> See, Exhibit BRA-28.

analysis of the information in the dumping investigation, including the elements for the determination of normal value and elements for the definition of the export price.<sup>143</sup> All of which were facts under consideration that would be used to form the basis for the decision whether to apply definitive measures.

### *Normal Value*

#### Sadia

328. In the report prior to the final determination, the DCD stated that Sadia provided on 26 August 1999 lists of invoices issued from 1996 through February 1999 and a copy of one invoice with the corresponding translation.<sup>144</sup> Due to the extensive volume of invoices to be examined and for which supporting documentation would have to be provided, the DCD made a statistic sample for the period starting January 1998 through January 1999.<sup>145</sup> According to the DCD, the sample was done randomly and considered 372 transactions.<sup>146</sup> The DCD then requested supporting documentation for the sample it had made. According to the report, Sadia had not presented the referred documentation up to that moment.<sup>147</sup>

329. On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>148</sup> In the determination, the DCD stated that on 13 January 2000, Sadia presented part of the supporting documentation requested by the DCD (268 invoices).<sup>149</sup> The DCD calculated normal value for Sadia based on the sample it chose, and for which Sadia presented supporting documentation.<sup>150</sup>

#### Avipal

330. The report prior to the final determination provided that on 12 August 1999, Avipal explained that due to the great number of invoices (around 545 invoices a day and 196,200 invoices per year) it would not be feasible to send copy of all invoices.<sup>151</sup> On 1 September 1999, Avipal submitted copies of the translation of invoice forms.<sup>152</sup> On 21 December 1999, Avipal submitted diskette with the list of the invoices and attached spreadsheets with deductions to be made to the referred list.<sup>153</sup> The DCD noted that the mentioned information had not yet been examined up to that moment.<sup>154</sup>

331. On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>155</sup> In the determination, the DCD explained that from the information submitted by Avipal on 12 August 1999, the DCD made a calculation based on the transactions, for which Avipal submitted invoice copies (25 invoices).<sup>156</sup> The DCD further stated that the information submitted on 21 December 1999 was not accompanied by supporting documentation and that the DCD only made discounts for which it

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<sup>143</sup> See, Page 50 of Exhibit BRA-28.

<sup>144</sup> See, Pages 60 and 61 of Exhibit BRA-28.

<sup>145</sup> See, Page 61 of Exhibit BRA-28.

<sup>146</sup> See, Page 61 of Exhibit BRA-28.

<sup>147</sup> See, Page 61 of Exhibit BRA-28.

<sup>148</sup> See, Exhibit BRA-15.

<sup>149</sup> See, Page 62 of Exhibit BRA-15.

<sup>150</sup> See, Page 63 of Exhibit BRA-15.

<sup>151</sup> See, Page 62 of Exhibit BRA-28.

<sup>152</sup> See, Page 62 of Exhibit BRA-28.

<sup>153</sup> See, Page 62 of Exhibit BRA-28.

<sup>154</sup> See, Page 62 of Exhibit BRA-28.

<sup>155</sup> See, Exhibit BRA-15.

<sup>156</sup> See, Page 64 of Exhibit BRA-15.

was able to corroborate.<sup>157</sup> The DCD calculated normal value for Avipal based only on the information of transactions, for which Avipal submitted invoice copies.<sup>158</sup>

### Frangosul

332. Oddly, the report issued by the DCD prior to the final determination made no reference to the normal value information provided by Frangosul throughout the investigation.<sup>159</sup> In this regard, it is important to note that Frangosul invited the DCD to verify *in loco* or to select a sample of the transactions so that it could provide the corresponding invoices.<sup>160</sup> On 30 December 1999, Frangosul presented a list of invoices for transactions in the home market for January 1998 through January 1999 in a diskette.<sup>161</sup> The DCD never selected the transactions for which Frangosul was supposed to provide invoice copies.

333. On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>162</sup> The DCD applied to Frangosul the normal value found for all other exporters, which was based on information presented by the petitioner on 26 August 1999.<sup>163</sup>

### Catarinense

334. In the report prior to the final determination, the DCD stated that Catarinense submitted the response to the dumping questionnaire on 3 November 1999.<sup>164</sup> It is important to note that Catarinense was notified of the investigation and was requested to provide responses to the questionnaire only on 15 September 1999.<sup>165</sup> The DCD report prior to the final determination presented the following table based on the data submitted by Catarinense.

#### NORMAL VALUE REPORTED BY CATARINENSE

Year	Total Kg.	Total US\$	Price Per Kg	Normal Value (+9,09%)
1998	52,528,211	47,068,340.55	0.8961	0.9775
1999*	43,475,875	24,424,618.28	0.5618	0.6129
Weighted Average	96,004,086	71,492,958.83	0.7447	0.8124

Source: Page 66 of Exhibit BRA-28.

335. The DCD indicated that the values in the table came from the aggregate data presented in Annexes V and VI of the exporter's questionnaire and corresponded to a period greater than the period under investigation.<sup>166</sup>

336. On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>167</sup> In the final determination, the DCD provided that Catarinense did not present supporting documentation for the listed home market sales and applied the normal value found for all other exporters, which was based on information presented by the petitioner on 26 August 1999.<sup>168</sup>

<sup>157</sup> See, Pages 64 and 65 of Exhibit BRA-15.

<sup>158</sup> See, Page 65 of Exhibit BRA-15.

<sup>159</sup> See, Exhibit BRA-28.

<sup>160</sup> See, Exhibit BRA-26.

<sup>161</sup> See, Exhibit BRA-26.

<sup>162</sup> See, Exhibit BRA-15.

<sup>163</sup> See, Pages 54, 55, 103 and 104 of Exhibit BRA-15.

<sup>164</sup> See, Page 66 of Exhibit BRA-28.

<sup>165</sup> See, Exhibit BRA-13.

<sup>166</sup> See, Page 66 of Exhibit BRA-28.

<sup>167</sup> See, Exhibit BRA-15.

<sup>168</sup> See, Pages 103 and 104 of Exhibit BRA-15.

*Export Price*

337. In the report prior to the final determination, the DCD provided that on 13 September 1999, the Subdirector General de Operaciones Aduaneras del Interior submitted lists of import transactions,<sup>169</sup> and that CEPA had also provided on 17 November and 16 December 1999 information regarding imports for the month of October and November 1999.<sup>170</sup> The exporters also submitted lists of invoices for the sales transactions to Argentina throughout the investigation. The report, however, did not mention the export price information submitted by the Brazilian exporters. The information that was considered by the DCD as the most complete and detailed source of information to establish the FOB export price was that provided by the agency *Ganaderia*.<sup>171</sup>

338. On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>172</sup> In the final determination, the DCD established export price based on the import information from *Ganaderia*.<sup>173</sup> For the export price established for all other exporters, the DCD used the information provided by SENASA.<sup>174</sup>

(i) ***Claim 21: Inconsistency with Article 6.9 of the Anti-Dumping Agreement***

***Text of Article 6.9***

339. Article 6.9 provides as follows:

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

***Legal Argument Relative to Claim 21***

340. Article 6.9 of the Anti-Dumping Agreement mandates authorities to inform all interested parties of the essential facts under consideration that will form the basis for the decision whether to apply definitive measures. Article 6.9 further provides that such disclosure of the essential facts take place in sufficient time for the parties to defend their interests.

341. Information regarding normal value and export price, which are used to establish dumping margins, are considered essential facts to be considered in the final determination. By not indicating in the report prior to the final determination that the normal value and export price reported by the exporters was not going to be used and by not giving the reasons why that information would be disregarded, the DCD has not informed of the essential facts under consideration considered in the decision whether to apply definitive measures and has not given the exporters the opportunity to defend their interests.

342. In particular, the DCD report prior to the final determination did not indicate: (i) that the information in the lists of invoices provided by Sadia that covered the extensive period of 1996 through February 1999 would not be used to establish normal value; (ii) that the only information considered to establish normal value for Sadia in the final determination would correspond to the

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<sup>169</sup> See, Page 72 of Exhibit BRA-28.

<sup>170</sup> See, Pages 72 and 73 of Exhibit BRA-28.

<sup>171</sup> See, Page 72 of Exhibit BRA-28.

<sup>172</sup> See, Exhibit BRA-15.

<sup>173</sup> See, Pages 76 and 77 of Exhibit BRA-15.

<sup>174</sup> See, Page 104 of Exhibit BRA-15.



information for the transactions chosen through the sample made by the DCD, for which supporting documentation was actually provided to the DCD; and, (iii) the reason why the DCD would not consider the information provided by Sadia for all sales in the home market.

343. In addition, the report did not indicate that the only information that would be considered to establish normal value for Avipal would be the information for the transactions, for which supporting documentation was submitted to the DCD (25 invoices).

344. With respect to Frangosul and Catarinense, the DCD simply disregarded the information submitted by the two exporters and applied the normal value found for all other exporters, based on the information provided by petitioner.

345. Likewise, the report did not indicate why the information submitted by the exporters was not considered for purposes of determining the FOB export price, nor did the DCD explain why it considered the information provided by the agency *Ganaderia* more complete and, thus, denied the exporters the right to defend their interests.

346. Our understanding of Article 6.9 comes from the Panel's reasoning on *Argentina – Ceramic Floor Tiles*:

“(…) the DCD relied primarily upon evidence submitted by petitioners and derived from secondary sources, rather than upon information provided by the exporters, as the factual basis for a determination of the existence of dumping. Thus, petitioner and secondary source information, rather than exporters' information, represented (with respect to the existence of dumping) the essential facts which formed the basis for the decision whether to apply definitive measures. We therefore examined the record in order to determine whether exporters were informed by the Argentine authority, through access to the file, that it was on these facts that the authority would primarily rely in its determination regarding the existence of dumping.”<sup>175</sup> (emphasis added)

347. Furthermore, Brazil agrees with that Panel's conclusion that exporters cannot be aware simply by reviewing the record of the investigation that evidence submitted by petitioners and derived from secondary sources, rather than facts submitted by the exporters, would form the primary basis for the determination of the existence and extent of dumping.<sup>176</sup> Brazil agrees with that Panel's conclusion that:

“(…) The DCD thus failed to put the exporters on notice of an essential fact under consideration. As a result, the exporters were unable to defend their interests within the meaning of Article 6.9, for example, by giving reasons why their responses should not be rejected and by suggesting alternative sources for facts available if their responses were nonetheless disregarded. Under these circumstances, we find that the DCD did not, by referring the exporters to the complete file of the investigation, fulfil its obligation under Article 6.9 to inform the exporters of the “essential facts under consideration which form the basis for the decision whether to apply definitive measures.”<sup>177</sup> (emphasis added)

348. Brazil believes that the analysis and conclusions of the Panel in *Argentina - Ceramic Floor Tiles* apply to the present claim. The DCD failed to provide the exporters the essential facts, which

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<sup>175</sup> *Argentina – Definitive Measures on Imports of Ceramic Floor Tiles from Italy*, 28 September 2001, WT/DS189/R, at para. 6.127 (adopted on 5 November 2001) (“*Argentina – Ceramic Floor Tiles*”).

<sup>176</sup> *Argentina – Ceramic Floor Tiles*, at para. 6.129.

<sup>177</sup> *Argentina – Ceramic Floor Tiles*, at para. 6.129.

would form the basis for the application of the definitive measures, and that the information submitted by exporters was not to be used.

349. By not explaining the reasons why such information was rejected, the DCD denied the exporters the opportunity to defend their interests within the meaning of Article 6.9. This constitutes a *prima facie* violation of Article 6.9 of the Anti-Dumping Agreement.

350. Also, to the extent that Argentina, in order to justify its activities in the investigation, may bring forth information or documents not disclosed to the exporters during the investigation (particularly in regard to Claim 39), Brazil submits that such non-disclosure of essential facts should also be considered a violation of Article 6.9.

#### D. CONDUCT OF THE ANTI-DUMPING INVESTIGATION AND FINAL AFFIRMATIVE DETERMINATION

##### 1. Article 2.4 and 2.4.2

351. Five claims follow from the facts described below and the legal text of the Anti-Dumping Agreement:

**Claim 23:** Argentina acted inconsistently with Article 2.4 by not making due allowance for differences in freight in the normal value established for Sadia and Avipal.

**Claim 24:** Argentina acted inconsistently with Article 2.4 by not making due allowance for differences in taxation, freight and financial cost in the normal value established for all other exporters.

**Claim 25:** Argentina acted inconsistently with Article 2.4 by incorrectly making due allowances to normal value based on alleged physical characteristic differences between the product sold in Brazil and to Argentina.

**Claim 26:** Argentina acted inconsistently with Article 2.4 by imposing an unreasonable burden of proof on Sadia, Avipal and Frangosul by not determining the period of investigation and by allowing the exporters to submit dumping information for the years 1996 through 1999, when the dumping period of investigation was later determined as from January 1998 through January 1999.

**Claim 27:** Argentina acted inconsistently with Article 2.4.2 by incorrectly making a comparison between the export price and the normal value for Sadia and Avipal based only on internal market transactions for which invoices were presented, instead of determining normal value based on all the transactions in the internal market for the period, listed and submitted to the DCD. The DCD established the margins of dumping for Sadia and Avipal on the basis of a comparison of a weighted average statistical sample of normal value with a weighted average of prices of all comparable export transactions.

##### (a) Facts

352. On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>178</sup> The export price, normal value and the dumping margin calculation in the final determination were established as follows.

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<sup>178</sup> See, Exhibit BRA-15.

*Export Price*

353. In the final dumping determination, the DCD established export price based on the import information from *Ganaderia*.<sup>179</sup> The DCD used a weighted average FOB export price for the period January 1998 through January 1999 for each exporter. The table used by the DCD to establish export price is the following:

<b>Total By Producer</b>	<b>US\$ FOB</b>	<b>Net Kgs</b>	<b>US\$/Kgs</b>
Sadia S.A.	16216345	20049051	0.80883
Comaves	3015738	3380321	0.89215
Da Granja Agroí	1652300	1820106	0.90780
Sadia Concordia	1398960	1519560	0.92063
Minuano Alimentos	3139461	3390151	0.92605
Avipal	3554693	3767350	0.94355
Acaua Industria	39824	41920	0.95000
Felipe Avícola	306650	322000	0.95233
Nicolini – SIF	5172876	5397254	0.95843
Catarinense Ltd.	1163894	1158307	1.00482
Perdigão Agroin	1564110	1551753	1.00796
Seara Alimentos	11147872	11038851	1.00988
Ceval Alimentos	947993	917261	1.03350
Frangosul	2663240	2558914	1.04077
Veneto	67252	64050	1.04999
Chapecó CI	1445063	1363221	1.06004
Litoral Aliment	523440	482000	1.08598
<b>TOTAL</b>	<b>54019711</b>	<b>58822070</b>	<b>0.91836</b>

Source: Pages 76 and 77 of Exhibit BRA-15.

Export Price for All Other Exporters

354. In the final determination, the DCD calculated export price for all other exporters based on the information provided by SENASA.<sup>180</sup> The following is the table used by the DCD to establish that export price:

**FOB EXPORT PRICE 1998 – January 1999**

<b>Producer</b>	<b>US\$/Kg</b>	<b>Net Kg</b>	<b>US\$ FOB</b>
Comaves	0.89215	3.380.321,00	3.015.738,00
Da Granja Agroí	0.90780	1.820.106,00	1.652.300,00
Sadia Concordia	0.92063	1.820.106,00	1.652.300,00
Minuano Alimentos	0.92605	3.390.151,00	3.139.461,00
Acaua Industria	0.95000	41.920,00	39.824,00
Felipe Avicola	0.95233	322.000,00	306.650,00
Catarinense Ltd	1.00482	1.158.307,00	1.163.894,00
Perdigão Agroin	1.00796	1.551.753,00	1.564.110,00

<sup>179</sup> See, Pages 76, 77, 103 and 104 of Exhibit BRA-15.

<sup>180</sup> See, Page 104 of Exhibit BRA-15.

<b>Producer</b>	<b>US\$/Kg</b>	<b>Net Kg</b>	<b>US\$ FOB</b>
Frangosul	1.04077	2.558.914,00	2.663.240,00
Veneto	1.04999	64.050,00	67.252,00
Chapecó CI	1.06004	1.363.221,00	1.445.063,00
Litoral Aliment	1.08598	482.000,00	523.440,00
<b>TOTAL</b>	<b>0.95992</b>	<b>17.952.849,00</b>	<b>17.233.272,00</b>

Source: Annex “Precio FOB de exportación de las firmas brasileñas con escasa o sin participación en la investigación” in Exhibit BRA-15.

### *Normal Value*

#### Sadia

355. On 20 April 1999, Sadia submitted the questionnaire response, providing sales information for the home market and for Argentina for the period 1996 through 1998 and January and February of 1999.<sup>181</sup> On 26 August 1999, Sadia sent a letter to the DCD providing a list of the sales transactions in the home market for 1996 through 1999 and explaining that the great volume of sales in the home market made it impossible to provide an invoice copy for each transaction. In this letter, Sadia invited the DCD to verify *in loco* the transactions listed or to select a sample of transactions so it could provide the corresponding invoices.<sup>182</sup> On 3 December 1999, the DCD sent a letter to Sadia requesting invoice copies of 372 selected sales transactions in the home market, establishing a 5-day deadline to submit the invoice copies.<sup>183</sup> On January 4, 2000, the DCD issued the memorandum *Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa Probatoria*, the report prior to the end of the evidence-producing stage of the dumping investigation.<sup>184</sup> On 13 January 2000, Sadia submitted copies of the invoices requested by the DCD.<sup>185</sup> On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>186</sup>

356. In its determination, the DCD explained how it established normal value for Sadia. From the information submitted by Sadia on 26 August 1999, the DCD stated that due to the great volume of information to be analyzed and for which supporting documentation was required, the DCD chose a statistical sample for the period of January 1998 through 1999.<sup>187</sup> The DCD did not explain how this sample was made. The only explanation given was that the DCD determined that the size of the sample would be of 166, considering a tolerable error of 2 per cent and a trusted gap (“*intervalo de confianza*”) of 95 per cent.<sup>188</sup> Without further explanation, the DCD stated that it decided to choose a greater sample size for Sadia of 372 transactions.<sup>189</sup>

357. Based on that sample, the DCD requested Sadia to provide supporting documentation (copies of invoices) for that sample. The DCD stated that Sadia requested an extension of the deadline, which was granted, and that on 13 January 2000, Sadia presented part of the supporting documentation requested (268 invoices).<sup>190</sup> The DCD further indicated that according to the memorandum prior to the final determination of 4 January 2000, for purposes of the final determination, the investigating authority would consider the information submitted until that date.<sup>191</sup> The DCD calculated normal

<sup>181</sup> See, Pages 18 and 19 of Exhibit BRA-15 and Exhibit BRA-22.

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

<sup>183</sup> See, Exhibit BRA-30.

<sup>184</sup> See, Exhibit BRA-28.

<sup>185</sup> See, Page 62 of Exhibit BRA-15.

<sup>186</sup> See, Exhibit BRA-15.

<sup>187</sup> See, Page 62 of Exhibit BRA-15.

<sup>188</sup> See, Page 62 of Exhibit BRA-15.

<sup>189</sup> See, Page 62 of Exhibit BRA-15.

<sup>190</sup> See, Page 62 of Exhibit BRA-15.

<sup>191</sup> See, Page 63 of Exhibit BRA-15.

value for Sadia based on the information provided by Sadia for the sample chosen by the DCD and for which Sadia had presented supporting documentation. The normal calculation for Sadia was as follows:

**STATISTICAL SAMPLE  
SADIA S.A.**

Period	Gross Simple Average Price R\$	Net Simple Average Price R\$	Gross Simple Average Price US\$	Net Simple Average Price US\$	Normal Value + 9,09%	Gross Weight Average Price US\$	Net Weight Average Price US\$	Normal Value + 9,09%
Jan 98– Jan 99	1,2409	1,1465	1,0527	0,9726	1,061	0,9222	0,852	0,9294

Source: Page 63 of Exhibit BRA-15.

Avipal

358. On 21 April 1999, Avipal submitted its questionnaire response.<sup>192</sup> On 7 May 1999, Avipal submitted a hard copy of the response with the non-confidential information.<sup>193</sup> On 12 August 1999, Avipal submitted a list of sales transactions in the home market for 1996 through 1999, with a sample invoice for each month in 1997 and 1998, and explanation that the great volume of sales in the home market made it impossible to provide an invoice copy for each transaction. In its letter dated 12 August 1999, Avipal invited the DCD to verify *in loco* the transactions listed or to select a sample of transactions so it could provide the corresponding invoices.<sup>194</sup> On 1 September 1999, Avipal provided translation of a standard invoice from Portuguese into Spanish.<sup>195</sup> On 21 December 1999, Avipal submitted a diskette with a list of invoices for sales of poultry in the home market for the period January 1998 through January 1999, including deductions and taxes.<sup>196</sup> The DCD never selected the transactions for which Avipal offered to provide invoice copies. On January 4, 2000, the DCD issued the memorandum *Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa Probatoria*, the report prior to the end of the evidence-producing stage of the dumping investigation.<sup>197</sup> On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>198</sup>

359. In the final dumping determination, the DCD explained how it established normal value for Avipal. From the information submitted by Avipal on 12 August 1999, the DCD made a calculation based on the transactions, for which Avipal sent invoice copies (25 invoices).<sup>199</sup>

**INVOICES HOME MARKET  
AVIPAL SA**

Year	# of Inv. Presented	Total Kgs	Gross Simple Average Price US\$	Net simple Average Price US\$	Normal Value +9,09%	Net Weight Average Price R\$	Gross Weight Average price US\$	Net Weight Average Price US\$	Normal Value +9,09%
1998	25	174.030,9	1,102	1,007	1,0985	1,2220	1,0806	1,0437	1,1385

Source: Page 64 of Exhibit BRA-15.

<sup>192</sup> See, Exhibit BRA-23.

<sup>193</sup> See, Exhibit BRA-23.

<sup>194</sup> See, Exhibit BRA-31.

<sup>195</sup> See, Page 64 of Exhibit BRA-15.

<sup>196</sup> See, Page 64 of Exhibit BRA-15.

<sup>197</sup> See, Exhibit BRA-28.

<sup>198</sup> See, Exhibit BRA-15.

<sup>199</sup> See, Page 64 of Exhibit BRA-15.

360. The DCD further stated that on 1 September 1999, Avipal sent a translation of a standard invoice. The DCD indicated that on 21 December 1999, Avipal sent a diskette with the list of invoices and that spreadsheets were attached to the response with deductions to be made to the listed figures.<sup>200</sup> From the analysis of the submitted information, the DCD created the following table:

**AVIPAL SA**  
**List of sales in the Home Market**

Period	Total Kgs	Gross Simple Average Price R\$	Net Simple Average Price R\$	Gross Weight Average Price US\$	Net Weight Average Price US\$	Normal Value +9,09%
Jan 98 – Jan 99	126,828,110.36	1,2183	1,1358	1,011	0,9421	1,028

Source: Pages 64 and 65 of Exhibit BRA-15.

361. The DCD indicated that the information submitted on the 21 December 1999 did not present supporting documentation and that the DCD only made discounts for which it was able to corroborate.<sup>201</sup>

362. The DCD calculated normal value for Avipal based on the information of the transactions that accompanied invoice copies. The normal value calculation for Avipal was as follows:

**INVOICES HOME MARKET**  
**AVIPAL SA**

Year	# of Inv. Presented	Total Kgs	Gross Simple Average Price US\$	Net Simple Average Price US\$	Normal Value +9,09%	Net Weight Average Price R\$	Gross Weight Average Price US\$	Net Weight Average Price US\$	Normal Value +9,09%
1998	25	174.030,9	1,102	0,986	1,0756	1,1695	1,0806	0,9988	1,0896

Source: Page 65 of Exhibit BRA-15.

Frangosul

363. On 27 April 1999, Frangosul submitted its questionnaire response.<sup>202</sup> On 19 August 1999, Frangosul provided translation of four invoices of sales to Argentina, translation of product brochure, and explanation that the great volume of sales in the home market made it impossible to provide invoice copies for each transaction. Frangosul in this response invited the DCD to verify *in loco* or to select a sample of the transactions so that it could provide the corresponding invoices.<sup>203</sup> On 30 December 1999, Frangosul presented a list of invoices for transactions in the internal market for January 1998 through January 1999 in a diskette.<sup>204</sup> The DCD never selected the transactions for which Frangosul offered to provide invoice copies. On 4 January 2000, the DCD issued the memorandum *Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa Probatoria*, the report prior to the end of the evidence-producing stage of the dumping investigation.<sup>205</sup> On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>206</sup>

<sup>200</sup> See, Page 64 of Exhibit BRA-15.

<sup>201</sup> See, Page 65 of Exhibit BRA-15.

<sup>202</sup> See, Exhibit BRA-24.

<sup>203</sup> See, Exhibit BRA-26.

<sup>204</sup> See, Exhibit BRA-26.

<sup>205</sup> See, Exhibit BRA-28.

<sup>206</sup> See, Exhibit BRA-15.

364. In the final determination, the DCD did not consider Frangosul's response nor did it provide an explanation for why the information provided was not used.<sup>207</sup>

Catarinense

365. On 15 September 1999, the DCD sent a letter to Catarinense notifying it of the investigation and requesting it provide responses to the questionnaire. In this letter the DCD established, for the first time, the period of investigation for data collection from January 1998 until January 1999.<sup>208</sup> On 13 October 1999, Catarinense requested an extension of 20 days to submit the responses. On 3 November 1999, Catarinense provided its questionnaire responses. For sales to Argentina, Catarinense provided a list of invoices and copy of the invoices for 1998 and 1999. For sales in the home market, Catarinense provided a list of sales transactions.<sup>209</sup> On 8 November 1999, in reference to Catarinense's request of 13 October 1999, the DCD sent a letter to Catarinense granting the extension of the deadline until 8 November 1999.<sup>210</sup> After this date, the DCD did not request further information from Catarinense. On 23 June 2000, the DCD issued the final affirmative dumping determination, without taking into account the responses submitted by Catarinense in the investigation.<sup>211</sup>

366. In the final determination, the DCD presented the following table from the information submitted by Catarinense on 3 November 1999:

**NORMAL VALUE REPORTED BY CATARINENSE**

<b>Year</b>	<b>Total Kg.</b>	<b>Total US\$</b>	<b>Price Per Kg</b>	<b>Normal Value (+9,09%)</b>
1998	52,528,211	47,068,340.55	0.8961	0.9775
1999*	43,475,875	24,424,618.28	0.5618	0.6129
Weighted Average	96,004,086	71,492,958.83	0.7447	0.8124

Source: Pages 69 and 70 of Exhibit BRA-15.

367. In the final determination, the DCD indicated that the values in the table came from the aggregate data presented in Annexes V and VI of Section A of Catarinense's questionnaire response and corresponded to a period greater than the period under investigation, and that the information provided by Catarinense did not present supporting documentation.<sup>212</sup>

Normal Value for All Other Exporters

368. In the final determination, the DCD calculated the normal value for all other exporters based on the information provided by petitioner on 26 July 1999.<sup>213</sup> Petitioner presented a spreadsheet with the normal value calculation in the home market for the period 1998 through 1999 based on prices published by JOX.<sup>214</sup> Petitioner's calculation used prices from three reference dates, for each month of the period January 1998 – January 1999.<sup>215</sup> These prices were for chilled poultry, with head and feet, sold in the São Paulo wholesale market. Petitioner's calculation is as follows:

<sup>207</sup> See, Pages 103 and 104 of Exhibit BRA-15.

<sup>208</sup> See, Exhibit BRA-13.

<sup>209</sup> See, Pages 38 and 39 of Exhibit BRA-15 and Exhibit BRA-25.

<sup>210</sup> See, Exhibit BRA-27.

<sup>211</sup> See, Pages 103 and 104 of Exhibit BRA-15.

<sup>212</sup> See, Page 70 of Exhibit BRA-15.

<sup>213</sup> See, Page 54 of Exhibit BRA-15.

<sup>214</sup> See, Exhibit BRA-19.

<sup>215</sup> See, Exhibit BRA-19.

**NORMAL VALUE  
SÃO PAULO – CHILLED POULTRY**

<b>Date</b>	<b>Average R\$</b>	<b>Exchange Rate</b>	<b>Average US\$</b>	<b>Adjustment 9,09%</b>
5/01/98	1.175	1.1161	1.0528	1.1485
14/01/98	1.065	1.1195	0.9513	1.0378
30/01/98	1.167	1.123	1.0392	1.1336
January				1.107
10/02/98	1.217	1.1261	1.0807	1.1790
16/02/98	1.235	1.1281	1.0948	1.1943
27/02/98	1.215	1.1301	1.0751	1.1729
February				1.182
4/03/98	1.240	1.1311	1.0963	1.1959
17/03/98	1.203	1.1341	1.0608	1.1572
27/03/98	1.190	1.1361	1.0474	1.1427
March				1.165
8/04/98	1.212	1.1319	1.0708	1.1681
17/04/98	1.183	1.1409	1.0369	1.1312
30/04/98	1.187	1.144	1.0376	1.1319
April				1.144
6/05/98	1.187	1.1445	1.0371	1.1314
11/05/98	1.187	1.145	1.0367	1.1309
18/05/98	1.132	1.1465	0.9874	1.0771
May				1.113
4/06/98	1.017	1.1514	0.8833	0.9636
16/06/98	1.120	1.1538	0.9707	1.0589
24/06/98	1.032	1.1547	0.8937	0.9750
June				0.999
3/07/98	1.005	1.1566	0.8689	0.9479
14/07/98	1.078	1.1645	0.9257	1.0099
30/07/98	0.990	1.162	0.8520	0.9294
July				0.962
7/08/98	1.090	1.17	0.9316	1.0163
13/08/98	1.088	1.17	0.9299	1.0144
31/08/98	0.998	1.18	0.8458	0.9226
August				0.984
4/09/98	1.07	1.18	0.9068	0.9892
16/09/98	1.052	1.18	0.8915	0.9726
29/09/98	0.987	1.19	0.8294	0.9048
September				0.956
5/10/98	0.97	1.19	0.8151	0.8892
14/10/98	1.092	1.19	0.9176	1.0011
29/10/98	1.007	1.19	0.8462	0.9231
October				0.938
4/11/98	1.048	1.19	0.8807	0.9607
16/11/98	1.020	1.19	0.8571	0.9351
30/11/98	1.015	1.2	0.8458	0.9227



Date	Average R\$	Exchange Rate	Average US\$	Adjustment 9,09%
November				0.940
4/12/98	1.053	1.2	0.8775	0.9573
16/12/98	1.170	1.21	0.9669	1.0548
29/12/98	1.252	1.21	1.0347	1.1288
December			34.476	1.0470
Average 1998			0.9577	1.0447
NV				
4/01/99	1.232	1.21	1.0182	1.1107
15/01/99	0.972	1.43	0.6797	0.7415
January			0.8490	0.9261
<b>Total 98 and 99</b>			<b>36.174</b>	<b>39.4620</b>
<b>Average 98/99</b>			<b>0.9519</b>	<b>1.0385</b>
NV				

Source: Pages 54 and 55 of Exhibit BRA-15 and Exhibit BRA-19.

### Dumping Margin

369. In the final determination, the DCD calculated the dumping margin based on the export price and normal value explained above. The following tables indicate how the dumping margins were calculated:

#### SADIA SA

Normal value US\$/Kg A	FOB Price Average US\$/Kg B	Dumping Margin % (A-B)/B
0,9294	0,80883	14,91

Source: Page 102 of Exhibit BRA-15.

#### AVIPAL SA

Normal value US\$/Kg A	FOB Price Average US\$/Kg B	Dumping Margin % (A-B)/B
1,0896	0,94355	15,48

Source: Page 103 of Exhibit BRA-15.

#### ALL OTHER EXPORTERS

Normal value US\$/Kg A	FOB Price Average US\$/Kg B	Dumping Margin % (A-B)/B
1,0385	0,95992	8,19

Source: Page 104 of Exhibit BRA-15.

370. The DCD further indicated that for the companies Catarinense, Frangosul, Comaves, Da Granja Agroí, Sadia Concordia, Minuano, Acaua, Felipe, Perdigão, Veneto, Chapecó and Litoral Aliment, the investigating authority did not have sufficient additional information or supporting documentation that would enable the final determination of an individual dumping margin.<sup>216</sup>

<sup>216</sup> See, Pages 103 and 104 of Exhibit BRA-15.

(i) ***Claim 23: Inconsistency with Article 2.4 of the Anti-Dumping Agreement***

***Text of Article 2.4***

371. Article 2.4 of the Anti-Dumping Agreement provides how a fair comparison between the export price and normal shall be made:

“A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at ex-factory level, in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between the importation and resale, and for profits accruing, should also be made. If in these case price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. 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.”

***Legal Argument Relative to Claim 23***

372. On 20 April 1999, Sadia submitted the questionnaire response, providing sales information for the home market and Argentina for the period 1996 through 1998 and January and February of 1999. In Annex VIII, Section C of its questionnaire response, Sadia reported internal freight costs for sales in the internal market for the years 1996, 1997, 1998 and for January and February 1999.

373. On 21 April 1999, Avipal submitted the questionnaire response. On 12 October 1999 the DCD requested a list of invoices for all the sales of poultry in the home market for the period January 1998 through January 1999. The DCD did not provide a deadline for Avipal to submit this information. On 21 December 1999, Avipal submitted a diskette with a list of invoices for sales of poultry in the home market for the period January 1998 through January 1999, including a spreadsheet with taxes (ICMS/PIS/COFINS), commission, freight and financial costs included in the normal value that should be deducted for an *ex-factory* comparison with the export price.

374. In its final dumping determination, the DCD calculated normal value for Sadia based on the information provided by Sadia, which was accompanied by supporting documentation, for the sample chosen by the DCD. In its normal value calculation, the DCD failed to make the freight deductions as reported in Sadia's 20 April 1999 response to the questionnaire.

375. Also in the final dumping determination, the DCD calculated normal value for Avipal based on the transactions in the internal market for which Avipal provided copies of invoices. The DCD failed to make the freight deductions as reported by Avipal on 21 December 1999.

376. Article 2.4 of the Anti-Dumping Agreement requires due allowance to be made 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.

377. The requirement to make due allowance for such differences means, at a minimum, that the authority has to evaluate identified differences to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price, pursuant

to Article 2.4. From the evaluation of the identified differences, the authorities must make adjustments where necessary.

378. From the facts of this investigation, the DCD violated Article 2.4 by not making due allowance for freight, as demonstrated by Sadia and Avipal in their responses submitted during the investigation.

**(ii) Claim 24: Inconsistency with Article 2.4 of the Anti-Dumping Agreement**

***Text of Article 2.4***

379. Article 2.4 provides in part that:

“(…) 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.(…)”

***Legal Argument Relative to Claim 24***

380. On 25 June 1999, the DCD requested JOX to clarify the taxes included in the prices published and used to determine normal value in the preliminary determination.<sup>217</sup> On 27 July 1999, the DCD sent once again the request for clarification to JOX.<sup>218</sup> On 3 August 1999, JOX sent a letter to the DCD explaining that the prices published by JOX include the following taxes: 12 per cent ICMS (Value Added Tax) and 2.65 per cent PIS/COFINS (Social Contribution on Revenue). JOX further explained that the prices published include: financial costs, depending on the sales term; sales commission of 0.5 per cent to 1 per cent over the value of the sale; and, a variable freight for delivery, depending on the geographic location of the seller and the buyer.<sup>219</sup> JOX provided these responses in Portuguese.

381. According to the facts related to these claims, the DCD established normal value for all other exporters based on the information provided by petitioner on 26 July 1999. This information included a spreadsheet with the calculated normal value. Petitioner’s calculation used prices published by JOX for three reference dates, for each month of the period January 1998 – January 1999. The published prices were for chilled poultry, with head and feet, sold in the São Paulo wholesale market.

382. Even though the DCD decided to use JOX published prices of poultry to establish the normal value for all other exporters, it did not make due allowance to account for taxes, financial costs, sales commission and freight included in the published prices, as explained by JOX. The DCD simply disregarded the information it had requested JOX and decided not to make any adjustment to the normal value, which was demonstrated to affect price comparability.

383. In the final determination, the DCD simply stated that the information JOX provided was in Portuguese.<sup>220</sup>

384. Article 2.4 of the Anti-Dumping Agreement requires due allowance to be made 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. The DCD violated Article 2.4 by not making due

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<sup>217</sup> See, Exhibit BRA-32.

<sup>218</sup> See, Exhibit BRA-32.

<sup>219</sup> See, Exhibit BRA-32.

<sup>220</sup> See, Page 56 of Exhibit BRA-15.

allowance for taxes and other differences that affect comparability (financial cost, sales commission, and freight), as demonstrated by JOX in the letter sent to the DCD on 3 August 1999.

385. During the consultation stage of this dispute, Brazil presented on 5 December 2001 questions to Argentina regarding the investigation. Specifically, Brazil requested the following explanations.

**Question 39:**

**Please provide explanation why Authorities disregarded the information they requested of JOX clarifying that the reference price published by them include taxes (ICMS and PIS/COFINS), freight and financial cost.**

Argentina responded on 11 January 2002 by stating that:

“With respect to the JOX publication, the authority requested through notification DCD No. 273-000788/99 that JOX provide clarification regarding the taxes included in the prices published, as well as the general conditions to which these prices are subject. The request was repeated subsequently through another notification.

Finally, on 28 July 1999 and on 3 August 1999, JOX presented information in Portuguese, which did not allow the authority to use the information once it did not comply with the formal requirements required by the laws and rules regarding the administrative proceedings regime”

**Question 40:**

**If authorities disregarded JOX’s explanation due to lack of translation, please provide whether Authorities requested such translation and why Authorities, themselves, did not provide the translation since they were the ones requesting the information.**

Argentina responded on 11 January 2002 by stating that:

“We refer to the response provided in question 39. (...) It should be observed that the proceedings of unfair trade practices are governed by the Law of Administrative Proceedings that require that documentation presented be translated, a fact known to the parties intervening in the proceedings”

386. Brazil recalls that the clarification provided by JOX was not requested by the Brazilian exporters or CEPA, but by the authorities themselves. In fact, the JOX publication of chilled poultry sold in São Paulo was not a source of information used by the Brazilian exporters. However, Brazil believes that if the DCD decided to use JOX information to establish normal value for all other exporters, it should also have taken into account JOX’s explanation on taxes, financial cost, sales commission and freight for the published prices.

387. Brazil also recalls that JOX was not an interested party in this proceeding. To that regard, “interested parties” are defined in Article 6.11 of the Anti-Dumping Agreement as:

- “(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” (emphasis added)

388. JOX is not included in the definition of “interested parties” as provided in the Agreement and, thus, did not have to comply with the Law of Administrative Proceedings as indicated by Argentina.

389. Furthermore and as stated in footnote 25 of this submission, JOX is a private entity, not related to the Brazilian government or any of the Brazilian exporters subject to the investigation, and was, therefore, under no obligation to respond to the Argentinean authorities much less to provide a translation of its response in Spanish. By responding to the DCD’s request, JOX was doing the Argentinean authorities a favor.

390. Brazil understands that when Argentina requested JOX clarification regarding what was included in the published prices, it was checking the data received from petitioner with the source of that information. Thus, it was up to the DCD to have JOX’s explanation translated.

391. Furthermore, the DCD never requested a translation of the explanation from JOX, which further indicates that the investigating authority was not unbiased and objective in evaluating the normal value information provided in the investigation.

392. In addition, Sadia, Avipal, Frangosul, Nicolini and Seara presented on 26 August 1999 arguments with respect to the comparison between export price and normal value.<sup>221</sup> Among the arguments presented was that out of the normal value price provided by CEPA, taxes, freight and financial cost should be deducted.<sup>222</sup> The exporters presented the following table to demonstrate what should be the normal value price comparable to the *ex-factory* export price:

**JOX PRICE**

<b>Jox Price</b>		<b>US\$ 0,920</b>
<b>Deductions</b>		
ICMS 12%	0,110	
PIS/COFINS 2,65% /US\$ 0,92	0,024	
National Freight	0,055	
Financial Cost	0,016	
<b>Total</b>		<b>0,715</b>

Source: Exhibit BRA -33.

393. Even with the information provided by JOX and exporters requesting that due allowance be made to account for these differences which affect the normal value price, the DCD did not comply with the requirements set forth in Article 2.4 of the Anti-Dumping Agreement.

**(iii) Claim 25: Inconsistency with Article 2.4 of the Anti-Dumping Agreement**

**Text of Article 2.4**

394. Article 2.4 provides in part that:

“(…) 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,

<sup>221</sup> See, Exhibit BRA-33.

<sup>222</sup> See, Exhibit BRA-33.

taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.(...)”

### ***Legal Argument Relative to Claim 25***

395. On 7 January 1998, the DCD issued a notice to initiate the dumping investigation against imports of poultry from Brazil. In that notice, the DCD decided to initiate the investigation based on the normal value information provided by petitioner in the application, which took into account prices published by the Brazilian company JOX on 30 June 1997, for chilled poultry, with head and feet, for the São Paulo wholesale market. Based on the JOX published price, the DCD made an adjustment to normal value, proposed by petitioner, to account for physical characteristic differences in the poultry sold in Brazil and to Argentina.

396. According to the suggested adjustment, the average weight of the live poultry raised in Brazil is 2.250 kgs. Petitioner alleged, without submitting any evidence, that the yield of the product in Brazil is 88 per cent and, therefore, out of 1 kg of live poultry 880 gm of eviscerated poultry is obtained, with giblets (heart, stomach, neck and liver), and with head and feet. Petitioner also alleged that the yield of the product sold in Argentina differs from the yield obtained in Brazil. In Argentina, the yield of the product is 80 per cent, considering that head and feet are discarded. Petitioner’s conclusion was that out of a live poultry weighing 2.250 kgs, for every 1kg, 800 gm of eviscerated poultry is obtained that can actually be sold in the Argentinean market.

397. Still according to petitioner, the yield rate difference occurs because poultry is sold to Argentina without head and feet while poultry is sold in Brazil with head and feet. The DCD added 9.09 per cent to the price of poultry sold in Brazil to compensate for the allegation that poultry to Argentina is sold without head and feet. No evidence was presented to support petitioner’s allegation of physical characteristic differences.

398. Throughout the investigation, the exporters Sadia, Avipal and Frangosul reported that the poultry sold to Argentina was identical to the poultry sold in Brazil. The Brazilian exporter Catarinense reported that from the two types of poultry it sells (broiler and griler), there is a difference in the broiler type poultry sold to Argentina and in Brazil. The broiler type poultry sold to Argentina did not contain head and feet, while the broiler type poultry sold to Brazil contained head but not feet.

399. On 23 June 2000, the DCD issued the final affirmative dumping determination. In the fair comparison made between the export price and the normal value, the DCD decided to make allowance for the alleged difference in the physical characteristics of the poultry sold to Argentina and in Brazil. The DCD made a 9.09 per cent adjustment to the normal value, even though the exporters had reported in their responses that there were no differences in the physical characteristics of the products sold to both markets.

400. Article 2.4 mandates that a fair comparison be made between the export price and the normal value. In order to obtain a fair comparison between export price and normal value, Article 2.4 further requires that due allowances be made in each case, on its merits, for differences which affect price comparability. Article 2.4 lists, but does not limit, these differences. They include 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.

401. In view of the fact that the Brazilian exporters submitted information providing that there were no differences in physical characteristics between the poultry sold in Brazil and the poultry sold to Argentina, there was no due allowance to be made by the DCD for differences related to physical characteristics.

402. It is important to note that Article 2.4 requires due allowance to be made for differences, which affect price comparability. The DCD adjusted normal value based on petitioner's unsubstantiated allegation that there were differences in physical characteristics between the poultry sold to Argentina and in Brazil. Exporters submitted responses, and evidence, demonstrating that no such differences existed. Furthermore, due allowance is only warranted for differences which affect price comparability. Petitioner did not provide evidence nor demonstrate that the alleged differences affected price comparability.

403. Based on exporters response to the questionnaire and the lack of evidence presented by petitioner to prove the existence of differences in physical characteristics in the poultry sold to Argentina and in Brazil, and that such differences affected price comparability, Brazil claims that Argentina acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by incorrectly making allowances to normal value.

*(iv) Claim 26: Inconsistency with Article 2.4 of the Anti-Dumping Agreement*

*Text of Article 2.4*

404. Relevant part of Article 2.4 provides that:

“(...) 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.”

*Legal Argument Relative to Claim 26*

405. On 20 January 1999, the MEOSP issued a public notice announcing the initiation of the anti-dumping investigation on imports of poultry from Brazil. In the public notice of initiation, Argentina did not establish the period of data collection for the dumping investigation. On 16 February 1999, the SSCE sent letters to Sadia, Avipal, Frangosul, Nicolini and Seara inviting them to participate in a hearing on 25 February 1999 for consultations regarding the initiation of the dumping investigation and to receive the dumping questionnaires.

406. The dumping questionnaires did not establish the period of data collection for the dumping investigation. The five exporters presented normal value and export price information for the years 1996, 1997, 1998, and the available months in 1999. The DCD requested further information without limiting the scope of the dumping period of investigation.

407. On 15 September 1999, the DCD sent letters to CCLP, Catarinense, Chapeco, Minuano, Perdigão, Comaves and Pena Branca notifying of the investigation and inviting these exporters to provide responses to the dumping questionnaire. In this letter, the DCD established for the first time in the investigation that the period of data collection for dumping was from January 1998 through January 1999.

408. On 12 October 1999, the DCD sent letters to Frangosul and Avipal requesting they provide list of transaction and invoices for sales in the internal market from January 1998 through January 1999. On 18 October 1999, the DCD sent letters to Sadia, Nicolini and Seara requesting they provide list of transaction and invoices for sales in the internal market from January 1998 through January 1999. Nine months after the investigation was initiated and after a preliminary determination had been issued, the DCD chose to establish the data collection period for the dumping investigation.

409. Article 2.4 of the Anti-Dumping Agreement requires that the authorities indicate to the parties in question what information is necessary to ensure a fair comparison and further requires that investigating authorities not impose an unreasonable burden of proof on those parties.

410. Export price and normal value data constitute necessary information needed in making a fair comparison. However, a request that such information be provided for an undetermined period of time is not in accordance with the requirement of Article 2.4. This provision establishes that authorities must indicate what information is necessary to ensure a fair comparison. Information for one particular period may differ from the information for another period, therefore, defining the period of investigation is essential for the exporter, who must know what information must be provided to ensure a fair comparison.

411. The request by authorities that the exporters provide normal value and export price data for a period exceeding that of the period of investigation is an unreasonable burden of proof imposed by the authority on the exporters. By not clearly indicating to the five exporters the scope of the period of data collection, the Brazilian exporters were imposed an excessive and unreasonable burden of proof in presenting data for a period outside the data collection period of dumping. This unreasonable burden of proof, which prevailed for nine months of the investigation, made it impossible for exporters to provide complete, accurate and timely responses.

412. Brazil considers that the establishment of the data collection period nine months after the initiation of the investigation and after a preliminary determination had been made does not comply with Article 2.4.

413. Brazil also considers that the last part of Article 2.4 has been violated by the fact that Argentina only established normal value (in the case of Sadia and Avipal) based on transactions in the internal market for which exporters presented invoices.

414. As demonstrated throughout the investigation, the great volume of sales of poultry in Brazil made it impossible for exporters to attach all invoices corresponding to those transactions. Exporters invited the DCD to verify *in loco* the responses provided, so as to ascertain that the responses were accurate and complete. The DCD chose not to verify these exporters, which does not mean that the information provided by them was not verifiable.

415. Considering the great volume of sales transactions of poultry in Brazil and the fact that only the sales transactions for which exporters presented invoices were considered in the establishment of normal value, exporters were imposed with an unreasonable and impossible burden of proof, contrary to the requirement in Article 2.4.

(v) ***Claim 27: Inconsistency with Article 2.4.2 of the Anti-Dumping Agreement***

***Text of Article 2.4.2***

416. Pertinent language of Article 2.4.2 of the Anti-Dumping Agreement provides as follows:

“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 (...)”

***Legal Argument Relative to Claim 27***

417. Article 2.4.2 of the Anti-Dumping Agreement provides for how margins of dumping must be established. The first part of this provision sets out the general rule that a comparison be made on the basis of: (1) weighted average normal value with a weighted average of prices of all comparable export transactions; or, (2) individual transactions of normal value and export prices.



418. In the final determination, the DCD established the margins of dumping for the exporters Sadia and Avipal based on the normal value information for which invoices were presented, and not based on all the sales transactions in the internal market reported for the period. The fact that the DCD did not take into account all of the transactions in the internal market to establish the normal value violated how Article 2.4.2. requires a comparison to be made for purposes of establishing the existence of dumping margins.

419. In the final determination, the DCD established the margins of dumping for Sadia and Avipal on the basis of a comparison of a weighted average statistical sample of normal value with a weighted average of prices of all comparable export transactions.

420. Brazil understands that if the investigating authority had access to information regarding all transactions in the internal market, even if invoices did not accompany these transactions, it could not select through a sample, even if randomly, and use a limited portion of these transactions for purposes of establishing normal value and for purposes of making the comparison for establishment of the dumping margin. A weighted average of a statistical sample of normal value is not the same as a weighted average of normal value of all transactions reported by the exporters.

421. As shown in the facts above, Sadia and Avipal reported that the sales transactions in the internal market were too voluminous for the exporters to present an invoice for each sale transaction. Sadia and Avipal presented a list of all the transactions in the internal market for the period. Invoices were presented for only some transactions in order for the DCD to verify the accuracy of the data submitted in the responses as a whole and not just those for which invoices were provided. Brazil understands that the magnitude of the information submitted may mean that not all data will actually be examined, however this does not exclude the validity of the data provided, particularly, if that data could be verified.

422. Not only did Sadia and Avipal report their transactions for the period of investigation (January 1998 – January 1999) but they also provided information on the sales transactions outside the period of investigation (1996, 1997, 1998 and available data for 1999), which they also reported. To have that burden imposed on exporters, and then for the investigating authority to use only some of the transactions during 1998 and January 1999 is contrary to how a margin should be established pursuant to Article 2.4.2 of the Anti-Dumping Agreement.

## 2. Articles 3.1, 3.4, 3.5 and 12.2.2

423. The following two claims arise from the facts described below:

**Claim 32:** By using different periods to evaluate the relevant economic factors and indices listed in Article 3.4, Argentina failed to make an injury determination based on positive evidence and involving an objective examination as provided for in Article 3.1, 3.4 and 3.5.

**Claim 33:** Argentina acted inconsistently with Article 12.2.2 by failing to explain in the final determination why the CNCE examined the relevant economic factors and indices listed in Article 3.4 based on different periods.

(a) Facts

424. On 23 December 1999, the CNCE issued the final affirmative injury determination.<sup>223</sup> In the determination, the CNCE stated that the period of injury analysis was from January 1996 until

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<sup>223</sup> See, Exhibit BRA-14.

December 1998, taking into account data for the year 1995 as a reference year.<sup>224</sup> The CNCE further explained that for some factors such as: output, prices, imports, exports, and apparent consumption, the period of analysis was from January 1996 until June 1999; and that for the remaining factors the period of analysis was from January 1996 until December 1998.<sup>225</sup>

(i) ***Claim 32: Inconsistency with Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement***

***Text of Article 3.1***

425. Article 3.1 of the Anti-Dumping Agreement sets forth the general requirements for a determination of injury.

“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.”

***Legal Argument Relative to Claim 32***

426. According to Article 3.1 of the Anti-Dumping Agreement, an injury determination must involve an objective examination of the volume of the dumped imports, the effect of the dumped imports on prices in the domestic market, and the impact of the dumped imports on domestic producers.

427. Based on textual interpretation, the term “objective” means that which is “not subjective”.<sup>226</sup> The term “subjective” refers to something that is “imaginary”, “partial” or “distorted”.<sup>227</sup> Thus, in order for an objective examination to occur, the factors subject to examination must be evaluated within the same parameters and not subject to different or distorted parameters. That said, Article 3.4 of the Anti-Dumping Agreement provides what economic factors must be evaluated in the examination of the impact of the dumped imports on the domestic industry. For an objective examination to occur, the economic factors and indices listed in Article 3.4 must be examined based on the same parameters.

428. The fact that the CNCE evaluated data for output, prices, imports, exports, and apparent consumption for the period January 1996 through June 1999; and, data for the remaining factors and indices listed in Article 3.4 based on data for the period January 1996 through December 1998, indicates that different parameters of evaluation were used. Thus, the examination of the impact of the dumped imports on domestic producers was not objective and, therefore, contrary to Article 3.1 of the Anti-Dumping Agreement.

429. The examination of the impact of the dumped imports on the domestic industry concerned must be objective, since Article 3.1 of the Anti-Dumping Agreement imposes this obligation on all the factors to be examined in an injury determination. Once the Panel establishes that the injury determination was not based on an objective examination, the Panel must also establish that Argentina violated Articles 3.4 and 3.5 of the Anti-Dumping Agreement.

430. With respect to Article 3.5, some of the factors in the injury analysis were examined in a period that went until June 1999. Since dumping was only ascertained for a period that went until

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<sup>224</sup> See, Page 9 of Exhibit BRA-14.

<sup>225</sup> See, Page 9 of Exhibit BRA-14.

<sup>226</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 938.

<sup>227</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1387.

January 1999, there is no basis on which the authorities could attribute the June 1999 injury to the January 1999 dumping. At the very least, some very convincing explanation on how this link existed would be needed in the final determination on causal link.

(ii) ***Claim 33: Inconsistency with Article 12.2.2 of the Anti-Dumping Agreement***

***Text of Article 12.2.2***

431. Article 12.2.2 provides in part that:

“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 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.”

***Legal Argument Relative to Claim 33***

432. The question presented to the Panel is whether any reasoning has been provided in the final determination, sufficient to satisfy the requirements of Article 12.2.2 of the Anti-Dumping Agreement, regarding why the DCD used different periods to evaluate the relevant economic factors and indices listed in Article 3.4 of the Anti-Dumping Agreement.

433. In the case of an affirmative determination providing for the imposition of a definitive duty, Article 12.2.2. mandates that a public notice of conclusion of the investigation contain, or otherwise make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures. In particular, the public notice of conclusion must contain information described in subparagraph 2.1 of Article 12. Among the information required in subparagraph 2.1 of Article 12 are considerations relevant to the injury determination as set out in Article 3 of the Anti-Dumping Agreement.

434. As shown in the Claim above, the examination by the CNCE of the economic factors and indices listed in Article 3.4 was not objective because it used different parameters to evaluate the factors. Some factors were evaluated taking into account the period from January 1996 through June 1999 and other factors were evaluated taking into account the period from January 1996 through December 1998.

435. In the final injury determination, the CNCE simply stated that the period under analysis corresponded to January 1996 through December 1998. The CNCE further stated that for some variables, such as national production, prices, imports, national exports and apparent consumption, data for the first semester of 1999 was included.

436. No explanation or consideration was offered in the final determination as to why the CNCE evaluated data for output, prices, imports, exports, and apparent consumption for the period January 1996 through June 1999, which was outside the injury period of investigation.

437. By not providing in the final determination considerations relevant to the injury determination as set out in Article 3, Argentina violated Article 12.2.2 of the Anti-Dumping Agreement.

### 3. Articles 3.1, 3.2, 3.4 and 3.5

438. The following four claims arise from the facts transcribed below:

**Claim 34:** The injury analysis in the final determination did not exclude Nicolini and Seara's imports even though the DCD considered that these were not "dumped imports". By not excluding the imports from Nicolini and Seara from the volume of the "dumped imports", the CNCE did not properly consider whether there had been a significant increase in "dumped imports", thereby violating Article 3.2.

**Claim 35:** The flawed evaluation of the "dumped imports" indicates that the final injury determination was not based on positive evidence and did not involve an objective examination as required by Article 3.1.

**Claim 36:** By not excluding the imports from Nicolini and Seara from the volume of the "dumped imports", the CNCE failed to properly examine the impact of the "dumped imports" on the domestic industry, as required by Article 3.4.

**Claim 37:** By not excluding the imports from Nicolini and Seara from the volume of the "dumped imports", the CNCE did not properly consider injury as prescribed in Article 3.1, and, consequently, did not properly demonstrate the causal link between the dumped imports and the injury to the domestic industry, as required in Article 3.5.

#### (a) Facts

439. On 23 December 1999, the CNCE issued the final affirmative injury determination.<sup>228</sup> On 23 June 2000, the DCD issued the final affirmative dumping determination.<sup>229</sup> In the dumping determination, the DCD determined that the Brazilian exporters Nicolini and Seara were not exporting the subject merchandise at dumped prices and that poultry from Sadia, Avipal, and all other exporters were being exported at dumped prices.<sup>230</sup>

440. On 17 July 2000, the SSCE issued the final affirmative determination on causal link between the allegedly dumped imports and the injury to the domestic industry.<sup>231</sup>

#### (i) *Claim 34: Inconsistency with Article 3.2 of the Anti-Dumping Agreement*

##### *Text of Article 3.2*

441. Article 3.2 of the Anti-Dumping Agreement provides factors to be considered with regards to the increase in the volume of "dumped imports", which Article 3.1 requires to be examined. The relevant portion of Article 3.2 sets forth that:

"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. (...)"

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<sup>228</sup> See, Exhibit BRA-14

<sup>229</sup> See, Exhibit BRA-15.

<sup>230</sup> See, Pages 102, 103 and 104 of Exhibit BRA-15.

<sup>231</sup> See, Exhibit BRA-16.

**Legal Argument Relative to Claim 34**

442. The language set out throughout Article 3 of the Anti-Dumping Agreement is consistent, the injury to the domestic industry must have been caused by “dumped imports”. Article 2.1 of the Anti-Dumping Agreement provides definition of what constitutes a product that is being dumped. In this regard, Article 2.1 provides the definition as follows:

“For the purposes 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”

443. From the language of Article 2.1, “imports are dumped” when a product is introduced into the commerce of another country at a price that is less than the price of the like product in the exporting country.

444. Brazil understands that the definition of the term “dumped imports”, as provided in Article 2.1, is applicable to all articles under the Anti-Dumping Agreement.

445. In the final dumping determination, the DCD determined that the Brazilian exporters Nicolini and Seara were not exporting the subject merchandise at dumped prices.

446. As stated previously in this submission, the DCD established export price in the final dumping determination based on the import information from *Ganaderia*. The DCD listed the net volume of poultry imports in kilograms, the total FOB value of poultry imports in US dollars, and the per unit FOB US dollar per kilogram price of the exports of each Brazilian exporter for the period January 1998 through January 1999.<sup>232</sup>

447. According to that list, for the period of January 1998 through January 1999, Nicolini exported 5,397,254 kilograms to Argentina of the product under investigation, Seara exported 11,038,851 kilograms to Argentina of the product under investigation, and the total volume of the product exported by all Brazilian exporters was 58,822,070 kilograms.

448. Out of the total volume exported by the Brazilian exporters for the period of investigation, Nicolini exported 9.18 per cent and Seara 18.77 per cent of the total volume.

<b>Product</b>	<b>Net Kgs</b>	<b>Participation in Total %</b>
Nicolini	5.397.254	9.18%
Seara	11.038.851	18.77%
Total	58.822.070	100%

Source: Pages 76 and 77 of Exhibit BRA-15.

449. Together, Nicolini and Seara exported 27.95 per cent of total exports from Brazil of the product under investigation, almost one third of total exports of poultry from Brazil for the period. Brazil understands this to be a significant volume and a relevant factor in the injury analysis.

450. The injury analysis in the final injury determination, did not exclude the imports from Nicolini and Seara from the “dumped imports” analyzed in the injury examination.

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<sup>232</sup> See, Page 76 of Exhibit BRA-15.

451. Brazil knows this to be fact, since the final injury determination, which was issued on 23 December 1999, preceded the final dumping determination, issued on 23 June 2000, by six months.

452. Article 3.2 of the Anti-Dumping Agreement requires the investigating authority to consider whether there has been a significant increase in “dumped imports”, either in absolute terms or relative to the production or consumption in the importing Member. Brazil affirms that the consideration by the investigating authorities of whether there was a significant increase in the “dumped imports” never occurred, since the significant volume of imports from Nicolini and Seara were not excluded from the volume of the “dumped imports”.

453. By not excluding the imports from Nicolini and Seara from the total volume of “dumped imports”, Argentina has failed to adequately consider whether there had been a significant increase in the “dumped imports”, in violation of Article 3.2 of the Anti-Dumping Agreement.

*(ii) Claim 35: Inconsistency with Article 3.1 of the Anti-Dumping Agreement*

*Text of Article 3.1*

454. Article 3.1 of the Anti-Dumping Agreement sets forth the general requirements for a determination of injury.

“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.”

*Legal Argument Relative to Claim 35*

455. Article 3.1 mandates that a determination of injury by the investigating authority be based upon positive evidence and involve an objective examination of three factors: (1) the volume of the “dumped imports”; (2) the effect of the “dumped imports” on prices in the domestic market for like products; and, (3) the consequent impact of the “dumped imports” on domestic producers of such products.

456. According to the facts above, Argentina has failed to base its final injury determination upon positive evidence and make an objective examination of the factors set out in Article 3.1, by incorrectly establishing “dumped imports”.

457. As demonstrated in the previous claim, Article 2.1 of the Anti-Dumping Agreement considers a product as being dumped, when it is introduced into the commerce of another country at less than its normal value.

458. Thus, “dumped imports” are those imports that are introduced into the commerce of another country at a price lower than the normal value price. In the final dumping determination, the DCD found that Nicolini and Seara’s imports of poultry into Argentina were not being dumped.

459. However, the final injury determination included the imports from Nicolini and Seara as part of the “dumped imports” examined pursuant to Article 3.1.

460. Because the CNCE did not exclude the imports of poultry from Nicolini and Seara from the total of the “dumped imports”, the injury examination, as set out in Article 3.1, cannot be considered objective.

(iii) *Claim 36: Inconsistency with Article 3.4 of the Anti-Dumping Agreement*

*Text of Article 3.4*

461. Article 3.4 of the Anti-Dumping Agreement provides for the examination of the impact of the “dumped imports” on the domestic industry. Article 3.4 sets forth that:

“The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”

*Legal Argument Relative to Claim 36*

462. Article 3.4 of the Anti-Dumping Agreement requires that the examination of the impact of the “dumped imports” on the domestic industry include an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry. In particular, the examination to be made is of the impact of the “dumped imports” on the domestic industry.

463. A textual interpretation of the first sentence of Article 3.4 indicates that the investigating authority must examine the impact in the domestic industry of the imports that are being dumped, and not of all imports from a certain destination.

464. In the final dumping determination, a significant part (almost 30 per cent) of the imports of poultry from Brazil were considered not to be “dumped imports”. However, for purposes of the injury determination, these imports that were not considered as “dumped imports” were not excluded from the injury analysis of “dumped imports”. By not excluding these imports from the total imports of poultry, the CNCE made an incorrect examination of the impact of the “dumped imports” on the domestic industry.

465. A previous GATT Panel raised a similar issue in EC – Cotton Yarn:

“(…) the Panel noted that in responding to a question by the Panel the EC has stated ‘Regarding the volume to be considered for injury purposes, the Community took into account all imports, whether dumped or non-dumped, for the reasons mentioned above.’ Articles 3.2 and 3.4 of the Agreement required that the investigating authorities examined the volume and effects of the “dumped imports”. The Panel noted that the EC stated in its response that it had, for the purposes of its injury analysis, taken into account the effects of all imports from Brazil, whether dumped or non-dumped. As Brazil had not made a Claim that the EC had thereby acted inconsistently with the Agreement, the Panel could not pronounce itself on any such claim”<sup>233</sup> (emphasis added)

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<sup>233</sup> EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, 4 July 1995, ADP/137, at para. 525 (“EC – Cotton Yarn”).

466. That Panel indicated that had Brazil made a Claim that the EC had acted inconsistently with the Agreement by taking into account the effects of all imports from Brazil in the injury analysis, and not only the imports that were being dumped, the Panel might have been able to rule on that claim.

467. Unlike the above-mentioned GATT panel proceeding, Brazil does Claim that Argentina's determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

468. With respect to the Claim at issue, by not excluding the imports from Nicolini and Seara from the total of "dumped imports", Argentina has failed to correctly examine the impact of the "dumped imports" on the domestic industry concerned, contrary to the provision in Article 3.4 of the Anti-Dumping Agreement.

*(iv) Claim 37: Inconsistency with Article 3.5 of the Anti-Dumping Agreement*

*Text of Article 3.5*

469. Article 3.5 of the Anti-Dumping Agreement establishes the requirements for the analysis of the causal relationship between the dumped imports and the injury to the domestic industry:

"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 at which at the same time are injuring the domestic industry, and the injuries caused by these other factors may not be attributed to the dumped imports. (...)"

*Legal Argument Relative to Claim 37*

470. Article 3.5 of the Anti-Dumping Agreement clarifies how the causal link between dumping and injury to the domestic industry is to be established.

471. First, Article 3.5 requires that the demonstration of a causal relationship be based on the examination of all relevant evidence. Second, Article 3.5 provides that the authorities shall examine any known factors other than the "dumped imports", which are at the same time injuring the domestic industry. Third, the authorities are to make sure that injuries caused by these factors are not attributed to the "dumped imports".

472. The SSCE did not make a causal link analysis. The SSCE simply reproduced the margins of dumping found in the final affirmative dumping determination, some of the factors examined in the final affirmative injury determination, and concluded that there was causal link between the two, without providing the reasons why they believed such link existed. No demonstration of causal link between the two was made in the final affirmative determination of causal relationship.

473. Furthermore, Article 3.5 mandate authorities to determine that "dumped imports" are the cause of injury to the domestic industry. As indicated above, the authorities knew before the causal relationship determination was issued that the imports of Nicolini and Seara were not considered "dumped imports". However, the causal relationship determination failed to evaluate that factor and exclude Nicolini and Seara's imports from the total "dumped imports".



474. Brazil considers that in the absence of a valid injury finding, which was flawed by the inclusion of the imports from Nicolini and Seara in the total “dumped imports”, there was no basis for a causal relationship finding.

#### **4. Articles 3.1, 3.4 and 12.2.2**

475. The following three claims arise follow from the facts described below and from the legal requirements in the Anti-Dumping Agreement:

**Claim 38:** Argentina acted inconsistently with Article 3.4 by failing to evaluate all the relevant economic factors and indices listed in Article 3.4.

**Claim 39:** By failing to evaluate all the relevant economic factors and indices listed in Article 3.4 in its final determination, Argentina’s injury determination was not based on positive evidence and did not involve an objective evaluation, as required by Article 3.1.

**Claim 40:** Argentina acted inconsistently with Article 12.2.2 by failing to adequately explain and provide in its final determination an evaluation of all relevant economic factors and indices listed in Article 3.4.

##### (a) Facts

476. On 23 December 1999, the CNCE issued its final affirmative injury determination.<sup>234</sup> The examination of the impact of the dumped imports on the domestic industry did not contain an evaluation of all the relevant economic factors and indices having a bearing on the state of the industry. In particular, the CNCE did not evaluate the actual and potential decline in productivity; factors affecting domestic price; the magnitude of the dumping margin; and, the actual and potential negative effects on cash flow, growth and the ability to raise capital or investments.

##### (i) *Claim 38: Inconsistency with Article 3.4 of the Anti-Dumping Agreement*

###### *Text of Article 3.4*

477. Article 3.4 provides for the examination of the impact of the dumped imports on the domestic industry. The examination must include an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic 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”

###### *Legal Argument Relative to Claim 38*

478. Article 3.4 of the Anti-Dumping Agreement sets specific requirements for examination of factor (b) in Article 3.1. It mandates that in the examination of the impact of the dumped imports on the domestic industry, the authorities evaluate all relevant economic factors and indices having a bearing on the state of the industry. Article 3.4 includes, but does not limit, the factors that must be evaluated by the investigating authority.

479. In its final injury determination, the CNCE failed to evaluate the actual and potential decline in productivity; factors affecting domestic price; the magnitude of the dumping margin; and, the

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<sup>234</sup> See, Exhibit BRA-14.

actual and potential negative effects on cash flow, growth and the ability to raise capital or investments. The CNCE did not refer to actual and potential decline in productivity for the period of analysis nor did it evaluate the productivity of the domestic industry. Similarly, other factors affecting domestic price were neither mentioned nor evaluated by the investigating authority. With respect to the magnitude of the dumping margin, the CNCE did not and could not have evaluated it, since the final dumping determination with the dumping margin was issued on 23 June 2000, six months after the final injury determination was issued. Specific data and analysis of actual and potential negative effects on cash flow, growth and the ability to raise capital or investments were not included in the final injury determination either. All these are factors set out in Article 3.4 and should have been examined.

480. This understanding that the list of factors set out in Article 3.4 is mandatory, and not illustrative, derives from the language of Article 3.4, as well as from various Panel interpretations of this provision.

481. The phrase in Article 3.4 that “the examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors”, strongly suggests that the evaluation of the listed factors in that provision is mandatory in all cases. Article 3.4 further provides that the evaluation of all relevant economic factors having a bearing on the state of the industry include the 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. The term “include” as set forth in Article 3.4 simply indicates that there may be other relevant, additional economic factors to be evaluated among all the factors that must be evaluated.

482. Furthermore, various WTO Panels have concluded that the evaluation of the economic factors and indices listed in Article 3.4 is mandatory. For example, the Panel in *Thailand – H-Beams* read the Article 3.4 phrase “shall include and evaluation of all relevant factors and indices having a bearing on the state of the industry, including ...” as:

“(…) introducing a mandatory list of relevant factors which must be evaluated in every case. We are of the view that the change that occurred in the wording of the relevant provision during the Uruguay Round (from “such as” to “including”) was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory. (...)”<sup>235</sup> (emphasis added)

483. That Panel further stated that:

“We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and mandatory in this regard. (...)”<sup>236</sup> (emphasis added)

484. That Panel concluded by stating that:

“On the basis of a textual analysis of Article 3.4, we are therefore of the view that each of the fifteen individual factors listed in the mandatory list of factors in

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<sup>235</sup> *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, 28 September 2000, WT/DS122/R, at para. 7.225 (“*Thailand – H-Beams*”).

<sup>236</sup> *Thailand – H-Beams*, at para. 7.229.

Article 3.4 must be evaluated by the investigating authorities. (...)”<sup>237</sup> (emphasis added)

485. The Appellate Body upheld that Panel’s findings with respect to the Panel’s interpretation that Article 3.4 requires a mandatory evaluation of all the factors listed in that provision.<sup>238</sup>

486. Likewise, the Panel on *Mexico – HFCS* dealt with this specific issue by stating that:

“(…) The text of Article 3.4 is mandatory:

‘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 ...**’

In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required”<sup>239</sup> (emphasis added by the Panel)

487. That interpretation is also supported by the Panel in *EC – Bed Linen*, which concluded that:

“(…) **each** of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned.”<sup>240</sup> (emphasis added by the Panel)

488. Furthermore, the nature of the evaluation of the factors listed in Article 3.4 cannot be limited to a mere referral of the factors but must address the data provided, put it into context and analyze it. An evaluation of the factors listed in Article 3.4 requires the investigating authority to determine the significance and value of the information by careful appraisal and study.

489. This can be supported by the understanding of the Panel in *United States – Hot-Rolled Steel Products*, that it would not be sufficient if the investigating authority merely mentioned data for certain factors of Article 3.4 without undertaking an evaluation of that factor. According to that Panel:

“(…) An evaluation of a factor implies putting data in context and assessing such data both in their internal evolution and vis-à-vis other factors examined. Only on the basis of the evaluation of data in the determination would a reviewing panel be able

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<sup>237</sup> *Thailand – H-Beams*, at para. 7.231.

<sup>238</sup> *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, 12 March 2001, WT/DS122/AB/R, at para. 139 (adopted on 05 April 2001) (“*AB – Thailand – H-Beams*”).

<sup>239</sup> *Mexico – HFCS*, at para. 7.128. The Appellate Body found that the Panel satisfied its duty under Article 12.7 of the DSU to set out a “basic rationale behind [its] findings” with respect to Article 3.4 of the Anti-Dumping Agreement. *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, 22 October 2001, WT/DS132/AB/RW, at para. 135 (adopted on 21 November 2001) (“*AB – Mexico – HFCS*”).

<sup>240</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, 30 October 2000, WT/DS141/R, at para. 6.159 (adopted on 12 March 2001) (“*EC – Bed Linen*”). The Panel’s findings on the Claim related to Article 3.4 were not appealed.

to access whether the conclusions drawn from the examination are those of an unbiased and objective authority.<sup>241</sup> (emphasis added)

490. More support is found in *Thailand – H-Beams*, where the Panel presented the following view:

“(…) Therefore, in determining that Article 3.4 contains a mandatory list of fifteen factors to be looked at, we do not mean to establish a mere “checklist approach” that would consist of a mechanical exercise of merely ensuring that each listed factor is in some way referred to by the investigating authority. (…) Rather, we are of the view that Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of “relevance or irrelevance” of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.<sup>242</sup> (emphasis added)

491. Likewise, the Panel in *EC – Bed Linen* concluded that:

“Regarding the nature of the evaluation of each factor that is required, the panel determined that while authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors.<sup>243</sup> (emphasis added)

492. From the considerations above and from the final injury determination, the Panel will verify not only that all the factors listed in Article 3.4 were not considered by the investigating authority, but also that not all factors were properly evaluated, which constitutes a *prima facie* violation of Article 3.4 of the Anti-Dumping Agreement.

**(ii) Claim 39: Inconsistency with Article 3.1 of the Anti-Dumping Agreement**

***Text of Article 3.1***

493. Article 3.1 of the Anti-Dumping Agreement sets forth the overall structure of an authority’s injury analysis:

“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.”

***Legal Argument Relative to Claim 39***

494. Article 3.1 sets out the general requirements for a determination of injury based on consideration of the volume, price and consequent impact of the “dumped imports” on the domestic industry. The succeeding sections of Article 3 provide for more specific guidance for such determinations. Article 3.4 sets forth factors to be considered in examining the impact of the dumped

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<sup>241</sup> *United States – Hot-Rolled Steel Products*, at para. 7.232.

<sup>242</sup> *Thailand – H-Beams*, at para. 7.236.

<sup>243</sup> *EC – Bed Linen*, at para. 6.159.

imports on the domestic industry, as required by Article 3.1. This examination requires an evaluation of all relevant economic factors and indices, listed in Article 3.4, which have a bearing on the domestic industry.

495. To that regard, the requirement under Article 3.4 of an “evaluation of all relevant factors” must be read in conjunction with the overarching requirements imposed by Article 3.1 of “positive evidence” and “objective examination” in determining the existence of injury.

496. In the final injury determination, the CNCE failed to evaluate the actual and potential decline in productivity; factors affecting domestic price; the magnitude of the dumping margin; and, the actual and potential negative effects on cash flow, growth and the ability to raise capital or investments. In order for the injury finding by the CNCE to have been based on positive evidence and on an objective examination, the investigating authorities would have had to explicitly state and evaluate in the injury determination all the relevant economic factors listed in Article 3.4. This was not the case.

497. The CNCE did not refer to actual and potential decline in productivity for the period of analysis nor did it evaluate the productivity of the domestic industry. Similarly, other factors affecting domestic price were neither mentioned nor evaluated by the investigating authority. With respect to the magnitude of the dumping margin, the CNCE did not and could not have evaluated it, since the final dumping determination with the dumping margin was issued on 23 June 2000, six months after the final injury determination was issued. Specific data and analysis of actual and potential negative effects on cash flow, growth and the ability to raise capital or investments were not included in the final injury determination either.

498. These factors are part of the mandatory list of factors that have to be evaluated in the examination of the impact of the imports on the domestic industry. An objective examination based on positive evidence of the impact of the dumped imports on domestic producers requires that all of the listed factors in Article 3.4 be evaluated.

499. By failing to evaluate all of these factors, Argentina acted inconsistently with Article 3.1 of the Anti-Dumping Agreement.

***(iii) Claim 40: Inconsistency with Article 12.2.2 of the Anti-Dumping Agreement***

***Text of Article 12.2.2***

500. Article 12.2.2 provides in part that:

“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 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.”

***Legal Argument Relative to Claim 40***

501. The question before the Panel is whether the final determination listed and sufficiently considered all the economic factors and indices in Article 3.4, to satisfy the requirements of Article 12.2.2 of the Anti-Dumping Agreement.

502. In the case of an affirmative determination providing for the imposition of a definitive duty, Article 12.2.2. mandates that a public notice of conclusion of the investigation contain, or otherwise make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures. In particular, the public notice of conclusion must contain information described in subparagraph 2.1 of Article 12. Among the information required in subparagraph 2.1 of Article 12 are considerations relevant to the injury determination as set out in Article 3 of the Anti-Dumping Agreement.

503. Pursuant to claims 28 and 29, not all relevant economic factors listed in Article 3.4, which must be included in the examination of the impact of the dumped imports on the domestic industry, were referred to or evaluated in the final injury determination.

504. In particular, the CNCE did not refer or evaluate the actual and potential decline in productivity for the period; other factors affecting domestic price were neither mentioned nor evaluated by the investigating authority; and, specific data and analysis of actual and potential negative effects on cash flow, growth and the ability to raise capital or investments were also not included in the final injury determination. With respect to the magnitude of the dumping margin, the CNCE did not, and could not, evaluate the magnitude of the margin of dumping because the final dumping determination, establishing the dumping margin, was issued only on 23 June 2000, six months after the final injury determination was issued.

505. With respect to what has to be considered in the written final determination, Brazil refers to the understanding of the Panel in *Mexico – HFCS*. That Panel confirmed that Article 3.4 requires that:

“(…) the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.”<sup>244</sup> (emphasis added)

506. Similarly, the Panel in *EC – Bed Linen* concluded that:

“(…) The nature of the consideration of each factor listed in Article 3.4, including whether the investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination.”<sup>245</sup> (emphasis added)

507. Because productivity; factors affecting domestic price; the magnitude of the dumping margin; cash flow, growth and the ability to raise capital or investments were not referred to or considered in the final determination, Brazil understands that Argentina incurred in a *prima facie* violation of Article 12.2.2.

**5. Article 4.1**

508. **Claim 41:** Argentina acted inconsistently with Article 4.1 of the Anti-Dumping Agreement by considering that 46 per cent constituted the major proportion of the total domestic production and, thus, qualified as the domestic industry.

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<sup>244</sup> *Mexico – HFCS*, at para. 7.128.

<sup>245</sup> *EC – Bed Linen*, at para. 6.162.

(a) Facts

509. On 23 December 1999, the CNCE issued the final injury determination.<sup>246</sup> In that determination, the CNCE stated that the Argentinean companies San Sebastian, Rasic Hnos, Granja Tres Arroyos, Avicola Roque Perrez, Domvil, F.E.P.A.S.A., Frigorifico de Aves Soychu, Miralejos, Las Camelias, Frigorifico Cumini, Industrial Avicola Cordobesa, Nestor Eggs, and Super had formally adhered to the application presented by CEPA.<sup>247</sup> Out of the thirteen companies listed above, ten responded to the injury questionnaires submitted by the CNCE to the national producer.<sup>248</sup> Out of the ten domestic producers that responded to CNCE's injury questionnaire, responses of only six domestic producers were verified.<sup>249</sup>

510. Examination of the impact of the dumped imports on the domestic industry was based on data provided by the ten companies that responded to the questionnaires. These companies composed 45 per cent of the total domestic production of the like products during the period under analysis (January 1996 through December 1998), and 46 per cent of the total production in 1998.<sup>250</sup>

(i) ***Claim 41: Inconsistency with Article 4.1 of the Anti-Dumping Agreement***

***Text of Article 4.1***

511. Relevant part of Article 4.1 states that:

“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”

***Legal Argument Relative to Claim 41***

512. The issue before the Panel is whether 46 per cent of the total domestic production of poultry in Argentina constitutes a major proportion of the total domestic production.

513. The definition of “domestic industry” in Article 4.1 requires authorities to consider the domestic industry taken as a whole or whose collective output constitutes a major proportion of the total domestic production, and not a segment of that industry. In order to examine the issue, the Panel must interpret the meaning of the term “major proportion” in Article 4.1 of the Anti-Dumping Agreement.

514. According to ordinary meaning interpretation, the term “major part”<sup>251</sup> is defined as “the majority”.<sup>252</sup> “Majority” is understood to mean “the greater number or part”.<sup>253</sup> From these

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<sup>246</sup> See, Exhibit BRA-14.

<sup>247</sup> See, Page 61 of the “Informe Técnico Previo a La Determinación Final” in Exhibit BRA-14.

<sup>248</sup> The national producers that responded to the CNCE's questionnaire were: San Sebastian, Rasic Hnos, Granja Tres Arroyos, Avicola Roque Perez, Domvil, F.E.P.A.S.A., Frigorifico de Aves Soychu, Miralejos, Las Camelias, and Super. See, Page 61 of the “Informe Técnico Previo a La Determinación Final” in Exhibit BRA-14.

<sup>249</sup> The CNCE verified the responses to the injury questionnaires of: San Sebastian, Rasic, Granja Tres Arroyos, Avicola Roque Perez, Frigorifico de Aves Soychu, and Las Camelias. See, Page 61 of the “Informe Técnico Previo a La Determinación Final” in Exhibit BRA-14.

<sup>250</sup> See, Page 62 of the “Informe Técnico Previo a La Determinación Final” in Exhibit BRA-14.

<sup>251</sup> The terms “proportion” and “part” are viewed and used as synonyms. *Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, pages 995 and 1098.

<sup>252</sup> *Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 822.

definitions, the phrase “major proportion” can be understood as the greater part in relation to the whole. If the whole in question is 100 per cent of the total domestic production of the like product, 46 per cent cannot be considered as the greater part in relation to the whole.

515. As stated, Article 4.1 defines the “domestic industry” as the domestic producers representing the 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.

516. Brazil understands Article 4.1 to provide that the domestic industry can either be represented by 100 per cent of the producers of the like product or by those whose production, jointly considered, constitutes more than half of the total domestic production. If the domestic producer’s output, jointly considered, is less than 50 per cent of the total production, the domestic producers do not comply with the definition of Article 4.1 of the Anti-Dumping Agreement.

517. The establishment of the domestic industry is important, particularly with respect to the injury analysis. Because the injury examination takes into account the impact of the dumped imports on the domestic industry, if the domestic industry is not properly constituted, the impact examination in the injury analysis may be flawed.

518. Thus, the requirement to make a determination of injury to the domestic industry read in light of the definition of the domestic industry of Article 4.1 implies that the injury must be analyzed with regard to domestic producers as a whole of the like product or to those whose collective output constitutes a major proportion, or the majority, of the total domestic production of those products. Injury cannot be evaluated in respect to a segment or a part of the domestic industry.

519. The CNCE’s determination that 46 per cent of the total domestic production of the like product constituted the major proportion of the collective output of the domestic producers is on its face inconsistent with Article 4.1 of the Anti-Dumping Agreement.

#### E. IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES AS A RESULT OF THE ANTI-DUMPING INVESTIGATION

##### 1. Articles 9.2, 9.3 and 12.2.2

520. The following three claims arise from the facts transcribed below and from the legal requirements in the Anti-Dumping Agreement:

**Claim 28:** Argentina has acted inconsistently with Article 9.2 by imposing a variable anti-dumping duty that can be collected in an inappropriate amount.

**Claim 29:** Argentina has acted inconsistently with Article 9.3 by imposing a variable anti-dumping duty that can exceed the margin of dumping established in the final determination.

**Claim 30:** Argentina acted inconsistently with Article 12.2.2 by failing to provide how the “minimum export price” was established in the determination to impose definitive anti-dumping duties.

##### (a) Facts

521. On 23 June 2000, the DCD issued its final affirmative dumping determination.<sup>253</sup> In its determination, the DCD calculated and determined margins of dumping of 14,91 per cent for exports

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<sup>253</sup> *Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 822.

<sup>254</sup> See, Exhibit BRA-15.



of the subject merchandise from Sadia,<sup>255</sup> of 15,48 per cent for exports of the subject merchandise from Avipal,<sup>256</sup> and of 8,19 per cent for exports of the subject merchandise from all other exporters.<sup>257</sup> The DCD determined that the Brazilian exporters Nicolini and Seara were not exporting the subject merchandise at dumped prices.<sup>258</sup> The dumping margins were calculated as follows:

**SADIA S.A.**

Normal value US\$/Kg	FOB Price Average US\$/Kg	Dumping Margin %
<b>A</b>	<b>B</b>	<b>(A-B)/B</b>
0,9294	0,80883	14,91

Source: Page 102 of Exhibit BRA-15.

**AVIPAL S.A.**

Normal value US\$/Kg	FOB Price Average US\$/Kg	Dumping Margin %
<b>A</b>	<b>B</b>	<b>(A-B)/B</b>
1,0896	0,94355	15,48

Source: Page 103 of Exhibit BRA-15.

**FRIGORÍFICO NICOLINI LTDA.**

Normal value US\$/Kg	FOB Price Average US\$/Kg	Dumping Margin %
<b>A</b>	<b>B</b>	<b>(A-B)/B</b>
0,8027	0,95843	----

Source: Page 103 of Exhibit BRA-15.

**SEARA ALIMENTOS S.A.**

Normal value US\$/Kg	FOB Price Average US\$/Kg	Dumping Margin %
<b>A</b>	<b>B</b>	<b>(A-B)/B</b>
0,9104	1,00988	----

Source: Page 103 of Exhibit BRA-15.

**ALL OTHER EXPORTERS**

Normal value US\$/Kg	FOB Price Average US\$/Kg	Dumping Margin %
<b>A</b>	<b>B</b>	<b>(A-B)/B</b>
1,0385	0,95992	8,19

Source: Page 104 of Exhibit BRA-15.

522. On 21 July 2000, based upon the final dumping, injury and causal link determinations, the MEOSP issued Resolution No. 574/2000, imposing definitive dumping measures on imports of poultry from Brazil for a period of three years.<sup>259</sup>

<sup>255</sup> See, Page 102 of Exhibit BRA-15.

<sup>256</sup> See, Page 103 of Exhibit BRA-15.

<sup>257</sup> See, Page 104 of Exhibit BRA-15.

<sup>258</sup> See, Page 103 of Exhibit BRA-15.

<sup>259</sup> See, Exhibit BRA-17.

523. Such measures took the form of specific anti-dumping duties to be collected as the absolute difference between the FOB price invoiced in any one shipment and a designated “minimum export price” also fixed in FOB terms, to be applied whenever the former price is lower than the latter. The “minimum export price” established for each exporter was US\$ 0,92 per kilogram for Sadia, US\$ 0,98 per kilogram for Avipal, and US\$ 0,98 per kilogram for all other exporters.<sup>260</sup> The public notice of the decision to impose the anti-dumping duties did not explain how the “minimum export prices” were determined. The Brazilian exporters Nicolini and Seara did not have dumping measures since they were found not to be exporting poultry at dumped prices.<sup>261</sup> The public notice also set forth the dumping margins found for Sadia (14.91 per cent), Avipal (15.48 per cent) and all other exporters (8.19 per cent).<sup>262</sup>

(i) ***Claim 28: Inconsistency with Article 9.2 of the Anti-Dumping Agreement***

***Text of Article 9.2***

524. The relevant portion of Article 9.2 of the Anti-Dumping Agreement provides that:

“When an anti-dumping duty is imposed in respect of any product, such an 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 (...)”

***Legal Argument Relative to Claim 28***

525. Brazil asserts that the variable anti-dumping duties imposed on imports of poultry from Brazil, that is, the absolute difference between the FOB price invoiced in any one shipment and a designated “minimum export price” also fixed in FOB terms, to be applied whenever the FOB export price is lower than the designated “minimum export price”, can exceed the margin of dumping established in the final determination, and thus can be collected in inappropriate amounts.

526. A hypothetical example of this circumstance is presented in the exercise below:

**TABLE 1**

<b>Exporter</b>	<b>“Minimum Export Price” in Resolution No. 574</b>	<b>Ad Valorem Duty in Final Determination</b>
Sadia	0.92 US\$/Kg	14.91%
Avipal	0.98 US\$/Kg	15.48%
All Others	0.98 US\$/Kg	8.19%

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<sup>260</sup> See, Exhibit BRA-17.

<sup>261</sup> See, Exhibit BRA-17.

<sup>262</sup> See, Exhibit BRA-17.

**TABLE 2**

<b>Exporter</b>	<b>“Minimum Export Price”</b>	<b>Example of FOB Export Price</b>	<b>Ad Valorem Dumping Margin per cent</b>
	<b>(A)</b>	<b>(B)</b>	<b>(A) – (B)/(B) x100%</b>
Sadia	0.92 US\$/Kg	0.75 US\$/Kg	22.66%
Avipal	0.98 US\$/Kg	0.75 US\$/Kg	30.66%
All Others	0.98 US\$/Kg	0.75 US\$/Kg	30.66%

**TABLE 3**

<b>Exporter</b>	<b>Ad Valorem Duty in Final Determination</b>	<b>Ad Valorem Duty in Exercise</b>	<b>Difference</b>
	<b>(A)</b>	<b>(B)</b>	<b>(B) – (A)</b>
Sadia	14.91%	22.66%	7.75%
Avipal	15.48%	30.66%	15.18%
All Others	8.19%	30.66%	22.47%

527. In the above exercise, Brazil has simulated a dumping margin calculation, assuming that the FOB price invoiced in a shipment is US\$ 0.75 per kilogram and that the “minimum export price” is the one determined in Resolution No. 574 for each company (Table 2 above).

528. In this hypothetical exercise, specific anti-dumping duties to be collected as the absolute difference between the FOB price invoiced in that shipment and the designated “minimum export price” also fixed in FOB terms, result in the *ad valorem* duty of 22.66 per cent for Sadia, 30.66 per cent for Avipal and 30.66 per cent for all other exporters (Table 2 above).

529. If we compare the margins of dumping found in the DCD’s final affirmative dumping determination with the margins found in the exercise above, the Panel will verify that the dumping duty to be applied in the hypothetical case would greatly exceed the margin of dumping established in the final determination (Table 3 above).

530. According to the exercise above, if the Brazilian exporters choose to export poultry into Argentina at a determined lower price, they will be imposed anti-dumping duties to be collected at inappropriate amounts, that is, in excess to the dumping margin found in the investigation and provided in the final determination.

531. This situation would violate the requirement in Article 9.2 of the Anti-Dumping Agreement that an anti-dumping duty must be collected in the appropriate amounts in each case.

**(ii) Claim 29: Inconsistency with Article 9.3 of the Anti-Dumping Agreement**

**Text of Article 9.3**

532. Relevant portion of Article 9.3 sets forth that:

“The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.”

***Legal Argument Relative to Claim 29***

533. After Argentina imposed variable anti-dumping duties on imports of poultry from Brazil, Brazilian exporters have not exported poultry into Argentina at less than the “minimum export price” in order not to pay an amount of anti-dumping duty in excess of the margin established under Article 2.

534. Article 9.3 of the Anti-Dumping Agreement specifically requires that the amount of the antidumping duty must not exceed the margin of dumping as established under Article 2. To that effect, Article 2.4.2 of the Anti-Dumping Agreement provides that the “existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis”.

535. In this case, the dumping margin as established under Article 2 of the Anti-Dumping Agreement is that established during the investigation phase, based on the normal value and export price data collected from January 1998 through January 1999. The “minimum export price” determined in Resolution No. 574 does not qualify as a dumping margin established under Article 2, since it does not reflect the normal value and export price as provided by the exporters and examined by the investigating authority.

536. Also, as provided in the hypothetical exercise presented in Claim 28 above, if the Brazilian exporters choose to export poultry into Argentina at a determined lower price, they will be imposed anti-dumping duties to be collected in excess of the dumping margin found in the final determination.

537. By establishing a variable anti-dumping measure on imports of poultry from Brazil, which can exceed the margin of dumping established under Article 2, Argentina has acted inconsistently with Article 9.3 of the Anti-Dumping Agreement.

***(iii) Claim 30: Inconsistency with Article 12.2.2 of the Anti-Dumping Agreement***

***Text of Article 12.2.2***

538. Article 12.2.2 provides in part that:

“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 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.”

***Legal Argument Relative to Claim 30***

539. The question presented to the Panel is whether information has been provided in the final determination, sufficient to satisfy the requirements of Article 12.2.2 of the Anti-Dumping Agreement, as to how the Argentinean authority calculated the “minimum export price” established in Resolution No. 574/2000.

540. Resolution No. 574/2000 was the public notice of conclusion that provided for the imposition of a definitive duty. Resolution No. 574/2000 imposed dumping measures in the form of specific anti-dumping duties to be collected as the absolute difference between the FOB price invoiced in any one shipment and a designated “minimum export price” also fixed in FOB terms, to be applied whenever the former price is lower than the latter. No explanation was provided in Resolution No. 574/2000 as to how Argentina calculated the “minimum export price”.

541. Article 12.2.2 requires that a public notice providing for the imposition of a definitive duty contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have lead to the imposition of final measures.

542. Argentina did not provide relevant information as to why the margin established in the final determination was not applied and how the “minimum export price” was calculated.

543. Brazil considers the application of the dumping measures to be relevant information that must be included in the public notice providing for the imposition of a definitive duty. An exporter is entitled to know how the information and arguments presented during the investigation were considered by the investigating authority and how that information was used in arriving at a dumping measure.

544. By not providing relevant information in the public notice as to how and why the investigating authority established a “minimum export price”, Argentina has failed to comply with Article 12.2.2 of the Anti-Dumping Agreement.

## **V. CONCLUSION AND REQUESTS**

### **A. CONCLUSION**

545. The claims set forth in Part III of this submission provide the facts and legal basis on which Brazil believes that Argentina has acted inconsistently with GATT 1994 and the various provisions in the Anti-Dumping Agreement. Brazil believes that the anti-dumping proceeding that lead to the application of definitive anti-dumping measures on imports of poultry from Brazil should never have been initiated (Part III.B of this submission – Initiation of the Anti-Dumping Investigation). Not only did the application not provide relevant evidence to be considered sufficient to meet the requirements of the necessary evidence in an application, but also the Argentinean authorities failed to examine the accuracy and adequacy of that evidence in order to justify the initiation of the investigation. By failing to do this, the Argentinean authorities failed to reject the application based on insufficient evidence of dumping and injury.

546. After Argentina incorrectly initiated the investigation, the Argentinean authorities acted inconsistently with the rules on notification, public notice, evidence and overall procedure set forth in the Anti-Dumping Agreement (Part III.C of this submission – Conduct of the Anti-Dumping Investigation – Evidentiary and Public Notice Requirements). The failure to comply with these provisions of the Agreement has impaired the rights of the exporters for a ‘full opportunity’ to defend their interests in the investigation at issue. Furthermore, the final determinations of dumping and injury presented material errors regarding the establishment of normal value, adjustments to the normal value, export price, fair comparison; the examination of injury, and its elements, and the establishment of the domestic industry (Part III.D of this submission – Conduct of the Anti-Dumping Investigation and Final Affirmative Determination).

547. When Argentina imposed definitive measures, it further tarnished the proceeding by imposing duties that can exceed the margin of dumping found in the final determination and that, thus, can be collected in inappropriate amounts (Part III.E of this submission – Imposition and Collection of Anti-Dumping Duties as a Result of the Anti-Dumping Investigation).

548. As a final note, Brazil observes that under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of the benefits under that Agreement. Accordingly and pursuant to the claims in this submission, to the extent that Argentina has acted inconsistently with the provisions of the Anti-Dumping Agreement, Argentina has nullified or impaired benefits accruing to Brazil under the Agreement.

## B. REQUESTS

549. For the reasons shown above, Brazil respectfully requests the Panel to find that Argentina has acted inconsistently with the Anti-Dumping Agreement as per the claims above, which are summarized as follows:

- The initiation of the anti-dumping proceedings against poultry from Brazil by Argentina is inconsistent with Articles 5.2, 5.3, 5.7 and 5.8 of the Anti-Dumping Agreement;
- The initiation and conduct of the anti-dumping investigation against poultry from Brazil by Argentina was inconsistent with Article 12.1 of the Anti-Dumping Agreement;
- The conduct of the anti-dumping investigation against poultry from Brazil by Argentina was inconsistent with Articles 6.1.1, 6.1.2, 6.1.3, 6.2, 6.8, paragraphs 3, 5, 6 and 7 of Annex II, Articles 6.9 and 6.10 of the Anti-Dumping Agreement;
- The final dumping determination by Argentina on poultry from Brazil is inconsistent with Articles 2.4, 2.4.2 and 12.2.2 of the Anti-Dumping Agreement;
- The final injury determination by Argentina on poultry from Brazil is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 12.2.2 of the Anti-Dumping Agreement;
- The final injury determination and the imposition of the definitive anti-dumping measures by Argentina on poultry from Brazil is inconsistent with Article 4.1 of the Anti-Dumping Agreement; and,
- The imposition of the definitive anti-dumping measures by Argentina on poultry from Brazil is inconsistent with Articles 9.2, 9.3 and 12.2.2 of the Anti-Dumping Agreement.

550. Accordingly, Brazil respectfully requests that the Panel:

- Recommend that the DSB request Argentina to bring these actions into conformity with GATT 1994 and the Anti-Dumping Agreement;
- Use its right to make suggestions on ways which Argentina could implement the Panel's recommendations, as provided in Article 19.1 of the DSU; and,
- Suggest that, in light of the numerous outcome-decisive violations of the Anti-Dumping Agreement that Argentina immediately repeal Resolution No. 574/2000 imposing definitive anti-dumping duties.

## ANNEX A-2

### FIRST ORAL STATEMENT OF BRAZIL

(25 September 2002)

#### INTRODUCTION

1. Brazil appreciates the opportunity to appear before the Panel to explain its position in this dispute. We would like to note our appreciation for the time and effort devoted by the Panel and the secretariat to this matter.
2. In this statement, Brazil will not repeat the arguments already stated in its first submission (BFS) and will simply address some of the central issues before the Panel in light of the arguments raised by Argentina in its first submission (AFS).
3. However, before turning to the specific arguments, we would first like to address an issue raised in AFS. It relates to Argentina's claim that the dispute before this Panel has already been "debated and resolved" in a previous Mercosul Ad Hoc Arbitral Tribunal. Argentina suggests that, for this reason, the Panel should dismiss Brazil's complaint.

#### THE MERCOSUL AD HOC TRIBUNAL – *Res Judicata*

4. Although Argentina does not clearly state this in its first submission, it appears that Argentina claims that the ruling by the Mercosul Tribunal on the dispute has the effect of *res judicata*.<sup>1</sup> Under the principle of *res judicata* a final judgement rendered by a court or competent jurisdiction on the merits of a case is conclusive as to the rights of the parties and their privies, and as to these parties, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. In other words, the principle of *res judicata* is only applied if the subsequent action involves the same parties, the same measures and the same claims as the previous action.
5. Having said that, we underscore that although we have the same parties (Brazil and Argentina) and the measure (Resolution No. 574/2000) before this Panel, the claims of the present dispute are not the same.
6. Since Argentina has gone at length with this argument, we would like to explain that the matter before the Mercosul Tribunal had to be decided according to Mercosul anti-dumping rules for trade within the region. The Mercosul Tribunal, however, found that Mercosul anti-dumping rules for trade within the region were not properly in force. Within that context, the Tribunal found that Mercosul Member States were allowed to apply their domestic anti-dumping legislation with respect to regional trade. The Tribunal also concluded that it did not have to decide on any of the substantive issues concerning the investigation, such as the existence of dumping, injury to the domestic industry, and causal link.

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<sup>1</sup> AFS, paragraph 17.

7. Brazil notes that the Mercosul arbitrators dealt with the dispute under the umbrella of the Brasilia Protocol, the dispute settlement mechanism that applies strictly to the Mercosul legal texts, that is, the Treaty of Asuncion and all other agreements and decisions that make up Mercosul's legal framework.

8. Brazil's claims before this Panel are not related to the interpretation, application or non-compliance with the provisions of any of the Mercosul texts. Brazil's claims before this Panel relate to the consistency of the Argentinean anti-dumping investigation and measure with the provisions of the Anti-Dumping Agreement and Article VI of GATT 1994, issues that were never addressed by the Mercosul arbitrators.

9. We make special note that Paraguay also argues, in its third party submission that the ruling by the Mercosul Ad Hoc Arbitral Tribunal has the effect of *res judicata*.<sup>2</sup> In developing its arguments, Paraguay considers relevant to mention the Olivos Protocol. At this point, Brazil will simply recall that the Olivos Protocol is not even in force yet.

10. At any rate, what Paraguay and Argentina bring before this Panel is a situation where Mercosul Members potentially have divergent views on what their rights and obligations under the Mercosul legal texts may be. Yet, Article 1 of the DSU confines the jurisdiction of this Panel to disputes brought pursuant to the "covered agreements" (those listed in Appendix 1 of the DSU), the "WTO Agreement", and the DSU, taken in isolation or in combination with each other. The Brasilia Protocol and the Olivos Protocol are not listed in Article 1 of the DSU.

11. In bringing this *res judicata* claim to the Panel, Argentina cites no provision of the WTO legal texts to support its contention. It simply makes a reference to Article 3.2 of the DSU without clearly indicating how that provision would support the *res judicata* argument. This is not surprising, for Article 3.2 of the DSU deals exclusively with the clarification of the existing provisions of the WTO Agreement and bears no relation whatsoever to the relationship between previous rulings by an international tribunal and the rights and obligations of WTO Members under the "covered agreements", the "WTO Agreement" and the DSU.

12. What Article 3.2 of the DSU provides is that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." In fact, Article 3.2 affirms the right of Brazil to have the Panel hear its claims that the Argentinean anti-dumping measure impairs Brazil's WTO rights.

## **INITIATION OF THE DUMPING INVESTIGATION**

### **(a) Article 5.2 – Evidence in the Application**

13. Regarding the claims of violation of Article 5.2 of the ADA, Argentina claims that an applicant is not obligated to prove without doubt the existence of dumping, but acknowledges that simple assertion of the existence of dumping, injury, and causal link is not sufficient if that assertion is not substantiated by relevant evidence. According to Argentina, an application substantiated by relevant evidence is conditioned on what information is "reasonably available" to the applicant.<sup>3</sup>

14. Argentina states that there are two levels of requirements regarding the quality and quantity of evidence that should be submitted. The first level is the evidence presented in an application for initiation, which according to the Agreement is that which is "reasonably available" to the applicant.

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<sup>2</sup> Paraguay's submission, paragraph 5.

<sup>3</sup> AFS, paragraph 34.



The second level is the evidence that should be submitted once the investigation has initiated. To that regard, Argentina cites previous WTO Panel Reports that support the idea that the quantum and quality of evidence required prior to initiation has to be necessarily less than that required for a final determination.<sup>4</sup>

15. Brazil agrees. What Argentina fails to state, however, is that previous WTO Panels have also found that the evidence required at the time of initiation **nonetheless** had to be **relevant** in establishing the elements in the Agreement, and that the **type** of evidence needed to justify initiation **is the same as** that needed to make a preliminary or final determination of dumping, although the quality and quantity is less.

16. The existence, in the application, of relevant evidence of the type necessary to conduct an investigation is particularly important when it is obvious on the face of the application that adjustments will unavoidably be made to normal value and export price data.

17. That said, Argentina has neither presented arguments nor indicated the evidence in the application to support that: 1) poultry sold in Brazil was physically different from the poultry sold to Argentina; 2) that the alleged differences in physical characteristics actually affect price comparability; and, 3) that the yield rate difference alleged by petitioner was correct.

18. In Brazil's submission, we have shown that the petitioner, in suggesting the calculation adjustment to compensate the alleged difference between the poultry sold in Brazil and to Argentina, provided no "evidence" – that is, no information drawn from a document tending to prove a fact or a proposition – that would justify such an adjustment. Likewise, no evidence was presented showing that price comparability would be affected or that the yield rate proposed by the petitioner was justified.

19. Brazil has also shown that the normal value submitted in the application was for only one day in 1997 (30 June 30), while export data covered a period of six months in 1997 (January through May 1997 and August 1997). According to the Anti-Dumping Agreement, a fair comparison must be made in respect of sales made at as nearly as possible the same time. From the data provided in the application, such a comparison would not be possible.

20. Argentina repeatedly makes the argument that an application substantiated by relevant evidence is conditioned on what information is "reasonably available" to the applicant.<sup>5</sup> We have indicated that normal value information for all of 1996 and 1997 was reasonably available to the petitioner, even though the petitioner only presented normal value information for one day in 1997.<sup>6</sup> The petitioner could have attached prices on poultry published by JOX for all months of 1997. Nonetheless, it chose to provide it for one single day in that year.

**(b) Article 5.3 – Accuracy and Adequacy of the Evidence in the Application**

21. Regarding the claims of violation of Article 5.3 of the ADA, Argentina again argues that the level of evidence sufficient to justify the initiation of an investigation is considerably inferior to that required in a determination to apply a preliminary or definitive measure. Argentina cites selected passages of previous WTO Panel Reports.

22. We repeat that we do not contest such standard. What Argentina again fails to state that those same reports conclude that "when from the face of an application it is obvious that there are

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<sup>4</sup> AFS, paragraph 37.

<sup>5</sup> AFS, paragraphs 31, 32 and 39.

<sup>6</sup> BFS, paragraph 124.

substantial questions of comparability between the export price and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek further evidence as might be necessary.”

23. In the present case, the investigating authority neither gave 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.

24. Still under Article 5.3, Brazil showed in its first submission that Argentina established export prices – and consequently the dumping margins – based only on export transactions below normal value. We simply refer to Exhibit BRA-2. There, the Panel will verify that the investigating authority considered, from the import data presented in the application, only the portion of the imports of the product that entered Argentina at prices inferior to those for the product sold in Brazil.<sup>7</sup>

25. By selecting certain export transactions, namely those below normal value, from the total export transactions in the application, Argentina not only failed to examine the accuracy and adequacy of all the evidence that was presented in the application but also inflated the dumping margin. It is obvious that the adoption of this methodology would always result in a dumping margin.

26. In explaining the methodology used to establish the export price, Argentina provided in its first submission a different explanation from that found in the decision to initiate the investigation. In its first submission, Argentina states that the investigating authority examined 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.”<sup>8</sup> Members of the Panel, this is a convoluted way of trying to explain what in effect is the “zeroing” methodology. We could not agree with the statement that a more adjusted and comparable export price is that which is inferior to those prices for the product sold in the domestic market.

27. Furthermore, had the investigating authority properly examined the accuracy and adequacy of the evidence provided in the application, it would have realized that the normal value data in the application was for one single day in 1997 and that the export price data was for a period of six months in 1997. Because prices vary over a period of time, a fair comparison must be made in respect of sales made at as nearly as possible the same time, even for purposes of initiation of an investigation. Obviously, it is insufficient or inadequate to compare normal value of a single day to export prices covering six non-consecutive months.

## **CONDUCT OF THE ANTI-DUMPING INVESTIGATION – EVIDENTIARY AND PUBLIC NOTICE REQUIREMENTS**

### **(a) Article 12.1 – Notification and Public Notice of the Initiation**

28. Regarding the claim of violation of Article 12.1 of the Agreement, Argentina argues that it was impossible to notify the seven exporters, since the interest of these parties was unknown at the time the investigating authority was satisfied that there was sufficient evidence to justify the initiation of the investigation.<sup>9</sup>

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<sup>7</sup> Pages 10 and 11 of BRA-2.

<sup>8</sup> AFS, paragraphs 78 and 79.

<sup>9</sup> AFS, paragraph 110.

29. First, it is of the utmost importance to reaffirm that Article 12.1 mandates that the investigating authorities notify “the Member ... the products of which are subject to the investigation **and** other interested parties known to the investigating authorities.” This obligation falls exclusively upon the investigating authority. Argentina tries to share this obligation with Brazil when it states that it notified Brazil of the initiation of the investigation and requested that it cooperate in identifying the producers and exporters interested in the investigation.<sup>10</sup>

30. Second, it is simply not true that Argentina did not notify these seven exporters because it did not know that these were parties with an interest in the investigation. As stated and proven in paragraph 199 and Exhibit BRA-2 of Brazil’s first submission, out of the seven Brazilian exporters that were not notified of the initiation, at least five of these exporters (Comaves, Catarinense, Minuano, Chapecó and Perdigão) were listed as Brazilian exporters in the determination to initiate.<sup>11</sup>

31. Even though Argentina knew these seven exporters to be interested parties in the investigation it only notified them eight months after the investigation had initiated.

**(b) Article 6.1.1 – Deadlines for Responses**

32. On the claim of violation of Article 6.1.1 of the Agreement, Argentina states that it provided a period of more than 30 days for exporters to reply to the questionnaire.

33. This is not true. Brazil has provided as Exhibit BRA-13 the letters from the DCD to the seven Brazilian exporters inviting them to provide questionnaire responses within a period no longer than 20 days from receipt of the mentioned letter. It is evident that the timeframe required by the DCD in these letters was on its face contrary to the 30-day period required under Article 6.1.1 of the Agreement.

34. In paragraph 133 of its first submission, Argentina confirms that it sent the questionnaires to the Brazilian exporters Catarinense, Chapecó, Minuano, Perdigão, Comaves and Pena Branca on 15 September 1999. However, Argentina fails to inform the Panel that in that communication of 15 September, DCD allows a period “not longer than 20 days from the receipt of the [communication]”.<sup>12</sup>

35. We also reaffirm that these seven exporters were never notified by the CNCE of the investigation and of the need to provide responses to the injury questionnaire. In fact, these exporters never even received such questionnaires. Argentina confirms that the CNCE only sent the injury questionnaires to eight exporters – in fact only five exporters received them.<sup>13</sup> By not sending the injury questionnaires to all exporters participating in the investigation, Argentina impaired their rights for defence, again violating Article 6.1.1.

**(c) Article 6.1.2 – Evidence Submitted ... Shall be Made Available Promptly**

36. With respect to the claim of violation of Article 6.1.2 of the Agreement, Brazil has already established that Argentina knew these exporters to be interested parties in the investigation at the time of initiation. We have also presented evidence to the effect that these exporters were notified of the investigation and the need to participate eight months after the investigation had already been initiated. Such evidence is in Exhibit BRA-13 of Brazil’s submission.

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<sup>10</sup> AFS, paragraphs 112 to 116.

<sup>11</sup> Exhibit BRA-2, page 5.

<sup>12</sup> Exhibit BRA-13.

<sup>13</sup> AFS, para.135.

37. In that sense, how could evidence presented by the other interested parties in the investigation be made “promptly” available, as required under Article 6.1.2, if these seven exporters were notified to participate in the investigation eight months after the investigation had already initiated and a preliminary determination of dumping, injury and causal link had already been issued?

**(d) Article 6.1.3 – ... Shall Provide the Full Text of the Written Application**

38. On the claim of violation of Article 6.1.3 of the Agreement, Argentina first argues that in the Spanish version of the Agreement the term “provide” is set forth as “facilitar”. Thus, based on the Spanish version of the Agreement, Argentina claims that the investigating authorities have complied with the requirement in Article 6.1.3 when they made the written application available to the interested parties once the investigation was initiated.

39. In fact, any reasonable interpretation of Article 6.1.3 would conclude that Argentina was obligated to supply the Government of Brazil and the exporters with the full text of the written application. Argentina’s position that the verb “to provide” could be understood to mean that authorities were only required to “make available” the full text of the written application is incorrect.

40. The first sentence of Article 6.1.3 of the Agreement states that “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.”

41. Article 6.1.3 of the Agreement carefully differentiates the obligation that the investigating authorities have with the exporters and the exporting Member from the obligation the investigating authorities have with other interested parties. In the first case, the investigating authority must actively “provide” the full text of the written application to the exporting Member and to the exporters involved in the investigation. In the second case, the investigating authorities must “make available”, upon request, the full text of the written application to other interested parties. Brazil believes that if the requirement imposed on the investigation authority was to be understood as being the same for the exporters and exporting Member as that for the other interested parties, there would be no need for the use of different language in Article 6.1.3 of the Agreement.

42. The same reasoning applies to the text in Spanish. The requirement imposed on the investigating authorities to provide, or “facilitar”, the full text of the written application to exporters and the exporting Member is different from the requirement imposed on the authorities to “make available”, or “pondrán a disposición”, the full text of the written application to other interested parties. Finally, the dictionary of the *Real Academia Española* defines the word “facilitar” as “proporcionar o entregar”, a definition entirely compatible with the word “provide”, used in the English version.

**(e) Article 6.8 – Facts Available**

43. On the claims of incorrect use of facts available by Argentina, we note that the authority disregarded the responses provided by the Brazilian exporters with respect to the description of the product sold to Argentina and in Brazil. Instead, the authority applied the normal value adjustment suggested in the application. Argentina claims that it was impossible to take into account the allegations made by the exporters without supporting documentation that could be verified.

44. We have shown in Exhibits BRA-22, BRA-23, BRA-24 and BRA-26 that the exporters Sadia, Avipal and Frangosul reported that the poultry sold to Argentina was identical to the poultry sold in Brazil. We have also shown in Exhibit BRA-25 that the Brazilian exporter Catarinense reported that from the two types of poultry sold (broiler and griler), there was a difference in the broiler type

poultry sold to Argentina and in Brazil. The broiler type poultry sold by Catarinense to Argentina did not contain head and feet, while the broiler type poultry sold in Brazil contained head but not feet.

45. Even though the exporters reported this important information within a reasonable period and the authority did not question the exporters on such information – or require further clarifications – the DCD still chose to apply the arbitrary normal value adjustment proposed by the petitioner in the application.

46. Argentina claims that the information reported in the questionnaires was not accompanied by supporting documentation that could be verified.

47. The Panel will note that not only did the questionnaire not specify that this information required supporting documentation but also that the authority never, throughout the investigation, requested any supporting documentation in order to verify the product description reported by these exporters. The investigating authorities also never informed the exporters that their evidence and information was not accepted, pursuant to paragraph 6 of Annex II.

48. Furthermore, the investigating authority decided that the information provided by the petitioner in the application, without any supporting documentation, was more “accurate” and “verifiable” than the precise information provided by the exporters with regard to their own product. We recall that the information used by the petitioner in the application, to indicate that an adjustment to normal value was necessary, was based on JOX information for chilled poultry, with head and feet, for the São Paulo wholesale market. JOX information was for chilled poultry with head and feet, a product that was different from the product under investigation, frozen poultry without head and feet.

49. We recall that these exporters invited the investigating authority to verify their responses *in loco*, but the authorities decided not to carry out this verification visit. Brazil understands that, in this case, even the information submitted without supporting documentation was still information that could be verified. Argentina seems to confuse the meaning of “verifiable” information, that is, information “that can be verified”, with information “that has not yet been verified”.

50. Moreover, paragraph 7 of Annex II instructs the investigating authority to use “special circumspection” if the authority has to base its findings, including with respect to normal value, on information from a secondary source, including the information supplied in the application by the petitioner. Argentina did not use “special circumspection” when it unjustifiably ignored the responses provided by these exporters and decided to apply the arbitrary adjustment to normal value suggested by the petitioner in the application.

## **CONDUCT OF THE ANTI-DUMPING INVESTIGATION - FINAL AFFIRMATIVE DETERMINATION**

### **(a) Article 2.4 – Fair Comparison**

51. On the claim that Argentina failed to make due allowance for freight in the normal value of two exporters, Argentina claims that the investigating authority could not have made the freight adjustment, even though Sadia reported that such adjustments were warranted, because these deductions were not properly documented.

52. Even though Argentina considers this adjustment has “a decisive and significant impact on price comparability”<sup>14</sup>, it still considered that the investigating authority would have acted incorrectly

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<sup>14</sup> AFS, paragraph 211.

if it had made this specific discount. According to Argentina, no documented evidence was provided and the freight information provided by the exporter was too general to be used.

53. Even though Argentina knows that this adjustment is warranted and that it is “decisive and significant” for the price comparison it simply decided not to make it, instead of using a secondary source of information to estimate such deduction, as it did with the normal value adjustment to compensate the alleged characteristic differences between poultry sold to Argentina and in Brazil.

54. Regarding Argentina’s failure to make due allowance for differences in taxation, freight and financial cost in the normal value established for all other exporters, it is important that the Panel not be confused by Argentina’s hazy arguments.

55. During the investigation, the DCD requested that JOX clarify the taxes included in the prices published and used to determine normal value in the preliminary determination.<sup>15</sup> In the final determination, the DCD simply stated that the information provided by JOX was in Portuguese.<sup>16</sup> We underline the fact that no further explanation by the authorities was provided in the final determination except that the JOX information was in Portuguese.

56. During the consultation stage of this dispute, Brazil requested an explanation on why the investigating authorities disregarded the information provided by JOX. Argentina responded that JOX presented information in Portuguese, which did not comply with the formal requirements of the Argentinean laws and regulations for administrative proceedings.

57. Now, in its first submission, Argentina provides an entirely different response. Argentina argues that for the comparison to be fair it has to be made in the same level of trade, and that is why it did not take into account the deductions informed by JOX, since that would be a comparison between an ex-factory price for normal value and an FOB price for export price.

58. It is noteworthy that for all other purposes, including the normal value adjustment, Argentina has used JOX information. With respect to the alleged differences in characteristics, the DCD did use JOX information even though the exporters submitted information indicating and proving that there were no such differences. With respect to normal value for all other exporters, the DCD also used all other information provided by JOX in establishing the normal value.

59. An ex-factory price is the price with no charges included since this represents the price at the factory. An FOB price includes inland freight to the port of exportation, inland insurance, handling and loading charges. The FOB price does not include taxes and financial costs. That said and with the information provided by JOX, the investigating authority should still have made deductions from the normal value with respect to the taxes and financial costs included in the JOX published prices. These deductions would have permitted a fair comparison on the same level of trade.

60. With respect to the claim that Argentina incorrectly made allowances to normal value based on alleged differences in physical characteristics, the authorities again refused all information submitted by the exporters alleging that no supporting documentation existed. The authorities never asked for such documentation nor did they take the initiative to verify the information provided.

61. Still in its claims of violation of Article 2.4, Brazil asserts that Argentina has imposed an unreasonable burden of proof on exporters Sadia, Avipal and Frangosul by allowing exporters to submit normal value and export price information for the years 1996 – 1999, when the dumping period of investigation was later fixed for January 1998 to January 1999.

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<sup>15</sup> Exhibit BRA-32.

<sup>16</sup> Exhibit BRA-15.

62. Argentina admits that it did not define the dumping period of data collection on purpose.<sup>17</sup> Argentina tries to justify its action by stating that the Agreement does not define the period of data collection. Argentina further affirms that the authority has the discretion to request the documentation that it considers necessary in determining dumping and may request more information if needed to ensure due process.

63. Brazil agrees that the Anti-Dumping Agreement does not define or establish what the period of data collection must be. However, the Agreement does provide in Article 2.4 that the investigating authorities have the obligation of indicating to the parties what information is necessary to ensure a fair comparison and cannot impose an unreasonable burden of proof on the parties.

64. The DCD only established that the dumping data collection period would be from January 1998 through January 1999, on October of 1999, that is, nine months after the investigation was initiated, after a preliminary determination had been issued, and after Sadia, Avipal, and Frangosul had presented their questionnaire responses with normal value and export price information for the years 1996 through 1999. The time and resource spent by these exporters in collecting normal value and export price for the years 1996 through 1999 is an unreasonable burden of proof imposed on these exporters.

65. Furthermore, an excessive burden of proof was also imposed on exporters Sadia, Avipal, and Frangosul when the investigating authority required that these exporters provide an invoice copy for all of the sales transactions in the home market in order to establish normal value and, consequently, make a “fair comparison”.

66. These same exporters provided letters to the DCD stating that the great volume of sales of poultry in Brazil made it impossible for exporters to attach all invoices corresponding to those transactions. These exporters attached invoices for a few transactions as sample. The exporters also invited the investigating authority to verify *in loco* the responses provided, so as to ascertain that they were accurate and complete.<sup>18</sup> The DCD chose not to verify these exporters.

**(b) Article 3 – Injury Determination**

67. Brazil’s claims of violation of Articles 3.1, 3.4, 3.5 and 12.2.2 of the Agreement, relate to the use of different periods to evaluate the relevant economic factors and indices listed in Article 3.4, and the lack of explanation in the final determination on why the investigating authority decided to examine the relevant economic factors and indices based on different periods.

68. Once again, Argentina tries to confuse the Panel by making the argument that in threat of injury cases, international law and practice allows for the possibility of analysis of a period longer than the period of investigation so as to verify whether or not there is a trend of increasing imports.<sup>19</sup>

69. We stress that this is not the issue before the Panel. We are not challenging whether in a threat of injury case the investigating authority may or may not analyse data for a period longer than that of the investigation. What we are challenging is that in the investigation at issue, the authority considered a certain period of injury analysis for some factors and another period for other factors.

70. In the final determination, the CNCE stated that the period under analysis corresponded to January 1996 through December 1998. However, only for some variables, such as national

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<sup>17</sup> AFS, paragraph 243.

<sup>18</sup> Exhibits BRA-26, BRA-29 and BRA-31.

<sup>19</sup> AFS, paragraphs 252 to 254.

production, prices, imports, exports, and apparent consumption did the authority include data corresponding to the first semester of 1999.

71. To that regard, the US disagrees with Brazil's contention that an analysis of differing time periods cannot be objective and thus violates Article 3.1 of the Agreement. To support its view, the US cites the Panel report in *United States – Hot Rolled Steel*. In that investigation, the US gathered information on all factors over the entire three-year period of investigation, and it evaluated the various factors, at various instances, over the three-year period.

72. We will not go further into the analysis of that Panel report because we believe that the facts of that investigation and the claim of violation presented here by Brazil are very different from that case. First, in the instant case, the investigating authority did not gather information on all factors over the same period, that it is, from January 1996 through December 1998. For the factors national production, prices, imports, exports, and apparent consumption the period of injury analysis was from January 1996 through June 1999. Second, the Argentinean investigating authority did not evaluate all the factors listed in Article 3.4 over the same period of injury analysis.

73. We believe that the US argument is that over one determined period of injury analysis, the investigating authority can compare data for certain years without explicitly discussing data for other years. However, all factors are analyzed under a certain, defined period of injury analysis. Here, unlike the case cited by the US, the Argentinean authorities decided that for certain factors the injury analysis period would be from January 1996 through December 1998 and for other factors the injury analysis period would be from January 1996 through June 1999. What the investigating authorities cannot do, and thus our claim of violation of Articles 3.1 and 3.4 of the Agreement, is establish a certain period of injury analysis for some factors and another period of injury analysis for other factors.

74. Regarding the claim that the CNCE's injury analysis in the final determination was flawed because it did not exclude the imports of the Brazilian exporters Nicolini and Seara from the "dumped imports" under analysis, Argentina argues that in the final causal link determination the authority took into account the dumping determination that the imports from the Brazilian exporters Nicolini and Seara were not being dumped.<sup>20</sup> This is not true.

75. First, the injury analysis in the final injury determination never mentioned the exclusion of the imports from these two Brazilian exporters from the total "dumped imports" under analysis. The Panel can verify this in Exhibit BRA-14. As stated in BFS paragraph 450, we know this to be a fact because the final injury determination was issued on 23 December 1999, and preceded the final dumping determination, issued on 23 June 2000, by six months. It was in the final dumping determination that the investigating authority reached the conclusion that the exporters Nicolini and Seara were not exporting the subject merchandise at dumped prices.

76. In its first submission, Argentina effectively admits that it did not exclude imports from Nicolini and Seara from the injury examination. This, in itself, is a blatant violation of Articles 3.1, 3.2, and 3.4. It is, after all, in the injury determination, that the authorities must examine the volume, the effect, and the impact of the dumped imports.

77. Argentina tries to remedy this situation claiming that it was in establishing the causal link that it took into account the fact that those imports were not dumped.<sup>21</sup> However, the causal link determination contains no indication whatsoever that Nicolini and Seara's imports were excluded

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<sup>20</sup> AFS, paragraph 266.

<sup>21</sup> *Id.*



from the total “dumped imports”. The final causal link determination simply restated what was already provided in the final dumping determination.

78. On the claim of violation that Argentina failed to evaluate all the relevant economic factors and indices listed in Article 3.4, Argentina tries to convince the Panel that these factors were evaluated by citing various pages in the final injury determination where it claims such information was provided. We will demonstrate that the investigating authority has not evaluated these factors.

79. With respect to the actual and potential decline in productivity, Argentina cites pages 12 through 14 and 20 in the final determination and pages 26 through 30 and 95 of the Technical Report in an attempt to demonstrate that this factor was evaluated. We ask the Panel to check those pages and verify that the factors evaluated in them refer to production, capacity, capacity utilization, employment and wages, that is, other factors listed in Article 3.4 of the Agreement other than actual and potential decline in productivity. Argentina also cites to Annexes 1, 11, 12, 13 and 14 of the Technical Report of the final determination. The Panel must be aware that these Annexes refer to production, employment, wages, and cost structure but do not relate to the factor productivity.

80. Concerning factors affecting domestic prices, Argentina claims that it has analysed the evolution of the price indices of substitute products, basically red meat, as well as the general level of activity and price indices of the most important sectors.<sup>22</sup> We have not identified such evaluation. Argentina further cites Table 16 of the Technical Report, which presents the average sales revenue by kilogram of fresh or chilled poultry. Brazil fails to see how that relates to factors affecting the domestic price.

81. With respect to the magnitude of the dumping margin, instead of citing the final determination to demonstrate that the factor was evaluated, Argentina tries to evaluate this factor in its submission. To this regard, we restate that the investigating authority did not and could not have evaluated the magnitude of the dumping margin because the final dumping determination, with the dumping margin, was issued on 23 June 2000, six months after the final injury determination was issued.

82. With respect to remaining factors, regarding actual and potential negative effects on cash flow, growth, and the ability to raise capital or investments, Argentina admits that it made no cash flow evaluation and claims that such an evaluation would be impossible given some peculiarities of the Argentinean market.<sup>23</sup> Brazil notes that no explanation of the kind offered in AFS is present in the final determination, where this issue is not even mentioned. With respect to the other factors (growth, and the ability to raise capital or investments), Argentina does not indicate, in its first submission, if and where these factors were evaluated in the injury analysis contained in the final injury determination.

83. We find it appropriate at this moment to address the US comment on these claims. First, the US agrees that the Agreement requires an investigating authority to evaluate each of the Article 3.4 factors. Second, the US disagrees that the failure to refer to a particular factor in the published determination necessarily breaches Article 12.2.2. In arguing this position, the US states that Article 12.2.2 requires only that the authorities set forth “in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities”. The US argues that while all enumerated factors must be evaluated, not all are necessarily material in any particular case.

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<sup>22</sup> AFS, paragraph 292.

<sup>23</sup> AFS, paragraphs 297 to 299.

84. We have demonstrated in our submission that Argentina has not even enumerated in the final determination all the factors in Article 3.4, let alone evaluated them. Furthermore, it is not discernible from the published determination that authorities have evaluated all of Article 3.4 factors. More importantly, Brazil recalls that the evaluation of all Article 3.4 injury factors is mandatory and, as such, an inherently material issue of fact and law. Even if a particular factor does not have a material effect in the injury determination, its evaluation cannot be considered immaterial by the authorities. The final determination, therefore, must necessarily indicate if and how all factors were evaluated in the underlying investigation and, at a minimum, explain why a particular factor was considered immaterial.

**(c) Article 4.1 – Major Proportion**

85. Regarding the claim of violation of Article 4.1 of the Agreement, we agree with Argentina that the Agreement does not stipulate an exact percentage of what constitutes a “major proportion” of the total domestic production. That is exactly the issue before the Panel, whether 46 per cent of the total domestic production of poultry in Argentina constitutes a major proportion of the total domestic production.

86. At this point in time, Brazil will simply reiterate the terms of its first submission. Brazil however takes note of the arguments advanced by some of the Third Parties and submits that should the Panel find that a “major proportion” could mean less than 50 per cent of national production, the following considerations should apply.

87. First, contrary to what the EC suggests, nothing in Article 5.4 equates “producers expressly supporting the application” to the “domestic industry”. Secondly, if the Agreement provides no specific benchmark for what would constitute a major proportion of total domestic production, then the investigating authorities are under the obligation to expressly elucidate how it found that a percentage lower than 50 per cent could be considered a major proportion.

**IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES AS A RESULT OF THE ANTI-DUMPING INVESTIGATION**

88. Members of the Panel, regarding the claims of violation of Articles 9.2 and 9.3 of the Agreement, due to the imposition of anti-dumping duties pegged to minimum export prices, Brazil takes note of the arguments raised by Argentina and some Third Parties. At this point in time, Brazil would refrain from advancing any further arguments other than those set out in its first submission. Brazil is still evaluating the new elements brought into this discussion and will provide a more substantive and robust analysis of this issue in our second submission. Nonetheless, if necessary, Brazil would endeavour to offer preliminary answers to any questions raised by the Panel in this meeting.

89. Mr. Chairman, members of the Panel, this oral statement merely touches on some of the issues raised in Brazil’s first submission. We tried to offer the Panel a fresh view on some of the core issues and arguments of this case, bearing in mind some of the points raised by Argentina and the Third Parties in their submissions. We did not intend to exhaust the arguments that could and will be raised by Brazil in the following stages of these proceedings. Any omissions should not be construed as lack of interest on the points not addressed, or that Brazil has given up any of the claims raised in its first submission.

90. Let me thank you again for your time and attention.

## ANNEX A-3

### SECOND WRITTEN SUBMISSION OF BRAZIL

(17 October 2002)

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## INTRODUCTION

1. Brazil thanks the Panel for its continued attention and welcomes this opportunity to rebut the arguments presented by Argentina in its first written submission and in its oral statements. Jointly with the second submission, Brazil is also providing the written responses to the list of questions of the Panel, provided on the first substantive meeting of 25 September 2002. In essence, the present submission serves to further point out factual inconsistencies and mistaken interpretations of provisions in the Agreement on the Implementation of Article VI of GATT 1994 (“Anti-Dumping Agreement”), that have not been dealt with in Brazil’s first submission and in the written response to the Panel’s questions.

2. In order to facilitate, Brazil has divided this rebuttal into 8 parts:

- I. Article 18.2 of the Dispute Settlement Understanding (“DSU”);
- II. Anti-Dumping Standard of Review;
- III. Ruling by the Mercosul Ad Hoc Tribunal;
- IV. Claims Related to the Initiation of the Anti-Dumping Investigation;
- V. Claims Related to the Conduct of the Anti-Dumping Investigation - Evidentiary and Public Notice Requirements;
- VI. Claims Related to the Conduct of the Anti-Dumping Investigation and Final Affirmative Determination;
- VII. Claims Related to the Imposition and Collection of Anti-Dumping Duties as a Result of the Anti-Dumping Investigation; and,
- VIII. Conclusion and Requests.

3. Before making considerations relative to the specific claims, Brazil would like to address three issues raised by Argentina. The first issue relates to Argentina’s allegation that Brazil has acted inconsistently with Article 18.2 of the DSU. The second relates to the standard of review in anti-dumping cases as set out in Article 17.6 of the Anti-Dumping Agreement. The third issue deals with Argentina’s claim that the dispute before this Panel has already been “discussed and settled” in a previous ruling by a Mercosul Ad Hoc Arbitral Tribunal (“Mercosul Tribunal”).

### I. ARTICLE 18.2 OF THE DSU

4. Brazil has characterized its first written submission as not having any confidential information, with the exceptions of Exhibits. To that effect, Brazil has offered Argentina, as a courtesy, the opportunity to identify any portion of Brazil’s first submission that Argentina might view as confidential. Argentina has not identified any specific portion of that document as confidential.

5. Argentina has claimed, however, that by classifying its whole first submission as non-confidential, Brazil has acted contrary to Article 18.2 of the DSU and has “impaired” Argentina’s rights under the DSU.<sup>1</sup>

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<sup>1</sup> Argentina’s letter to the Panel, n° 220/02, dated 15 August 2002.

6. In Argentina's view, the first sentence of Article 18.2 requires written submissions to always be treated as confidential, regardless of the fact that written submissions may sometimes **not** include confidential information. Argentina understands that the second sentence of Article 18.2 allows only the public disclosure of a party's "statements" of positions. Brazil understands that the DSU does not limit the scope, form, length or content of a party's "statements" and that, in this instance, Brazil's first submission, without the Exhibits, is identical to the "statements" provided in the second sentence of Article 18.2.

7. This is in accordance with Rule 3 of the Working Procedures for this Panel, that provides the following:

*"(...)Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public." (emphasis added)*

8. In this case, there was no confidential version of Brazil's written submission and, therefore, Brazil was not required to provide a non-confidential summary of the information contained in its first submission.

9. We recall that the purpose of Article 18.2 is to safeguard the protection of confidential information. If no confidential information is included in the first submission there is nothing to be safeguarded and the submission may be disclosed to the public without restrictions.

10. As a final comment, we note that Argentina has failed to demonstrate how the disclosure of any information contained in Brazil's first submission "impairs" Argentina's rights under the DSU.

## **II. ANTI-DUMPING STANDARD OF REVIEW**

11. Regarding the anti-dumping standard of review, Argentina alleges that Brazil has put forward a generic argument without identifying the instances in Argentina's investigation in which it considers that Argentina did not act in good faith.<sup>2</sup> According to Argentina, "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".<sup>3</sup>

12. The Panel should note that Argentina's allegation is not correct. In its first submission, Brazil has developed arguments that properly identify the various aspects in the Argentinean investigation that were conducted contrary to the Anti-Dumping Agreement. Specifically, in paragraphs 3 and 4 of the first submission, Brazil has provided a summary of the 41 claims, identifying the specific actions taken by the Argentinean authorities in the investigation. In paragraphs 11 through 544, Brazil has also provided the specific claims, facts and legal arguments relative to each of the 41 claims. 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.

13. In addition, Argentina alleges that Brazil has not substantiated the arguments in any of the paragraphs under the heading "Anti-Dumping Agreement Standard of Review", and has merely set forth allegations which it fails to develop.<sup>4</sup>

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<sup>2</sup> Argentina's first submission, para. 11.

<sup>3</sup> *Id.*

<sup>4</sup> Argentina's first submission, para. 12.

14. Brazil has indicated that the violation of each claim is demonstrated in detail throughout the first submission.<sup>5</sup> Accordingly, we have substantiated all our claims of violation and understand that the Panel will carefully examine them in order to assess whether the Argentinean investigating authorities properly established the facts and whether the evaluation of those facts was unbiased and objective.

15. Contrary to what Argentina has provided, Brazil has **never** affirmed, nor implied, that the language in Article 17.6(i) of the Agreement is addressed to the parties, rather than to the Panel.<sup>6</sup> Consequently, we have also **never** claimed in this dispute that Argentina has violated Article 17.6(i) of the Agreement.

### III. RULING BY THE MERCOSUL AD HOC ARBITRAL TRIBUNAL

16. In Section II.2 of Argentina's first submission, Argentina claims that Brazil has not acted in good faith by omitting reference to the ruling by the Mercosul Tribunal on the same dispute before the Common Market of the South ("Mercosul").<sup>7</sup> Argentina further provides that this case has already been "discussed and settled" within Mercosul's framework, and that by omitting such reference Brazil has incurred in an abusive exercise of its rights under the WTO covered Agreements.<sup>8</sup>

17. Furthermore, Argentina seems to conclude, that with the purpose of clarifying the scope of the obligations at issue, the Panel should take into account in the instant case Mercosul's legal framework and the consequences of the application of the Brasilia Protocol.<sup>9</sup> Alternatively, Argentina concludes that the principle of *estoppel* should be applied to this dispute, since, according to Argentina, there has been a "consistent and unequivocal" behavior on behalf of Brazil that has created a conviction in Argentina with respect to matters involving trade dispute settlement between both Members within Mercosul's framework and with respect to the scope of rulings by a Tribunal.<sup>10</sup>

18. Even though Argentina has stated that it has **not** argued the application of *res judicata*<sup>11</sup>, from the arguments presented in its first submission (case has already been "discussed and settled"), 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*, we would like the Panel to take into account the following considerations.

19. *Res judicata* is a "rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action".<sup>12</sup> Thus, in order for a ruling or a decision to have the effect of *res judicata* the claims brought in a new action have to be **the same** as those in the previous action, where a final judgement has been rendered.

20. Regarding the applicability of *res judicata* in WTO dispute settlement, we refer to the Panel's reasoning in *India-Autos*. In that case, the Panel found it appropriate to first consider whether the factual circumstances for the application of *res judicata* could be met in the circumstances of that case

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<sup>5</sup> Brazil's first submission, para. 6.

<sup>6</sup> Argentina's oral statement, para. 3.

<sup>7</sup> Argentina's first submission, para. 16.

<sup>8</sup> Argentina's first submission, para. 17.

<sup>9</sup> Argentina's first submission, para. 22.

<sup>10</sup> Argentina's first submission, para. 22.

<sup>11</sup> Argentina's oral statement, para. 7.

<sup>12</sup> Black's Law Dictionary, Sixth Edition by the Publisher's Editorial Staff, St. Paul, Minn., West Publishing Co. 1990, at page 1305.

before ruling on its applicability as a doctrine.<sup>13</sup> In conducting this analysis, that Panel identified a benchmark by which disputes might be seen as distinct or similar for the purposes of rejecting or applying *res judicata*.<sup>14</sup> The Panel established that benchmark as follows:

*“In the context of WTO dispute settlement, the notion of “matter”, as referred to in Article 7.1 of the DSU, determines the scope of what is submitted, and what can be ruled upon, by a panel. As confirmed by the Appellate Body in the Guatemala – Cement case, the matter referred to the DSB consists of two elements: the specific measures at issue and the legal basis of the complaint (or the claims). This appears to the Panel to be the most appropriate minimal benchmark by which to assess whether the conditions of *res judicata* could conceivably be met, if such notion was of relevance.*

*The Panel therefore considers that for *res judicata* to have any possible role in WTO dispute settlement, there should, at the very least, be in essence identity between the matter previously ruled on and that submitted to the subsequent panel. This requires identity between both the measures and the claims pertaining to them. There is also, for the purposes of *res judicata*, a requirement of identity of parties (...)”*<sup>15</sup> (emphasis added)

21. Brazil agrees with that benchmark and believes that in this instance the Panel should also apply this standard. To that regard, we re-state our position that although the parties and the measure currently before this Panel are identical to the parties and measure before the Mercosul Tribunal, the claims of the dispute before this Panel are **not** the same as the claims that were before the Mercosul Tribunal.

22. In order for the Panel to verify this, we find it appropriate to provide background information on the scope of application of the Mercosul dispute settlement system.

23. On 17 December 1991, the Member States of Mercosul approved the Brasília Protocol, establishing Mercosul’s dispute settlement mechanism. The Protocol set forth the scope of the dispute mechanism by providing that “disputes between Mercosul Member States regarding the interpretation, application or non-compliance with provisions of the Treaty of Asunción and the agreements and decisions integrated in its framework must be submitted to the dispute settlement procedure established in the Protocol”.<sup>16</sup> According to the Protocol, the scope of application of the dispute settlement mechanism relates to the interpretation, application or non-compliance with provisions of the Treaty of Asunción and the agreements and decisions integrated in its framework.<sup>17</sup>

24. It is important to note that the claims raised in Brazil’s request for the establishment of a WTO panel are not related to the interpretation, application or non-compliance with the provisions of the Treaty of Asunción and all other agreements and decisions that make up Mercosul’s legal framework. The object of Brazil’s challenge in the WTO relates to Argentina’s non-compliance of its obligations in the WTO, and in particular to the Anti-Dumping Agreement and GATT 1994.<sup>18</sup>

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<sup>13</sup> India – Measures Affecting the Automotive Sector, 21 December 2001, WT/DS146/R and WT/DS175/R, at para. 7.60 (adopted on 05 April 2002) (“*India - Autos*”). The Panel’s findings related to the principle of *res judicata* were not appealed.

<sup>14</sup> *India – Autos*, at para. 7.61.

<sup>15</sup> *India – Autos*, at paras. 7.65 and 7.66.

<sup>16</sup> See, Article 1 of the Brasília Protocol.

<sup>17</sup> *Id.*

<sup>18</sup> See, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil: Request for the Establishment of a Panel by Brazil*, WT/DS241/3 (26 Feb. 2002).



25. The Mercosul Tribunal dealt with the dispute based on the scope of application set forth in the Protocol, that is, whether provisions that make up Mercosul's framework were correctly interpreted, applied or complied with in the anti-dumping investigation conducted by Argentina on imports of poultry from Brazil. It was **not** before the Tribunal the examination and decision of whether Argentina complied with its WTO obligations in the conduct and imposition of anti-dumping measures on poultry from Brazil. Brazil believes that this Panel has the appropriate jurisdiction to examine such claims.

26. In that regard, Article 23 of the DSU mandates exclusive jurisdiction in favour of the DSU for WTO violations. Relevant part of Article 23 provides that:

*"1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.*

2. *In such cases, Members shall:*

*(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through the recourse to dispute settlement in accordance with rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under the Understanding.(...)*" (emphasis added).

27. Thus, the claims presented to the Panel on Argentina's violation of its WTO obligations entitles Brazil to trigger and use the WTO dispute settlement mechanism, excluding thereby the competence of any other mechanism to examine WTO law violation claims.

28. Argentina also makes the argument that the principle of *estoppel* should be applied to this dispute, since there is a conviction on the part of Argentina, based on previous rulings of the Mercosul Tribunal, that Brazil would relinquish its right to use WTO dispute settlement whenever a case is decided by a Mercosul Tribunal. To that regard, Brazil once again affirms that the dispute before the Mercosul Tribunal was grounded on **a different legal basis** from the dispute before this Panel.

29. Nevertheless, if the Panel considers the examination of this argument relevant, Brazil notes that it is to interpret the principle of *estoppel* and whether it is applicable in WTO dispute settlement.

30. *Estoppel* means that "a party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly."<sup>19</sup> As noted by the European Communities ("EC") in its third part submission,<sup>20</sup> the Panel in *EC – Bananas I*, correctly concluded that "*estoppel* could only result from the express, or in exceptional cases implied, consent of such parties or of the CONTRACTING PARTIES".<sup>21</sup> That Panel further considered that:

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<sup>19</sup> Black's Law Dictionary, Sixth Edition by the Publisher's Editorial Staff, St. Paul, Minn., West Publishing Co. 1990, at page 551.

<sup>20</sup> EC's third party submission, at. Para. 16.

<sup>21</sup> EEC – Member States' Import Regimes for Bananas 3 June 1993, WT/DS32/R, at para. 361 (unadopted) (*EC – Bananas I*). The Panel's conclusion related to the principle of *estoppel* was not appealed.

*“(…) The decision of a contracting party not to invoke a right vis-à-vis another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement. The Panel noted in this context that previous panels had based their findings on measures which had remained unchallenged for long periods of time. The Panel therefore found that the mere fact that the complaining parties had not invoked their rights under the General Agreement in the past had not modified these rights and did not prevent them from invoking these rights now.”<sup>22</sup> (emphasis added)*

31. The same applies in the instant case. The simple fact that Brazil has brought a similar dispute to the Mercosul Tribunal does not represent that Brazil has consented not to bring the current dispute before the WTO. Specially when the dispute before this Panel is based on **a different legal basis** than the dispute brought before the Mercosul Tribunal.

32. We also call to the Panel’s attention that the Mercosul Protocol of Olivos on Dispute Settlement, signed on 18 February 2002, cannot be raised here as an implicit or express consent by Brazil to refrain from bringing the present case to the WTO dispute settlement.

33. To that regard, we are aware that the Protocol of Olivos provides that “disputes within the scope of application of the Protocol, that may also be submitted to the WTO dispute settlement system, may be submitted to either one or the other forum, according to the choice made by the complainant”.<sup>23</sup> The Protocol further states that “once a dispute settlement has been initiated, neither one of the parties may have recourse to other dispute settlement mechanisms in other forums with respect to the same **object** as defined in Article 14 of the Protocol”.<sup>24</sup>

34. We note, and repeat, that the object before the Mercosul Tribunal is **different** from the object before this Panel. Furthermore, the Protocol of Olivos has not yet entered into force, and even if it had and the object of the dispute was the same, the Protocol of Olivos provides that “disputes underway initiated in accordance with the Protocol of Brasília will continue to be exclusively governed by that Protocol until the dispute has been concluded”.<sup>25</sup> Furthermore, the Protocol also states that “while the disputes initiated under the regime of the Protocol of Brasília are not completely concluded and until the proceedings under Article 49 are completed, the Protocol of Brasília will continue to be applied”.<sup>26</sup> Therefore, the Protocol of Olivos does not apply to disputes that have already been concluded under the Brasília Protocol.

35. Argentina also errs in its understanding that the existence of Mercosul’s legal framework and adjudications of its dispute settlement mechanism must be taken into account by the Panel in fulfilling its responsibilities in accordance with the DSU.<sup>27</sup> Argentina states that this in accordance with Article 3.2 of the DSU, in respect to the clarification of the obligations of the Agreements in accordance with customary rules of interpretation of public international law.<sup>28</sup>

36. We recall that Article 3.2 deals exclusively with the clarification of the existing provisions of the WTO Agreement and does **not** provide that a previous ruling by an international tribunal constrains a WTO Panel’s interpretation of a WTO Agreement.

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<sup>22</sup> *EC – Bananas I*, at para. 362.

<sup>23</sup> *See*, Article 1.2 of the Protocol of Olivos.

<sup>24</sup> *Id.*

<sup>25</sup> *See*, Article 50 of the Protocol of Olivos.

<sup>26</sup> *See*, Paragraph 2 of Article 55 of the Protocol of Olivos.

<sup>27</sup> Argentina’s first submission, at para. 18.

<sup>28</sup> *Id.*

37. What Article 3.2, in fact, provides is that:

*“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. It serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of WTO Agreements in accordance with customary rules of interpretation of public international law.”* (emphasis added)

38. Based on this provision, Brazil understands that the Panel must consider a claim brought by a Member with respect to a violation of a covered agreement in order to preserve that Member’s rights under that agreement.

39. As a final comment on this issue, Brazil notes that contrary to Argentina’s allegations, Brazil has not incurred in an abusive exercise of its rights under the WTO Agreements,<sup>29</sup> nor has its conduct been contrary to good faith by not mentioning in the first submission the ruling by the Mercosul Tribunal.<sup>30</sup> Brazil has not made reference to that ruling simply because it believes that it has no relevance to this case, since the claims currently before the Panel **are not the same** as the claims that were before the Mercosul Tribunal.

#### IV. CLAIMS RELATED TO THE INITIATION OF THE ANTI-DUMPING INVESTIGATION

##### *Article 5.3*

##### **Claim 4 – Export Price Below Normal Value**

40. Argentina has affirmed that Brazil’s statement that, for the purpose of establishing the export price, the selection of data was inappropriate and biased is untrue.<sup>31</sup> To prove that Brazil’s statement is untrue, Argentina explained that “the implementing authority analyzed 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 the pre-initiation stage”.<sup>32</sup> Argentina further provided that “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”.<sup>33</sup>

41. Brazil cannot accept this response as an account of how the export price was established in the initiation stage of the investigation. We have demonstrated in the first submission that the DCD **did** make a selection of export transactions, namely those with prices below normal value, and this selection **did** distort the difference between the export price and the normal value.

42. Brazil will once again show this to the Panel. The Table in Page 10 of Exhibit BRA-2 provides the total export price information submitted by petitioner in the application. The average export price found from that information was **US\$1,014/ton**. From that information provided in the application, the investigating authority considered that a significant portion of the product was being imported into Argentina at dumping condition, that is, at prices inferior to those sold in the domestic

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<sup>29</sup> Argentina’s first submission, at para. 23.

<sup>30</sup> Argentina’s first submission, at para. 16.

<sup>31</sup> Argentina’s first submission, at para. 78.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

market of Brazil.<sup>34</sup> The DCD, then, considered only the prices of those export transactions that were below the normal value.

43. The Table in Page 11 of Exhibit BRA-2 shows the volume and value of the export transactions below normal value for the period January through May of 1997. Specifically, the DCD provided that the same selection was made for the month of August 1997 (exports transactions with prices below the normal value).<sup>35</sup> Next, the authority added the export transactions below normal value for August 1997 to the export transactions below normal value for the period January through June 1997.<sup>36</sup> This resulted in an amount of US\$4,390,836.38 and a volume of 4,854.24 tons for the exports of poultry from Brazil with prices inferior to the normal value for the period January through August 1997.<sup>37</sup> This resulted in the average f.o.b. export price of **US\$0.904536/kg** used to initiate the investigation, which appears on Page 12 of Exhibit BRA-2.

44. Obviously, this method adopted by the DCD distorted (and decreased) the export price and, consequently, distorted the dumping margin. Argentina has not only failed to examine the accuracy and adequacy of all the evidence that was presented in the application but has also inflated the dumping margin.

## V. CLAIMS RELATED TO THE CONDUCT OF THE ANTI-DUMPING INVESTIGATION – EVIDENTIARY AND PUBLIC NOTICE REQUIREMENTS

*Articles 12.1, 6.1.1, 6.8, 6.9 and Annex II*

### **Claim 10 - Failure to Notify Seven Brazilian Exporters**

45. Regarding the claim of violation of Article 12.1 of the Agreement, Brazil has provided documentation that supports the fact that the investigating authorities had recognized and identified the Brazilian exporters Comaves, Minuano, Chapecó, Catarinense and Perdigão prior to the initiation of the investigation.<sup>38</sup>

46. The authorities first became aware of the existence of these producers/exporters on 17 February 1998, when petitioner submitted additional information that included lists of imports of poultry from Brazil broken down by producer and exporter.<sup>39</sup> The name of these Brazilian exporters appeared in all lists submitted by petitioner. In fact, the information on these lists came from two Argentinean agencies: *SENASA – Dirección Nacional de Fiscalización Agroalimentaria* (“*SENASA*”) and the *Secretaría de Agricultura, Ganadería, Pesca y Alimentación Dirección de Ganadería* (“*Ganadería*”). How, then, can Argentina allege that these exporters were unknown to them at the time of initiation, when the identification of these Brazilian producers/exporters actually came from two Argentinean agencies?

47. On 7 January 1998, at a second moment but still prior to initiation, the DCD issued the report regarding the viability of the initiation of the dumping investigation, identifying once again these same exporters.<sup>40</sup> This time, the identification of these exporters was made by the authorities **themselves**.

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<sup>34</sup> See, Page 10 of Exhibit BRA-2.

<sup>35</sup> See, First paragraph of Page 11 of Exhibit BRA-2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See, Annexes 1 and 2 of Exhibit BRA-4 and Pages 4 and 5 of Exhibit BRA-2.

<sup>39</sup> See, Exhibit BRA-4.

<sup>40</sup> See, Pages 4 and 5 of Exhibit BRA-2.

48. Brazil has also demonstrated that these five exporters were notified of the investigation and the need to provide responses to the dumping questionnaire only on 15 September 1999,<sup>41</sup> almost eight months after initiation and after a preliminary injury, dumping and causal link determination had been issued.<sup>42</sup>

49. The timing of this notification to these exporters proves that the authorities did not comply with the requirement in Article 12.1 of the Agreement.

50. It is interesting that Argentina tries to share the obligation under Article 12.1 with Brazil, when it states that it requested Brazil's cooperation in identifying the producers/exporters.<sup>43</sup> Even though Argentina states this, Argentina never requested Brazil's cooperation in providing the address or contact information of these specific exporters, which it had already identified.

51. It is also curious how Argentina implicitly tries to equate the obligation of notification with the obligation of publication. In particular, Argentina states that "the initiation of an investigation is a general administrative procedure and published as such in the Official Journal, which constitutes sufficient **notification** of a general scope".<sup>44</sup>

52. We cannot agree with such statement, specially in light of the express distinction of obligations set forth in Article 12.1. Relevant part of that Article provides:

*"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)*

53. It is clear that Article 12.1 requires that **in addition** to a public notice, a **notification** be given when the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation. Thus, the requirement of notification is not fulfilled simply by the issuance of the public notice.

#### **Claim 11 – Failure to Give 30-Day Deadline to Respond to Questionnaire**

54. In its first submission, Argentina categorically states that it granted the seven Brazilian exporters a **period of more than 30 days** to reply to the DCD's questionnaire and also dully acceded to their requests for extension.<sup>45</sup>

55. Brazil reaffirms that this is simply **not** true. The DCD's notification of the investigation and the need to provide responses to the questionnaires sent to the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and PenaBranca **expressly** indicated that these exporters had **no more than 20** days to respond to the questionnaire.<sup>46</sup> It is evident that the timeframe required by the DCD in these letters was on its face contrary to the 30-day period required under Article 6.1.1 to respond to questionnaires.

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<sup>41</sup> See, Exhibit BRA-13.

<sup>42</sup> See, Exhibits BRA-10, BRA-11 and BRA-12.

<sup>43</sup> Argentina's first submission, paras. 112 – 116.

<sup>44</sup> Argentina's first submission, at para. 167.

<sup>45</sup> Argentina's first submission, at para. 126.

<sup>46</sup> See, Exhibit BRA-13.

56. The requirement in Article 6.1.1 is of such importance that it is the only provision under Article 6 that establishes a specific timeframe for the accomplishment of an obligation. It is simple, if authorities do not provide at least 30 days for exporters or foreign producers to respond to the questionnaires, authorities are in violation of Article 6.1.1 of the Agreement.

57. Under Article 6.1.1, it is **not** permissible for authorities to simply provide a lesser period for response from the outset, just as long as the total period allowed for response (including extension) is at least 30 days. That interpretation would render meaningless the obligation in Article 6.1.1 of the Agreement:

*“Exporters and foreign producers receiving the 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.”* (emphasis added)

58. Article 6.1.1 is divided into two sentences. The first sentence specifically relates to the original deadline that authorities must give for exporters/producers to respond to the questionnaire. The second sentence relates to extensions that authorities may give to such responses. The first sentence is an **obligation** imposed on the authorities and must be read separately from the second sentence, which is **not an obligation**. If authorities could simply give any period of time, inferior to 30 days, for exporters/producers to respond to the questionnaire and afterwards provide extensions for a period that, in total, would make up the 30 days, there would be no need for the second sentence in Article 6.1.1. We do not believe that to be the intention in Article 6.1.1 of the Agreement.

59. Furthermore, when exporters and producers receive a questionnaire they rely on that 30-day period to plan and allocate the necessary resources in order to respond. The great volume of information required in a questionnaire demands time and available personnel to collect and report such information. If from the outset these exporters/producers receive a questionnaire with a deadline for response inferior to 30 days, they will either not even try to respond to the questionnaire or provide incomplete/insufficient responses. In a way, the opportunity to defend their interests is impaired.

60. This is even more so, if the Panel considers that in this case these seven Brazilian exporters were notified of the investigation almost eight months after initiation and after a preliminary injury, dumping and causal link determination had been issued. These exporters had already had their right of defense impaired. In addition, they were faced with having to respond the dumping questionnaire in **only** 20 days.

61. As a final remark, the Panel should also note that Article 6.1.1 refers to responses to the questionnaires. In this case, **none** of the seven exporters received the injury questionnaire and, thus, were not even afforded the opportunity to respond.

### **Claim 15 – Disregard of Exporters’ Product Description**

62. Brazil has demonstrated in Exhibits BRA-22, BRA-23, BRA-24 and BRA-26 that Sadia, Avipal and Frangosul reported in their questionnaire responses that there were no physical characteristic differences between poultry sold to Argentina and in Brazil. Even so, the investigating authority disregarded that information and used the normal value adjustment proposed by petitioner in the application.

63. Brazil has also demonstrated in Exhibit BRA-25 that Catarinense sold both griler (without giblets) and broiler (with giblets) type poultry to Argentina and in Brazil. However, the investigating

authority chose to apply the normal value adjustment to all of the poultry sales in Brazil even though some of these sales did not warrant an adjustment because they were sales of griler type poultry, that is, poultry sold without head and feet.

64. In the first submission, Argentina seems to justify not using the product description information reported by the Brazilian exporters in their questionnaire responses simply on the basis of lack of supporting documentation.<sup>47</sup> We understand that in this case the DCD was not entitled to resort to facts available.

65. Under Article 6.8, an investigating authority is only authorized to resort to facts available where a party refuses access to, or otherwise does not provide, **necessary information**, or where a party significantly impedes the investigation. In the evidence-producing stage of an investigation, it is a basic obligation of the investigating authority to indicate the information that is required for the investigation. In that respect, Article 6.1 of the Agreement sets forth that:

*“All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.”*  
(emphasis added)

66. Article 6.1 requires that authorities give notice of the information that is required. So, if an investigating authority does not clearly specify what information is required, the investigating authority cannot punish the interested party (use of facts available) for not submitting such information.

67. Furthermore, Paragraph 1 of Annex II of the Agreement reaffirms the obligation under Article 6.1, by stating that:

*“As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry”* (emphasis added)

68. Paragraph 1 of Annex II requires investigating authorities to specify **in detail** the required information. If that information is not provided within a reasonable period, the investigating authorities must inform the interested party that a determination may be made on the basis of facts available. Accordingly, investigating authorities **are not** entitled to resort to facts available if the interested party did not provide certain information because the investigating authority failed to specifically indicate that it was required.

69. We find further support in Article 6.6 of the Agreement to our understanding that the DCD was not entitled to resort to facts available in view of the lack of supporting documentation. Article 6.6 states the following:

*“Except in circumstances provided for in paragraph 8, the authorities shall during the course of the investigation satisfy themselves as to the accuracy of the information*

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<sup>47</sup> Argentina’s first submission, at paras. 176 – 185.

*supplied by the interested parties upon which their findings are based.” (emphasis added)*

70. From the language in Article 6.6, unless the authorities specifically indicate, exporters are not required to submit supporting documentation for all information submitted, in order to demonstrate the accuracy of such information.

71. That was also the conclusion of the Panel in *Argentina – Ceramic Tiles*:

*“(…) we conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided **unless** the investigating authority has clearly requested that the party provide such supporting documentation.”<sup>48</sup> (emphasis added)*

72. To that regard, after Sadia, Avipal, Frangosul and Catarinense provided their product description responses to the dumping questionnaire, the investigating authority did not, at any moment during the course of the investigation, request specific information/clarification or supporting documentation on the product description submitted by these exporters.

73. In fact, not even the dumping questionnaire specifically required that the exporters submit supporting documentation for the product description.<sup>49</sup> In the section “Instructions for Completing the Producer/Exporter Questionnaire”, under “Objective & Scope”, the questionnaire provides that the producer/exporter shall respond to the questionnaire as precisely as possible, attaching supporting documentation for its responses, or in case this is not possible, indicating the source of information.<sup>50</sup> Likewise, the “General Instructions for Completing the Questionnaire” section provides that the producer/exporter is required to mention on each of the pages it presents, the case number, detailed response to each question, information on the sources used, and attachment of corresponding documentation, as a necessary condition to uphold the veracity of the source.<sup>51</sup>

74. From the general instructions in the questionnaire regarding the need for supporting documentation, we do not believe that the authority provided sufficient information on the precise supporting documentation that was expected from the exporters.

75. We cannot reasonably assume that the questionnaire requested supporting documentation for **all** the information provided by exporters in their responses. At a minimum, this would impose an unreasonable burden on the exporters in responding to the questionnaire. Not to mention the fact that it would be **impossible** for exporters to comply with the 30-day deadline to respond to questionnaires, as provided in Article 6.1.1 of the Agreement.

76. The fact that the DCD never requested clarifications or supporting documentation for the information reported by the exporters indicated that the information that had been submitted would be accepted. In that sense, Paragraph 6 of Annex II provides that:

*“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*

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<sup>48</sup> Argentina- Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy, 28 September 2001, WT/DS189/R, at para. 6.58 (adopted on 5 November 2001) (“*Argentina – Ceramic Floor Tiles*”)

<sup>49</sup> See, Pages 19 and 21 of Exhibit BRA-22.

<sup>50</sup> See, Page 19 of Exhibit BRA-22.

<sup>51</sup> See, Page 21 of Exhibit BRA-22.



*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.”* (emphasis added)

77. As previously stated, the investigating authority **never** informed the exporters that the product description information reported by them was insufficient or unacceptable. By doing so, the authority acted inconsistently with Paragraph 6 of Annex II of the Agreement.

78. Furthermore, Argentina confirms that the adjustment was based on the method of calculation provided by petitioner in the application and that the validity of such method was confirmed by the absence of any objection by exporters.<sup>52</sup> To that regard, the following considerations should be taken into account.

79. First, by submitting the precise product description information, exporters were already indicating that the need for the adjustment proposed by petitioner was not warranted. In addition, the Brazilian Embassy in Buenos Aires sent a letter prior to the final determination with its considerations regarding the adjustment proposed by petitioner and that would be used by the authorities in the final determination.<sup>53</sup> In that letter, the Brazilian Embassy provided that the investigating authority, in making a fair comparison, should observe for **each exporter** the characteristics of the product sold to Argentina and in Brazil.<sup>54</sup> The Brazilian Embassy further stated that the 9.09 per cent adjustment corresponding to head and feet was absurd, since there were exporters that sold in the internal market **the same** poultry that was sold to Argentina.<sup>55</sup> Other considerations regarding the methodology used in the adjustment calculation were also put forth by the Embassy, but were not taken into account by the authority in the final determination.<sup>56</sup>

80. Second, petitioner did not submit, for purposes of initiation and during the investigation, any supporting documentation that there existed physical characteristic differences between the poultry sold to Argentina and in Brazil, that such alleged differences affect price comparability, and that the yield rate difference presented was correct. Furthermore, the adjustment information used by petitioner in the application was based on JOX information for chilled poultry, with head and feet, a product different from the product under investigation, frozen poultry without head and feet. Even so, the investigating authority considered JOX information as acceptable evidence that an adjustment was warranted.<sup>57</sup>

81. By considering petitioner's information rather than exporters, the investigating authority failed to use “special circumspection” in their normal value finding and, thus, also violated Paragraph 7 of Annex II of the Agreement.

### **Claim 17 – Disregard of Exporters' Export Price Information**

82. With respect to the claim that Argentina disregarded the export price data provided by the Brazilian exporters and resorted, instead, to the export price information provided by the Argentinean agency the *Ganaderia*, we have shown that Sadia, Avipal, Frangosul and Catarinense submitted such information during the investigation.

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<sup>52</sup> Argentina's first submission, at para. 179.

<sup>53</sup> See, Exhibit BRA-39.

<sup>54</sup> See, Page 5 of Exhibit BRA-39.

<sup>55</sup> *Id.*

<sup>56</sup> See, Page 6 of Exhibit BRA-39.

<sup>57</sup> See, Argentina's first submission, at para. 50.

83. On 23 April 1999, Sadia provided export price information of poultry sold to Argentina for the period 1996 through February 1999.<sup>58</sup> On 7 May 1999, Avipal provided export price information of poultry sold to Argentina for the period 1996 through March 1999.<sup>59</sup>

84. On 27 April 1999, Frangosul provided export price information for individual export transactions of poultry sold to Argentina from January 1996 through March 1999, with supporting documentation.<sup>60</sup> Even though Frangosul presented export price data for each sale transaction to Argentina for the period 1996 through March 1999, with corresponding supporting documentation, the investigating authority did not accept that information alleging that these invoices had not been translated.<sup>61</sup> We have provided in Exhibit BRA-26 that Frangosul submitted a few translated invoices of sales to Argentina as sample of all invoices submitted. Furthermore, most of the information in the invoices to Argentina were already in Spanish.

85. On 3 November 1999, Catarinense provided export price information for individual transactions of poultry sold to Argentina from January 1998 through January 1999, with supporting documentation.<sup>62</sup> The DCD never requested translation of the supporting documentation provided for the export price data. In addition, most of the information in the invoices to Argentina was already in Spanish.

86. Here, not only did the authority require information in excess of the dumping period of data collection (January 1998 through January 1999), but the authority also decided that the specific information with supporting documentation submitted by exporters was not as complete and detailed as the information from the Argentina agency the *Ganaderia*.<sup>63</sup> We fail to see how the authority could have reached such conclusion. We also fail to see the grounds for the authority to have used best information available as provided under Article 6.8 of the Agreement.

#### **Claim 21 – Failure to Inform the Essential Facts Under Consideration**

87. Brazil has provide in Exhibit BRA-28 the report prior to the end of the evidence-producing stage of the dumping investigation (“*Relevamiento de lo Actuado com Anterioridad al Cierre de la Etapa Probatoria*”). In particular, Brazil has provide that this report did not indicate that:

- (1) The normal value information in the list of invoices provided by Sadia, covering the period January 1996 through February 1999, would not be used in establishing Sadia’s normal value;
- (2) That the only information considered to establish normal value for Sadia in the final determination would correspond to the information for the transactions chosen through the sample made by the DCD, and for which supporting documentation was actually provided;
- (3) The reason why the DCD would not consider the information provided by Sadia for all reported sales in the home market;

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<sup>58</sup> See, Exhibit BRA-22 and Pages 18 and 43 of Exhibit BRA-15.

<sup>59</sup> See, Exhibit BRA-23 and Pages 22 and 45 of Exhibit BRA-15.

<sup>60</sup> See, Exhibit BRA-24 and Pages 29 and 49 of Exhibit BRA-15.

<sup>61</sup> See, Page 75 of Exhibit BRA-15.

<sup>62</sup> See, Exhibit BRA-25 and Pages 38 and 39 of Exhibit BRA-15.

<sup>63</sup> See, Page 75 of Exhibit BRA-15.

- (4) That the only information that would be considered to establish normal value for Avipal would be the information for the transactions for which supporting documentation was submitted;
- (5) The reason why the DCD would not consider the information provided by Avipal for all reported sales in the home market;
- (6) That none of the normal value information submitted by Frangosul and Catarinense would be considered in establishing the normal value and an individual margin of dumping for these two exporters;
- (7) The reason why the DCD would not consider the normal value information provided by Frangosul and Catarinense;
- (8) Why the information submitted by all Brazilian exporters would not be considered for purposes of determining the f.o.b. export price; and,
- (9) Why the product description provided by exporters in the investigation would not be considered in evaluating whether the normal value adjustment to account for differences in physical characteristics was warranted.

88. Brazil reaffirms its position that exporters cannot be aware simply by reviewing the record of the investigation that evidence submitted by petitioner and derived from secondary sources, rather than facts submitted by the exporters, would be used as the primary basis for the determination of the existence and the extent of dumping. By not explaining the reasons why such information was rejected, the investigating authority denied the exporters the opportunity to defend their interests within the meaning of Article 6.9 of the Agreement.

89. As stated in the first submission, in the event Argentina provides information or documents not disclosed to exporters during the investigation as means of justification of its actions during the investigation, Brazil submits that such non-disclosure of essential facts should also be considered a violation of Article 6.9 of the Agreement.<sup>64</sup>

## **VI. CLAIMS RELATED TO THE CONDUCT OF THE ANTI-DUMPING INVESTIGATION AND FINAL AFFIRMATIVE DETERMINATION**

*Articles 2.4, 3.1, 3.4, 3.5 and 12.2.2*

### **Claim 26 – Unreasonable Burden on Exporters**

90. The DCD has imposed an unreasonable burden on the Brazilian exporters Sadia, Avipal and Frangosul by allowing exporters to submit normal value and export price information for the years 1996 through 1999, when the dumping period of investigation was later defined as January 1998 through January 1999. The investigating authority also imposed an excessive burden on Brazilian exporters by requiring that they provide an invoice copy for all of the sales transactions in the home market in order to consider all reported sales in the establishment of the normal value and, consequently, make a “fair comparison”.

91. Argentina admits that it did not define the dumping period of data collection on purpose.<sup>65</sup> As justification, Argentina states that the Agreement does not define the period for collecting information

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<sup>64</sup> Brazil's first submission, at para. 350.

<sup>65</sup> Argentina's first submission, at para. 243.

or for the investigation itself, having the authority discretion to request 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.<sup>66</sup>

92. Brazil fails to see how normal value and export price information for January 1996 through December 1997 was necessary to determine dumping for the period January 1998 through January 1999. Likewise, Brazil fails to see how the normal value and export price information for January 1996 through December 1997 was necessary to guarantee due process of any interested party in the investigation.

93. Argentina tries to make the argument that Brazil's claim is contradictory because at times it alleges that the investigating authority did not request more information.<sup>67</sup> Argentina further states that 'whenever the implementing authority has sought further information for a particular purpose, Brazil complains that the information requested represents an 'unreasonable burden on exporters' ".<sup>68</sup>

94. There is an obvious difference between the relevant type of information that the investigating authority must require in an investigation and information that is not relevant to the investigation.

95. For example, product description is the type of information that was relevant in this investigation. The authorities were required under Article 2.4 of the Agreement to make adjustments in the fair comparison between the export price and the normal value. If authorities were unsure whether such adjustments should have been made, since there were exporters that reported no differences between the product sold in Brazil and to Argentina, the investigating authority was required to request more information. But they did not. The application of the head/feet adjustment had a direct impact on the normal value and on the final dumping margin. This was the type of information that was relevant in this investigation and which the authority was required to request.

96. However, information on normal value and export price for a period outside of the period of investigation, which therefore was not even used in establishing the margin of dumping, was **not** the type of information that was relevant to the investigation. Thus, requiring the submission of this information, with supporting documentation, was an unreasonable burden on exporters.

97. Regarding this claim, the EC argues that Article 2.4 of the Agreement does not address the issue raised by Brazil.<sup>69</sup> In doing so, the EC recalls the Panel report in *Egypt – Steel Rebar*, that provides that Article 2.4 is concerned exclusively with the comparison between normal value and the export price and that, therefore, it does not apply to the determination of normal value and export price.<sup>70</sup>

98. Brazil considers that the interpretation of the term "unreasonable burden" in Article 2.4 made in that report is incorrect in so far as that Panel found that the burden requirement applies only to comparison of export price and normal value, through various adjustments as appropriate, and not to the establishment of normal value.

99. Brazil understands Article 2.4 to provide for how a fair comparison is to be made between the export price and the normal value. More specifically, the last sentence of Article 2.4 states that "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." That being so,

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<sup>66</sup> *Id.*

<sup>67</sup> Argentina's first submission, at para. 244.

<sup>68</sup> *Id.*

<sup>69</sup> EC third party submission, at para. 27.

<sup>70</sup> *Id.*

normal value information **is** included in the information necessary to ensure a fair comparison. If authorities do not indicate exactly what information is needed to establish normal value how can a fair comparison be made?

100. In this particular case, normal value and export price information for the period January 1996 through December 1997 was **not** information that was necessary for a fair comparison to be made. Thus, by requesting that information the investigating authority imposed an unreasonable burden on exporters.

### **Claim 32 – Failure to Use the Same Period to Evaluate Article 3.4 Factors**

101. Brazil has presented as Exhibit BRA-14 the final affirmative injury determination by the CNCE. In that determination, the CNCE stated that the period of injury under analysis corresponded to the period from January 1996 through December 1998.<sup>71</sup> However, only for some variables, such as national production, prices, imports, exports, and apparent consumption, did the CNCE include data in its analysis corresponding to the first semester of 1999.<sup>72</sup>

102. The fact that some of the factors under Article 3.4 were evaluated for a certain period while other factors were evaluated for a different period, indicates that different parameters of evaluation were used. This demonstrates that the examination of the impact of the dumped imports on domestic producers was not objective and was, thus, inconsistent with the requirement in Article 3.1 of the Agreement.

103. Argentina has argued that in threat of injury cases, such as this one, “international rules and relevant practice” provide that it is possible to undertake an analysis **beyond the period of investigation** in order to find out whether or not there is a growing trend in imports and, thus, give the investigation a more substantial factual basis.<sup>73</sup>

104. This is not the issue presented before the Panel. Brazil is not challenging whether in a threat of injury case the investigating authority may or may not analyze data for a period beyond the period of investigation. What we are challenging is that in this investigation the CNCE considered a certain period of injury analysis for some factors and considered another period of injury analysis for other factors. Had the CNCE decided to analyze data for **all** factors under Article 3.4 for a period **beyond** the period of investigation, the examination of the impact of the dumped imports on domestic producers would have been, at least, objective within the meaning of Article 3.1 of the Agreement. That was not the case.

105. The injury analysis considered the data for the factors production, prices, imports, exports and apparent consumption for the period 1996 through June of 1999. The Panel can verify this by looking at the following pages of the injury analysis in the final determination : **production** (Page 9 and Table 1 of Exhibit BRA-14); **prices of product in the domestic market** (Page 14 and Tables 15b – 16 of Exhibit BRA-14); **volume and value of imports** (Pages 15 - 16 and Tables 22 – 29 of Exhibit BRA-14); **exports** (Page 10 and Table 5 of Exhibit BRA-14); and, **apparent consumption** (Page 25 and Tables 30 and 31 of Exhibit BRA-14).

106. For all other factors under Article 3.4 of the Agreement, the CNCE considered data in its analysis for the period January 1996 through December 1998.

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<sup>71</sup> See, Page 9 of Exhibit BRA-14.

<sup>72</sup> *Id.*

<sup>73</sup> Argentina’s first submission, at para. 252.

107. In its third party submission, the United States (“US”) seems to disagree with Brazil’s contention that an analysis of differing periods cannot be objective, and thus per se breaches Article 3.1 of the Agreement.<sup>74</sup>

108. To support its view, the US cites the Panel report in *United States – Hot Rolled Steel Products*. In that investigation, Japan had alleged that the USITC focused on two years of the three-year period of investigation.<sup>75</sup> We understand that in that investigation the US collected information on **all relevant economic factors having a bearing on the state of the domestic industry over the entire three-year period of investigation**, and analyzed all those factors on the basis of data covering that period. Also in that case, Japan **acknowledged** that the USITC gathered data for the entire three-year period and that those data were mentioned in the USITC report in various tables and annexes.<sup>76</sup>

109. The case mentioned by the US bears no relation to the case at issue. We believe that the facts of that investigation and the facts and claim of violation presented here by Brazil are very different. First, there was no discussion in that investigation on the period of investigation. Apparently, data was collected and analyzed for the entire three-year period of investigation. In this instance, the investigating authority did **not** gather information on all factors over the same period, that is, from January 1996 through December 1998. As stated above, for the factors national production, prices, imports, exports, and apparent consumption the period of injury analysis was from January 1996 through June 1999. Second, in that investigation the USITC analyzed **all** the relevant economic factors for the entire three-year period of investigation. Here, the Argentinean investigating authority did **not** evaluate **all** the factors listed in Article 3.4 over the same injury analysis period.

110. It seems that the US argues that over one determined period of injury analysis, the investigating authority can compare data for certain years without **explicitly** discussing data for other years. However, all factors are analyzed under a certain, determined period of injury analysis. Here, unlike the case cited by the US, the Argentinean authorities decided that for certain factors the injury analysis period would be from January 1996 through December 1998 and for other factors the injury analysis period would be from January 1996 through June 1999.

111. If an investigating authority establishes a certain period of injury analysis for some factors and another period of injury analysis for other factors, that authority has not made an objective examination of the impact of dumped imports on domestic producers within the meaning of Article 3.1 of the Agreement.

### **Claim 38 – Failure to Evaluate All Article 3.4 Factors**

112. In examining the impact of the dumped imports on the state of the domestic industry, investigating authorities are obligated to evaluate **all** relevant economic factors and indices listed in Article 3.4 of the Agreement. In the final injury determination, the CNCE failed to evaluate the following relevant economic factors under Article 3.4: actual and potential decline in productivity; factors affecting domestic price; the magnitude of the dumping margin; and, the actual and potential negative effects on cash flow, growth and the ability to raise capital or investments.

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<sup>74</sup> US third party submission, at para. 12.

<sup>75</sup> United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, 28 February 2001, WT/DS184/R, at para. 7.226 (“*US – Hot Rolled Steel Products*”). This issue was not appealed. United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, 24 July 2001, WT/DS184/AB/R, at para. 240 (adopted on 23 August 2001) (“*AB – United States – Hot Rolled Steel Products*”).

<sup>76</sup> *Id.*

113. Argentina alleges that applicants submitted information on the “productivity situation” in the sector during the course of the investigation.<sup>77</sup> Argentina claims that this information is reflected in the final injury determination in Pages 12, 13, 14, 20 and in the Technical Report in Pages 26, 28, 29, 30 and 95. We ask the Panel to verify this information. Brazil has found that these pages present an analysis of the following factors: production capacity; utilization of capacity; employment; wages; cost structure; and, sales in the internal market, but do not present any data information for the period under analysis or any evaluation for that period for the factor productivity.

114. For factors affecting the domestic price, Argentina also affirms that the CNCE has properly considered all the factors which, in addition to imports, might have had an impact on the price of the domestic product.<sup>78</sup> To support this statement, Argentina refers the Panel to Table 16 in the Technical Report.<sup>79</sup> Table 16 presents the average sales revenue by kilogram of fresh or chilled poultry. Brazil does not see the connection between the information contained in Table 16 and factors affecting the domestic price.

115. With respect to the magnitude of the dumping margin, Argentina proposes to make the evaluation that was intended in the final injury determination in its first submission.<sup>80</sup> Accordingly, Argentina fails to cite where in its final injury determination the authority evaluated the magnitude of the dumping margin. Once again, we state that the authority did not and could not have evaluated the magnitude of the dumping margin because the final dumping determination, with the dumping margin, was issued on 23 June 2000, that is, six months after the final injury determination was issued. Still, Argentina argues in the first submission that margins of 8 – 14 per cent are significant and were evaluated by the authority because of their potential impact on Argentine production.<sup>81</sup> First, no such evaluation was made in the final injury determination. Second, even if the CNCE had considered, which it did not, margins of 8 – 14 per cent in the final injury determination, these margins referred to the margins used to initiate the investigation<sup>82</sup> and did not account for the normal value or export price information presented during the investigation.

116. For the factor cash flow, Argentina states, for the first time, that the cash-flow analysis requirement was not relevant and could not be met due to particular characteristics of the Argentinean market.<sup>83</sup> Brazil notes that no explanation of the kind was offered in the final injury determination, where this factor is not even mentioned. For the factors growth and the ability to raise capital or investments, Argentina makes no indication in its first submission where, and if, these factors were evaluated in the injury analysis in the final determination.

#### **Claim 40 – Failure to Provide Adequate Final Notice**

117. The US seems to agree with Brazil that the Anti-Dumping Agreement requires an investigating authority to evaluate all of the factors listed in Article 3.4 of the Agreement.<sup>84</sup> However, the US has affirmed that the failure to refer to a particular factor in the published determination does not necessarily breach Article 12.2.2 of the Agreement.<sup>85</sup>

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<sup>77</sup> Argentina’s first submission, at para. 275.

<sup>78</sup> Argentina’s first submission, at para. 292.

<sup>79</sup> *Id.*

<sup>80</sup> Argentina’s first submission, at para. 294.

<sup>81</sup> Argentina’s first submission, at para. 295.

<sup>82</sup> *See*, Page 12 of Exhibit BRA-2.

<sup>83</sup> Argentina’s first submission, at para. 299.

<sup>84</sup> US third party submission, at para. 14.

<sup>85</sup> US third party submission, at para. 15.

118. The US understands that Article 12.2 requires only that the authorities set forth “in sufficient detail the findings and conclusions reached on all issues of fact and law *considered material by the investigating authorities*”.<sup>86</sup> The US argues that while all enumerated factors must be evaluated, not all factors are necessarily material in any particular case.<sup>87</sup>

119. Brazil has demonstrated that in the final injury determination Argentina has not even enumerated all of Article 3.4 factors, let alone evaluated them. Brazil understands that if the Panel finds that Argentina has failed to evaluate all the economic factors set forth in Article 3.4 of the Agreement (Claim 38), then the Panel need not address Brazil’s claim with respect to the failure by Argentina to give adequate explanation of the evaluation of those factors in the final notice (Claim 40). We understand that a notice may adequately explain in the determination that was made, but if the determination was substantively inconsistent with the requirements under the Agreement, the adequacy of the notice is meaningless. Nevertheless, if the Panel does not find that Argentina has failed to evaluate all Article 3.4 factors, the Panel must address Brazil’s claim with respect to the failure of adequate notice (Claim 40).

120. The US has also provided that it should, nonetheless, be discernible from the published determination that the authorities have evaluated all of the factors in Article 3.4.<sup>88</sup> To that regard, Brazil notes that the evaluation of **all** Article 3.4 injury factors is **mandatory** and, as such, this evaluation is an inherently material issue of fact and law. Even if a particular factor does not have a material effect in the injury determination, its evaluation **cannot** be considered immaterial by the authorities and must be provided for in the final notice. Therefore, the final determination must necessarily indicate if and how all factors were evaluated in the underlying investigation and, at a minimum, explain why a particular factor was considered immaterial.

## VII. CLAIMS RELATED TO THE IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES AS A RESULT OF THE ANTI-DUMPING INVESTIGATION

*Articles 9.2, 9.3 and 12.2.2*

### **Claims 28 and 29 – Duty in Excess of the Dumping Margin**

121. Regarding the claims of violation of Articles 9.2, 9.3 and 12.2.2 of the Agreement, relative to the specific anti-dumping duties to be collected as the absolute difference between the f.o.b. price invoiced in any one shipment and a designated “minimum export price”, we have taken into consideration the arguments raised by Argentina<sup>89</sup> and by the EC and Canada, in their third party submissions,<sup>90</sup> in preparing the following analysis of the issue.

122. We begin by examining the language in Article 9 of the Agreement, which provides for how anti-dumping duties are to be imposed and collected. Specifically, relevant part of Article 9.2 of the Agreement establishes that:

*“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,(...)”* (emphasis added)

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> US third party submission, at para. 16.

<sup>89</sup> Argentina’s first submission, at paras. 305 – 321.

<sup>90</sup> EC’s third party submission, at paras. 29 – 37; Canada’s third party submission, at paras. 1 – 18.



123. Article 9.3. of the Agreement further provides:

*“The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.”* (emphasis added)

124. From the language of these two provisions, we understand the requirement under Article 9.2 (collection of anti-dumping duties in appropriate amounts) to be closely related to the requirement under Article 9.3 of the Agreement (duties shall not exceed the margin of dumping as established under Article 2). In other words, if the amount of an anti-dumping duty exceeds the margin as established under Article 2, then the anti-dumping duty will consequently be collected in inappropriate amounts. That being so, a violation of Article 9.2 is entirely dependent on a violation of Article 9.3 of the Agreement.

125. Thus, we turn to a closer examination of Article 9.3 of the Agreement.

126. Article 9.3 of the Agreement imposes a limit on the amount of the anti-dumping duty. That limit is the margin of dumping found in the investigation, as established under Article 2 of the Agreement. Article 2 of the Agreement provides for the determination of dumping. We find that, under Article 2, the **only** provision that defines how margins of dumping are to be established is paragraph 4.2 of that Article. Relevant portion of Article 2.4.2 provides that:

*“Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis(...)”* (emphasis added)

127. In the instant case, the dumping margin as established under Article 2 of the Agreement was that established during the investigation phase. That is, the dumping margin based on the normal value and export price data submitted by the exporters during the investigation, for the period January 1998 through January 1999, and used by the authority in the final determination.<sup>91</sup> From the moment the anti-dumping duty is imposed until a review of the imposition of that duty is made, the only margin of dumping available, calculated pursuant to Article 2, is the margin assessed in the investigation, found in the final determination, and informed to all interested parties through a public notice, as provided in Article 12.2 of the Agreement. In that regard, Article 12.2.2 requires that the public notice of a conclusion of an investigation contain the following information:

*“(...) (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;(...)”* (emphasis added)

128. The “minimum export price” determined in Resolution No. 574/2000 does not qualify as a dumping margin established under Article 2, since it does not reflect the normal value and export price as provided by the exporters and examined by the investigating authority in the investigation.

129. In that regard, Canada has stated in its third party submission that Article 2.4.2 of the Agreement does not appear immediately relevant to this case,<sup>92</sup> since in determining the “margin of dumping” for purposes of Article 9.3, Article 2 should be examined in its entirety.<sup>93</sup> In doing so,

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<sup>91</sup> See, Pages 102 – 104 of Exhibit BRA-15.

<sup>92</sup> Canada’s third party submission, at para. 11.

<sup>93</sup> Canada’s third party submission, at para. 10.

Canada argues that the **margin of dumping** is simply the difference between the export price and “the comparable prices ... in the exporting country”, as set out in Article 2.1.<sup>94</sup>

130. We remind the Panel that Article 2.1 does not define, or even refer to, how a margin of dumping is to be established. Article 2.1 simply defines what dumping is. In fact, the only provision in the Agreement that specifically explains how the dumping margin is to be established is Article 2.4.2.

131. Both, Argentina and Canada, appear to have the same understanding that the margin of dumping found in the course of the original investigation does not limit the amount of anti-dumping duties that may be imposed when future imports take place.<sup>95</sup> Canada further provides that when such future imports are dumped at a higher margin than that determined to exist at the time of the final determination, the importing Member may impose anti-dumping measures equal to that margin.<sup>96</sup>

132. In making this statement, Canada does not take into account the fact that this alleged “higher margin of dumping” caused by future imports, would only take into account the export prices of the subject merchandise without considering any possible changes in the prices in the internal market. It is not unlikely, that changes in market conditions or exporter’s improvement in productivity create a situation where the price of the product, in the internal market and the export market, is reduced. Apparently, Canada does not consider the possibility that such a situation could occur, since in proposes that anti-dumping duties can change based only on future imports.

133. Furthermore, if we were to assume, based on Canada’s argument, that the “margin of dumping” to be imposed and collected simply refers to the difference between the export price and the comparable price in the exporting country **for any given period**, what would be the purpose of the “margin of dumping” found in a final determination? Obviously, the dumping margin found in the final determination of an investigation is that which is established on the basis of the normal value and the export price provided during the investigation. In that sense, the dumping margin is that found in the period of investigation.

134. Contrary to Canada’s position, we find that that Article 2.4.2 of the Agreement is **extremely** relevant in interpreting the language of Article 9.3 of the Agreement.

135. The same reasoning applies to the EC’s arguments related to the interpretation of Article 9.3. In particular, the EC states that “(...) from the fact that Article 2.4.2 applies to the investigation phase, it does not follow that the application of all other provisions of Article 2 is also restricted to the investigation phase”.<sup>97</sup>

136. We call the Panel’s attention to the fact that Brazil has **never** affirmed, or implied, that all other provisions of Article 2 are restricted to the investigation phase. What we have argued is that the margin of dumping is established based on the information collected and examined during the investigation and, in that sense, dumping margins are restricted to the investigation period, as set out in Article 2.4.2 of the Agreement.

137. Regarding this issue, a clarification is in order. Article 2.4 establishes how a fair comparison between export price and normal value has to be made (same level of trade, sales made at as nearly as possible the same time, possibility of allowances, etc). This provision is valid in making a fair comparison under any proceeding, since Article 2.1 defines what dumping is for purposes of the

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<sup>94</sup> *Id.*

<sup>95</sup> Argentina’s oral statement, at para. 60; Canada’s third party submission, at para. 17.

<sup>96</sup> Canada’s third party submission, at para. 17.

<sup>97</sup> EC’s third party submission, at para. 32.

Agreement, that is, in investigations and reviews. Likewise, the provisions under Article 2 regarding normal value and export price are also applicable to any proceeding (investigations and reviews). However, the methodology for the establishment of a dumping margin is provided under Article 2.4.2 and **is** limited to investigations.

138. The EC further provides that Brazil's interpretation is contradicted by the immediate context of Article 9.3.<sup>98</sup> In making its argument, the EC states that "Article 9.3.1 envisages the possibility to collect duties on a retrospective basis, which, by definition, presupposes the possibility to calculate the dumping margins on the basis of data for individual shipments or for time-periods outside the investigation period".<sup>99</sup> The EC also cites to Article 9.3.2 of the Agreement that provides that in cases "where duties are assessed prospectively, the authorities shall **refund** the duties 'paid in excess of the dumping margin'".<sup>100</sup> According to the EC, that "dumping margin" is **not** the margin established for the investigation period, but rather the margin established for individual shipments or time-periods **after** the imposition of the duties.<sup>101</sup> That also seems to be the understanding of Argentina in its first submission.<sup>102</sup>

139. We cannot agree with this understanding.

140. Article 9.3.1 provides for duties assessed on a retrospective basis. In such cases, a positive dumping margin, as a result of an investigation, not only allows the collection of duties but also serves as basis for the establishment of the deposit made by importers, until that duty is effectively collected. For purposes of collection, whenever requested, an administrative review is made to determine the margin of dumping corresponding to a new period. For example, during the first year that the dumping measure is in place, the importers deposit an amount equivalent to the dumping margin assessed in the investigation for each transaction made (liability). In the end of that year, if requested, an administrative review is initiated and will determine a normal value and export price corresponding to that year. The comparison between this new normal value and export price will result in a dumping margin that will serve as the basis for the duty to be effectively collected and for the new liability to be established for the following year.

141. Article 9.3.2 provides for the assessment of duties on a prospective basis. In such cases, the duty to be collected is established and may not exceed the margin of dumping found. This duty will be the basis for collection until a new margin of dumping (through a review) is determined. Since the duty is fixed, there is the possibility of collection in excess of the margin found for specific transactions. For that reason, Article 9.3 provides for refunds. A refund, however, only occurs if an **importer** requests it and does not imply modification of the duty. In order for the duty to be changed, a new margin of dumping would have to be determined, which would take into account data provided by the exporters (normal value and export price) for a different period than that considered in the investigation.

142. Thus, in the prospective system, when the duty is imposed the only margin of dumping available to be considered for the assessment of the duty to be collected is the margin of dumping determined in the investigation, as established under Article 2.

143. Regarding refunds for duties paid in excess of the margin of dumping, the Panel should note that such refunds do not imply that a Member has the discretion (or the right) to collect duties in any given amount. It is also important to note that the importer has the burden of requesting such a

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<sup>98</sup> EC's third party submission, at para. 33.

<sup>99</sup> EC's third party submission, at para. 33.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Argentina's first submission, at paras. 309 – 316.

refund. The objective of the refund is to guarantee that the importer will not pay in excess of the margin found in the investigation in cases where the dumping margin related to an importer's specific transaction is inferior to the dumping margin found in the investigation. We note that the refund proceeding is not immediate since it requires a new calculation of the margin and the deadlines to make such calculations are equivalent to the deadlines in an investigation.

144. Specifically with respect to the "minimum export prices" imposed by Argentina, there is no limit in the amount of the duties to be collected and, thus, in essence, it is not in compliance with the Agreement. As stated previously, we cannot agree that the reference to the dumping margin in Article 9.3.2 of the Agreement does not relate to the dumping margin established for the investigation period.

145. Furthermore, Article 9.3.2 does not provide for how the dumping margin is established but rather for refund situations as explained above. We cannot presume that Article 9.3.2 allows for a permanent review of the anti-dumping duty, where only the export price is reviewed and the normal value remains unchanged (that is, the normal value found in the investigation). At a minimum, that new margin of dumping would not be in accordance with Article 2.4 of the Agreement, in that the comparison between the export price and the normal value would not be made in respect of sales made at as nearly as possible the same time. A comparison between a current export price for a specific transaction and an average normal value based on data for one year ago is not in conformity with Articles 2.1 and 2.4 (prices must be *comparable*).

146. If Article 9.3.2 was to be understood that way, that would also mean that the exporters, interested parties in the investigation that provided the export price and normal value data, would have absolutely **no** right of defense with respect to this "review" in Article 9.3.2, since it is up to the importer, and not the exporter, to request refunds under Article 9.3.2. We repeat, **Article 9.3.2 of the Agreement does not provide for a review of the margin of dumping found in the investigation.** If a review is warranted the Agreement provides for such a situation under Article 11. There, all interested parties participate, including the exporter, and are able to submit new export price and normal value information and to defend their interests.

147. Furthermore, when the EC affirms that Article 9.4 of the Agreement **expressly** contemplates for "the collection of variable duties equal to the difference between the normal value established for the investigation period and the export prices of the shipments made after the imposition of the duties",<sup>103</sup> we can under **no** circumstance agree with that position.

148. In examining the EC's argument, we turn to the relevant language in Article 9.4:

*"When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:*

*(i) the weighted average margin of dumping established with respect to the selected exporters or producer or,*

*(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined, (...)" (emphasis added)*

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<sup>103</sup> EC's third party submission, at para. 35.

149. Article 9.4 of the Agreement identifies a ceiling which investigating authorities shall not exceed in establishing an “all others” rate. We understand that Article 9.4(i) refers to cases where the anti-dumping duty is assessed on a prospective basis (Article 9.3.2), and Article 9.4(ii) refers to cases where duties are assessed on a retrospective basis (Article 9.3.1). We know this to be true, since the language in Article 9.4(i) **expressly** refers to the “margin of dumping”, that is, the “margin of dumping” found in the investigation.

150. This interpretation is supported by the Appellate Body’s understanding in *United States – Hot Rolled Steel Products*:

*“Before focusing on the qualifying language in Article 9.4 of the Anti-Dumping Agreement, we recall that the word “margins”, which appears in Article 2.4.2 of that Agreement, has been interpreted in European Communities – Bed Linen. The Panel found, in that dispute, and we agreed, that “margins” means the individual margin of dumping determined for each of the **investigated** exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant **home market and export market transactions**. We see no reason, in Article 9.4, to interpret the word “margins” differently from **the meaning it has in Article 2.4.2,(...)”**<sup>104</sup> (emphasis added)*

151. Because Article 9.4(ii) refers to the “liability for payment of anti-dumping duties”, we understand that provision to refer to duties assessed on a retrospective basis, and not on a prospective basis.

152. That said, Brazil has demonstrated in the first submission that Argentina has imposed a variable anti-dumping duty that can exceed the margin of dumping found in the final determination<sup>105</sup> and, thus, can be collected in inappropriate amounts.

### **Claim 30 – Failure to Provide How “Minimum Export Prices” Were Established**

153. As a final note, the EC has stated in its submission that the precise method followed by the Argentinean authorities in order to calculate the “minimum export prices” is unclear.<sup>106</sup> According to the EC, it is unclear whether, and if so how, the “minimum export prices” relate to the normal values established during the investigation.<sup>107</sup>

154. It is also unclear for Brazil how the investigating authority established the “minimum export prices”. That is precisely our claim of violation of Article 12.2.2 of the Agreement. In the final determination and in Resolution No. 574/2000, no explanation was provided as to how Argentina calculated the “minimum export prices”. We have alleged in our first submission that Argentina did not provide relevant information as to why the margin established in the final determination was not applied and how the “minimum export price” was calculated.<sup>108</sup> We consider the application of the dumping measures to be relevant information that must be included in the public notice providing for the imposition of a definitive duty. An exporter is entitled to know how the information and

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<sup>104</sup> United States – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan, 24 July 2001, WT/DS184/AB/R, para. 118 (adopted on 23 August 2001) (“*AB – United States – Hot Rolled Steel Products*”).

<sup>105</sup> Brazil’s first submission, at paras. 520–531.

<sup>106</sup> EC’s third party submission, at para. 37.

<sup>107</sup> *Id.*

<sup>108</sup> Brazil’s first submission, at para. 542.

arguments presented during the investigation were considered by the investigating authority and how that information was used in arriving at a dumping measure.

155. To that regard, even if the “minimum export price” are equivalent to or lower than the relevant normal values established during the investigation, Argentina still failed to provide in the final dumping determination, or in Resolution No. 574/2000, why the margin established in the final determination was not applied and how the “minimum export prices” were calculated, as required under Article 12.2.2 of the Agreement.

## **VIII. CONCLUSION AND REQUESTS**

### **A. CONCLUSION**

156. Brazil has raised 41 claims in this dispute. These claims have been presented in detail in Brazil’s first submission, which also included 34 Exhibits that support Brazil’s various allegations. Further evidence and arguments related to the 41 claims were raised and presented by Brazil in its first oral statement, as well as in the present submission. Thus, any claims that have not been addressed in the present submission should not be construed as claims which Brazil has renounced to.

157. Brazil believes to have covered all the points raised by the Panel, Argentina and Third Parties in this dispute and understands that additional issues or considerations regarding the arguments here presented may be forthcoming. In such instance, Brazil welcomes the opportunity to present its views and arguments at that moment.

### **B. REQUESTS**

158. For the reasons presented throughout this dispute, Brazil respectfully reiterates its request in the first submission that the Panel find that Argentina has acted inconsistently with the Anti-Dumping Agreement with respect to Articles 5.2, 5.3, 5.7, 5.8, 12.1, 6.1.1, 6.1.2, 6.1.3, 6.2, 6.8, paragraphs 3, 5, 6 and 7 of Annex II, 6.9, 6.10, 2.4, 2.4.2, 12.2.2, 3.1, 3.2, 3.4, 3.5, 4.1, 9.2 and 9.3.

159. Accordingly, Brazil also reiterates its request that the Panel recommend that the DSB request Argentina to bring these actions into conformity with GATT 1994 and the Anti-Dumping Agreement and, in doing so, use its right to make suggestions on ways which Argentina could implement the Panel’s recommendations, as provided in Article 19.1 of the DSU.

160. In light of the numerous outcome-decisive violations of the Anti-Dumping Agreement, we request that the Panel suggest that Argentina immediately repeal Resolution No. 574/2000 imposing definitive anti-dumping duties.

## ANNEX A-4

### REPLIES OF BRAZIL TO QUESTIONS OF THE PANEL - FIRST MEETING

(25 September 2002)

#### 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 recommendation 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?**

#### Response

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

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

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

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

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

*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.**

Response

Article 5.2 of the Anti-Dumping Agreement requires that the application include evidence of **dumping**. Pursuant to Article 2.1 of the Agreement, “dumping” is the introduction of a product into the commerce of another country at an export price lower than the normal value (comparable price in the exporting country’s market). To prove whether dumping exists, or whether there is an indication of dumping, a comparison between the export price and the normal value must be made. In making this comparison, adjustments are made for differences which affect price comparability. Thus, if an applicant alleges that an adjustment is required in order for a fair comparison to be made, and for there to be an indication of dumping, relevant evidence of such adjustment **must** be included in the application.

In view of the above, we understand that Article 5.2 of the Agreement requires that the application contain reasonably available relevant evidence on adjustments to be made, specially if that adjustment is so important that without it the applicant could not have alleged the existence of dumping. Obviously, not all adjustments have such an impact in determining whether dumping exists. However, that is not the case here.

In the instant case, had the investigating authority not accepted the adjustment to normal value (9.09 per cent) as proposed by petitioner and considered the export price for all transactions, and not only those with prices inferior to normal value, there would be no indication of the existence of dumping and the investigation would not have been initiated.

To demonstrate this, we have simulated an exercise to show that there would be no indication of dumping had the authorities considered:

1. The average f.o.b. price for all export transactions, and not only those at prices lower than the normal value in the establishment of the export price; and,
2. That an adjustment to normal value was not warranted because petitioner did not present relevant evidence to support such an adjustment.

For the normal value, we have used the JOX price published on 30 June 1997, as provided in the application, without the 9.09 per cent adjustment to normal value. In this scenario, the normal value would have been **0.957** US\$/kg.<sup>1</sup>

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<sup>1</sup> See, Page 9 of Exhibit BRA-2.



For the export price, we have considered all the data offered by petitioner for the period January through June and August of 1997, instead of considering only the export transactions at prices below the price of eviscerated poultry in Brazil. Using this methodology, the export price for that period would have been **1.014 US\$/Kg.**<sup>2</sup>

Still with respect to the export price, we have also considered all the export data provided by the Argentinean agency Delegación II – Unidade de Informatica (“DUI”) for the period August through October of 1996, instead of considering only the export transactions at prices below the price of eviscerated poultry in Brazil. The export price for that period would have been **1.091 US\$/Kg.**<sup>3</sup>

In comparing the above export prices (**1.014 US\$/Kg** or **1.091 US\$/Kg**) with the unadjusted normal value (**0.957 US\$/kg**), the Panel will be able to verify that the normal value was lower than the export prices and, therefore, there was **no** indication that poultry from Brazil was entering the Argentinean market at dumped prices.

This exercise serves to show the Panel how important it was for the investigating authority to have considered and required that the relevant evidence in the application identify and indicate that:

1. An adjustment was required;
2. The nature and extent of that adjustment; and,
3. The basis/methodology for making such adjustment.

Brazil considers that evidence of the relevant **type** is required in a case where it is obvious from the face of the application that normal value and export price alleged in the application will require significant adjustments in order to effectuate a fair comparison. At a minimum, the investigating authorities in examining the application should have required relevant evidence to support the allegation that an adjustment, with such an impact, was warranted. Relevant evidence, that is, information drawn from a document tending to prove a fact or a proposition, must support the need for an adjustment (specially whether the alleged physical characteristic differences that lead to the adjustment affect price comparability) and the methodology adopted for making such an adjustment.

**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.**

Response

Yes, we believe that information regarding poultry sold in Brazil (including physical characteristics) was reasonably available to the applicant at the time the application was filed.

We do not propose here to indicate how and where the applicant should search for such information in order to provide the evidence required in an application. Nevertheless, we have found that there are several (national and regional) poultry associations and publications in Brazil, where the applicant could have gathered the necessary evidence. In that regard, we cite to the Brazilian publication presented by the importer Interamericana Comercial S.R.L. (“Interamericana”), the Folha

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<sup>2</sup> See, Page 10 of Exhibit BRA-2 and Annex to Exhibit BRA-2 with export data for the period January through June and August 1997.

<sup>3</sup> See, Last Page of Exhibit BRA-2 with export data for the period August through October 1996.

de Londrina/Folha do Paraná.<sup>4</sup> More specifically, the Brazilian exporters also presented during the investigation price publication from the Associação Nacional dos Abatedouros Avícolas (“ANAB”) regarding frozen poultry sold in the internal market for all of 1997 and the first seven months of 1998.<sup>5</sup>

## Claim 2

*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?**

### Response

Claim 2 in Brazil's submission, relative to the violation of Article 5.3 of the Agreement, is not whether the investigating authority should have made the frozen/chilled adjustment. The argument presented in Claim 2 is that if the authorities considered from the information provided in the application that an adjustment to compensate for the head/feet differences was required, then, at a minimum, the investigating authorities should have also made an adjustment to compensate for the differences between frozen/chilled poultry.

We recall that petitioner's application is provided in Exhibit BRA-1. From that Exhibit, the Panel will be able to verify that the export price data submitted by petitioner, and used by the authority, referred to frozen poultry (Mercosul Common Nomenclature NCM 0207.12.00)<sup>6</sup>, a product different from that corresponding to the JOX price publication used to establish the normal value, which was for chilled poultry (NCM 0207.11.00).<sup>7</sup> If Argentina found there to be sufficient evidence to make the head and feet adjustment, Argentina should have also found, from the information submitted in the application, that a frozen and chilled adjustment was also required.

That said, Brazil's Claim 2 is that there was not sufficient evidence from the information provided in the application for the Argentinean authorities to have accepted that an adjustment to normal value was needed to compensate for the alleged physical characteristic differences (head/feet) between the poultry sold to Argentina and in Brazil.

The normal value information provided in the application by petitioner was information provided by JOX exclusively with regards to prices of chilled poultry, sold in São Paulo, with head, feet and giblets for one day in 1997. The information in the JOX price publication did not provide or affirm that all poultry sold in Brazil contained head, feet and giblets. The information presented did not correspond to prices at which the product in question was sold when destined for consumption in Brazil.

We understand that petitioner tried to make the JOX price published for chilled poultry with head and feet into evidence that all poultry sold in Brazil is chilled and includes head and feet. That is not true. However, the investigating authority incorrectly accepted the JOX information as evidence that all poultry sold in Brazil is chilled and contains head and feet.

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<sup>4</sup> See, Page 13 of Exhibit BRA-15.

<sup>5</sup> See, Pages 16, 20 and 24 of Exhibit BRA-15.

<sup>6</sup> See, Page 6 of Exhibit BRA-1.

<sup>7</sup> See, Page 2 of Exhibit BRA-1.

Petitioner further alleged that it was necessary to compensate for these physical characteristic differences and assumed that such differences affect price comparability. Again, no evidence was presented in the application to support the allegation that these differences affect price comparability.

Petitioner, then, presented a calculation of compensation where the yield rate of eviscerate poultry sold in Brazil is 88 per cent of the live poultry and that the yield rate of eviscerated poultry sold in Argentina is 80 per cent of the live poultry. Nowhere in the application or in the determination to initiate is there indication of a document supporting the allegation that the yield rate of poultry sold in Brazil is 88 per cent and that in Argentina it is 80 per cent. This calculation and the yield rates proposed were accepted by the investigating authority even though no supporting evidence was presented in the application to sustain such allegations.

#### **Claim 6**

*To Brazil*

#### **21. Para. 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'?**

#### Response

Brazil's response to this question does not address whether we find the period under analysis established by Argentina, prior to initiation, to be appropriate. Brazil will limit its response to what it considers to be the entire period under analysis based on the normal value and export price data used by the authority in the initiation.

In assessing whether there is sufficient evidence of dumping in the application to justify the initiation, the investigating authority may not ignore the provisions of Article 2 of the Anti-Dumping Agreement, which defines what dumping is. In particular, Article 2.4 of the Agreement requires a fair comparison be made between the export price and the normal value in respect of sales made at as nearly as possible the same time.

Taking into account that for purposes of initiation the data considered by the DCD in the establishment of the export price was from August through October of 1996 and January through June and August of 1997<sup>8</sup>, we consider that for a fair comparison to have occurred the authority should have, **at least**, considered normal value data for the same period, that is, from August through October of 1996 and January through June and August of 1997. That was not the case.

Petitioner and the investigating authority considered normal value for purposes of initiation based on only one day in 1997 (30 June). In that regard, we know from the information provided by petitioner prior to initiation and during the investigation that normal value information for all of 1996 and 1997 was reasonably available.

On 17 February 1998, prior to initiation, petitioner submitted to the authority additional information that included, among other information, JOX price publication for chilled poultry with

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<sup>8</sup> See, Page 12 of Exhibit BRA-2.

head and feet in the Brazilian market for July and December of 1997 and January and February of 1998.<sup>9</sup> Even with this information, the authority chose to initiate the investigation based only on normal value information for one day in 1997.

In addition, on 26 July 1999, during the investigation, petitioner once again submitted updated information on normal value for three days in each of the twelve months of 1998 and two days in January 1999.<sup>10</sup>

From the facts above, we have shown that the JOX price publication was (and is) reasonably available to petitioner for any desired period, and could have been submitted in the application. Likewise, we have shown that the authorities did not examine the accuracy and adequacy of the evidence provided in the application (or the additional information provided by petitioner) to determine whether it was sufficient to justify the initiation of the investigation.

### **Claim 9**

*To both parties*

#### **22. In the present case, by virtue of which legal instrument was the investigation initiated?**

##### Response

Brazil understands that the investigation was initiated when the Ministerio de Economía y Obras y Servicios Públicos (“MEOSP”) issued Resolution No. 11/1999, announcing the initiation of the anti-dumping investigation on imports of poultry from Brazil.<sup>11</sup>

That said, the Panel should take account of the fact that the **consideration** of the dumping and injury evidence, that lead to the decision to initiate the investigation, was not done simultaneously. For the sake of clarification, we will present the sequence of facts related to this claim in order for the Panel to verify what we have argued.

1. On 7 January 1998, the DCD issued a report regarding the viability of the initiation of the dumping investigation, determining that there was sufficient evidence of dumping in the export transactions of poultry from Brazil into Argentina.<sup>12</sup>
2. On 7 January 1998, the CNCE issued Acta No. 405, determining **insufficient** evidence of injury to justify the initiation of the investigation.<sup>13</sup>
3. On 17 February 1998, after having access to Acta No. 405, petitioner submitted additional information to the authority.<sup>14</sup>
4. On 22 September 1998, the CNCE issued Acta No. 464, determining sufficient evidence of threat of injury to justify the initiation of the investigation.<sup>15</sup>

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<sup>9</sup> See, Exhibit BRA-4.

<sup>10</sup> See, Exhibit BRA-19.

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

<sup>12</sup> See, Exhibit BRA-2.

<sup>13</sup> See, Exhibit BRA-3.

<sup>14</sup> See, Exhibit BRA-4.

<sup>15</sup> See, Exhibit BRA-6.

5. On 29 December 1999, the authority in charge of the causal link analysis issued the report on causal link. In it, the authority stated that the DCD based its report on the elements that were included in the original application that took into account the period January through June of 1997.<sup>16</sup> The causal link determination also pointed out that petitioner submitted additional updated information for all of 1997 and the first semester of 1998.<sup>17</sup> However, the DCD did not make or issue a new dumping analysis, taking into account petitioner's additional information.
6. On 20 January 1999, the MEOSP issued Resolution No. 11/1999, announcing the initiation of the anti-dumping investigation on imports of poultry from Brazil.<sup>18</sup> This Resolution was published in the Argentinean Official Journal on 25 January 1999.

From the sequence of the facts related above, we can conclude that the evidence of dumping and injury was considered at different times. The dumping evidence was considered on 7 January 1998, and the injury evidence on 22 September 1998, more than eight months after the evidence of dumping was considered. If the term "simultaneously" is defined as "occurring or operating at the same time"<sup>19</sup> and the Panel understands that Article 5.7 require authorities to examine evidence simultaneously rather than sequentially, how could the authority have simultaneously considered the dumping and injury evidence if there was an eight-month gap between the two considerations?

For Argentina to have met the requirement in Article 5.7, a new dumping consideration taking into account the updated information presented by petitioner should have occurred on 22 September 1998, but that did not happen. In this case, the timing of the consideration of the dumping and injury evidence was not simultaneous.

Therefore, even though we understand the MEOSP to be the authority that issued the decision to initiate the investigation, that decision was based on the evidence of dumping considered by the DCD on 7 January 1998 and on the evidence of injury considered by the CNCE on 22 September 1998.

**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?**

#### Response

First, we would like to indicate that we do not find it possible for an authority to **consider** evidence of dumping and injury simultaneously if the evidence considered by the authorities indisputably refers to non-related periods for dumping and injury.

The Panel will verify that the causal link analysis, prior to initiation, was issued on 29 December 1999, and in it the authority stated that the DCD made a dumping analysis based on the elements that were included in the **original** application, which took into account the period January through June of 1997.<sup>20</sup> The causal link determination also pointed out that petitioner submitted

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<sup>16</sup> See, Page 2 of Exhibit BRA-20.

<sup>17</sup> See, Page 4 of Exhibit BRA-20.

<sup>18</sup> See, Exhibit BRA-7.

<sup>19</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1294.

<sup>20</sup> See, Page 2 of Exhibit BRA-20.

additional updated information for all of 1997 and the first semester of 1998.<sup>21</sup> However, the DCD did not **consider** petitioner's updated information and did not issue a new dumping analysis.

On the other hand, the first injury analysis, Acta No. 405, **considered** there to be insufficient evidence of injury to justify the initiation of the investigation. The data collected for that injury analysis went from January 1994 through June 1997.<sup>22</sup> Eight months after the dumping and the first injury analysis had been made, the CNCE issued a second injury analysis, Acta No. 464, considering there to be sufficient evidence of threat of injury to justify the initiation of the investigation. The second injury analysis was based on the data collected for the period January 1994 through June 1998.<sup>23</sup>

If the first injury analysis considered that the dumping found on June 1997 was not causing injury or threat of injury on June 1997, how could Argentina have found threat of injury on June 1998 if the dumped imports on June 1997 were not causing injury on June 1997?

Second, even if the language in Article 5.7 of the Agreement could be interpreted in accordance with the understanding of the Panel in *Guatemala – Cement II* (simultaneous, rather than sequential, examination of the dumping and injury evidence), in this case that also did not occur.

Our response to question 22 above presents the sequence of events that clearly indicate that the evidence of injury was considered eight months after the evidence of dumping was considered. An eight-month gap between these two considerations is not in accordance with the understanding of the Panel in *Guatemala – Cement II* of the requirement in Article 5.7 of the Agreement.

#### **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?**

##### Response

The definition of “interested parties”, for the purposes of the Anti-Dumping Agreement, is provided in Article 6.11 of the Agreement. It includes the exporter, the foreign producer and the importer of a product subject to investigation; the government of the exporting Member; and, the producer of the like product in the importing Member.

From that definition, we understand the phrase “interested parties known to the investigating authorities to have an interest” to mean the interested parties, as defined by Article 6.11, recognized or identified by the investigating authorities to have an interest in the investigation.

In that regard, we remind the Panel that prior to initiation, petitioner submitted on 17 February 1998 additional information, including lists of imports of poultry from Brazil, broken down by producer and exporter.<sup>24</sup> These lists identified by name fifteen Brazilian producers of poultry and twenty Brazilian exporters of poultry. These lists provided by petitioner were, in fact, a document from two Argentinean agencies: *SENASA – Dirección Nacional de Fiscalización Agroalimentaria* (“SENASA”) and the *Secretaría de Agricultura, Ganadería, Pesca y Alimentación*

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<sup>21</sup> See, Page 4 of Exhibit BRA-20.

<sup>22</sup> See, Exhibit BRA-3.

<sup>23</sup> See, Page 8 of the “*Informe Técnico Previo a la Apertura*” in Exhibit BRA-6.

<sup>24</sup> See, Exhibit BRA-4.

*Dirección de Ganadería* (“*Ganadería*”).<sup>25</sup> Identified in these two lists were five Brazilian producers/exporters (Comaves, Minuano, Chapecó, Catarinense and Perdigão) of the seven producers/exporters that were notified of the investigation almost eight months after it had been initiated.<sup>26</sup> We understand that at that moment, prior to initiation, petitioner had identified and provided the names of the Brazilian producers/exporters of poultry to the investigating authority.

In addition, in the report regarding the viability of the initiation of the dumping investigation, of 7 January 1998, the investigating authority identified ten Brazilian exporters of the subject merchandise.<sup>27</sup> The identification of these Brazilian exporters was made by the investigating authorities, **themselves**, prior to the initiation of the investigation. These ten exporters were “interested parties known to the investigating authority” within the meaning of Article 12.1 of the Agreement. Among these ten exporters identified were five (Comaves, Minuano, Chapecó, Catarinense and Perdigão) of the seven exporters that were notified of the investigation almost eight months after it had been initiated, and after a preliminary injury, dumping and causal link determination had been issued.

As a final comment, we find it quite evident that an exporter, that exports the product subject to an investigation, will undoubtedly have an interest in the investigation. After all, the exports of these companies might be subject, at the end of the investigation, to the imposition of anti-dumping duties.

Thus, from the facts above, we have shown that these exporters were “interested parties known to the investigating authorities” and should have been notified of the investigation as soon as it was initiated.

**25. When were each of the following parties notified of the initiation of the investigation:**

**Government of Brazil, Avipal, Seara, Frigorífico Nicolini, Sadia, Frangosul, Chapecó, Minuano, Perdigão, Catarinense, CCLP, PenaBranca, and Comaves?**

Response

The Government of Brazil was notified of the initiation of the investigation on 1 February 1999.<sup>28</sup>

The Brazilian exporters Avipal, Seara, Nicolini, Sadia and Frangosul were notified by the DCD of the initiation and the need to provide responses to the dumping questionnaire on 10 February 1999.<sup>29</sup> These same exporters were notified by the CNCE of the initiation and the need to provide responses to the injury questionnaire on 16 February 1999.<sup>30</sup>

The Brazilian exporters Chapecó, Minuano, Perdigão, Catarinense, CCLP, PenaBranca and Comaves were notified by the DCD of the initiation of the investigation and the need to provide responses to the dumping questionnaire on 15 September 1999<sup>31</sup>, almost eight months after the investigation had been initiated. These exporters were never notified nor did they receive an injury questionnaire from the CNCE.

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<sup>25</sup> See, Annexes 1 and 2 of Exhibit BRA-4.

<sup>26</sup> See, Brazil’s first submission, at paras. 192 – 201.

<sup>27</sup> See, Pages 4 and 5 of Exhibit BRA-2.

<sup>28</sup> See, Exhibit ARG-III.

<sup>29</sup> See, Exhibit BRA-8.

<sup>30</sup> See, Exhibit BRA-9.

<sup>31</sup> See, Exhibit BRA-13.

In this regard, we refer to Argentina's explanation that the injury questionnaire was only sent to 8 exporters (when, in fact, was sent to only 5 exporters) because the injury analysis basically considers the injury to the domestic industry and, therefore, there is no need for all exporters to receive and respond to the injury questionnaire.

We call the attention of the Panel to the fact that an injury analysis takes into account not only the impact of the dumped imports on the domestic industry (Article 3.4 of the Agreement) but also the volume of the alleged dumped imports (Article 3.2 of the Agreement) and the effect of the dumped imports on prices in the domestic market (Article 3.2 of the Agreement). Therefore, the information on volume and price of imports provided by exporters is important and required in an injury analysis.

Furthermore, it was important and, in fact, a right of all exporters to receive the injury questionnaire and have the opportunity to respond to the questions made by the CNCE. If other exporters, and interested parties, had the opportunity to defend their interests by responding to the injury questionnaire, these seven exporters should also have had that opportunity. Whether or not these exporters would have responded to the injury questionnaire was a decision to be made by them and not by the investigating authority.

#### **Claim 11**

*To both parties*

**27. What is the 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?**

#### Response

Brazil understands that the term "questionnaires" in Article 6.1.1 of the Anti-Dumping Agreement refers to the questionnaires provided at the initial stage of the investigation. Subsequently, if the investigating authorities require additional, supplemental information or clarification of the information provided (by exporters, importers or the domestic industry) in the response to the questionnaires, the investigating authority will request such information.

In particular, the term "questionnaires" in Article 6.1.1, used in an anti-dumping investigation, refers to the dumping questionnaire as well as the injury questionnaire. We understand that some Members adopt a system where two agencies share the responsibility for administering the anti-dumping law and investigation procedures. One agency being responsible for determining the existence of dumping and calculating the dumping margin and the other for determining whether the domestic industry has been injured by the allegedly dumped imports. We understand that Argentina adopts such a system.

Consequently, Argentina also failed to comply with Article 6.1.1 of the Agreement when it did not send the injury questionnaire to the Brazilian exporters CCLP, Comaves, Minuano, Chapecó, Catarinense, Perdigão and PenaBranca.



## 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'?**

### Response

To participate means to be a part or “an essential member or constituent of anything”.<sup>32</sup> A producer or exporter of a product under investigation is an essential member or constituent of an investigation.

Companies that **are aware**, that is, that have knowledge of an ongoing investigation, qualify as “interested parties participating in the investigation”, even if they do not show an interest in the investigation. The lack of interest of an interested party in an investigation does not exclude or diminish the obligation of the investigating authorities of “promptly” making available to them evidence presented in writing by other interested parties. Interested parties that do not show an interest in the investigation may still want to defend their rights in an investigation based on certain allegations or evidence presented by other parties.

That said, Brazil reaffirms that the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and PenaBranca were **not aware** of the ongoing investigation until they were notified by the authorities, eight months after it had been initiated.

**33. What is the meaning of the word 'promptly' in Article 6.1.2 ADA?**

### Response

According to textual interpretation, the term “promptly” means “to make or do readily or at once”.<sup>33</sup> Brazil considers that evidence presented in writing by one interested party could not be made readily or immediately available to the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and PenaBranca, if these exporters were notified of the investigation almost eight months after it had been initiated.

We stress that these seven exporters had not been notified of the initiation or given the questionnaires to respond during eight months of the investigation but were, in any event, included in the investigation because they exported the subject merchandise to Argentina in the period of investigation.

Any evidence that was presented during these eight months could not be understood as being “promptly” available to these exporters if they were **not aware** of the existence of this investigation and their need to participate.

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<sup>32</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 995.

<sup>33</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1096.

#### 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'?**

#### Response

Brazil would first like to clarify that Argentina **never** provided the full text of the written application to the Government of Brazil (authorities of the exporting Member) nor to any exporter (known or allegedly unknown) of the product under investigation.

That said, we understand the phrase “known exporters” in Article 6.1.3 of the Agreement to mean exporters that were recognized or identified by the investigating authorities. Information submitted in Brazil’s Exhibits demonstrate that the investigating authorities knew, prior to the initiation, of the existence of the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and PenaBranca.

Prior to initiation, petitioner submitted on 17 February 1998 additional information, including lists of imports of poultry from Brazil, broken down by producer and exporter.<sup>34</sup> These lists identified by name fifteen Brazilian producers of poultry and twenty Brazilian exporters of poultry. These lists provided by petitioner were, in fact, a document from two Argentinean agencies: *SENASA – Dirección Nacional de Fiscalización Agroalimentaria* (“*SENASA*”) and the *Secretaría de Agricultura, Ganadería, Pesca y Alimentación Dirección de Ganadería* (“*Ganadería*”).<sup>35</sup> Identified in these two lists were five Brazilian producers/exporters (Comaves, Minuano, Chapecó, Catarinense and Perdigão) of the seven producers/exporters that were notified of the investigation almost eight months after it had been initiated.<sup>36</sup> We understand that at that moment, prior to initiation, petitioner had identified and provided the names of the Brazilian producers/exporters of poultry to the investigating authority.

Still prior to initiation and in the report regarding the viability of the initiation of the dumping investigation, of 7 January 1998, the investigating authority identified ten Brazilian exporters of the subject merchandise.<sup>37</sup> We point out that here the identification of these Brazilian exporters was made by the investigating authorities **themselves**. Among these ten exporters identified were five (Comaves, Minuano, Chapecó, Catarinense and Perdigão) of the seven exporters that were notified of the investigation almost eight months after it had been initiated, and after a preliminary injury, dumping and causal link determination had been issued. These ten exporters were “known exporters” within the meaning of Article 6.1.3 of the Agreement.

**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.**

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<sup>34</sup> See, Exhibit BRA-4.

<sup>35</sup> See, Annexes 1 and 2 of Exhibit BRA-4.

<sup>36</sup> See, Brazil’s first submission, at paras. 192 – 201.

<sup>37</sup> See, Pages 4 and 5 of Exhibit BRA-2.

Response

Brazil notes that the issue here is not so much related to the timing in Article 6.1.3 but to the fact that the Argentinean authorities **never** provided the written application to the Government of Brazil and the exporters.

That being so, Brazil agrees with the finding of the Panel in *Guatemala – Cement II* that the term “as soon as” conveys a sense of substantial urgency. In particular, we find the following conclusion of that Panel to be relevant and applicable to this case:

*“We note that Article 6.1.3 does not specify the number of days within which the text of the application shall be provided. What it does specify is that the text of the application be provided “as soon as” the investigation has been initiated. In this regard, the term “as soon as” conveys a sense of substantial urgency. In fact, the terms “immediately” and “as soon as” are considered to be interchangeable. We do not consider that providing the text of the application 24 or 18 days after the date of initiation fulfils the requirement of Article 6.1.3 that the text be provided “as soon as an investigation has been initiated”<sup>38</sup> (emphasis added)*

Immediate access to the application is important for exporters to prepare their arguments in defence of their interests and to devise a strategy to defend the allegations made by petitioner in the application.

*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?**

Response

Brazil once more makes note of the fact that the Argentinean authorities **never** provided the text of the written application to the Government of Brazil and the exporters, as required under Article 6.1.3 of the Anti-Dumping Agreement. We repeat, the Argentinean authorities **never** provided the text of the application.

We understand that Argentina argues that in the Spanish version of the Agreement the term “provide” is set forth as “facilitar” and that based on that meaning the Argentinean authorities complied with the requirement in Article 6.1.3 of the Agreement when they made the written application **available** to the interested parties once the investigation was initiated.<sup>39</sup> Argentina’s position that the verb “to provide” could be understood to mean that authorities were only required to “make available” the full text of the written application is incorrect.

We restate that Article 6.1.3 carefully differentiates the obligation that the investigating authorities have with the exporters and the exporting Member from the obligation the investigating authorities have with other interested parties. In the first case, the investigating authority must actively “provide” the full text of the written application to the exporting Member and to the exporters involved in the investigation. In the second case, the investigating authority must “make available”, upon request, the full text of the written application to other interested parties. Brazil believes that if the requirement imposed on the investigating authority was to be understood as being the same for the

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<sup>38</sup> Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, 24 October 2000, WT/DS156/R, at para. 8.101 (adopted on 17 November 2000) (“*Guatemala – Cement II*”).

<sup>39</sup> See, Argentina’s first submission, at para. 164.

exporters and the exporting Member as that for the other interested parties, there would be no need for the use of different language in Article 6.1.3 of the Agreement.

The same reasoning applies to the text in Spanish. The requirement imposed on the investigating authorities to provide, or “facilitar”, the full text of the written application to exporters and the exporting Member is different from the requirement imposed on the authorities to “make available”, or “podrán a disposición”, the full text of the written application to other interested parties.

Furthermore, the verb “facilitar” is understood to mean “proporcionar o entregar”, a definition entirely compatible with the verb “provide” used in the English version.<sup>40</sup>

That said, we return to the Panel’s question. The phrase “as soon as an investigation has been initiated” in Article 6.1.3 of the Agreement means that the authority must actively provide the text of the application **immediately** after the investigation is initiated. We note the urgency required in Article 6.1.3. Brazil notes that the investigation was initiated when the MEOSP published, on 25 January 1999, Resolution No. 11/1999, of 20 January 1999. Argentina notified but did not provide the application the Government of Brazil of the initiation of the investigation on 1 February 1999<sup>41</sup>, that is, seven days after the initiation had been published.

### 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.**

### Response

*Sadia*

Exhibit BRA-22 includes Section A of Sadia’s questionnaire response submitted on 20 April 1999, and Section A of Sadia’s supplemental response submitted on 28 April 1999. In Annex II (“*Identificación del Producto Denunciado*”) of Section A, the questionnaire requests a complete product description with technical specifications for each model/type/code for the merchandise sold in the internal market and exported to Argentina.<sup>42</sup>

In its response of 20 April 1999, Sadia described the product as whole, frozen, eviscerated poultry with giblets. More specifically, for the internal market, Sadia reported the product as whole, frozen, eviscerated poultry, with giblets, box of 18kg - individual weight of 1.750 to 2.750 kg. For the Argentinean market, Sadia reported the product as whole, frozen, eviscerated poultry, with giblets, box of 18kg - individual weight of 1.700 to 2.700 kg.<sup>43</sup> In addition, Sadia submitted a detailed description of the poultry produced by the company. In this description, Sadia reports that a bag of giblets containing heart, liver, gizzard and neck, previously cleaned and chilled, is put into the abdominal cavity of the animal.<sup>44</sup> No mention is made to the head and feet of the poultry. According to Sadia’s response there were no differences in the physical characteristics for the products sold to Argentina and in Brazil.

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<sup>40</sup> *Real Academia Española*, Editorial Espasa Calpe, S.A, 2001.

<sup>41</sup> *See*, Exhibit ARG-III.

<sup>42</sup> *See*, Page 4 of Exhibit BRA-22.

<sup>43</sup> *See*, Page 4 of Exhibit BRA-22.

<sup>44</sup> *See*, Page 12 of Exhibit BRA-22.

In its supplemental response of 28 April 1999, Sadia indicated in Annex V of Section A, that whole, frozen, eviscerated poultry, **without** giblets, was sold to the internal market but not to Argentina during the period January 1996 through February 1999.<sup>45</sup> Thus, poultry without head and feet was, in fact, sold in Brazil.

The DCD never requested additional information or clarification regarding the description of the product sold to Argentina and in Brazil.

### *Avipal*

Exhibit BRA-23 includes a letter from Avipal submitting the questionnaire in a diskette on 21 April 1999, and the non-confidential part of Section A of Avipal's questionnaire response on 7 May April 1999. In Annex II ("*Identificación del Producto Denunciado*") of Section A, the questionnaire requests a complete product description with technical specifications for each model/type/code for the merchandise sold in the internal market and exported to Argentina.<sup>46</sup>

In its response, Avipal described the product as whole, frozen, eviscerated poultry. More specifically, Avipal divided the product into two types: (i) **broiler** – whole, frozen eviscerated, containing a plastic bag with neck **without head**, gizzard and liver; and, (ii) **griler** - whole, frozen eviscerated without giblets.<sup>47</sup> In Annex V of that response, Avipal reported that both broiler and griler type poultry were sold to Argentina and Brazil.<sup>48</sup> According to Avipal's response, there were no differences in the physical characteristics of the product sold to Argentina and in Brazil.

We also recall that throughout the investigation the DCD never requested additional information or clarification regarding the description of the product.

### *Frangosul*

Exhibit BRA-24 includes Section A of Frangosul's questionnaire response submitted on 27 April 1999. Exhibit BRA-26 includes Frangosul's response to the DCD with the translation of the product brochure in Spanish submitted on 19 August 1999. In Annex II ("*Identificación del Producto Denunciado*") of Section A, the questionnaire requests a complete product description with technical specifications for each model/type/code for the merchandise sold in the internal market and exported to Argentina.<sup>49</sup>

In its response of 27 April 1999, Frangosul described the product as whole, frozen, eviscerated poultry with giblets (**broiler type**) and whole, frozen, eviscerated poultry without giblets (**griler type**).<sup>50</sup> Both broiler and griler type poultry were sold to Argentina and in Brazil.

In its response of 19 August 1999, Frangosul attached a product brochure (in English and Spanish), describing the types of products sold. According to the description on the product brochure, griler type poultry is fresh, frozen poultry, white or yellow skin, fully eviscerated, **headless and footless**, without giblets; and broiler type poultry is fresh, frozen poultry, white skin, fully eviscerated, **headless and footless**, with giblets.<sup>51</sup>

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<sup>45</sup> See, Last page of Exhibit BRA-22.

<sup>46</sup> See, Page 7 of Exhibit BRA-23.

<sup>47</sup> See, Page 7 of Exhibit BRA-23.

<sup>48</sup> See, Page 11 of Exhibit BRA-23.

<sup>49</sup> See, Page 5 of Exhibit BRA-24.

<sup>50</sup> See, Pages 5 and 6 of Exhibit BRA-24.

<sup>51</sup> See, Page 8 of Exhibit BRA-26.

Once again, throughout the investigation the DCD never requested additional information or clarification regarding the description of the product sold to Argentina and in Brazil.

### *Catarinense*

Exhibit BRA-25 includes Section A of Catarinense's questionnaire response submitted on 3 November 1999. In Annex II ("*Identificación del Producto Denunciado*") of Section A, the questionnaire requests a complete product description with technical specifications for each model/type/code for the merchandise sold in the internal market and exported to Argentina.<sup>52</sup>

In its response, Catarinense described the product as whole, frozen poultry with giblets (**broiler type**) and whole frozen poultry without giblets (**griler type**).<sup>53</sup> For the export market, the broiler type poultry (with giblets) contains liver, gizzard and neck.<sup>54</sup> The griler type poultry sold to Argentina and in Brazil do not contain giblets.<sup>55</sup> Catarinense reported that it sold both broiler and griler type poultry in the home market.

The DCD never requested additional information or clarification regarding the description of the product sold to Argentina and in Brazil.

### **Claim 19**

#### *To Brazil*

**41. Argentina asserts that Frangosul's normal value data was submitted out-of-time. Please comment.**

#### Response

In order to respond to this question, we find it necessary to provide and explain the chronology of the responses submitted by Frangosul and the requests for extension to submit such responses, as well as the requests by the DCD for information.

1. On 16 February 1999, the DCD notified Frangosul of the initiation of the investigation and fixed a deadline of 29 March 1999 for Frangosul to respond to the dumping questionnaire.<sup>56</sup>
2. On 15 March 1999, Frangosul requested an extension of the deadline to submit the response to the questionnaire by 20 April 1999.<sup>57</sup>
3. On 26 March 1999, the DCD granted the extension until 20 April 1999.<sup>58</sup>
4. On 27 April 1999, Frangosul submitted the response to the dumping questionnaire.<sup>59</sup> In particular, Frangosul responded to Section C of the questionnaire regarding sales to the domestic market. This information included sales of poultry made in Brazil (internal market) corresponding to the years 1996, 1997, 1998 and the first three months of 1999, separated by

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<sup>52</sup> See, Page 8 of Exhibit BRA-25.

<sup>53</sup> See, Page 8 of Exhibit BRA-25.

<sup>54</sup> See, Page 9 of Exhibit BRA-25.

<sup>55</sup> See, Pages 10 and 36 of Exhibit BRA-25.

<sup>56</sup> See, Exhibit BRA-9.

<sup>57</sup> See, Page 28 of Exhibit BRA-15.

<sup>58</sup> See, Page 28 of Exhibit BRA-15.

<sup>59</sup> See, Page 29 of Exhibit BRA-15.

month.<sup>60</sup> We make special note that, subsequently, the authority requested supporting documentation for all of the sales transactions in the internal market covering that period.<sup>61</sup> Even though Frangosul submitted this information seven days after the deadline of 20 April 1999, Frangosul still provided this information within a reasonable period for the authority to consider that information, specially taking into account the volume of data submitted for a period in excess of what was needed.

5. On 12 July 1999, the DCD requested that Frangosul provide additional information. This information included translation of all supporting documentation corresponding to the export transactions of the product under investigation (even though most of the information provided in these invoices were already in Spanish); information on export transactions to the five largest export markets (aside from Argentina) where the product was sold; translation of the product brochure (even though the product brochure had already been provided in Spanish); and, supporting documentation for all the sales transactions in the domestic market for the period.<sup>62</sup> The DCD fixed a deadline of ten days for Frangosul to submit this information.
6. On 28 July 1999, Frangosul requested an extension of the deadline to submit the information requested by the DCD.<sup>63</sup>
7. On 9 August 1999, the DCD granted the extension for Frangosul to submit the requested information within fifteen days.<sup>64</sup>
8. On 19 August 1999, Frangosul provided a translation of invoices for a few export transactions, as sample of all export transactions, which it had reported; information on the export transactions to the five largest export markets for the period 1996 through 1999; translation of the product brochure with the description of the product; and, an explanation that the great volume of sales in the internal market did not make it possible for it to provide copies of invoices for each transaction.<sup>65</sup> To support its explanation, Frangosul indicated that more than 320,000 invoices are issued in one given year for sales transactions in the internal market and that on 27 April 1999 it had submitted a list of invoices for the sales transactions in the internal market. Frangosul further stated that the invoices were available to the investigating authorities for a verification *in loco* or for a selection of such documents for specific transactions to be used as sample.<sup>66</sup>
9. On 12 October 1999, the DCD requested a new list of invoices with the total transactions in the internal market for the period January 1998 through January 1999, so that the DCD could select a statistic sample and subsequently request the supporting documentation for that sample.<sup>67</sup> In this request, the DCD also informed, for the first time in the investigation, that the list of invoices sent on 27 April 1999, did not include specific information necessary for the authority's analysis.<sup>68</sup> We also call to the Panel's attention the fact that this was the first time that the investigating authority informed Frangosul what the dumping period of data collection was.

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<sup>60</sup> *Id.*

<sup>61</sup> *See*, Pages 29 and 30 of Exhibit BRA-15.

<sup>62</sup> *See*, Page 49 of Exhibit BRA-15.

<sup>63</sup> *See*, Page 49 of Exhibit BRA-15.

<sup>64</sup> *See*, Page 49 of Exhibit BRA-15.

<sup>65</sup> *See*, Exhibit BRA-26.

<sup>66</sup> *See*, Exhibit BRA-26.

<sup>67</sup> *See*, Exhibit BRA-26.

<sup>68</sup> *Id.*

10. On 18 November 1999, the DCD renewed its request for a list of invoices for the sales transactions in the internal market for the period January 1998 through January 1999 and that Frangosul submit this information in a diskette within 5 days. No mention is made to the supporting documentation.<sup>69</sup>
11. On 30 December 1999, Frangosul presented in a diskette the list of invoices for the sales transactions in the internal market for the period January 1998 through January 1999.<sup>70</sup>
12. On 4 January 2000, the DCD issued the report prior to the final determination (disclosure of essential facts under consideration). This report does not mention the list of invoices submitted by Frangosul.<sup>71</sup>
13. On 5 January 2000, the DCD notified Frangosul of the end of the evidence-producing stage of the investigation.<sup>72</sup>

With respect to the sequence of events above, Brazil would like to make the following considerations.

First, the Panel must not forget under what circumstances Article 6.8 of the Agreement allows an investigating authority to resort to the use of facts available. According to Article 6.8 of the Agreement, where interested parties do not “significantly impede” the investigation, recourse may be had to facts available **only** if an interested party fails to submit **necessary information** “within a reasonable period”. If information is, in fact, supplied “within a reasonable period”, the investigating authority cannot use facts available and must use the information submitted by the interested party. In the case at issue, Frangosul did not incur in any of the circumstances set forth in Article 6.8 of the Agreement for the application of facts available.

Even though Frangosul responded to the questionnaire seven days after the deadline, Frangosul still submitted responses “within a reasonable period”. To that regard, Brazil recalls that “a reasonable period” will not necessarily be equivalent to the established deadlines set out by investigating authorities. Our understanding of a “reasonable period” is aligned with the understanding of the Panel in *United States – Hot Rolled Steel Products*:

*“(…) The AD Agreement establishes that facts available may be used if necessary information is not provided within a reasonable period. What is a ‘reasonable period’ will not, in all instances be commensurate with pre-established deadlines set out in general regulations. We recognize that in the interest of orderly administration investigating authorities do, and indeed must establish deadlines. However, a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied.”<sup>73</sup> (emphasis added)*

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<sup>69</sup> See, Exhibit ARG-XXVIII.

<sup>70</sup> See, Exhibit BRA-26.

<sup>71</sup> See, Exhibit BRA-28.

<sup>72</sup> See, Exhibit BRA-26.

<sup>73</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, 28 February 2001, WT/DS184/R, at para. 7.54 (“*United States – Hot Rolled Steel Products*”). The Appellate Body upheld the Panel’s findings with respect to the United States inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement in its application of facts available. *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, 24 July 2001, WT/DS184/AB/R, at para. 240 (adopted on 23 August 2001) (“*AB – United States – Hot Rolled Steel Products*”).



We do not propose to affirm or imply that Article 6.8 and Annex II of the Agreement is a license for interested parties to simply disregard the time-limits set out by investigating authorities. However, we understand that the word “reasonable” in Article 6.8 suggests a degree of flexibility by authorities that involves consideration of all of the circumstances of a particular case.

Second, Brazil understands that the application of Article 6.8 of the Agreement is also dependent upon the actions of the investigating authority in an investigation. If an investigating authority does not act in a proper manner during the investigation, it cannot claim that the interested party did not comply with the requirements of Article 6.8 and, thus, resort to the application of facts available.

In this respect, Brazil turns to the Panel’s consideration in *Guatemala – Cement II* on the interpretation of the application of Article 6.8 of the Agreement:

*“(…) We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner(…)”<sup>74</sup> (emphasis added)*

The sequence of facts presented above demonstrate that the investigating authority in this case did not act in a reasonable, objective and impartial manner. The fact that Frangosul was originally required to submit normal value and export price information for an excessively long period (January 1996 through March 1999) and that more than eight months after the initiation the authority fixed a much smaller dumping period of data collection (January 1998 through January 1999) indicates how unreasonable, non-objective and partial the authority was in this investigation. Specially, if you consider that the authority, at a subsequent stage, requested supporting documentation for all sales transactions in the internal market for the period January 1996 through March 1999. In this regard, the Panel should understand that Frangosul spent a considerable amount of time and resource collecting and reporting normal value and export price information for a period in excess of three years. In particular, we recall that in Frangosul’s case there were over 320,000 transactions in the internal market for just one given year.

Third, it was not until 12 October 1999, that the DCD informed Frangosul that the information submitted on 27 April 1999 was not sufficient to make a dumping analysis. It was also at that moment that the DCD established the dumping data collection period. Thus, in accordance with the authority’s instructions (more than eight months after initiation), Frangosul had to submit a new and more specific set of normal value data for a new period. This meant that Frangosul had to go back and collect specific information for the period January 1998 through January 1999, which sometimes meant manually having to search the many invoices (over 320.000) to find the information requested by the authority. Even though such information was submitted outside the deadline established by the DCD, it was still provided prior to the disclosure of the essential facts under consideration and the final determination.

Brazil considers that in light of the nature and quantity of the information submitted, the unreasonable burden imposed by the authority throughout the investigation, and the fact that Frangosul invited the authority to verify in its premises all documents of sales transactions (in the internal market and to Argentina), the authority should have considered that the information was submitted within a “reasonable period” and should have used it in the final determination.

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<sup>74</sup> *Guatemala – Cement II*, at para. 8.251.

**Claim 19**

*To Brazil*

**46(a). Please provide a copy of Catarinense's questionnaire response of 3 November 1999.**

Response

We have provided as Exhibit BRA-25 Catarinense's response to Section A of the dumping questionnaire. Catarinense's complete dumping questionnaire response, with list of invoices for all sales transactions to Argentina (Section B) with copies of invoices, list of invoices for all sales transactions in the internal market (Section C), and cost breakdown (Section D), comprises over 1.500 pages. We believe that such volume of information would not only be burdensome to collect and copy but would also serve very little purpose, since we understand that the Panel's objective is not whether the authority wrongfully calculated the normal value and export price for Catarinense but that it did **not** even consider any of the information submitted by the exporter.

We are, however, providing as Exhibit BRA-37 Catarinense's response to Section B of the questionnaire with a sample of the list of invoices of sales to Argentina for each month in 1998 and January 1999, as well as a sample of invoices reported for sales in each month of 1998 and January 1999; the response to Section C of the questionnaire with a sample of the list of invoices of sales in the internal market for each month in 1998 and January 1999; and, the response to Section D of the questionnaire.

If the Panel considers this information to be insufficient to examine the claims put forth by Brazil, we will gladly provide the complete set of Catarinense's response to the questionnaire.

**46(b). Argentina asserts that Frangosul's normal value data was submitted out-of-time. Please comment.**

Response

Please see the response to question 41 above.

**Claim 23**

*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.**

Response

Article 2.4 of the Anti-Dumping Agreement imposes an obligation on the investigating authority to make a fair comparison between the export price and the normal value. In making this fair comparison, due allowances must be made for differences, which affect price comparability. We understand freight charges to be included in such adjustments.

We note that the obligation in Article 2.4 of the Agreement is imposed on the investigating authority and that the exporter does not have to request that such an adjustment be made.

Accordingly, in the course of the investigation, the DCD never requested supporting documentation from Avipal for such freight charges.

That being so, we point out that on 20 April 1999, Avipal and other exporters submitted a letter to the DCD that stated, among other things, that in order to compare the normal value proposed by petitioner (JOX publication) to the *ex factory* export price certain adjustments had to be made. Avipal provided a list with the value of such adjustments, including tax, **national freight charges** and financial cost.<sup>75</sup>

On 12 October 1999, the DCD established and informed Avipal, for the first time in the investigation, that the dumping period of data collection was from January 1998 through January 1999.<sup>76</sup> In this communication, the DCD also requested that Avipal present a list of invoices for all sales of poultry in the internal market for that period. The DCD did not provide a deadline for Avipal to submit this information.

On 21 December 1999, Avipal submitted a diskette with a list of invoices for sales of poultry in the home market for the period January 1998 through January 1999, including a spreadsheet with taxes (ICMS/PIS/COFINS), commission, **freight** and financial costs included in the normal value that should be deducted from an *ex factory* comparison with the export price.<sup>77</sup>

We understand that Argentina considers freight adjustment to have “a decisive and significant impact on price comparability”.<sup>78</sup> It is interesting, however, that even though Argentina knows this adjustment is warranted and that it is “decisive and significant” for the price comparison, it simply decided not to make it. Even if no supporting documentation was provided (when, in fact, it was not even requested), Argentina still could have used a secondary source of information to estimate such deduction, as it did with the normal value adjustment to compensate the alleged characteristic differences between poultry sold to Argentina and in Brazil.

In that sense, we remind the Panel that JOX provided a response to the investigating authority’s request for clarification of what taxes and charges were included in the prices published and used to determine normal value.<sup>79</sup> JOX letter to the DCD, of 3 August 1999, explained that the prices published by JOX included taxes (12 per cent - ICMS; 2.65 per cent - PIS/COFINS); financial costs; sales commission of 0.5 per cent to 1 per cent over the value of the sale; and, **a variable freight for delivery**, depending on the geographic location of the seller and the buyer.<sup>80</sup>

Even with this explanation provided by JOX, the investigating authority still chose not to make the freight adjustments to Avipal’s normal value, required in a fair comparison.

**50. Is Brazil’s argument regarding the investigating 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?**

**Response**

Brazil’s arguments regarding the investigating authority’s failure to use information submitted by exporters is **not** limited to adjustments for purpose of Article 2.4 of the Agreement.

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<sup>75</sup> See, Exhibit BRA-35.

<sup>76</sup> See, Page 44 of Exhibit BRA-15.

<sup>77</sup> See, Exhibit BRA-36.

<sup>78</sup> See, Argentina’s first submission, at para. 211.

<sup>79</sup> See, Exhibit BRA-32.

<sup>80</sup> See, Exhibit BRA-32.

Brazil has also argued failure of the investigating authority to use information submitted by exporters in the following claims:

**Claim 17** – Argentina disregarded the export price provided by the Brazilian exporters and resorted, instead, to the export price information provided by the Argentinean agency *Ganaderia*;<sup>81</sup>

**Claim 19** – Argentina disregarded all normal value information submitted by the Brazilian exporters Frangosul and Catarinense and resorted, instead, to information provided by petitioner<sup>82</sup>, and,

**Claim 27** – Argentina disregarded all listed and reported transactions in the internal market for the Brazilian exporters Sadia and Avipal in establishing normal value and in making the fair comparison and used, instead, only the internal market transactions for which invoices were submitted.<sup>83</sup>

### Claims 23 – 27

*To Brazil*

**51. Please explain precisely what evidence was in the record that you consider the investigating authorities failed to use.**

#### Response

We refer to the response to question 50 above.

Regarding **Claim 17**, Sadia provided export price information of poultry sold to Argentina for the period 1996 through February 1999.<sup>84</sup> Avipal provided export price information of poultry sold to Argentina for the period 1996 through March 1999.<sup>85</sup> Frangosul provided export price information for individual export transactions of poultry sold to Argentina from January 1996 through March 1999, with respective supporting documentation.<sup>86</sup> Catarinense provided export price information for individual transactions of poultry sold to Argentina from January 1998 through January 1999, with respective supporting documentation.<sup>87</sup>

In the final determination, the DCD established export price for all Brazilian exporters based on the import information from the Argentinean agency *Ganaderia* and disregarded (without justification) all export price data submitted by the Brazilian exporters.<sup>88</sup>

Regarding **Claim 19**, please refer to the responses to question 41 (Frangosul) and question 46(a) (Catarinense) above. Specifically, all normal value information submitted by these two exporters was disregarded in the final determination and the DCD used, instead, the normal value calculated for all other exporters. We note the fact that in the final determination the normal value used by the authority for all other exporters was that submitted by petitioner based on JOX published prices for chilled poultry with head and feet.

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<sup>81</sup> See, Brazil's first submission, at paras. 282 - 290.

<sup>82</sup> See, Brazil's first submission, at paras. 298 - 310.

<sup>83</sup> See, Brazil's first submission, at paras. 416 - 422.

<sup>84</sup> See, Exhibit BRA-22 and Pages 18 and 43 of Exhibit BRA-15.

<sup>85</sup> See, Exhibit BRA-23 and Pages 22 and 45 of Exhibit BRA-15.

<sup>86</sup> See, Exhibit BRA-24 and Pages 29 and 49 of Exhibit BRA-15.

<sup>87</sup> See, Exhibit BRA-25 and Pages 38 and 39 of Exhibit BRA-15.

<sup>88</sup> See, Pages 76, 77 and 104 of Exhibit BRA-15.

Regarding **Claim 27**, the following took place:

On 26 August 1999, Sadia sent a letter to the DCD with a list of invoices issued for the sales transactions in the home market for 1996 through 1998, and January and February 1999.<sup>89</sup> In this letter, Sadia explained that the great volume of sales in the home market made it impossible to provide an invoice copy for each transaction and invited the DCD to verify *in loco* the transactions listed or to select a sample of transactions so it could provide the corresponding invoices.<sup>90</sup> On 3 December 1999, the DCD sent a letter to Sadia requesting invoice copies of 372 selected sales transactions in the home market, establishing a 5-day deadline to submit the invoice copies.<sup>91</sup> On 13 January 2000, Sadia submitted copies of the invoices requested by the DCD.<sup>92</sup>

In the final determination, the DCD established normal value for Sadia based only on information for which supporting documentation was provided and not for all reported internal market transactions.<sup>93</sup>

On 12 August 1999, Avipal submitted a list of sales transactions in the home market for 1996 through 1999, with a sample invoice for each month in 1997 and 1998, and explanation that the great volume of sales in the home market made it impossible to provide an invoice copy for each transaction. In this letter, Avipal invited the DCD to verify *in loco* the transactions listed or to select a sample of transactions so it could provide the corresponding invoices.<sup>94</sup> On 1 September 1999, Avipal provided translation of a standard invoice from Portuguese into Spanish.<sup>95</sup> On 21 December 1999, Avipal submitted a diskette with a list of invoices for sales of poultry in the home market for the period January 1998 through January 1999, including deductions and taxes.<sup>96</sup> The DCD never selected the transactions for which Avipal offered to provide invoice copies.

In the final determination, the DCD established normal value for Avipal based only on the transactions for which Avipal had provided invoice copies and not on all reported transactions in the internal market.<sup>97</sup>

As shown, Sadia and Avipal presented a list of all transactions in the internal market for the period. Invoices were presented for only some transactions in order for the DCD to verify the accuracy of the data submitted in the responses as a whole and not just those for which invoices were provided. Brazil understands that the magnitude of the information submitted may mean that not all data will accurately be examined, however, this does not exclude the validity of the data provided, particularly if that data could be verified.

It is important to note that not only did Sadia and Avipal report transactions for the period of investigation (January 1998 through January 1999) but they also provided information on the sales transactions outside the period of investigation (1996, 1997, 1998 and available data in 1999). To have that burden imposed on exporters and, then, for the investigating authority to use only some of the transactions during 1998 and January 1999 is contrary to how a margin should be established pursuant to Article 2.4 of the Agreement.

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<sup>89</sup> See, Exhibit BRA-29.

<sup>90</sup> *Id.*

<sup>91</sup> See, Exhibit BRA-30.

<sup>92</sup> See, Page 62 of Exhibit BRA-15.

<sup>93</sup> See, Pages 62 and 63 of Exhibit BRA-15.

<sup>94</sup> See, Exhibit BRA-31.

<sup>95</sup> See, Page 64 of Exhibit BRA-15.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

## 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).**

### Response

From the documents of the investigation to which Brazil had access to, Brazil was not able to identify the responses to Sections B.2 and C.1.1 of the dumping questionnaire for the Brazil exporters Sadia, Avipal and Frangosul.

If the Panel considers that the information on product description reported by the exporters in the investigation and, thus far, presented by Brazil in this dispute is not sufficient to examine this claim, we ask that the Panel request that Argentina provide the responses of these companies to Sections B.2 and C.1.1 of the dumping questionnaire. We understand that the Argentinean investigating authority has all of the confidential and non-confidential responses of the exporters submitted in the investigation and will be able to provide the requested information to the Panel.

We are providing, however, as Exhibit BRA-38 the injury questionnaire responses of the Brazilian exporters Sadia, Avipal and Frangosul, that also contains information on the product description. Also in Exhibit BRA-38, the Panel will find Catarinense's response to Section B.2 and Section C.1.1 of the dumping questionnaire.

## 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?**

### Response

Article 3.1 of the Agreement requires a determination of injury to be based upon positive evidence and involve an objective examination of the volume, the effect, and the impact of "**dumped imports**" on domestic producers. We understand that the injury analysis, as provided in Article 3 of the Agreement, must exclude imports that are **found not to be dumped** from the total imports subject to the investigation. To this regard, we find several indications in the provisions related to anti-dumping investigations that support our understanding.

First, Article VI:1 of the General Agreement on Tariffs and Trade of 1994 ("GATT") provides that dumping occurs when the **products** of one country are introduced into the commerce of another country at less than the normal value of the product. Thus, if certain products by one country are not being entered into the commerce of another country at prices below normal value, dumping does not occur. Consequently, those **products** from that country cannot be considered "**dumped imports**".

Likewise, Article 2.1 of the Anti-Dumping Agreement provides that a **product** is to be considered as **being dumped** if the export price of the product exported from one country to another

is less than the comparable price. The same reasoning applies, if the export price of a product exported from one country is not inferior to the comparable price in the exporting country, then those products cannot be considered as **being dumped**.

From the language of these provisions, it is clear that the definition of dumping is not related to all exports of a certain country that enter the commerce of another but to the exports of the **products** from a certain country, which enter the commerce of another at prices below the normal value.

Second, all of Article 3, with the exception of Article 3.3, refers to **“dumped imports”** as those imports that are **found to be dumped**. We find this to be true, since Articles 3.1, 3.2, 3.4, 3.5, 3.6, 3.7 and 3.8 explicitly refer to **“dumped imports”**, and not to imports subject to an investigation.

Since the definition of **“dumped imports”**, in Article 2.1, is used for purposes of the Agreement, and not only for purposes of that Article, we understand that the term in Article 3 conveys the same meaning.

Specifically, Article 3.5 of the Agreement is where this is most evident. Article 3.5 requires the demonstration that **“dumped imports”** are, through the effects of **dumping**, causing injury to the domestic industry. Thus, the causal link analysis requires a demonstration that the imports with **“dumping effects”** be the cause of injury to the domestic industry, and not all imports, which also includes those imports found not to be dumped. Article 3.5 further requires that the demonstration of causal link, between the **“dumped imports”** and the injury to the domestic industry, be based on examination of all relevant evidence before the authorities. We find that evidence that imports from certain producers/exporters are not found to be dumped to be relevant evidence before the authorities. More importantly, Article 3.5 requires the investigating authority to examine **any known factors other than the dumped imports** which at the same time are injuring the domestic industry. Imports of the product found not to be dumped qualify as known factors other than the **“dumped imports”**. Article 3.5 even exemplifies such factors which may be relevant in this respect, such as the volume and prices of **imports not sold at dumping prices**. In this sense, the volume and value of the imports from Nicolini and Seara was an important factor that should have been examined by the investigating authority in the causal link analysis.

As mentioned above, Article 3.3 is an exception to Article 3 of the Agreement. Article 3.3 refers to cumulation cases, where the authority may cumulatively assess the effects of **imports** where **imports** of more than one country are simultaneously subject to an anti-dumping investigation. It is important to mention that not only is this not the case here, since only the imports of one country were subject to the investigation, but also that Article 3.3 expressly refers to **“imports of a product”** rather than to **“dumped imports”**, being understood that for reasons of cumulation **all imports** are considered and not only the ones that are **being dumped**.

Third, further clarification is found when we look at the language in Article 9.2 of the Agreement:

*“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, or in a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury.(...)”* (emphasis added)

The language in this provision supports the idea that only imports of a product, **which where found to be dumped**, from a certain producer/exporter may be considered as dumped imports. Again, not all imports of the product are subject to anti-dumping duties, only those products from producers/exporters that were **found** to be dumped.

This understanding is in agreement with the Panel's understanding in *EC – Bed Linen*:

*“(…)we consider that dumping is a determination made with reference to a **product from a particular producer/exporter**, and not with reference to individual transactions. That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from **particular producers/exporters**. If the result of that consideration is a conclusion that the product in question from **particular producers/exporters is dumped**, we are of the view that the conclusion applies to all imports of the product **from such source(s)**, at least over the period for which dumping was considered. (…)”<sup>98</sup> (emphasis added)*

That Panel also found that:

*“(…)It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or de minimis margin of dumping. In such a case, it is our view that **the imports attributable to such a producer/exporter may not be considered as “dumped” for purposes of the injury analysis.** (…)”<sup>99</sup> (emphasis added)*

Likewise, in the present investigation, we believe that the Panel should come to the same conclusion, that is, that **only the total imports from any producer/exporter that was actually found to be dumping be considered as “dumped imports”**. Accordingly, The imports from Nicolini and Seara should not be included in the **“dumped imports”** evaluated under Article 3 of the Agreement.

That being said, we understand that the dumping analysis in an investigation should always precede the injury analysis. It has to be this way in order for the provisions in the Agreement to make sense.

For example, in Article 3.4 of the Agreement, one of the mandatory relevant economic factors to be evaluated in the examination of the impact of the dumped imports on the domestic industry is the magnitude of the **dumping margin**. If an injury analysis precedes the dumping analysis how can the injury analysis evaluate the magnitude of the dumping margin?

Also, if the injury analysis precedes the dumping analysis, the **“dumped imports”** in the injury analysis will always include the totality of the imports and not only those imports that the dumping analysis found to be dumped. For the reasons indicated above, we do not believe that the Agreement meant for imports found **not to be dumped** to be included in the term **“dumped imports”** for purposes of the injury and causal link analysis.

The injury analysis depends upon the findings in the dumping analysis and cannot, therefore, be subsequent to it.

In the response to question 23 above, we have provided our understanding of Article 5.7 of the Agreement. There, we have stated that we do not find it possible for an authority to consider

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<sup>98</sup> European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, 30 October 2000, WT/DS141/R, at para. 6.136 (“*EC – Bed Linen*”). The EC did not appeal the Panel's understanding of “dumped imports” in Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement. European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, 1 March 2001, WT/DS141/AB/R (adopted on 12 March 2001) (“*AB – EC – Bed Linen*”).

<sup>99</sup> *EC – Bed Linen*, at para. 6.138.



evidence of dumping and injury simultaneously if the evidence considered by the authorities indisputably refers to non-related periods for dumping and injury. The different periods examined by the DCD and the CNCE in determining whether there was sufficient evidence of dumping and injury, indicates that the dumping and injury evidence was **not** considered simultaneously in the decision whether or not to initiate the investigation. We understand that the dumping determination need not consider trends over time, whereas the injury determination will normally require information covering more than one year in order to evaluate volume and price changes. However, in order for an authority to consider dumping and injury evidence simultaneously, the evidence of dumping and injury should, at a minimum, relate to the same period, in order for that evidence to justify the initiation of an investigation. We repeat, evidence of dumping and injury cannot be considered simultaneously if such evidence relates to different periods.

To that regard, we turn to the considerations of the United States (“US”) regarding this claim. The US affirms that the obligation in Article 5.7 of the Agreement is to consider the evidence of dumping and injury simultaneously.<sup>100</sup> According to the US, the term “simultaneously” is linked to the term “considered” and not to the term “evidence”.<sup>101</sup> The US provides as an example of simultaneous consideration, consideration of dumping and injury evidence in “concurrent investigations”.<sup>102</sup>

Brazil does not understand “simultaneous consideration” to mean consideration of dumping and evidence in concurrent investigations. Obviously, in all investigations evidence of dumping and injury have to be considered in concurrent investigations, otherwise the requirements in Article 5.2 and 5.3 of the Agreement are not met. If evidence of injury is considered in a different investigation than the investigation where evidence of dumping is considered, how could the requirement in Article 5.2, that the application include evidence of dumping, injury and causal link, be met? Likewise, how could the authorities examine the accuracy and adequacy of evidence provided in the application if dumping evidence is considered in a separate investigation from the injury evidence? We do not consider that the term “simultaneously” in Article 5.7 of the Agreement refers to consideration of dumping and injury evidence in concurrent investigations.

In addition, Brazil understands that the US Department of Commerce (“DOC”), responsible for dumping investigations, and the US International Trade Commission (“USITC”), responsible for injury investigations, do not issue their dumping and injury determination at the same time. In that sense and according to the interpretation of the term “simultaneously” given by the Panel in *Guatemala – Cement II*, the DOC and the ITC’s consideration of dumping and injury evidence is not made simultaneously.

Even if Article 5.7 of the Agreement is to be understood as simultaneous consideration of evidence of dumping and injury, rather than sequential consideration, that also did not occur in this investigation. The Panel will be able to verify that the final affirmative injury determination was issued on 23 December 1999<sup>103</sup> and the final dumping determination was issued on 23 June 2000<sup>104</sup>, exactly six months after the dumping evidence was considered. How could authorities have simultaneously considered the dumping and injury evidence if there was a six-month gap between the two considerations?

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<sup>100</sup> See, US third party submission, at para. 3.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See, Exhibit BRA-14.

<sup>104</sup> See, Exhibit BRA-15.

#### Claim 41

*To Brazil*

**65. Regarding para. 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.**

#### Response

Brazil does not believe that CNCE's determination that 46 per cent of the total domestic production of the like product constituted the "major proportion" of the collective output of the domestic producers is consistent with Article 4.1 of the Agreement. We remind the Panel that the issue is exactly whether 46 per cent of the total domestic production of poultry in Argentina constitutes a "major proportion" of the total domestic production.

We have provided our understanding of the term "major proportion" in our first submission and, according to that interpretation, we understand Article 4.1 of the Agreement to provide that the domestic industry can either be represented by 100 per cent of the producers of the like product or by those whose production, jointly considered, constitutes more than half of the total domestic production. We understand this to be an objective benchmark that leaves very little room for confusion or abuse. There is no question that 51 per cent, 60 per cent, or 70 per cent of the total domestic production constitutes a "major proportion" of the total (100 per cent) domestic production.

Here, we find it appropriate to consider the arguments presented by Third Parties in respect to this claim.

First, Guatemala recognizes that the term "major" in the English version of the Agreement could imply a higher level of requirement than the term "importante" in the Spanish version.<sup>105</sup> However, Guatemala incorrectly considers that the term "importante" could not, in any case, be meant to constitute more than half of a whole, as provided by Brazil.<sup>106</sup> We do not agree that the term "importante" could not be understood in any case as more than half of the total production. If we follow Guatemala's reasoning, we could not consider the domestic industry as a "proporción importante" in a case where the domestic industry represents 70 per cent of the total domestic production, which is clearly the majority of the total production.

Second, the US provides as an initial matter that Article 4.1 of the Agreement is just a definition and, as such, does not impose an independent obligation on WTO Members.<sup>107</sup> We respectfully disagree with that position. Article 4.1 of the Agreement requires that the term "domestic industry" be interpreted as referring to the domestic producers as a whole or to those of them whose collective output of the products constitutes a major proportion of the total domestic industry. The term "domestic industry" cannot be interpreted any other way than that provided in Article 4.1 of the Agreement. If a Member's investigating authority does so, it is not in compliance with what is required in Article 4.1 of the Agreement.

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<sup>105</sup> See, Guatemala third party submission, at para. 21.

<sup>106</sup> *Id.*

<sup>107</sup> See, US third party submission, at para. 8.

Furthermore, the US is mistaken when it states that the meaning of the term “major” cannot connote to mean “the majority”.<sup>108</sup> We have provided in our first submission that the term can have that connotation.<sup>109</sup>

The US also argues that Brazil’s understanding that the term “major proportion” means “majority” “directly conflicts with the fact that the drafters were quite explicit, elsewhere in the Agreement, when they intended to impose a majority requirement for a particular obligation”.<sup>110</sup> According to the US, Article 5.4 clearly imposes a “majority” requirement, whereas Article 4.1 establishes a “major proportion” requirement, which is a different standard.<sup>111</sup>

We agree with the US that the standard under Article 5.4 is different from that under Article 4.1 of the Agreement. In Article 5.4 of the Agreement, the requirement in order for an application to be considered as made by or on behalf of the domestic industry, is that the application be supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production by that portion of the domestic industry expressing either support for or opposition to the application, as long as those producers that express support for the application constitute at least 25 per cent of the total domestic production. Article 5.4 refers to the standing of the producers supporting the application, while Article 4.1 refers to the definition of “domestic industry”, with implications regarding the injury analysis. In fact, the threshold in Article 5.4 is lower than in Article 4.1 of the Agreement, since they refer to different standards.

Third, unlike the US, the European Communities (“EC”) supports the position that the term “domestic industry” has the same meaning throughout the Anti-Dumping Agreement.<sup>112</sup> Here, the EC seems to imply that “major proportion” is defined by reference to the standing requirements of Article 5.4 of the Agreement, that is, producers accounting for at least 25 per cent of the total domestic production. We cannot agree that the term “major proportion” in Article 4.1, which is used as an alternative to domestic producers as a whole (100 per cent), could mean 25 per cent of the total domestic production. Nothing in the Anti-Dumping Agreement provides, or implies, that “producers expressly supporting the application” is equivalent to the “domestic industry” in an investigation.

Our view is that the term “major proportion” in Article 4.1 allows for determinations to be made in situations where the information for the industry as a whole is not available, so long as that information relates to producers that constitute more than 50 per cent of the total domestic production.

However, if the Panel understands that the Anti-Dumping Agreement does not provide a specific benchmark for what constitutes a “major proportion” of the total domestic production, then we believe that the investigating authority must elucidate how it found a percentage lower than 50 per cent to be a “major proportion”. Otherwise, investigating authorities will have such wide discretion as to consider 46 per cent, 25 per cent or 10 per cent of the total domestic production as sufficient to constitute a “major proportion” of the total domestic industry. We cannot believe that this is the intention of the Agreement.

It is in the Panel’s terms of reference to decide whether 46 per cent of the total domestic production of poultry in Argentina constitutes a “major proportion” of the total domestic production. In doing so, the Panel must consider the meaning of the term “major proportion”. Such consideration must set forth what the investigating authority’s reasoning is (or should be) in determining “major proportion” as a percentage lower than 50 per cent of total domestic production.

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<sup>108</sup> See, US third party submission, at para. 9.

<sup>109</sup> See, Brazil’s first submission, at para. 514.

<sup>110</sup> See, US third party submission, at para. 10.

<sup>111</sup> *Id.*

<sup>112</sup> See, EC third party submission, at para. 51.

We recall that in Argentina's first submission, the only argument set forth was that Brazil's understanding of the term "major proportion" is subjective.<sup>113</sup> On the contrary, we understand that a finding by an investigating authority that a percentage lower than 50 per cent constitutes the "major proportion" of the total domestic production to be subjective. Accordingly, we believe that investigating authorities must elucidate how, in such instances, that proportion of the domestic industry can be understood as constituting a "major proportion".

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<sup>113</sup> See, Argentina's first submission, at para. 302.

## ANNEX A-5

### SECOND ORAL STATEMENT OF BRAZIL

(26 November 2002)

#### INTRODUCTION

1. Brazil welcomes the opportunity to once again appear before the Panel and to present its positions on the dispute regarding Argentina's imposition of definitive anti-dumping duties on poultry from Brazil. We would like to reiterate our appreciation for the time and effort devoted by the Panel and the secretariat to this matter.

2. Similarly to what we have done in the first oral statement, Brazil will endeavour not to repeat the arguments that have already been offered many times in this proceeding. Brazil will simply address some of the main issues before the Panel in light of the arguments and responses provided by Argentina in its second submission (ASS) and in its response to the Panel's questions in the first substantive meeting (AR).

3. Before turning to our specific arguments, we will briefly comment on Argentina's position regarding the ruling by the Mercosul Ad Hoc Arbitral Tribunal and the applicability of the principle of good faith and *estoppel* to this case.

#### RULING BY THE MERCOSUL AD HOC TRIBUNAL

4. Argentina argues that Brazil's conduct in bringing the present dispute to the WTO is contrary to the principle of good faith because a similar dispute has already been brought, discussed and settled within Mercosul. According to Argentina, the present dispute before the Panel represents an exercise of Brazil's right that is contrary to the principle of good faith and, thus, the Panel should prevent Brazil from invoking its rights under the WTO by applying the principle of *estoppel*.<sup>1</sup>

5. Brazil strongly opposes Argentina's allegation and affirms that the exercise of its rights under the WTO is **not** contrary to the principle of good faith.

6. In that regard, we recall that the claims of the dispute before this Panel are **not** the same as the claims that were before the Mercosul Tribunal. The Mercosul Tribunal dealt with the dispute based on whether provisions that make up Mercosul's framework were correctly interpreted, applied or complied with in the anti-dumping investigation carried out by the Argentinean authorities.<sup>2</sup> The claims raised in Brazil's request for the establishment of a WTO Panel relate to Argentina's non-compliance of its obligations in the WTO, in particular under the Anti-Dumping Agreement.<sup>3</sup>

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<sup>1</sup> Argentina Second Submission ("ASS"), paragraph 6.

<sup>2</sup> See, Article 1 of the Brasília Protocol.

<sup>3</sup> *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil: Request for the Establishment of a Panel by Brazil*, WT/DS241/3 (26 Feb. 2002).

7. Argentina's allegation that Brazil has not acted in accordance with the principle of good faith by first resorting to the Mercosul dispute settlement mechanism and then resorting to the WTO dispute settlement system with respect to the same dispute<sup>4</sup> is not correct. We have shown that the disputes are not the same.

8. Furthermore, the Mercosul Tribunal itself found that it did not have the appropriate jurisdiction to examine claims of WTO violations. We recall that the Mercosul Tribunal found that Mercosul anti-dumping rules for trade within the region were not properly in force<sup>5</sup> and that Mercosul Member States were allowed to apply their domestic anti-dumping legislation with respect to regional trade.<sup>6</sup>

9. The Tribunal further established that the discrepancies related to the existence of requirements for the application of anti-dumping duties, that is, whether there was dumping, injury and causal link, were not aspects that were up to the Tribunal to clarify.<sup>7</sup> Thus, the Tribunal itself recognized that its jurisdiction was limited.

10. Moreover, we understand that Article 23 of the DSU mandates exclusive jurisdiction in favor of the DSU for WTO violations.

11. Article 3.2 of the DSU provides that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements". Accordingly, it is Brazil's right to have the Panel hear and decide its claims brought before it. To interpret otherwise would diminish Brazil's rights under the WTO covered agreements.

12. Regarding Argentina's allegation that the principle of *estoppel* should be invoked in this WTO dispute, we restate that simply because Brazil has brought a related – but different – dispute to the Mercosul Tribunal does not mean that Brazil has accepted to relinquish its right to bring the current dispute before the Panel. We accentuate the fact that the dispute before this Panel is based on a different legal basis than the dispute brought before the Mercosul Tribunal.

13. Even by Argentina's standard of what constitutes estoppel - a statement of fact which is clear, unambiguous, voluntary, unconditional and authorized, which is relied upon in good faith<sup>8</sup> - the Panel will verify that no such statement was made on behalf of Brazil renouncing its right to bring a dispute, based on different claims, to the WTO.

14. Alternatively, Argentina appears to argue that, in considering the claims brought forth by Brazil in this dispute, the Panel cannot ignore the ruling by the Mercosul Tribunal in keeping with the rules of international law applicable in the relations between the parties, pursuant to Article 31.3(c) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), and as provided in Article 3.2 of the DSU.<sup>9</sup> Concerning this allegation, the following considerations are in order.

15. First, Argentina requests that the Panel consider the Mercosul rules used by the Mercosul Tribunal in interpreting the current dispute before the Panel.<sup>10</sup> We cannot reasonably presume that a ruling by the Mercosul Tribunal, which does not even address the Anti-Dumping Agreement, is to be

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<sup>4</sup> ASS, paragraph 10.

<sup>5</sup> Award of the Fourth Mercosul *Ad Hoc* Arbitral Tribunal, 21 May 2001, at paragraph 131.

<sup>6</sup> *Id.*, paragraph 153.

<sup>7</sup> *Id.*, paragraph 214.

<sup>8</sup> ASS, paragraph 13.

<sup>9</sup> ASS, paragraph 7.

<sup>10</sup> ASS, paragraph 29.

used in the interpretation of provisions of that Agreement, which binds over 140 WTO Members that are not Members of Mercosul.

16. Second, Brazil reaffirms that Article 3.2 of the DSU deals exclusively with the clarification of the existing provisions of the WTO Agreement. It is clear from the language in Article 3.2 that the dispute settlement system “serves to preserve the rights and obligations of Members under the “covered agreements” and to clarify the existing provisions of **those agreements**”.

17. Contrary to Argentina’s understanding,<sup>11</sup> Article 3.2 of the DSU is, in fact, limited to the rules of interpretation used to clarify the existing provisions of the WTO Agreement and bears no association to the relationship between previous rulings by an international tribunal and the rights and obligations of WTO Members under the “covered agreements”.

## INITIATION OF THE DUMPING INVESTIGATION

### (a) Article 5.2 – Lack of Evidence in the Application

18. According to Argentina, the JOX publication of 30 June 1997, presented in the application, contained information on “whole poultry”. Specifically, that publication provides the price of chilled poultry with head, feet and giblets sold in São Paulo, Brazil.<sup>12</sup> Argentina has **affirmed** that this “physical characteristic” difference affects prices and that the difference holds a value equivalent to the demand in view of markets’ characteristics.<sup>13</sup>

19. Even though Argentina alleges that these differences affect prices, Argentina failed to show where in the application or in the determination to initiate the investigation evidence was presented to support this allegation. In fact, Argentina **assumes** that the alleged differences have such effects **solely** based on the product description of the JOX publication.

20. Argentina has also stated that the evidence presented by petitioner to the authority contained sufficient data, within the meaning of Article 5.2 of the Agreement, that: (1) there were physical characteristic differences in the product used as basis to calculate normal value; (2) that in so far as these differences affected the commercial yield of the products object of comparison, there **unquestionably** was an impact in the price comparability; and, (3) that such differences merited an adjustment that would allow, prior to initiation, a fair comparison, for which an adjustment methodology was presented.<sup>14</sup>

21. Apparently, Argentina **assumes** that from the data provided in the JOX price publication an investigating authority could **infer** that all poultry sold in Brazil contains head and feet; that such differences affect price comparability; that an adjustment was, thus, warranted and that the methodology presented by petitioner was justified. However, once again, Argentina does not indicate the **evidence** presented in the application that would support the investigating authority’s conclusions that petitioner’s adjustment, as proposed, was necessary for purposes of making a fair comparison between export price and normal value.

22. Even though Argentina appears to agree with Brazil’s definition of “evidence”<sup>15</sup>, Argentina still fails to indicate what “information drawn from a document tending to prove a fact or

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<sup>11</sup> ASS, paragraph 23.

<sup>12</sup> Argentina Response to the Panel’s Questions in the First Substantive Meeting (“AR”), question 5.

<sup>13</sup> *Id.*

<sup>14</sup> ASS, paragraph 36.

<sup>15</sup> AR, question 6.

proposition”<sup>16</sup> was used to support the allegation that these differences affect price comparability and justify the methodology used for the normal value adjustment.

23. In responding to the Panel’s question as to whether Argentina considered that the JOX price publication for only one day (30 June) was all the information “reasonably available to the applicant” on normal value, Argentina replied that although petitioner submitted the value for one day, this value indicated the **trend** of prices in the market as well as the causes of the existence of its variations.<sup>17</sup>

24. Here, Brazil cannot agree that the JOX price published for only one day in 1997 could reasonably indicate **a trend** of prices in the market for a six-month period.

25. In that regard, Argentina affirms that the “evidence provided [in the application] is a representative value taken from a specialized publication for a given period.”<sup>18</sup> When asked what the term “given period” meant, Argentina categorically stated that even though the JOX publication provides for the price in effect on 30 June 1997, one can see in the right margin of that publication that the “production of the parallel market of São Paulo’s inland is clearly inferior, which has maintained the price in solid ground”.<sup>19</sup> According to Argentina, this information reflects that the price published by JOX did not vary considerably and has maintained its stability.<sup>20</sup> We understand this to be Argentina’s reasoning for not providing JOX price publication for other months in 1997, in the establishment of the normal value.

26. Here, we call the attention of the Panel to the fact that the information quoted by Argentina in the JOX publication refers to the **live** poultry market and **not** to the frozen or chilled poultry market (slaughtered poultry), a market, whose description by the same publication, does not contain the reference cited by Argentina. Thus, Argentina tries to use the explanation in the JOX publication for a different product, **live poultry**, to justify not requesting, or using, prices for more than one day in 1997 for chilled poultry, a product that is completely different from live poultry. Brazil does not accept this as a reasonable explanation for the establishment of normal value based on only one day in 1997.

27. Furthermore, the JOX price publication used by petitioner in the application is a daily publication. Accordingly, Brazil has provided Exhibit BRA-19, which demonstrates that normal value information for all of 1996 and 1997 was “reasonably available” to petitioner. This Exhibit shows that petitioner could have attached information on prices of poultry published by JOX for all months of 1997 but, instead, chose to provide it for one single day in that year.

28. According to Argentina’s own definition, the phrase “reasonably available evidence to the applicant” in Article 5.2 is defined as evidence that may be obtained by an applicant without an excessive burden of proof that would make the presentation of the application impossible.<sup>21</sup>

29. Brazil understands that the JOX price publication for all months of 1997 was information that could have been obtained by the applicant without an excessive burden of proof and would have made the presentation of the application possible.

30. Argentina also affirms that the JOX price publication for 30 June 1997 was considered normal value evidence submitted in the application and that the investigating authority did not require

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<sup>16</sup> Brazil First Submission (“BFS”), paragraph 63.

<sup>17</sup> AR, question 7.

<sup>18</sup> Argentina First Submission (“AFS”), paragraph 50.

<sup>19</sup> AR, question 12.

<sup>20</sup> *Id.*

<sup>21</sup> AR, question 8.



additional information on it.<sup>22</sup> Argentina understands that the authority did not find it necessary to request additional information with respect to the physical characteristic differences mentioned in the application and the adjustment provided by the applicant, taking into account the standard of information to be considered in that stage of the investigation (that is, prior to initiation).<sup>23</sup>

31. We find that this statement actually proves that the authority failed to examine the accuracy and adequacy of the information provided in the application. This adjustment to normal value was so important that without it the applicant could not have alleged the existence of dumping and, thus, the investigation could not have been initiated. It was obvious from the information provided in the application that the investigating authority, fully aware of the impact of the adjustment, should have required, and used, additional information.

32. Accordingly, Brazil understands that Argentina neither gave consideration to the impact of the possible differences on the sufficiency of the evidence submitted in the application, nor did it seek further evidence, as confirmed by Argentina.

(b) Article 5.3 - Accuracy and Adequacy of the Evidence Provided in the Application

33. Brazil reaffirms its position that the method adopted 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.<sup>24</sup> Brazil has also affirmed that the methodology adopted by the Argentinean authority is, in fact, the “zeroing” methodology.<sup>25</sup>

34. Argentina has confirmed our understanding that in establishing the dumping margin for purposes of initiation, the investigating authority has taken all export transactions with prices below normal value, excluding those transactions that would result in a negative dumping margin.<sup>26</sup> Therefore, there is no doubt that the Argentinean methodology inflated the dumping margin and made sure that one existed.

## CONDUCT OF THE ANTI-DUMPING INVESTIGATION – EVIDENTIARY AND PUBLIC NOTICE REQUIREMENTS

(a) Article 12.1 – Notification and Public Notice of the Initiation

35. Regarding the claim of violation of Article 12.1 of the Agreement, Brazil has already demonstrated that the investigating authority **knew**, prior to initiation, of the existence and interest of at least five of the seven exporters that were not notified of the investigation almost eight months after it had been initiated.<sup>27</sup>

36. Argentina seems to imply that the authority must notify only those parties that consider themselves interested in the investigation, within the meaning of Article 6.1.1 of the Agreement.<sup>28</sup> Argentina’s reasoning is untenable; how can a party present itself as an interested party if it does not even know that an investigation has been initiated? That is exactly why Article 12.1 requires the authority to notify interested parties known to them.

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<sup>22</sup> AR, question 9.

<sup>23</sup> AR, question 11.

<sup>24</sup> Brazil First Oral Statement (“BFO”), paragraphs 24 and 25.

<sup>25</sup> BFO, paragraph 26.

<sup>26</sup> AR, question 11.b.

<sup>27</sup> Brazil Second Submission (“BSS”), paragraphs 45 through 53.

<sup>28</sup> AR, question 24.

37. In explaining how it reconciles the fact that five exporters were listed (and identified) in the report initiating the investigation, but notified only eight months after initiation, Argentina confirms that it “knew” these exporters but that this alone did not constitute an “identification” that would have made it possible for the authority to send the corresponding questionnaires.<sup>29</sup> Presumably, Argentina is claiming that it did not have the addresses of those companies.

38. Once again, Argentina tries to share the notification obligation imposed on the investigating authority with Brazil, by stating that the authority requested the co-operation of the Brazilian government in this identification.<sup>30</sup> This is simply not true; Brazil never received any communication from the Argentinean authorities requesting such information concerning those five **specific** exporters identified in the report.

(b) Article 6.1.1 – Deadlines for Responses

39. In response to the panel’s question on the Article 6.1.1 issue, Argentina has explicitly stated that it does **not** apply a system where a lesser period is provided at the outset, as long as the total period, including extensions, is at least 30 days.<sup>31</sup> Argentina, in fact, confirms that the 30-day deadline from the outset is applicable in all situations. Nonetheless, in Argentina’s Exhibits ARG-XLVI through ARG-LIII, we verify that the deadline set forth by the authority for the questionnaire responses was for a period **no longer than 20 days** from receipt of the mentioned notification.

40. Taking into account the statement made by Argentina together with the fact that the deadline provided by the DCD was for a period no longer than 20 days and that the CNCE never sent the injury questionnaire to the seven exporters, it is clear that the investigating authorities were in violation of Article 6.1.1 of the Agreement.

(c) Article 6.1.2 – Evidence Shall Be Made Available Promptly

41. Brazil has asserted that Argentina did not make promptly available the evidence presented by the other interested parties in the investigation to the seven Brazilian exporters that were notified of the investigation almost eight months after it had been initiated.<sup>32</sup>

42. Once again, Argentina confuses the requirement under Article 6.1.2 by explaining that interested parties in the investigation are the parties that have qualified themselves in the investigation as interested parties and have manifested an interest to participate in the investigation.<sup>33</sup>

43. We do not agree with Argentina’s understanding of Article 6.1.2. First, a party cannot qualify itself as an interested party in an investigation if it is not aware of the investigation. Second, a party need not qualify itself in an investigation in order to be a part of it. Third, the lack of interest of a party in an investigation does not exclude or diminish the obligation of the investigating authorities of promptly making available to them evidence presented in writing by other interested parties.

44. Argentina seems to think that an interested party is only included in an investigation once it has requested to participate in that investigation.<sup>34</sup> This reasoning simply does not make sense. There is nothing in the Anti-Dumping Agreement that requires parties to request participation in an

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<sup>29</sup> AR, question 26.

<sup>30</sup> AR, question 26.

<sup>31</sup> AR, question 31.

<sup>32</sup> BFS, paragraphs 215 through 220.

<sup>33</sup> AR, question 32.

<sup>34</sup> ASS, paragraph 50 (last sentence).

investigation in order to be included in that investigation. In order for a party to be included in an investigation, the party must simply be a producer/exporter of the product subject to the investigation.

(d) Article 6.8 and Article 12.2.2 – Inappropriate Use of Facts Available

45. With respect to the authority's disregard of the responses provided by the Brazilian exporters on the description of the product sold to Argentina and in Brazil, Argentina has firmed its position that only information provided by the exporters that was accompanied by supporting documentation was used by the authority in establishing the normal value.<sup>35</sup>

46. In its second submission, Brazil has demonstrated that Argentina's lack of supporting documentation argument did not entitle the authority to resort to facts available.<sup>36</sup> The Panel will note that Sadia, Avipal, Frangosul and Catarinense provided responses in the questionnaire regarding the description of the product sold to Argentina and in Brazil.<sup>37</sup> The Panel will also note that the questionnaires did not **specify** that the product description information required supporting documentation. Furthermore, the investigating authority did not, at any moment during the course of the investigation, request specific information, clarification or supporting documentation on the product description responses submitted by these exporters.

47. In addition, the investigating authorities never informed these exporters that their information would not be accepted and, thus, never provided the exporters an opportunity to provide explanations or supplemental documentation, pursuant to Paragraph 6 of Annex II of the Agreement.

48. Brazil understands that Article 6.1 of the Agreement requires authorities to give notice to all interested parties of the information that is required. Consequently, if an investigating authority does not clearly specify what information is required, the investigating authority cannot resort to facts available and punish the interested party for not submitting such information. Likewise, Paragraph 1 of Annex II of the Agreement also requires authorities to specify in detail the information required from any interested party.

49. Furthermore, the Brazilian Government specifically objected the authority's adjustment calculation. Nonetheless, the Argentinean authority still made the adjustment to normal value based on the adjustment proposed in the application, even though petitioner did not provide supporting documentation for its proposed adjustment.

50. In this regard, we understand that the authority failed to use "special circumspection", within the meaning of Paragraph 7 of Annex II, in applying the arbitrary adjustment to normal value as suggested by petitioner in the application.

51. Still with respect to Article 6.8 of the Agreement, the authority also disregarded the export price provided by all Brazilian exporters and, instead, established the export price based on the import information from the Argentinean agency *Ganaderia*.

52. In particular, Argentina explains, for the first time, that the information provided by Frangosul and Catarinense was not used simply because in Frangosul's case the information submitted was insufficient and outside the deadline, and in the case of Catarinense because the information was considered insufficient.<sup>38</sup>

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<sup>35</sup> ASS, paragraph 54.

<sup>36</sup> BSS, paragraphs 62 through 81.

<sup>37</sup> Exhibits BRA-22, BRA-23, BRA-24, BRA-25 and BRA-26.

<sup>38</sup> ASS, paragraph 56.

53. This explanation seems to contradict Argentina's own response that Frangosul provided supporting documentation for the export prices reported in the investigation.<sup>39</sup> It is noteworthy that Argentina does not respond to the Panel's question on whether the DCD had sufficient export price data for Frangosul and Catarinense.<sup>40</sup> The answer to that question would be that not only did Frangosul and Catarinense provide all the export price data requested by the authority within a reasonable period but they also provided the corresponding supporting documentation.<sup>41</sup>

54. The Panel should also note that the Brazilian exporters Sadia, Avipal, Frangosul and Catarinense provided export price information on poultry sold to Argentina for the period 1996 through 1999, as required by the authority.<sup>42</sup>

(e) Article 6.10 – Individual Margin of Dumping

55. On the claim of violation of Article 6.10, Argentina apparently seems to justify not calculating individual margins for Frangosul and Catarinense based on the argument that the normal value information provided by these companies was not accompanied by supporting documentation.<sup>43</sup>

56. We have already presented our views as to Argentina's inappropriate use of facts available based on lack of supporting documentation. In the case of Frangosul, the authority changed the scope of the dumping period of data collection more than eight months after the investigation had initiated and requested supporting documentation for all sales transactions in the internal market. By doing so, the investigating authority did not act in a reasonable, objective and impartial manner and could not have resorted to facts available.<sup>44</sup> In the case of Catarinense, the investigating authority never requested supporting documentation for the sales transactions in the home market reported by the company.<sup>45</sup>

57. Furthermore, we have demonstrated that both Frangosul and Catarinense provided the required export price data with supporting documentation but the authority nonetheless disregarded that information.

58. In that regard, we refer to Argentina's explanation that it was evident that the investigating authority did not count on the necessary elements to calculate the individual margins of dumping.<sup>46</sup> According to Argentina, this margin appears from the relationship between both values, the export price and the normal value; no supporting documentation was provided for the latter.<sup>47</sup>

59. We point out to the Panel that even though the investigating authority also disregarded the export price information submitted by the exporters Sadia and Avipal, the investigating authority still calculated the individual margins of dumping for those two companies. Brazil fails to see the reason why the authority decided to proceed differently with respect to the information provided by Frangosul and Catarinense.

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<sup>39</sup> AR, question 45.

<sup>40</sup> AR, question 45.

<sup>41</sup> Pages 29, 38, 39 and 49 of Exhibit BRA-15.

<sup>42</sup> Pages 18, 22, 29, 38, 39, 43, 45 and 49 of Exhibit BRA-15.

<sup>43</sup> AR, questions 44 and 45.

<sup>44</sup> Brazil's Response to the Panel's Questions in the First Substantive Meeting ("BR"), question 41.

<sup>45</sup> BFS, paragraph 250.

<sup>46</sup> AR, question 45.

<sup>47</sup> AR, question 45.

## CONDUCT OF THE ANTI-DUMPING INVESTIGATION - FINAL AFFIRMATIVE DETERMINATION

(a) Article 2.4 – Fair Comparison

60. On the claim that Argentina failed to make due allowance for freight in the normal value of the exporters Sadia and Avipal, Argentina admits that Sadia presented in Annex VIII the internal freight costs for sales in the internal market.<sup>48</sup> Argentina further explains that this adjustment should have been made had Sadia presented supporting documentation.<sup>49</sup>

61. What Argentina fails to state is that after Sadia submitted the internal freight cost data in Annex VIII of its questionnaire response, the investigating authority never requested additional information, clarification or supporting documentation regarding internal freight costs.<sup>50</sup>

62. Even though Argentina agrees that this adjustment has “a decisive and significant impact on price comparability”,<sup>51</sup> it still maintains that the investigating authority would have acted incorrectly if it had made this specific discount.

63. We have already demonstrated that the authority could have used a secondary source of information to estimate such deduction, as it did with the normal value adjustment to compensate the alleged characteristic differences between poultry sold to Argentina and in Brazil, but it chose not to.<sup>52</sup>

64. Furthermore, Exhibit ARG-LVI presents a letter from Sadia and Avipal’s attorney to the investigating authority explicitly stating that the normal value established for Sadia and Avipal incorrectly included internal freight costs.<sup>53</sup> Even so, the investigating authority still did not make the required freight adjustment to the normal value of these two companies.

65. On the claim relative to Argentina’s failure to make due allowance for differences in taxation, freight and financial cost in the normal value established for all other exporters, if the authority found that the JOX information was so reliable as to make adjustments concerning physical characteristics that were not warranted, why did the authorities not consider the JOX information on taxation, freight and financial cost adjustments reliable?

66. We underline that the JOX information on taxation, freight and financial cost adjustments was provided as a result of a request made by the investigating authority and not by any interested party in the investigation. If the JOX response was provided in Portuguese, the authorities themselves should have either translated the information or requested that JOX provide a translation. Instead, the investigating authority chose not to consider that information and not to make the required adjustments.

67. Argentina argues that the JOX information was not taken into account because it would result in an improper comparison between an *ex factory* price for the normal value and an FOB export price. According to Argentina, there was no identical information on the deductions to be made from the export values of the goods.<sup>54</sup>

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<sup>48</sup> ASS, paragraph 71.

<sup>49</sup> *Id.*

<sup>50</sup> AR, question 47, Exhibit ARG-XLIV.

<sup>51</sup> AFS, paragraph 211.

<sup>52</sup> BFO, paragraph 53.

<sup>53</sup> Exhibit ARG-LVI.

<sup>54</sup> AFS, paragraph 229.

68. Brazil recalls that an FOB price includes inland freight to the port of exportation, inland insurance, handling and loading charges. An FOB price, however, does not include taxes and financial cost. Thus, there were no adjustments to be made to the FOB export price with respect to taxes and financial cost. Because the FOB price does not include taxes and financial cost the authority should have, at least, made an adjustment in the normal value to exclude taxes and financial cost (included in JOX prices), in making a fair comparison. In doing so, the authority would still be left with a normal value price that was not exactly *ex factory* – for it would still include internal freight charges – but the comparison would be on a more similar level of trade. These deductions would have permitted a fair comparison.

69. On the claim that the investigating authority imposed an “unreasonable burden” on exporters, Brazil would merely like to clarify that Argentina’s statement that the investigating authority did not request or require during the investigation that all invoices be presented is not true.<sup>55</sup>

70. The investigating authority did, in fact, request supporting documentation for all of the sales transactions in Brazil and to Argentina. The Panel will confirm this by looking at pages 18, 19, 22, 23, 27, 29 and 30 of Exhibit BRA-15. We recall that exporters Sadia, Avipal and Frangosul complained that this requirement was excessive and impossible to meet due to the great volume of sales in the home market.<sup>56</sup>

(b) Article 3 – Injury Determination

71. Regarding the claims of violation on the use of different periods to evaluate the relevant economic factors and indices listed in Article 3.4, Argentina maintains that an authority is not obligated to examine any of the factors outside the period of investigation.<sup>57</sup>

72. We agree with Argentina that an authority is not obligated to examine any Article 3.4 factor outside the period of investigation. However, this is not the case at issue. In this investigation, the Argentinean authority considered a certain period of injury analysis for the factors production, prices, imports, exports and apparent consumption and considered another period of injury analysis for the remaining Article 3.4 factors.

73. In explaining its position, Argentina provides that the authority considered some factors with the purpose of ratifying the trend observed during the period of investigation.<sup>58</sup> In that sense, the investigating authority evaluates certain relevant factors for a given period outside the period of investigation by way of reference.<sup>59</sup>

74. The Panel can verify that, in this investigation, that is not how the Argentinean authority proceeded. Brazil believes that if the investigating authority had examined the factors production, prices, imports, exports and apparent consumption for the first semester of 1999 by way of reference, the authority would have stated so in the final injury determination just as it did with respect to the data for the year 1995.<sup>60</sup>

75. In the final injury determination, the authority explicitly stated that it took into account data for the year 1995 as a reference year. Because the data collected for 1995 was used just as a reference

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<sup>55</sup> AR, question 52.

<sup>56</sup> Exhibits BRA-29, BRA-31 and BRA-26.

<sup>57</sup> AR, question 59.

<sup>58</sup> AR, question 59.

<sup>59</sup> AR, question 59.

<sup>60</sup> Page 9 of Exhibit BRA-14.

and was not included in the authority's examination, the investigating authority didn't even mention the year 1995 in its narrative evaluation of Article 3.4 factors. The Panel will note that for all factors that were evaluated in the injury determination, the authority begins its evaluation with the year 1996. Likewise, in the Tables attached to the final injury determination, the data for 1995 even appears in a different shade from the rest of the data with an indication at the bottom of each Table that the year 1995 is used as a reference period.

76. Unlike the data for 1995, the investigating authority made a narrative evaluation for the factors production, prices, imports, exports and apparent consumption, taking into account the first semester of 1999.<sup>61</sup> In the same manner, the data for the first semester of 1999 in the Tables relating to the factors production, prices, imports, exports and apparent consumption appear in the same shade as the data for the period January 1996 through December 1998,<sup>62</sup> and there is no indication that the data for the first semester of 1999 is used only by way of reference.<sup>63</sup>

77. Regarding the authority's failure to exclude the imports of the Brazilian exporters Nicolini and Seara from the "dumped imports" in the injury analysis, we must point out that instead of citing the final determination to ensure that non-dumped imports were excluded for the purposes of the injury analysis, Argentina tries in its first submission to explain that because "the average FOB prices for the other imports investigated were lower than the prices of companies that did not practice 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".<sup>64</sup>

78. We fail to see how this explanation proves that the imports from Nicolini and Seara were **effectively** taken out of the total "dumped imports" in the injury analysis.

79. On the other hand, Brazil has shown that the injury analysis in the final determination never mentioned the exclusion of the imports from these two Brazilian exporters.<sup>65</sup> Brazil has found additional support on the fact that the final injury determination was issued on 23 December 1999, and preceded by six months the final dumping determination, which was issued on 23 June 2000.

80. Furthermore, Argentina states that the investigating authority took into account the determination that there was no dumping by Nicolini and Seara, when analysing the causal link relationship.<sup>66</sup> This alone is a clear indication that in the injury analysis the authority did not exclude the non-dumped imports. After all, it is in the injury determination that authorities must examine the volume, the effect, and the impact of the "dumped imports".

81. Even if we look at the causal link determination, we find no indication that Nicolini and Seara's imports were excluded from the total "dumped imports".<sup>67</sup> We repeat, the final causal link determination simply restated what was already provided in the final dumping determination.

82. Let's now turn to Argentina's allegation that the factor actual and potential decline in productivity was specifically analysed in the final injury determination.<sup>68</sup>

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<sup>61</sup> Pages 9, 10, 14, 15, 16 and 25 of Exhibit BRA-14.

<sup>62</sup> Tables 1, 5, 15b- 16, 22-29 and 30-31 of Exhibit BRA-14.

<sup>63</sup> *Id.*

<sup>64</sup> AFS, paragraph 269.

<sup>65</sup> Exhibit BRA-14.

<sup>66</sup> AFS, paragraph 266.

<sup>67</sup> Exhibit BRA-16.

<sup>68</sup> AR, question 59.

83. Brazil has not found in the final determination a specific analysis of the factor productivity over the injury period of investigation. There is also no specific data in the final determination or in the Tables attached to the determination that present an explicit analysis of that factor. What Argentina has presented is the evaluation by the authority of the factors production capacity, utilization of capacity, employment, wages, cost structure and sales in the internal market, but not the evaluation for the factor productivity.

84. To that effect, Argentina mentions that the determination provided that “in general terms, the relative stability of the number of employees in relation to the increase observed in the production, would be indicating a greater physical productivity of labour, probably due to the incorporation of the aforementioned technology”.<sup>69</sup> We fail to see how that qualifies as a specific analysis of the factor productivity for the injury period of investigation and where the data regarding productivity for that period is indicated.

85. Furthermore, Argentina indicates that the investigating authority relied on a letter presented by petitioner on 2 December 1999 to evaluate the factor productivity.<sup>70</sup> On this issue, Brazil makes the following considerations.

86. First, the letter presented by petitioner contained no data, or supporting documentation, regarding its allegation.<sup>71</sup> Second, Argentina cites a passage in the final determination that refers to the arguments by the parties and not to the authority’s evaluation of factors in the impact examination.<sup>72</sup> The authority simply restated in the final determination part of the letter presented by petitioner and failed to evaluate and consider data for the factor productivity for the injury period of investigation.<sup>73</sup>

87. Brazil also stresses the fact that Argentina has not indicated where in the final determination the factor magnitude of the dumping margin was evaluated. In this respect, Argentina has not responded to the Panel’s question to comment on paragraph 81 of Brazil’s first oral statement.<sup>74</sup> This omission is not surprising. Brazil has already established that the investigating authority did not and could not have evaluated this factor because the final dumping determination, with the dumping margin, was issued six months after the final injury determination was issued.

88. In addition, Argentina has also failed to indicate where in the final determination there is a **specific** evaluation of data for the factors cash flow, growth and ability to raise capital and investments for the injury period of investigation.

89. In examining claims 38 through 40, the Panel should keep in mind that even though some factors may not have been relevant or weighed significantly in the decision of the investigating authority, the authority was still obligated to explain its conclusion as to the lack of relevance or significance of such factors and could not have simply disregarded them.

## CONCLUSION

90. Members of the Panel, the purpose of this statement is merely to address some of the main or new arguments raised by Argentina in its second written submission and in its response to the Panel’s questions. We have tried not to repeat the arguments already set forth in previous stages of this

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<sup>69</sup> Page 13 of Exhibit BRA-14.

<sup>70</sup> AFS, paragraph 279.

<sup>71</sup> Exhibit ARG-LX.

<sup>72</sup> Page 95 of Exhibit BRA-14.

<sup>73</sup> *Id.*

<sup>74</sup> AR, question 59.



proceeding and to offer additional clarification on the fundamental issues of this dispute. In this statement, we did not mention claims where Argentina's second submission and answers to the Panel's questions did not introduce any new or significant arguments.

91. In conclusion, we request that the Panel find that Argentina has acted inconsistently with the provisions of the Anti-Dumping Agreement as provided in the 41 claims presented in Brazil's first submission. We thank you for your time and attention and will be pleased to answer any questions you may have.

## ANNEX A-6

### REPLIES OF BRAZIL TO QUESTIONS OF THE PANEL – 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.**

#### Response

Brazil would first like to clarify that Frangosul and Catarinense did, in fact, submit the requested normal value and export price information and that, therefore, the investigating authority could not have disregarded that information based on the relevant provisions of the Anti-Dumping Agreement. Consequently, the Argentinean authority was, in fact, required to calculate an individual dumping margin for Frangosul and Catarinense.

We understand that Argentina has alleged that the investigating authority could not calculate an individual margin of dumping for these two companies because the normal value information presented by them was not accompanied by supporting documentation.<sup>1</sup> In that regard, we present, once again, the chronology of the normal value and export price information presented by these two companies and the reasons why the DCD could have, and should have, calculated an individual margin of dumping for them.

#### ***Frangosul's Normal Value***

Regarding the normal value data submitted by Frangosul, the Panel can verify that on **27 April 1999**, Frangosul responded to Section C of the questionnaire regarding sales to the domestic market. This information included sales of poultry in Brazil corresponding to the years 1996, 1997, 1998 and the first three months of 1999, separated by month.<sup>2</sup> The Panel will also note that, subsequently, the Argentinean authority requested supporting documentation for all of the sales transactions in the internal market covering that period.<sup>3</sup>

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<sup>1</sup> Argentina Response to the Panel's Questions in the First Substantive Meeting ("AR"), questions 44 and 45.

<sup>2</sup> Page 29 of Exhibit BRA-15.

<sup>3</sup> Pages 29 and 30 of Exhibit BRA-15.

**On 19 August 1999**, Frangosul sent a letter to the DCD explaining that the great volume of sales in the internal market did not make it possible for the company to provide copies of invoices for each transaction.<sup>4</sup> In this letter, Frangosul indicated that over 320,000 invoices are issued in one given year for sales transactions in the internal market and that the invoices were available to the investigating authority for a verification *in loco* or for a selection of such documents for specific transactions to be used as sample.<sup>5</sup>

**On 12 October 1999**, the DCD requested a new list of invoices with the total transactions in the internal market for the period January 1998 through January 1999, so that the DCD could select a sample and subsequently request the supporting documentation for that sample.<sup>6</sup> This was the first time that the investigating authority informed Frangosul what the dumping period of data collection was.

**On 30 December 1999**, Frangosul presented a diskette with the list of invoices for the sales transactions in the internal market for the period January 1998 through January 1999.<sup>7</sup> The investigating authority never selected the specific transactions for which Frangosul was supposed to present the supporting documentation.

**On 5 January 2000**, the DCD notified Frangosul of the end of the evidence-producing stage of the investigation.<sup>8</sup>

Brazil understands that the application of Article 6.8 of the Agreement is also dependent upon the actions of the authority in an investigation. If an investigating authority does not act in a proper manner during the investigation, it cannot claim that the interested party did not comply with the requirements of Article 6.8 and, thus, resort to the application of facts available. To support this understanding, we have turned to the Panel's consideration in *Guatemala – Cement II* on the interpretation of the application of Article 6.8 of the Agreement:

*“(...) We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner (...)”<sup>9</sup> (emphasis added)*

Because the Argentinean authority changed the scope of the dumping period of data collection more than eight months after the investigation had initiated and, in the beginning of the investigation, requested supporting documentation for all sales transactions in the internal market for a period over 3 years, we understand that the authority did not act in a reasonable, objective and impartial manner and could not have resorted to the use of facts available.

### *Catarinense's Normal Value*

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<sup>4</sup> Exhibit BRA-26.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, 24 October 2000, WT/DS156/R, at para. 8.251 (adopted on 17 November 2000) (“*Guatemala – Cement II*”).

With respect to the normal value data submitted by Catarinense, we observe that Catarinense was notified of the investigation and the need to respond to the dumping questionnaire on **15 September 1999**, almost eight months after the investigation had initiated.<sup>10</sup> In this notification, the DCD established that the normal value and export price information to be provided was for the period January 1998 through January 1999.

**On 3 November 1999**, Catarinense provided the questionnaire response with information on sales transactions to Argentina, disaggregated by transaction, with supporting documentation, as well as the information on sales transactions in Brazil, disaggregated by transaction, without supporting documentation.<sup>11</sup> The Argentinean authority never requested the supporting documentation for Catarinense's sales transactions in the internal market, nor did it select specific transactions in the internal market for Catarinense to provide the corresponding supporting documentation.

Even though the authority notified Catarinense almost eight months after the investigation had initiated and after a preliminary dumping, injury and causal link determination had been issued, Catarinense still submitted the requested information. Nonetheless, the DCD disregarded the normal value information submitted by the exporter.

### *Frangosul and Catarinense's Export Price*

Regarding the export price submitted by Frangosul and Catarinense, the Panel will note that both exporters reported the information, disaggregated by transaction, with the supporting documentation.<sup>12</sup> Apparently, even Argentina concurs with this fact.<sup>13</sup>

Even though Frangosul and Catarinense submitted the requested export price information with supporting documentation, the Argentinean authority still disregarded the export price data provided by them and resorted to facts available.

Here, it is important to note that even though the Argentinean authority also disregarded the export price data submitted by Sadia and Avipal, the authority still calculated the individual dumping margins for those two companies. We do not agree with Argentina's disregard of Sadia and Avipal's export price information, but we find it correct that the investigating authority still proceeded to calculate an individual dumping margin for those companies. We do not understand why, and cannot agree that, the investigating authority proceeded differently with respect to the information provided by Frangosul and Catarinense. There simply was no reason under Article 6.8 of the Agreement for the Argentinean authority to have disregarded the normal value and the export price (with supporting documentation) provided by these two exporters.

With that in mind, we respond the Panel's question by stating that there simply was no basis in the Agreement for the Argentinean authority to disregard the information provided by the exporters Frangosul and Catarinense.

We point out that even if the two exporters had not submitted the appropriate information and the authority had correctly disregarded it in accordance with the relevant provisions of the Agreement, the investigating authority was still required to calculate an individual dumping margin for the two exporters, as provided under Article 6.10 of the Agreement. The fact that an exporter has not submitted the relevant and appropriate information to establish normal value and export price does not exclude the authority's obligation under Article 6.10 to calculate an individual margin of dumping for

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

<sup>11</sup> Page 39 of Exhibit BRA-15.

<sup>12</sup> Pages 29 and 39 of Exhibit BRA-15.

<sup>13</sup> AR, question 45.

that exporter. The Panel will find a more detailed response regarding the difference between the obligation under Article 6.10 and the use of facts available under Article 6.8 in our response to questions 97 and 98.

**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?**

Response

We have provided in the response to question 90, that the investigating authority did not have legal basis under the Agreement to disregard the normal value and the export price data submitted by Frangosul and Catarinense and that, therefore, the authority was required to calculate an individual dumping margin for the two exporters.

However, even if the Argentinean authority could have disregarded the data submitted by Frangosul and Catarinense in accordance with the provisions of the Agreement, that is Article 6.8, the authority was still required to explain before the final determination and in the final determination why an individual dumping margin for those exporters had not been calculated.

In that sense, Article 6.9 of the Agreement provides that:

*"The authorities shall, before the final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether or not to apply definitive measure. Such disclosure should take place in sufficient time for the parties to defend their interests"* (emphasis added)

The calculation of the dumping margin is an essential fact under consideration as provided in Article 6.9 of the Agreement. Accordingly, if an authority decides to calculate the dumping margin for certain exporters based on information other than that provided by the exporters during the investigation, that too is an essential fact that should be informed prior to the final determination so that the parties can defend their interests. Even if the authority only provides that the information was disregarded in accordance with the relevant provisions of the Agreement but does not explain why the information was disregarded and why an individual margin of dumping was not calculated, how can the exporters defend their interests, as provided in Article 6.9?

Likewise, Article 12.2.2 requires that a public notice of conclusion with the imposition of a definitive duty contain "**all relevant information** on the matters of **fact and law and reasons** which have led to the imposition of final measures". In particular, Article 12.2.2. provides that such notice must contain:

*"(...) (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2(...)"* (emphasis added)

Brazil understands that included in the **full explanation** of the reasons for the methodology used in the establishment of the export price and the normal value is the reason why the authority

disregarded the export price and normal value provided by the exporters and why an individual margin of dumping for those exporters was not calculated.

### Claim 23

#### 92. Please comment on para. 210 of Argentina's first written submission.

#### Response

Argentina agrees that the investigating authority did not make the required freight reductions to Sadia's normal value. To justify the authority's error, Argentina argues that the authority could not have made the adjustment because it had not been properly documented. Argentina further argues that in Annex VIII of Sadia's questionnaire response, the exporter provided a general estimate of freight deductions. According to Argentina, the information used to calculate the normal value was based on an analysis of all invoices provided by Sadia in accordance with the sample used by the authority and that these invoices were not accompanied by any details concerning freight charges to be deducted.

Concerning these allegations, the Panel should note the following considerations.

It is a fact that Sadia presented, in Annex VIII of its questionnaire response of 20 April 1999, the costs of freight in the internal market.<sup>14</sup> If Argentina considers that the freight adjustment should have been made if supporting documentation had been submitted,<sup>15</sup> why didn't the Argentinean authority specifically request that Sadia provide additional or supplemental information, clarification or supporting documentation on the internal freight costs? Article 6.1 of the Agreement requires authorities to give notice of the information, which interested parties are required to present. Likewise, Paragraph 1 of Annex II of the Agreement **expressly** states that "investigating authorities should specify in **detail** the information required from interested parties". The Argentinean authority should have specified that supporting documentation for freight deductions was the type of information that Sadia was required to present. By not specifically indicating this to Sadia, there was no way that the exporter could have known that the information reported in Annex VIII was not going to be used.

Brazil is convinced that Argentina was fully aware of the need to make freight adjustments to Sadia's normal value. First, Sadia reported the freight cost in the internal market in Annex VIII of its questionnaire response. Second, Exhibit BRA-32 provides a letter from JOX to the authority stating that the quoted prices in its publication include taxation, **freight** and financial costs. Third, Exhibit ARG-LVI presents a letter from Sadia and Avipal's attorney to the investigating authority explicitly stating that the normal value established for Sadia and Avipal incorrectly included internal freight costs. Even though the Argentinean authority was aware that the adjustment was warranted, it still did not request that Sadia provide such information.

We understand that if the freight costs reported by Sadia were not considered reliable, the authority could have also used a secondary source of information to estimate such deduction, as it did with the normal value to compensate for the alleged characteristic differences between the poultry sold to Argentina and in Brazil.

As a final observation, it is important that the Panel note that even though the authority knew, and Argentina admits, that the freight adjustment has a "decisive and significant impact on price

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<sup>14</sup> Argentina Second Submission ("ASS"), para. 71.

<sup>15</sup> *Id.*

comparability”,<sup>16</sup> Argentina still considers that the investigating authority would have acted incorrectly if it had made this specific discount. Here, we remind the Panel that Article 2.4 of the Agreement requires authorities to make due allowance for any difference that affects price comparability. In our view, the failure to make the freight adjustment to Sadia’s normal value was contrary to the requirement under Article 2.4 of the Agreement.

#### **Claim 24**

#### **93. Please comment on paras 77 – 79 of ASS.**

#### Response

Exhibit BRA-32 provides the JOX letter to the investigating authority explaining that the prices quoted in its publication, used by the authority to establish the normal value for all other exporters, includes Value Added Tax (ICMS) of 12per cent; Social Contribution on Revenue (PIS/COFINS) of 2.65per cent; financial cost, depending on the sales term; sales commission of 0.5 to 1per cent over the value of the sale; and, a variable freight for delivery, depending on the geographic location of the seller and the buyer.

Article 2.4 of the Agreement provides that a fair comparison shall be made at the same level of trade, normally at the ex-factory level. We have established, and Argentina apparently does not dispute this, that an ex-factory price is the price with no charges included, since this represents the price at the factory. In other words, the buyer bears all costs and risks involved in taking the goods from the seller’s premises. We also believe that it is fair to state that the JOX price is not an ex-factory price, since it includes taxes, freight and financial cost.

Argentina appears to agree with Brazil that an F.O.B. price includes inland freight to the port of exportation, inland insurance, handling and loading charges.<sup>17</sup> Its is also safe to say that an f.o.b. price does not include taxes and financial cost. Thus, there are no adjustments to be made to the f.o.b. export price with respect to taxes and financial cost.

What we have argued is that because the f.o.b. export price does not include taxes and financial cost, the authority should have, at a minimum, made an adjustment in the JOX price (normal value), excluding the taxes and financial cost, when making a fair comparison. In doing so, the authority would still be left with a normal value that was not ex-factory because it would still include internal freight charges. We recall that Article 2.4 of the Agreement requires that the comparison be made at the same level of trade, which is normally at ex-factory. However, if a comparison on an ex-factory level is not possible, the comparison still has to be on the same level of trade. The deductions of taxes and financial cost from the JOX price would have permitted a fair comparison on the same, or at least a more similar, level of trade.

The Panel should note that the investigating authority, when calculating the normal value for the exporters Sadia, Avipal, Nicolini and Seara, adjusted the normal value of these exporters by excluding the Value Added Tax (ICMS) of 12per cent and the Social Contribution on Revenue (PIS/COFINS) of 2.65per cent.<sup>18</sup> For Sadia and Avipal the investigating authority also adjusted the normal value by excluding the financial cost.<sup>19</sup> This adjusted normal value, without taxes and financial cost, was used by the authority in making the fair comparison with the f.o.b. export price.<sup>20</sup>

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<sup>16</sup> Argentina First Submission (“AFR”), para. 211.

<sup>17</sup> ASS, para. 77.

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

<sup>19</sup> *Id.*

<sup>20</sup> Pages 63, 65, 67, 69, 102 and 103 of Exhibit BRA-15.

We see no reason why the authority could not have made the same adjustment to the normal value established for all other exporters. This adjustment would have allowed a fair comparison with the f.o.b. export price.

#### **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?**

#### Response

Brazil considers that the investigating authority would still have violated Article 2.4.2 even 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.

We remind the Panel that when the investigation was initiated and the authority sent the dumping questionnaire to the exporters Sadia, Avipal, Frangosul, Nicolini and Seara, the authority had required normal value and export price information for the years 1996, 1997, 1998 and the months where data was available in 1999.<sup>21</sup> Subsequently, the investigating authority required supporting documentation for all sales transactions in Brazil and to Argentina for that same period.<sup>22</sup> Because of the enormous volume of sales transactions in the internal market, the exporters were forced to send a letter to the authority explaining that it was impossible to provide an invoice for each sale transaction in the internal market.<sup>23</sup> In this letter, the exporters recommended that the authority either verify the transaction *in loco* or select a sample of transactions so that supporting documentation could be presented.<sup>24</sup>

The idea behind the exporters' suggestion was to give the authority, through a sample, the ability to verify the accuracy and veracity of the universe of normal value information reported in the questionnaire response. The Panel must not forget that the exporters had already gone through the burdensome task of collecting and reporting normal value and export price data for several years, which was not used by the authority in the final determination. Brazil understands that the magnitude of the information provided may mean that not all data will actually be examined, however, this does not exclude the validity of all the data provided, particularly if that data could be verified.

Furthermore, we understand that the establishment of the period of data collection, for dumping purposes, is intrinsically related to the dumping margin methodology under Article 2.4.2 of the Agreement. Article 2.4.2 provides that the existence of margins of dumping "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 (...)". Normally, the weighted average normal value is compared to the weighted average export price for a comparable product sold during the period of investigation. It is important to note that the weighted average prices are usually calculated for the entire period of investigation. This comparison of prices for products sold during a certain period ensures a more accurate picture of the price patterns to export and domestic markets. We understand that this is one of the reasons why the Committee on Anti-Dumping Practices has recommended that the period of data collection for dumping investigations normally be 12 months and, in any case, no

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<sup>21</sup> Pages 18, 22, 23, 26, 27 and 29 of Exhibit BRA-15.

<sup>22</sup> Pages 18, 19, 22, 23, 27, 29 and 30 of Exhibit BRA-15.

<sup>23</sup> Exhibit BRA-26, Exhibit BRA-29 and Exhibit BRA-31.

<sup>24</sup> *Id.*



less than 6 months.<sup>25</sup> A limited period of data collection also means limited transactions for comparison and cannot substitute a comparison analysis based on all sales transactions for the entire period.

Likewise, if an authority limits the transactions that are to be used in the comparison, be it those transactions selected by the authority and for which invoices were presented, there is a risk that the prices provided will not reflect the actual price patterns for the entire period.

### *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?**

#### Response

The term “essential” means “absolutely necessary; indispensable”.<sup>26</sup> “Fact” is “a thing that is known to have occurred, to exist, or to be true”.<sup>27</sup> Thus, “essential facts”, within the meaning of Article 6.9 of the Agreement, are assertions of something existing or done, which are indispensable for the authority’s consideration in forming the basis for the decision whether or not to apply definitive measures. Information regarding the establishment of the normal value and the export price, used to calculate the dumping margin, are essential facts to be considered in the final determination.

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

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

This is our understanding of the phrase “essential facts” in Article 6.9 of the Agreement. We note that the first sentence of Article 6.9 should be read and construed together with the second sentence of Article 6.9, that is, that the disclosure of the “essential facts” should take place in sufficient time for the parties to **defend their interests**. Within the meaning of Article 6.9, a party needs to know the reasoning supporting a certain conclusion made by an authority in order to provide arguments and reasons in its defense. If the phrase “essential facts” is interpreted otherwise, the second sentence of Article 6.9 would be rendered meaningless.

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<sup>25</sup> Committee on Anti-Dumping Practices – Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the Committee on 5 May 2000 – G/ADP/6 – 16 May 2000.

<sup>26</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 461.

<sup>27</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 482.

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.**

Response

Brazil agrees with the Panel's findings in *Guatemala – Cement II* that an interested party will only know whether a particular fact is important if the authority explicitly identifies it as an "essential fact" to be considered in forming the basis of the authority's decision whether or not to impose definitive measures. We emphasize that the obligation of the authority under Article 6.9 is not to inform all interested parties of just any "fact", but to inform interested parties of the "essential facts". In fact, the requirement under Article 6.9 is even more specific. Authorities are not only required to inform the "essential facts", but the "essential facts" that will form the basis for the decision whether or not to apply definitive measures.

If an authority simply summarizes the vast amount of information that was submitted to the files of the investigation without specifically indicating what information is important in forming the basis of the authority's decision, how can an exporter know what "essential fact" will be used in the authority's decision whether or not to impose definitive measures? Likewise, how can an exporter defend its interest?

For example, in the instant case, Frangosul and Catarinense submitted export price information with supporting documentation. Even though the authority acknowledged this in the report prior to the end of the evidence-producing stage of the dumping investigation,<sup>28</sup> the authority still disregarded that export price information in the final determination. In the disclosure report prior to the final determination, the authority neither indicated nor did it provide why that information would be disregarded. The exporters had no reason to suspect that that information would not be considered by the authority and, thus, were not able to defend their interests.

In that sense, we find it useful to also cite to another passage of the Panel's findings in the *Guatemala – Cement II* report:

"(...) The difficulty for an interested party with access to the file, however, is that it will not know whether particular information in the file forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties. This has been acknowledged by Guatemala, which has itself asserted that "[t]he object and purpose of Article 6.9 is to allow exporters a fair opportunity to comment on the important issue in an investigation after the record is closed to new facts". 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.<sup>29</sup> (emphasis added)

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<sup>28</sup> Pages 29 and 38 of Exhibit BRA-28.

<sup>29</sup> *Guatemala – Cement II*, para. 8.229.

The purpose of Article 6.9 is exactly that, to provide interested parties the opportunity to present arguments and to comment on the important issues in an investigation after the evidence-producing stage is finished but prior to the final determination.

#### 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.**

#### Response

The first sentence of Article 6.10 of the Agreement requires authorities to determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. Thus, if an exporter is known to the authority, the authority is required, and Article 6.10 expressly states this as a rule, to calculate an individual dumping margin for that exporter.

If the known exporter provides the relevant information necessary to calculate the individual margin of dumping, there is no question, the authority must do so. That was the case for Frangosul and Catarinense. If the known exporter does not provide the relevant information necessary to calculate the normal value and the export price, but the authority still has access to individual information for that exporter, the investigating authority is still required to calculate the individual margin of dumping.

It is important to note the difference between applying facts available, in accordance with Article 6.8 of the Agreement, to a specific exporter and not calculating the individual margin of dumping for that exporter. In cases where the authority does not have the relevant normal value or export price information and the authority is entitled to resort to facts available, the facts available applicable to a specific exporter may not be the same as the facts available applicable to another exporter. Accordingly, the calculation of the individual dumping margins for those two exporters will not be the same.

For instance, in the final determination the Argentinean authority disregarded the export price submitted by the exporters Sadia, Avipal, Nicolini and Seara and applied the individual weighted average export price for these exporters as provided by the Argentinean agency *Ganaderia*.<sup>30</sup> However, for Frangosul and Catarinense, the authority also disregarded the export price submitted by these exporters but failed to use the individual weighted average export price as provided by the *Ganaderia*.<sup>31</sup> Because the authority did not calculate an individual margin of dumping for Frangosul and Catarinense, the authority used as the export price for these two exporters a weighted average f.o.b. export price of US\$0,95992, that took into account the weighted average export price of all other exporters with little or no participation in the investigation.<sup>32</sup> This export price of US\$0,95992 was lower than the individual weighted average export price provided by the *Ganaderia* for Frangosul (US\$1,0407) and Catarinense (US\$1,0048).<sup>33</sup> Had the authority used this individual weighted average export price instead of the weighted average export price for all other exporters, there would have been no dumping margin for Frangosul and a dumping margin of 3.35per cent for Catarinense.

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<sup>30</sup> Pages 76 and 77 of Exhibit BRA-15.

<sup>31</sup> *Id.*

<sup>32</sup> Page 103 and the last page of Exhibit BRA-15.

<sup>33</sup> Pages 76 and 77 of Exhibit BRA-15.

We point out, however, that specifically in this case, Frangosul and Catarinense **did** provide the required export price information with supporting documentation and the authority should have used that information to calculate the individual dumping margin for the two exporters.

Thus, in the instant case, the authority not only incorrectly disregarded the information submitted by Frangosul and Catarinense during the investigation, and thus erred in not calculating the individual dumping margin, but the authority also had access to individual weighted average export price for those two exporters as provided by the *Ganaderia* but decided to apply the weighted average f.o.b. export price for all other exporters. Consequently, the authority incorrectly applied the dumping margin for all others exporters to Frangosul and Catarinense.

**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.**

Response

Even though the facts of the case *Argentina- Ceramic Tiles* are somewhat different from the facts in the instant case, the reasoning provided by that Panel regarding the interpretation of Article 6.10 is still valid.

First, we agree with the Panel's views in *Argentina - Ceramic Tiles* that Article 6.10 requires that an individual margin of dumping has to be determined for each exporter with regard to the product subject to investigation. Relevant part of that report provides that:

"While the second sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters and producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that are examined. To the contrary, Article 9.4 provides that, where the authorities limit their examination under Article 6.10, the anti-dumping duty for exporters or producers that are not examined shall not exceed a level determined on the basis of the results of the examination of those exporters or producers that were examined. That Article 9.4 does not provide any methodology for determining the level of duties applicable to exporters or producers that are examined in our view confirms that the general rule requiring individual margins remains applicable to those exporters or producers. We find further confirmation in Article 6.10.2, which requires that, in general, an individual margin of dumping must be calculated even for the producers/exporters not initially included in the sample, if they provide the necessary information and if to do so is not unduly burdensome. If even producers not included in the original sample are entitled to an individual margin calculation, then it follows that producers that were included in the original sample are entitled as well. Indeed, the parties appear to agree that Article 6.10 of the AD Agreement requires that as a rule an individual margin of dumping has to be determined for

each exporter with regard to the product subject to investigation.<sup>34</sup> (emphasis added)

We point out the fact that in the instant case the authority did not limit their examination pursuant to the second sentence of Article 6.10 of the Agreement and the authority was, thus, required to determine an individual margin of dumping for each known exporter or producer concerned.

Second, we have presented in the response to question 90 above that Frangosul and Catarinense **did** submit the required normal value and export price information during the investigation. In particular, these two exporters also submitted supporting documentation with the export price information. Brazil fails to see the reason why the Argentinean authority did not use that information to calculate the individual margin of dumping for Frangosul and Catarinense.

Third, we agree with the Panel's finding in *Argentina – Ceramic Tiles* that “(...) *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*”.<sup>35</sup> We have provided in the response to question 97 above, that there is a difference between applying facts available, based on Article 6.8 of the Agreement, in order to establish normal value and export price for a specific exporter and not calculating the individual margin of dumping for that exporter. In establishing the normal value or the export price, the authority may be entitled to resort to facts available under specific circumstances. However, that does not mean that the authority is not required to calculate an individual margin of dumping.

For example, the facts available applied by an authority to determine an exporter's normal value may be different from the facts available applied by an authority to determine another exporter's normal value. Another example occurs when an authority applies facts available to determine an exporter's normal value but uses the export price reported by the exporter, while for another exporter the authority applies facts available to determine the export price and uses the exporter's reported normal value. In such situations, the authority will still calculate an individual margin of dumping for each known exporter or producer concerned of the product under investigation.

Thus, we do not agree that the lack of information on normal value, export price or cost of production **automatically** allows the non-calculation of an individual dumping margin. To accept that as true would violate the requirement in the first sentence in Article 6.10 of the Agreement.

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<sup>34</sup> *Argentina – Definitive Measures on Imports of Ceramic Floor Tiles from Italy*, 28 September 2001, WT/DS189/R, at para. 6.90 (adopted on 5 November 2001) (“*Argentina – Ceramic Tiles*”).

<sup>35</sup> *Argentina – Ceramic Tiles*, para. 6.96.

## ANNEX A-7

### COMMENTS OF BRAZIL ON THE RESPONSES OF ARGENTINA TO THE PANEL'S AND TO BRAZIL'S QUESTIONS – SECOND MEETING

(28 November 2002)

#### *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).**

#### Response from Argentina

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

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

Moreover, the fact that Brazil signed the Protocol of Olivos on 18 February 2002 – by which it expressly accepted the choice of forum clause – and then, seven days later, on 25 February 2002, requested the establishment of a Panel in the current dispute, displays a clear contradiction in its conduct, in which Argentina had had full confidence, both countries being member states of

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

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

MERCOSUR; and Argentina is now suffering the negative impact of this change of position.<sup>3</sup> This fact was also raised in the submissions of the EC<sup>4</sup> and Paraguay<sup>5</sup> as third parties.

### Brazil's Comments

Brazil understands that the phrase “statement of fact” means “the act or an instance of stating or being stated; expression in words”<sup>6</sup> of “a thing that is known to have occurred, to exist, or to be true”.<sup>7</sup> Within that meaning, Brazil reiterates that it has never declared that it would renounce its right to bring a dispute, based on different claims, to the WTO because a similar dispute had been brought to the Mercosul Tribunal.

We recall that the Mercosul Protocol of Olivos on Dispute Settlement cannot be raised here as an implicit or express consent by Brazil to refrain from bringing the present case to the WTO dispute settlement. First, we note that the object before the Mercosul Tribunal was different from the object before this Panel. Second, The Protocol of Olivos has not yet entered into force, and even if it had and the object of the dispute were the same, the Protocol of Olivos provides that “disputes underway initiated in accordance with the Protocol of Brasília will continue to be exclusively governed by that Protocol until the dispute has been concluded”.<sup>8</sup> The Protocol also states that “while the disputes initiated under the regime of the Protocol of Brasília are not completely concluded and until the proceedings under Article 49 are completed, the Protocol of Brasília will continue to be applied”.<sup>9</sup> Based on those provisions, it is fair to state that the Protocol of Olivos does not apply to disputes that have already been concluded under the Brasília Protocol. Third, what Argentina brings before this Panel is a situation where Mercosul Members potentially have divergent views on what their rights and obligations are under Mercosul legal framework. We remind the Panel that Article 1 of the DSU confines the jurisdiction of this Panel to disputes brought pursuant to the “covered agreements”, the “WTO Agreement”, and the DSU, taken in isolation or in combination with each other. The provisions of the Brasília Protocol and the Protocol of Olivos are not listed in Article 1 of the DSU. Thus, the rules and procedures of the DSU do not apply to consultations and the settlement of disputes concerning the rights and obligations of Mercosul Members under the Mercosul legal framework.

**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.**

### Response from Argentina

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.

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<sup>3</sup> In fact, Argentina has already approved the Protocol of Olivos. On 9 October 2002, the National Congress adopted the Protocol of Olivos by Law 25.663, promulgated by the Executive through Decree 2091/02 of 18 October 2002 and published in Official Bulletin of the Republic of Argentina No. 30008 of 21 October 2002.

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

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

<sup>6</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 1361.

<sup>7</sup> *The Concise Oxford Dictionary – Ninth Edition*, Oxford University Press, 1995, p. 482.

<sup>8</sup> Article 50 of the Protocol of Olivos.

<sup>9</sup> Paragraph 2 of Article 55 of the Protocol of Olivos.

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<sup>10</sup>, namely that other panels have already examined the principle of estoppel in past disputes: "*European Communities – Asbestos*"<sup>11</sup> and "*Guatemala – Cement*"<sup>12</sup>.

#### Brazil's Comments

No comments.

#### **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 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?**

#### Response from Argentina

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.

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<sup>10</sup> Second written submission of Argentina, 17 October 2002, paragraphs 17, 18 and 19.

<sup>11</sup> WT/DS135/R, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report adopted on 5 April 2001, paragraph 8.60.

<sup>12</sup> WT/DS156/R, *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, Report adopted on 17 November 2000, paragraph 8.23.



### Brazil's Comments

We point out that Argentina confirms that the investigating authority did **not** consider whether the value of the head and feet was the same as the value of the other parts of the chicken for the purpose of evaluating the necessary adjustments.<sup>13</sup> Based on Exhibit BRA-1, the Panel can verify that the application contained no evidence or indication that there were physical characteristic differences in the product sold in Brazil and to Argentina, that such alleged differences affect price comparability, that the yield rate as proposed by the applicant was appropriate, and that, therefore, the adjustment methodology presented was justified.

### **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 mean to say that "the price remains on very firm ground"?**

### Response from Argentina

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.

### Brazil's Comments

Argentina confirms that the quoted extract from the JOX document refers to **live** poultry and that there is no similar statement in the JOX publication for **eviscerated** poultry.<sup>14</sup>

We disagree with Argentina that the reference in the JOX publication for **live** poultry is sufficient to establish the trend of normal value prices for **eviscerated** poultry (a different product), because **live** poultry is the raw material of the product under investigation.<sup>15</sup> The Panel should note that the extract from the JOX publication under heading "Frango Vivo" (**live** poultry) monitors daily changes in the market and cannot possibly be used to indicate price trends over a longer period of time. Furthermore, the Panel should note that there is another heading in the JOX publication titled "Frango Abatido" (slaughtered poultry). This heading provides that "the sales of slaughtered and cuts of poultry at the end of the week have not demonstrated any recovery in volume. The cold storage plants (freezers) continue trying to re-pass higher prices, without success, in view of the existing surplus in offer. Even though the beginning of the month is near, it will be difficult to re-pass the adjustments while the offer is still inadequate".<sup>16</sup> Even though "frango abatido" (slaughtered poultry) is also a product made from **live** poultry, the extract in the JOX publication for slaughtered poultry

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<sup>13</sup> Argentina Response to the Panel's Questions in the Second Substantive Meeting ("ARS"), question 68.

<sup>14</sup> ARS, question 69.

<sup>15</sup> *Id.*

<sup>16</sup> Exhibit BRA-1

indicates the inability to raise prices because of the excess volume of poultry offered in the Brazilian market.

It is also interesting that Argentina considers valid, in the initiation stage of the investigation, that the authority consider as sufficient evidence to establish normal value the price of poultry for only one day in 1997, when the export price was established based on a six-month period. We have demonstrated that the JOX report used to establish the normal value is a daily publication, which was reasonably available to the applicant. Accordingly, the applicant could, and should, have presented the prices in the JOX publication for a period of at least six months in 1997, but chose not to.

### **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 APCDS (also dated 7 January 1998)?**

#### Response from Argentina

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.

#### Brazil's Comments

No comments.

**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"?**

#### Response from Argentina

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.

#### Brazil's Comments

No comments.

### **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.**

#### Response from Argentina

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.

### Brazil's Comments

According to Argentina, the investigating authority obtained the addresses of the Brazilian exporters, contacted on February 1999, through interested importers in the investigation.<sup>17</sup> Once the initiation of the investigation was published, these importers contacted the investigating authority and provided such information.<sup>18</sup>

Brazil recalls that the investigating authority knew, prior to initiation, of the existence and interest of at least five of the seven Brazilian exporters that were only notified of the investigation on 15 September 1999.<sup>19</sup> If the investigating authority knew of the existence of these exporters prior to initiation but did not have their contact information, why didn't the authority inquire in February 1999 with the interested importers on the addresses of these Brazilian exporters? In particular, if the investigating authority was only able to contact the seven Brazilian exporters after the importer Interamericana Comercial ("Interamericana") provided their addresses<sup>20</sup>, why didn't the authority inquire in February 1999 with the importer Interamericana about the addresses of these seven exporters? Likewise, the authority could have also requested that the Brazilian government provide the contact information of those **specific** exporters identified in the report regarding the viability of the investigation.

Still on Argentina's response, Brazil wonders whether it is normal procedure for an Argentinean authority to wait for importers to contact them with addresses of exporters so that the authority can then notify the interested exporters known to them. If that is the normal procedure, what happens when interested importers do not contact the authority, providing the addresses of the known exporters? In such cases, does it mean that the interested exporters known to the authorities are not notified?

### **73. Please comment on para. 36 of Brazil's Second Oral Statement.**

#### Response from Argentina

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.

#### Brazil's Comments

No comments.

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<sup>17</sup> ARS, question 72.

<sup>18</sup> *Id.*

<sup>19</sup> Pages 4 and 5 of Exhibit BRA-2.

<sup>20</sup> Argentina Response to the Panel's Questions in the First Substantive Meeting ("AR"), questions 26 and 28.

### **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?**

#### Response from Argentina

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.

#### Brazil's Comments

No comments.

### **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.**

#### Response from Argentina

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.

Brazil's Comments

Article 6.1 and Paragraph 1 of Annex II of the Agreement require authorities to give notice and specify in detail the information required from interested parties. We note that the dumping questionnaire did not specifically require that the exporters submit supporting documentation for the product description. The Panel should look at Pages 19 and 21 of Exhibit BRA-22, where the instructions for completing the producer/exporter questionnaire are provided.<sup>21</sup> From these general instructions, one can see that there was not sufficient information on the precise supporting documentation that was expected from the exporters. Furthermore, the fact that the authority never requested clarifications or supporting documentation for the information reported by the exporters indicated that the information that had been submitted would be accepted. In that sense, the authority never informed the exporters that the product description information reported by them was insufficient or unacceptable. By doing so, the authority acted inconsistently with Paragraph 6 of Annex II of the Agreement.

**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?**

Response from Argentina

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.

Brazil's Comments

No comments.

**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?**

Response from Argentina

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

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<sup>21</sup> Brazil Second Written Submission, paragraph 73.

Catarinense at no time provided any certification of legal status although this had been requested in Note DCD 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.

#### Brazil's Comments

Argentina confirms that the Brazilian exporter Catarinense provided information on sales made in the domestic market corresponding to 1998 and January 1999, disaggregated by transaction.<sup>22</sup> We recall that Catarinense was notified of the investigation and the need to respond to the dumping questionnaire only on 15 September 1999.<sup>23</sup> Even though Catarinense was notified of the investigation almost eight months after it had initiated, Catarinense still provided the questionnaire response with complete information on sales transactions to Argentina, disaggregated by transaction, with supporting documentation, as well as complete information on sales transactions in Brazil, disaggregated by transaction, without supporting documentation.<sup>24</sup> To that regard, the Argentinean authority never requested the supporting documentation for Catarinense's sales transactions in the internal market, nor did it request that the information be provided in a diskette. Furthermore, the authority never selected specific transactions in the internal market, as it did with other exporters, for Catarinense to provide the corresponding supporting documentation.

During the investigation, Catarinense provided complete normal value and export price data that should have been used by the authority in determining the exporter's individual margin of dumping.

#### **78. Please comment on the first two sentences of para. 53 of Brazil's Second Oral Statement.**

#### Response from Argentina

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.

#### Brazil's Comments

Argentina confirms that the export price data submitted by the exporters Frangosul and Catarinense was, in fact, accompanied by supporting documentation.<sup>25</sup> Nevertheless, Argentina alleges that since it was not able to establish normal value for these two exporters, the authority was not able to consider the export price data submitted by them.<sup>26</sup> We disagree with Argentina's

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<sup>22</sup> ARS, question 77.

<sup>23</sup> Exhibit BRA-13.

<sup>24</sup> Page 39 of Exhibit BRA-15.

<sup>25</sup> ARS, question 78.

<sup>26</sup> *Id.*

position that the normal value information for Frangosul and Catarinense could not be established. However, even if that were true, that does not exclude the fact that the authority could, and should, have used Frangosul and Catarinense's export price data and calculated an individual dumping margin for the two exporters. In that sense, we remind the Panel that even though the Argentinean authority disregarded the export price data submitted by the exporters Sadia and Avipal, the authority still calculated an individual dumping margin for those two companies. We understand that the Argentinean authority should have proceeded accordingly with respect to Frangosul and Catarinense. The fact that the authority does not have normal value or export price information for a certain exporter does not exclude the authority's obligation under Article 6.10 to calculate an individual margin of dumping for that exporter.

It is true that Argentina had official information on the export price for Frangosul and Catarinense.<sup>27</sup> However, it is **not** true that the authority used that information in the final determination. In the final determination, the Argentinean authority disregarded the export price submitted by the exporters Sadia, Avipal, Nicolini and Seara and applied the individual weighted average export price for these exporters as provided by the Argentinean agency *Ganaderia*.<sup>28</sup> However, for Frangosul and Catarinense, the authority also disregarded the export price submitted by these exporters but failed to use the individual weighted average export price as provided by the *Ganaderia*.<sup>29</sup> Because the authority did not calculate an individual margin of dumping for Frangosul and Catarinense, the authority used as the export price for these two exporters a weighted average f.o.b. export price of US\$0,95992, that took into account the weighted average export price of all other exporters with little or no participation in the investigation.<sup>30</sup> This export price of US\$0,95992 was lower than the individual weighted average export price provided by the *Ganaderia* for Frangosul (US\$1,0407) and Catarinense (US\$1,0048).<sup>31</sup> Had the authority used this individual weighted average export price instead of the weighted average export price for all other exporters, there would have been a negative dumping margin for Frangosul and a dumping margin of 3.35 per cent for Catarinense.

We emphasize, nevertheless, the fact that Frangosul and Catarinense **did** provide the required export price information with supporting documentation and the authority should have used that information to calculate the individual dumping margin for the two exporters.

#### **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'?**

#### Response from Argentina

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.

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<sup>27</sup> *Id.*

<sup>28</sup> Pages 76 and 77 of Exhibit BRA-15.

<sup>29</sup> *Id.*

<sup>30</sup> Page 103 and the last page of Exhibit BRA-15.

<sup>31</sup> Pages 76 and 77 of Exhibit BRA-15.

Brazil's Comments

No comments.

**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.**

Response from Argentina

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.

Brazil's Comments

Brazil understands that Argentina has failed to indicate, in its response to question 80(2), precisely where in the report prior to the final determination (Exhibit BRA-28), 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.

**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?**



### Response from Argentina

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

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

In this connection, a *'nota fiscal'* (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 *'notas 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.

### Brazil's Comments

No comments.

**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.**

### Response from Argentina

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.

### Brazil's Comments

We ask that the Panel examine Section VIII.1.3.3.1 of the report prior to the final determination<sup>32</sup> and Section VIII.1.3.3.1 of the dumping final determination,<sup>33</sup> in order to verify that the investigating authority did **not** provide an explanation for rejecting Sadia's freight cost adjustment.

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<sup>32</sup> Pages 58 – 62 of Exhibit BRA-28.

<sup>33</sup> Pages 59 – 63 of Exhibit BRA-15.

## Claim 22

### 83. Please comment on para. 59 of Brazil's Second Oral Statement.

#### Response from Argentina

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 Article 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.

#### Brazil's Comments

Regarding Argentina's response, the following observation is in order. We believe that Argentina has failed to respond to the Panel's question, that is, to comment on para. 59 of Brazil's Second Oral Statement. Paragraph 59 provides that:

*"We point out to the Panel that even though the investigating authority also disregarded the export price information submitted by the exporters Sadia and Avipal, the investigating authority still calculated the individual margins of dumping for those two companies. Brazil fails to see the reason why the authority decided to proceed differently with respect to the information provided by Frangosul and Catarinense."*

We have already established, and Argentina confirms, that the export price data submitted by Frangosul and Catarinense was complete and accompanied by supporting documentation. The authority could, and should, have used that information to establish the export price data for the two exporters. We believe that the authority should have also used the normal value information submitted by Frangosul and Catarinense in the investigation. However, even if the authority was entitled to disregard the normal value information of these two exporters, which it wasn't, the authority could have still determined an individual dumping margin for them. That is exactly what the authority did with respect to the exporters Sadia and Avipal. While the authority accepted the normal value information and disregarded the export price data submitted by them, the authority still went on to calculate the individual margins of dumping for Sadia and Avipal. Argentina has **not** explained why the authority acted differently with respect to Frangosul and Catarinense.

The Panel should note that this is the first time in this proceeding that Argentina presents the argument that the investigating authority did not accept the information submitted by Catarinense because the company did not accredit representation. We point out that nowhere in the report prior to the final determination<sup>34</sup> or in the final determination<sup>35</sup> does the authority offer that explanation as the reason why the information submitted by Catarinense was disregarded.

#### **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.**

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<sup>34</sup> Exhibit BRA-28.

<sup>35</sup> Exhibit BRA-15.

Response from Argentina

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.

Brazil's Comments

In responding to the Panel's question, Argentina refers to Section VIII.1.3 of the final determination<sup>36</sup>, where supposedly the investigating authority gave the reasons for not making the various adjustments to the JOX domestic price data. We note that the passage referred to by Argentina simply provides that the Argentinean authority requested JOX, on 25 June 1999 and on 27 July 1999, to provide an explanation of the taxes included in the published prices, as well as the general conditions to which the prices were subject to. That passage further provides that, on 28 July 1999 and on 3 August 1999, JOX submitted the requested information in Portuguese. The Panel will note that in the final determination the investigating authority did **not** indicate that the various adjustments reported by JOX would not be made to the domestic price data, nor did it provide the reasons for not making such adjustments.

**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.**

Response from Argentina

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.

Brazil's Comments

Argentina confirms that the investigating authority did not ask JOX to provide a Spanish translation of its 3 August 1999 letter.<sup>37</sup> Argentina justifies the authority's failure to request the translation by stating that the parties intervening in a dumping proceeding know the requirements for submitting such information.<sup>38</sup>

Regarding Argentina's justification, we remind the panel the following. First, the information submitted by JOX was a result of a request made by the investigating authority and not by the Brazilian exporters or petitioner. It is important that the Panel note that JOX is a private entity, not related to the Brazilian government or any of the Brazilian exporters subject to the investigation. Thus, according to the definition of "interested parties" in Article 6.11 of the Agreement, JOX did not qualify as an interested party in the investigation proceeding, and was under no obligation to respond to the Argentinean authorities much less to provide a translation of its response in Spanish. Second, even after JOX provided information on the various adjustments to its published domestic prices, the authority still did not request the translation. We point out that the authority could, and should, have requested the translation or translated the information themselves. Brazil believes that if the Argentinean authority decided to use the JOX information to establish the normal value for all other exporters, it should have taken into account JOX's explanation on taxes, financial discount, sales commission and freight for the published prices. Third, under Article 2.4 of the Agreement due

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<sup>36</sup> Page 56 of Exhibit BRA-15.

<sup>37</sup> ARS, question 85.

<sup>38</sup> *Id.*

allowance in a fair comparison is an obligation of the investigating authority. If the authority knows that there are differences between the export price and the normal value, which affect price comparability, the authority is required to make that adjustment. Once JOX provided that its published domestic prices include taxes, financial cost, sales commission and freight, the authority was obligated to make these adjustments.

**86. Please comment on para. 68 of Brazil's second oral statement.**

Response from Argentina

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.

Brazil's Comments

Apparently, Argentina agrees with Brazil that in order to make a fair comparison, all necessary adjustments should be made to normal value and export price.<sup>39</sup> Argentina, however, fails to comment on paragraph 68 of Brazil's second oral statement, where we explain why the authority should have, at least, made an adjustment in the normal value to exclude taxes and financial cost included in the JOX prices, in order to make a fair comparison. A more detailed explanation on why the authority should have excluded taxes and financial cost from the JOX published domestic prices is provided in our response to the Panel's questions in the second substantive meeting.<sup>40</sup>

**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.**

Response from Argentina

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)

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<sup>39</sup> ARS, question 86.

<sup>40</sup> Brazil Response to the Panel's Questions in the Second Substantive Meeting ("BRS"), question 93.

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.

#### Brazil's Comments

In responding to the Panel's question, Argentina fails to provide where the investigating authority explained why it looked at 1999 data for only certain injury factors and not others. The passage referred to by Argentina clearly states that the data corresponding to the year 1995 is used by way of reference.<sup>41</sup> However, that same passage does **not** provide that the data corresponding to the first semester of 1999 is used by way of reference. What that passage provides is that the data for the variables national production, prices, imports, national exports and apparent consumption corresponding to the first semester of 1999 were included<sup>42</sup> in the period of injury analysis. Had the authority intended to use the data for the first semester of 1999 merely as reference, the authority would have clearly stated this in the final determination, just as it did with the data for the year 1995. In this investigation, the Argentinean authority considered a certain period of injury analysis for the factors production, prices, imports, exports and apparent consumption and considered another period of injury analysis for the remaining Article 3.4 factors.

#### **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.**

#### Response from Argentina

Table No. 16, which belongs to Technical Report GEGE/ITDF 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.

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<sup>41</sup> ARS, question 87 and Page 9 of Exhibit BRA-14.

<sup>42</sup> *Id.*

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 GECE/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 is 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 ...".

#### Brazil's Comments

No comments.

**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.**

#### Response from Argentina

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.

Brazil's Comments

No comments.

*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?**

Response from Argentina

They are the facts upon which the implementing authority bases its conclusions.

Brazil's Comments

No comments.

**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.**

Response from Argentina

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.

Brazil's Comments

Argentina states that all information contained in the report prior to the final determination (Exhibit BRA-28) make up the facts which form the basis of the authority's decision whether to impose definitive measures.<sup>43</sup> We do not agree with Argentina's statement. The Panel should carefully look at Exhibit BRA-28 in order to verify that the authority did **not** explicitly identify what facts were considered "essential facts", which would form the basis of the authority's decision

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<sup>43</sup> ARS, question 96.



whether to impose definitive measures. In fact, what Exhibit BRA-28 presents is a summary of the information submitted by the various interested parties in the files of the investigation. Without explicitly indicating to the interested parties what the “essential facts” under consideration were, the authority failed to provide the exporters with the opportunity to defend their interests.

## **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.**

### Response from Argentina

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.

### Brazil's Comments

According to Argentina, in order for the authority to determine an individual margin of dumping, two conditions are required: (1) that the exporter be known to the authority; and, (2) that the exporter present the necessary documentation to enable the calculation of the individual margin.<sup>44</sup>

We must point out that nothing in Article 6.10 of the Agreement requires that the exporter present the necessary documentation, as a condition for the authority to determine an individual dumping margin. Under Article 6.10, the authority must determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In that regard, the exporters Frangosul and Catarinense were known exporters/producers of the product under investigation. Both companies presented normal value and export price information during the investigation, being that the export price data submitted by these exporters was accompanied by supporting documentation. Accordingly, the authority was obligated to determine an individual dumping margin for the two exporters.

We have, nonetheless, also provided that the fact that an exporter has not submitted the relevant or appropriate information to establish normal value or export price does not exclude the authority's obligation under Article 6.10 to determine an individual margin of dumping for that exporter.<sup>45</sup> If the known exporter does not provide the relevant information necessary to calculate normal value or export price, but the authority still has access to individual information for that exporter, the investigating authority is still required to calculate the individual margin of dumping. We emphasize that there is a difference between applying facts available, as provided in Article 6.8 of the Agreement, to a specific exporter and not calculating the individual dumping margin for that exporter. In cases where the authority does not have the relevant normal value or export price data and the authority is entitled to resort to facts available, the facts available applicable to a specific exporter may be different from the facts available applicable to another exporter. Accordingly, the calculation of the individual margins for those two exporters will also be different.

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<sup>44</sup> ARS, question 97.

<sup>45</sup> BRS, questions 90, 97 and 98.

**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.**

Response from Argentina

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.

Brazil's Comments

Even though in *Argentina - Ceramic Tiles* the Argentinean authority calculated the dumping margin based on the second sentence of Article 6.10, which limits the examination of the authority to certain producers and exporters, the reasoning provided by that Panel with respect to the interpretation of Article 6.10 is, nonetheless, correct and applicable to this case.

In particular, we cite to the following passage in that report:

*"(...) Article 9.4 provides that, where the authorities limit their examination under Article 6.10, the anti-dumping duty for exporters or producers that are not examined shall not exceed a level determined on the basis of the results of the examination of those exporters or producers that were examined. That Article 9.4 does not provide any methodology for determining the level of duties applicable to exporters or producers that are examined in our view confirms that the general rule requiring individual margins remains applicable to those exporters or producers. We find further confirmation in Article 6.10.2, which requires that, in general, an individual margin of dumping must be calculated even for the producers/exporters not initially included in the sample, if they provide the necessary information and if to do so is not unduly burdensome. If even producers not included in the original sample are entitled to an individual margin calculation, then it follows that producers that were included in the original sample are entitled as well. Indeed, the parties appear to agree that Article 6.10 of the AD Agreement requires that as a rule an individual margin of dumping has to be determined for each exporter with regard to the product subject to investigation."<sup>46</sup> (emphasis added)*

Thus, if that Panel found that producers included or not in a sample, in situations where a sample was needed, were entitled to an individual margin calculation, then this Panel should also conclude that in the instant case the producers that were examined, in situations where a sample was not needed, were also entitled to an individual margin calculation.

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<sup>46</sup> Argentina – *Definitive Measures on Imports of Ceramic Floor Tiles from Italy*, 28 September 2001, WT/DS189/R, at para. 6.90 (adopted on 5 November 2001) ("*Argentina – Ceramic Tiles*").

## REPLIES BY ARGENTINA TO THE QUESTIONS OF BRAZIL

**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?**

### Brazil's Comments

The Panel should observe that the Argentinean investigating authority did not clearly and specifically establish in the preliminary determination that the dumping period of data collection was from January 1998 through January 1999.<sup>47</sup> It is also important to note that the investigating authority sent a letter to petitioner on 1 June 1999, requesting that petitioner update the information regarding normal value in Brazil for the period January 1998 through January 1999.<sup>48</sup> No similar letter was sent from the authority to the Brazilian exporters prior to the preliminary determination. In fact, the investigating authority did not use any of the normal value and export price information submitted by the Brazilian exporters for the years 1996 through 1999 in the preliminary dumping determination. It was only on 12 October 1999 and on 18 October 1999, that the authority sent a letter to Avipal, Frangosul, Sadia, Nicolini and Seara requesting that they provide a list of transactions and invoices for sales in the internal market from January 1998 through January 1999. Nine months after the investigation was initiated and after a preliminary determination had been issued, the authority chose to establish and inform the Brazilian exporters of the data collection period for the dumping investigation.

It was also only on 15 September 1999, that the authority sent a letter to the Brazilian exporters CCLP, Catarinense, Chapecó, Minuano, Perdigão, Comaves and Pena Branca notifying them of the investigation and inviting them to provide questionnaire responses.<sup>49</sup>

On a final note, if the authority determined the period of investigation based on the information corresponding to the period closest to initiation, why did the authority request normal value and export price information for the years 1996 through 1999, and why didn't the authority establish the period of investigation as soon as the investigation was initiated?

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<sup>47</sup> Exhibit BRA-11

<sup>48</sup> Page 10 of Exhibit BRA-11.

<sup>49</sup> Exhibit BRA-13.