

ANNEX C

Third Parties

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ANNEX C-1

THIRD PARTY SUBMISSION OF CANADA

(5 September 2002)

I. INTRODUCTION

1. In letter dated April 24, 2002 to H.E. Carlos Pérez del Castillo, Chairman of the Dispute Settlement Body, Canada expressed its wish to participate as a third party in *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* (WT/DS241). Canada makes this submission in accordance with Article 10.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). At this point, Canada restricts its comments to the interpretation of Article 9.3 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-dumping Agreement). However, Canada may make additional submissions on this and other legal issues at the Substantive Meeting of the Panel with the Third Parties.

II. LEGAL ARGUMENT

A. BRAZIL'S ARGUMENTS

2. In its claims 28 and 29, as set out and developed in its First Written Submission, Brazil argues that the imposition by Argentina of a "variable anti-dumping duty" violates Articles 9.2 and 9.3 of the Anti-dumping Agreement.

3. According to Brazil, the variable duty at issue is an anti-dumping duty that is equal to the "absolute difference between the f.o.b. price invoiced in any one shipment and a designated 'minimum export price' also fixed in f.o.b. terms ...". Because the amount of the duty is variable, the result can be the imposition of duties on each shipment that "can exceed the margin of dumping established in the final determination". In its First Written Submission, Brazil does not adequately set out a legal analysis of the relevant provisions of the Anti-dumping Agreement. It only asserts that Argentina's anti-dumping duties are not collected in "an appropriate amount" as required by Article 9.2 and are, in addition, in violation of Article 9.3 because they exceed the margin of dumping "established in the final determination".

B. CANADA'S SUBMISSION

1. The Scope of this Submission

4. Canada is interested in ensuring that the Panel arrives at the correct legal interpretation of Articles 9.2 and 9.3. This is because if the Panel accepts Brazil's assertions, the consequence would be a serious dilution of the rights of WTO Members under the Anti-dumping Agreement.

5. Canada does not express any views on the application of the provisions at issue on the specific facts of this case.

2. An appropriate amount: Article 9.2 of the Anti-Dumping Agreement

6. Brazil purports to argue that with respect to the amount of an anti-dumping duty, there are *two* obligations on WTO Members: Article 9.2, which requires the collection of “an appropriate amount”, and Article 9.3, which restricts the “amount” of an anti-dumping duty to the “margin of dumping as established under Article 2”.

7. Brazil does not explain what would constitute an “appropriate” amount for the purposes of Article 9.2. The context of Article 9 as a whole is cogent evidence, however, that the appropriateness of an amount under the second paragraph of that Article is to be determined in accordance with the criteria set out in the third. Simply put, it is inconceivable that an “amount” arrived at following the detailed instructions of Article 9.3 (in conjunction with Article 2) would be considered not “appropriate” for the purposes of Article 9.2. Accordingly, as a starting point, unless Brazil can demonstrate otherwise, the Panel should consider that an amount permitted under Article 9.3 is “appropriate” under Article 9.2.

3. Margin of dumping: Article 9.3 of the Anti-Dumping Agreement

8. Article 9.3 provides that the “amount of an anti-dumping duty” must not exceed the “margin of dumping as established under Article 2.” Relying on Article 2.4.2 of the Anti-dumping Agreement, Brazil argues that, “the dumping margin as established under Article 2 of the Anti-dumping Agreement is that established *during the investigation phase*.” [emphasis added] Accordingly, Brazil seems to argue, even if Brazilian exporters export poultry at prices that result in dumping that is *more egregious* than during the investigation phase, Argentina may impose anti-dumping duties only if they do not exceed the original margin of dumping.

9. Article 9.3 has no such requirement. Indeed, the very fact situation set out by Brazil in its submission underlines the illogic of Brazil’s proposed interpretation.

10. In determining the “margin of dumping” for the purposes of Article 9.3, the Panel should examine Article 2 in its entirety. Article 2 provides that under normal market conditions, the margin of dumping is simply the difference between the export price and the “comparable price ... in the exporting country” as set out in Article 2.1. The prices must be *comparable* in the sense of Article 2.4; the comparison must be made at the same level of trade and *around the same time*. Nothing in Article 2 limits the margin of dumping to a static amount found during the period of investigation. Indeed, any such reading appears to directly contradict the fair comparison requirement in Article 2.4.

11. Brazil quotes Article 2.4.2 in support of its position that the “margin of dumping” is fixed in time. However, Article 2.4.2 deals with the situation where a weighted average dumping margin needs to be established *during the period of investigation*. Nowhere does it fix the “margin of dumping” to that found in the period of investigation. Article 2.4.2 does not appear immediately relevant to this case.

12. Finally, Brazil’s interpretation is fundamentally at odds with the object and purpose of Article VI of the GATT 1994 and the Anti-dumping Agreement.

13. Article VI:1 provides that:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the

products, *is to be condemned* if it causes or threatens material injury [emphasis added]

14. The object and purpose of the Anti-dumping Agreement, as can be seen in Article VI:1 and also in the terms of the Anti-dumping Agreement, is to provide a mechanism to address unfair trade situations where products are sold at prices below their “normal value” in the export market. This can be achieved through the imposition of anti-dumping duties equal to the difference between the two prices (the margin of dumping), or through price undertakings. If it were to prevail, Brazil’s interpretation would result in the perverse outcome that an exporter will be able to undermine anti-dumping duties legitimately imposed by an importing country, through dumping at even *larger* margins than those found during the investigation period. Nothing in the Anti-dumping Agreement prevents a Member from imposing anti-dumping duties equivalent to the actual margin of dumping to prevent precisely such an outcome.

15. The “margin of dumping” under Article 9.3 is the price difference set out in Article 2, and in this case, Article 2.1. Such a margin by definition varies in accordance with the pricing strategy of an exporter found to have engaged in dumping. An export price that equals or exceeds the normal value does not attract an anti-dumping duty. At the same time, an export price below the normal value will attract an amount equal to the difference between the normal value and export price of those goods (that is, the actual margin of dumping). While Members may choose, for their own reasons, to apply a rate of duty equal to the margin of dumping found in the original investigation, nothing in Article 9.3 compels them to do so.

III. CONCLUSION

16. Brazil’s interpretation of Articles 9.2 and 9.3 of the Anti-dumping Agreement is flawed and should be rejected because:

- the “appropriate amount” in Article 9.2 is the same as the amount found under Article 9.3 and Article 9.2 does not impose an additional calculation obligation on Members;
- read in context, the “margin of dumping” in Article 9.3 is not limited to the margin found during the period of investigation; and
- Brazil’s interpretation seriously vitiates the right of Members to ensure that anti-dumping measures address the actual margin of dumping.

17. Making a determination of dumping in accordance with Article 2 is one of the requisite elements for the imposition of anti-dumping measures. The margin of dumping found in the course of the original investigation does not, however, cap the amount of anti-dumping duties that may be imposed when future imports take place. When such future imports are dumped at a margin higher than that determined to exist at the time of the final determination, the importing Member may impose anti-dumping measures equal to that margin.

18. Canada stresses that it does not have any views on the application of the provisions of the Anti-dumping Agreement to the specific facts of this case. Canada may make additional remarks on this and other aspects of this dispute at the Substantive Meeting of the Panel with the Third Parties.

ANNEX C-2

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(9 September 2002)

I. INTRODUCTION

1. The European Communities (the "EC") intervene in this dispute because of their systemic interest in the correct interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement").

2. Many of the claims submitted by Brazil raise factual issues on which the EC is not in a position to comment. Accordingly, in this submission the EC will limit itself to provide its views with respect to a number of issues of legal interpretation to which it attaches particular importance. More specifically, the EC will argue in this submission that:

- in so far as the issue arises in connection with Claim 21, the Panel should confirm the interpretation of Article 6.9 made by the panel in *Guatemala – Cement II* to the effect that the disclosure obligation imposed by that provision cannot be satisfied simply by allowing access to the file;
- Article 2.4 does not address the issue raised by Brazil under Claim 24;
- contrary to Brazil's Claims 28 and 29, the imposition of variable duties equal to the difference between the normal value established during the investigation and the export prices of the shipments made after the imposition of the duties is not inconsistent with Articles 9.2 and 9.3;
- the term "dumped imports", as used in Article 3, may be interpreted as referring to all imports from the country concerned, contrary to Brazil's Claims 32, 33, 34, 35 and 36; and
- contrary to Brazil's Claim 41, the term "major proportion" used in Article 4.1 does not mean at least 50 per cent of the domestic production, but rather an important proportion thereof, which may be less than 50 per cent.

3. Before addressing the above issues, the EC will comment on the preliminary objection raised by Argentina on the basis of the existence of a ruling issued by an Ad Hoc Arbitral Tribunal established under the MERCOSUR Agreement in connection with the same measure.

II. PRELIMINARY OBJECTION

A. RELEVANCE OF THE RULING BY THE MERCOSUR AD HOC ARBITRAL TRIBUNAL WITH RESPECT TO THE SAME MEASURE

4. The anti-dumping measure in dispute in this case has already been the subject of another dispute before an Ad Hoc Arbitral Tribunal (“Tribunal Arbitral Ad Hoc”) established at the request of Brazil under Article 7 of the *Protocol of Brasilia*¹ to the *Treaty of Asunción* establishing the MERCOSUR², which issued a ruling (“laudo arbitral”) rejecting Brazil’s complaint on 21 May 2001.³

5. Citing the existence of the above mentioned arbitration ruling, Argentina has requested the Panel to dismiss Brazil’s complaint. The grounds for that request are, nevertheless, somewhat unclear. In essence, Argentina appears to be arguing the following:

- the dispute has already been “debated and resolved”.⁴ This suggests that Argentina takes the view that the arbitration ruling has the effect of *res iudicata* between the parties. Nevertheless, Argentina does not invoke expressly that notion;
- the arbitration ruling is part of the relevant “normative framework”⁵ and must be “taken into account”⁶ by the Panel in accordance with the last part of the second sentence of Article 3.2 of the *DSU* (which provides that the dispute settlement mechanism serves to “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”)⁷;
- by bringing this dispute, Brazil has abused its rights under the *WTO Agreement*⁸;
- given Brazil’s earlier decision to bring the same dispute before a MERCOSUR Ad Hoc Arbitral Tribunal, as well as Brazil’s previous practice of resorting exclusively to the MERCOSUR dispute settlement mechanism, Brazil is *estopped* from bringing this case before a WTO Panel.⁹

(a) *Res iudicata*

6. The applicability of the principle of *res iudicata* to the disputes arising under the *WTO Agreement* has been examined by the panel in *India – Autos*¹⁰, which nevertheless did not consider it necessary to rule on that issue. Likewise, this Panel need not reach this issue because it is plain that,

¹ Protocol of Brasilia on the Settlement of Disputes of 17 December 1991 (the “Protocol of Brasilia”).

² Tratado para la Constitución de un Mercado Común between the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay of 26 March 1991 (the “MERCOSUR Treaty”).

³ Laudo del Tribunal Ad Hoc del MERCOSUR constituido para decidir sobre Controversia entre la República Federativa de Brasil y la República Argentina sobre “Aplicación de Medidas Antidumping contra la exportación de pollos enteros provenientes de Brasil (Res. 574/2000) del Ministerio de Economía de la Republica Argentina” de 31 de Mayo de 2001.

⁴ Argentina’s Submission, paras. 23 and 17.

⁵ Argentina’s Submission, para. 22. See also para. 18.

⁶ *Ibid.*

⁷ *Ibid.*, para. 18.

⁸ *Ibid.*, paras. 17 and 23

⁹ *Ibid.*, paras. 22 and 24.

¹⁰ Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R (“*India – Autos*”).

in any event, the requirements for the existence of *res iudicata* are not met. As noted by the panel in *India – Autos*,

for *res iudicata* 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.¹¹

7. The measure before this Panel is the same as the measure in dispute before the MERCOSUR Ad Hoc Arbitral Tribunal. But the claims are different because they involve a different legal basis. The claims raised by Brazil before this Panel are based on the *Anti-Dumping Agreement*. On the other hand, the claims ruled upon by the MERCOSUR Ad Hoc Arbitral Tribunal were based on MERCOSUR law.

8. Indeed, the jurisdiction of the dispute settlement mechanism established by the *Protocol of Brasilia* is limited to disputes concerning the application and interpretation of MERCOSUR law. Article 1 of the *Protocol of Brasilia* states in this regard that

Las controversias que surjan entre los Estados Partes sobre la interpretación, aplicación o incumplimiento de las disposiciones contenidas en el Tratado de Asunción, de los acuerdos celebrados en el marco del mismo, así como de las Decisiones del Consejo del mercado Común y de las Resoluciones del Grupo del Mercado Común, serán sometidas a los procedimientos de solución establecidos en el presente protocolo.

9. Brazil argued before the Ad Hoc Arbitral Tribunal that since all the Party States of Mercosur were parties to the *WTO Agreement*, the *Anti-Dumping Agreement* was part of the relevant MERCOSUR law.¹² This view, however, was rejected by the Ad Hoc Arbitral Tribunal, which declined to rule on the consistency of the measure in dispute with the *Anti-Dumping Agreement*.¹³

(b) *Article 3.2 of the DSU*

10. The relevance of Article 3.2 of the *DSU* to Argentina's request is difficult to understand. The language of Article 3.2 relied upon by Argentina is concerned exclusively with the interpretation of the *WTO Agreement*, and not with the sources of WTO law. Yet, Argentina's position appears to be, not that the ruling of the Ad Hoc Arbitral Tribunal is a relevant element for the interpretation of the *Anti-Dumping Agreement* to be made by this Panel, but rather that the existence of such ruling would preclude this Panel from making such interpretation.

11. In any event, it is difficult to see how the interpretation of the provisions of MERCOSUR law made by the Ad Hoc Arbitral Tribunal could become relevant, in accordance with the rules laid down in Articles 31 and 32 of the *Vienna Convention*, for the interpretation of the provisions of the *Anti-Dumping Agreement* at issue in this dispute.

(c) *Abuse of rights and estoppel*

12. Although Argentina has made these two arguments separately, they raise essentially the same issues. Therefore, the EC will consider them together.

¹¹ Ibid., Para.7.66

¹² Arbitration ruling, para. 30.

¹³ Ibid., paras. 127-130.

13. As recalled by Argentina, Article 3.10 of the *DSU* provides that

if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute...

14. In *United States – FSC*, the Appellate Body relied upon Article 3.10 in order to conclude that the United States was precluded from raising at the appellate stage a defence which it had failed to invoke in a timely manner during the panel proceedings.¹⁴ This case shows that Article 3.10 of the *DSU* is more than a mere exhortation. Members are under a positive duty to exercise their procedural rights under the *DSU* in good faith and may forfeit those rights if they fail to do so.

15. The EC does not consider it necessary to take a position on the issue of whether a Member would abuse its right to a panel under the *DSU* and, hence, act inconsistently with Article 3.10 if it were to request the establishment of a panel in violation of the principle of *estoppel*.¹⁵ Indeed, this Panel need not reach this issue because, in any event, Brazil's conduct is not contrary to that principle.

16. As noted by the panel in *EC - Bananas I*, *estoppel* can only "result from the express, or in exceptional cases implied consent of the complaining parties".¹⁶ The same panel noted that, in particular,

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.¹⁷

17. The facts alleged by Argentina are not sufficient to conclude that Brazil has "consented", whether explicitly or implicitly, not to bring this dispute before the WTO. The *Protocol of Brasilia* contains no provision which limits in any manner the right of the parties to request a panel under the *WTO Agreement* with respect to a measure that has already been the subject of a dispute under that Protocol.¹⁸ Thus, the mere fact that Brazil requested first the establishment of an Ad Hoc Arbitral

¹⁴ Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporation"*, WT/DS108/AB/R, para. 166.

¹⁵ The panel in *India – Autos* (at footnote 364) suggested that a Member may be estopped from requesting the establishment of a panel with respect to a matter which has been the subject of a mutually agreed solution.

¹⁶ Panel Report, *EEC – Member States' Import Regimes for Bananas*, DS32/R ("EC – Bananas I") (unadopted), para 361. See also Panel Report, *Guatemala – Definitive Anti-Dumping measures on Grey Portland Cement from Mexico*, WT/DS156/R, footnote 791, ("it is clear that not any silence can be considered to constitute consent").

¹⁷ Panel Report, *EC – Bananas I*, para.362.

¹⁸ Unlike the more recent *Protocol of Olivos on Dispute Settlement*, which provides in its Article 1.2 that

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

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

The Protocol of Olivos was signed on 18 February 2002 and has not entered into force yet. The question might be raised whether the request for the establishment of the panel made by Brazil on 25 February 2002, i.e. after the signature of the Protocol of Olivos, was consistent with Brazil's obligation under Article 18 of the Vienna Convention not to defeat the object and purpose of a signed treaty prior to its entry into

Tribunal under the *Protocol of Brasilia* does not amount to a renunciation by Brazil to bring a dispute settlement action under the *WTO Agreement*.

18. Similarly, the mere fact that Brazil did not consider it necessary to take dispute settlement action under the *WTO Agreement* following the arbitration rulings issued in a number of other cases cited by Argentina cannot be construed as an implicit renunciation by Brazil to its right under the *WTO Agreement* to take such action in this case.

III. CLAIMS

A. CLAIM 21: ARTICLE 6.9

19. Brazil alleges that the report issued by the DCD prior to the Final Determination (the so-called '*Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa probatoria*') did not provide sufficient information with respect to certain facts that Brazil considers to be essential facts which formed the basis for the decision whether to apply definitive measures.¹⁹ Brazil claims that, by failing to provide such information to the exporters, Argentina violated Article 6.9.

20. The EC does not wish to express any views with respect to the largely factual issues of whether Argentina provided the information in question and of whether the omitted information, if any, constituted "essential facts" within the meaning of Article 6.9.

21. The EC would like, nevertheless, to restate its well known position with respect to the scope of the disclosure obligation imposed by Article 6.9. Brazil has relied²⁰ on the panel report in *Argentina - Ceramic Tiles*.²¹ The EC considers that the interpretation of Article 6.9 made in that report is incorrect in so far as the panel found that the disclosure requirements imposed by that provision could be met

through the inclusion in the record of documents - such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters - which actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply a definitive measure.²²

22. The EC agrees with the panel in *Argentina - Ceramic Tiles* that Article 6.9 "does not prescribe the precise manner in which the authority is to comply with its disclosure obligation".²³ Thus, for example, the authorities may provide disclosure by sending a disclosure document to the exporters, or by holding a disclosure hearing, or by placing a disclosure document in the file.

23. The EC considers, nevertheless, that Article 6.9 requires that, regardless of the form of the disclosure, the authorities take active steps in order to identify and point to the exporters the relevant "essential facts". Accordingly, merely giving access to the file is not sufficient to satisfy the

force. However, Article 50 of the Protocol of Olivos appears to suggest that it does not apply to disputes already decided in accordance with the Protocol of Brasilia.

¹⁹ Brazil's Submission, para. 342.

²⁰ Brazil's Submission, paras. 346-347.

²¹ Panel Report, *Argentina - Definitive Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R ("Argentina - Ceramic Tiles")

²² *Ibid.*, para. 6.125.

²³ *Ibid.*

requirements of Article 6.9, unless the file contains a disclosure document specifically prepared by the authorities which clearly identifies the “essential facts”.

24. For the above reasons, the EC considers that a more correct interpretation of Article 6.9 is to be found in the panel report on *Guatemala – Cement – II*.²⁴ In particular, the EC agrees with the following views expressed by that panel and would urge this Panel to endorse them :

We now turn to Guatemala's argument that the Ministry disclosed the "essential facts" by making copies of the file available to interested parties. We note that an investigating authority's file is likely to contain vast amounts of information, some of which may not be relied on by the investigating authority in making its decision whether to apply definitive measures. For example, the file may contain information submitted by an interested party that was subsequently shown to be inaccurate upon verification. Although that information will remain in the file, it would not form the basis of the investigating authority's decision whether to apply definitive measures. 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 issues 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.

Furthermore, if the disclosure of "essential facts" under Article 6.9 could be undertaken simply by providing access to all information in the file, there would be little, if any, practical difference between Article 6.9 and Article 6.4. Guatemala is effectively arguing that it complied with Article 6.9 by complying with Article 6.4, *i.e.*, by providing "timely opportunities for interested parties to see all information that is relevant to the presentation of their cases ... and that is used by the authorities ...". We do not accept an interpretation of Article 6.9 that would effectively reduce its substantive requirements to those of Article 6.4. In our view, an investigating authority must do more than simply provide "timely opportunities for interested parties to see all information that is relevant to the presentation of their cases ... and that is used by the authorities ..." in order to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". In light of these considerations, we do not consider that the Ministry could comply with the requirement to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" simply by offering to provide interested parties with copies of all information in the file.

25. The EC notes that in its First Submission Argentina appears to argue that it disclosed the “essential facts” by issuing to the exporters the above mentioned *‘Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa probatoria’*.²⁵ Thus, unlike in *Argentina – Ceramic Tiles*, Argentina does not seem to take the position that merely giving access to the file can be sufficient to comply with Article 6.9. If confirmed, the Panel would not need to address the issue discussed in the

²⁴ Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156R/, paras. 8.229-8.230.

²⁵ Argentina's Submission, para. 185.

above paragraphs. The above comments, therefore, are submitted in the event that, in subsequent submissions, Argentina were to take the view that, in examining Brazil's claim, the Panel should take into account not only the '*Relevamiento de lo Actuado con Anterioridad al Cierre de la Etapa probatoria*' but also any other facts "disclosed" in other documents contained in the file.

B. CLAIM 26: ARTICLE 2.4

26. Brazil alleges that the DCD did not establish the data collection period for the dumping investigation until nine months after the investigation was initiated.²⁶ Brazil argues that, by doing so, Argentina acted inconsistently with Article 2.4, which 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".

27. The EC is of the view that Article 2.4 does not address the issue raised by Brazil. As recently recalled by the panel report in *Egypt – Steel Rebar*²⁷, Article 2.4 is concerned exclusively with the comparison between the normal value and the export price. It does not apply to the determination of the normal value and the export price.

28. The EC would suggest that the relevant provisions to examine the issue raised by Brazil are Article 6.1, which states that

All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require ...

and the first paragraph of Annex II, which provides 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.

C. CLAIMS 28 AND 29: ARTICLES 9.2 AND 9.3

29. The Argentinean authorities have imposed anti-dumping duties in the form a specific duty equal to the difference between the FOB price invoiced in any one shipment and a designated "minimum export price", also fixed in FOB terms.

30. Brazil claims that the duties imposed by Argentina are inconsistent with Articles 9.2 and 9.3 of the *Anti-Dumping Agreement* because they may lead to the collection of duties in excess of the dumping margin (expressed as a percentage of the export price) established for the investigation period.

31. The EC considers that Brazil's claim under Article 9.3 (and, consequently, also its claim under Article 9.2, which appears to be entirely dependent upon a violation of Article 9.3) is based on a misinterpretation of that provision. Article 9.3 provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2". It does not provide that such margin must be the margin established for the investigation period. Nor is this required by Article 2.

²⁶ Brazil's Submission, para. 407.

²⁷ Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/ para. 7.335 (not adopted yet).

32. Brazil suggests that the “dumping margin” referred to in Article 9.3 is the margin established for the investigation period because Article 24.2 applies in order to determine “the existence of margins of dumping during the investigation phase”. This is an obvious *non-sequitur*. From the fact that Article 2.4.2 applies to the investigation phase, it does not follow that the application of all the other provisions of Article 2 is also restricted to the investigation phase. Nor does Article 2.4.2 imply that dumping margins can be calculated only for the investigation period.

33. Brazil’s interpretation is contradicted by the immediate context of Article 9.3. 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. Similarly, Article 9.3.2 provides that, where duties are assessed prospectively, the authorities shall refund the duties “paid in excess of the dumping margin”. 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.

34. Furthermore, Brazil’s claim would seem to imply that the application of variable anti-dumping duties, or indeed the application of any kind of specific duties, is contrary *per se* to Articles 9.2. The EC strongly disagrees with that proposition. The *Anti-Dumping Agreement* does not require to express the margin of dumping as a percentage of the export price (except for the purpose of establishing whether it is *de minimis*²⁸). Nor does it prescribe any particular type of duties.

35. The collection of variable duties equal to the difference between the normal value established for the investigation period and the export prices of the shipments made after the imposition of the duties is expressly contemplated in Article 9.4 of the *Anti-dumping Agreement*, which provides in pertinent part that

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:

[...]

(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 producers or exporters not individually examined.

36. Article 9.4 (ii) lays down rules to calculate the “all-others” rate where the duties applied to the exporters included in the sample are calculated on the basis of prospective normal values. It presupposes, therefore, that the use of such prospective normal values is not inconsistent *per se* with the *Anti-Dumping Agreement*, including with Articles 9.2 and 9.3.

37. The precise method followed by the Argentinean authorities in order to calculate the so-called “minimum export prices” is unclear to the EC. In particular, it is unclear whether, and if so how, those “minimum export prices” relate to the normal values established during the investigation. The EC would observe, nevertheless, that the “minimum export prices” set out in the table included at pages 112 and 113 of Brazil’s Submission appear to be lower than the corresponding normal values shown in the table at page 111. In the EC’s view, if it were confirmed that the “minimum export prices” applied by Argentina are equal to, or lower than the relevant normal values established during the investigation, the collection of a variable duty equal to the difference between those “minimum

²⁸ Cf. Article 5.8 of the *Anti-Dumping Agreement*.

export price” and the export prices of the shipments made after the imposition of the duties would not be inconsistent with Articles 9.2 and 9.3 of the *Anti-Dumping Agreement*.

D. CLAIMS 34, 35, 36 AND 37: ARTICLES 3.1, 3.2, 3.4 AND 3.5

38. The DCD found that imports from two exporters (Nicolini and Seara) were not dumped.²⁹ Brazil argues that the CNCE did not exclude those imports from the “dumped imports” analysed in the injury determination.³⁰ Brazil claims that, by failing to do so, Argentina violated Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement*.

39. Argentina appears to argue that, in fact, it did exclude imports from Nicolini and Seara from the injury determination.³¹ The comments below are submitted in the event that the Panel were to find that, contrary to Argentina’s contention, imports from those exporters were included in the injury analysis.

40. For the reasons explained below, the EC considers that Argentina was entitled to treat all imports from Brazil as “dumped imports” for the purposes of the injury determination and, therefore, did not act inconsistently with the provisions invoked by Brazil.

41. The *Anti-Dumping Agreement* is concerned with dumping between countries. This is reflected in the definition of dumping contained in Article VI:1 of the *GATT* and in Article 2.1 of the *Anti-Dumping Agreement*, as well as in the following basic features of the anti-dumping investigations:

- investigations are opened with respect to countries and not with respect to individual exporters. This is evident from Article 12.1, which provides that the notice of initiation shall contain “the name of the exporting country or countries”;
- once the investigation is open, all exports of the product from the named country must be examined in order to determine dumping and injury, subject to the possibility to resort to sampling in accordance with Article 6.10;
- although Article 6.10 provides that, as a rule, an individual dumping margin must be established for each exporter (*inter alia* to ensure that the measures are effective), there is normally always a general duty (the “residual” or “all others” duty) applicable to all unnamed exporters on a country-by-country basis. This practice is comforted by Article 9.2 which provides that, where duties are imposed, if it is impracticable to name all the suppliers from one country, the authorities may name the supplying country.

42. The wording of Article 3.3 confirms that the notion of “dumped imports”, as used in Article 3, refers to all the imports of the product under consideration from each country concerned. It provides that

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as

²⁹ Brazil’s Submission, para. 445

³⁰ Brazil’s Submission, paras. 450-451.

³¹ Argentina’s Submission, paras. 266-273.

defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like product.

43. There are no corresponding rules to address the cumulation of imports from several exporters, although this would be just as necessary if the term “dumped imports” were taken to require separate consideration of the imports from different exporters.

44. Additional support is provided by Article 5.7 of the *Anti-Dumping Agreement*, which provides that dumping and injury must be examined simultaneously during the course of the investigation. Since injury has to be investigated before it is established which exporters are dumping, it is clear that the term “dumped imports” used in connection with the injury provisions of Article 3 must be referring to all imports of the product under investigation (although the finding of injury is, of course, conditional upon dumping being found).³²

E. CLAIM 41: ARTICLE 4.1

45. Brazil alleges that the assessment of the impact of the dumped imports upon the domestic industry was based on the data supplied by ten domestic producers that responded to the CNCE’s questionnaires, out of the thirteen producers that had supported the application.³³ According to Brazil, those ten producers accounted for 46 per cent of the total domestic production in 1998.³⁴

46. Brazil claims that 46 per cent of the total domestic production does not constitute a “major proportion” of the total domestic production within the meaning of Article 4.1 of the *Anti-Dumping Agreement*. According to Brazil, “a major proportion” means at least 50 per cent of the total production.³⁵

47. As explained below, the EC disagrees with Brazil’s interpretation of the terms “a major proportion”. In the EC’s view, “a major proportion” does not mean the majority of the domestic production, but rather an important part thereof, which may be less than 50 per cent. In any event, assuming that “a major proportion” meant at least 50 per cent of the domestic production, this would not imply that the determination of injury must be based necessarily on data pertaining to domestic producers representing that proportion.

³² In addition, the EC would like to point out that its interpretation is also warranted in view of the fact that a joint injury analysis is possible or even warranted when anti-dumping and anti-subsidy proceedings concerning the same country run in parallel. The salmon Panel has recognized that the injury analysis can be carried out jointly for both such proceedings (see paras 572 and 573 of the Panel Report on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh Atlantic Salmon from Norway*, ADP/87, adopted on 27 April 1994). Indeed, since the starting point for such analysis is the volume and the prices of the imports concerned (and not the level of dumping or subsidization), it does not seem appropriate to distinguish at company level. If the EC’s interpretation were not accepted, two different injury examinations would have to be carried out if a company is found to be dumping but not to be subsidized or *vice versa*. This makes injury examinations often unworkable and that cannot have been the intention of the drafters of the *Anti-Dumping Agreement*.

³³ Brazil’s Submission, para. 509.

³⁴ *Ibid.*, para. 510.

³⁵ *Ibid.*, paras 512-519.

(a) *The meaning of “a major proportion”*

48. Brazil asserts that the ordinary meaning of the term “major proportion” is “the majority”.³⁶ That is indeed one of the ordinary meanings of “major”, but not the only one. The *New Shorter Oxford Dictionary* gives another meaning of “major”: “unusually important, serious or significant”.³⁷ Similarly, *Le Petit Robert* defines the word “majeur” as “très grand, très important”.³⁸

49. The EC submits that in the context of Article 4.1 the phrase “a major proportion” does not mean “the majority”, but rather an important part. Article 4.1 alludes to “a major proportion”, rather than “the major proportion”. The use of the indefinite article “a” indicates that there may be more than one “major proportion” and, therefore, that it is not necessary that “a major proportion” represents “the majority” of domestic production. Confirmation of this is provided by the Spanish version of the *Anti-Dumping Agreement*, where the term “major” has been rendered as “importante”.

50. The EC’s interpretation is supported by Article 5.4, which provides that an investigation shall not be initiated unless the authorities determine that the application has been made “by or on behalf of the domestic industry”. Article 5.4 goes on to state that

The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of the total production of the like product produced by the domestic industry.

51. Thus, in accordance with Article 5.4, an application may be considered to have been made “on behalf of the domestic industry” even if the producers which support it represent less than 50 per cent of the domestic production. The term “domestic industry” has the same meaning throughout the *Anti-Dumping Agreement*.³⁹ If a number of producers which accounts for less than 50 per cent of the domestic production may, in certain circumstances, be considered to constitute “a major proportion” of the domestic production for the purposes of Article 5.4, then the same should be true also for the purposes of the other provisions of the *Anti-Dumping Agreement*.

52. Moreover, it would be illogical to allow the opening of an investigation on the basis of an application filed by producers which represent less than 50 per cent of the domestic production only to conclude subsequently that the injury suffered by those producers does not, by reason of the percentage of the domestic production accounted by those producers, amount to injury to the “domestic industry”.

(b) *Must the injury determination be based on data for producers representing a “major proportion” of domestic production ?*

53. Brazil assumes that if the term “a major proportion” means at least 50 per cent of the domestic production, then the fact of basing the injury analysis on data for producers which represent less than that percentage amounts necessarily to a violation of Article 4.1.

³⁶ Brazil’s Submission, para. 514.

³⁷ The New Shorter Oxford Dictionary, Clarendon Press Oxford, 1993.

³⁸ Le Petit Robert, 1976.

³⁹ Cf. The introductory clause of Article 4.1 (“For the purposes of this agreement...”).

54. As explained above, the EC disagrees with the premise of Brazil's claim, i.e. that "major proportion" means at least 50 per cent. In any event, the EC takes issue also with the consequence attached by Brazil to that premise. The EC submits that, even if "a major proportion" meant at least 50 per cent of the domestic production, there are circumstances in which the authorities could base an injury finding on data pertaining to producers accounting for less than that percentage.

55. In the first place, if a domestic producer which is part of the domestic industry fails to cooperate in the investigation, as indeed happened in the case under consideration, the authorities may, in accordance with the provisions of Article 6.8 and Annex II, resort to "facts available" in order to establish whether such producer has been injured. For that purpose, the relevant "facts available" may include the data collected from other producers which have co-operated in the investigation.

56. Second, when assessing the state of the domestic industry, the authorities may resort to sampling techniques. In other words, the investigating authorities may consider that data for some domestic producers are representative of the state of the whole of the domestic industry. The possibility to use sampling techniques is expressly envisaged in Article 6.10 with respect to the dumping determination. There is no reason why similar sampling techniques should not be allowed also for the purposes of the injury determination, subject to the general requirement of Article 3.1 that the determination of injury must be based on "positive evidence" and involve an "objective examination" of the relevant facts.

ANNEX C-3

THIRD PARTY SUBMISSION OF GUATEMALA

(9 September 2002)

INTRODUCTION

1. Guatemala presents this third-party submission because of its systemic interest in the correct interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter "the Anti-Dumping Agreement").

2. The Government of Guatemala understands that most of the procedural errors arising in the course of anti-dumping investigations are due to the very complexity of the procedure, with which Members that are only sporadically involved in its application are not usually familiar. However, Guatemala holds the view that, in implementing such measures, the Members must fully guarantee observance of the rules of the WTO Agreements governing such mechanisms.

3. Many of the issues in this dispute refer to factual points on which Guatemala is not in a position to comment. Guatemala will therefore limit itself to addressing a matter of legal interpretation stemming from its interest. In any case, it reserves the right to amplify the views put forward in this submission.

ARTICLE 4.1 OF THE ANTI-DUMPING AGREEMENT

4. The Spanish version of Article 4.1 establishes that:

"A los efectos del presente Acuerdo, la expresión "rama de producción nacional" se entenderá en el sentido de abarcar el conjunto de los productores nacionales de los productos similares, o aquellos de entre ellos cuya producción conjunta constituya una proporción importante de la producción nacional total de dichos productos."

5. The English version of Article 4.1 establishes 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."

ARGUMENTS OF BRAZIL

6. In its first written submission, Brazil notes that Article 4.1 defines the term "domestic industry" as the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.¹

¹ Paragraph 511 of Brazil's first written submission.

7. Brazil also notes that 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 of that product.²

8. Brazil then suggests that, in order to examine the issue, the Panel must interpret the meaning of the term "major proportion" in Article 4.1 of the Agreement.³

9. In paragraph 514 of its first written submission, Brazil notes that:

"According to ordinary meaning interpretation, the term "major part"⁴ is defined as "the majority"⁵. "Majority" is understood to mean "the greater number or part"⁶. From these 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."

10. In the light of the foregoing, Brazil notes that Article 4.1 provides that the domestic industry can be represented by 100 per cent of the domestic producers of the like products or by those of them whose production, jointly considered, constitutes more than half of the domestic production. If the collective output of those whose domestic production, jointly considered, is less than 50 per cent of the total domestic production, the domestic producers do not comply with the definition of Article 4.1 of the Agreement.

11. Consequently, Brazil argues that the CNCE's determination that 46 per cent of the collective output of those whose production, jointly considered, of the like product constitutes a major proportion of the collective output of the domestic producers is inconsistent with Article 4.1 of the Agreement.⁷

ARGUMENTS OF ARGENTINA

12. In paragraphs 302 to 304 of its first written submission, Argentina notes that:

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

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

304. For the Argentine Republic, as for other WTO Members (in accordance with previous, consistent decisions in this respect), 46 per cent represents a major

² Paragraph 512 of Brazil's first written submission.

³ Paragraph 513 of Brazil's first written submission.

⁴ The terms "proportion" and "part" are viewed and used as synonyms. Concise Oxford Dictionary – Ninth Edition, Oxford University Press, 1995, pages 995 and 1098.

⁵ Concise Oxford Dictionary – Ninth Edition, Oxford University Press, 1995, page 822.

⁶ Concise Oxford Dictionary – Ninth Edition, Oxford University Press, 1995, page 822.

⁷ Paragraph 519 of Brazil's first written submission.

proportion because it is not by accident that the Anti-Dumping Agreement did not establish a fixed percentage in order to show what is meant by 'major proportion'."

GUATEMALA'S SUBMISSION

13. Guatemala concurs with paragraph 517 of Brazil's first written submission, stating that 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.

14. Guatemala also holds the view that the requirement to make a determination of injury to the domestic industry read in the light of the definition of the domestic industry of Article 4.1 implies that the injury must be analysed with regard to the domestic producers as a whole or to those of them whose collective output constitutes a major proportion of the total domestic production of those products.

15. The injury test being one of the prerequisites for the adoption of anti-dumping measures, the taking of such measures must logically encompass the producers that are, or deem themselves to be, injured by dumping practices, hence the importance of Article 4.1 in defining what is meant by "domestic industry".

16. There is a difference between the Spanish and the English version of paragraph 1 of Article 4. Indeed, the words "proporción importante" in the Spanish version are translated as "major proportion" in the English version.

17. According to Brazil's interpretation, the term "major proportion" is defined as "the majority", which is understood to mean "the greater number or part".

18. According to that interpretation, the phrase is understood to mean the greater part in relation to a "whole". Brazil suggests that the "whole" in question is 100 per cent of the total domestic production of the like products.

19. In other words, Brazil understands Article 4.1 to provide that the domestic industry can be represented by 100 per cent of the domestic producers of the like products or by those of them whose production, jointly considered, constitutes more than half of the domestic production. Thus, if the collective output of those whose domestic production, jointly considered, is less than 50 per cent of the total domestic production, the domestic producers do not comply with the definition of Article 4.1 of the Anti-Dumping Agreement.

20. Guatemala understands the term "major" to mean "muy importante, serio, a fondo"⁸ (very important, serious, thorough). Likewise, it understands the term "importante" to mean "la cualidad de lo importante, de lo que es muy conveniente o interesante, o de mucha entidad o consecuencia"⁹ (the quality of that which is important, very appropriate or interesting, or of considerable importance or consequence)."

21. In view of the above, Guatemala acknowledges that the term "major" used in the English version could involve a more exacting criterion than that implied by the term "importante" used in the Spanish version. However, it is of the opinion that the term "importante" in the Spanish version of

⁸ Oxford Spanish Dictionary, Oxford University Press, 2001, page 1293.

⁹ Diccionario de la Lengua Española. Real Academia Española, XXII Edición, 2001, page 1255.

Article 4.1 could on no account be defined as representing more than half of a "whole", as Brazil suggests.

22. Guatemala considers that this difference should not be interpreted as Brazil has suggested, because this would have significant practical implications.

23. Attempts to find a solution should in any event be based on the recognition that the Article in question does not expressly establish any percentage indicative of a "proporción importante" or a "major proportion."

24. For the Argentine Republic, as for other WTO Members (in accordance with previous, consistent decisions in this respect), 46 per cent represents a major proportion ("proporción importante"). In this respect, Guatemala considers that the practice of the Members does not, in and of itself, guarantee the consistency of a measure with a WTO Agreement.

25. Guatemala understands that the aforementioned provision leaves the authority some room for discretion in determining, with regard to the facts and in the light of the circumstances specific to each industry, what is meant by the expression "domestic industry". We thus consider that this expression encompasses a great deal more than the definition of a percentage.

26. Moreover, the Report of the Group of Experts that examined anti-dumping and countervailing duties states the following:

*"The Group then discussed the term "industry" in relation to the concept of injury and agreed that, even though individual cases would obviously give rise to particular problems, as a general guiding principle judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof."*¹⁰ (Emphasis added).

27. It seems to us that Article 4.1 allows the investigating authority to determine, depending on the complexity of the case, what is meant by the phrase "*those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.*" The investigating authority's discretionary power is not unlimited, however, since it would not be able to invoke this phrase alone.

28. Likewise, our understanding is that this provision is not intended to give the investigating authority unlimited discretion in the determination of the domestic industry and that such a determination must necessarily be examined in relation to the notion of injury, without prejudice to the other assumptions to be gathered and verified prior to the final determination of injury.

29. Guatemala thus urges the Panel to refrain from implying, in any context whatsoever, that the reference to "a major proportion" in Article 4.1 requires reaching the percentage of 50 per cent.

30. In any event, and pursuant to the examination rule in Article 17.6 of the Anti-Dumping Agreement, the Panel can assess the grounds for the Argentine authority's decision according to the decision's degree of consistency with that which an unbiased and impartial authority would have made in this case.

¹⁰ L/978, adopted on 13 May 1959, 8S/145, paragraph 18.

ANNEX C-4

THIRD PARTY SUBMISSION OF PARAGUAY

(9 September 2002)

Background

1. At its meeting on 17 April 2002, the DSB established a panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Brazil (WT/DS241/3).

2. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

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

3. At that meeting, Paraguay reserved the right under Article 10 of the DSU to participate as a third party in the procedure.

4. In this submission, Paraguay wishes to convey its preliminary views on the case, without prejudice to any other oral or written submission it may make at the substantive meeting of the Panel with the third parties.

Rules and principles of public international law relevant to and applicable in this case

5. Paraguay considers that, in accordance with the general principles of public international law, this case is "res judicata" because it has already been brought under the dispute settlement procedure established within the framework of MERCOSUR, and under the Brasilia Protocol in particular.

6. In this regard, Article 21¹ of the Brasilia Protocol clearly establishes the unappealable and binding nature of awards rendered by the Ad Hoc Arbitral Tribunal, which are deemed to be "res judicata" – a principle that should prevail in addressing this case.

7. As noted in paragraph 20 of Argentina's written submission, the fact that the States party to MERCOSUR resorted to the Protocol of Brasilia mechanism demonstrates their full acceptance of that mechanism as a part of the MERCOSUR legal framework and as a dispute settlement procedure *in totum*, which is why it should be considered that the Award rendered by the MERCOSUR Ad Hoc Arbitral Tribunal² gives res judicata effect to this case.

¹ **Article 21**

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

² Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the dispute between the Federative Republic of Brazil and the Argentine Republic regarding the imposition of anti-dumping measures

8. In Paraguay's view, it is also relevant to mention the signing of the Olivos Protocol for the settlement of disputes within MERCOSUR among the four States party to MERCOSUR. Although not yet in force, the Protocol provides in Article 1.2 that: "*... Disputes within the scope of this Protocol that can also be addressed under the dispute settlement system of the World Trade Organization or those of other preferential trade arrangements entered into by the States Parties to MERCOSUR on an individual basis may be brought before any one of those forums, at the complainant's discretion. Without prejudice to the foregoing, the parties to the dispute may jointly agree on the forum.*

*Once a dispute settlement procedure has been initiated pursuant to the preceding paragraph, none of the parties may resort to the mechanisms established in the other forums in respect of the same subject-matter.*³

This instrument, negotiated and signed by the States Parties to MERCOSUR, allows them to choose the forum in which they wish disputes to be settled, with the restriction constituted by the exclusion clause, which stipulates that once a procedure has been initiated in one forum, this precludes resorting to any of the other forums provided for in the Protocol.

9. Paraguay also wishes to draw the Panel's attention to a rule of public international law in force, namely Article 18 of the Vienna Convention on the Law of Treaties of 1969, which reads as follows:

A State is **obliged to refrain**⁴ from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) ...".

10. In view of the foregoing, Paraguay considers this case as having been subject to a prior dispute settlement procedure, as recognized by both parties and resolved by a ruling that is binding on and mandatory for those parties. Hence this case should not be addressed by this Panel, for if it were, this would constitute a violation of the principles and rules of public international law and failure to abide by decisions handed down by MERCOSUR institutions, in this instance the award of an Ad Hoc Arbitral Tribunal constituted under the Brasilia Protocol.

on exports of whole poultry from Brazil (Res. 574/2000) of the Ministry of the Economy of the Argentine Republic. Date: 21 May 2001.

³ Emphasis added.

⁴ Emphasis added.

ANNEX C-5

THIRD PARTY SUBMISSION OF THE UNITED STATES

(9 September 2002)

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I. Introduction

1. The United States welcomes the opportunity to present its views in this proceeding on *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* (DS241). The United States is limiting its comments to certain issues relating to the proper legal interpretation of various articles of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “AD Agreement”).¹

II. Article 5.7 of the AD Agreement Does Not Require Members Deciding Whether to Initiate an Anti-Dumping Investigation to Evaluate Dumping and Injury Data from "Simultaneous" Time Periods

2. Brazil claims that Argentina breached Article 5.7 of the AD Agreement because its investigating authorities evaluated dumping and injury data that covered non-identical time periods when it determined whether to initiate the challenged investigation.² Brazil’s argument is based on a misinterpretation of the term “simultaneously” as that term is used in Article 5.7.

3. Article 5.7 states that in deciding whether to initiate an investigation, the “evidence of both dumping and injury shall be considered simultaneously. . . .” Brazil appears to believe that this language obligates a Member to ensure that its investigating authorities consider dumping and injury information from simultaneous (*i.e.*, identical) time periods. Viewed in context, however, the term “simultaneously” is linked to the term “considered,” not the term “evidence.” Thus, the obligation in Article 5.7 is to *consider* the evidence of dumping and injury simultaneously (for example, in concurrent investigations), not to consider *evidence* of dumping and injury collected from simultaneous (or identical) time periods.

4. As the Committee on Anti-Dumping Practices has recognized, the AD Agreement “does not establish any period of investigation” or establish guidelines for determining an appropriate period of investigation “for the examination of either dumping or injury.”³ The Committee has adopted a non-binding recommendation, however, which calls for a twelve-month period of investigation for analyses of dumping, and a three-year period of investigation for analyses of injury.⁴ On its face, the Committee’s recommendation indicates the lack of any basis for requiring Members to examine dumping and injury information from “simultaneous” time periods. The lack of congruity in the recommended time periods reflects the inherent differences in the nature of the analyses that administering authorities conduct for determining the existence of dumping, on the one hand, and injury, on the other.

5. For example, a Member’s determination of dumping normally need not consider trends over time. An injury determination, by contrast, will normally require an investigating authority to gather information covering more than one year in order to evaluate volume and price changes. An importing Member’s consideration of whether there is sufficient evidence relating to injury, such as whether there have been significant absolute or relative increases in the volume of dumped imports,

¹ The United States has not had an opportunity to review fully Argentina’s written submission in this dispute and is therefore limiting itself to addressing Brazil’s written submission at this time. The United States will address Argentina’s written submission, as appropriate, at the first Panel meeting.

² See, e.g., Brazil’s first written submission at para. 168.

³ Committee on Anti-Dumping Practices, *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted by the Committee on 5 May 2000.

⁴ *Id.*

must be made in the context of an appropriate time frame, which will almost always extend longer than the period of investigation for making a dumping calculation.⁵

6. The US views on this issue are not meant to suggest, however, that an investigating authority is free to examine dumping and injury information from entirely unrelated time periods. Article 3.5 of the AD Agreement clearly requires a Member to demonstrate a causal relationship between the dumped imports and injury to the domestic industry.⁶ It is entirely possible that the particular time periods that a Member chooses to examine in a particular investigation could call into question whether the Member has demonstrated such a causal link. Article 5.7 of the AD Agreement, however, does not bear on this matter.

III. The Term "A Major Proportion" In the Definition of the Domestic Industry in Article 4.1 of the Agreement Does Not Mean "The Majority"

7. Article 4.1 of the AD Agreement defines the term "domestic industry" as:

the domestic producers as a *whole* of the like products *or* . . . those of them whose collective output of the products constitutes a *major proportion* of the total domestic production of those products

(emphasis added). Brazil claims that the term "major proportion" is synonymous with "majority," and that Argentina breached Article 4.1 because its investigating authority examined data for 46 per cent of the domestic industry, which is less than a majority.⁷ The United States respectfully submits that Brazil's argument is based upon a misinterpretation of Article 4.1.

8. As an initial matter, Article 4.1 is just a definition. As a definition, it does not impose an independent obligation on WTO Members.⁸ For this reason alone, there is no basis for Brazil's claim that Argentina's injury analysis breached Article 4.1.

9. Even if this were not the case, however, Brazil's claim would find no support in the text of Article 4.1. First, the AD Agreement does not define the term "major," and the ordinary meaning of the term is "[d]esignating the greater *or relatively greater* of . . . two things" – the opposite of "minor."⁹ It can also mean "unusually important, serious, or significant."¹⁰ None of these meanings necessarily connotes "the majority."

10. Second, Brazil's argument that "major proportion" actually 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. Specifically, Article 5.4 of the

⁵ Indeed, the effects of import volume increases or price undercutting often take longer than a year to reach the level where they would be significant, and the impact of those effects on the domestic industry's condition may take even longer to become apparent. Furthermore, the fact that execution of sales in some industries can take as long as a year, and that in some industries sales are made pursuant to annual contracts, further demonstrates the appropriateness of examining a multi-year period in injury investigations.

⁶ Similarly, Article 5.2 of the AD Agreement requires an application for an investigation to include evidence of dumping, injury, and causal link.

⁷ Brazil's first written submission, paras. 511-519.

⁸ See Appellate Body Report on *United States – Tax Treatment for "Foreign Sales Corporations"*, *Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, para. 85 (stating that the definition of the term "subsidy" in Article 1.1 of the *Agreement on Subsidies and Countervailing Measures* "does not impose any obligation on Members with respect to the subsidies it defines.").

⁹ *The New Shorter Oxford English Dictionary*, vol. 1 at 1670 (1993) (emphasis added).

¹⁰ *Id.*

Agreement provides that an application is made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes “more than 50 per cent” of the total production of the specified portion of the industry. Unlike Article 4.1, Article 5.4 clearly imposes a majority requirement. Article 4.1 establishes a different standard: “a major proportion.”

11. Viewing the term in context also provides support for the conclusion that “major proportion” was not meant to establish a “majority” requirement. The term appears in Article 4.1 as an alternative to the industry “as a whole.” The definition reflects the reality in many anti-dumping investigations that it will not be possible to obtain the requested information from all domestic producers of the like product, and confirms that an injury determination would not be rendered inadequate simply because an investigating authority was unable to obtain information from all such producers. The AD Agreement does not establish a numerical benchmark for what constitutes a “major” proportion of a domestic industry. It will vary from case to case.

IV. A Member's Decision to Evaluate Certain Factors under Article 3.4 Using a Time Period Different than That Used for Other Factors Would Not *per se* Breach Article 3.1

12. Brazil claims that Argentina committed a *per se* breach of Article 3.1 by evaluating certain Article 3.4 factors over the period January 1996 through June 1999, and other factors over the period January 1996 through December 1998.¹¹ The United States takes no position on the question whether Argentina's decision to base its analysis on two different time periods breached its obligations in the particular case at issue. The United States disagrees, however, with Brazil's contention that an analysis of differing time periods *cannot* be objective, and thus *per se* breaches Article 3.1.

13. The panel report in *United States – Hot Rolled Steel* is instructive in this regard.¹² In that investigation, the United States 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.¹³ With regard to certain factors pertaining to impact, however, the United States compared data for 1998 with data for 1997, without explicitly discussing the data for 1996.¹⁴ The Panel concluded that the United States' failure to explicitly address the data for 1996 did not “undermine the adequacy of the [United States'] evaluation of the relevant economic factors, in light of its analysis and explanations, so as to render its examination of the impact of dumped imports on the domestic industry inconsistent with the AD Agreement.”¹⁵ The Panel's finding is consistent with the US view that the use of differing time periods to evaluate injury does not *per se* mean the investigating authority failed to carry out an objective examination.

V. An Investigating Authority's Failure to Discuss a Particular Article 3.4 Factor Does Not Necessarily Breach Article 12.2.2

14. Brazil asserts (claims 38-40) that Argentina failed to evaluate or refer to several of the factors set out in Article 3.4, and that Argentina's failure to do so breached Articles 3.1, 3.4, and 12.2.2 of the Agreement.¹⁶ The United States agrees with Brazil that the AD Agreement requires an investigating authority to evaluate each of the Article 3.4 factors, and we take no position on the issue whether Argentina did, in fact, evaluate each of the factors in the challenged investigation.

¹¹ See Brazil's first written submission, paras. 425-430.

¹² Panel Report on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 (“*United States – Hot Rolled Steel*”).

¹³ *Id.* at para. 7.227.

¹⁴ *Id.* at para. 7.228.

¹⁵ *Id.* at para. 7.234.

¹⁶ Brazil's first written submission, paras. 475-507.

15. The United States does not agree, however, that a failure to refer to a particular factor in the published determination necessarily breaches Article 12.2.2. 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.*”¹⁷ While all enumerated factors must be evaluated, not all are necessarily material in any particular case.

16. Given the requirement to evaluate all of the Article 3.4 factors, however, it should be discernible from the published determination that the authorities have done so. This obligation may be achieved when a determination, through its demonstration of why the authorities relied on the specific factors they found to be material in the case, thereby discloses why other factors on which they did not make specific findings were accorded little weight or were deemed not relevant at all. “[A]s long as the lack of relevance or materiality of the factors not central to the decision is at least implicitly apparent from the final determination, the Agreement’s requirements are satisfied.”¹⁸

VI. The Panel Should Decline to Provide Views on the Proper Interpretation of Article 18.2 of the DSU

17. In a letter dated 8 August 2002, Brazil submitted a letter to the Panel stating its intention to release to the public a non-confidential version of its first written submission. On 15 August 2002, Argentina submitted a letter expressing its view that Brazil’s proposed action would be inconsistent with Article 18.2 of the DSU. On 21 and 23 August 2002, Brazil and Canada, respectively, submitted letters opposing Argentina’s views. Finally, on 27 August 2002, Argentina submitted a second letter supporting the “spirit of transparency” and requesting the Panel’s views on the proper interpretation of Article 18.2.

18. The United States agrees with Brazil and Canada that nothing in Article 18.2 of the DSU would prevent a Member from releasing its own WTO submissions to the public. We have long done so as a matter of course, and we would welcome a decision by Argentina to do the same. Argentina does not need permission to make its own submissions available to the public. The United States is concerned, however, that Argentina’s request for the Panel’s views on this matter is, in essence, a request for an advisory opinion since there is no measure before the Panel. Furthermore, Article 18.2 is not within the Panel’s terms of reference. The United States notes that to the extent that Argentina is asking the Panel to interpret Article 18.2, that would be incompatible with the exclusive authority of the Ministerial Conference and General Council under Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* to interpret the WTO agreement. We respectfully request the Panel to decline Argentina’s request for views on the proper interpretation of Article 18.2.

VII. Conclusion

19. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.

¹⁷ See Article 12.2 (emphasis added).

¹⁸ Panel Report on *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, para. 6.163.

ANNEX C-6

THIRD PARTY ORAL STATEMENT OF PARAGUAY

(26 September 2002)

Mr Chairman,

As one of the four States party to MERCOSUR, Paraguay wishes to convey its views on this case and defend the integration institutions created under the Treaty of Asunción of 1991, as mentioned in our third party submission a few weeks ago.

Paraguay considers that, in accordance with the general principles of public international law, this case is "res judicata" because it has already been brought under the dispute settlement procedure established within the framework of MERCOSUR, and under the Brasilia Protocol in particular.

In this regard, Article 21 of the Brasilia Protocol clearly establishes the unappealable and binding nature of awards rendered by the Ad Hoc Arbitral Tribunal, which are deemed to be "res judicata" – a principle which my delegation considers should prevail in addressing this case.

As noted in paragraph 20 of Argentina's written submission, the fact that the States party to MERCOSUR resorted to the Protocol of Brasilia mechanism demonstrates their full acceptance of that mechanism as a part of the MERCOSUR legal framework and as a dispute settlement procedure *in totum*, which is why it should be considered that the Award rendered by the MERCOSUR Ad Hoc Arbitral Tribunal gives res judicata effect to this case.

In Paraguay's view, it is also relevant to mention the signing of the Olivos Protocol for the settlement of disputes within MERCOSUR among the four States party to MERCOSUR. Although not yet in force, the Protocol provides in Article 1.2 that: **".. Disputes within the scope of this Protocol that can also be addressed under the dispute settlement system of the World Trade Organization or those of other preferential trade arrangements entered into by the States Parties to MERCOSUR on an individual basis may be brought before any one of those forums, at the complainant's discretion. Without prejudice to the foregoing, the parties to the dispute may jointly agree on the forum.**

Once a dispute settlement procedure has been initiated pursuant to the preceding paragraph, none of the parties may resort to the mechanisms established in the other forums in respect of the same subject-matter, ..."

This instrument, negotiated and signed by the States Parties to MERCOSUR, allows them to choose the forum in which they wish disputes to be settled, with the restriction constituted by the exclusion clause, which stipulates that once a procedure has been initiated in one forum, this precludes resorting to any of the other forums provided for in the Protocol.

Paraguay also wishes to draw the Panel's attention to a rule of public international law in force, on which my delegation bases the arguments set forth in this statement, namely Article 18 of the Vienna Convention on the Law of Treaties of 1969, which reads as follows:

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; ..."**

In view of the foregoing, Paraguay considers this case as having been subject to a prior dispute settlement procedure, as recognized by both parties and resolved by a ruling that is binding on and mandatory for those parties. Hence this case should not be addressed by this Panel, for if it were, this would constitute a violation of the principles and rules of public international law and failure to abide by decisions handed down by MERCOSUR institutions, in this instance the Award of an Ad Hoc Arbitral Tribunal constituted under the Brasilia Protocol.

Lastly, Paraguay trusts that this Panel will rule on the arguments put forward both by my delegation and by that of the Republic of Argentina, for my country's government accords vital importance to the institutions created under the international agreements and treaties to which it is party, and in this case in particular, to the MERCOSUR institutions. Compliance with and recognition of these institutions strengthens, and assures predictability and security for, the Members in general and the multilateral trading system in particular.

Thank you.

ANNEX C-7

THIRD PARTY ORAL STATEMENT OF CHILE

(26 September 2002)

Thank you, Mr Chairman.

1. Chile thanks the Panel for the opportunity to present its views in this dispute. We are making use of the right provided for in Article 10 of the Dispute Settlement Understanding, on account of our systemic interest in the correct application of Article VI of the GATT 1994 and the Anti-Dumping Agreement in order to avoid abusive use of anti-dumping measures as protectionist barriers to trade.
2. We do not wish at this stage to take any view on Brazil's numerous complaints, most of which concern procedural aspects that would require us to undertake a more careful study of the investigation conducted by the Argentine authorities.
3. Instead, Chile would like to refer to one of the preliminary arguments put forward by Argentina in its first written submission, which is that an international tribunal has ruled on this same case, which would disqualify this Panel from hearing Brazil's complaint.
4. Without knowing the details of the arbitral procedure followed by the parties in dispute under the MERCOSUR dispute settlement rules, Chile understands, on the one hand, that the Arbitral Tribunal ruled against Brazil because no anti-dumping disciplines exist in the MERCOSUR framework and, on the other, that there is no precedent of Brazil having renounced its rights before the WTO, and specifically that to invoke the WTO dispute settlement mechanism, as might have been the case if the Olivos Protocol, which contains a forum exclusion clause (*cláusula sobre opción excluyente de foro*), had been in force.
5. On that understanding, and in the absence of legal identity, Brazil legitimately brought its subsequent complaint before the forum in which anti-dumping disciplines impose obligations on Argentina and Brazil, and the rest of the WTO Members.
6. What has been invoked in this dispute is the violation or failure to abide by the rules of the WTO, which is a distinct regulatory system that imposes its own rights and obligations on its Members, and these are different from the rights and obligations imposed by a bilateral agreement.
7. Consequently, Chile considers that Argentina's preliminary claim is unfounded since Brazil has invoked, before the WTO and this Panel in particular, the violation of obligations undertaken by Argentina within the framework of the WTO Agreements – and the Anti-Dumping Agreement and the GATT 1994 in particular – and not of obligations entered into in the MERCOSUR framework. Accordingly, this Panel is the forum with jurisdiction to hear the complaint lodged by Brazil in its request for the establishment of a panel and in its first written submission.

ANNEX C-8

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

(26 September 2002)

Mr Chairman, members of the Panel,

1. It is my honour to appear before you to present the views of the United States as a third party in this proceeding. As the Panel will recall, the United States has already filed a third-party submission in this dispute. Today, my comments will be limited to Argentina's preliminary request that the Panel not address any of Brazil's claims. We would be happy to receive any questions the Panel may have on either our written submission or our statement today.

Preliminary Objection

2. Mr. Chairman, in Argentina's first written submission, Argentina argues that the Panel should refuse to make findings on the claims that Brazil has raised in this dispute. In the view of the United States, there is no basis in the DSU for the Panel to grant Argentina's request.

3. Argentina argues that the Panel should refuse to make findings on Brazil's claims because Brazil previously challenged the Argentine measure under MERCOSUR dispute settlement rules. In Argentina's view, the Panel must take account of those rules and consider the consequences of Brazil's decision to use them. Alternatively, Argentina argues that the Panel should apply the principle of estoppel because Brazil has, in the past, accepted the scope of those rules. Mr. Chairman, neither argument provides a basis for the Panel to refuse to make findings on Brazil's claims.

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

5. Turning to Argentina's second point, its request for a finding of estoppel against Brazil, the United States first notes that this alternative claim again appears to relate to Brazil's obligations under MERCOSUR rather than to any provision of the DSU or the other covered agreements. As a result, the matter is not within the Panel's terms of reference and the Panel has no basis for making the requested finding. The United States also disagrees with Argentina that the Panel may apply what Argentina calls the principle of estoppel. The fact that Argentina cites to no textual basis for its request reflects the fact that Members have not consented to provide for the application of any such

principle of estoppel in WTO dispute settlement. The term estoppel appears nowhere in the text nor does Argentina cite to any provision which in substance provides Argentina the type of defense it asserts.

6. The United States also notes that the lack of any textual basis is reflected in the fact that no panel to date has applied a principle of estoppel. Moreover, there is no basis for attempting to import into WTO dispute settlement proceedings legal concepts with no grounding in the DSU. The lack of any textual basis is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past. In *Bananas I*, for example, the panel stated that estoppel can only “result from the express, or in exceptional cases implied, consent of the complaining parties.”¹ In *Asbestos* and *Guatemala Cement*, by contrast, the panels stated that estoppel is relevant when a party “reasonably relies” on the assurances of another party, and then suffers negative consequences resulting from a change in the other party’s position.² These inconsistencies illustrate the dangers of seeking to identify purportedly agreed-upon legal concepts beyond the only source all Members *have* agreed to – the text of the DSU itself.

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

8. For the foregoing reasons, the United States respectfully urges the Panel to reject Argentina’s request that it not consider Brazil’s claims.

Conclusion

9. This concludes my presentation. Thank you again for this opportunity to express our views.

¹ See *Third Party Submission of the European Communities, citing Report of the Panel on EEC – Member States’ Import Regimes for Bananas*, DS32/R, unadopted, para. 361.

² See Report of the Panel on *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted April 5, 2001, para. 8.60 (citations omitted); Panel Report on *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 8.23-24. One could also argue that these panels are describing the concept of “detrimental reliance.”

ANNEX C-9

THIRD PARTY ORAL STATEMENT OF CANADA

(26 September 2002)

Thank you Mr. Chairman.

In starting, I would like to express Canada's appreciation and thank the Members of the Panel for having accepted to take on the responsibility of aiding the Parties in resolving this dispute.

Canada made a written Third Party submission in this matter on 5 September 2002. In that submission, Canada limited its arguments to the interpretation of Articles 9.2 and 9.3 of the Antidumping Agreement.

Also, 23 August, Canada submitted a letter to the Chairman, outlining Canada's position with respect to the procedural issue that arose between the Parties pertaining to the public release of a Party's own written submissions.

As you may recall, in its written Third Party submission Canada indicated that it may wish to raise further substantive points at a later time. However, Canada has decided to limit its Third Party submissions in this matter to what is contained in its two previous written communications to the Panel.

Nonetheless, although Canada does not wish to raise any further substantive points at this time, I would be pleased to receive from the Panel or the Parties any questions regarding Canada's positions.

Thank you Mr. Chairman.

ANNEX C-10

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(26 September 2002)

I. INTRODUCTION

1. The European Communities (the "EC") thanks the Panel for this opportunity to submit its views orally in this dispute.

2. In its written submission, the EC has limited its comments to certain issues of legal interpretation. Specifically, the EC has argued that:

- the Panel should dismiss Argentina's preliminary objection based on the existence of an arbitration award issued by a MERCOSUR Ad Hoc Arbitration Tribunal with respect to the same anti-dumping measure;
- in so far as the issue arises in connection with **Claim 21**, the Panel should confirm the interpretation of Article 6.9 made by the panel in *Guatemala – Cement II* to the effect that the disclosure obligation imposed by that provision cannot be satisfied simply by allowing access to the file;
- Article 2.4 does not address the issue raised by Brazil under **Claim 24**;
- contrary to Brazil's **Claims 28 and 29**, the imposition of a variable duty equal to the difference between the normal value established during the investigation and the export prices of the shipments made after the imposition of the duties is not inconsistent with Articles 9.2 and 9.3;
- the term "dumped imports", as used in Article 3, may be interpreted as referring to all imports from the country concerned, contrary to Brazil's **Claims 32, 33, 34, 35 and 36**; and
- contrary to Brazil's **Claim 41**, the term "major proportion" used in Article 4.1 does not mean at least 50 per cent of the domestic production, but rather an important proportion thereof, which may be less than 50 per cent.

3. In our statement of this morning we will not repeat the comments already made in our written submission. Instead, we will comment briefly on some of the arguments submitted by the other third parties to this dispute.

II. ARGUMENT

A. ARTICLE 18.2 DSU

4. The EC agrees with Canada¹ and with the United States² that Article 18.2 of the *DSU* does not prevent Brazil from making its written submissions available to the public.

5. The EC would recall, nevertheless, that the right of a Member to disclose its own submissions to the public is subject to the third sentence of Article 18.2, which provides that “Members shall treat as confidential information submitted by another Member to the panel ... which that Member has designated as confidential”. Therefore, to the extent that a Member’s submission incorporates or refers to confidential information provided to the panel by another party to the dispute, such information should be omitted from the version disclosed to the public or replaced by a non-confidential summary requested from the party concerned in accordance with the fourth sentence of Article 18.2. We understand, however, that this issue does not arise here, as Argentina’s complaint concerned Brazil’s first submission to the panel.

6. Also, to the extent that Brazil’s submission contained information received by the Brazilian Government on a confidential basis from the Argentinean investigating authorities during the underlying investigation, the Brazilian Government would be bound to comply with any applicable provisions of Argentinean law which protect such confidentiality. However, again, we understand that this issue does not arise in this dispute. In any event, it would be beyond the Panel’s jurisdiction to enforce the provisions of Argentinean law on confidentiality.

7. Finally, the EC also agrees with the United States³ that the Panel should reject Argentina’s request that the Panel gives its “opinion” on the correct interpretation of Article 18.2 of the *DSU*.⁴ As noted by the United States⁵, it would be beyond the Panel’s terms of reference to give such an advisory opinion.

B. RES IUDICATA AND ARTICLE 18 OF THE VIENNA CONVENTION

8. Paraguay has argued that, since under the *Protocol of Brasilia* the award issued by an Ad Hoc Arbitration Tribunal is binding upon the parties to the arbitration, it has the effect of *res iudicata* between them, with the consequence that Brazil would be barred from bringing this dispute.⁶

9. As explained in our written submission, the EC disagrees with that view. The existence of *res iudicata* requires identity between the claims. While the measure at issue in this dispute is the same as the measure before the Ad Hoc Arbitration Tribunal in the case cited by Argentina and Paraguay, the claims are different because they involve different legal bases. The claims before this Panel are based on the *WTO Agreement*. In contrast, the claims ruled upon by the Ad Hoc Arbitration Tribunal were based on MERCOSUR law.

10. Furthermore, the EC would recall that Article 23.1 of the *DSU* provides that:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the

¹ Canada’s Letter to the Panel of 23 August 2002.

² US Submission, para. 18.

³ Ibid.

⁴ Argentina’s Letter to the Panel of 27 August 2002.

⁵ US Submission, para. 18.

⁶ Paraguay’s Submission, para. 7.

attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

11. This suggests that the Members of the WTO are not free to refer the adjudication of a dispute concerning their rights and obligations under the *WTO Agreement* to a body outside the WTO. Thus, although Article 25 of the *DSU* allows Members to resort to arbitration as an alternative means of dispute settlement, it envisages that such arbitration will take place “within” the WTO.

12. Paraguay further suggests that, by bringing this dispute, Brazil would have acted in violation of Article 18 of the *Vienna Convention on the Law of the Treaties*, because the *Protocol of Olivos* (which in its Article 1.2 requires the complainant to make a choice between bringing the dispute before a WTO panel or a MERCOSUR Arbitration Tribunal) had already been signed before Brazil brought this dispute, even if it has not entered into force yet.⁷ However, as noted in our written submission, it seems that even if the *Protocol of Olivos* had already entered into force, it would not apply to the facts at issue. Article 50 of that protocol provides that:

Las controversias en trámite iniciadas de acuerdo con el régimen del Protocolo de Brasilia se regirán exclusivamente por el mismo hasta su total conclusión.

13. It seems that, by the same logic, and indeed *a fortiori*, the *Protocol of Olivos* cannot be applied to disputes which have already been adjudicated under the *Protocol of Brasilia* as of the date of entry into force of the *Protocol of Olivos*. If the *Protocol of Olivos*, including its Article 1.2, was not meant to apply to the current dispute, it is clear that, by bringing it before this Panel, Brazil cannot defeat the object and purpose of that protocol. The EC considers that, in view of that, this Panel need not reach the issue of whether, by bringing a dispute in violation of Article 18 of the *Vienna Convention*, a Member would act inconsistently with Article 3.10 of the *DSU*.

C. Article 5.7 of the Anti-Dumping Agreement

14. The EC agrees with the United States that the mere fact that the reference period used for the purposes of the injury determination does not coincide with that used for the dumping determination does not amount *per se* to a violation of Article 5.7 of the *Anti-Dumping Agreement*.⁸ That provision is concerned exclusively with the timing of the examination of dumping and injury and not with the scope of such examination.

Thank you for your attention.

⁷ Ibid., para. 9.

⁸ US Submission, paras. 2-6.

ANNEX C-11

REPLIES OF THE EUROPEAN COMMUNITIES TO QUESTIONS OF THE PANEL

(3 October 2002)

Question 1

Please comment on the distinction apparently made between the terms “written submissions” and “statements of [a member’s] own positions” in the first two sentences of Article 18.2 of the DSU.

Reply

The *DSU* does not limit in any manner the form, content or length of the “statements” referred to in the second sentence of Article 18.2. Accordingly, a Member is free to make a “statement” of its positions by disclosing its written submissions to the Panel.

Question 2

Please explain how your investigating authorities treat imports for the purpose of investigating injury. In particular, does your investigating authority presume from the outset that all imports are dumped? Is so, what is the basis for such presumption, and is the presumption rebuttable under any circumstances? For example, is that presumption rebutted if the investigating authority finds that imports from a given exporter are not dumped?

If your investigating authority does not presume from the outset that all imports are dumped, how does your investigating authority distinguish between dumped and non-dumped imports during its injury investigation?

If your investigating authority determines that imports from a given exporter are not dumped, are imports from that exporter excluded for the purpose of the Article 3 injury determination.

Reply

In accordance with Article 5.7 of the *Anti-Dumping Agreement*, the EC authorities examine simultaneously the existence of both dumping and injury. The examination of injury must, of necessity, be based on the assumption that all the imports under investigation are dumped. If the authorities did not make that assumption, it would be impossible to examine the existence of injury simultaneously with the examination of dumping. Instead, the authorities would have to wait until the examination of dumping has been completed and a final determination has been reached with respect to the existence of dumping before starting the injury examination.

If, as a result of the dumping examination, the EC authorities reach a negative determination of dumping for a country, the investigation will be terminated with respect to that country and the

imports from that country “decumulated” from the imports of the other countries under investigation for the purposes of the injury determination.

As explained in paragraphs 41 to 44 of the EC’s first submission, the EC considers that the determination of dumping is made with respect to countries and, therefore, that the authorities are entitled to treat all imports from a given country as “dumped” for the purposes of Article 3, even if one or more exporters from that country are found not to be dumping.

The exclusion from the injury examination of the imports from the exporters that have been found not to be dumping would often require a substantial re-examination of the injury, contrary to the requirement imposed by Article 5.7. This is an additional reason for considering that, as submitted by the EC, the terms “dumped imports” in Article 3 must be interpreted as including all the imports from a country.

Question 3

Is it possible to exclude non-dumped imports for the purposes of an injury determination while still complying with the Article 5.7 obligation to consider the evidence of dumping and injury “simultaneously”. Please explain. Does the word “simultaneously” in Article 5.7 mean that the determination of dumping and injury must be made at exactly the same point in time? Please explain.

Reply

See above the answer to Question 2.

ANNEX C-12

REPLIES OF THE UNITED STATES TO QUESTIONS OF THE PANEL

(17 October 2002)

Q1. Please comment on the distinction apparently made between the terms “written submissions” and “statements of [a Member’s] own positions” in the first two sentences of Article 18.2 of the DSU.

1. The second sentence of Article 18.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) recognizes that Members are entitled to release “statements” of their own positions to the public. The provision places no limitations on the form or manner in which a Member may choose to do so, including by making its “submissions” available to the public in their entirety. Public disclosure of submissions contributes to better public understanding of – and support for – the WTO dispute settlement system.

2. The ordinary meaning of the term “statement” supports the US interpretation. The *New Shorter Oxford English Dictionary* defines the term in pertinent part as “A formal written or oral account, setting down facts, an argument, a demand, etc.; *esp.* an account of events made to the police or in a court of law.¹ This is, in essence, what a Member does when it prepares a submission in a WTO dispute: It creates a formal written account setting down arguments in support of its position. That these “statements” also constitute “submissions” when Members provide them to panels does not mean they are no longer “statements” which may be disclosed to the public.

3. Finally, it is worth noting that panels routinely attach parties’ written submissions (or detailed summaries of the same) to the final versions of their written reports before releasing the reports to the public. If Argentina’s interpretation of Article 18.2 were correct, panels have been breaching Article 18.2 of the DSU whenever they have done so.

Q2. Please explain how your investigating authorities treat imports for the purpose of investigating injury. In particular, does your investigating authority presume from the outset that all imports are dumped? If so, what is the basis for such presumption, and is that presumption rebuttable under any circumstances? For example, is that presumption rebutted if the investigating authority finds that imports from a given exporter are not dumped?

If your investigating authority does not presume from the outset that all imports are dumped, how does your investigating authority distinguish between dumped and non-dumped imports during its injury investigation?

If your investigating authority determines that imports from a given exporter are not dumped, are imports from that exporter excluded for the purpose of the Article 3 injury determination?

¹ The New Shorter Oxford English Dictionary 3037 (1993).

4. The investigating authority of the United States makes no presumption regarding whether imports are dumped (or subsidized) at the outset of the investigation. In the preliminary injury determination, the US investigating authority makes a determination regarding the imports *alleged* to be dumped without presuming that the imports are dumped in fact. In the final injury determination, the US investigating authority excludes from the volume of dumped imports merchandise that is determined to have a zero or *de minimis* rate of dumping.

Q3: Is it possible to exclude non-dumped imports for the purpose of an injury investigation while still complying with the Article 5.7 obligation to consider the evidence of dumping and injury “simultaneously”. Please explain. Does the word “simultaneously” in Article 5.7 mean that the determinations of dumping and injury must be made at exactly the same point in time? Please explain.

5. Article 5.7 of the Antidumping Agreement provides 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 not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

6. Addressing the Panel’s second question first, the use of the term “simultaneously” in Article 5.7 does not mean that a Member must make its determinations of dumping and injury at the same time. The obligation in Article 5.7 is to simultaneously “consider” the evidence of dumping and injury, not to make simultaneous “determinations” of dumping and injury. The term “determination” is not even present in Article 5.7. Moreover, the obligation to simultaneously consider both dumping and injury is limited to the decision whether to initiate an investigation and then arises again only after the date on which provisional measures may be applied.

7. With respect to the Panel’s first question, it is possible to exclude non-dumped imports for the purpose of an injury determination while still complying with the Article 5.7 obligation to consider the evidence of dumping and injury “simultaneously.” Inherent to the exclusion of non-dumped imports for purposes of an injury determination is that the final determination of dumping be made before the final determination of injury. However, the fact that *determinations* are made at different times does not prevent the simultaneous *consideration* of evidence of dumping and injury “during the course of the investigation.” If a Member’s investigating authorities simultaneously consider the evidence of dumping and injury “during the course of the investigation,” the authorities satisfy the requirement of Article 5.7. As noted in response to question 2, there is no additional obligation to make the determinations of dumping and injury simultaneously.
