

**ARGENTINA – DEFINITIVE ANTI-DUMPING
MEASURES ON IMPORTS OF CERAMIC
FLOOR TILES FROM ITALY**

Report of the Panel

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I. INTRODUCTION

1.1 On 26 January 2000, the European Communities (the “EC”) requested consultations with Argentina regarding the definitive anti-dumping measures on imports of ceramic floor tiles from Italy imposed by Argentina on 12 November 1999.¹ The EC made its request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the “AD Agreement”). The EC and Argentina held consultations on 1 March 2000, but failed to reach a mutually satisfactory solution.

1.2 On 7 November 2000, the EC requested the establishment of a panel with the standard terms of reference set out in Article 7 of the DSU.² The EC made its request pursuant to Article 6 of the DSU and Article 17 of the AD Agreement. In that request, the EC identified the measures at issue as the definitive anti-dumping measures on imports of ceramic floor tiles (“*porcellanato*”) from Italy imposed by Argentina on 12 November 1999.

1.3 At its meeting on 17 November 2000, the Dispute Settlement Body (“DSB”) established a Panel pursuant to the above request.³ At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The terms of reference were:

To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS189/3 the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.4 On 12 January 2001, the parties agreed to the following composition of the Panel:

1.5 Chairman: Mr. Hugh McPhail

Members: Mr. Gilles Gauthier
Mr. Stephen Powell

1.6 Japan, Turkey and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.7 The Panel met with the parties on 18-19 April 2001 and 1 June 2001. It met with the third parties on 19 April 2001.

1.8 The Panel submitted its interim report to the parties on 25 July 2001. The Panel submitted its final report to the parties on 14 September 2001.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping measures by the Argentine Ministry of the Economy on imports of ceramic floor tiles from Italy.

2.2 On 30 January 1998, Cerámica Zanon (“Zanon”) filed an application for an anti-dumping investigation with the Dirección de Competencia Desleal (“DCD” – Directorate of Unfair Trade) of

¹ WT/DS189/1.

² WT/DS189/3.

³ WT/DS189/4.

the Argentine Ministry of the Economy alleging that imports of ceramic tiles were being exported to Argentina at dumped prices.⁴ On 25 September 1998, the Ministry of the Economy published a public notice announcing the initiation of an anti-dumping investigation on imports of ceramic tiles from Italy.

2.3 On 30 November 1998, Assopiastrelle, the association of Italian producers of ceramic tiles, requested the DCD to limit the calculation of individual dumping margins to four or five exporters accounting for around 70 per cent of the exports of the subject product from Italy to Argentina.⁵ On 12 December 1998, the DCD accepted this request.⁶ On 10 December 1998, four Italian exporters filed responses to the investigation questionnaire: Ceramica Bismantova (“Bismantova”), Ceramiche Casalgrande (“Casalgrande”), Ceramiche Caesar (“Caesar”), and Marazzi Ceramiche (“Marazzi”). On 24 March 1999, the DCD issued an affirmative preliminary determination (“Preliminary Dumping Determination”).⁷ In that determination, the DCD disregarded the questionnaire replies submitted by the above-mentioned exporters. The DCD proceeded to determine the dumping margin on the basis of the information available on the record, other than that presented by the exporters.⁸ As the DCD applied the same set of “facts available” to the four exporters concerned, they all were assessed the same dumping margin.

2.4 On 23 September 1999, the DCD issued an affirmative final determination (“Final Dumping Determination”).⁹ In this determination, the DCD relied predominantly on the information available on the record, other than that presented by the exporters.¹⁰ As the DCD applied the same set of “facts available” to the four exporters concerned, an identical dumping margin was assessed for all of them.

2.5 On 12 November 1999, the Ministry of the Economy, based upon the affirmative final determination regarding the existence of dumping issued by the DCD on 23 September 1999, and the affirmative final determination regarding the existence of injury and causality issued by the CNCE on 3 September 1999,¹¹ imposed definitive anti-dumping measures on imports of ceramic tiles originating in Italy for a period of three years.¹² Such measures took the form of specific anti-dumping duties to be collected as the absolute difference between the FOB price invoiced in any one shipment and a designated “minimum export price” also fixed in FOB terms, whenever the former price is lower than the latter. Each of the three size categories used for the dumping margin calculations was assigned its own “minimum export price”.

⁴ The DCD was responsible for conducting the dumping investigation. The injury investigation was conducted separately by the Comisión Nacional de Comercio Exterior (CNCE – National Foreign Trade Commission). As the EC did not make any injury claims, no reference is made here to the injury aspects of the investigation.

⁵ See Exhibit EC-3A.

⁶ See Exhibit EC-3B.

⁷ *Informe Relativo a la Determinación Preliminar del Margen de Dumping en la Investigación por Presunto Dumping en Operaciones de Exportación hacia la República Argentina de Placas y Baldosas de Cerámica, sin Barnizar ni Esmaltar, para Pavimentación o Revestimiento, de Gres Fino, "Porcellanato", en todas sus Medidas, Originarias de la República Italiana*, Exhibit ARG-8.

⁸ The DCD calculated three separate dumping margins for the subject product, on account of three different size-categories: tiles of 20 cm by 20 cm, tiles of 30 cm by 30 cm, and tiles of 40 cm by 40 cm

⁹ *Informe Relativo a la Determinación Definitiva del Margen de Dumping en la Investigación por Práctica Comercial Desleal en Operaciones de Exportación hacia la República Argentina de Placas y Baldosas de Cerámica, sin Barnizar ni Esmaltar, para Pavimentación o Revestimiento, de Gres Fino, "Porcellanato", en todas sus Medidas, Originarias de la República Italiana*, Exhibit EC-2.

¹⁰ As in the preliminary determination, the DCD calculated the dumping margin by size category.

¹¹ *Acta de Directorio No. 547*, Comisión Nacional de Comercio Exterior.

¹² *Resolución 1385/99 del Ministerio de Economía y Obras y Servicios Públicos* (“Notice of Imposition of Definitive Anti-Dumping Measures”), Exhibit EC-1.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THE EUROPEAN COMMUNITIES

3.1 The EC requests that the Panel finds that the anti-dumping measures applied by Argentina with respect to imports of *porcellanato* originating in Italy are inconsistent with Article 6.8 and Annex II, and Articles 6.10, 2.4, and 6.9 of the AD Agreement.

B. ARGENTINA

3.2 Argentina requests that the Panel rejects the EC's claims with respect to the alleged breaches of Article 6.8 and paragraph 6 of Annex II, and Articles 6.10, 2.4 and 6.9 of the AD Agreement.

IV. ARGUMENTS OF THE PARTIES AND THIRD PARTIES

A. CLAIM UNDER ARTICLE 6.8 OF THE AD AGREEMENT

1. The EC

(a) Arguments of the EC in its first written submission in support of its claim under Article 6.8 of the AD Agreement

4.1 In its first written submission, the EC made the following arguments regarding its claim under Article 6.8 of the AD Agreement.

4.2 The EC submits that in its Final Dumping Determination the DCD disregarded all the information on normal value and on export prices provided by the four exporters included in the sample and relied instead upon the petitioner's allegations and import statistics.

4.3 By disregarding the exporters' information without any valid justification, the DCD violated Article 6.8 and Annex II of the AD Agreement, which only allow the investigating authorities to resort to "facts available" in those cases where the exporters do not provide timely necessary information or significantly impede the investigation.

4.4 The EC presented first a number of facts relevant to its claim under Article 6.8.

4.5 All the four exporters included in the sample submitted complete responses to the questionnaires received from the DCD within the prescribed deadline (at the request of the exporters, the DCD agreed to extend the deadline to submit the questionnaire responses from 30 November 1998 until 9 December 1998; see Final Dumping Determination, Section III.4, p. 9. The four exporters included in the sample filed their responses on 9 December 1998. At a meeting held at the DCD on 10 May 1999, the case-handlers requested that Casalgrande and Bismantova submit copies of invoices covering at least 50 per cent of their sales in Italy and for export, both to Argentina and to third countries, during the period of investigation. The requested invoices were submitted by those two exporters within the deadline of 31 May 1999 set by the DCD. The submission of these invoices is mentioned expressly in the Final Dumping Determination; see Section V.1.3, page 26, paragraphs 6 and 7. The DCD made no further request for additional information). Moreover, the exporters agreed in advance to the verification of their responses, should the DCD consider it necessary (Final Dumping Determination, Section III.6, pp. 15-17).

4.6 Although the exporters timely provided all the necessary information, the DCD disregarded their responses and resorted to the petitioner's allegations, for the normal value, and to official import statistics, for the export price.

(i) *Normal value*

4.7 According to the table included in page 30 of the Final Dumping Determination (reproduced below as Table I), the DCD calculated three different normal values.

Table I

Source of Information	Supplied by	US\$/m²
<u>20 cm x 20 cm</u>		
Price list	Petitioner	8.65
Invoices (weighted average)	Italian Firms	5.54
<u>30 x 30 cm</u>		
Price list	Petitioner	9.89
Invoices (weighted average)	Petitioner	10.16
Invoices (weighted average)	Italian Firms	6.70
<u>40 cm x 40 cm</u>		
Price lists	Petitioner	11.04
Invoices (weighted average)	Petitioner	10.83
Invoices (weighted average)	Italian Firms	7.10

4.8 The first normal value was derived by the DCD from a series of price lists submitted by Zanon (although the precise method used by the DCD to derive the normal value from these lists is explained nowhere in the Final Dumping Determination), namely:

- (i) the “Prezzi Informativi delle Opere Edili in Milano 1997” (reference prices in the building industry in Milan 1997);
- (ii) the “Prezzi Informativi dell’Edilizia – febbraio 1997” (information prices in the Building Industry);
- (iii) a price list of Bismantova;
- (iv) a price list of Casalgrande;
- (v) a price list of Floor Gres (an Italian producer not included in the sample);
- (vi) a price list of Mirage (an Italian producer not included in the sample); and
- (vii) a price list of Cooperativa Ceramica d’Imola (an Italian producer not included in the sample).

4.9 The producers’ list prices supplied by Zanon provide a rough indication of the prices paid by the end-users of *porcellanato*. But they bear little resemblance to the prices actually charged to distributors and wholesalers, who normally receive large discounts (of up to 75 per cent of the list

price). Thus, they are not comparable to the prices for the export sales to Argentina, which are made to distributors and wholesalers and not to final users.

4.10 Similarly, the reference prices shown in the other two documents supplied by Zanon are also prices to end-users. Moreover, they are prices for February and August 1997, i.e., for a period not covered by the dumping investigation.

4.11 The second normal value in Table I is described by the DCD as a weighted average of the prices shown in the invoices supplied by the petitioner. Yet, according to the information available in the public file, Zanon provided to the DCD only seven invoices. In contrast, the four exporters included in the sample reported in their responses several hundred transactions.

4.12 The third normal value in Table I is the weighted average of the invoice prices reported in their responses by the four exporters included in the sample. As explained below, this normal value was not used subsequently by the DCD in order to calculate the dumping margin. Indeed, as shown in Table V below, had the DCD used this normal value, it would have found no dumping.

(ii) *Export price*

4.13 The export prices compared by the DCD to the normal value are shown in the table included on page 37 of the Final Dumping Determination (reproduced here below as Table II).

Table II

Size	Unit FOB price in US\$
20 cm x 20 cm	6.43
30 cm x 30 cm	7.00
40 cm x 40 cm	9.84

4.14 The export prices in Table II have been derived from the Summary Table (*Cuadro Resumen*) included in the Annex to the Final Dumping Determination, which in turn appears to be a weighted average of the import statistics collected by the *Delegación II – Unidad Informática* within the *Secretaría de Industria, Comercio and Minería* and of the data supplied by two importers: Quadri y Cia. and Canteras Cerro Negro S.A (“Cerro Negro”).

(iii) *Dumping margin*

4.15 The DCD calculated two different dumping margins for each size category of *porcellanato*. The details of the calculation are set out in two tables included on page 45 of the Final Dumping Determination (reproduced here below as Tables III and IV).

Table III

<u>Product</u>	<u>Normal Value.</u> <u>US\$/m2</u>	<u>FOB Export price</u> <u>US\$/m2</u>	<u>Dumping Margin</u>
Porcellanato 20 cm x 20 cm	8.65	6.43	34.52 per cent
Porcellanato 30 cm x 30 cm	10.02	7.00	43.14 per cent
Porcellanato 40 cm x 40 cm	10.94	9.84	11.18 per cent

Table IV

<u>Product</u>	<u>Normal Value.</u> <u>US\$/m2</u>	<u>FOB Export price</u> <u>US\$/m2</u>	<u>Dumping margin</u>
Porcellanato 20 cm x 20 cm	7.10	6.43	10.42 per cent
Porcellanato 30 cm x 30 cm	8.92	7.00	27.43 per cent
Porcellanato 40 cm x 40 cm	9.66	9.84	---

4.16 The export prices in Table III and in Table IV are the same: those shown in Table II. The difference in the level of the dumping margins results exclusively from the use of higher normal values in Table III than in Table IV.

4.17 The normal values in Table III are a simple (i.e. non-weighted) average of the first two normal values in Table I, i.e. the normal value based on the price lists supplied by Zanon, and the normal value based on the seven invoices provided by Zanon.

4.18 In turn, the normal values in Table IV are the simple average of the three normal values in Table I, i.e. of the two normal values based on Zanon's information and the normal value based on the data reported by the exporters included in the sample.

4.19 Thus, neither of the two dumping margins calculated by the DCD are based on the normal value data provided by the exporters. Such data was not used at all in the first calculation and was arbitrarily averaged with the petitioner's data in the second calculation.

4.20 As evidenced by Table V, had the DCD compared the export prices in Table II to the normal value determined by the DCD itself on the basis of the exporters' responses, it would have found no dumping.

Table V

<u>Product</u>	<u>A) Normal Value</u> <u>US\$/m²</u>	<u>B) FOB Export price</u> <u>US\$/m²</u>	<u>C) Dumping margin</u> <u>(A – B)</u>
Porcellanato 20 cm x 20 cm	5.54	6.43	- 0.89
Porcellanato 30 cm x 30 cm	6.70	7.00	- 0.30
Porcellanato 40 cm x 40 cm	7.10	9.84	- 2.74

4.21 In the Final Dumping Determination, the DCD appears to have regarded the two dumping calculations reproduced in Tables III and IV as being equally relevant. Similarly, *Resolución 1385/99* makes no express choice between them. As a result, it is unclear on which of the two dumping margins the anti-dumping measures in place are based.

4.22 The EC presented next its legal arguments concerning its claim under Article 6.8 of the AD Agreement.

4.23 The EC recalled that Article 6.8 of the AD Agreement provided that:

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

4.24 Therefore, when making a dumping determination, the investigating authorities may resort to facts available only to the extent that the exporter concerned:

- (a) refuses access to necessary information; or
- (b) otherwise fails to provide necessary information within a reasonable period of time; or
- (c) significantly impedes the investigation.

4.25 None of those three circumstances was present in this investigation. The four exporters included in the sample cooperated fully in the investigation. They provided all the information requested by the DCD within the prescribed time limits and volunteered their agreement to receive a verification visit, should it be considered necessary by the DCD.

4.26 The DCD did at no point during the investigation suggest that the exporters failed to provide necessary information or that they impeded in any other way the investigation. Indeed, during the consultations, Argentina did not argue that the exporters' responses had been disregarded on any of the grounds mentioned in Article 6.8. Instead, Argentina argued that the exporters' responses had been "considered" by the DCD "on an equal footing" with the information provided by the petitioner, but eventually the investigating authorities decided to rely on the latter.

4.27 However, the export prices reported by the exporters were totally ignored by the DCD. In turn, the exporters' normal value information was not used at all in calculating one of the two dumping margins calculated by the Argentinean authorities and was arbitrarily averaged with the petitioner's data in order to calculate the other dumping margin. Thus, it is beyond question that the DCD effectively rejected the information supplied by the exporters.

4.28 The position taken by Argentina during the consultations reflects a gross misunderstanding of the requirements imposed by the AD Agreement. Argentina seems to consider that, when making a dumping determination, the investigating authorities have complete discretion to pick and choose data from different sources, including the petitioner, provided that, previously, they have "considered" all of them. That view is manifestly mistaken.

4.29 The information supplied by each exporter is, in principle, the most direct and reliable source of evidence of that exporter's normal value and export price (with respect to cost of production data, Article 2.2.1.1 provides expressly that: "For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration". This provision is but an expression of the principle underlying the AD Agreement that dumping determinations should be based, in principle, on the normal value and export price information provided by the exporter). The investigating authorities may not disregard such information and substitute information from other sources, including the petitioner, except in the well defined circumstances enumerated in Article 6.8.

4.30 Argentina's interpretation would render totally redundant Article 6.8 and Annex II. If the investigating authorities were free to choose between the information provided by the exporters and that supplied by the petitioner, the restrictions imposed by Article 6.8 and Annex II on the use of facts available would become meaningless.

4.31 Consider, for example, paragraph 1 of Annex II, which provides that:

[...] The authorities should also ensure that the party is aware that if information is not supplied within a reasonable period of time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

4.32 The warning mandated by paragraph 1 of Annex II would be totally unnecessary if, as argued by Argentina, the investigating authorities were entitled to use information provided by the petitioner also where, as in the present case, the exporters have provided timely all the necessary information.

4.33 Further confirmation is provided by paragraph 7 of Annex II, which states that:

If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection [...].

4.34 Paragraph 7 evidences that the investigating authorities are not allowed to consider all sources of information "on an equal footing". Paragraph 7 recognises a hierarchy between "primary" and "secondary" sources. For the purposes of establishing whether an exporter is dumping, the "primary source" of information is the normal value and export price information supplied by that exporter. Paragraph 7 confirms that investigating authorities are not free to substitute secondary sources, such as the information provided by the petitioner, to the primary sources. In accordance with Paragraph 7,

investigating authorities may resort to secondary sources only when they “have to”, i.e. where the relevant primary sources cannot be used as a result of one of the circumstances described in Article 6.8.

4.35 For the above reasons, the EC submits that, by substituting the information provided by the petitioners and import statistics to the normal value and export price data supplied by the exporters, respectively, the DCD acted inconsistently with Article 6.8 and Annex II.

(b) Arguments of the EC in its first oral statement in support of its claim under Article 6.8 of the AD Agreement

4.36 In its first oral statement, the EC presented the following arguments with respect to its claim under Article 6.8 of the AD Agreement.

4.37 The main claim submitted by the EC in this case is based on Article 6.8 and Annex II of the AD Agreement.

4.38 The DCD disregarded the normal value and export price information provided by the exporters and substituted information from other sources, including the petitioners. This allowed the DCD to find a high margin of dumping where there was none.

4.39 The AD Agreement only allows the use of “facts available” in one of the three situations specified in Article 6.8, i.e. where the exporters:

- (a) refuse access to necessary information; or
- (b) otherwise fail to provide necessary information within a reasonable period of time; or
- (c) significantly impede the investigation.

4.40 None of those circumstances was present in this investigation. By disregarding the information provided by the exporters without any valid justification, the DCD violated Article 6.8 and Annex II of the AD Agreement.

4.41 During the consultations, Argentina argued that the exporters’ responses had not been rejected. Rather, according to Argentina, they had been considered on an “equal footing” with the petitioners’ information.

4.42 That position is, of course, legally untenable. In its first written submission, Argentina changes its line of defence and argues that that the exporters’ responses were in fact rejected pursuant to Article 6.8.

4.43 The grounds invoked by Argentina for rejecting the exporters’ responses are either factually inaccurate, or insufficient as a matter of law, or both. Moreover, all of them are *ex-post facto* justifications. The DCD did not inform the exporters during the investigation of the reasons why their responses had been rejected. Nor are those reasons stated in the Final Dumping Determination. Indeed, the Final Dumping Determination does not even say expressly that the exporters’ responses have been rejected. This has to be inferred from the fact that the exporters’ data are not used at all in one of the two dumping margin calculations made by the DCD and are arbitrarily averaged with the petitioners’ data in the other calculation.

4.44 It is not possible to address in an oral statement all the inaccurate, misleading or irrelevant assertions made in Argentina's submission. The EC will attempt, nevertheless, to respond to the main ones, starting with Argentina's contention that the exporters' responses were submitted late.

(i) *Alleged late submission of the questionnaire responses*

4.45 The original deadline for the submission of the responses was 30 November 1998. At the request of the exporters, that deadline was extended until 9 December 1998. The responses were submitted in the early morning of 10 December 1998.

4.46 Article 25 of *Decreto 1.759/72*, which implements the *Ley de Procedimientos Administrativos No. 19.549*, allows the filing of documents within the first two working hours of the day following that in which a deadline expires. The questionnaire responses were filed at 10.00 AM of 10 December 1998 (the hour of reception of the responses is stamped on the cover letters). In view of that, the EC understands that, in accordance with Article 25 of *Decreto 1759/72*, the responses must be deemed submitted within the prescribed deadline. It may be added that the representatives of the exporters had informed in advance the DCD that they would make use of the possibility provided in Article 25 of *Decreto 1.759/72*. The DCD raised no objections. The Panel should ask Argentina to clarify this issue.

4.47 One could assume for the sake of argument that the responses were in fact submitted one day late. No provision of the AD Agreement allows the investigating authorities to resort to "facts available" simply because the party concerned has missed a deadline. Article 6.8 provides that the investigating authority may resort to "facts available" when necessary information is not submitted "within a reasonable period of time", while paragraph 3 of Annex II requires that all information which is submitted "in a timely fashion" should be taken into account.

4.48 Interpreting these two provisions, the recent panel report on *US – Hot Rolled Steel* concluded that:

What is a 'reasonable period' will not, in all instances be commensurate with pre-established deadlines ... a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied.

Particularly, where information is actually submitted in time to be verified, and actually could be verified, ... it should generally be accepted, unless to do so would impede the ability of the investigating authority to complete the investigation within the time limits established by the Agreement (Panel Report on *United States – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/R, circulated on 28 February 2001, at paras 7.54 and 7.55 respectively).

4.49 The EC agrees. A mere one-day delay, especially at the very outset of the investigation, is clearly an insufficient ground for resorting to "facts available".

4.50 Argentina also alleges that one of the exporters (Casalgrande) missed the deadline for submitting some supporting invoices. Nevertheless, the delay was, once again, very short: at most three days. Moreover, the invoices were submitted in time to be verified and used by the DCD, and were indeed used in one of the dumping calculations (the invoices were filed on 10 June 1999, and the Final Dumping Determination was not issued until 23 September 1999).

4.51 More generally, Argentina complains about "repeated request for extensions" of deadlines ("*reiteradas solicitudes de prórrogas*"). In reality, however, the exporters requested only two

extensions: one for filing the responses and another for submitting additional non-confidential summaries and supporting invoices. The DCD agreed to both requests and is estopped from complaining now that, as a result, the information was not submitted “within a reasonable period” or that the extensions impeded the investigation.

(ii) *Alleged failure to submit adequate non-confidential summaries*

4.52 Argentina invokes as an additional ground for rejecting the responses that the exporters failed to provide adequate non-confidential summaries.

4.53 This allegation is, to say the least, ironic. The actual fact is that the DCD’s relentless demands forced the exporters to waive all its confidentiality claims and to disclose to their Argentinean competitors highly sensitive price and cost information.

4.54 The EC recalls briefly the relevant facts.

4.55 Together with the questionnaire responses, the exporters submitted non-confidential summaries. In preparing those summaries, the exporters applied the following principles:

- (a) non-sensitive information was left unchanged in the summary;
- (b) sensitive information covering several years/months was expressed in indexed form (Annexes IV, V and VI); and
- (c) other sensitive information was omitted from the summary (Annexes III, VII, VIII, IX, X and XI).

4.56 The DCD gave no indication to the exporters that the non-confidential summaries were inadequate until the Preliminary Dumping Determination of 24 March 1999, i.e more than three months after the filing of the responses.

4.57 By letters dated 30 April 1999, the DCD requested the exporters to waive their confidentiality requests or to supply more detailed non-confidential summaries. Specifically, these letters referred to Annexes III, VII, VIII, IX, X and XI, i.e. to the Annexes for which no confidential summary had been provided by the exporters.

4.58 Argentina now complains that the non-confidential summaries of Annexes IV, V and VI containing indexed figures were insufficient. But this issue was not raised by the DCD in the Preliminary Dumping Determination, or in the letters of 30 April 1999, or indeed at any stage of the investigation.

4.59 Following the letters of 30 April 1999, the representatives of the exporters met with the case-handlers on 11 May 1999. At that meeting, it was agreed that the exporters would submit non-confidential summaries of Annexes VII (exports to Argentina), VIII (sales in Italy) and IX (export to third countries), in which the names of the customers and the models would be replaced by “virtual codes”.

4.60 On 4 June 1999 the four exporters submitted non-confidential summaries of Annexes VII, VIII and IX in the format agreed at the meeting of 11 May. A “Conversion Table” indicating the correspondences between each code number and the customer and model was submitted to the DCD on a confidential basis.

4.61 One should emphasize that the summaries submitted on 4 June contained the same information as the confidential responses, with the only difference that the name of the model and of the customer had been replaced by a code number. Thus, the summaries allowed the petitioners to calculate by themselves the dumping margins by comparing the actual prices in the domestic and the export market. Clearly, this is more than enough to permit “a reasonable understanding of the substance of the information submitted in confidence” as required by Article 6.5.1.

4.62 In spite of that, on 22 June 1999, the DCD sent a letter to the exporters requesting them to waive the confidentiality of the product code. Within two days, the exporters agreed to that request.

4.63 By way of justification, the letter of 22 June asserted that the disclosure of the product code was necessary so that the DCD “can make a precise comparison” (“... *a fin de que la [DCD] pueda realizar una precisa comparación en su informe de determinación final del margen de dumping...*”). This suggests that the Argentinean authorities thoroughly misunderstood the purpose of the non-confidential summaries. Article 6.5.2 provides that information provided on a non-confidential basis may be disregarded if the party concerned does not provide a confidential summary. But this does not mean that the investigating authorities must base their findings on the information contained in the non-confidential summaries. If so, the submission of information on a confidential basis would be totally redundant. The non-confidential summaries serve exclusively to inform the other interested parties, so that they can defend adequately their interests.

4.64 By letter of 3 August 1999, the DCD requested the exporters to waive the confidentiality of the cost of production data contained in Annexes X and XI. On 10 August, the exporters agreed to that request (rather misleadingly, the exporters’ response of 10 August is omitted in Argentina’s first written submission).

4.65 Contrary to Argentina’s contentions, this sequence of events does not evidence lack of co-operation on the part of the exporters, but rather the opposite.

4.66 Although the non-confidential summaries submitted by the exporters on 10 December 1998 might not have been sufficiently detailed, the DCD did not inform the exporters of this until more than three months later. Thus, the DCD acted inconsistently with paragraph 6 of Annex II, which requires that “if evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor...” (emphasis added by the EC).

4.67 Once the exporters were advised by the DCD that the non-confidential summaries were not considered adequate, they agreed promptly to each of the successive, and increasingly exacting demands made by the DCD.

4.68 Eventually, the exporters were led by the DCD’s demands to disclose to their Argentinean competitors all the price and cost-of-production data for the investigation period included in their responses, a type of information which is clearly entitled to confidential treatment in accordance with Article 6.5. The EC is not aware of any other investigating authority in the world that requires the exporters to disclose that type of information, except under a narrowly drawn protective order (see footnote 17 of the AD Agreement), a system which is not available in Argentina.

(iii) *Alleged failure to provide supporting documents*

4.69 Yet another ground invoked by Argentina for rejecting the exporters’ responses is their alleged failure to provide “supporting documents”, and more particularly to provide copies of a “sufficient” number of invoices for the sales made in the Italian market.

4.70 Paragraph 1 of Annex II provides that the investigating authorities “should specify in detail the information required” (emphasis added by the EC). The DCD’s questionnaire did not require the exporters to provide copies of a “sufficient” number of invoices. Therefore, Argentina cannot complain now if the exporters did not do so in their questionnaire responses.

4.71 The only reference to invoices is found in Section B of the questionnaire (“Exports to Argentina”), which requests the exporters to provide “probatory documents which help to better understand the transactions” (“*documentación probatoria que ayude a una mejor comprensión de la operación*”), including invoices. This suggests that the DCD was interested in receiving only a few examples of invoices. This would accord with the practice of most investigating authorities, which is to ask for invoices during the subsequent on-the-spot verification, and not as part of the questionnaire response.

4.72 Argentina argues now that one of the introductory paragraphs to the questionnaire stated that the respondents should supply “supporting documents” (“*documentación respaldatoria*”). But that reference is too vague to meet the requirements of paragraph 1 of Annex II. Moreover, taken literally, it would have required the exporters to provide copies not only of the invoices, but of all the accounting and cost records that are usually examined in the course of an on-the-spot verification.

4.73 Even though, with the sole exception just mentioned, the questionnaire did not require specifically to provide copies of invoices, the exporters did provide, by way of example, some copies of invoices.

4.74 At any rate, the Preliminary Dumping Determination did not mention the alleged failure to provide “supporting documents” as a reason for rejecting the responses. Rather, as mentioned before, the Preliminary Dumping Determination suggested that the responses were rejected because the non-confidential summaries were deemed inadequate.

4.75 Nor did the letters of 12 April 1999 mention specifically the alleged failure to provide “supporting documents”, contrary to what is repeatedly asserted in Argentina’s first written submission. Those letters referred exclusively to alleged deficiencies of the non-confidential summaries.

4.76 It was only at the meeting of 11 May 1999 that the case-handlers requested specifically for the first time that Casalgrande and Bismantova, the two main exporters, provide copies of invoices covering an “important” volume of sales. The case-handlers justified that request on the grounds that they could not conduct on-the-spot verifications in Italy and, therefore, needed to check the responses “from their offices”.

4.77 In response to the request made at the meeting of 11 May, the exporters concerned submitted copies of invoices covering approximately 50 per cent of the sales in Italy and of the exports to Argentina and third countries (together with a translation into Spanish of each invoice!).

4.78 The DCD made no further request for “supporting documents” during the remainder of the investigation. The exporters, therefore, assumed that the DCD was satisfied with the documents submitted.

(iv) *Alleged lack of representativeness of the sample of exporters*

4.79 Argentina also invokes the lack of representativeness of the sample of exporters as a reason for resorting to “facts available”.

4.80 The EC rejects the contention that the sample was not representative. What matters is whether the exports made by the selected exporters were representative of the exports to Argentina covered by the investigation, and not whether the domestic sales made by the selected exporters were representative of the domestic sales made by all the Italian producers of *porcellanato* (including those made by the more than 100 producers which did not export to Argentina).

4.81 From that perspective, it is beyond question that the sample was sufficiently representative since the four selected exporters accounted for more than 70 per cent of all the Italian exports to Argentina during 1997.

4.82 Article 6.10 confirms that this is the relevant criterion. It provides that the examination may be limited to a reasonable number of exporters by using statistically valid samples or, as an alternative, to “the largest percentage of the volume of exports from the country in question which can reasonably be investigated”.

4.83 Furthermore, even assuming that the sample were in fact not sufficiently representative, that would still not justify the DCD’s decision to resort to “facts available”. Article 6.10 contains no provision authorising the investigating authorities to resort to “facts available” in such circumstances. The only options available under Article 6.10 would be: (1) to enlarge the sample; (2) to choose a new sample; or (3) to extend the examination to all the exporters.

4.84 Argentina suggests that the alleged lack of representativeness of the sample amounts to a refusal to provide necessary information in the sense of Article 6.8. However, the decision to limit the examination to a sample of exporters was a decision taken by the DCD itself. Argentina cannot fault now the non-selected exporters for failing to provide information that they were not requested to provide.

4.85 Moreover, the DCD did at no point during the investigation inform the exporters or Assopiastrelle that the sample was not considered representative. It was only in the Final Dumping Determination that the DCD made for the first time some vague remarks in that sense. Nevertheless, even at that late stage, the DCD refrained from drawing any conclusions. Thus, once again, this is but an *ex post* justification.

4.86 Argentina further suggests that the lack of representativeness of the sample could be established by the DCD only at a late stage of the investigation because of the delay in providing “supporting documents”. This is not true. As explained before, the “supporting documents” in question were supplied as soon as they were requested by the DCD. Moreover, nothing prevented the DCD from checking the representativeness of the sample on the basis of the confidential information contained in the questionnaire responses filed on 10 December 1998.

4.87 Furthermore, given Argentina’s view that the percentage of domestic sales, and not the percentage of exports, is the decisive criterion, the DCD could, and indeed should have requested that information from Assopiastrelle before taking any decision on the sampling.

(v) *Other alleged deficiencies*

4.88 Argentina also alleges in passing a series of miscellaneous deficiencies in the questionnaire responses. The EC submits that some of them were not such, while the others were minor omissions which did not warrant the DCD’s decision to reject the responses.

4.89 First, Argentina alleges that Caesar and Marazzi did not provide information with respect to their export sales to third countries. This is true. But Argentina misleadingly omits to mention that the

questionnaire allowed the exporters not to provide such information if the domestic sales were sufficiently representative. Caesar and Marazzi relied expressly upon that possibility.

4.90 Second, Argentina contends that Marazzi did not provide cost-of-production data for the models exported to Argentina. However, Marazzi explained in its response that the models exported to Argentina were the same as those sold in Italy and had the same cost of production, except for the differences in selling expenses.

4.91 Third, Argentina complains that three of the exporters did not provide a Spanish translation of their balance sheet. Again, this is correct but cannot justify the rejection of the responses. The requested translation cannot be considered as “necessary information” in the sense of Article 6.8, given that the essential content of the document in question were figures, that Italian and Spanish are closely related and that, in particular, the accounting terminology is very similar in both languages. Moreover Italian is widely understood in Argentina.

4.92 It is worth noting that the DCD accepted as good the “translation” provided by Marazzi. Yet Marazzi limited itself to translate one word in the front page, namely the word “esercizio”, which Marazzi rendered somewhat inaccurately as “año”, the precise translation being “ejercicio”. This confirms that the requested translations were by no means necessary.

4.93 Finally, Argentina complains that Bismantova provided the information requested in Annex VI (a summary table of the sales made during the last four years in different markets) in Italian Lire instead of in US\$. With respect, it is simply ridiculous to pretend that this minor omission impeded significantly the investigation.

(c) Replies of the EC to the first set of questions by the Panel relating to the EC’s claim under Article 6.8 of the AD Agreement

4.94 The EC replied to the first set of questions by the Panel relating to the EC’s claim under Article 6.8 of the AD Agreement as follows.

4.95 The Panel asked the parties whether, in their view, the DCD rejected the information from the exporters for one of the reasons set out in Article 6.8 AD Agreement. The Panel further asked whether reference was made in the record to one of these reasons and, if so, where. The Panel also asked under what circumstances an investigating authority may resort to secondary source information outside the specific circumstances of Article 6.8 AD Agreement.

4.96 To this question, the EC provided the following reply.

4.97 As explained in the EC’s first written submission, during the consultations Argentina did not argue that the information submitted by the exporters had been rejected on any of the grounds set out in Article 6.8. Instead, Argentina argued that the exporters’ information had been “considered” on an “equal footing” with the information supplied by the petitioner. This suggests that the DCD based its final determination on the erroneous premise that the investigating authority is free to use secondary sources of information, such as import statistics or data supplied by the petitioner, even if the circumstances specified in Article 6.8 are not present.

4.98 As discussed in the EC’s first written submission, that position is untenable under the AD Agreement. Predictably, in its first written submission Argentina invokes a misunderstanding on the part of the EC and argues that the DCD did in fact reject the exporters’ information for the reasons set out in Article 6.8.

4.99 Argentina's new position is not supported by the record of the investigation. The Final Dumping Determination does not mention anywhere that the exporters' information had to be rejected for any of the reasons set out in Article 6.8. Moreover, the DCD did at no point during the investigation inform the exporters that their responses had been rejected for the reasons set out in Article 6.8, contrary to the requirement imposed by paragraph 6 of Annex II.

4.100 Argentina's new position also is contradicted by the fact that the DCD did use the exporters' information in one of the two dumping margin calculations contained in the Final Dumping Determination, albeit arbitrarily averaged with secondary source information. Obviously, this would not have been possible if the exporters had failed to provide necessary information, or if such information had been deemed unreliable by the DCD.

4.101 The Panel recalled that Argentina's first written submission alleged that the exporters' questionnaire responses were deficient in many ways. In particular, that such questionnaire responses were submitted late, were not fully translated, lacked public summaries of confidential information sufficiently detailed, lacked some currency conversions, failed to report data on exports to third countries and costs of the product exported, and lacked supporting documentary evidence. The Panel asked Argentina which of these deficiencies, if any, were relied upon by the DCD for its final determination. The Panel further asked if Argentina could provide the Panel with the relevant references in either the report accompanying the final determination or in the administrative record.

4.102 To this question, the EC provided the following reply.

4.103 The DCD's Final Dumping Determination does not say anywhere that the exporters' information had to be rejected for any of the reasons stated in Article 6.8. Nor did the DCD inform the exporters that their responses had been rejected, as required by paragraph 6 of Annex II.

4.104 The following is a summary of the references made in the record to the grounds invoked now by Argentina in order to reject the responses.

(i) Late submission of the questionnaire responses and of supporting evidence

4.105 The Preliminary Dumping Determination and the Final Dumping Determination record the dates on which the exporters' submissions were made. But they make no suggestion to the effect that information was submitted late or that it was rejected for that reason.

(ii) Non-confidential summaries

4.106 The Preliminary Dumping Determination suggests that the information on normal value provided by the exporters was disregarded for reasons related to the confidentiality requests, but such reasons are not specified. No similar suggestion is found in the export price section of the Preliminary Dumping Determination.

4.107 The DCD's letters of 30 April 1999 requested the exporters to waive their confidentiality requests or supply more detailed non-confidential summaries of Annexes III, VII, VIII, IX, X, and XI. Those letters make no reference to the non-confidential summaries of Annexes IV, V and VI.

4.108 The letter of 22 June 1999 requested the exporters to disclose the "product code" included in the non-confidential summaries of Annexes VII and VIII submitted on 4 June 1999.

4.109 The letter of 3 August 1999 requested the exporters to waive the confidentiality requests or supply more detailed non-confidential summaries of Annexes X and XI.

4.110 The Final Dumping Determination records the above letters and the exporters' replies. It does not mention anywhere that the information submitted by the exporters in response to the DCD's requests was deemed insufficient or that the exporters' normal value and export price information was rejected because the exporters failed to disclose confidential information or provide adequate non-confidential summaries.

(iii) Supporting evidence

4.111 The Preliminary Dumping Determination did not mention the lack of supporting evidence, and in particular of invoices. Nor was this supposed deficiency mentioned in the letters of 30 April 1999. This issue was raised for the first time by the DCD at the meeting of 11 May 1999.

4.112 The letters of 22 June 1999 and of 3 August 1999 contain no reference to this alleged deficiency.

4.113 The Final Dumping Determination records that Bismantova and Casalgrande submitted the requested invoices on 7 and 11 June 1999, respectively. It makes no suggestion to the effect that the exporters failed to provide sufficient supporting invoices (or any other supporting evidence), or that the normal value and export price information supplied by the exporters was disregarded for that reason.

(iv) Representativeness of the domestic sales

4.114 The supposed lack of representativeness of the domestic sales reported by the exporters was mentioned for the first time in the Final Dumping Determination. Moreover, the DCD did not draw any conclusions from this.

(v) Currency conversions

4.115 The Preliminary Dumping Determination records that the exporter Bismantova completed the tables in Annex VI in Italian lire and provided exchange rates between that currency and the US\$, but attaches no consequences to this. This issue was not raised again until Argentina's first written submission to the Panel.

(vi) Export sales to third countries

4.116 The Preliminary Dumping Determination records that Marazzi and Caesar did not report export sales to third countries in Annex IX, together with the explanations given by both exporters to the effect that such information was not provided in accordance with the instructions contained in the questionnaire, which only required to complete Annex IX in the event that the volume of domestic sales was not sufficiently representative. The Preliminary Dumping Determination attaches no consequences to this. This issue was not raised again by the DCD and is not mentioned in the Final Dumping Determination.

(vii) Cost-of-production data for the exported merchandise

4.117 The Preliminary Dumping Determination records that Marazzi did not report cost of production data for the exported merchandise in Annex XI, together with Marazzi's explanation that the cost of production of the exported merchandise was the same as that of the merchandise sold in Italy. The Preliminary Dumping Determination attaches no consequences to this. The issue was not raised again by the DCD during the investigation and is not mentioned in the Final Dumping Determination.

(viii) *Translation of accounting documents*

4.118 The Preliminary Dumping Determination mentions that Bismantova, Casalgrande and Caesar did not provide a Spanish translation of their balance sheet, but attaches no consequences to this. The issue was not raised again by the DCD during the investigation.

4.119 The Panel recalled that Argentina, in paragraph 39 of its first written submission, states that “the submission of information and documentation for which confidential treatment is requested constitutes a limiting factor with respect to the analysis and public conclusions of the implementing authority” (emphasis added by Argentina). The Panel asked Argentina whether, in its opinion, the confidential nature of the information submitted constituted a constraint on the investigating authority’s ability to base its determination on that information. The Panel further asked Argentina to explain in which way it considered that confidentiality limited the DCD’s analysis in this case. The Panel also asked the EC to comment on the above-quoted statement from Argentina.

4.120 To this question, the EC provided the following reply.

4.121 Argentina’s interpretation is mistaken. Articles 6.5.1 and 6.5.2 of the Anti-Dumping Agreement do not require the investigating authority to base its findings on non-confidential information. Indeed, if so, the submission of confidential information by the parties would be totally redundant.

4.122 Article 6.5.2 provides that the investigating authority may, subject to certain requirements, disregard confidential information. This provision would be unnecessary if the investigating authority had to use always non-confidential information.

4.123 Further confirmation is provided by Articles 12.2.1 and 12.2.2, which stipulate that the notice or the report of the imposition of provisional and definitive measures, respectively, shall pay due regard to the requirement for the protection of confidential information. Again, this would have been unnecessary if the dumping and injury determinations had to be based exclusively on non-confidential information.

4.124 Dumping and injury determinations require necessarily the use of information which is confidential by nature, including information which is not capable of summarization. Argentina’s interpretation would make it impossible for the investigating authority to make an accurate dumping or injury determination without violating its duties under Article 6.5. The present case proves this point. The DCD was able to make a dumping determination (partially) based on non-confidential information supplied by the exporters only because the exporters had been forced previously to relinquish virtually all their confidentiality claims.

4.125 The Panel asked the Parties whether they drew a distinction between the obligation of authorities to protect confidential information from disclosure, on the one hand, and the obligation of authorities to use for their determinations exporter data that meets the requirements of the Agreement.

4.126 The EC replied that the investigating authority must base its determination of dumping on information provided by the exporter, including that for which confidential treatment has been requested. The investigating authority may not disregard the information provided in confidence by the exporter and resort to “facts available” except in the circumstances specified in Article 6.5.2.

4.127 The Panel recalled Argentina’s statement that, according to the DCD, the non-confidential summaries submitted by the exporters were insufficient under Article 6.5.1 AD Agreement, since this provision required that such summaries permit a “reasonable understanding of the substance of the information provided in confidence”. The Panel asked the parties how did they interpret the objective

of Article 6.5.1, that is, whose “reasonable understanding” was being addressed – that of the public or that of the investigating authorities?

4.128 The EC replied that the non-confidential summaries provided for in Article 6.5.1 serve exclusively to inform the other interested parties. They constitute a compromise between the conflicting objectives of protecting the confidentiality of the information supplied by each party and of allowing the other parties to defend adequately their interests.

4.129 The Panel asked the parties whether the following summary of relevant facts was correct. The exporters requested confidentiality for most of the information provided in their questionnaire reply. On 30 April 1999, the DCD sent letters to the exporting firms requesting them to consider providing a more detailed non-confidential summary than that already provided in the questionnaire replies, to elaborate on the information supplied, or to remove the requested confidentiality that had been granted by the investigating authority. More specifically, information on sales in the Italian market (Annex VIII) and the cost structure of the goods in the domestic Italian market (Annex X) was requested. On 4 June 1999, the exporting firms submitted public and confidential information concerning domestic sales of the product concerned, with conversion tables that were submitted as confidential information. On 7 June 1999, Bismantova and Casalgrande further submitted as confidential information sales invoices relating to the Italian domestic market. By its letters of 22 June 1999 and 3 August 1999, the DCD requested the exporting firms to reconsider the requested confidentiality of the information concerning product codes and the production costs. The DCD’s report acknowledged that the exporting firms agreed by letters of 23 and 24 June that the product code item could be made non-confidential. On 10 August 1999, the exporting firms further agreed to remove the confidentiality of the item concerning cost of production provided that the names of the companies relating to each cost structure were not revealed.

4.130 To this question, the EC provided the following reply.

4.131 The above summary of the facts is generally correct. Nevertheless, some additional clarifications were in order:

- (a) The letters of 30 April 1999 did not request the exporters to provide “information on sales in the Italian market (Annex VIII) and the cost structure of the goods in the domestic Italian market (Annex X)”. Those letters mentioned exclusively the supposed deficiencies of the non-confidential summaries. Moreover, the letters addressed to Bismantova and Caesar did not mention Annex X.
- (b) The EC recalls that on 11 May 1999 representatives of the exporters held a meeting with the case-handlers, in which the DCD specified its requests.
- (c) On 4 June 1999, the four exporters did not submit “public and confidential information concerning domestic sales”, but rather a non-confidential summary of both their domestic and export sales as previously reported in their questionnaire responses. In addition, as indicated correctly in the summary, they submitted in confidence conversion tables, with the product and customer codes.
- (d) On 7 and 10 June 1999, Casalgrande and Bismantova submitted not only invoices of domestic sales, but also invoices of export sales to Argentina and to third countries.
- (e) The letter of 22 June 1999 requested exclusively the disclosure of the “product code” used in the non-confidential summaries of Annexes VII and VIII submitted on 4 June 1999. The disclosure of the cost of production tables (Annexes X and XI) was requested for the first time in the letter of 3 August 1999.

4.132 The Panel asked the parties to clarify whether, in light of the exporters' agreement to re-classify the information as requested, the concerns the DCD raised with regard to the confidential nature of the information at the time of the preliminary determination (recorded on page 23 of the DCD's Final Dumping Determination) had been resolved by the time of the final determination. The Panel further asked the parties to indicate which of the exporters' information, if any, was still confidential at the time of the final determination. If certain information had remained as confidential, the Panel also asked the parties to clarify whether non-confidential summaries were provided for this confidential information.

4.133 To this question, the EC provided the following reply.

4.134 In response to the DCD's requests, the exporters were forced to waive virtually all their confidentiality requests. Thus, they assumed that all the concerns of the DCD with respect to this issue had already been resolved by the time of the final determination. Indeed, as mentioned above, the Final Dumping Determination does not say anywhere that the information submitted by the exporters in response to the DCD's requests was deemed insufficient or that the exporters' normal value and export price information was rejected because the exporters failed to disclose confidential information or provide adequate non-confidential summaries.

4.135 More specifically, at the time of the final determination, the exporters maintained the following confidentiality requests:

- (a) Annex III (list of customers): the exporters did not provide a non-confidential summary for this Annex. The EC considers that this information is not capable of summarization (see Panel Report on *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.211).
- (b) Annex IV (information on the exporter's market situation), Annex V (summary of sales in different markets – quantity) and Annex VI (summary of sales in different markets – value): the exporters provided non-confidential summaries together with their questionnaire responses of 10 December 1998, in which the actual figures had been replaced by indexes. Argentina raised no objections with respect to the non-confidential summaries of these Annexes until its first written submission in these proceedings.
- (c) Annex VII (export sales to Argentina), Annex VIII (domestic sales) Annex IX (export sales to other markets): following the DCD's requests of 30 April 1999 and of 22 June 1999, the exporters maintained their confidentiality requests only with respect to the customer code.
- (d) Annexes X and XI (cost of production tables): in response to the DCD's request of 3 August 1999, the exporters accepted to disclose these Annexes, provided that the name of the exporter was kept confidential.
- (e) Invoices: the exporters requested confidential treatment for the invoices submitted on 7 and 10 June 1999. Nevertheless, the contents of these invoices are summarised in the non-confidential summaries provided on 4 June 1999.

4.136 The Panel asked Argentina to explain the relevance of the DCD's finding that the four exporters included in the sample only represented 1.92 per cent of the total volume of sales in the home market. In particular, did the 1.92 per cent refer to all sales made by Italian producers, including those with no exports to Argentina? If this was the case, the Panel asked the parties whether

they were of the view that, as a legal matter, companies selected for an individual determination have to account collectively for a large percentage of all home market sales made.

4.137 To this question, the EC provided the following reply.

4.138 Article 6.10 allows the investigating authority to limit the examination to (1) a statistically valid sample of exporters; or (2) the largest percentage of the volume of exports from the country in question which can reasonably be investigated. The question posed by the Panel may arise only where the investigating authority resorts to the first method.

4.139 In the present case, it is unclear which of the two methods permitted by Article 6.10 was followed by the DCD, even if both parties have been referring, without too much precision, to a “sample” of exporters. The following comments are, therefore, based on the assumption that the DCD intended to select a “statistically valid sample”.

4.140 The purpose of an anti-dumping investigation is to establish whether the exports under investigation are dumped. The existence of dumping does not require the existence of domestic sales. Therefore, there is no reason why a sample should include a large percentage of domestic sales.

4.141 This interpretation is supported by the second method provided in Article 6.10. If the percentage of domestic sales is irrelevant for the purposes of that method, why should it be considered as decisive when applying the first method?

4.142 At any rate, assuming that the percentage of domestic sales were in fact relevant in assessing whether a sample is statistically valid for the purposes of Article 6.10, Argentina disregards that, as noted by Japan in its third party submission, a sample covering a relatively small percentage of the relevant universe may nevertheless be “statistically valid”.

4.143 The Panel asked the parties to confirm whether that the four exporters included in the sample accounted, in quantity terms, for around 70 per cent of all exports made.

4.144 The EC replied that this had been the case.

4.145 The Panel asked the parties to comment on the relevance of the fact that the DCD initially accepted the sampling methodology suggested by the exporters’ association, although the sampled firms were later found by the DCD to cover too few home sales.

4.146 The EC replied that the decision to limit the examination to the four exporters concerned was a decision of the DCD, even if it was suggested by Assopiastrelle. The DCD could and should have verified in advance the representativeness of the sample. Consequently, the DCD is estopped from claiming now that the sample was not representative.

4.147 The Panel recalled that the exporters’ questionnaire made reference to the provision of supporting documentation in two places. In the introductory section, while indicating that supporting documentation must be provided, it also allowed exporters the possibility to identify instead the source of the information reported. In addition, Section B requested the submission of any supporting documentation that would help the DCD to better understand the mechanics of the reported transactions. The Panel asked Argentina whether it was of the view that, according to the specifications of the questionnaire used by the DCD, respondents were obliged to provide full documentary evidence of each and every sale reported. The Panel further asked Argentina to clarify whether any of the exporters chose to comply with the requirement set out in the introductory section of the questionnaire by identifying the source of its information. If no exporters took advantage of that option, the Panel asked Argentina whether it was of the view that the DCD was entitled to require

the submission of “additional” supporting documentation without specifying what that information should consist of.

4.148 The EC replied that the exporters’ replies to Annexes VII, VIII and IX include the number and the date of the sales invoices from which the information reported in those Annexes was derived. Thus, in any event, those Annexes would satisfy the requirement to indicate the “source of the information”.

4.149 The Panel recalled that, on page 14 of the EC’s first written submission, the EC argued that the Argentine authority acted inconsistently with paragraph 6 of Annex II of the AD Agreement, by failing to inform the exporters that their responses had been rejected and by failing to state the reasons therefor. The Panel asked the EC whether this is not a separate claim of the EC but rather an additional argument in support of the EC’s claim that the DCD disregarded the normal value and export price information of the exporters inconsistently with Article 6.8 and Annex II.

4.150 The EC replied that this was the case.

(d) Replies of the EC to the questions made by Argentina, following the first meeting of the Panel with the parties, that relate to the EC’s claim under Article 6.8 of the AD Agreement

4.151 The EC replied to the questions made by Argentina relating to the EC’s claim under Article 6.8 of the AD Agreement as follows.

4.152 Argentina asked the EC why it considers irrelevant the legal requirement to provide translations set forth in article 28 of Decree 1759/72, when the EC regards as mandatory article 25 of that same Decree, regarding deadlines for submitting documents in administrative proceedings conducted in Argentina.

4.153 To this question, the EC replied as follows.

4.154 The two situations can be easily distinguished.

4.155 The interpretation of the obligations imposed upon the investigating authority by the AD Agreement cannot be left to the discretion of each Member. Thus, the definition of what constitutes “necessary information” or a “reasonable period” made in the domestic law of each Member is subject to review by Panels.

4.156 Nonetheless, each Member’s own interpretation of those notions creates legitimate expectations for the interested parties. The investigating authority is estopped from claiming that information submitted within the deadline which it has prescribed (computed according to the applicable domestic rules) has not been submitted within a “reasonable period”.

4.157 Argentina asked the EC what value the EC attaches to non-confidential summaries, bearing in mind the obligations arising from Article 6.5.1, if, as argued by the EC in its first oral statement, “the non confidential summaries serve exclusively to inform the other interested parties, so that they can defend adequately their interests”.

4.158 The EC replied that its answer to this question was reflected in its answers to questions 3, 4 and 5 made by the Panel following the first meeting.

4.159 Argentina asked the EC why it believed there would not be a justification for resorting to the “facts available” even in situations where samples turn out to be admittedly not representative.

4.160 The EC replied that the decision to limit the examination to a sample of exporter is taken by the investigating authority, which must satisfy itself in advance that the sample is sufficiently representative. Thus, the situation described in the question might arise only as a result of the investigating authority's own fault. Exporters should not be penalized for the lack of diligence of the investigating authority.

4.161 The circumstances in which the investigating authority may resort to facts available are enumerated exhaustively in Article 6.8. Neither that provision, nor Article 6.10 authorise the investigating authority to use facts available in the event that the sample turns out not to be sufficiently representative in the course of the investigation.

4.162 Argentina asked the EC how one check the veracity of the pricing information regarding home-market sales in the absence of supporting documentation relating to those sales. Argentina further asked the EC how one can check the veracity of this kind of information in cases where the investigating authorities are unable to conduct an on-site verification. Argentina also asked the EC why it gave greater value to an on-site verification than to the provision of supporting documentation.

4.163 The EC replied that its point was simply that the questionnaire did not request the exporters to provide copies of all invoices and that, moreover, this would have been a most unusual request in light of the verification methods usually followed by most investigating authorities.

4.164 Argentina asked the EC why it considered "ridiculous" the issue of currency conversions, even through Article 2.4 of the AD Agreement specifically dealt with the way in which those conversions shall take place. Argentina further asked the EC whether it considered that exchange rates did not have an impact in the calculation of dumping margins. Argentina also asked the EC whether it was of the view that it was unreasonable to request the submission of exchange rate data in order to avoid assigning staff to calculate the value of each of the sales falling within the period of investigation.

4.165 The EC replied that the alleged deficiency concerned exclusively Annex VI, which contains a summary of the sales by market. The 24 amounts reported in that Annex were not used in the dumping calculation. In any event, they can be easily converted into US\$ by using the exchange rates provided by Bismantova or other publicly available rates.

(e) Arguments of the EC in its second written submission in support of its claim under Article 6.8 of the AD Agreement

4.166 In its second written submission, the EC made the following arguments in support of its claim under Article 6.8 of the AD Agreement.

4.167 During the consultations, Argentina argued that the information submitted by the exporters had not been rejected. Rather, according to Argentina, that information was "considered" by the DCD on an "equal footing" with the information supplied by the petitioner.

4.168 That position is clearly untenable under the AD Agreement. Thus, predictably, in its first written submission Argentina invokes a misunderstanding on the part of the EC and argues that the DCD did in fact reject the exporters' information for the reasons set out in Article 6.8 of the AD Agreement.

4.169 The grounds invoked now by Argentina for resorting to "facts available" are either wrong as a matter of fact, or clearly insufficient as a matter of law, or both.

4.170 Furthermore, Argentina's new position is not supported by the record of the investigation. The DCD did at no point during the investigation inform the exporters that their responses had been rejected for the reasons set out in Article 6.8, contrary to the requirement imposed by paragraph 6 of Annex II. Moreover, the Final Dumping Determination does not mention anywhere that the exporters' information had to be rejected for any of those reasons, contrary also to paragraph 6 of Annex II.

(i) *Alleged late submission of the questionnaire responses*

4.171 In its first written submission, Argentina contended that the exporters filed their responses to the questionnaire one day after the expiry of the deadline imparted by the DCD.

4.172 Nevertheless, in its first oral statement Argentina qualified this by noting that:

Esto no implica de nuestra parte afirmar que la presentación efectuada por las empresas exportadoras el 10 de diciembre fuera considerada una falta procesal, pero de todos modos, destacamos con esto la buena fe de la Autoridad de Aplicación en considerar la presentación efectuada a pesar de ser tardía (Argentina's first oral statement, at para. 11).

4.173 Thus, Argentina seems to admit that the alleged delay in submitting the questionnaire responses is not a sufficient ground for resorting to "facts available" or, at least, that it was not considered as such by the DCD. In view of that, it is difficult to understand what is the relevance, if any, of this argument.

4.174 At any rate, it is not true that the responses were submitted late by the exporters. Article 25 of *Decreto 1.759/72*, which implements the *Ley de Procedimientos Administrativos No. 19.549*, allows the filing of documents within the first two working hours of the day following that in which a deadline expires. The questionnaire responses were filed at 10.00 AM of 10 December 1998 (the hour of reception of the responses is stamped on the cover letters) and, therefore, within the prescribed deadline. It may be added that the representatives of the exporters had informed in advance the DCD that they would make use of the possibility provided in Article 25 of *Decreto 1.759/72*. The DCD raised no objections.

4.175 Argentina also alleges that one of the exporters (Casalgrande) missed the deadline for submitting some supporting invoices. Nevertheless, the delay was short: at most three days. Moreover, the EC recalls that no provision of the Anti-Dumping Agreement allows the investigating authorities to resort to "facts available" simply because the party concerned has missed a deadline. Article 6.8 provides that the investigating authority may resort to "facts available" when necessary information is not submitted "within a reasonable period of time", while paragraph 3 of Annex II requires that all information which is submitted "in a timely fashion" should be taken into account.

4.176 Interpreting these two provisions, the recent panel report on *US – Hot Rolled Steel* concluded that:

What is a 'reasonable period' will not, in all instances be commensurate with pre-established deadlines ... a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied.

Particularly, where information is actually submitted in time to be verified, and actually could be verified, ... it should generally be accepted, unless to do so would impede the ability of the investigating authority to complete the investigation within

the time limits established by the Agreement (Panel Report on *United States – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/R, circulated on 28 February 2001, at paras. 7.54 and 7.55).

4.177 Casalgrande submitted the requested invoices in time to be used by the DCD (the invoices were filed on 10 June 1999, and the Final Dumping Determination was not issued until 23 September 1999). And, indeed, the DCD did use them in one of the dumping calculations. Therefore, the DCD cannot pretend now that this delay impeded the investigation. Moreover, the DCD did not inform Casalgrande that the evidence filed on 10 June 1999 had been rejected. Nor is the rejection of that evidence mentioned in the Final Dumping Determination.

4.178 More generally, Argentina complains about “repeated request for extensions” of deadlines (“*reiteradas solicitudes de prórrogas*”). In reality, however, the exporters requested and obtained only two extensions: one for filing the responses and another for submitting additional non-confidential summaries and supporting invoices. The DCD agreed to both requests and cannot complain now that, as a result, the information was not submitted “within a reasonable period” or that the extensions impeded the investigation.

4.179 Finally, the EC rejects the contention made by Argentina in its oral statement, according to which the deadline for submitting the questionnaire responses would have been successively “extended” by the DCD from 30 November 1998 until 10 August 1999, i.e. until the date were the exporters responded to the DCD’s letter of 3 August 1999. The letters of 30 April 1999, 22 June 1999 and 3 August 1999 did not grant any “extensions” for answering to the questionnaire responses. They contained additional requests to remedy the alleged deficiencies of the non-confidential summaries, which were promptly and satisfactorily answered by the exporters.

(ii) *Alleged failure to submit adequate non-confidential summaries*

4.180 Argentina invokes as an additional ground for rejecting the responses that the exporters failed to provide adequate non-confidential summaries.

4.181 This allegation is, to say the least, ironic. The actual fact is that the DCD’s relentless demands forced the exporters to waive all its confidentiality claims and to disclose to their Argentinean competitors highly sensitive price and cost information.

4.182 Together with the questionnaire responses, the exporters submitted non-confidential summaries. In preparing those summaries, the exporters applied the following principles:

- (a) non-sensitive information was left unchanged in the summary;
- (b) sensitive information covering several years/months was expressed in indexed form (Annexes IV, V and VI); and
- (c) other sensitive information was omitted from the summary (Annexes III, VII, VIII, IX, X and XI).

4.183 The DCD gave no indication to the exporters that the non-confidential summaries were inadequate until the Preliminary Dumping Determination of 24 March 1999, i.e. more than three months after the filing of the responses.

4.184 By letters dated 30 April 1999, the DCD requested the exporters to waive their confidentiality requests or to supply non-confidential summaries. Specifically, the letters addressed to Bismantova

and Marazzi referred to Annexes III, VII, VIII, IX, X and XI, whereas those addressed to Bismantova and Caesar mentioned only Annexes III, VII, VIII and IX.

4.185 Argentina now complains that the non-confidential summaries of Annexes IV, V and VI containing indexed figures were insufficient. But this issue was not raised by the DCD in the Preliminary Dumping Determination, or in the letters of 30 April 1999, or indeed at any stage of the investigation.

4.186 Following the letters of 30 April 1999, the representatives of the exporters met with the case-handlers on 11 May 1999. At that meeting, it was agreed that the exporters would submit non-confidential summaries of Annexes VII (exports to Argentina) and VIII (sales in Italy), in which the names of the customers and the models would be replaced by "virtual codes". No requests were made with respect to the other Annexes for which the exporters had requested confidential treatment.

4.187 On 4 June 1999 the four exporters submitted non-confidential summaries of Annexes VII and VIII in the format agreed at the meeting of 11 May 1999. A "Conversion Table" indicating the correspondences between each code number and the customer and model was submitted to the DCD on a confidential basis.

4.188 It bears emphasising that the non-confidential summaries submitted on 4 June 1999 contained the same information as the confidential responses of 10 December 1998, with the only difference that the name of the model and of the customer had been replaced by a code number. Thus, the summaries allowed the petitioners to calculate by themselves the dumping margins by comparing the actual prices in the domestic and the export market. Clearly, this is more than enough to permit "a reasonable understanding of the substance of the information submitted in confidence" as required by Article 6.5.1 of the AD Agreement.

4.189 In spite of that, on 22 June 1999, the DCD sent a letter to the exporters requesting them to waive the confidentiality of the product code. Within two days, the exporters agreed to that request.

4.190 By way of justification, the letter of 22 June 1999 asserted that the disclosure of the product code was necessary so that the DCD "can make a precise comparison" ("*... a fin de que la [DCD] pueda realizar una precisa comparación en su informe de determinación final del margen de dumping ...*"). Thus, the DCD appears to have taken the position that the investigating authority can only make a final determination of dumping based on non-confidential information. Argentina's first written submission reflects the same position. For the reasons explained in the EC's answers to some of the questions made by the Panel following the first meeting, that view has no basis on the Anti-Dumping Agreement and is clearly mistaken.

4.191 By letter of 3 August 1999, the DCD requested the exporters to waive the confidentiality of the cost of production data contained in Annexes X and XI. On 10 August 1999, the exporters agreed to that request (although rather misleadingly, the exporters' response of 10 August 1999 is omitted in Argentina's first written submission).

4.192 Contrary to Argentina's contentions, the above sequence of events does not evidence lack of co-operation on the part of the exporters, but rather the opposite. Once the exporters were advised by the DCD that the non-confidential summaries submitted together with the questionnaire responses on 10 December 1998 were not considered adequate, they responded promptly to each of the successive and increasingly exacting demands made by the DCD.

4.193 Eventually, the exporters were led by the DCD's demands to relinquish virtually all their confidentiality requests (while it is true that the EC "never lifted the confidentiality" of the items listed therein, the degree of disclosure accepted by the EC had essentially the same result), and to

disclose to their Argentinean competitors all the price and cost-of-production data for the investigation period included in their responses, a type of information which is clearly entitled to confidential treatment in accordance with Article 6.5 of the AD Agreement.

4.194 Having answered promptly and satisfactorily to all the DCD's requests, the exporters assumed that all the concerns of the DCD with respect to this issue had already been resolved by the time of the final determination. And, indeed, the Final Dumping Determination does not mention anywhere that the exporters' normal value and export price information was rejected because the exporters failed to disclose confidential information or provide adequate non-confidential summaries.

(iii) *Alleged failure to provide supporting documents*

4.195 Another ground invoked by Argentina for rejecting the exporters' responses is their alleged failure to provide "supporting documents" ("*documentación respaldatoria*"), and more particularly to provide copies of a "sufficient" number of invoices of the sales made in the Italian market.

4.196 Paragraph 1 of Annex II of the AD Agreement provides that the investigating authorities "should specify in detail the information required" (emphasis added by the EC). The questionnaire did not require the exporters to provide copies of a "sufficient" number of invoices for verification purposes. Therefore, Argentina cannot complain now if the exporters did not do so in their questionnaire responses.

4.197 The only reference to invoices made in the questionnaire is found in Section B ("Exports to Argentina"), which requests the exporters to provide "probatory documents which help to better understand the transactions" ("*documentación probatoria que ayude a una mejor comprensión de la operación*"), including invoices. This suggests that the DCD was interested in receiving only a few examples of invoices.

4.198 Moreover, the questionnaire requested the exporters' consent for carrying out on-the-spot verifications, something to which all of them agreed. Thus, the exporters could assume legitimately that the DCD would verify the responses by conducting on-the-spot investigations, rather than through the unusual method of asking the exporters to supply, together with their responses, the invoices of all the reported transactions.

4.199 Argentina argues now that one of the introductory paragraphs to the questionnaire stated that the respondents should supply "supporting documents" ("*documentación respaldatoria*"). But that reference is too vague to meet the requirements of paragraph 1 of Annex II. Moreover, taken literally, it would have required the exporters to provide copies not only of the invoices, but of all the accounting and cost records that are usually examined in the course of an on-the-spot verification. That demand would be clearly unreasonable.

4.200 The AD Agreement envisages that the information provided by interested parties will be verified by means of on-the spot investigations (see Article 6.7 and Annex I of the AD Agreement). An investigating authority may chose not to conduct such investigations. But, if so, it cannot impose upon the exporters the burden of supplying all the supporting documents that might have been requested in the course of an on-the-spot verification (and, in addition, translated into the authority's official language!).

4.201 Furthermore, the introductory paragraph of the questionnaire cited by Argentina allows the exporters to indicate the "source of the information" ("*fuentes de la información*") as an alternative to supplying the supporting documents. Annexes VII, VIII and IX mentioned the number and the date of the invoices from which the information reported in those Annexes was derived. Thus, the exporters' responses would in any event have satisfied this requirement.

4.202 At any rate, the Preliminary Dumping Determination did not mention the alleged failure to provide “supporting documents” as a reason for rejecting the responses. Rather, as mentioned before, the Preliminary Dumping Determination suggested that the responses were rejected because the non-confidential summaries were deemed inadequate.

4.203 Nor did the letters of 30 April 1999 mention the alleged failure to provide “supporting documents”, contrary to what is repeatedly asserted in Argentina’s first written submission and in its first oral statement. Those letters referred exclusively to alleged deficiencies of the non-confidential summaries.

4.204 It was only at the meeting of 11 May 1999 that the case-handlers requested for the first time that Casalgrande and Bismantova, the two main exporters, provide copies of invoices covering an “important” volume of sales.

4.205 In response to the request made at the meeting of 11 May 1999, the exporters concerned submitted copies of invoices covering approximately 50 per cent of the sales in Italy and of the exports to Argentina and third countries (together with a translation into Spanish of each invoice!).

4.206 The DCD made no further request for “supporting documents” during the remainder of the investigation. The exporters, therefore, could assume legitimately that the DCD was satisfied with the documents submitted.

4.207 The Final Dumping Determination confirms that assumption. It confirms that the exporters submitted the requested invoices. It makes no suggestion to the effect that the exporters failed to provide sufficient supporting invoices (or any other supporting evidence) or that the normal value and export price information supplied by the exporters was disregarded for that reason.

(iv) Alleged lack of representativeness of the domestic sales reported by the selected exporters

4.208 Argentina also invokes the supposed lack of representativeness of the domestic sales reported by the selected exporters as a reason for resorting to “facts available”.

4.209 As noted by the Panel in its questions to the parties, it is unclear whether Argentina complains that the sample of exporters was not representative or, rather, that the domestic sales reported by the selected exporters were not sufficient for the purposes of establishing the normal values (the EC has not been able to establish how the percentages mentioned by Argentina at paragraphs 43 and 50 of its first written submission have been calculated).

4.210 For the reasons already explained in its first oral statement and in the answers to the questions made by the Panel following the first meeting, the EC rejects the contention that the sample of exporters was not representative.

4.211 Likewise, the EC rejects the allegation that the domestic sales reported by the selected exporters were insufficient. As explained in the EC’s answer to a question by the Panel, the exporters reported in Annex VIII of their responses all the domestic transactions of each of the models exported to Argentina in significant quantities (the total volume and value of the sales of all models made in Italy is reported in Annexes V and VI, respectively, of the questionnaire responses).

4.212 The domestic sales of the other models were not reported in that Annex because that information was not required in order to make a model-to-model comparison of the normal value with the export price. Contrary to Argentina’s assertions, this approach was clearly explained in the questionnaire responses and was never contested by the DCD.

4.213 The reported domestic transactions of each model represented more than 5 per cent of the volume of the exports sales of the same model. Moreover, taken together, the reported domestic sales represented more than 5 per cent of the overall export sales of each exporter (the Final Dumping Determination states, on page 29, that the volume of the domestic sales reported by Caesar represented 4.46 per cent of its exports to Argentina during 1998. That figure is incorrect. According to the EC's own calculations, the correct figure is 7.35 per cent for 1998 and 10.6 per cent for the whole investigation period, which included also 1997). Therefore, the reported sales were sufficient for the purposes of establishing the normal values (see footnote 2 of the AD Agreement). They were certainly more "representative" than the seven invoices supplied by the petitioner and relied upon by the DCD.

4.214 Furthermore, the DCD did at no point during the investigation inform the exporters that the reported domestic transactions were insufficient. It was only in the Final Dumping Determination that the DCD made for the first time some remarks in that sense. Nevertheless, even at that late stage, the DCD refrained from drawing any conclusions.

4.215 Argentina argues that the lack of representativeness of the reported domestic transactions could be established by the DCD only at a late stage of the investigation because of the delay in providing "supporting documents". This is not true. The "supporting documents" in question (i.e. the non-confidential summaries submitted on 4 June 1999) were supplied by the exporters as soon as they were requested by the DCD. In any event, the DCD did not need those summaries in order to establish whether the sales reported in the questionnaire responses were sufficient for the purposes of establishing the normal values. Argentina makes again the error of assuming that the determination of dumping must be based on non-confidential information.

4.216 At any rate, this alleged deficiency would concern only part of the information supplied by the exporters. Even if the domestic sales reported by the exporters had in fact been insufficient for establishing the normal values, that would not provide a valid justification for disregarding also the export price information supplied by the exporters in the questionnaire responses.

(v) *Other alleged deficiencies*

4.217 Argentina also alleges in passing a series of deficiencies of the questionnaire responses. As explained below, some of those alleged deficiencies were not such, while the others were minor omissions which did not warrant the DCD's decision to reject all the information contained in the responses.

(vi) *Export sales to third countries*

4.218 Argentina alleges that Caesar and Marazzi did not provide information with respect to their export sales to third countries.

4.219 This is true. But Argentina misleadingly omits to mention that the questionnaire allowed the exporters not to provide such information if the volume of domestic sales was sufficiently representative. Caesar and Marazzi relied expressly upon that possibility.

4.220 At any rate, the DCD never informed Marazzi and Caesar that their responses had been rejected for this reason. The Preliminary Dumping Determination records that Marazzi and Caesar did not report export sales to third countries in Annex IX, together with the explanations given by both exporters to the effect that such information was not provided in accordance with the instructions contained in the questionnaire, but attaches no consequences to this omission. This issue was not raised again by the DCD during the investigation and is not mentioned in the Final Dumping Determination.

(vii) *Cost of production data for the exported merchandise*

4.221 Argentina also alleges that Marazzi did not provide cost-of-production data for the models exported to Argentina.

4.222 Again, this allegation is misleading. Marazzi explained in its response that the models exported to Argentina were the same as those sold in Italy and had the same cost of production, except for the differences in selling expenses.

4.223 Moreover, the DCD never informed Marazzi that its response had been rejected for this reason. The Preliminary Dumping Determination records that Marazzi did not report cost of production data for the exported merchandise in Annex XI, together with Marazzi's explanations, but draws no consequences from this. The issue was not raised again by the DCD during the investigation and is not mentioned in the Final Dumping Determination.

(viii) *Currency conversions*

4.224 Argentina complains that Bismantova provided the information requested in Annex VI in Italian Lire instead of in US\$.

4.225 This is clearly a minor deficiency which, contrary to Argentina's allegations, could not have impeded significantly the investigation. Annex VI is a summary table of the sales turnover by market. Bismantova reported in that Annex a total of 24 amounts. Those amounts can be easily converted into US\$ by using the exchange rates provided by Bismantova or other publicly available rates.

4.226 In any event, the DCD never informed Bismantova that it would reject the response for this reason. The Preliminary Dumping Determination mentions that Bismantova completed the tables in Annex VI in Italian Lire and provided exchange rates between that currency and the US\$, but attaches no consequences to this. This issue was not raised again during the investigation and is not mentioned in the Final Dumping Determination.

(ix) *Translation of accounting documents*

4.227 Finally, Argentina complains that three of the exporters did not provide a Spanish translation of their balance sheet.

4.228 Again, this is correct but cannot justify the rejection of the responses. The requested translation cannot be considered as "necessary information" in the sense of Article 6.8, given that the essential content of the document in question were figures, that Italian and Spanish are closely related and that, in particular, the accounting terminology is very similar in both languages. Moreover Italian is widely understood in Argentina.

4.229 It is worth noting that the DCD accepted as good the "translation" provided by Marazzi. Yet Marazzi limited itself to translate one word in the front page, namely the word "esercizio", which Marazzi rendered somewhat inaccurately as "año", the precise translation being "ejercicio". This confirms that the requested translations were by no means necessary.

4.230 At any rate, once again, the DCD did not inform the exporters concerned that their responses had been rejected on this ground. The Preliminary Dumping Determination mentions that Bismantova, Casalgrande and Caesar did not provide a Spanish translation, but draws no consequences from this. The issue was not raised again by the DCD during the investigation and is not mentioned in the Final Dumping Determination.

(x) *Paragraph 6 of Annex II*

4.231 The DCD failed to comply with the requirements imposed by paragraph 6 of Annex II. It did not inform forthwith the exporters of the rejection of their responses and it failed to give the reasons for such rejection in the Final Dumping Determination.

4.232 Argentina contends that it complied with the requirement to inform the exporters in the letters of 30 April, 22 June and 3 August 1999. However, those letters were concerned exclusively with the alleged deficiencies of the non-confidential summaries, which were in any event remedied by the exporters well before the final determination. Those letters make no reference to any of the other grounds for rejecting the responses now invoked by Argentina.

4.233 Argentina also failed to comply with the requirement to explain in the final determination the reasons for rejecting the evidence provided by the exporters. In its first oral statement, Argentina raises the extraordinary argument that the DCD's decision to resort to facts available is "reflected" on page 39 of the Final Dumping Determination, where the DCD "incorporates" the allegations ("*alegatos*") of the petitioner. There is, however, an obvious difference between the allegations made by an interested party and the findings of the investigating authority. The mere fact that the Final Dumping Determination reproduces the allegations of the petitioner cannot be taken to mean that those allegations were upheld by the investigation authority. The Final Dumping Determination also "incorporates" the allegations made by the exporters, including the allegation that the sales were not made at dumping prices. Yet the EC would not mistake those allegations for the DCD's findings.

(f) Arguments of the EC in its second oral statement in support of its claim under Article 6.8 of the AD Agreement

4.234 In its second oral statement, the EC made the following arguments relating to its claim under Article 6.8 of the AD Agreement.

(i) *Information on export sales*

4.235 In Annex VII of the questionnaire responses the exporters reported all the sales made to Argentina of all the models exported in significant quantities. Moreover, the exporters provided to the DCD copies of invoices covering approximately 50 per cent of those sales. Yet that information, and the supporting invoices, were totally disregarded by the DCD.

4.236 In response to a question from the Panel, Argentina mentions, for the very first time, that the export price information supplied by the exporters was disregarded because it could not be "cross-checked" ("*cruzada*") with the official import statistics and the questionnaire responses of some importers.

4.237 This "revelation" leaves us astonished. The exporters were at no point during the investigation informed of the discrepancies now alleged by Argentina. Nor are such discrepancies mentioned anywhere in the Final Dumping Determination or, indeed, in any of Argentina's previous submissions to this Panel.

4.238 Argentina's explanations not only arrive too late, but are also insufficient. Argentina does not bother to specify what were the alleged discrepancies. Moreover, Argentina does not explain why the secondary sources used by the DCD were deemed more reliable than the information supplied by the exporters regarding their own sales, including the invoices.

4.239 The EC is convinced that the alleged discrepancies could have been satisfactorily explained by the exporters, if only they had been given a chance to do so. By denying such opportunity to the

exporters, the DCD acted inconsistently, once again, with paragraph 6 of Annex II and, consequently, with Article 6.8 of the Anti-Dumping Agreement.

(ii) *Confidentiality*

4.240 In response to a question from the Panel, Argentina asserts that the concerns expressed by the DCD with respect to this issue in the preliminary determination had not been resolved by the time of the final determination because “the essential information in order to determine the normal value, the export price and the dumping margin continued to be confidential until the final determination (and still remains so)” (“... *la información sustancial a fin de determinar el valor normal, el valor de exportación y el margen de dumping continuó siendo confidencial hasta la determinación final (y aún subsiste)*”).

4.241 Argentina appears to disregard, once again, that, under Article 6.5 of the AD Agreement, interested parties have a right to request confidential treatment. Thus, the mere fact that the exporters maintained some of their confidentiality requests would not, in itself, be a sufficient justification for disregarding their responses. Rather, Argentina would have to demonstrate that all the requirements for resorting to Article 6.5.2 were met.

4.242 Moreover, Argentina makes again the fundamental mistake of considering that the determination of dumping can be based only on non-confidential information.

4.243 In any event, Argentina’s contentions are totally unsupported. Argentina does not say what “essential” information remained undisclosed by the time of the final determination.

4.244 Furthermore, Argentina’s contentions are unfounded. It is undisputed that the exporters disclosed all the information on domestic prices and on export prices contained in Annexes VII and VIII, with the only exception of the customer codes. It is also undisputed that the exporters disclosed all the cost of production data reported in Annexes X and XI, except the name of the producers. Those Annexes do contain the “essential” information for calculating the dumping margin.

4.245 Finally, if the DCD remained unsatisfied with the non-confidential summaries by the time of the final determination, why is the Final Dumping Determination silent on this issue?

(iii) *Supporting documents*

4.246 The EC rejects once again Argentina’s contention that the questionnaire required the exporters to provide a “sufficient” number of invoices for verification purposes.

4.247 The new arguments made by Argentina in its second written submission, like those made in earlier submissions, are contrived and unconvincing. The AD Agreement requires the investigating authority to specify “in detail” the information requested from the exporters (see Annex II, paragraph 1). The DCD failed to do so. It would be unreasonable to read into a vague instruction to provide the “documentación correspondiente”, without any further specification, a requirement to supply copies of a “sufficient” number of invoices of the domestic sales listed in Annex VIII (whatever Argentina means now by “sufficient”).

4.248 Moreover, on Argentina’s own interpretation, the questionnaire would be internally contradictory:

- (a) the section entitled *Objetivos y Alcances* requires to provide supporting documents or, alternatively, to cite the source of information;

- (b) yet, point 1 of the *Instrucciones Generales* requires to provide the “documentación correspondiente”, which would suggest that it is not sufficient to cite the source of information;
- (c) finally, Section B (exports to Argentina), but not sections C (sales in Italy) and D (export sales to third countries), requires to provide invoices with the purpose of helping the DCD to “achieve a better understanding of the transactions” (“... *que ayude a una mejor comprensión de la operación*”). That request, however, would have been totally redundant if, as argued now by Argentina, the *Objetivos y Alcances* section and the *Instrucciones Generales* already required to provide copies of a “sufficient” number of invoices with verification purposes.

4.249 The EC also rejects Argentina’s assertions that a request to provide supporting documents was made in the letters of 30 April 1999. Argentina quotes selectively from those letters.

4.250 The letters of 30 April 1999 did not request the exporters to supply “nuevos elementos probatorios ...”. Rather, the letters allude to:

... la incorporación de nuevos elementos probatorios o bien la adecuación de la información obrante en las actuaciones (emphasis added by the EC).

4.251 It is also misleading to suggest that the letters requested from the exporters “una ampliación de la información adjuntada”. The relevant passage requests the exporter to evaluate:

... la posibilidad de incorporar a las actuaciones un resumen no confidencial más detallado o bien una ampliación de la información adjuntada o, en su defecto, proceda a habilitar la incorporación de dicha documentación a las actuaciones de referencia, levantando el carácter de confidencial oportunamente solicitado (emphasis added by the EC).

4.252 The letters of 30 April 1999 reflect the DCD’s erroneous view that only non-confidential information can be used in the dumping calculation and, therefore, that the information covered by a confidentiality request cannot be “*incorporada a las actuaciones*”. The letters do not request the exporters to supply any “supporting documents”, but rather to waive their confidentiality requests with respect to information already contained in the questionnaire responses of 10 December 1998, so that such information can be “*incorporada a las actuaciones*”. Thus, the “*elementos probatorios*” mentioned in the letter of 30 April 1999 were “new” only in the sense that they had not been “incorporados a las actuaciones” yet by the DCD, because they were covered by a confidentiality request.

4.253 Furthermore, the letters of 30 April 1999 refer expressly to Article 6.5 of the *Ley No. 24.425*, which is the equivalent provision of Article 6.5 of the AD Agreement, and not to the equivalent provision of Article 6.8, thus confirming that those letters are concerned exclusively with the issue of the confidentiality requests made by the exporters.

4.254 For those reasons, the EC reiterates its position that the provision of supporting invoices with verification purposes was requested for the first time at the meeting with the case-handlers of 11 May 1999.

4.255 In any event, the EC considers that this issue is ultimately irrelevant, since it is not disputed that the requested invoices were submitted by the exporters on 7 and 11 June 1999 and, thus, could, and indeed were used by the DCD in the final determination, albeit arbitrarily averaged with the petitioner’s information.

4.256 Argentina contends that the invoices were not representative of the exporters' domestic sales. However, the invoices covered approximately 50 per cent of the domestic sales reported in the questionnaire responses. Therefore, they were clearly representative of those transactions. Thus, in reality, Argentina's argument appears to be that the transactions reported in the questionnaire responses, rather than the invoices, were not representative, which leads me to the next point of our statement.

(iv) *Representativeness of domestic sales*

4.257 As already explained by the EC, the exporters reported in Annex VIII of their responses all the domestic transactions of each of the models exported to Argentina in significant quantities. The domestic sales of the other models were not reported in that Annex because that information was not required in order to make a model-to-model comparison of the normal value with the export price. This approach was clearly explained in the questionnaire responses and was never contested by the DCD in the course of the investigation.

4.258 The domestic sales reported by the exporters in Annex VIII were certainly more "representative" than the eight invoices supplied by the petitioner and relied upon by the DCD. Moreover, of those eight invoices, four correspond to sales of polished tiles (which according to Argentina's explanations were not used in the dumping calculation) and another to a sale of tiles of 12.5 cm x 25 cm.

4.259 Furthermore, the DCD never informed the exporters that the domestic sales reported in the questionnaire responses were insufficiently representative. It was only in the Final Dumping Determination that the DCD made for the first time some remarks in that sense. Nevertheless, even at that late stage, the DCD refrained from drawing any conclusions.

(g) Replies of the EC to the second set of questions by the Panel relating to the EC's claim under Article 6.8 of the AD Agreement

4.260 The EC replied to the second set of questions by the Panel regarding the EC's claim under Article 6.8 of the AD Agreement as follows.

4.261 The Panel recalled that, with respect to Annexes IV-VI, the exporters provided information for which they requested confidential treatment, as well as a non-confidential summary of the information concerned. The Panel recalled further that this summary was prepared by way of indexing all the figures provided in those Annexes. The Panel asked the parties why the DCD was of the view that indexation did not permit a "reasonable understanding of the substance of the information submitted in confidence".

4.262 The EC replied that this issue was not raised by the DCD in the Preliminary Dumping Determination, or in the letters of 22 April 1999, or indeed at any stage of the investigation. Furthermore, this issue was nowhere mentioned by the DCD in the Final Dumping Determination. It was no more than an *ex-post facto* justification and, as such, should be rejected by the Panel.

4.263 The Panel recalled that, with respect to Annexes III and VII-XI of the investigation questionnaire, the exporters provided information for which they requested confidential treatment, although they did not provide a non-confidential summary of the information concerned. The Panel asked the parties whether the exporters provided a justification as to why such information was not capable of summarization (that is, a justification separate from the statement that the information in question required confidential treatment). If this was so, the Panel asked the parties to provide it with copies of the relevant evidence in the record.

4.264 To this question, the EC gave the following reply.

4.265 In the EC's view, the Panel need not reach the issue of whether the information contained in Annexes VII-XI was capable of summarization.

4.266 The EC recalls that on 4 June 1999 the exporters submitted non-confidential summaries of Annexes VII-IX in the format agreed with the case-handlers at the meeting of 11 May 1999. Those summaries contained the same information as the confidential responses of 10 December 1998, with the only difference that the name of the model and of the customer had been replaced by a code number. On 24 June 1999, the exporters agreed to a further request from the DCD to waive the confidentiality of the product code. At the request of the DCD, the exporters also agreed to waive the confidentiality of all the cost of production data contained in Annexes X and XI, on condition that the identity of the producer was kept confidential.

4.267 Thus, contrary to what is suggested in the question, the only Annex for which the exporters did not provide a non-confidential version was Annex III (list of customers). The type of information contained in that Annex (a list of names) is clearly not capable of summarization. And, indeed, the DCD appears to agree since it did not request the exporters to disclose the customer names in the non-confidential summaries of Annexes VII and VIII submitted on 4 June 1999.

4.268 If the exporters did provide a justification as to why the information for which confidential treatment was requested was not capable of summarization, the Panel asked whether the parties were of the view that under Article 6.5.1 of the AD Agreement investigating authorities have the right to contest such justifications. If so, the Panel asked further, did the DCD conclude, contrary to the exporters, that the information in question could in effect be summarized? If the DCD made this conclusion, could Argentina explain the DCD's reasoning?

4.269 The EC replied that its answer to this question was the same as its answer to the previous question.

4.270 The Panel asked the parties to comment on the following statement in the report of the Appellate Body in *Thailand – H-Beams*, in which the Appellate Body addressed the question of the use of confidential information by the investigating authority as a basis for an authority's final determination:

An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the Anti-Dumping Agreement, involves the collection and assessment of both confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the Anti-Dumping Agreement must be based on the totality of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information (Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, at para. 107).

4.271 The EC replied that Argentina's position in this case reflects the erroneous assumption that only non-confidential information can be used in a dumping determination. The ruling of the Appellate Body in *Thailand – H Beams* confirms that such view is thoroughly mistaken.

4.272 The Panel recalled that Exhibit EC-10 was a report of the meeting with the case-handlers on 11 May 1999 from the representatives of the exporters in Argentina to the exporters' lawyers in Brussels. The report reflected the discussions with the case handlers, concerning the non-confidential information that needed to be provided, in the following manner:

Additionally, this information must cover an “important” part of total sales in the domestic market (you said 50 per cent – I don’t know, I guess that is largely enough), the coverage must be September 1997 – October 1998, and we have to present invoices (with confidential status) supporting this non-confidential version.

4.273 The Panel asked Argentina whether this was an accurate reflection of what was said during that meeting and of the requests for information that were made. Further, the Panel asked Argentina whether the case-handlers at the 11 May meeting requested invoices from two exporters only (Casalgrande and Bismantova). The Panel asked the parties next whether the 50 per cent coverage mentioned in this paragraph related to the provision of non-confidential information, or to the documentation supporting the information provided. The Panel also asked the parties whether the 50 per cent related to all sales made in the home market, or only to the sales reported by the exporters.

4.274 To this question, the EC provided the following reply.

4.275 During the meeting of 11 May 1999, the case-handlers made two requests:

- (a) first, that all the four exporters provide a non-confidential summary of the domestic and export sales reported in their questionnaire responses in accordance with the agreed format described in Exhibit EC-10; and
- (b) second, that the main two exporters (Bismantova and Casalgrande) provide copies of a “sufficient” number of supporting invoices for the domestic and export transactions reported in the questionnaire responses.

4.276 The case-handlers explained that the invoices were requested in order to verify the transactions reported in the confidential version of the questionnaire responses. According to the case-handlers, it was necessary to resort to this method of verification because the DCD could not pay verification visits to Italy. The case-handlers made no suggestion to the effect that the transactions reported in the confidential version of the questionnaire responses were insufficient.

4.277 During the meeting, Mr. Di Gianni (of the law firm Van Bael & Bellis of Brussels), asked whether it would be sufficient to provide invoices covering 50 per cent of the sales reported in the questionnaire responses. The case-handlers agreed.

4.278 The above is confirmed by another report sent by Mr. Di Gianni to the Italian exporters on 19 May 1999, in which it was explained that:

... we have decided ... to co-operate with [the DCD] and to include in the non-confidential reply a list of sales in Italy and in Argentina. From such a list, the names of the supplier and customers should be eliminated. The other information, including the prices and quantities should be kept.

Moreover, it would be advisable to submit a copy of the invoices concerning the sales reported in the reply for the period September 1997 to September 1998. The Dumping Team would appreciate it receiving at least 50 per cent of the sales reported for that period (free translation from the Italian language by the EC).

4.279 As a final remark, the EC would recall that Annex II, paragraph 1, provides that the investigating authority must “specify in detail” the information requested from the exporters. The fact that it has become necessary to engage into the exegesis of internal reports of the exporters in order to ascertain what “supporting documents” were actually requested by the DCD is in itself sufficient evidence that the DCD failed to comply with that requirement.

2. Argentina

(a) Arguments of Argentina in its first written submission relating to the EC's claim under Article 6.8 of the AD Agreement

4.280 In its first written submission, Argentina made the following arguments relating to the EC's claim under Article 6.8 of the AD Anti-Dumping Agreement.

4.281 Argentina first laid out the facts relevant for the presentation of its arguments.

(i) *General facts*

4.282 The record of the case, File No. 061-000794/98 of the Registry of the Ministry of the Economy and Public Works and Services, incorporated by reference in Resolution 1385/99 introducing the anti-dumping measures in question, demonstrates that the claims of the EC are erroneous. The above-mentioned file explains clearly that Argentina had valid recourse to Article 6.8 of the AD Agreement.

4.283 Argentina considers that the exporting firms significantly impeded the investigation, refused access to necessary information and did not provide it within a reasonable period. This assertion is based on the facts contained in the record of the case.

4.284 By Note SSCE No. 945/98 of 9 October 1998, the implementing authority sent a certified copy of the Resolution initiating this investigation to the Counsellor of the European Commission in Argentina, informing him that "... under Article 6.1 of Law 24.425 (the Argentine law approving the Uruguay Round Agreements, duly notified to the WTO), all interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to submit in writing all evidence which they consider relevant ...".

4.285 The then Secretary for Industry, Trade and Mining of Argentina informed the Government of Italy, by its note of 10 November 1998, that "... the fullest transparency will be ensured at every stage of the proceedings, and pursuant to the appropriate legal provisions, all relevant technical and formal requirements will be respected ...". The note went on to state that "... we repeat that the institutions involved in these proceedings are ready at any time to provide both the Government of Italy and the firms and entities concerned with technical advice regarding the various stages of the investigation and the particular features of the case".

4.286 These notes reflect the willingness of the Argentine Government to give the exporters every opportunity to defend their interests in conformity with Articles 6.1 and 6.2 of the AD Agreement.

(ii) *Lack of cooperation from the exporters in the light of Article 6.8 of the AD Agreement*

4.287 Despite having been invited to an information meeting, the exporters did not attend. Argentina draws the Panel's attention to the note dated 28 October 1998, sent by Assopiastrelle to the DCD (File No. 061-009413 – folio 1), which states "... we regret to inform you that, owing to the distance and our business commitments, it will be impossible for us to attend ...".

4.288 The information meeting was held on 30 October 1998. DCD officials answered all the participants' questions in order to dispel their doubts regarding the procedures and the required information, and supplied them with the questionnaires. The record of that hearing, which lists the participating entities and shows that the exporting companies and/or their representatives were absent, has been attached to the record. Because the exporters were present at that meeting, the Italian Embassy agreed to send them the questionnaires.

4.289 It should be pointed out that the explanatory section of each questionnaire sets out the general and specific instructions for each of the required items, so that the parties could respond properly, in such a way as to enable the implementing authority to use the data supplied by the exporters and importers at the time of the preliminary and definitive determination.

4.290 In addition, the instructions emphasize that “producers and/or exporters from the respondent country must answer this questionnaire with the greatest possible precision, attaching documentation to support its replies, or, if this is impossible, indicating the source of the information”. In other words, in no case was it sufficient to state, for example, for determining the normal value, that a certain number of sales had been made, without backing up that information with a sufficient number of sales invoices for the domestic market. The sample evidence in support of the replies needed to be sufficiently extensive to allow a precise evaluation of the information submitted. Argentina submits that the attached replies did not fulfill the time, quality and quantity requirements that would have enabled the DCD to use them as a basis for reaching a determination. Nevertheless, the DCD took the trouble to consider the information supplied on the basis of the standard of review of the AD Agreement. That standard recognizes the principle of deference to the implementing authority, in the context of anti-dumping investigations, as regards the analysis of the facts and definition of the scope of the obligations of the Agreement (Article 17.6 of the AD Agreement).

4.291 The period originally granted for the submission of the forms and replies to the questionnaires expired on 30 November 1998. In response to the requests for extension sent by the foreign exporting firms and national importers concerned, and in conformity with Article 6.1.1 of the AD Agreement, the DCD granted an additional non-extendable period for all submissions, expiring on 9 December 1998, so that the participating firms could duly complete their respective questionnaires, including sufficient supporting documentation, and appropriate evidence (Notes DCD Nos. 273-000414/98, 273-000429/98 and 273-000430/98 of 19 and 27 November 1998 stated that, in view of the request for an additional period for submission of the questionnaire for foreign producers/exporters, duly completed and with the necessary supporting documentation, “... it has been decided to grant the extension, setting 9 December 1998 as the final deadline for submission ...”).

(iii) *Qualitative, quantitative and time-related deficiencies in the information submitted*

4.292 Article 6.8 of the AD Agreement states as follows:

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

4.293 As regards the information supplied in the replies to the questionnaires for producers/exporters, this submission will only highlight the points in which Argentina considers that the producing/exporting companies impeded the investigation, by failing to comply with required formalities in the general and specific instructions of the questionnaires, by not providing the necessary information within a reasonable period, even when granted repeated extensions, by not supplying, with the questionnaires, sufficient supporting documentation (requested for verification purposes), by not providing enough information in the confidential summaries, by not providing any summary in certain cases, and also by the delay and reluctance they displayed in removing the confidentiality of the information supplied, a step which was absolutely necessary to enable the DCD to take account of that information and make it public as an element considered in its decisions.

Replies to the questionnaires

4.294 The four exporting companies making up the sample submitted the following documentation through their representatives on 10 December 1998:

- (a) Completed questionnaire for producers/exporters.
- (b) Report on procedural deficiencies.
- (c) Report on the methodology for selection of the sample.

4.295 The extension granted by the DCD for submitting the forms and replies expired on 9 December 1998. The companies concerned were late in submitting the information, there were a number of formal breaches, and the summaries of the information were insufficient to permit the use of the data supplied, or in some cases were missing altogether.

4.296 As regards the accounting statements submitted by the sample companies, it is important to point out that they were not accompanied by any Spanish translation (except in the case of Marazzi), as required by the general instructions (item 2 of the questionnaire) which refer to the Law on Administrative Procedures No. 19.549, Regulatory Decree No. 1759/72, as harmonized in 1991 by Decree No. 1883/91.

4.297 In this regard the DCD stated, by Notes DCD Nos. 273-000404/99, 273-000405/99, 273-000406/99 and 273-000407/99 of 30 April 1999 to Bismantova, Casalgrande, Caesar and Marazzi (Section 25 of File No. 061-000794/98), that "it is of the utmost importance that all the information and/or documentation presented should be in Spanish or translated into Spanish by a certified translator (Articles 15 and 28, in accordance with the Law on Administrative Procedures No. 19.549, Regulatory Decree No. 1759/72, as harmonized in 1991 by Decree No. 1883/91) in order to be considered in the present proceedings".

4.298 In the case of information requested by the DCD and submitted by the four representative companies in Annex III – List of importers in Argentina and third countries of the goods under investigation, Annex IV – Information on the producer/exporter market, Annex V – Summary of producer/exporter sales (physical volume) and Annex VI – Summary of producer/exporter sales (estimated volume), the information was presented as confidential, and for reasons of competition, a non-confidential summary was supplied.

4.299 With respect to the said documentation and given the importance of the information supplied, classified as confidential, Argentina considers that the lack of non-confidential summaries "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence" (Article 6.5.1 of the AD Agreement) shows a failure to cooperate in clarifying during the investigation whether there was dumping or not.

4.300 The fact that the DCD considered that the summaries were not sufficiently detailed to permit a reasonable understanding of the substance of the information, in particular, the information corresponding to Annexes V and VI without whose supporting documentation it could not validly be considered for the purposes of reaching a determination of the normal value, is apparent from the repeated requests to provide further supporting documentary evidence and to remove the confidentiality or provide sufficiently detailed non-confidential summaries, as can be seen from the DCD Notes to the four exporting companies concerned on 30 April 1999, 22 June 1999 and 3 August 1999.

4.301 In the particular case of the information presented in Annex VI by Bismantova, the latter supplied the information in Italian lire, adding a note with the exchange rates for the years 1995, 1996 and 1997 and January-October 1998. Here it should be emphasized that point 6 of the specific instructions to the questionnaire clearly states that the table in Annex VI must be in US\$. Providing this information in Italian lire shows a lack of cooperation and an effort to impede the investigation, as well as a failure to comply with a formal requirement of the procedure established in respect of the implementing authority.

4.302 Similarly, Bismantova stated that Rondine S.p.A. was its controlling company, holding a 60 per cent share, and that these companies were separate legal entities, with independent accounting records.

4.303 The DCD was thus obliged to handle this information separately in reaching the final determination, in view of the high percentage of unpolished *porcellanato* sales on the Italian domestic market between related companies. It was therefore necessary for the DCD to separate sales made to the controlling company, Rondine, from those made to the remaining customers on the said market. In particular, folios 27 and 28 of the Final Dumping Determination state that:

In the specific case of the manufacturing export company Ceramica Bismantova S.p.A., it should be stated that the sample documentation supplied with respect to its sales on the Italian market showed a high percentage of transactions involving the sale of unpolished *porcellanato* in that market between related companies. Thus, approximately 50 per cent of the documentation submitted by the said company involved sales to its controlling company, Rondine S.p.A., from which it in fact buys its inputs for the production of *porcellanato*. The reply to the questionnaire for exporters originally submitted (Company Structure – File No. 061-10307/98 of 10 December 1998, included in Section XXI, folio 881, sheet 10) reveals that Rondine S.p.A. has a 60 per cent share in Ceramica Bismantova S.p.A.

In accordance with the procedures set forth above, the Directorate of Unfair Competition divided the documentation submitted by Ceramica Bismantova S.p.A. in respect of domestic market sales into those made to its controlling company, Rondine S.p.A., and those made to the remaining customers on the said market, designated as ‘other customers’.

This procedure revealed that taking the total samples submitted to the Directorate, the share of ‘other customers’ in the sales of unpolished 20 cm x 20 cm *porcellanato* was 71 per cent, while Rondine S.p.A.’s share was 29 per cent. In the case of 30 cm x 30 cm tiles, the respective shares were 39 per cent and 61 per cent, while in the case of 40 cm x 40 cm tiles, the shares were 7 per cent for ‘other customers’ and 93 per cent for the controlling company Rondine S.p.A.

Moreover, in the specific case of prices relating to transactions with ‘other customers’, there were price differences of some 13.69 per cent for 20 cm x 20 cm *porcellanato* tiles, 26.87 per cent for 30 cm x 30 cm tiles and 30.08 per cent in the 40 cm x 40 cm segment. These differences were not justified by the exporting company.

4.304 As regards Annex VII – Actual exports to Argentina, Annex VIII – Sales in the Italian domestic market, Annex IX – Exports to third countries, Annex X – Cost structure of the goods under investigation in the Italian domestic market and Annex XI – Cost structure of the exported goods, the companies supplied the data as confidential information, attaching a brief note regarding its confidential status and citing reasons of competition as justification.

4.305 As reflected in File No. 061-000794/98 incorporated by reference in Resolution 1385/99, the DCD considered that, in the case of the information contained in the above-mentioned Annexes, the grounds given for confidentiality were somewhat thin. Nevertheless, the implementing authority was quite willing to accept the confidentiality, even where the companies had not so much as provided a sufficiently detailed non-confidential summary to permit a reasonable understanding of the substance of the information submitted in confidence, or offered any justification as to why this was not done, ignoring the provisions of Article 6.5.1 of the AD Agreement.

4.306 Notwithstanding the above, the DCD repeatedly requested further supporting documentation, removal of the confidentiality or at least the submission of sufficiently detailed summaries (Notes of 30 April 1999, 22 June 1999 and 3 August 1999). On the one hand, this shows the willingness of the implementing authority to use all the information supplied and, on the other hand, the importance attached to such information, even though the latter proved to be insufficient as supporting documentation.

4.307 In particular, it should be emphasized that Caesar and Marazzi did not submit any information on exports to third countries (Annex IX), nor did the latter submit any information referring to the cost structure of the exported goods (Annex XI). In Argentina's view, this failure to submit information constitutes at the very least an impediment to the investigation, if not a refusal to provide access to information that is essential in itself.

4.308 Finally, it should be emphasized that, during the evidence-gathering period, none of the exporters offered any evidence, but merely replied to the questionnaire without furnishing sufficient supporting documentation.

Requests to elaborate on the insufficient supporting documentation, to remove the confidentiality or, where appropriate, to provide sufficiently detailed non-confidential summaries

4.309 In its preliminary determination, the DCD stated that the fact that the foreign companies had asked most of the information they supplied to be declared confidential implied differential and restricted treatment in processing that information. The final determination shows that the implementing authority was restricted in its handling of the information, and therefore requested a review of the status of that documentation and the incorporation in the proceedings – during the next stage – of evidence of interest that would enable the Technical Department to present, in its conclusions, the technical and documentary evidence on which they were based from all the firms involved.

4.310 Here it is appropriate to cite Notes DCD Nos. 273-000404/99, 273-000405/99, 273-000406/99 and 273-000407/99 of 30 April 1999 to Bismantova, Casalgrande, Caesar and Marazzi (section 25 of File No. 061-000794/98). In these Notes, the DCD states that it undertook a comprehensive and detailed analysis of all the information submitted by the firms and requested their cooperation in incorporating already requested evidence or adapting information in the record of the proceedings in order to ensure that the DCD had the information it needed to reach a public conclusion with respect to the matter at issue. In this regard it states that, although it is conceivable that for reasons of competition certain items of business information supplied by the companies may have to be safeguarded (hence the requested confidentiality that was accepted by the implementing authority), for the purposes of reaching objective and meaningful conclusions, the DCD had to have information that enabled it to do so. Consequently, it requested that the possibility should be considered of including in the record of the case a more detailed non-confidential summary or of elaborating on the information supplied or, failing this, of allowing the said documentation to be incorporated in the record, removing its confidentiality. This would give the parties concerned and their representatives access to the information in question, remembering that only duly accredited parties would be allowed to consult the information, for the purposes of issuing an opinion.

4.311 The Notes go on to list the documents of particular interest for full incorporation in the record as follows:

- List of importers in Argentina and third countries of the goods under investigation – Annex III;
- Actual exports to Argentina – Annex VII;
- Sales in the Italian domestic market – Annex VIII;
- Exports to third countries – Annex IX;
- Cost structure of the goods under investigation in the Italian domestic market – Annex X;
- Cost structure of the exported goods – Annex XI.

4.312 By File No. 061-004097/99 of 14 May 1999, included as folio 1315 in the record of the case, and in response to DCD's requests in the Notes mentioned above, the representatives of the Italian firms requested an extension of the time-limit for the submission of the required information. In Note DCD No. 273-000617/99 of 19 May 1999, the DCD states that "... the implementing authority has decided to grant an extension up to 7 June 1999".

4.313 By File No. 061-004809/99 of 4 June 1999, the representative of Assopiastrelle, Bismantova, Casalgrande, Marazzi and Cesar wrote to the DCD listing the information submitted and stating that, for each of the Annexes corresponding to each of the exporting firms included in the sample, there was a corresponding confidential Annex containing "conversion tables" so that the implementing authority could analyse the information. In other words, information was submitted from the four Italian firms of both a public and a confidential nature, separated into different Annexes.

4.314 By File No. 061-004860/99 of 7 June 1999, the representatives of Bismantova further submitted, as confidential information, Annex IC *bis* containing copies of sales invoices relating to the Italian domestic market.

4.315 On expiry of the extension on 10 June 1999, by File No. 061-005002/99 of 10 June 1999, the representatives of the Italian exporting firm Casalgrande further submitted, as confidential information, Annex IIC *bis* containing copies of sales invoices relating to the Italian domestic market.

4.316 Once again the Italian firms alleged that the confidentiality of all this information was based on strict reasons of competition. Once again, without responding to the DCD's concerns regarding the lack of supporting documentation, when they added a further sample thereof to the record, they asked for it to be treated as confidential information without providing non-confidential summaries "in sufficient detail to permit a reasonable understanding of the substance of the information submitted ..." (Article 6.5.1 of the AD Agreement).

4.317 Consequently, by means of Note No. 273-000768/99 of 22 June 1999, the DCD had to repeat the need for further supporting documentation, since what it had was insufficient:

... The DCD repeats the statement made on other occasions concerning the need for information that would enable the implementing authority to reach public conclusions in its technical reports. To that end, and to enable the DCD to make a precise comparison in its report on the final determination of the margin of dumping, the companies Ceramica Bismantova S.p.A., Ceramica Casalgrande Padana S.p.A.,

Marazzi Ceramiche S.p.A. and Ceramiche Caesar S.p.A are therefore asked to remove the confidentiality requirement for the information concerning the product code so that the said information can be incorporated in the record of the proceedings, or to submit a sufficiently detailed non-confidential summary of the information. This requirement must be met within five days after the receipt of this note ...

4.318 As stated during the proceeding in question, the submission of information and documentation for which confidential treatment is requested constitutes a limiting factor with respect to the analysis and public conclusions of the implementing authority.

4.319 Hence, the DCD sought, during the investigation, to obtain elements that were not subject to that condition so that it could make proper estimates with respect to the product under investigation. The removal of the confidentiality of the product code would enable the goods to be categorized according to their dimensions. In other words, without the product code it was very difficult to make out which product the information submitted applied to.

4.320 By File No. 061-005427/99 of 24 June 1999, the Italian firms, through their representatives, stated that they would remove the confidentiality of the product code item.

4.321 Moreover, by Note DCD No. 273-000890/99 of 3 August 1999, the DCD informed the representative of Assopiastrelle, Bismantova, Casalgrande, Marazzi and Caesar that "... the implementing authority is currently engaged, at this final stage of the investigation, in the analysis of all the information in the record of the case in order to arrive at a final determination in these proceedings. To do so, it must take into account all the information in these proceedings, and considers that it is important to ask you to remove the confidentiality of the information concerning production costs of the product at issue, or to prepare a non-confidential summary that would enable the information to be processed. Given the time-limit for the final determination, we would be grateful if this request could be met within five days following the receipt of this communication ...".

Particular quantitative aspects of the sample

4.322 It is important to emphasize that the sample documentation relating to sales on the Italian domestic market supplied by all of the manufacturing export companies concerned in the case – major representatives of the *porcellanato* production market – in conformity with the supplied sample methodology, covers no more than approximately 1.92 per cent of the physical volume (m²) and 1.35 per cent of the total estimated value (Italian lire) of sales in the domestic market according to the information duly supplied.

4.323 Argentina would like to stress that the DCD accepted without reservation the sample methodology presented by Assopiastrelle (i.e. the four exporting companies Bismantova, Marazzi, Caesar and Casalgrande) because the association itself said that this would facilitate the work of the investigators. As is apparent from the record of the case, the alleged facilitation of the work did not materialize in practice in view of the lack of sufficiently detailed non-confidential summaries, the absence of such summaries in cases where the information was absolutely necessary, the delay in removing the confidentiality and the limited supply of supporting documentation.

4.324 The Italian companies concerned had to be requested by the DCD to expand on the inadequate supporting documentation (Notes of 30 April, 22 June and 3 August 1999), and even after it had been supplied, it continued to be meaningless for the purposes of an objective valuation.

4.325 Finally, the implementing authority pointed out the shortcomings in the accompanying documentation, as well as the impact of those shortcomings on the investigation. The statements by the DCD in the Notes mentioned above correspond exactly, in the authority's view, to the situation

described in Article 6.8 of the AD Agreement. That is to say, this is a situation where the investigation was significantly impeded since the DCD was obliged to continue requesting additional evidence, what it had being insufficient. As a result of the repeated requests for supporting documentary evidence, the DCD was obliged to grant repeated extensions to facilitate the pursuit of the investigation, which was impeded by the attitude of the exporters. The combination of these elements placed the authority in a situation in which it did not have the necessary information because the exporting firms were refusing access to that information.

4.326 Argentina presented then its legal arguments concerning the EC's claim under Article 6.8 of the AD Agreement.

4.327 The EC asserts, in paragraph 48 of its first written submission, that none of the three circumstances required by Article 6.8 to make a determination on the basis of the facts available was present in this case.

(iv) Significant impeding of the investigation

4.328 Argentina submits that the exporters did significantly impede the investigation in that they failed to carry out the formalities required in the general and specific instructions accompanying the questionnaires. Nor did they provide sufficient supporting documentation with the information supplied, and the DCD had to request further evidence. Finally, the scant information provided in the confidential summaries also represented a significant impediment to the investigation, particularly as regards information needed to determine the normal value and the export value, where no direct summary was provided at all.

(v) Refusal of access to necessary information

4.329 At the same time, the fact that the DCD accepted, without reservations, the "sample methodology" proposed by Assopiastrelle because the association itself said that this would facilitate the work of the investigators shows that the implementing authority was favourably disposed to consider such information as that party might submit.

4.330 Having accepted this sample methodology, the DCD discovered, upon examining the supporting documentation, supplied belatedly at the specific request of the authority, that it only covered approximately 1.92 per cent of the physical volume (m²) and 1.35 per cent of the total estimated value (Italian lire) of domestic market sales, based on the information previously received.

4.331 Much of the information supplied by the companies was confidential. This information included data concerning total volumes and amounts of sales in the Italian domestic market by the participating firms. The firms also subsequently provided information concerning some of their sales transactions which enabled the implementing authority to establish average values in accordance with the above-mentioned method. However, it was felt that certain considerations should be highlighted with respect to the supporting sample. Its representativeness was mentioned as a factor to be taken into account, given that the percentages were fairly insignificant in comparison to the total for the period analysed.

4.332 This falls within the scope of Article 6.8 of the AD Agreement as significantly impeding the investigation by refusing access to necessary information.

(vi) Failure to provide the information within a reasonable period

4.333 With respect to the requirement to provide necessary information within a reasonable period, Argentina submits that the repeated requests for extensions together with the delay in removing the

confidentiality of the information and the unwillingness to do so even though absolutely necessary for the DCD to be able to take it into account, in fact reflect the situation described in Article 6.8 in which the party does not provide necessary information within a reasonable period.

4.334 It should therefore be stressed that the two situations described above (significant impeding of the investigation and refusal of access) in themselves reflect the circumstances described in Article 6.8 justifying a determination by the authority on the basis of the facts available as the only possible alternative.

4.335 In the light of the above considerations, the implementing authority could only base its determination on the facts available, and was indeed forced to do so, since it could not, on the basis of a sample as unrepresentative as the one provided, make a correct determination of the normal value.

(vii) Rebuttal of the EC's supplementary arguments concerning Article 6.8 of the AD Agreement

4.336 The Notes of 30 April, 22 June and 30 August 1999 provide confirmation that exporters were informed of the insufficiency of the information, and rebut the assertion in paragraph 54 of the first written submission of the EC that the Argentine interpretation of Article 6.8 renders paragraph 1 of Annex II null and void, since in this case the exporters did not submit all of the information within a reasonable period, nor was the information submitted of the kind required by the authorities to enable them to make a determination on the basis thereof.

4.337 With respect to the information contained in the record, the EC has taken the alleged Argentine terms "considered on an equal footing" – used in the informal context of consultations – out of their context, claiming that according to Argentina, Article 6.8 enables the investigating authorities to "pick and choose" from the data submitted. Argentina had all of the information before it and duly examined it, following the sequence set forth in Article 6.8, but found that it had to opt for a determination on the basis of the facts available because the information from the exporters turned out to be insufficient, as explained above.

4.338 At the same time, while the authority accepted the sample put forward by the exporters, it asked that the confidentiality of the supporting information be removed and granted a series of extensions to the importers, even accepting late answers to the questionnaires (10 December 1998). How can the EC contend that Argentina has deviated from paragraph 7 of Annex II and that it has relied on a secondary source of information without the special circumspection required by that paragraph?

4.339 The DCD was so meticulous that when forced to resort to secondary information, although aware that the supporting documentation for the determination of the normal value was insufficient, it nevertheless took account of that information and averaged the figures out in order to reduce the margin of dumping. This is ultimately what Table 4 in the first written submission of the EC.

4.340 Thus, contrary to the EC's assertion, Argentina followed the sequence of Article 6.8 of the AD Agreement and finding that the circumstances described therein had been met, resorted to a secondary source which provided more extensive information within a reasonable period.

4.341 Argentina addressed next the EC's claim under Paragraph 6 of Annex II of the AD Agreement.

4.342 Argentina first laid out the facts relevant for the presentation of its arguments.

4.343 With respect to the EC's claim in paragraph 49 of its first written submission that the DCD at no point during the investigation suggested that the exporters failed to provide necessary information,

Argentina refers the Panel to the Notes DCD Nos. 273-000404/99, 273-000405/99, 273-000406/99 and 273-000407/99 of 30 April 1999 to Bismantova, Casalgrande, Caesar and Marazzi (Section 25 of File No. 061-000794/98), in which the DCD requests the cooperation of the said enterprises in supplying new evidence or adapting the information pertaining to the proceedings so that the implementing authority would have the information it needed to reach a public conclusion with respect to the matter at issue.

4.344 In this connection, the DCD points out that while it is possible that for reasons of competition, certain items of business information supplied by companies must be safeguarded (hence the requested confidentiality that was accepted by the implementing authority), for the purposes of reaching objective and meaningful conclusions the DCD must have information that enables it to do so. This is why it requested the companies to consider the possibility of including in the record of the case a more detailed non-confidential summary or of elaborating on the information supplied or, failing this, to allow the said documentation to be incorporated in the record, removing its confidentiality. This would expressly give the parties concerned and their representatives access to the information in question, remembering that only the duly accredited parties would be allowed to consult the information, for the purposes of issuing an opinion.

4.345 Consequently, by Note No. 273-00768/99 of 22 June 1999, the DCD had to repeat the need for further supporting documentation, since what it had was insufficient:

... The Directorate of Unfair Competition repeats the statement made on other occasions concerning the need for information that would enable the implementing authority to reach public conclusions in its technical reports. To that end, and to enable the Directorate of Unfair Competition to make a precise comparison in its report on the final determination of the margin of dumping, the companies Ceramica Bismantova SpA., Ceramica Casalgrande Padana SpA., Marazzi Ceramiche SpA., and Ceramiche Caesar SpA., are therefore asked to remove the confidentiality requirement for the information concerning the Product Code so that the said information can be incorporated in the record of the proceedings, or to submit a sufficiently detailed non-confidential summary of the information. This requirement must be met within five days after the receipt of this note

4.346 Moreover, by Note DCD No. 273-000890/99 of 3 August 1999, the DCD informed the representative of Assopiastrelle, Bismantova, Casalgrande, Marazzi, and Caesar, that "... the implementing authority is currently engaged, at this final stage of the investigation, in the analysis of all of the information in the record of the case in order to arrive at a final determination in these proceedings. To do so, it must take account of all of the information in these proceedings, and considers that it is important to ask you to remove the confidentiality of the information concerning production costs of the product at issue, or to prepare a non-confidential summary that would enable the information to be processed. Given the time-limit for the final determination, we would be grateful if this request could be met within five days following the receipt of this note ...".

4.347 Argentina presented next its legal arguments concerning the EC's claim under Paragraph 6 of Annex II of the AD Agreement.

4.348 The EC's argument in paragraph 49 of its first written submission that the implementing authority "did at no point during the investigation suggest that the exporters failed to provide necessary information" is unfounded in view of the above-mentioned Notes. Moreover, it is clear that the reason why the DCD requested – through these Notes – further information from the exporters, was that the information supplied by them was not sufficient.

4.349 In any case, even if it were to be assumed that Argentina had violated paragraph 6 of Annex II, this would be a harmless error (an error committed in the progress of the trial "..., but which was not prejudicial to the rights of the party assigning it, and for which, therefore, the court will not reverse the judgment ..."; see *Blacks Law Dictionary*, Revised Fourth Edition, West Publishing Company, 1968, p. 638) that did not cause any injury, since its effect would be formal and procedural; in other words, what the EC would be demanding is a separate notification with a special format setting out the conclusion that the DCD had reached. As concluded in the previous paragraph, that conclusion was in fact implicit in the mentioned Notes (see Annexes ARG-7, 10 and 11) and would in no way have signified a change of position on the part of the implementing authority.

(b) Arguments of Argentina in its first oral statement relating to the EC's claim under Article 6.8 of the AD Agreement

4.350 In its first oral statement, Argentina made the following arguments relating to the EC's claim under Article 6.8 of the AD Agreement.

(i) *Treatment of the information in the record*

4.351 Argentina submits that it had valid recourse to Article 6.8 of the AD Agreement, as shown by the record of the case (File No. 061-000794/98 of the Registry of the Ministry of the Economy and Public Works and Services, incorporated by reference in Resolution No. 1385/99 introducing the anti-dumping measures in question). The above-mentioned file explains clearly that the exporting firms significantly impeded the investigation, refused access to necessary information or did not provide that information within a reasonable period.

4.352 Consequently, Argentina was fully justified in resorting to the information available.

4.353 Argentina considers that the producing/exporting firms significantly impeded the investigation for the following reasons:

- (a) They failed to provide information, or they did so without sufficient supporting documentation;
- (b) they did not provide the necessary information within a reasonable period, even when granted repeated extensions;
- (c) ©©they were late and displayed reluctance in removing the confidentiality of the information that was absolutely necessary so that the DCD could take it into account and make it public;
- (d) they provided little information in the non-confidential summaries;
- (e) in some cases they did not provide any non-confidential summary at all;
- (f) they failed to comply with some of the required formalities in the general and specific instructions of the questionnaires.

Lack of information or information without sufficient supporting documentation

4.354 Firstly, the information requested from the exporters in the questionnaires was the information that the implementing authority considered absolutely necessary to reach a reasoned and public conclusion. Moreover, it was not enough simply to reply to the questionnaires: the replies needed to be backed by sufficient supporting documentation.

4.355 To allow a precise evaluation of the information submitted, the documentation in support of the replies needed to be sufficiently extensive. Indeed, the general and specific instructions accompanying the questionnaires emphasize that “producers and/or exporters from the respondent country must answer this questionnaire with the greatest possible precision, attaching documentation to support their replies, or if this is impossible, indicating the source of the information”.

4.356 This is reflected in the repeated Notes sent by the DCD to the exporters requesting more extensive information, since what they had provided was not sufficient to make a correct determination of the normal value, the export value and the margin of dumping (see DCD Notes of 30 April, 22 June and 3 August 1999. The last of these Notes is the one in which the DCD merely requested that the confidentiality of the information be removed).

4.357 Moreover, some exporting firms failed to provide any information at all for certain Annexes to the questionnaires. In particular, Caesar and Ceramiche failed to provide any information concerning exports to third countries (Annex IX), and the latter failed to provide any information concerning the cost structure of the exported goods (Annex XI).

4.358 Nor did Caesar and Marazzi supply any information or supporting documentation concerning sizes 20 cm x 20 cm and 30 cm x 30 cm. The latter, did not even provide any information or supporting documentation concerning size 40 cm x 40 cm. Therefore, one of the four sample enterprises failed to provide any information on any of the size categories established by DCD for the product, although this segmentation was accepted by the firms even before Assopiastrelle presented the sampling methodology and the questionnaires were answered.

4.359 In the view of Argentina, this failure to supply information at the very least constitutes an impediment to the investigation, if not a refusal to provide access to information that is essential in itself.

Information within a reasonable period

4.360 Further evidence that the investigation was impeded can be found in the failure by the exporters to supply the requested information within a reasonable period, in spite of the fact that the implementing authority responded favourably to their repeated requests for extensions.

4.361 The exporters were originally given until 30 November 1998 to reply to the questionnaires, and in response to the requests for extension, it was decided to “grant the extension, setting 9 December 1998 as the final deadline for submission”. This does not mean that Argentina submits that the submission of the information by the exporting firms on 10 December was considered a procedural error, but whatever the case, Argentina emphasizes the goodwill shown by the implementing authority in considering the information despite the fact that it was late.

4.362 In any case, Argentina considers the argument made by Japan in its third party submission that a delay of one day should have led the authority to conclude that the information had nevertheless been submitted within a reasonable period to be wrong. Technically, the reasonable period is established by the authority in conformity with its anti-dumping laws and regulations (Article 1 of the AD Agreement). Consequently, it is those laws and regulations which govern the matter at issue. In other words, while the implementing authority was willing to grant extensions for the purposes of gathering the information supplied by the exporters, the limit to that willingness was determined by the statutory deadlines provided for in the AD Agreement (Article 5.10) and Decree 2121/94.

4.363 In the end, the period actually used by the exporters for completing the requirements of the questionnaire ran from 30 November 1998 to 10 August 1999. Indeed, the DCD, in its Note of 30 April 1999, granted 15 days to definitively fulfil the requirements of the questionnaire in view of

the shortcomings it had already noted in the replies. Similarly, in its Note of 22 June 1999, the DCD granted a new extension of five days, and finally, in its Note of 3 August, granted another five-day extension. Argentina considers that these successive extensions of the period for submitting the necessary information reflect, in fact, a lack of cooperation by the exporters that is contrary to Article 6.8 of the Agreement.

4.364 It is questionable whether a period running from 30 November 1998 to 10 August 1999 is in fact “reasonable” for the purposes of Article 6.8.

Delay and reluctance in removing the confidentiality of the information; lack of information in the non-confidential summaries; and absence of summaries in certain cases

4.365 The exporting firms were effectively impeding the investigation by completing the required information only at the request of the implementing authority. The authority considered the information to be insufficient without non-confidential summaries or sufficiently detailed summaries, and considered the removal of the confidentiality to be essential. This was finally done on 10 August 1999, that is eight months after the period accorded.

4.366 Argentina recalls in this connection that the DCD repeatedly requested further information, stressing that what had been received was insufficient. Argentina cites, for example, Notes DCD Nos. 273-000404/99, 273-000405/99, 273-000406/99 and 273-000407/99 of 30 April 1999 to Bismantova, Casalgrande, Caesar and Marazzi (Section 25 of File No. 061-000794/98), in which the DCD requested the cooperation of these firms in incorporating already requested evidence or adapting information in the record of the proceedings in order to ensure that the DCD had the information it needed to reach a public conclusion with respect to the matter at issue, granting them a period of 15 days for the purpose.

4.367 In these Notes, the DCD points out that for the purposes of reaching objective and meaningful conclusions, it had to have the information that enabled it to do so. Consequently, to ensure that the parties concerned and their representatives had access to the information in question, it requested that the possibility should be considered of including in the record of the case a more detailed non-confidential summary or of elaborating on the information supplied, or, failing this, of allowing the said documentation to be incorporated in the record, removing its confidentiality.

4.368 Exhibit ARG-19 contains a complete list of the confidential information submitted by each one of the firms with respect to each one of the Annexes, and identifies the information that was accompanied by non-confidential but incomplete summaries. The non-confidential summaries provided by the four sample firms with respect to Annexes III, VII, VIII, IX, X and XI, provided to the Panel in Exhibit ARG-20, are completely irrelevant in that they lack substance and hence could not be used by the implementing authority. Thus, the EC’s comment to the effect that Argentina’s allegation concerning the inadequacy of the non-confidential summaries is ironic seems out of place.

4.369 The exporters were aware that, as indicated in the general instructions for completing the questionnaire (point 5), “... ‘confidential’ information that is not accompanied by a summary or an explanation of why it is impossible to provide such a summary will not be considered as such”. Argentina asks the Panel to make an objective evaluation of whether the summaries provided in Exhibit ARG-20 are “in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence” (Article 6.5.1 of the AD Agreement).

4.370 Moreover, the DCD had to repeat its request for further supporting documentation, since what it had was insufficient (see paragraphs 38 and 42 of Argentina’s first written submission).

Failure to comply with the required formalities in the general and specific instructions of the questionnaires

4.371 Yet another example of the investigation being impeded within the meaning of Article 6.8 of the AD Agreement is, in our view, the fact that the accounting statements submitted by the sample companies were not accompanied by any Spanish translation (except in the case of Marazzi) as required by the general instructions (item 2 of the questionnaire) which refer to the Law on Administrative Procedures No. 19.549, Regulatory Decree No. 1759/72, as harmonized in 1991 by Decree No. 1883/91. In this regard, Argentina recalls that Exhibit ARG-7 cites the DCD Notes of 30 April 1998 in which the DCD states that “it is of the utmost importance that all the information and/or documentation presented should be in Spanish or translated into Spanish by a certified translator (Articles 15 and 28, in accordance with the Law on Administrative Procedures No. 19.549, Regulatory Decree No. 1759/72, as harmonized in 1991 by Decree No. 1883/91) in order to be considered in the present proceedings”.

4.372 Likewise, point 6 of the specific instructions to the questionnaire clearly states that the table in Annex VI (Summary of producer-exporter sales – physical volume) must be in US\$. And yet, in the particular case of Bismantova, the information relating to Annex VI was provided in Italian lire, accompanied by a note with the exchange rates for 1995, 1996, 1997 and January-October 1998. Argentina considers that providing this information in Italian lire shows a lack of cooperation and an effort to impede the investigation, as well as a failure to comply with a formal procedural requirement. Moreover, in view of the EC’s comments concerning the legal value of other Argentine legislative provisions (paragraph 12 of its first oral statement), Argentina does not understand why it describes this requirement as ridiculous (paragraph 59).

(ii) *Treatment of the information as reflected in the final determination*

Impeding of the investigation and refusal of access to the necessary information

4.373 The impeding of the investigation and the refusal of access to the necessary information is also reflected in the final determination, folio 29, which states that: “The sample documentation relating to sales on the Italian domestic market supplied by all of the manufacturing export companies concerned in the case – and as affirmed at the time of their participation in the proceedings by Assopiastrelle, of which these firms are members, they are major representatives of the Italian *porcellanato* production market – covers no more than approximately 1.92 per cent of the physical volume (m²) and 1.35 per cent of the total estimated value (Italian lire) of sales in the domestic market according to the information duly supplied”.

4.374 Argentina therefore wonders how it is possible to make a correct determination of the normal value of the goods on the basis of a sample of market sales invoices that is so unrepresentative of the total for domestic sales given by the exporting firms. Indeed, the implementing authority had no alternative but to base its determination on the facts available.

4.375 Finally, Argentina stresses that the implementing authority pointed out the shortcomings in the accompanying documentation, as well as the impact of those shortcomings on the investigation. The statements by the DCD in the notes appearing in Annexes ARG-7, ARG-10, ARG-11 and ARG-18 to Argentina’s first written submission correspond exactly to the situation described in Article 6.8 of the AD Agreement. That is to say, this is a situation where the investigation was significantly impeded since the DCD was obliged to continue requesting additional evidence, what it had being insufficient.

4.376 As a result of the repeated requests for supporting documentary evidence, the DCD was obliged to grant repeated extensions to facilitate the pursuit of the investigation, which was impeded

by the attitude of the exporters. The combination of these elements placed the authority in a situation in which it did not have the necessary information because the exporting firms were refusing access to that information.

4.377 This was reflected in the final determination, folio 39, where the implementing authority includes the paragraphs of the argument submitted by Zanon, in that these paragraphs introduce the reasoning which led the implementing authority to use the best information available: “As regards the margins of dumping, we submit that the preliminary determination of the Directorate of Unfair Competition (folios 1131 *et seq*) should be endorsed in that the information on which it was based, i.e. ‘information and documentation supplied by the domestic manufacturing firm Ceramica Zanon S.A.C.I. y M. and by the domestic importing company Canteras Cerro Negro S.A. (from its Italian supplier ITS S.p.A.)’, is the best information available in view of the lacunae and inconsistencies in the information submitted both by the Italian exporting companies and by Ceramica San Lorenzo (...).”

Rebuttal of various paragraphs of the EC's first written submission

4.378 In paragraph 60 of its first written submission, the EC claims that the DCD did not inform the exporters at any time during the investigation that the information on export prices and normal value contained in their questionnaire responses had been disregarded.

4.379 Argentina does not consider this to be the case, since the DCD repeatedly asked for more extensive information, stressing that the information submitted was insufficient. One only needs to mention, in this connection, the Notes of 30 April, 22 June and 3 August 1999, in which the DCD requests the cooperation of the exporting firms in incorporating already requested evidence or adapting information in the record of the proceedings in order to ensure that the DCD had the information it needed to reach a public conclusion with respect to the matter at issue. Similarly, in its Note of 22 June 1999, the DCD had to repeat the need for further supporting documentation, since what it had was insufficient.

4.380 The EC is also mistaken when it states, in paragraph 61, that the DCD did not explain in the final dumping determination the reasons why such information was rejected. Indeed, the DCD, in its determinations, pointed out that the information supplied was not sufficient to enable it to reach a reasoned and public conclusion.

4.381 Firstly, already in its preliminary determination the DCD stated that the fact that the exporting firms had asked most of the information they supplied to be declared confidential implied differential and restricted treatment in processing that information.

4.382 Likewise, the final determination shows that the implementing authority was restricted in its handling of the information, and therefore requested a review of the status of that documentation and the incorporation in the proceedings of evidence of interest that would enable the Technical Department to present, in its conclusions, the technical and documentary evidence on which they were based from all the firms involved.

4.383 At the same time, the final determination also shows that as stated before, the lack of representativeness of the sample was a determining factor in forcing the implementing authority to use the best information available.

4.384 It is well known that a sample of some 2 per cent is not valid in statistical terms. In this case, the exporters submitted as the universe of their sales in the domestic market precisely what is usually considered to be the margin of error, and even worse, they did so without indicating the criterion on which they based their sample.

4.385 Argentina submits therefore that the DCD used the facts available because it considered that the exporters had acted in a manner that fit the description in Article 6.8, that is to say they refused access to the necessary information, did not supply such information within a reasonable period and significantly impeded the investigation.

4.386 In its first oral statement, Argentina also presented a series of arguments relating to the EC's claim under Paragraph 6 of Annex II of the AD Agreement.

4.387 In Argentina's view, the EC is mistaken in paragraph 60 of its first written submission when it claims that the DCD did not inform the exporters at any time during the investigation that the information on export prices and normal value contained in the questionnaire responses had been disregarded. Similarly, the EC is mistaken when, in paragraph 61 of its first written submission, it states that the DCD did not explain in the final dumping determination the reasons why such information was rejected.

4.388 On the contrary, the DCD, in its determinations, showed that the information submitted was not sufficient to enable it to reach at a reasoned and public conclusion.

4.389 Indeed, Argentina considers that the implementing authority was explicit enough in the notes provided in Annexes ARG-7, ARG-10 and ARG-11 in which it explained to exporters the situation that was developing in the investigation owing to the lack of necessary information within a reasonable period. In other words, Argentina is of the view that sufficient notice was given to exporters that they were involved in the situation described in 6.8 of the AD Agreement.

4.390 As required in paragraph 6 of Annex II, Argentina informed the exporters of the insufficiency of the information provided and the lack of sufficiently detailed summaries, and granted a series of extensions. Since the requirements had not been met, i.e. since not enough supporting information had been submitted to enable the authority to arrive at a reasoned and public conclusion, the DCD gave the reasons, in its final determination, why the information was disregarded (see paragraphs 61 to 65 of Argentina's first written submission and folios 29 and 39 of the final determination, incorporated by reference in Resolution No. 1385/99 introducing the measure.

(c) Arguments of Argentina in its oral statement at the third-party session of the first meeting of the Panel with the parties, relating to the EC's claim under Article 6.8 of the AD Agreement

4.391 In its oral statement at the third-party session of the first meeting of the Panel with the parties, Argentina made the following arguments relating to the EC's claim under Article 6.8 of the AD Agreement.

4.392 Japan's submission (at paragraph 2) proceeds from certain assumptions that do not apply to this case:

- (a) Firstly, that information submitted within a reasonable period and not contested is automatically valid. In fact, this was not the case, since a series of extensions were granted and, above all, the information submitted was insufficient.
- (b) Secondly, that the authorities did not point out that the information would not be accepted. This is also wrong: the authority at least pointed out that the information was insufficient, asked for more extensive information, and requested that the confidentiality be removed. Consequently, Japan's conclusion that in this case "the respondent is reasonably entitled to assume that the investigating authority is satisfied with the information" is false. On the contrary, the authority expressed its dissatisfaction in its notes dated 30 April 1999, 20 June 1999 and 3 August 1999 and

gave these reasons in its final determination to justify its decision to use the best information available.

4.393 Moreover, the authority, in conformity with paragraph 6 of Annex II, notified that it would not consider the information that was not accompanied by a non-confidential summary. Exhibit ARG-20 containing a series of summaries from the four exporting firms with respect to the different annexes in the record: Annex III – List of importers in Argentina and third countries of the goods under investigation; Annex VII – Actual exports to Argentina; Annex VIII – Sales in the Italian domestic market; Annex IX – Exports to third countries; Annex X – Cost structure of the goods under investigation in the Italian domestic market; and Annex XI – Cost structure of the exported goods. Exhibit ARG-20 should help the Panel to appreciate the technical weakness of the non-confidential summaries and confirm that in the circumstances, the authority had no alternative but to resort to the best information available.

4.394 Thus, Japan's statement that the exporters did cooperate in the investigation is false. In fact, the contrary is true.

4.395 Japan is also mistaken in asserting that the authority considered the issue of the date to be the determining factor in its decision to use the best information available. It was the combination of various elements, delays in submitting information, successive extensions, delay in removing the confidentiality of the information, and insufficient non-confidential summaries that meant that the authority had to resort to the best information available, since in fact, the exporting firms were to all intents and purposes refusing access to the information.

(d) Replies of Argentina to the first set of questions by the Panel relating to the EC's claim under Article 6.8 of the AD Agreement

4.396 Argentina replied to the first set of questions by the Panel relating to the EC's claim under Article 6.8 of the AD Agreement as follows:

4.397 The Panel asked the parties whether, in their view, the DCD rejected the information from the exporters for one of the reasons set out in Article 6.8 AD Agreement. The Panel further asked whether reference was made in the record to one of these reasons and, if so, where. The Panel also asked under what circumstances an investigating authority may resort to secondary source information outside the specific circumstances of Article 6.8 AD Agreement.

4.398 To this question, Argentina replied that the DCD proceeded the way it did because it found that the combination of different circumstances set out in Article 6.8 of the AD Agreement had been satisfied. Only the circumstances laid down in Article 6.8 could justify recourse to Annex II of the AD Agreement.

4.399 The Panel recalled that Argentina's first written submission alleged that the exporters' questionnaire responses were deficient in many ways. In particular, that such questionnaire responses were submitted late, were not fully translated, lacked public summaries of confidential information sufficiently detailed, lacked some currency conversions, failed to report data on exports to third countries and costs of the product exported, and lacked supporting documentary evidence. The Panel asked Argentina which of these deficiencies, if any, were relied upon by the DCD for its final determination. The Panel further asked if Argentina could provide the Panel with the relevant references in either the report accompanying the final determination or in the administrative record.

4.400 To this question, Argentina provided the following reply.

4.401 For its final determination, the DCD did not rely on the deficiencies only, but on all of the facts contained in the record.

4.402 Paragraphs 7 to 60 inclusive of Argentina's first written submission and paragraphs 2 to 35 inclusive of Argentina's first oral statement provide a full explanation of where, in the preliminary and final determinations, each one of the different ways in which the exporters impeded the investigation is recorded: failure to supply information within a reasonable period and refusal of access to the necessary information.

4.403 In the report on the final determination of the margin of dumping in the investigation at issue, the items identified as V.1.3 and V.2.3 (final determination of normal value and final determination of the f.o.b. export price, respectively) explain both the deficiencies and the limitations that the DCD encountered in analysing the information and documentation supplied by the participating firms.

4.404 Regarding the last part of the question, Argentina provided a detailed account of the documentation submitted by the firms concerned as an indication of the information to which the DCD had access.

4.405 The Panel recalled that Argentina, in paragraph 39 of its first written submission, states that "the submission of information and documentation for which confidential treatment is requested constitutes a limiting factor with respect to the analysis and public conclusions of the implementing authority" (emphasis added). The Panel asked Argentina whether, in its opinion, the confidential nature of the information submitted constituted a constraint on the investigating authority's ability to base its determination on that information. The Panel further asked Argentina to explain in which way it considered that confidentiality limited the DCD's analysis in this case.

4.406 Argentina replied that confidentiality imposes a limit on the authority by preventing it from relying on public elements that can be invoked against the parties or third parties, particularly when the information in question is not accompanied by non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence and hence to allow the determination reached, which must be public, to be backed.

4.407 The Panel asked the Parties whether they drew a distinction between the obligation of authorities to protect confidential information from disclosure, on the one hand, and the obligation of authorities to use for their determinations exporter data that meets the requirements of the Agreement.

4.408 Argentina replied that the above were two different concepts. On the one hand, there was the generic obligation of the authority to protect the confidentiality of information provided in confidence by the exporters and importers during the investigation, information which must be accompanied by non-confidential summaries in sufficient detail to permit a reasonable understanding of its substance. On the other hand, there was another obligation relating to the treatment which the authority must give to the information provided by exporters as an element in calculating the normal value and the export value and determining the margin of dumping. The implementing authority tried to do both things, i.e. to protect the confidentiality of the information submitted in confidence while using the information furnished by the exporters.

4.409 The Panel recalled Argentina's statement that, according to the DCD, the non-confidential summaries submitted by the exporters were insufficient under Article 6.5.1 AD Agreement, since this provision required that such summaries permit a "reasonable understanding of the substance of the information provided in confidence". The Panel asked the parties how did they interpret the objective of Article 6.5.1, that is, whose "reasonable understanding" was being addressed – that of the public or that of the investigating authorities?

4.410 Argentina replied that the implementing authority considers that the non-confidential summaries must enable the authorities to arrive at reasoned and public conclusions and enable the parties concerned to exercise their right of defence by participating in the investigation and commenting on the submissions of the other parties involved.

4.411 In Argentina's view, additionally, the non-confidential summaries must meet the requirements of Article 6.5.1 by permitting a reasonable understanding of the substance of the information submitted so that the authority can make them public.

4.412 The Panel asked the parties whether the following summary of relevant facts was correct. The exporters requested confidentiality for most of the information provided in their questionnaire reply. On 30 April 1999, the DCD sent letters to the exporting firms requesting them to consider providing a more detailed non-confidential summary than that already provided in the questionnaire replies, to elaborate on the information supplied, or to remove the requested confidentiality that had been granted by the investigating authority. More specifically, information on sales in the Italian market (Annex VIII) and the cost structure of the goods in the domestic Italian market (Annex X) was requested. On 4 June 1999, the exporting firms submitted public and confidential information concerning domestic sales of the product concerned, with conversion tables that were submitted as confidential information. On 7 June 1999, Bismantova and Casalgrande further submitted as confidential information sales invoices relating to the Italian domestic market. By its letters of 22 June 1999 and 3 August 1999, the DCD requested the exporting firms to reconsider the requested confidentiality of the information concerning product codes and the production costs. The DCD's report acknowledged that the exporting firms agreed by letters of 23 and 24 June that the product code item could be made non-confidential. On 10 August 1999, the exporting firms further agreed to remove the confidentiality of the item concerning cost of production provided that the names of the companies relating to each cost structure were not revealed.

4.413 Argentina replied that the notes contained in Exhibit ARG-7 not only requested further information concerning Annex VIII and Annex X, but also, in the case of Marazzi y Casalgrande, requested additional information with respect to the following:

List of importers in Argentina and third countries of the goods under investigation (Annex III);

- Actual exports to Argentina (Annex VII);
- Sales in the Italian domestic market (Annex VIII);
- Exports to third countries (Annex IX);
- Cost structure of the goods under investigation in the Italian domestic market (Annex X);
- Cost structure of the exported goods (Annex XI).

4.414 In the case of Bismantova and Caesar, the notes requested additional information with respect to:

- List of importers in Argentina and third countries of the goods under investigation (Annex III);
- Actual exports to Argentina (Annex VII);
- Sales in the Italian domestic market (Annex VIII);

- Exports to third countries (Annex IX).

4.415 The Panel asked the parties to clarify whether, in light of the exporters' agreement to re-classify the information as requested, the concerns the DCD raised with regard to the confidential nature of the information at the time of the preliminary determination (recorded in p. 23 of the DCD's Final Determination Report, Exhibit EC-2) had been resolved by the time of the final determination. The Panel further asked the parties to indicate which of the exporters' information, if any, was still confidential at the time of the final determination. In certain information had remained as confidential, the Panel also asked the parties to clarify whether non-confidential summaries were provided for this confidential information.

4.416 To this question, Argentina provided the following reply.

4.417 The DCD's concern with regard to the confidential nature of the information during the preliminary investigation persisted even after the confidentiality of the product code and costs of production was removed, since the substantial information needed to determine the normal value, the export value and the margin of dumping remained confidential until the final determination (and is still confidential).

4.418 Regarding the information submitted in response to the various requests from the implementing authority, Argentina referred the Panel to its past comments on the merits thereof and the limitations encountered by the implementing authority in treating the said information.

4.419 Argentina referred back, in this reply, to the DCD's explanations concerning the exporters' submissions of 4 June 1999.

4.420 A detailed look at the information supplied by the exporters and their submissions of 4 June 1999 shows that not only did they not provide any information regarding the Annexes listed in the DCD's Note of 30 April, as recognized by the EC in paragraph 25 of its first oral submission, but they never in fact furnished sufficient supporting documentation relating to the information provided regarding Annex V (confidential), nor did they provide non-confidential summaries in conformity with Article 6.5.1 or remove the confidentiality with respect to the Annexes that were essential to determining the normal value, the export value and the margin of dumping.

4.421 The Panel asked Argentina whether it agreed with the EC's statement that the submission of questionnaire replies within the first two hours of the morning of the working day following the specified deadline cannot be regarded as late as it is consistent with the provisions of *Decreto 1759/72*, as amended by *Decreto 1883/1991*. If so, the Panel asked Argentina to clarify which, if any, of the exporters' submissions were not covered by this grace period.

4.422 Argentina replied that it agreed with the EC regarding the possibility of using the first two hours of the day following a specified deadline, and indeed all of the parties to the procedure have that right. Argentina had only mentioned this subject as yet another example of the uncooperative attitude of the exporters. What Argentina wanted to stress was the fact that the period actually used by the exporters to complete the questionnaire requirements ran from 30 November 1998 to 10 August 1999.

4.423 The Panel asked Argentina to explain what the concern of the DCD was with respect to the alleged lack of "representativeness" of the exporters' home sales. In particular, was this a concern relating to the sampling method, or did this concern relate to the "sufficiency" of the exporters' home sales for the purpose of establishing normal values?

4.424 Argentina replied that the DCD's concern related to the lack of representativeness of the sales on the Italian domestic market, as stated on page 29, Section V.1.3, of the report on the final

determination of the margin of dumping, and not the sampling methodology itself, since this was accepted by the DCD in the Note of 22 December 1998 (DCD No. 273-000471/98).

4.425 The Panel asked Argentina to explain the relevance of the DCD's finding that the four exporters included in the sample only represented 1.92 per cent of the total volume of sales in the home market. In particular, did the 1.92 per cent refer to all sales made by Italian producers, including those with no exports to Argentina? If this was the case, the Panel asked the parties whether they were of the view that, as a legal matter, companies selected for an individual determination have to account collectively for a large percentage of all home market sales made.

4.426 Argentina replied that the sample documentation on domestic market sales, which covered only 1.92 per cent of the physical volume and 1.35 per cent of the total estimated value in Italian lire, referred to the domestic market sales reported by the four companies participating in the investigation. The relevance of this weakness in the sample documentation was that it prevented the implementing authority from understanding precisely the transactions that took place in the domestic market during the investigation period and hence from making an accurate determination of the normal value. In other words, the supporting documentation was not statistically valid for the purposes of reaching an accurate determination of the normal value. Additionally, as noted earlier, this supporting documentation was submitted in confidence.

4.427 The Panel asked the parties to confirm whether that the four exporters included in the sample accounted, in quantity terms, for around 70 per cent of all exports made.

4.428 Argentina replied to this question by citing Exhibit ARG-23, which contains a note from Assopiastrelle to the DCD, dated 30 November 1998, stating that: "... Based on our information the exports of the 4 to 5 largest exporting companies would account for approximately 70 per cent of the overall exports from Italy to Argentina of the products under investigation ...".

4.429 The Panel asked the parties to comment on the relevance of the fact that the DCD initially accepted the sampling methodology suggested by the exporters' association, although the sampled firms were later found by the DCD to cover too few home sales.

4.430 Argentina replied that Exhibit ARG-12 shows that the sampling methodology was proposed on 1 December 1998, before the replies to the questionnaires were received. On 22 December 1998, the DCD, by Note DCD No. 273-000471/98, accepted the said methodology on the understanding that Assopiastrelle had suggested it with a view to cooperating in, and simplifying the investigation. It would have been impossible for the DCD, in the space of 12 days, to evaluate the replies to the questionnaires and the supporting documentation and to assess whether the information provided was sufficient to arrive at a reasoned and public conclusion.

4.431 In short, Argentina said, the DCD accepted the sampling methodology on the understanding that the companies making up the sample would fill out the questionnaires properly, and provide all of the information that the implementing authority needed to arrive at a proper determination of dumping.

4.432 The Panel recalled that the exporters' questionnaire made reference to the provision of supporting documentation in two places. In the introductory section, while indicating that supporting documentation must be provided, it also allowed exporters the possibility to identify instead the source of the information reported. In addition, Section B requested the submission of any supporting documentation that would help the DCD to better understand the mechanics of the reported transactions. The Panel asked Argentina whether it was of the view that, according to the specifications of the questionnaire used by the DCD, respondents were obliged to provide full documentary evidence of each and every sale reported. The Panel further asked Argentina to clarify

whether any of the exporters chose to comply with the requirement set out in the introductory section of the questionnaire by identifying the source of its information. If no exporters took advantage of that option, the Panel asked Argentina whether it was of the view that the DCD was entitled to require the submission of “additional” supporting documentation without specifying what that information should consist of.

4.433 Argentina replied that the exporters’ questionnaire clearly establishes the obligations of the exporters interested in participating in the investigation. In the introductory section, they are asked to provide supporting documentation, and only when this is not possible, to identify the source. The supporting documentation requested in Section B must be sufficiently representative to enable the implementing authority to better understand the transactions carried out on the domestic market. This clearly does not mean that it must include, for example, all of the invoices for the domestic market – but it should include a statistically valid percentage thereof.

4.434 Additionally, the implementing authority was entitled to ask exporters to elaborate on the information provided. The need for the implementing authority to impose such a requirement was duly established. As mentioned throughout the investigation, the authority was trying all along to obtain information that would enable it to make individual determinations for each exporter.

4.435 The Panel recalled that Argentina argued that, by means of the notes that have been provided to the Panel as Annexes ARG-7, ARG-10 and ARG-11, the DCD duly informed the exporters that it was necessary for them to provide additional documentary evidence. The Panel asked Argentina in what ways, other than by requesting the information to be re-classified, did Annexes ARG-7, ARG-10 and ARG-11 draw the exporters’ attention to the need to provide additional documentary evidence?

4.436 Argentina replied that, clearly, the note of 30 April 1999 requested further evidence and the submission of non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Thus, the DCD was not merely asking for the confidentiality to be removed. The notes of 22 June and 3 August (Annexes ARG-10 and ARG-11) requested that the confidentiality of the product code and production costs be removed so that the information supplied on 4 June following the first request could be used, since the said information was not accompanied by non-confidential summaries.

(e) Arguments of Argentina in its second written submission relating to the EC’s claim under Article 6.8 of the AD Agreement

4.437 In its second written submission, Argentina made the following arguments relating to the EC’s claim under Article 6.8 of the AD Agreement.

(i) *Significant impeding of the investigation*

4.438 Argentina reiterates that the exporters significantly impeded the investigation by failing to comply with the required formalities in the general and specific instructions of the questionnaires provided by the implementing authority, by not providing enough supporting documentation with the information supplied and by providing little information in the non-confidential summaries.

Failure to comply with the formalities

4.439 With respect to point (e) of the EC’s first oral statement, Argentina would like to stress that according to Article 1 of the AD Agreement, “The following provisions govern the application of Article VI of the GATT 1994 insofar as action is taken under anti-dumping legislation or regulations.” This Article concerns the rules governing the implementation of the Agreement which, it stipulates, are valid to the extent that they are consistent with its provisions.

4.440 Argentine legislation implements the AD Agreement and stipulates that the submissions of the parties must be translated into the national language, and that values must be expressed in US\$. It is unacceptable that the EC should play down rules governing a procedure conducted in Argentina in accordance with Argentine legislation while at the same time invoking that legislation in its own favour and considering it valid when it comes to justifying the delay in submitting documentation – specifically, the provision allowing documentation to be provided during the first two hours of the day following the deadline.

Insufficient supporting documentation

4.441 Argentina reiterates that, in its Note of 30 April 1999, the DCD specifically asked the companies to “... supply further evidence ...” and “... elaborate on the information supplied ...”. In Argentina’s, what was being requested was supporting documents, since the supporting documentation provided with the replies to the questionnaires was insufficient.

4.442 Moreover, a meeting was held on 11 May 1999 between the DCD and the representatives of the exporters for the purposes of informing the latter of the shortcomings in their supporting documentation, and the result of the meeting was the Note provided by the EC in Exhibit EC-10. This Note clearly shows the DCD’s concern – understood by the representative of the exporters – regarding the insufficiency of the documentation submitted. Indeed, the representative states that at least 50 per cent of the exporters’ sales invoices for the Italian domestic market should be provided.

Insufficient non-confidential summaries

4.443 Argentina recalls Exhibit ARG-19, which contains a complete list of the confidential information submitted by each one of the firms with respect to each one of the Annexes, and identifies the information that was accompanied by non-confidential but incomplete summaries. Moreover, the non-confidential summaries provided by the four sample firms with respect to Annexes III, VII, VIII, IX, X and XI are completely irrelevant in that they lacked substance and hence could not be used by the authority.

4.444 Argentina also reiterates that the exporters were aware that, as indicated in the general instructions for completing the questionnaire (point 6), “... ‘confidential’ information that is not accompanied by a summary or an explanation of why it is impossible to provide such a summary will not be considered as such”.

(ii) Refusal of access to necessary information

4.445 The EC cannot reasonably claim, as it does in paragraph 37 of its first oral statement, that the questionnaires only required invoices for exports to Argentina. Argentina draws the Panel’s attention to page 2, Title 1 of the questionnaire:

OBJECTIVES AND SCOPE

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT Uruguay Round) was implemented by Argentina through Law No. 24.425, published in the Official Bulletin of 5 January 1995, and Regulatory Decree No. 2121/94 of 30 November 1994, published in the Official Bulletin of 5 December 1994.

The purpose of this questionnaire is to enable the Secretary of Industry, Trade and Mining of the Republic of Argentina to obtain necessary and sufficient information for investigations of unfair international trade practices.

The producer and/or exporter of the respondent country shall answer this questionnaire as accurately as possible, accompanying its replies with supporting documentation or, where this is not possible, identifying the source of the information.

All of the information supplied shall be subject to possible verification by the implementing authority. Where it is not possible to verify the replies in a satisfactory manner or if they are incomplete or submitted after the time-limit has elapsed, determinations shall be made on the basis of the best information available (emphasis added by Argentina).

4.446 Argentina considers that anyone participating in an anti-dumping procedure should be able to appreciate that the implementing authority's requirements as set forth in the "Objectives and Scope" section form a fundamental part of the instructions, in that they include the essential requirements for fulfilling the legal obligation and describe the consequences of failing to do so.

4.447 Similarly, Argentina draws the Panel's attention to point 1 of the general instructions for completing the questionnaire, which appear on page 4:

The four sections ... [Section A: General Information; Section B: Exports to Argentina; Section C: Sales in the domestic market and to third countries; Section D: Production cost structure. Manufacturing process] ... include Annexes and detailed information. The producer/exporter is asked to indicate the file number on each of the sheets it submits, answering each question in detail and identifying the sources used, adding, as a necessary condition for certifying the validity of the source, the corresponding documentation (emphasis added by Argentina).

4.448 This clearly shows that contrary to what the EC claims in paragraphs 35 to 39 of its first oral statement, the DCD had stated precisely its requirements in the way of supporting documentation and the conditions under which such submissions as were made in this respect could be considered valid.

4.449 In other words, the documentation required by the authority is that which can reasonably be requested in any anti-dumping investigation, and the EC's far-fetched claim that the implementing authority required copies not only of all the invoices, but of all the accounting and cost records, is unacceptable.

4.450 Regarding the EC's claim in paragraph 41 of its first oral statement concerning the DCD's Note of 30 April 1999, Argentina would like to point out that its request to the firms to "... supply further evidence ..." and "... elaborate on the information supplied ..." refers to none else than "supporting documents".

4.451 It is clear from the above that it was not only at the meeting held on 11 May between the DCD and the representatives of the exporters that the latter were informed of the shortcomings in the supporting documentation submitted, as the EC asserts. Following this meeting, as shown by Exhibit EC-10, the exporters clearly could no longer have any doubts as to DCD's requirements.

4.452 In Argentina's view, the clearest evidence that the accompanying documentation was not sufficient appears in the Note provided by the EC as Exhibit EC-10, in which the representative of the exporters, following the above meeting, states that "... this information must cover an 'important' part of total sales in the domestic market (you said 50 per cent ...)".

(iii) *Lack of representativeness of the sample of domestic market sales*

4.453 In paragraph 46 of its first oral statement, the EC asserts that what matters is whether the exports made by the selected exporters were representative of exports to Argentina, and not whether the domestic sales made by the selected exporters were representative of the domestic sales made by all the Italian producers. This statement is out of context and refers to a point against which Argentina did not argue. It was precisely because the four sample firms were representative in terms of their exports to Argentina – “more than 70 per cent” – that the DCD accepted the sampling methodology proposed by Assopiastrelle on 22 December 1998.

4.454 What Argentina did argue in paragraphs 43-46 and 49-52 of its first written submission and in paragraphs 23 and 24 of its oral submission was that the lack of representativeness of the documents provided by the exporters in respect to their sales (those of the four sample exporters) in the Italian domestic market, and not in respect of all sales by all producers of *porcellanato* in the Italian market.

4.455 The Panel will appreciate the relevance of the fact that the sales invoices in the domestic market included in the record by the exporters for the totality of their sales on the Italian domestic market were not sufficient from a statistical point of view to determine the normal value, and hence, the margin of dumping.

4.456 It is odd that the EC should argue, in discussing Article 6.8, that “... even assuming that the sample were in fact not sufficiently representative, that would still not justify the DCD’s decision to resort to ‘facts available’. Article 6.10 contains no provision authorizing the investigating authorities to resort to ‘facts available’ in such circumstances”. It is a bit confusing that in this context the EC should refer to Article 6.10, claiming that it contains no provision authorizing the investigating authorities to resort to the facts available. Perhaps the EC is thinking of its own regulations, which do in fact entitle it to do what it seems to want to prevent Argentina from doing.

4.457 In fact, the provision that enables the authority to rely on the facts available is Article 6.8, which is at the centre of the discussion on the insufficiency of supporting documentation. Ultimately, what links Article 6.8 and 6.10 of the AD Agreement is the fact that in normal circumstances, Article 6.10 applies, whereas if the authority does not have sufficient information, Article 6.8 applies.

4.458 Argentina reiterates that upon examining the supporting documentation – submitted late and at the DCD’s specific request – the authority found that the firms making up the sample proposed by Assopiastrelle itself only represented approximately 1.92 per cent of the physical volume (m²) and 1.35 per cent of the total estimated value (in Italian lire) of sales on the domestic market.

(iv) *Failure to provide the information within a reasonable period*

4.459 Argentina stresses once again that the repeated extensions and the delay and reluctance displayed in removing the confidentiality of the information supplied without sufficiently detailed non-confidential summaries in fact reflect the situation described in Article 6.8 as regards the failure to provide the necessary information within a reasonable period.

4.460 Specifically, with respect to paragraph 52 of the EC’s first oral statement, the supporting documentation was not submitted as soon as it was requested as the EC contends, since it was in fact requested in the questionnaires of 30 October 1998, and the deadline for submitting replies and documentation, once it had been extended, was 9 December (within the first two hours of 10 December, as the EC has pointed out).

4.461 As the EC also correctly states in paragraph 25 of its oral statement, following the Note of 30 April 1999, the exporters, on 4 June, submitted information on Annexes VII, VIII and IX.

Consequently, the EC itself recognizes that the information was not submitted as soon as it was requested. Argentina reiterates that the information was insufficient.

4.462 Argentina also reiterates its conviction that the exporters were warned of the shortcomings in the information supplied, as illustrated by the Notes sent by the DCD to the exporters on 30 April, 22 June and 3 August 1999.

4.463 Since the exporters did not provide the requested information within a reasonable period and since the information provided did not meet the authority's requirements for reaching a determination based thereon, Argentina submits that the investigating authority acted within the legal framework of Annex II, paragraph 1.

4.464 Consequently, Argentina considers that the situations described (significant impeding of the investigation and failure to provide access, added to the failure to provide the information within a reasonable period) reflect the circumstances described in Article 6.8, the combination of which enables the authority to make a determination on the basis of the facts available as the only remaining alternative.

(v) *Other claims by the EC*

4.465 The EC is mistaken when it claims in paragraph 7 and 8 of its oral statement that Argentina changed its line of defence. In paragraph 57 of its first written submission, Argentina explains the meaning of the expression "considered on an equal footing", which the EC had taken out of its context.

4.466 In other words, far from changing a line of defence, the paragraph in question merely sets out the facts, i.e. that Argentina had all of the information before it, the information submitted by the exporters and that submitted by the complainant. In the case of the former, which – and Argentina does not dispute this – should form the basis for calculating the normal value and the export value, the authority did try to use it. However, in view of the considerations mentioned with respect to the shortcomings in the information, its late submission, and the incomplete and insufficient supporting documentation submitted by the sample firms (that is, the exporters submitted supporting documentation concerning their own insufficient sales on the domestic market: 1.35 per cent in value and 1.92 per cent in volume), the authority had no alternative but to resort to the "facts available".

4.467 This is very different from the distorted version of the facts according to which the authority placed both sets of information (the information submitted by the exporters and the rest of the information) on an equal footing when considering them from the legal point of view and picked only the data which it found the most convenient.

4.468 Argentina had all of the information before it, and only opted for a determination on the basis of the facts available when it had concluded, in the light of the situation described above, that the information from the exporters was insufficient. The mention of Folio 29 was more than a "vague remark": it concerned a finding under point V.I.3 of the authority's final determination. The conclusion that the DCD drew from this is reflected in that final determination in Folio 39, which was cited by Argentina in paragraph 27 of its first oral statement.

4.469 Thus, Argentina did not deviate from paragraph 7 of Annex II, since the authority accepted the sample proposed by the exporters and requested sufficiently detailed non-confidential summaries. It also asked for supporting documentation and granted a series of extensions, finally having to resort to secondary information because the supporting documentation was insufficient.

4.470 In this respect, Argentina is convinced that it acted in conformity with the sequence laid down in Article 6.8. Making sure that the circumstances described in Article 6.8 existed, the implementing authority resorted to a secondary source which provided more ample information, and within a reasonable period, only when forced to do so.

(f) Arguments of Argentina in its second oral statement relating to the EC's claim under Article 6.8 of the AD Agreement

4.471 In its second oral statement, Argentina made the following arguments relating to the EC's claim under Article 6.8 of the AD Agreement.

(i) *Refusal of access to necessary information concerning the lack of supporting documentation*

4.472 Firstly, contrary to what the EC argued in a reply to a question by the Panel following the first meeting, Argentina never argued that the investigating authority was free to use secondary sources of information. On the contrary, Argentina reaffirms that the DCD was forced to do so when it found that the information submitted by the exporters was insufficient.

4.473 This is clearly reflected in the record of the investigation. Suffice it to mention once again, for example, the meeting held on 11 May 1999 between the DCD and the representatives of the exporters, one of the essential purposes of which was to remind the exporters of the shortcomings in the supporting documentation submitted. This meeting resulted in the Note provided by the EC in Exhibit EC-10, which shows the DCD's concern regarding the insufficiency of the documentation submitted. Indeed, the representative of the exporters states that at least 50 per cent of the exporters' sales invoices for the Italian domestic market should be provided, stressing the particular importance of including invoices for all sizes (20 x 20, 30 x 30 and 40 x 40).

4.474 Argentina submits that in accordance with the facts described and as reflected in Exhibit ARG-7, the DCD explicitly requested exporters to "... supply further evidence" and "... elaborate on the information supplied ...". With due respect, Argentina would like to ask the Panel: does this not constitute a request for supporting documents, given the insufficiency of the supporting documentation provided in the replies to the questionnaires?

4.475 From the beginning of this case, the EC has maintained, both in its first written submission and in a reply to a question by the Panel following the first meeting, that Argentina went back on the position it held during the consultations on how the DCD proceeded in relation to the information supplied by the exporters. Argentina quotes Article 4.6 of the DSU in this respect: "Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings."

4.476 In its statements before the Panel, the EC has distorted the meaning of an informal exchange during the consultations, and is trying to pass this off as a legal interpretation by Argentina when it is no such thing. "Equal footing" can only mean that value is given to a secondary source when the circumstances set forth in Article 6.8 are met in a specific case and in accordance with the particular nature of that case.

4.477 Once again, Argentina points out that the DCD never considered that the sampling methodology put forward by Assopiastrelle was not representative; on the contrary, the DCD accepted it, precisely because the four sample companies were representative in respect of their exports to Argentina – "more than 70 per cent". Argentina maintains that the supporting documentation provided by the four sample firms in respect of their sales in a Italian domestic market was insufficient to constitute a statistically valid sample for the purposes of determining the normal value of sales in that market. This was reflected in the final determination, folio 29 1967, page 29.

4.478 Argentina trusts that the Panel will understand the importance in the context of the investigation of the fact that the sales invoices in the domestic market were not sufficient from a statistical point of view for the purposes of determining normal value and hence the margin of dumping.

(ii) Lack of representativeness of the sample owing to the insufficiency of the information provided

4.479 Once again, the EC is confusing the issue when it states, in its reply a question by the Panel, that the implementing authority should have verified in advance the representativeness of the sample suggested by Assopiastrelle. Obviously, in accepting the sample, the DCD took account of what the exporters had said, i.e. the Note from Assopiastrelle of 30 November 1998, according to which the four selected firms represented 70 per cent of exports to Argentina. However, although the sample was representative, the information provided by the selected companies was not. The DCD never doubted the representativeness of the sample. Clearly, however, no implementing authority can verify, in the space of seven working days, whether information provided in replies to questionnaires is sufficient as supporting documentation (note that the replies to the questionnaires were submitted on 10 December 1998, while the DCD accepted the sampling methodology on 22 December 1998). Consequently, the DCD reaffirms that although the sample was representative, the information supplied by the sample firms in respect of normal value was not statistically valid.

4.480 Regarding the EC's claim in paragraph 38 of the replies to the questions of the Panel that the exporters reported in their responses "all" the domestic sales of each of the models that were exported to Argentina in significant quantities, Argentina reiterates that, as stated in Argentina's reply to question 15 by the Panel, the questionnaire responses were incomplete since they did not contain sufficient information, in particular concerning domestic market sales.

(iii) Impeding of the investigation by refusing access to necessary information

4.481 Likewise, Argentina would like to refute the EC's reply to a question by the Panel in which it states that the DCD Notes of 30 April did not request the exporters to provide information on Annexes VIII and X. Argentina reiterates that these Notes make it clear that information on Annex VIII was requested of all the firms, while information on Annex X was requested of Marazzi and Casalgrande, although these were not the only Annexes on which information was requested. Argentina refers the Panel to its reply to question 6 of the Panel.

(iv) Impeding of the investigation by failing to comply with the formalities required under Argentine law

4.482 As regards the EC claims in paragraphs 59-65 of its second written submission concerning the formalities required in the questionnaires, Argentina repeats what it said in paragraphs 6 and 7 of its second written submission: since Article 1 of the AD Agreement provides that domestic legislation or regulations implementing the Agreement must be respected, and Argentine legislation implementing the AD Agreement provides that submissions of the parties must be translated into the national language and values expressed in US\$, it is unacceptable that the EC should play down the rules governing a procedure conducted in Argentina in accordance with Argentine legislation.

(v) Lack of cooperation

4.483 Argentina does not share either the EC's assertion that there was no evidence of lack of cooperation on the part of the exporters. Suffice it to mention that they were late in submitting the information and failed to comply with certain formalities, and that the information was supplied with

non-confidential summaries that were insufficient for the purposes of using the data supplied, or without any summaries at all.

(vi) *Three new EC claims*

Qualitative analysis of the documentation supplied

4.484 As regards the EC's assertion that the questionnaire did not require the exporters to provide copies of a sufficient number of invoices, Argentina reiterates that the instructions emphasized that "Producers and/or exporters from the respondent country must answer this questionnaire with the greatest possible precision, attaching documentation to support their replies, or if this is impossible indicating the source of the information".

4.485 In other words, it clearly was not enough to state that a given number of sales had been made without providing a sufficient number of sales invoices in the domestic market to back the reply to the question. Indeed, the sample backing the replies had to be sufficiently extensive to allow a precise evaluation of the information submitted, and although the actual word "invoices" was not mentioned, it was implicitly included in the type of information requested.

4.486 Similarly, Argentina refutes the EC's assertion that the reference to the fact that the respondents should supply supporting documents was too vague to meet the requirements of paragraph 1 of Annex II. Argentina does not agree, since the documentation supporting the replies was requested from the exporters in the general and specific instructions for each one of the items required in each questionnaire, in its explanatory part. Thus, Argentina considers that the implementing authority specified the information required in detail. Moreover, the EC's statement that the said reference was too vague is an interpretation, and in any case, would fall within the realm of the implementing authority's discretion.

Article 2.2 and its footnote as a flawed defence by the EC

4.487 Argentina does not understand why the EC has brought in a new claim – in paragraph 48 of its second written submission – with respect to Article 2.2 and footnote 2, as a argument in defence of the contention that the supporting documentation provided with respect to Annex VIII to the questionnaire was sufficient.

4.488 Article 2.2 lays down the methodology to be used for establishing the margin of dumping when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison. It then goes on to establish how the margin of dumping is to be determined in such situations, i.e. by comparison with a comparable price of the like product when exported to an appropriate third country, or with the cost of production in the country of origin, subject to certain conditions in both cases.

4.489 The 5 per cent referred to in footnote 2 is an exception which, if applicable, entitles the authority to use, as evidence of normal value, the comparable price of the like product when exported to an appropriate third country, or to use the cost of production. But footnote 2 nowhere refers to the supporting documentation for sales in the domestic market. Consequently, the said Article does not say that it is enough for exporters to provide supporting documentation on domestic market sales when such sales constitute 5 per cent or more of the sales of the importing Member.

4.490 In other words, what the footnote does not say is that 5 per cent can be considered as sufficient supporting documentation to back the validity of a sample.

4.491 The EC's claim should cause the Panel to have serious doubts with respect to its assertion that it provided sufficient supporting documentation.

Article 6.8 and a mistaken link with Article 6.10

4.492 The EC has also stated in its defence that the circumstances provided for in Article 6.8 were not met, claiming that Article 6.10 does not allow the authority to base its determination on the facts available.

4.493 Its argument focuses on the alternatives offered by Article 6.10, which assume that there is such a great number of exporters and producers that it is impossible to carry out a determination. Thus, it allows the authority to limit the examination to a reasonable number of interested parties using (1) a statistically valid sample of exporters; or (2) the largest percentage of the volume of exports.

4.494 In the present case Assopiastrelle offered a sample which was, in fact, valid for the investigation (four exporting enterprises which, as stated by Assopiastrelle, represented 70 per cent of exports to Argentina). However, the EC appears to interpret Article 6.10 to imply that once the sample is limited to a reasonable number of interested parties, the implementing authority cannot weigh the quantity and quality of the information supplied.

4.495 Nor does Argentina agree with the EC's interpretation in paragraph 49 of its first oral statement – among the claims with respect to Article 6.8 – according to which Article 6.10 establishes the possibility of (1) enlarging the sample; (2) choosing a new sample; or (3) extending the examination to all exporters.

4.496 This raises a question: if the DCD accepts a sample methodology, at the request of the exporters, because it considers the sample to be representative of the exporters, and the sample companies do not provide sufficient information to enable it to arrive at a reasoned conclusion – refusal of access to information – does the EC maintain that at this point in the investigation (almost eight months after its initiation) the implementing authority should enlarge the sample, choose a new sample or extend the examination to cover all exporters, to request what they failed to request?

4.497 In any case, what led the implementing authority to use the facts available was precisely that the four companies in question supplied documentation for approximately 1.35 per cent of the value of domestic market sales. Clearly, as Argentina said in paragraph 34 of our first oral statement, the exporters submitted as the universe of their sales in the domestic market precisely what is usually considered to be the margin of error – which cannot exceed two or three per cent of the sample – in any statistical data.

4.498 In short, Argentina submits that the scant information provided in the way of supporting documentation relates to Article 6.8 in that it implies a refusal of access to necessary information. When the parties act in accordance with the circumstances described in Article 6.8, the authority may use the facts available to reach a determination.

4.499 Indeed, as Argentina stated in paragraph 24 of its second written submission, what links Article 6.8 and 6.10 of the AD Agreement is the fact that in normal circumstances, Article 6.10 applies, whereas if the authority does not have sufficient information, Article 6.8 applies. In other words, if the implementing authority had had the said information at its disposal in order to make a dumping determination in accordance with Article 6.10, it would not have had to apply Article 6.8 to Article 6.10.

- (g) Replies of Argentina to the second set of questions by the Panel relating to the EC's claim under Article 6.8 of the AD Agreement

4.500 Argentina replied to the second set of questions by the Panel relating to the EC's claim under Article 6.8 of the AD Agreement as follows:

4.501 The Panel recalled that, in its reply a question by the Panel following the first meeting, Argentina argues that "As stated in Exhibit ARG-19, the confidentiality requested in the submission contained in File No. 061-010305/98 of 10 December 1998 was maintained throughout the proceedings. Although in the last submission of 4 June 1999, the company provided information on exports to Argentina, it could not be used, since the information provided in the lists could not be checked against the information in the official registers or against that submitted by the importers in their questionnaire responses. This prevented the implementing authority from checking the accuracy of the information provided." The Panel asked Argentina to clarify why it believed that this information could still not be used by DCD. Could the information still not be used for reasons relating to the confidentiality of the information or does this remark relate to Argentina's argument concerning lack of supporting documentation? The Panel further asked Argentina to explain why the DCD felt it was necessary to cross-check the information and documentation provided by the exporters with information from the official registers.

4.502 To this question, Argentina provided the following reply.

4.503 Throughout the proceedings, Argentina was faced with two different situations. On the one hand, the confidentiality of much of the documentation supplied was maintained. On the other hand, there was a failure to comply with the formal requirements for the supporting documentation relating to export transactions. More specifically, the documentation in question was submitted without the consular certification required under Article 28 of the Argentine Law on Administrative Procedures (Law No. 19549).

4.504 To illustrate this pointed, Argentina quoted the relevant part of the instructions to exporters' questionnaire:

GENERAL INSTRUCTIONS FOR COMPLETING THE QUESTIONNAIRE:

2. The replies and documentation attached hereto must be submitted in Spanish. Where other languages are used, a translation by a registered translator must be provided. Documents issued by foreign authorities must be authenticated by consular or diplomatic officials of the Republic. The signatures must, in turn, be authenticated by the Ministry of Foreign Affairs, International Trade and Worship of Argentina (Article 28 and related articles of the System of Administrative Procedures – Law No. 19.549, Regulatory Decree No. 1759/72, Regulatory Enactment of 1991 by Decree No. 1883/91).

4.505 In spite of the above, and given that it was not the intention of the investigating authority to reject the information submitted, the DCD proceeded to cross-check the information with the documentation in the record obtained from the official registers and from the other parties involved in the proceedings, specifically the importers. It is all of this information that made up the 30 sets of documentation in these proceedings and thus constituted the essential facts of the investigation which determined the conclusions reached.

4.506 In fact, this cross-checking revealed differences. For example, the implementing authority found information that had been submitted by the importer, in this particular case Quadri y Cia. S.A., which had not been supplied by the exporter, as well as the information on exports from the exporter

that was not supplied by the importer. In other cases, the implementing authority detected export and import transactions that had not been notified by any of the parties, but that appeared in the official Argentine customs registers.

4.507 Cross-checking of information from different sources enables the implementing authority to bring together elements with a view to providing a full picture of trade operations with the participation of the exporting firm, the importers and the official Argentine registers. Thus the authority is able to double check every aspect of the facts and weed out the conjectures, contributing to the reliability of its conclusions as to what actually took place.

4.508 The Panel recalled that Argentina replied to a question by the Panel following the first meeting as follows: “The DCD’s concern with regard to the confidential nature of the information during the preliminary investigation persisted even after the confidentiality of the product code and costs of production was removed, since the substantial information needed to determine the normal value, the export value and the margin of dumping remained confidential until the final determination (and is still confidential)”. The Panel asked Argentina to explain which substantial information remained confidential until the final determination.

4.509 To this question, Argentina gave the following reply.

4.510 In its reply to a question by the Panel following the first meeting, Argentina provided an exhaustive list of information submitted by the exporters making up the sample and of the accompanying Annexes for which confidentiality was requested, indicating for each case whether a non-confidential summary was provided.

4.511 However, as it regards normal value, Argentina wished to explain that the supporting information was not only confidential, and remained that way throughout the proceedings, but in fact it was inappropriate and ill-suited for the purposes of determining the normal value. In other words, in this specific case, the most important problem was the lack of representativeness of the supporting documentation provided for the purposes of determining the normal value.

4.512 As regards the export price, the supporting documentation supplied did not enable the authority to carry out the task mentioned in the preceding question. This explains why the implementing authority proceeded the way it did.

4.513 The Panel recalled that, with respect to Annexes IV-VI, the exporters provided information for which they requested confidential treatment, as well as a non-confidential summary of the information concerned. The Panel recalled further that this summary was prepared by way of indexing all the figures provided in those Annexes. The Panel asked the parties why the DCD was of the view that indexation did not permit a “reasonable understanding of the substance of the information submitted in confidence”.

4.514 In replying to this question by the Panel, Argentina recalled that Exhibit ARG-20 contained, as an illustration, the non-confidential summaries submitted by the exporting firms for Annexes III, VII, VIII, IX, X and XI to the questionnaires. In addition, Argentina wished to submit Exhibit ARG-24, containing the non-confidential summaries for Annexes IV, V and VI. Thus, in the opinion of Argentina, the Panel had before it all of the relevant non-confidential summaries provided by the exporting firms and would be able to appreciate that it was impossible, in view of their nature, to arrive at any public conclusions on the basis thereof.

4.515 The Panel recalled that, with respect to Annexes III and VII-XI of the investigation questionnaire, the exporters provided information for which they requested confidential treatment, although they did not provide a non-confidential summary of the information concerned. The Panel

asked the parties whether the exporters provided a justification as to why such information was not capable of summarization (that is, a justification separate from the statement that the information in question required confidential treatment). If this was so, the Panel asked the parties to provide it with copies of the relevant evidence in the record.

4.516 Argentina replied that it had dealt with this question exhaustively before, but for the purposes of further clarification it wished to refer the Panel to the documentation provided in Annexes ARG-20 and ARG-24.

4.517 Argentina added that, as could be seen in Annexes III, IV, V, VI, VII, VIII, IX, X and XI, the request was justified in the following terms: “The request for confidentiality of this information is based on reasons of competition”.

4.518 If the exporters did provide a justification as to why the information for which confidential treatment was requested was not capable of summarization, the Panel asked whether the parties were of the view that under Article 6.5.1 of the AD Agreement investigating authorities have the right to contest such justifications. If so, the Panel asked further, did the DCD conclude, contrary to the exporters, that the information in question could in effect be summarized? If the DCD made this conclusion, could Argentina explain the DCD’s reasoning?

4.519 Argentina replied to this question by saying that it was understood that the parties concerned must do their utmost to provide the implementing authority with the elements it needed to reach public conclusions (as required in investigations such as this one to avoid further consultations such as those that took place subsequently because the confidential nature of the information made it impossible for the authority to provide a full report of how it had proceeded – for example, in the case of the 1.92 per cent).

4.520 The Panel asked the parties to comment on the following statement in paragraph 107 of the report of the Appellate Body in the case *Thailand – H-Beams*, in which the Appellate Body addressed the question of the use of confidential information by the investigating authority as a basis for an authority’s final determination:

An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the Anti-Dumping Agreement, involves the collection and assessment of both confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the Anti-Dumping Agreement must be based on the totality of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information (Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, at para. 107).

4.521 Argentina replied that the DCD had proceeded in accordance with the legislation in force for the investigation of alleged dumping. This was reflected in the comprehensive survey conducted by the DCD with respect to the documentation in the record of the proceedings and to its status.

4.522 The impossibility of reflecting all of the information supplied in the technical reports did not imply that the implementing authority ignored the information. However, it was the status of the information and the possibility of arriving at conclusions on the basis thereof that determined whether it could be considered.

4.523 The Panel recalled that Exhibit EC-10 was a report of the meeting with the case-handlers on 11 May 1999 from the representatives of the exporters in Argentina to the exporters’ lawyers in

Brussels. The report reflected the discussions with the case handlers, concerning the non-confidential information that needed to be provided, in the following manner:

Additionally, this information must cover an “important” part of total sales in the domestic market (you said 50 per cent – I don’t know, I guess that is largely enough), the coverage must be September 1997 – October 1998, and we have to present invoices (with confidential status) supporting this non-confidential version.

4.524 The Panel asked Argentina whether this was an accurate reflection of what was said during that meeting and of the requests for information that were made. Further, the Panel asked Argentina whether the case-handlers at the 11 May meeting requested invoices from two exporters only (Casalgrande and Bismantova). The Panel asked the parties next whether the 50 per cent coverage mentioned in this paragraph related to the provision of non-confidential information, or to the documentation supporting the information provided. The Panel also asked the parties whether the 50 per cent related to all sales made in the home market, or only to the sales reported by the exporters.

4.525 To this question, Argentina provided the following reply.

4.526 The meeting held on 11 May 1999 was in fact an information meeting held at the request of the Italian exporting firms for the purpose of clarifying, for the legal representatives of the exporting firms, the points they considered to be of interest to them. Thus, the results and exact terms used in this meeting were not recorded in writing in the record of the proceedings.

4.527 Although it is impossible to be certain of the actual terms used, the terms reflected in the quoted statement correspond fairly closely to what would be in the interests of any anti-dumping proceeding. Thus, it is helpful in all anti-dumping proceedings to have supporting documentation corresponding to a high percentage of trade transactions in respect of the goods under investigation. In this case, it would be understood that what the investigating authority wanted was to have information corresponding to sales transactions in the Italian domestic market, and in view of the proposal submitted with respect to the Italian producing firms, this would mean documentation in respect of the four firms making up the sample.

4.528 As regards the question of whether the information was requested from Bismantova and Casalgrande only, the answer is that it was requested for the four firms making up the sample.

4.529 In other words, the sample having been accepted, the high percentage of supporting information to be provided concerned the exporters making up the sample.

4.530 In this connection, while Argentina recognized the possibility of requesting confidentiality for documentation that warrants such treatment, such requests could only be considered, and taken into account in conjunction with the overall treatment of the other elements in the proceedings, provided an adequate non-confidential summary was supplied.

4.531 Regarding the volume of the supporting documentation requested (required percentage), this applies to the totality of information concerning trade in the product under investigation, and domestic market sales of the four firms making up the sample, with full details of the transactions carried out during the period defined and where they are reflected. The non-confidential summary requested refers to the totality of sales of the product at issue during the period in question, with a reservation as to the publication of data which might be sensitive for the firms concerned.

4.532 The Panel recalled that, in replying to a question by the Panel following the first meeting, Argentina stated that the 1.92 per cent figure mentioned on page 29 of the DCD’s Final Determination, referred to the supporting documentation covering domestic market sales reported by

the four companies participating in the investigation. The Panel asked Argentina to explain how this figure was calculated. Specifically, the Panel wished to know whether the total home market sales (the denominator in this calculation):

included sales by all producers in Italy, independently of whether they exported to Argentina?

included sales by exporters not in the sample?

included sales of models not exported in significant quantities to Argentina?

included all of the sales made of any given model? (that is, they did not refer to a sample of sales)

4.533 Likewise, the Panel wished to know if the sales for which invoices were provided (the numerator in the calculation):

- related to all four companies?
- excluded sales to related parties and sales at prices below cost?

4.534 The Panel asked Argentina to provide it, if possible, with the figures that went into the calculation.

4.535 Argentina replied that, as already stated on several occasions, the DCD interrelated the information available in the questionnaires provided in the course of the proceedings, and concluded that the documentation supplied covered that percentage in relation to total sales on the Italian domestic market.

4.536 Unfortunately, this was a good example of the limitations facing the implementing authority as a result of the request for confidentiality of the information provided. In this case, the Argentine authority was limited in the reply it could give to the question, in that it could not reveal the numerical calculation made, but for the purposes of that calculation, it considered the information corresponding to the aggregate total amount of sales reported for the Italian domestic market by the four firms in relation to the total obtained from the documentation contributed by those firms during the proceedings.

3. Third Parties: Japan

- (a) Arguments of Japan in its written submission relating to the EC's claim under Article 6.8 of the AD Agreement

4.537 In its written submission, Japan made the following arguments relating to the EC's claim under Article 6.8 of the AD Agreement.

4.538 The EC claimed that the DCD disregard the normal value and export price information provided by the exporters inconsistently with Article 6.8 and Annex II. The relevant legal provisions are those in AD Agreement Article 6.8:

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

4.539 Article 6.8 must be read in context with the other provisions on evidence in Article 6 and the provisions of Annex II. When so read, it is clear that Article 6 as a whole establishes a strong preference for using actual information collected from interested parties in an antidumping investigation. Article 6.1, for instance, provides the right for interested parties to submit information and to obtain the information submitted by other interested parties. Article 6.7 provides for the investigations in the territory of other Members to verify the information submitted. Article 6.8 provides for recourse to "the facts available," but only in limited circumstances when an interested party has failed to cooperate. Annex II further develops conditions on the use of such "best information available." All of these provisions are premised on a preference for real information collected during the investigation and determined to be accurate. It follows that antidumping authorities can only rely on the allegations in an antidumping petition or other "facts available" when real information is simply not available. Where real information has been submitted within a reasonable period and found to be accurate during the course of an investigation, antidumping authorities must rely on it, and cannot give preferential treatment, or even equal treatment to unverified allegations by the petitioner.

4.540 The practical reasons for this hierarchy of factual sources in the AD Agreement are well illustrated by the DCD's final dumping determination in the ceramic tiles investigation. Rather than rely on real, verifiable information about actual prices paid for ceramic tile in the Italian market, DCD appears to have relied wholly or in part on published lists of prices to end-users supplied by the petitioner. According to the EC written submission, these prices to end-users bear little resemblance to the prices actually charged to distributors and wholesalers, who normally receive large discounts of up to 75 per cent of the list price. These end-user prices were compared not to end-user prices in the Argentine market but to prices for export sales to distributors and wholesalers in Argentina. Apparently there was no on-the-spot verification of these price list data.

4.541 Paragraph 7 of Annex II provides that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." As the panel noted in the recent dispute on *United States – Hot-Rolled Steel*, "any 'less favourable' result under paragraph 7 of Annex II may only be appropriate in the case of an interested party who does not cooperate" (Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, circulated on 28 February 2001, at para. 7.71). The facts as presented by the EC indicate that the four Italian respondent tile exporters did cooperate; if this is in fact the case, the use to any extent of "facts available" was inconsistent with Argentina's obligations under Article 6.8 of the AD Agreement.

4.542 Article 6, and the information collection exercise it provides for, must be interpreted in a manner that gives them meaning. If antidumping authorities were free to disregard the information collected, then this information collection exercise would be pointless. The provisions of Article 6.1 would be a nullity, and the limitations specified in Article 6.8 would be meaningless as well. Article 6, and Annex II, reflect the concept that the legal regime of antidumping is based on an investigative process in which respondents cooperate with the investigating authority to produce real data, relating to verifiable facts, so as to arrive at an antidumping margin that reflects as closely as possible the actual degree of dumping that may or may not have taken place. If investigating authorities can simply disregard with no explanation the data collected from respondents, respondents have no incentive to cooperate, and the purposes of this regime are frustrated.

4.543 The DCD final determination indicates that the deadline set for receipt of information from the four responding firms was 9 December 1998, and the information was received only on 10 December 1998. A similar situation occurred in the antidumping investigation examined in *United States – Hot-Rolled Steel*. In that case, certain information requested was supplied after the deadline set by the US Department of Commerce (DOC) but well before the time of verification; DOC then rejected this information and applied the “facts available” instead. The panel in that case noted that the AD Agreement:

establishes that facts available may be used if necessary information is not provided within a reasonable period. What is a ‘reasonable period’ will not, in all instances be commensurate with pre-established deadlines ... a rigid adherence to such deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period and consequently that facts available may be applied (Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, circulated on 28 February 2001, at para. 7.54).

4.544 Noting the provisions in paragraph 3 of Annex II, the panel went on to find:

Particularly where information is actually submitted in time to be verified, and actually could be verified, we consider that it should generally be accepted, unless to do so would impede the ability of the investigating authority to complete the investigation within the time limits established by the Agreement (Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, circulated on 28 February 2001, at para. 7.55).

4.545 The panel then determined that an unbiased and objective investigating authority could not have reached the conclusion that the company concerned had failed to provide necessary information within a reasonable period. On this basis, the panel concluded that DOC had acted inconsistently with Article 6.8 in applying facts available in making its dumping determination.

4.546 In the ceramic tiles investigation, the DCD final dumping determination states that DCD received responses from the four firms in the agreed sample of respondent exporters on 10 December 1998. While this was one day later than the deadline, the information was clearly submitted within a “reasonable period” in terms of Article 6.8. Since the purpose of timely submission is to enable the authorities to verify the information and complete their investigation in a timely manner, if DCD did not conduct any verification then Argentina cannot now claim that it had a right to disregard this information, to give equal status to unverified allegations by the petitioner or to give such allegations any status at all in its investigation. In consequence, it appears that Argentina’s treatment of information on normal values was inconsistent with Article 6.8 and Annex II of the AD Agreement.

4.547 The EC first written submission notes that paragraph 6 of Annex II of the AD Agreement provides that if evidence or information is not accepted, the party supplying it should be informed “forthwith” of the reasons for the refusal to accept, and should be given an opportunity to provide further explanations within a “reasonable period;” if the authorities consider these explanations as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination.

4.548 According to the EC, the DCD never informed the exporters at any time during the investigation that the information they had supplied on normal value and export prices had been disregarded. In this case, if DCD did not verify this information, in spite of the fact that the four firms had consented in advance to verification, the firms were reasonably entitled to assume that DCD was satisfied with the information and would rely entirely on it in its dumping calculations. The DCD final dumping determination provides no explanation of why DCD failed to rely entirely on the information submitted when it computed the normal values in this case. Moreover, *Resolución 1385/99* provides no explanation at all of the basis on which the normal values therein were derived, what factors were taken into account or what treatment was accorded to the information received from the four exporters in the agreed sample.

4.549 Article 6.8 of the AD Agreement specifically requires that the provisions of Annex II be observed. Respect for the provisions of Annex II is not only an obligation itself, since (under Article 18.7) Annex II is an integral part of the AD Agreement; it is also a limiting condition on recourse to Article 6.8. If the facts are as alleged by the EC, then DCD’s failure to inform the four exporters that their information would not be taken into account, its failure to accord them opportunities to supply more information, and its failure to publish any explanation why DCD did not wholly rely on the submitted information would therefore appear to constitute not only violations of Annex II, but additional reasons why this determination was in violation of Article 6.8.

(b) Arguments of Japan in its oral statement relating to the EC’s claim under Article 6.8 of the AD Agreement

4.550 In its oral statement, Japan made the following arguments relating to the EC’s claim under Article 6.8 of the AD Agreement.

4.551 The parties to this dispute disagree concerning whether the Italian respondents cooperated fully with Argentina’s investigation. It is for the Panel to determine the facts of this case and to apply the appropriate burden of proof. However, Japan has a few further legal points on Annex II and Article 6.8.

(i) *Information requested in the questionnaire*

4.552 Argentina claims that the questionnaire responses received by DCD were non-responsive because the Italian producers did not provide supporting documentation for their home market sales. However, if DCD requested that respondents submit complete documentation for each such sale reported, this request goes well beyond any reasonable demand on the respondent. Checking documentary proof for transactions is for the verification process, not for the questionnaire. Submissions are verified by reviewing a sample of invoices during an on-the-spot investigation.

4.553 Paragraph 3 of Annex II requires the investigating authority to take into account “all information which is verifiable.” As the panel in *Guatemala – Cement (II)* found, “‘best information available’ should not be used when information is ‘verifiable,’ and when ‘it can be used in the investigation without undue difficulties’” (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.252).

4.554 Respondents' alleged failure to provide supporting documentation in questionnaire responses does not mean the information they submitted was not verifiable, since the sales information could have been verified by conducting an on-the-spot investigation in Italy under Article 6.7. If Argentina chose not to conduct such an investigation, for reasons that did not relate to any action by the respondents unreasonably impeding the investigation, Argentina cannot now claim the information was not "verifiable." Moreover, under paragraph 5 of Annex II, if the EC provides a prima facie case that the Italian respondents did act to the best of their ability, then Argentina was not justified in rejecting the information that the respondents did supply, unless Argentina can rebut that prima facie case.

(ii) *Demands to waive claims of confidential status*

4.555 Argentina's first written submission discusses in paragraphs 20-21, 25-27 and 30-42 correspondence in which DCD appears to have demanded that Italian respondents waive claims of confidential status for certain sensitive information. Argentina appears to have taken the position that DCD could only make a final determination based on non-confidential information, and if DCD did not have the respondents' information in non-confidential form, then DCD was entitled to proceed on the basis of the "facts available."

4.556 This position is legally unfounded (and unusual). Antidumping authorities in many Members reach and announce final dumping determinations based strictly on information submitted in confidence. The provisions on public notice in Article 12.2 of the AD Agreement specifically defer to the "requirement for the protection of confidential information"(see Articles 12.2.1, 12.2.2, and 12.2.3). Article 6.5 of the AD Agreement recognizes that antidumping investigations necessarily concern issues and data deeply sensitive to interested parties from a business standpoint, and requires authorities to keep such information confidential. A recent Appellate Body report on *Thailand-H Beams* also made clear that the AD Agreement "permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it", inclusive of the confidential information (Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, at para. 111).

4.557 Article 6.5.1 requires the investigating authority to require interested parties submitting confidential information to furnish non-confidential summaries or to provide a statement of the reasons why summarization is not possible (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.213). However, it only requires that the non-confidential summary must "be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence" (for instance, if a respondent submits a series of prices, its non-confidential summary could present the numerical information in grouped form, or in terms of indices or ranges, or approximate figures). If an investigating authority demands that the respondent submit a summary disclosing the essence of what is confidential in the information submitted, the investigating authority is not requesting a non-confidential summary under Article 6.5.1, but is violating its duties under Article 6.5.

4.558 Article 6.5.1 also recognizes that some information is not susceptible of summary. For instance, customer lists may well not be susceptible of summary, whether submitted by a respondent in a dumping investigation, or by a petitioner in an injury investigation. In *Guatemala – Cement (II)*, at para. 8.211, the panel found that information of the following sort is "not generally capable of summarization 'in sufficient detail to permit a reasonable understanding of the substance': technical information on Cementos Progreso's principal equipment, a contract between Cementos Progreso and F.L. Smith & Co., and tables used to prepare questionnaires and reconcile the cost structure calculated for production of grey portland cement with the accounting statements.

4.559 Article 6.5.2 provides that if the authorities find that a request for confidentiality is not warranted, *and* if the supplier is unwilling either to make the information in question public or to authorize its disclosure in generalized or summary form, the authorities may disregard the information unless it is demonstrated that the information is correct. However, footnote 18 provides that Members may not act in an arbitrary manner with regard to requests for confidentiality, and Article 6.5.1 recognizes that some requests for confidentiality are genuinely warranted, in situations where information is “by nature confidential” under Article 6.5, and the information submitted to the authorities is genuinely not capable of summary. In such a case, an unbiased and objective investigating authority could not find that a request for confidentiality is not warranted, and it could not force a respondent to choose between disclosing company secrets to its competitors and being subjected to “best information available.” As the panel in *Guatemala – Cement (II)* found, “the Antidumping Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner” (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (WT/DS156/R), adopted 17 November 2000, at para. 8.251).

(iii) *Consequences following from Article 6.5.2*

4.560 Argentina also mischaracterizes the legal consequences when investigating authorities may disregard information under Article 6.5.2. The authorities may not disregard the information if it can be “demonstrated to their satisfaction from appropriate sources that the information is correct,” and they remain subject to Article 6.6 of the AD Agreement, which applies except in circumstances provided for under Article 6.8 (on Article 6.6, see Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (WT/DS156/R), adopted 17 November 2000, at para. 8.172).

4.561 Argentina appears to argue in paragraph 20 that failure to submit a non-confidential summary *ipso facto* impedes the antidumping investigation, creates circumstances provided for in Article 6.8, and thereby authorizes the investigating authority to make determinations on the basis of the “facts available”. This argument must be rejected.

4.562 Failure to submit a non-confidential summary does not impede an investigation by the antidumping authorities in the meaning of Article 6.8. The antidumping authorities are fully capable of drawing conclusions based on the confidential information if it can be demonstrated to their satisfaction from appropriate sources that it is correct. Therefore, even if lack of a non-confidential summary impedes access to information by other interested parties, this is still not a basis for finding that the investigation has been impeded in the sense of Article 6.8.

4.563 Thus, an investigating authority cannot automatically go to “facts available” even if an interested party failed to comply with Article 6.5.1 (though such is not the case with the Italian respondents in this investigation). That argument dangerously confuses two different concepts within Article 6, and compromises the rights of respondents under the AD Agreement. The panel must reject it.

4.564 It is for the Panel to probe the facts of this case, which appear so differently in the presentations of the two parties. However, the Panel might raise the following issues:

- Argentina argues in paragraph 22 that failure to supply information in US\$ constitutes a lack of cooperation. Historical US dollar and Italian lira exchange rates are a matter of public record. Why was Argentina unable to

perform this calculation on its own? Does a failure to provide data converted into US\$ justify use of entirely different data?

- In paragraph 50, Argentina seems to imply that because the sales in a sample were less than 2 per cent of total Italian domestic market sales, the sample was *ipso facto* unreliable for determining normal value. This argument is wrong. The AD Agreement recognizes that there may be some antidumping investigations with very large numbers of exporters and importers (such as cases involving horticultural products). Article 6.10 provides for use in such situations of “samples which are statistically valid on the basis of information available to the authorities at the time of the selection.” The legal requirement is that the sample must be statistically valid, not that it must meet or exceed some arbitrary minimum percentage of the universe sampled.

4. Third Parties: Turkey

- (a) Arguments of Turkey in its written submission relating to the EC's claim under Article 6.8 of the AD Agreement

4.565 In its written submission, Turkey made the following arguments relating to the EC's claim under Article 6.8 of the AD Agreement.

(i) *Facts available*

4.566 The EC submits that Argentina acted inconsistently with Article 6.8 and Annex II of the AD Agreement by disregarding the normal value and export price information provided by the Italian exporters and substituting information from other sources, including the petitioner. The EC, further contends that, Article 6.8 and Annex II of the AD Agreement, only allow the investigating authorities to resort to "facts available" in those cases where the exporters do not provide timely necessary information or significantly impede the investigation.

4.567 Turkey submits that the wording of Article 6.8 makes clear the circumstances under which an investigating authority may have resort to the "facts available" provisions of the AD Agreement. If an interested party "refuses access to" necessary information within a reasonable period, "otherwise does not provide" necessary information within a reasonable period, or "significantly impedes the investigation" the investigating authority may make determinations on the basis of the facts available.

4.568 Turkey considers that, taking into account the above mentioned conditions, the investigating authorities shall avoid the discretionary implementation of "facts available" and given the provisions of paragraph 5 of Annex II, shall refrain from disregarding the information of the parties, provided that it is timely and the interested party had acted to its best ability. Recourse to facts available should not be punitive, instead the authorities should implement it with due caution to supply the lacking information not made available to them by the interested parties.

4.569 Turkey further submits that, investigating authorities are not free to choose between information supplied by the parties without giving any reason and any opportunity to respondents to provide explanations. On the contrary, the authorities may use information other than that supplied by the interested parties, only if they "have to" and "with special circumspection" as required by the provisions of paragraph 7 of Annex II. Thus, this Article does not give the authority the right to choose between the primary and secondary source of information, contrariwise limits the usage of information from a secondary source.

4.570 Moreover, it is also worth noting that paragraph 3 of Annex II, provides that, "All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, (...) should be taken into account when determinations are made." Particularly, as stated clearly in this Article, where information is actually submitted in a timely fashion and is verifiable, Turkey considers that it should be accepted, unless doing so prevents the timely completion of the investigation.

(ii) *Failure to inform the interested parties that their information was rejected*

4.571 The EC submits that, the Argentinean authorities had acted inconsistently with paragraph 6 of Annex II of the AD Agreement by failing to explain the reasons of rejection of the information provided by the respondents.

4.572 Turkey submits that paragraph 6 of Annex II clearly sets forth the obligation of the investigating authority to inform the interested party of the reasons of rejection and grant them an opportunity to provide further explanations within a reasonable period.

4.573 In Turkey's view failure to do so, should be deemed to impair the right of defence of respondents and be inconsistent with the provisions of the paragraph 6 of Annex II.

(b) Arguments of Turkey in its oral statement relating to the EC's claim under Article 6.8 of the AD Agreement

4.574 In its oral statement, Turkey made the following arguments relating to the EC's claim under Article 6.8 of the AD Agreement.

(i) *Facts Available*

4.575 Considering the first issue, Turkey's submission, in general, covered Turkey's understanding of the requirements of Article 6.8 and Annex II.

4.576 In this respect, Turkey submits that, although conditions for recourse to facts available is mentioned in Article 6.8 in connection with Annex II, rising number of members are using this provision in many cases to create artificial dumping margins.

4.577 Turkey considers that, the wording of Article 6.8, puts forward the only cases where the investigating authorities may make use of the facts available.

4.578 Only where, the interested parties, "refuses access to" or "doesn't provide necessary information" "within a reasonable period" or "significantly impedes the investigation", authorities may recourse to "facts available" and preliminary and final determinations affirmative or negative may be made on such basis. This explicit wording in Article 6.8 and other paragraphs of both Article 6 and Annex II, leave no room for misinterpretations and they actually demonstrate that the preference should be given by the authorities to make use of "actual information" obtained in the course of the investigation and determined to be accurate.

4.579 In this respect, in accordance with paragraph 3 of Annex II, the investigating authorities, when making determinations are required to take into account all information which is verifiable and supplied in a timely fashion, appropriately submitted so that it can be used in the investigation without undue difficulties.

4.580 Likewise, paragraph 7 of Annex II, explicitly puts forward the conditions "have to" and "special circumspection" referring to the usage of information from a secondary source which, in other words, limits the freedom of substitution of the information supplied by the respondents.

4.581 Furthermore, paragraph 1 of Annex II, for use of "facts available" and in particular, information in the application, puts forward the condition if information is not supplied within a "reasonable time".

4.582 To sum up, generally speaking, authorities recourse to "facts available" in an investigation should not be of punitive feature. Thus, Turkey submits that, in any given case where information submitted is not lacking or misleading and timely submitted so that it can be verified, should be dealt with.

4.583 Nevertheless, considering the EC's submission, it appears to Turkey in this case that the investigating authorities' recourse to "facts available" is not justified, taking into account the above

mentioned reasons and EC's submission which states that the responses of the parties concerned were sufficient, verifiable and timely submitted.

(ii) *Failure to inform the interested parties that their information were rejected.*

4.584 Turkey views the provisions of paragraph 6 of Annex II as an important element for proper conduction of anti-dumping investigations. It is deemed essential for proper functioning of a healthy decision making process by the authorities and, on part of interested parties, for predictability and transparency of decisions taken. Considering the growing number of new investigations initiated, the vitality of the very function of this provision becomes even more important.

4.585 In this regard, Turkey submits that this paragraph clearly sets forth the obligation of the investigating authority to inform the interested party of the reasons of rejection and grant them an opportunity to provide further explanations within a reasonable period.

4.586 Turkey considers that, failure to inform the interested parties that their information were rejected may be deemed to be violation of right of defence of the respondent. As a matter of fact, this provision should be dealt together with Article 6.8, since in many cases recourse to facts available comes along with such practice.

4.587 From the respondent's point of view, having not received any notice of rejection, one may consider that, its own information was deemed sufficient for the purposes of investigation, thus may not necessarily be in need of supplying further explanatory information or supporting evidence to the authority. Eventually, the respondent might be informed about the rejection of its information at the final disclosure stage, at the earliest, which would significantly limit its right to defend.

4.588 Turkey concludes that, as alleged by the EC, if the exporters own information was not used and exporters were not timely informed of such practice and reasons thereby, this behavior may well be deemed inconsistent not only with paragraph 6 of Annex II but also with Article 6.8 of the Agreement.

5. Third Parties: The United States

- (a) Arguments of the United States in its written submission relating to the EC's claim under Article 6.8 of the AD Agreement

4.589 In its written submission, the US made the following arguments relating to the EC's claim under Article 6.8 of the AD Agreement.

4.590 The EC claims that, by disregarding the exporters' information without valid justification, Argentina acted inconsistently with Article 6.8 and Annex II of the AD Agreement, which only allows the use of "facts available" in those cases where an interested party does not provide timely information or significantly impedes the investigation. Argentina asserts that it fully complied with Article 6.8 of the AD Agreement because its application of "facts available" in this case was justified by the exporters' failure to provide necessary information in the time and form required.

4.591 Paragraph 6 of Annex II of the AD Agreement places an obligation on the investigating authority to inform an interested party in a timely manner when the investigating authority intends to reject the party's information and to provide the reasons therefor. Paragraph 6 of Annex II also states that the investigating authority should allow the party an opportunity to provide further explanations, due account being taken of the time limits of the investigation.

4.592 The United States is not familiar with the underlying facts of this case and, therefore, cannot comment on whether the letters to the exporters cited by Argentina in its first written submission satisfy Argentina's obligations under Annex II, paragraph 6. However, in the view of the United States, the purpose of the requirement that parties be informed if their information is not accepted is the same as the purpose behind Article 6.9, namely, to ensure that parties are able to defend their interests. Thus, any notice informing the parties of the reasons their information is not accepted must be sufficiently explicit to put the parties on notice that they must provide further explanation as contemplated by paragraph 6 of Annex II.

4.593 The United States did not address in its oral statement the EC's claim under Article 6.8 of the AD Agreement.

B. CLAIM UNDER ARTICLE 6.10 OF THE AD AGREEMENT

1. The EC

- (a) Arguments of the EC in its first written submission in support of its claim under Article 6.10 of the AD Agreement

4.594 In its first written submission, the EC made the following arguments relating to its claim under Article 6.10 of the AD Agreement.

4.595 The EC first presented the facts relevant to its claim under Article 6.10.

4.596 In spite of agreeing to the sampling proposed by Assopiastrelle, the DCD did not determine an individual margin of dumping for each of the four exporters included in the sample.

4.597 Instead, as explained earlier, the DCD calculated two dumping margins for each size category of *porcellanato* by using mainly data supplied by the petitioner and official import statistics. *Resolución* 1385/99 then imposed the same duty rate on all imports of *porcellanato* falling within each size category, irrespective of the exporter.

4.598 The EC then presented its legal arguments relating to this claim.

4.599 The EC recalled that Article 6.10 of the AD Agreement requires that:

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

4.600 Thus, in accordance with Article 6.10, the investigating authorities must, “as a rule”, determine an individual dumping margin for each known producer or exporter concerned. By way of exception to that rule, where the number of producers and exporters concerned is so large as to make such determination “impracticable”, the investigating authorities may limit their examination to some of them. In such case, nevertheless, the investigating authorities must determine an individual dumping margin for each of the producers or exporters included in the examination.

4.601 Where the investigating authorities have made a selection of producers/exporters in accordance with the second sentence of Article 6.10, they cannot pretend that the determination of individual margins for each of those producers/exporters would be “impracticable”. Indeed, the very purpose of the selection is to make “practicable” such determination. Therefore, in those circumstances, there can be no valid justification to depart from the general rule set out in the first sentence of Article 6.10 with respect to those exporters.

4.602 The above is confirmed by Article 6.10.2 of the AD Agreement, which provides that:

In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual dumping margin of dumping for any exporter or producer not initially selected who submits the necessary information in time to be considered during the course of the investigation, except

where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged (emphasis added by the EC).

4.603 This presupposes that the investigating authorities are required to determine individual margins for each of the producers/exporters “initially selected”. Otherwise, it would have been illogical to allow the “not initially selected” producers/exporters to request the determination of individual dumping margins in accordance with Article 6.10.2, and not to give the same opportunity to the “initially selected” producers/exporters.

4.604 Further confirmation is provided by Article 9.4, which stipulates that, where the investigating 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 not included in the examination shall not exceed:

- (a) the weighted average margin of dumping established with respect to the selected exporters or producers, or
- (b) where the liability for payment of anti-dumping duties is calculated on the basis of prospective normal values, the difference between the weighted average normal value of the selected exporters or producers and the exporters not individually examined.

4.605 The calculation of a weighted average dumping margin or of a weighted average [prospective] normal value presupposes necessarily that individual dumping margins or individual prospective normal values, respectively, have been determined first for each of the selected producers/exporters.

4.606 Article 9.4 further states that:

... the authorities shall disregard for the purposes of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6 (emphasis added by the EC).

4.607 Again, this presupposes that individual dumping margins have been determined previously for each selected producer/exporter.

4.608 The Argentinean authorities agreed to make a selection of exporters in accordance with Article 6.10. Therefore, they were required to determine an individual margin of dumping for each of the four selected exporters. By failing to do so, and by calculating instead a single dumping margin for all the Italian producers/exporters, the Argentinean authorities acted inconsistently with Article 6.10.

- (b) Arguments of the EC in its first oral statement in support of its claim under Article 6.10 of the AD Agreement

4.609 In its first oral statement, the EC made the following arguments in support of its claim under Article 6.10 of the AD Agreement.

4.610 The EC recalls that Article 6.10 provides that the investigating authorities must, “as a rule”, determine an individual dumping margin for each known producer or exporter concerned. By way of exception, where the number of exporters is so large as to make such determination “impracticable”, the investigating authorities may limit their examination to some exporters. In such case,

nevertheless, the investigating authorities must still determine an individual dumping margin for each of the exporters included in the examination.

4.611 In the present case, the DCD decided to limit the examination of dumping to four Italian exporters. Therefore, the DCD was required by Article 6.10 to determine an individual margin of dumping for each of the four selected exporters. Yet the DCD calculated a single dumping margin for all the Italian producers/exporters, including those in the sample. By doing so, the DCD acted inconsistently with Article 6.10.

4.612 In its first written submission, Argentina argues that the information supplied by the exporters included in the sample did not allow the DCD to calculate individual dumping margins for those exporters. This is simply not correct.

4.613 Argentina does not say why the DCD could not have calculated an individual dumping margin for Casalgrande.

4.614 In the case of Bismantova, Argentina alleges that part of its domestic sales were made to a related party (Rondine). But this is not a valid ground for resorting to “facts available”. At most, it could have been a reason for calculating Bismantova’s normal value on the basis of the constructed value or of the export prices to third countries (see Article 2.2 of the AD Agreement).

4.615 It is true that Caesar only made export sales to Argentina of 40 cm x 40 cm tiles. But the product under investigation was ceramic tiles and not each of the three size categories defined by the DCD. Accordingly, the DCD was required to establish the existence of dumping for the product under investigation as a whole, and not for each single size category (Appellate Body Report, *EC-Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, at para. 53). Thus, the DCD could, and indeed should have calculated an individual dumping of margin for Caesar in respect of the product under investigation as a whole based on Caesar’s export sales of 40 cm x 40 cm tiles.

4.616 Finally, it is not correct that Marazzi submitted no price information.

4.617 The point which Argentina tries to make at paragraphs 115-122 of its first written submission is difficult to grasp. Argentina appears to be arguing, once again, that the sample was not representative. However, this argument is clearly irrelevant in this context. Assuming that the sample were in fact not representative, that could not justify to resort to “facts available” for the exporters included in the sample.

4.618 Finally, Argentina contends that the violation of Article 6.10 would be a “harmless error” (*error inoquio*) since the EC has not demonstrated that it caused a prejudice to the exporters concerned. For the reasons set out by the panel in *Guatemala – Cement (II)*, the EC considers that this is not a valid defence under the WTO Agreement (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.22.). In accordance with Article 3.8 of the DSU, all violations of the WTO Agreement are presumed to cause nullification or impairment. It is for Argentina to rebut that presumption.

(c) Replies of the EC to the first set of questions by the Panel relating to the EC’s claim under Article 6.10 of the AD Agreement

4.619 The EC replied to the first set of questions made by the Panel relating to the EC’s claim under Article 6.10 of the AD Agreement as follows.

4.620 The Panel recalled that Argentina argued that the questionnaire responses submitted by the exporters were incomplete since in many cases the exporters failed to report home sales of certain size categories. The Panel asked Argentina to clarify which exporters failed to provide what kinds of home sales? The Panel further asked Argentina to explain whether the exporters concerned made home sales in every size category during the period of investigation. If they did not, the Panel asked whether Argentina contended that the calculation of dumping margins for the product under investigation required the calculation of dumping margins for every size category devised by the DCD.

4.621 To this question, the EC provided the following reply.

4.622 Many models sold in Italy were not exported to Argentina, or only so in small quantities. The exporters reported in their responses all the domestic sales of each of the models that were exported to Argentina in significant quantities.

4.623 In a few cases where a model exported to Argentina was not sold profitably in Italy or where the domestic sales represented less than 5 per cent of the export sales to Argentina, the exporters reported the export sales of that model to third countries, as required by the questionnaire. In addition, the exporters supplied the cost of production for each of the reported models.

4.624 All the models exported to Argentina by Caesar were of 40 cm x 40 cm. Caesar did not report the domestic sales of other models, since that information was not required in order to make a model-to-model comparison. The other exporters reported domestic sales for models of the three size categories.

4.625 The Panel asked the parties whether there was a legal link between Article 6.8 of the AD Agreement and Article 6.10 AD Agreement. Assuming that an investigating authority was justified in using facts available, the Panel further asked whether in the view of the parties Article 6.10 of the AD Agreement nevertheless required an investigating authority to always determine an individual margin of dumping for each exporter included in the sample.

4.626 The EC replied that it was obvious that if the dumping margins for all the exporters included in the sample were based entirely on “facts available”, and if those facts were the same for all the exporters concerned, the dumping margin would also be the same.

(d) Replies of the EC to the questions made by Argentina, following the first meeting of the Panel with the parties, that relate to the EC’s claim under Article 6.10 of the AD Agreement

4.627 Argentina made one question to the EC in connection to the EC’s claim under Article 6.10 of the AD Agreement. In particular, Argentina asked the EC to clarify its statement to the effect that the DCD “was required to establish the existence of dumping for the product under investigation as a whole and not for each single size category”, in spite of the fact that the EC recognized that Caesar had exported tiles corresponding to the 40x40 category.

4.628 The EC replied that the existence of dumping must be established for the product under investigation as a whole. The product under investigation in this case was ceramic tiles, and not each of the size categories. Caesar’s dumping margin for the product under investigation could have been calculated by comparing the export price for its exports of models of 40 cm x 40 cm to the domestic prices for the same models.

(e) Arguments of the EC in its second written submission in support of its claim under Article 6.10 of the AD Agreement

4.629 In its second written submission, the EC made the following arguments in support of its claim under Article 6.10 of the AD Agreement.

4.630 In its first written submission, Argentina argues that the information supplied by the selected exporters did not allow the DCD to calculate individual dumping margins for those exporters. This argument is totally unfounded.

4.631 Argentina does not explain why it was not possible to calculate an individual dumping margin for Casalgrande.

4.632 As regards Bismantova, Argentina alleges that part of its domestic sales were made to a related party (Rondine). But this is not a valid ground for resorting to “facts available”. At most, it could have been a reason for calculating Bismantova’s normal value on the basis of the constructed value or of the export prices to third countries using the information provided by that exporter (see Article 2.2. of the AD Agreement).

4.633 All the models exported to Argentina by Caesar were of 40 cm x 40 cm. For that reason, Caesar did not report domestic sales of models of 20 cm x 20 cm or of 30 cm x cm. But this did not prevent the DCD from calculating an individual dumping margin for Caesar. The product under investigation were ceramic tiles and not each of the three size categories defined by the DCD. Accordingly, the DCD was required to establish the existence of dumping for the product under investigation as whole, and not for each single size category (Appellate Body Report, *EC – Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, at para. 53). Thus, the DCD could, and indeed was required to calculate an individual dumping of margin for Caesar in respect of the product under investigation as a whole based on Caesar’s export sales of 40 cm x 40 cm tiles.

4.634 Finally, it is not correct that Marazzi submitted no price information.

4.635 Argentina further contends that the violation of Article 6.10 would, in any event, be a “harmless error” (“*error inocuo*”) since the EC has not demonstrated that it caused a prejudice to the exporters concerned. For the reasons set out by the panel in *Guatemala – Cement (II)*, the EC considers that this is not valid defence under the WTO Agreement (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (WT/DS156/R), adopted 24 October 2000, at para. 8.22). In accordance with Article 3.8 of the DSU, all violations of the WTO Agreement are presumed to cause nullification or impairment. It is for Argentina to rebut that presumption.

4.636 In its second oral statement, the EC did not address its claim under Article 6.10 of the AD Agreement.

4.637 The Panel did not ask the EC any questions following the second meeting relating to the EC’s claim under Article 6.10 of the AD Agreement.

2. Argentina

- (a) Arguments of Argentina in its first written submission relating to the EC's claim under Article 6.10 of the AD Agreement

4.638 In its first written submission, Argentina made the following arguments relating to the EC's claim under Article 6.10 of the AD Agreement.

4.639 Argentina first presented a number of facts relevant for its arguments.

4.640 The EC argument concerning the failure to calculate an individual dumping margin for each producer is based on the erroneous hypothesis that the authority was in a position to make such a calculation using the elements at its disposal. To a certain extent the EC would seem, on the one hand, to be demanding what its own producers requested, i.e. that the authority work on the basis of the sample provided, while on the other hand blaming Argentina when the information contained in the sample was insufficient and it was impossible to determine an individual margin of dumping for each exporter.

4.641 In discussing Article 6.8, Argentina explained at length that Assopiastrelle itself had asked that the sample should be considered as representative of the Italian ceramics industry. In the same chapter, it pointed out the shortcomings of the sample as a valid tool to calculate normal value. The sample also suffered from shortcomings as a basis for calculating the margin of dumping for each firm.

4.642 The most notorious shortcomings which made it impossible to calculate an individual margin of dumping for each firm are as follows:

- (a) 30 x 30 ceramic tiles:

Two companies in the sample (Caesar and Marazzi) failed to provide any information on average prices for this category.

In the case of Bismantova, it was found that 56 per cent of sales on the domestic market were to its controlling company, Rondine.

- (b) 20 x 20 ceramic tiles:

The same two companies failed to provide any information for this category.

- (c) 40 x 40 ceramic tiles:

The company Marazzi failed to provide any information for this category either.

In the case of Bismantova, it was found that 91 per cent of sales on the domestic market were to its controlling company, Rondine.

4.643 This lack of information in itself makes it impossible to calculate the individual margin of dumping for the company Marazzi in any of the three categories and for Caesar in categories 30 x 30 and 20 x 20. In the case of Bismantova, the high percentage of sales in abnormal trading conditions made it impossible to calculate the margin of dumping for the categories 30 x 30 and 40 x 40.

4.644 In other words, the sample, as such, could not serve to determine the margins of dumping for each company either.

4.645 Argentina presented next a number of legal arguments concerning the EC's claim under Article 6.10 of the AD Agreement.

4.646 Firstly, due account should be taken, as stressed throughout the investigation, of the large number of exporters involved. Indeed, Assopiastrelle listed 205 producers, of which 78 were apparently exporters of the product investigated.

4.647 This justifies, under Article 6.10 of the Agreement, the decision to make a determination on the basis of the sample procedure. Moreover, the sample used was put forward by Assopiastrelle, acting as representative of the Italian manufacturing firms, in view of the large number of manufacturing enterprises involved. In this connection, the presentation by Assopiastrelle of the "methodology for the selection of samples" states, *inter alia*, that "On behalf of the Italian manufacturers of *porcellanato*, Assopiastrelle suggested limiting the supply of information on dumping and injury to a sample considered representative of all of the companies". It goes on to state that "The purpose of Assopiastrelle's proposal was to ensure greater cooperation by the Italian industry concerned and at the same time to simplify the task of the authorities investigating the Italian producers".

4.648 This statement by the Association clearly shows that for the purposes of calculating the margin of dumping, the sample is claimed to be a valid methodology.

4.649 In reply to the proposal submitted by Assopiastrelle, the DCD, by Note No. 273-000471/98, wrote to the Economic and Trade Advisor of the Italian Embassy in Argentina as follows:

However, according to the information received, we are faced with an investigation involving a large number of Italian exporters, and would therefore like to limit the procedure to the few Italian companies representing most of Italian exports to Argentina.

4.650 In this connection it was pointed out that:

... the implementing authority, pursuant to Article 6.10 ... may resort to statistically representative samples for the purposes of determining the margin of dumping in the investigation. Similarly, in order to apply this procedure, the consent of the exporters concerned is needed as long as the conclusions reached would have to be extended to the other firms that were not included in the selection.

While the investigation should extend to all firms which have exported to Argentina from the investigated origin during the period concerned, for purely methodological purposes, the analysis should be confined to a representative number of exporters of the goods involved.

4.651 The note concluded by stating that "having received the express consent of the firms, we shall proceed as stated, subject to the relevant legislation in force".

4.652 Thus, there is on the one hand a recognition by the EC of the validity of a selection or sample as a basis for determining the margin of dumping. It cannot be inferred from the acceptance of the sample that if the sample did not serve the proposed purpose, the authority had no alternative. In other words, either the authority calculates a margin of dumping for all of the companies exporting to Argentina beyond the sample, which would clearly be unreasonable since the very purpose of the sample was to avoid such a situation, or it uses another alternative to make up for the shortcoming.

4.653 The sample did not, as such, serve the purpose, and the authority therefore warned of the possibility of "using samples which are statistically valid on the basis of information available to the authorities at the time of the selection" (Article 6.10). This became necessary in order to complete the missing information. The exporting firms were certainly not left defenceless and could have protested

against the note or asked the authority to reconsider its approach; or they could have provided the missing information, thereby enabling the authority to determine a margin of dumping for each firm on the basis of the sample. The exporters did none of this, and legally consented to the approach the authority said it would use in calculating the margin of dumping. It is difficult to see how the situation that the exporters themselves contributed to creating can now be invoked against the DCD, proposing a sample that could not be used for the purpose put forward.

4.654 In any case, even if despite the above considerations Argentina is deemed to have deviated from the requirements of Article 6.10 of the AD Agreement, *quod non*, this would be a case of harmless error, since Argentina could not apply Article 6.10 of the AD Agreement with the supporting information provided by the sample. The error would have been harmless, since the EC did not demonstrate how this situation injured the companies by producing a higher margin of dumping for its exports. In fact, the EC did not even claim that this was the case, but confined itself to arguing that Article 6.10 of the AD Agreement had been violated, thereby tacitly acknowledging that it did not happen.

(b) Arguments of Argentina in its first oral statement relating to the EC's claim under Article 6.10 of the AD Agreement

4.655 In its first oral statement, the EC made the following arguments relating to the EC's claim under Article 6.10 of the AD Agreement.

4.656 Pursuant to Article 6.10, in particular paragraph 1 thereof, the DCD selected the enterprises that would be the subject of the investigation. To that end, it accepted Assopiastrelle's proposal, as explained in paragraphs 115 and 116 of Argentina's first written submission.

4.657 At the same time, when the implementing authority, upon opening the investigation, chose as a "homogenization" criterion the segmentation of the tiles on the basis of their size, it distributed the questionnaires prepared accordingly. The firms involved replied to these questionnaires without raising any objections, showing that they accepted the validity of segmentation by size. Nevertheless, a vast majority of the sample documentation provided by the exporting firms did not correspond to the segmentation used by the implementing authority.

4.658 Thus, when the implementing authority had to decide on the elements necessary for the determination of dumping, it found, as explained below, that it did not have the required documentation from the selected companies corresponding to the segmentation of the tiles on the basis of their size.

(i) *Characteristics of the sample*

4.659 The fact that the sample companies represented a majority of exports to the Argentine market does not in itself imply that the supporting documentation was representative for each one of the segments selected (20 cm x 20 cm, 30 cm x 30 cm and 40 cm x 40 cm) for the purposes of determining their normal value and export price.

4.660 How could an individual margin of dumping be calculated when the domestic market sales invoices represented only some 1.35 per cent of the value and 1.92 per cent of the physical volume (m²), as stated earlier on?

4.661 How, also, could the DCD have calculated the margin of dumping for 30 cm x 30 cm tiles from Caesar and Marazzi when these companies failed to submit any information on average prices in the Italian domestic market for that category?

4.662 At the same time, as stated in paragraph 112 of Argentina's first written submission, in the case of Bismantova, 56 per cent of sales on the domestic market were to its controlling company, Rondine; so that without the remaining 44 per cent of the invoices, the calculation would have been somewhat dubious.

4.663 The same doubts arise in the case of Caesar and Marazzi for size 20 cm x 20 cm tiles, for which the firms also failed to provide any information.

4.664 Similarly, Marazzi failed to provide any information concerning the 40 cm x 40 cm. category, while 91 per cent of Bismantova's domestic market sales in that category were made to its controlling company, Rondine. How, then, could the EC have expected the DCD to establish an individual margin of dumping in these cases?

4.665 All this shows that although the DCD had hoped, through the sample methodology, to be able to determine a margin of dumping for each exporter, this proved impossible because the information from the exporters that was available to the DCD when it issued its final determination did not enable it to do so.

4.666 In short, Argentina considers that the EC proceeds from an erroneous hypothesis when it states that the authority was in a position to make the said calculation on the basis of the elements at its disposal, since the only elements that were in fact available were those which the companies had asked to be considered as a sample, and they turned out to be totally insufficient.

4.667 Argentina submits therefore that it did not deviate from the requirements set forth in Article 6.10 of the AD Agreement.

(c) Arguments of Argentina in its oral statement at the third-party session of the first meeting of the Panel with the parties, relating to the EC's claim under Article 6.10 of the AD Agreement

4.668 In its oral statement at the third-party session of the first meeting of the Panel with the parties, and in connection to the EC's claim under Article 6.10 of the AD Agreement, Argentina recalled Japan's statement that the DCD was required to determine individual dumping margins for each of the four selected exporters, since it had accepted the selection of exporters. Argentina argued that this statement failed to recognize the fact that the information in question was insufficient for such a calculation.

(d) Replies of Argentina to the first set of questions by the Panel relating to the EC's claim under Article 6.10 of the AD Agreement

4.669 Argentina replied to the first set of questions by the Panel relating to the EC's claim under Article 6.10 of the AD Agreement as follows:

4.670 The Panel recalled that Argentina argued that the questionnaire responses submitted by the exporters were incomplete since in many cases the exporters failed to report home sales of certain size categories. The Panel asked Argentina to clarify which exporters failed to provide what kinds of home sales? The Panel further asked Argentina to explain whether the exporters concerned made home sales in every size category during the period of investigation. If they did not, the Panel asked whether Argentina contended that the calculation of dumping margins for the product under investigation required the calculation of dumping margins for every size category devised by the DCD.

4.671 Argentina argued that the questionnaire responses were incomplete since they did not contain sufficient information, as stated in the report on the final determination of the margin of dumping.

One thing that was missing was sufficiently detailed supporting documentation on domestic market sales.

4.672 To this question, Argentina provided the following reply.

4.673 To help the Panel understand what domestic market sales information according to size was presented by each exporter, Argentina refers the Panel to the Annex to the Final Determination Report.

4.674 At the same time, Argentina reiterates what was explained in paragraphs 112 and 113 of Argentina's first written submission:

(a) 30 x 30 ceramic tiles:

Two companies in the sample (Caesar and Marazzi) failed to provide any information on average prices for this category.

In the case of Bismantova, it was found that 56 per cent of sales on the domestic market were to its controlling company, Rondine.

(b) 20 x 20 ceramic tiles:

The same two companies failed to provide any information for this category.

(c) 40 x 40 ceramic tiles:

The company Marazzi failed to provide any information for this category.

In the case of Bismantova, it was found that 91 per cent of sales reported for the domestic market were to its controlling company, Rondine.

4.675 This lack of information in itself makes it impossible to calculate the individual margin of dumping for the company Marazzi in any of the three categories and for Caesar in categories 30 x 30 and 20 x 20. In the case of Bismantova, the high percentage of sales in abnormal trading conditions made it impossible to calculate the margin of dumping for the categories 30 x 30 and 40 x 40.

4.676 The implementing authority decided to analyse the product in accordance with the adopted segmentation, 20 x 20, 30 x 30 and 40 x 40, taking account of the elements it had at its disposal. There was no objection to this. The implementing authority expected the selected sample companies to be representative, in terms of their exports, under Article 6.10 of the AD Agreement, and that they would also provide information that would enable it to make a determination of dumping on the basis of the above categories. It is impossible to establish, from the information they supplied, whether or not they in fact sold all the sizes in question on the domestic market. But based on the information in the record of the case, the implementing authority understood that the criterion which would enable it to make a proper determination of dumping was the segmentation of the product under investigation by size.

4.677 Consequently, the DCD had to calculate the margin of dumping of the product under investigation for each one of the size categories analysed.

- (e) Arguments of Argentina in its second written submission relating to the EC's claim under Article 6.10 of the AD Agreement

4.678 In its second written submission, Argentina made the following arguments relating to the EC's claim under Article 6.10 of the AD Agreement.

4.679 The EC's claim concerning the failure to calculate individual margins of dumping for the exporting firms is based on an erroneous analysis of the elements making up the record which inevitably leads to a mistaken conclusion concerning compliance with Article 6.10.

4.680 Firstly, the EC claims that Article 6.10 has been violated, but analysing the content of the obligation that it claims was violated ("... determine an individual margin of dumping for each known exporter or producer concerned ..."), it disregards other provisions of the AD Agreement which necessarily condition the interpretation of that provision.

4.681 In other words, the EC speaks of a violation of Article 6.10 that did not occur – since the calculation of the margin of dumping could not take place on the basis of the characteristics of the sample – while at the same time disregarding the determination of the margin of dumping for the product that ultimately served as a basis for adopting the measure, which, for its part, did comply with Article 2 of the AD Agreement. Furthermore, the product was adjusted in order to arrive at a "fair" comparison in conformity with Article 2.4.

4.682 Regarding the first element, i.e. the calculation of the margin of dumping for the product, which is highly relevant to the analysis of the Article 6.10 obligation, in Argentina's view the individual margin of dumping cannot be analysed for each firm outside the context of the calculation of the margin of dumping for the product under investigation. This calculation of the margin of dumping for the product is related to the definition of dumping in Article 2.1 which matches the definition of the product given by the Appellate Body (Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, at para. 51).

4.683 This finding of dumping must be made with respect to the product under investigation, i.e. the "product" that is introduced into the commerce of another country at less than its normal value on the market of the exporting country.

4.684 In broaching the subject of Article 6.10, the EC disregards Argentina's argument that the sample proposed by Assopiastrelle being a valid methodology for calculating the margin of dumping, it could not be claimed that when the documentation provided by the sample exporting companies turned out to be insufficient, the Authority was left without any alternative for determining a margin of dumping according to the duly adopted segmentation.

4.685 In this case, the product under investigation was ceramic tiles from Italy, "in all sizes", which includes, specifically, sizes 20 x 20, 30 x 30 and 40 x 40. This type of *porcellanato* makes up 99.29 per cent of imports from the investigated origin comparable to the like domestic product.

4.686 Since the Authority had thus defined the like product, the EC's assertion in paragraph 66 of its oral statement that "the product under investigation was ceramic tiles and not each of the size categories defined by the DCD" is erroneous. It is on the basis of its own definition that the DCD calculated the margin of dumping for each one of the three categories of the product based on the adopted segmentation.

4.687 Having made a calculation of the margin of dumping which was in keeping with its definition of the like product, the authority would have been in a position to proceed with the calculation of the

margin for each exporter – Article 6.10 – if it had had the necessary information from the sample that the exporters themselves proposed.

4.688 The sample provided by Assopiastrelle was claimed to be a valid methodology for calculating the margin of dumping. However, as already mentioned on many other occasions, the sample presented a number of shortcomings that made it impossible to calculate an individual margin of dumping for each firm, among which the most significant were the following:

- (a) 30 x 30 ceramic tiles: Two companies in the sample (Caesar and Marazzi) failed to provide any information on average prices for this category. In the case of Bismantova, it was found that 56 per cent of sales on the domestic market were to its controlling company, Rondine.
- (b) 20 x 20 ceramic tiles: The same two companies failed to provide any information for this category.
- (c) 40 x 40 ceramic tiles: The company Marazzi failed to provide any information for this category either. In the case of Bismantova, it was found that 91 per cent of sales on the domestic market were to its controlling company, Rondine.

4.689 This lack of information in itself made it impossible to calculate the individual margin of dumping for the company Marazzi in any of the three categories and for Caesar in categories 30 x 30 and 20 x 20. In the case of Bismantova, the high percentage of sales in abnormal trading conditions made it impossible to calculate the margin of dumping for the categories 30 x 30 and 40 x 40.

4.690 Thus, Argentina does not think that the DCD can be blamed for not having calculated the individual margins of dumping for each exporting firm, since the firms in question did not provide the information needed for that purpose.

4.691 Similarly, Argentina would like to point out that in response to the questionnaires of 30 October 1998, the Argentine representative of Assopiastrelle sent a note dated 12 May 1999 to its principal in which it states that “regarding non-confidential invoices, I suggest to select the same invoices of each segment (20 x 20, 30 x 30, etc.) with prices closer to the weight average of the segment ... “. This note shows once again that the exporters were aware of, and indeed agreed with, the segmentation in question.

- (f) Arguments of Argentina in its second oral statement relating to the EC’s claim under Article 6.10 of the AD Agreement

4.692 In its second oral statement, Argentina made the following arguments relating to the EC’s claim under Article 6.10 of the AD Agreement.

4.693 As explained in paragraph 112 of Argentina’s first written submission, the information on domestic market sales by size submitted by each exporter was as follows:

- (a) 30 x 30 ceramic tiles: two companies in the sample (Caesar and Marazzi) failed to provide any information on average prices. In the case of Bismantova, it was found that 56 per cent of sales on the domestic market were to its controlling company, Rondine.
- (b) 20 x 20 ceramic tiles: the same two companies failed to provide any information.

- (c) 40 x 40 ceramic tiles: the company Marazzi failed to provide any information for this category either, while in the case of Bismantova, it was found that 91 per cent of sales on the domestic market were to its controlling company, Rondine.

4.694 As stated in paragraph 113 of Argentina's first written submission, this lack of information in itself made it impossible to calculate the individual margin of dumping for the company Marazzi in any of the three categories and for Caesar in categories 30 x 30 and 20 x 20. In the case of Bismantova, the high percentage of sales in abnormal trading conditions made it impossible to calculate the margin of dumping for the categories 30 x 30 and 40 x 40.

4.695 With respect to paragraph 72 of the EC's second written submission and paragraph 66 of its second oral statement, Argentina reiterates that the product under investigation was ceramic tiles from Italy, "in all sizes" which includes, specifically, sizes 20 x 20, 30 x 30 and 40 x 40. As already mentioned, this type of *porcellanato* makes up 99.29 per cent of imports from the investigated origin comparable to the like domestic product.

4.696 Argentina therefore repeats that since the authority had thus defined the like product, the EC's assertion that "the product investigation was ceramic tiles and not each of the size categories defined by the DCD" is erroneous. It is on the basis of its own definition that the DCD calculated the margin of dumping for each one of the three categories of the product based on the adopted segmentation.

4.697 In its reply a question by the Panel following the first meeting, the EC agrees with Argentina's statement that if the implementing authority has to resort to the facts available, the margin of dumping determined will depend on those facts.

4.698 The Panel did not ask Argentina any questions following the second meeting relating to the EC's claim under Article 6.10 of the AD Agreement.

3. Third Parties: Japan

- (a) Arguments of Japan in its written submission relating to the EC's claim under Article 6.10 of the AD Agreement

4.699 In its written submission, Japan made the following arguments relating to the EC's claim under Article 6.10 of the AD Agreement.

4.700 The EC submission claims that the Argentine authorities violated Article 6.10 of the AD Agreement by first agreeing to make a selection of exporters and then not determining individual margins of dumping for those four companies which had been selected. Article 6.10 reads as follows:

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

In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

4.701 This provision consists of two sentences. The first sentence requires, as a rule, that the national authorities of a WTO Member calculate individual dumping margins for all producers and exporters of merchandise who are subject to an anti-dumping investigation. The second sentence provides that when there are so many exporters, producers, importers or types of product that calculation of individual margins for each known exporter or producer is impracticable, the national authorities can limit their examination to those firms that account for the largest volume of exports, or alternatively employ statistically valid sampling techniques.

4.702 If national authorities rely on the second sentence of Article 6.10, they are still required to calculate an individual dumping margin for those firms which had been selected for examination. The rate applied to the firms that were not selected for examination must conform to the requirements of Article 9.4 of the AD Agreement.

4.703 The Argentine authorities in the present case did not calculate individual margins of dumping for each of the four selected exporters. Instead, they calculated two dumping margins for each of three tile sizes, which applied to all exporters without exception. Japan agrees that if the EC's factual allegations are correct, this action by the Argentine authorities appears to be inconsistent with Article 6.10 of the AD Agreement, for the following reasons.

4.704 First, nothing in the second sentence of Article 6.10 requires that the general *rule* set out in the first sentence of that provision should be disregarded. The Argentine authorities should therefore have calculated individual margins of dumping for the limited number of companies under investigation.

4.705 Second, Argentina's interpretation would nullify the possibility explicitly created in Article 6.10.2 of the AD Agreement for those exporters that were not initially selected. This provision requires that the national authorities "shall [...] determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time" (emphasis added by Japan). Like those initially selected, exporters submitting information at a later stage have the advantage – as a result of Article 6.10.2 – of also having their individual dumping margins determined. If, as Argentina assumes, national authorities would be allowed to calculate

dumping margins for different sizes of a product without considering the situation of those initially or subsequently selected, the content of Article 6.10.2 would be in direct contradiction with this option.

4.706 Japan agrees with the EC that DCD, by agreeing to limit its examination to a selection of exporters, was required to determine individual dumping margins for each of the four selected exporters. By failing to do so, Argentina violated Article 6.10 of the AD Agreement.

4.707 In addition, the DCD calculated the dumping margin of the exporters which were not selected for the investigation based on the “facts available.” As was found by the recent Panel on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Japan believes that the rate applied to the firms not selected for examination (“all others rate”) must conform to the requirements of Article 9.4, including the requirement that such a rate not be derived from any calculation in which any element was established on the basis of “facts available.”

4.708 Japan did not address in its oral statement the EC’s claim under Article 6.10 of the AD Agreement.

4. Third Parties: Turkey

4.709 Turkey did not address the EC's claim under Article 6.10 of the AD Agreement either in its written submission nor in its oral statement.

5. Third Parties: The United States

4.710 The United States did not address the EC's claim under Article 6.10 of the AD Agreement either in its written submission nor in its oral statement.

C. CLAIM UNDER ARTICLE 2.4 OF THE AD AGREEMENT

1. The EC

- (a) Arguments of the EC in its first written submission in support of its claim under Article 2.4 of the AD Agreement

4.711 In its first written submission, the EC made the following arguments in support of its claim under Article 2.4 of the AD Agreement.

4.712 The EC submits that the DCD did not make “due allowance” for all the differences in physical characteristics between the models of *porcellanato* exported to Argentina and those sold in Italy, thereby violating Article 2.4 of the AD Agreement.

4.713 The EC presented first the facts relevant for its arguments concerning its claim under Article 2.4.

4.714 *Porcellanato* is a very heterogeneous product. Each of the exporters included in the sample produces many different models, the prices of which may vary considerably. Since the mix of models exported to Argentina is not the same as that sold domestically, the exporters requested to the DCD that the export price for each model be compared, where possible, to the normal value for the same model.

4.715 The DCD rejected that request. Instead, the DCD grouped all the models in three broad categories according to their size (20 x 20 cm, 30 x 30 cm and 40 x 40 cm) and calculated a normal value and an export price for each of those categories. The DCD made only one adjustment to the normal value in order to reflect the differences between polished and unpolished *porcellanato*. No further adjustments were made to take into account the other differences in physical characteristics. Thus, the DCD erroneously disregarded that the prices of *porcellanato* may vary considerably according to factors other than the size, or whether it is polished or unpolished.

4.716 For example, the price list of Casalgrande relied upon by the DCD shows that the list price of unpolished *porcellanato* of 30 cm x 30 cm may range from 25,000 Lit/m² to more than 50,000 Lit/m², i.e. more than a 100 per cent price difference (by way of comparison, the dumping margins determined by the DCD for this size category were 43.14 per cent and 27.43 per cent).

4.717 The DCD’s failure to make due allowance for all the differences in physical characteristics is all the more unjustifiable in view of the fact that, in its Final Dumping Determination, the DCD itself acknowledged that there were significant price differentials between models of unpolished *porcellanato* of the same size:

Del análisis de la información de ventas en el mercado interno italiano (listado de precios) se ha observado una gran disparidad de precios del producto de iguales medidas y precios de venta inferiores en las medidas de mayor tamaño. Así, se pudo observar casos en que el ‘porcellanato’ sin pulir de 40 cm x 40 cm presenta precios de venta inferiores a los precios de venta del ‘porcellanato’ de 20 cm x 20 cm, o al de 30 cm x 30 cm; como también precios de venta de la medida 30 cm x 30 cm inferiores a los de la medida 20 cm x 20 cm (Final Dumping Determination, Section V.1.3, at p. 28).

4.718 The EC presented next its legal arguments concerning its claim under Article 2.4.

4.719 The EC recalls that Article 2.4 of the Anti-dumping Agreement provides in pertinent part that:

A fair comparison shall be made between the export price and the normal value [...]. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in [...] physical characteristics [...].

4.720 The DCD acknowledged in the Final Dumping Determination that, in addition to the differences in size and the differences between polished and unpolished *porcellanato*, other differences in physical characteristics could have also a significant impact on the price and, consequently, “affect price comparability” in the sense of Article 2.4. Therefore, the DCD was under the obligation to make “due allowance” for such differences.

4.721 In spite of that, the DCD rejected, without advancing any justification, the exporters’ request to make the comparison between normal value and export price on a model-to-model basis. Instead, the DCD lumped together very different models with very different prices, thereby grossly distorting the comparison.

4.722 Admittedly, the terms “due allowance” leave some discretion to the investigating authorities. Thus, arguably, the DCD could have chosen to make “due allowance” for the differences at issue by using a different method from that suggested by the exporters. For example, by making adjustments *a posteriori* to the normal value or to the export price. Nevertheless, the DCD also failed to apply any such alternative method. As explained above, the DCD limited itself to make an adjustment for the differences between polished and unpolished *porcellanato*.

4.723 Moreover, had the DCD considered that a different method would be more appropriate to make “due allowance” for the differences in physical characteristics than the model-to-model comparison proposed by the exporters, it should have informed the exporters thereof and indicated to them what evidence was required in accordance with the last sentence Article 2.4, which provides that:

[t]he authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

4.724 In conclusion, by failing to make “due allowance” for all the differences in physical characteristics affecting price comparability, the DCD violated Article 2.4, third sentence. Furthermore, as a result, the DCD also failed to make a “fair comparison” between normal value and export price, contrary to the first sentence of Article 2.4.

(b) Arguments in the EC’s first oral statement in support of its claim under Article 2.4 of the AD Agreement

4.725 In its first oral statement, the EC made the following arguments concerning its claim under Article 2.4 of the AD Agreement.

4.726 *Porcellanato* is a very heterogeneous product. Each of the exporters concerned produces many different models, the prices of which can vary considerably according to factors such as the size, the shape, the thickness, whether they are polished (“polito”) or unpolished, the colour of the surface, the pigmentation of the clay, the quality or choice (“scelta”), the resistance, the water absorption, etc.

4.727 Since the mix of models exported to Argentina was not the same as that sold domestically, the exporters requested to the DCD that the export price for each model be compared, where possible, to the normal value for the same model.

4.728 The DCD did not follow that method. Instead, the DCD grouped all the models in three broad categories according to their size (20 cm x 20 cm, 30 cm x 30 cm and 40 cm x 40 cm) and calculated a normal value and an export price for each of those categories.

4.729 As a result, the DCD failed to make “due allowance” for all the differences in physical characteristics affecting price comparability, thereby violating Article 2.4 of the AD Agreement.

4.730 Argentina admits, and indeed even stresses, the existence of numerous differences in physical characteristics, in addition to those relating to the size of the tiles. Nevertheless, it argues that to take them into account would have complicated “enormously” the task of the investigating authorities.

4.731 This defence is clearly without merit. Article 2.4 does not allow investigating authorities to disregard differences in physical characteristics that affect price comparability simply because it would be too complicated to take them into account. Moreover, the difficulties invoked by Argentina could have been easily avoided if the DCD had made a model-to-model comparison.

4.732 Argentina further contends that the DCD’s decision to make “due allowance” only for the differences in size is reasonable and within the limits of the “deference” accorded to the investigating authorities by Article 17.6, because size is the most “universal” characteristic of tiles.

4.733 The EC disagrees. As noted in our written submission, Article 2.4 leaves some discretion to the investigating authorities with respect to the choice of the precise method for making “due allowance” for differences in physical characteristics affecting price comparability.

4.734 In contrast, Article 2.4 leaves no discretion to the investigating authorities for choosing whether or not to make “due allowance”. The only “permissible” interpretation of Article 2.4 is that it requires to make “due allowance” for all the differences in physical characteristics that affect price comparability. The investigating authorities cannot limit themselves to make “due allowance” only for the differences concerning a certain characteristic of their choice, even if that characteristic is the most “universal”.

(c) Replies of the EC to the first set of questions by the Panel relating to the EC’s claim under Article 2.4 of the AD Agreement

4.735 The EC replied to the first set of questions by the Panel relating to the EC’s claim under Article 2.4 as follows.

4.736 The Panel asked the parties to clarify whether the exporters that replied to the questionnaire requested the DCD at some point to calculate the dumping margin on the basis of model-based comparisons. If so, the Panel further asked, what specific model-matching methodology was proposed? Could the parties provide the Panel with the relevant references either in the report or in the administrative record? The Panel also asked the EC to comment on the relevance in this respect of Exhibit EC-10.

4.737 To this question, the EC provided the following reply.

4.738 In their questionnaire responses, the exporters requested that the export price for each model exported to Argentina be compared to the normal value based on domestic prices for the same model and, where this was not possible, to the export price to third countries or the constructed value for the same model.

4.739 This request was reiterated by the representatives of the exporters at the meeting of 11 May 2001 with the case-handlers. The representatives of the exporters understood that the DCD would

make a model-to-model comparison on the basis of the information provided by the exporters if the exporters supplied the requested additional non-confidential summaries and supporting invoices.

4.740 Casalgrande, Caesar and Marazzi sold their models under the same name in Italy and for export (including to Argentina). Accordingly, no model-matching methodology was necessary.

4.741 Bismantova sold the models for export to Argentina and third countries under a different name. In order to allow the DCD to make a model-to-model comparison, Bismantova provided in its response a "conversion table". As agreed at the meeting of 11 May 1999, that table was disclosed to the other interested parties in Bismantova's submission of 4 June 1999.

4.742 If the exporters did request the DCD to do its margin calculations on the basis of models, the Panel asked the parties to clarify what was the DCD's response to that request.

4.743 The EC replied that the DCD did at no point during the investigation inform the exporters that it would not make a model-to-model comparison. To the contrary, the representatives of the exporters drew the conclusion from the meeting of 11 May 1999 that the DCD would make a model-to-model comparison on the basis of the information provided by the exporters if the exporters supplied the requested additional non-confidential summaries and supporting invoices.

4.744 The Panel recalled that, independently of whether the exporters asked for a model-based comparison of normal value and export prices, the record suggested that prices of tiles varied significantly, even within a single size category, on account of differences in processing (polished/unpolished), quality, and colour (for instance, Bismantova's price list submitted as Exhibit EC-5C). The DCD itself recognized (see page 28 of its Final Dumping Determination) that the exporters' sales information revealed considerable price differences in products of equal size and lower sales prices for the larger sizes than for the smaller sizes. On account of this situation, the Panel asked the parties whether they were of the view that the requirement to adjust for physical differences affecting price comparability could be met in this investigation by comparing normal values and export prices corresponding to the same size category.

4.745 The EC replied to this question in the negative. In accordance with Article 2.4, the DCD was required to make due allowance for all the differences in physical characteristics affecting price comparability, and not only for the differences in size.

4.746 The Panel asked Argentina whether it was of the view that the infinite number of physical differences made adjustment beyond size impracticable, and that Article 2.4 would recognize an exception in this respect. Additionally, was Argentina's view that the exporters failed to support such an adjustment by not providing sufficient data? The Panel further asked Argentina, if the data were considered inadequate, to what extent was such inadequacy based on the confidential nature of the information supplied, and were the exporters informed thereof?

4.747 To this question, the EC provided the following reply.

4.748 In theory, in an investigation involving a large number of different models with many different features, the investigating authority could ensure a "fair comparison", as required by Article 2.4, by using two different methods.

4.749 The first method involves two steps: (1) comparing the export price for each model to the normal value for the same model (or for a similar model, after adjustments if necessary); and (2) averaging the resulting price differentials into a dumping margin for the product under investigation as a whole. This is the most accurate method and also the easiest to apply.

4.750 The second method involves also two steps: (1) making adjustments for all the differences between a “benchmark” model and all the other models; and (2) comparing the adjusted normal value and export price on a product basis. This method would be extremely cumbersome and, in any event, much less accurate in practice than a model-to-model comparison. Moreover, assuming that all the necessary adjustments could be accurately estimated, the result should not differ from that obtained by using the first method. For those reasons, in practice no investigating authority uses this method.

4.751 Since the exporters had requested, and expected, that the DCD would make a model-to-model comparison (the first method), they did not request the DCD to make adjustments for differences in physical characteristics (the second method).

4.752 Argentina argues now that the second method would have been very difficult to apply in this case. The EC would agree. However, this did not entitle the DCD to make allowance only for the differences in size. Rather, Argentina should have made a model-to-model comparison, something for which the exporters had provided all the necessary information.

4.753 The Panel recalled Argentina’s statement to the effect that the exporters did not object to the DCD’s adjusting only for size, and not for quality or other physical differences affecting price comparability. The Panel asked the EC whether it agreed with this characterization of the evidence. The Panel further asked the parties to comment on the relevance this fact could have under Article 2.4. In other words, the Panel asked, if the investigating authorities have reason to believe that certain physical differences, in fact, affect price comparability, and if the record contains evidence sufficient to make such an adjustment, would the acceptance by the exporters of the adjustments actually made relieve the authorities of the need to make further adjustments?

4.754 To this question, the EC provided the following reply.

4.755 Contrary to Argentina’s unsupported assertions, the DCD never informed the exporters that it would make allowance only for differences in size. Nor, consequently, could the exporters have acquiesced to that decision. In particular, it is not correct that the DCD’s decision to make allowance only for differences in size was reflected in the questionnaire sent to the exporters. The questionnaire required the exporters to supply normal value and export price information by “model/type/code”, and not by size category.

4.756 The Preliminary Dumping Determination was based on “facts available”, and not on the exporters’ data. The facts available used by the DCD did not allow to make a model-to-model comparison. Thus, the fact that the DCD did not make such comparison in the Preliminary Dumping Determination was not interpreted by the exporters as implying a rejection of that approach.

4.757 The exporters expected that, since the issue of the non-confidential summaries had been resolved in the meantime, the DCD would make a model-to-model comparison in the Final Dumping Determination, based on the information supplied by them, which would take due account of all the differences in physical characteristics. As mentioned before, the meeting of 11 May 1999 with the case-handlers reinforced this expectation. Due to the DCD’s failure to make a disclosure of “essential facts” prior to the final determination, the EC exporters were unaware that the DCD would not make a model-to-model comparison and could not object to the DCD’s decision to make allowance only for differences in size.

4.758 The Panel recalled that the EC argued in its first written submission (at para. 77) that the DCD did adjust normal value in order to reflect the physical differences between polished and unpolished tiles. However, the DCD’s report raised this issue exclusively in the context of margin calculations for one of the exporters (Caesar), and, even in this case (see page 29 of the Final Determination Report), it suggested that the information on home prices provided by the exporter

concerned was rejected by the DCD on the grounds that that home sales of polished tiles could not be compared to export sales of unpolished tiles. The Panel asked the parties to clarify whether the adjustment concerned was made.

4.759 To this question, the EC provided the following reply.

4.760 As noted by the Panel, the Final Dumping Determination is unclear about whether the requested adjustment was granted. During the consultations, the Argentinean authorities informed the EC that the adjustment had been granted, but did not disclose the details of the calculation.

4.761 Caesar was the only exporter which requested an adjustment for differences in physical characteristics between polished and unpolished tiles. Caesar made this request because one of the models exported to Argentina was unpolished, while the model sold under the same name in Italy was polished.

4.762 Exhibit EC-17 contains a copy of the relevant section of Caesar's questionnaire response where the adjustment was requested. The amount of the adjustment estimated by Caesar was omitted in the non-confidential version. The EC considers that this amount was not capable of summarization.

4.763 The other exporters did not request an adjustment for differences between polished and unpolished tiles because the models sold in Italy were identical in all respects to those exported to Argentina. Thus, a model-to-model comparison would have been sufficient to ensure a fair comparison.

(d) Replies of the EC to the questions made by Argentina, following the first meeting of the Panel with the parties, that relate to the EC's claim under Article 2.4 of the AD Agreement

4.764 The EC replied to the questions made by Argentina relating to the EC's claim under Article 2.4 of the AD Agreement as follows.

4.765 Argentina asked the EC how it could make an argument for undertaking price comparisons by model and at the same time express the view that "fair comparison" requires taking into consideration every physical characteristic.

4.766 The EC replied that there was no contradiction. In the present case, a model-to-model comparison would have been the most accurate and the simplest method to make due allowance for all the differences in physical characteristics. The EC referred Argentina to the EC's answer to a question made by the Panel (question No. 2) following the first meeting.

4.767 Argentina asked the EC whether it was of the view that a "fair comparison" could be made on the basis of the information contained in the catalogues that the exporters submitted and were provided to the Panel as Exhibit ARG-22.

4.768 The EC replied that its answer to this question was reflected in paragraphs 82-83 of its second written submission.

(e) Arguments of the EC in its second written submission in support of its claim under Article 2.4 of the AD Agreement

4.769 In its second written submission, the EC made the following arguments supporting its claim under Article 2.4 of the AD Agreement.

4.770 Argentina admits, and indeed emphasises, the existence of numerous differences in physical characteristics, in addition to those relating to the size of the tiles. Nevertheless, it argues that to take them into account would have complicated “enormously” the task of the DCD.

4.771 This defence is clearly without merit. Article 2.4 does not allow investigating authorities to disregard differences in physical characteristics that affect price comparability simply because it would be too difficult to take them into account. Moreover, the difficulties invoked by Argentina could have been easily avoided if the DCD had made a model-to-model comparison, as requested by the exporters.

4.772 Argentina further contends that DCD’s decision to make “due allowance” only for the differences in size is reasonable and within the limits of the “deference” accorded to the investigating authorities by Article 17.6 of the AD Agreement, because size is the most “universal” characteristic of tiles.

4.773 This argument is thoroughly misguided. Article 2.4 leaves some discretion to the investigating authorities with respect to the choice of the precise method for making “due allowance” for differences in physical characteristics affecting price comparability. Thus, in particular, the investigating authority can choose whether to make “due allowance” by making a model-to-model comparison, or by making adjustments to the normal value and/or the export price prior to the comparison. In practice, nevertheless, the authority’s discretion is limited by the fact that the second method is extremely cumbersome where the investigation concerns a product which is sold in many different, multi-featured models.

4.774 In contrast, Article 2.4 leaves no discretion to the investigating authorities for choosing whether or not to make “due allowance”. The only “permissible” interpretation of Article 2.4 is that it requires to make “due allowance” for all the differences in physical characteristics that affects price comparability.

4.775 In its first oral statement, Argentina implies that the exporters agreed in advance, or at least did not object, to the DCD’s decision to make allowance exclusively for the differences in size. That is not true.

4.776 Argentina also argues in its first oral statement that the exporters failed to provide the necessary information to make adjustments for other differences in physical characteristics. More specifically, Argentina contends that, when answering the questionnaire’s request to supply the technical specifications of the products, it was not sufficient for the exporters to refer to the specifications contained in the brochures attached to the response (Argentina also argues, at para. 71 of its first oral statement, that the DCD could not make adjustments because the exporters failed to provide the information requested in Annex IV on a “model/code/type” basis. That Annex, however, requested information on production, production capacity, stocks, exports and imports. That information is not directly relevant for making adjustments for differences in physical characteristics. At any rate, this is the first time that this supposed deficiency is raised by the Argentinean authorities). Argentina, nevertheless, does not explain why. Moreover, this is the first time that the Argentinean authorities complain that the exporters’ response to that section of the questionnaire was not complete.

4.777 In any event, it must be recalled that the exporters did not request the DCD to make adjustments (with the exception, in the case of Caesar, of the differences between polished and unpolished models) but rather to make a model-to-model comparison. That comparison would have made unnecessary to make any adjustments before comparing the normal value with the export price. Had the DCD informed the exporters that it would not make a model-to-model comparison, the exporters could have submitted requests for adjustments and supplied supporting evidence.

(f) Arguments of the EC in its second oral statement in support of its claim under Article 2.4 of the AD Agreement

4.778 In its second oral statement, the EC made the following arguments in support of its claim under Article 2.4 of the AD Agreement.

4.779 Argentina contends that the decision to calculate the dumping margin by comparing the normal value of each of the three size categories defined by the DCD to the export price for the same category was taken by the DCD at the opening of the investigation (“*a la apertura de la investigación*”).

4.780 However, if such decision was taken, it was never communicated to the exporters. It is not mentioned in the Resolution opening the investigation. Nor is there any trace of that decision in the questionnaire. As already explained, the questionnaire required the exporters to provide the information on a “model/type/code” basis, and not by size category.

4.781 Argentina asserts repeatedly that the “segmentation” made by the DCD (to borrow the term used by Argentina) was “accepted” or at least “not objected” by the exporters. This is simply untrue, and Argentina has provided no evidence whatsoever to support those assertions.

4.782 In their questionnaire responses the exporters made a clear request to the DCD to make a model-to-model comparison. That request was renewed at the meeting with the case-handlers of 11 May 1999. The DCD never informed the exporters that such request had been rejected.

4.783 Argentina cites the report of the meeting with the case-handlers of 11 May 1999 as evidence that the exporters would have acquiesced to the segmentation decided by the DCD. However, the passage cited by Argentina is no more than a suggestion made by the representative of the exporters in Argentina to the effect that the sample of invoices requested by the DCD should include examples of the three size categories. The exporters have never questioned that size is an important differentiating characteristic, or that the main size categories are those defined by the DCD. In view of that, it was sensible to suggest that the sample of invoices, so as to be comprehensive, should include examples of each of those size categories. But from this it does not follow that the exporters had renounced to the model-to-model comparison requested in the responses. The exporters understood that the sample of invoices had been requested by the DCD with the exclusive purpose of verifying the information reported in the responses, and that the dumping calculation would be made by using all the transactions reported in the responses. Furthermore, the report of the meeting also alludes to the need to provide non-confidential versions of the conversion tables between models. Yet the submission of those tables would have been totally unnecessary if the exporters had not envisaged that the DCD would make a model-to-model comparison.

4.784 Argentina further argues that the request to make a model-to-model comparison was first “suggested” by the EC before this Panel. But this assertion is contradicted in the very next paragraph of Argentina’s second written submission, where Argentina is forced to admit that, in fact, the questionnaire responses showed the “interest” (“*interés*”) of the exporters in a model-to-model comparison.

4.785 Argentina goes on to argue that the DCD could not make the requested model-to-model comparison because the exporters failed to provide necessary information. However, this is mere assertion: Argentina nowhere specifies what additional information was required for this purpose.

4.786 Moreover, the exporters were never informed during the investigation of these alleged deficiencies. Nor were these deficiencies mentioned in the Final Dumping Determination.

(g) Replies of the EC to the second set of questions by the Panel relating to the EC's claim under Article 2.4 of the AD Agreement

4.787 The EC replied to the second set of questions by the Panel relating to the EC's claim under Article 2.4 of the AD Agreement as follows.

4.788 The Panel asked the EC to confirm that all the information submitted by the exporters related to first-quality, unpolished tiles.

4.789 To this question, the EC provided the following reply.

4.790 The EC can confirm that all the sales reported in the exporters' responses related to first-quality, unpolished tiles, with the exception of some of the domestic sales made by Caesar, which related to polished tiles.

4.791 On the other hand, the EC is not in a position to confirm whether the petitioners' information and import statistics relied upon by the DCD related also to unpolished, first quality tiles. As already explained, of the eight invoices submitted by the petitioner, four correspond to sales of polished tiles, and another to a sale of tiles of 12.5 cm x 25 cm. It is still unclear to the EC whether those five invoices were included by the DCD in the dumping calculation.

4.792 If so, the Panel asked the EC to explain what other physical differences affecting price comparability the EC believed existed for which adjustments should have been made.

4.793 To this question, the EC provided the following reply.

4.794 The following was a non-exhaustive list of other factors affecting price comparability (the EC stated that all the prices mentioned below were for models of 30 x 30 cm of first quality shown in Casalgrande's Price List for October 1998 attached to Casalgrande's questionnaire response).

4.795 Colour: tiles of darker colours such as black, green, blue and red are more expensive to produce than those of lighter colours and are sold at higher prices. By way of example, according to Casalgrande's Price List for October 1998, the price for the model UNICOLOR BIANCO A was 33.000 Lit/m², whereas the list price of the model UNICOLOR BLU, which is identical in all respects to the BIANCO A except the colour, was 47.000 Lit/m² (i.e. 42 per cent more expensive).

4.796 Thickness: thicker tiles require more materials and manufacturing work and are more expensive. Thus, for instance, Casalgrande's list price for the model SAHARA of 9 mm (of the series GRANITO I) was 33.000 Lit/m², while the list price for the SAHARA of 11/12 mm was 46.000 Lit/m² (i.e. a 39 per cent difference).

4.797 Raw material and production process: some models undergo further manufacturing processes, often involving the addition of special raw materials (e.g. special salts), in order to acquire an appearance resembling that of certain types of stone, such as granite or marble (e.g. the series GRANITO I, GRANITO II, MARMORIZZATO, ARDESIA, VENATI or TIBURTINO in Casalgrande's catalogue). These models are generally more expensive than the basic ones. Thus, by way of example, the list price of the marble-looking model ARDESIA BIANCO is 42.000 Lit/m² (27 per cent more than the price of the basic model UNICOLOR BIANCO A). However, a basic model of an expensive colour (e.g. UNICOLOR BLU) can be more expensive than a non-expensive model of one of the special series (e.g. the model SAHARA, of the series GRANITO I).

4.798 Surface: many models are available in versions with special surfaces (e.g. anti-slip) presenting small reliefs. In Casalgrande's catalogue these surfaces are designated with names such as

SECURE, ROCCIA, CARBO, PAVE or PROFIL. Those versions are more expensive. Thus, for example, the price list of Casalgrande's model SAHARA ROCCIA is 35.000 Lit/m², i.e. 6 per cent more expensive than the standard version of SAHARA.

4.799 If the adjustments for physical differences are only granted upon good cause shown, the Panel asked the parties whether the calculation of the dumping margin by model should not be subject to the same requirement.

4.800 To this question, the EC provided the following reply.

4.801 The application of Article 2.4 is subject to the same requirements regarding the burden of proof, regardless of the method followed by the investigating authority to make "due allowance".

4.802 The evidence before the DCD demonstrated beyond doubt that the differences in physical characteristics between models (other than in size) had an impact on their price and, therefore, affected price comparability.

4.803 The DCD has never disputed this. Thus, in the Preliminary Dumping Determination, the DCD noted that:

... se debe mencionar que cada empresa posee una gran variedad de líneas de modelos del producto en estudio, con significativas variaciones de precios entre ellos. Esta circunstancia determina una complejidad adicional en el análisis en curso.

4.804 Similarly, in the Final Dumping Determination stressed that:

Del análisis de la información de ventas en el mercado interno italiano (listados de ventas) se ha observado una gran disparidad del producto de iguales medidas y precios de venta inferiores en las medidas de mayor tamaño en relación a las de menor tamaño. Así, se pudo observar casos en que el "procellanto" sin pulir de 40 cm x 40 cm presenta precios de venta inferiores a los precios de venta del "porcellanato" de 20 cm x 20 cm, o al de 30 cm x 30 cm., como también precios de venta de la medida 30 cm x 30 cm inferiores a los de la medida 20 cm x 20 cm.

4.805 Before this Panel, Argentina has not argued that the physical differences between models (other than in size) do not affect price comparability, but rather that there are so many differences that to take all of them into account would have complicated "enormously" the task of the DCD.

4.806 Thus, in the EC's view, the issue before the Panel is not a factual one (i.e. whether the differences between the models affect price comparability), but rather one of legal interpretation, namely whether, as alleged by Argentina, the "deference" to which the investigating authority is entitled under Article 17.6(ii) means that the investigating authority can, for reasons of administrative convenience, limit itself to make "due allowance" for just one of the differences affecting price comparability.

4.807 Furthermore, the EC would recall that the last sentence of Article 2.4 provides that:

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

4.808 In its second written submission, Argentina suggested that the DCD could not make a model-to-model comparison because the exporters failed to provide necessary information. However, this

was mere assertion. Three of the exporters sold the exported models under the same name and product code in both markets. Thus, no additional information was required in order to make a model-to-model comparison. The other exporter, Bismantova, used different names in each market. Nevertheless, it submitted a *tabla de comparación* in order to allow the DCD to make a model-to-model comparison.

4.809 At any rate, the exporters were never informed during the investigation of the alleged deficiencies. Nor are those deficiencies mentioned anywhere in the Final Dumping Determination.

4.810 If this was so, the Panel asked the parties whether the calculation of the dumping margin by model would be necessary when the same models are sold in both markets in the same proportions.

4.811 To this question, the EC provided the following reply.

4.812 If the normal value is calculated by comparing the weighted average normal value to the weighted average export price (see Article 2.4.2 of the AD Agreement), and if the same models happened to be sold in both markets in precisely the same proportions, there would be no need to make due allowance for differences in physical characteristics, either by making a model-to-model comparison, or by way of adjustments. However, in practice, the model-mix of the export sales is very unlikely to coincide exactly with that of the domestic sales in any given investigation.

4.813 In the case at hand, the information contained in Annexes VII and VIII evidences that the model mix of the export sales was not the same as that of the domestic sales, which rendered it necessary to make due allowance for the differences in physical characteristics between models.

4.814 The Panel recalled that in a reply to question posed by the Panel following the first meeting, Argentina stated that: “Upon opening the investigation, the DCD decided on the segmentation of the product according to the universal criterion that offered the greatest homogeneity, i.e. *porcellanato* in its different sizes, establishing three categories: 20 x 20, 30 x 30 and 40 x 40”. The Panel asked Argentina to direct the Panel to the evidence on the record showing that the DCD had made this determination from the moment of initiating the investigation. In addition, the Panel recalled that, in its reply to the same question, the EC argued that the exporters requested that a model-to-model comparison be made. The Panel also asked the EC to direct the Panel to the evidence on the record that demonstrated that the exporters explicitly requested such a comparison.

4.815 To this question, the EC provided the following reply.

4.816 The EC refers the Panel to the relevant sections of Casalgrande’s and Bismantova’s questionnaire responses provided as Annexes EC-15 and EC-16, respectively, which describe the approach followed by those exporters in responding to Annexes VII and VIII. A model-to-model comparison is inherent in that approach.

4.817 Moreover, as explained above, Bismantova submitted a *tabla de comparación* between the exported and domestic models, with the express indication that it was provided in order to “facilitate the comparison of identical types with different names” (the original Spanish reads as follows: “facilitar la comparación de los tipos idénticos con nombres diferentes”).

4.818 Casalgrande sold the exported models under the same name and product code in both markets. Thus, the submission of a *tabla de comparación* was not required. Nevertheless, Casalgrande provided a table comparing the weighted average export price to the weighted average domestic price for the same model. That table evidences clearly that the exporters envisaged that the DCD would make a model-to-model comparison.

4.819 The exporters reiterated their request for a model-to-model comparison at the meeting of 11 May 1999. The case-handlers seemed to agree. Indeed, as recorded in Exhibit EC-10, they requested that Bismantova waive the confidentiality of the *tabla de comparación* between domestic and export models included in Bismantova's questionnaire response. On 4 June 1999 Bismantova agreed to that request. Ecolatina's cover letter recalled expressly that "by using that table [the DCD] can make the necessary comparisons".

4.820 Finally, the EC would recall that in its second written submission Argentina admits that the questionnaire responses showed the "interest" ("*interés*") of the exporters in a model-to-model comparison.

4.821 The Panel recalled that, according to Exhibit EC-10 (at page 2), the local counsel to the exporters in Argentina suggested to the counsel to the exporters in Brussels to provide the DCD invoices with prices "closer to the weight average of the segment". The Panel asked the parties whether this statement suggested that the representatives of the exporters were aware of the fact that the DCD would calculate the normal value for any size category on the basis of all of the home prices available for that size category, irrespective of the model to which those prices referred to. The Panel further asked the parties to comment on the implications of this statement, if any. Did this suggest that the exporters were aware of the fact that their information was going to be compared per size rather than per model?

4.822 To this question, the EC provided the following reply.

4.823 The EC reiterates that the DCD never informed the exporters of the alleged decision to compare the normal value and export price information per size rather than per model. Exhibit EC-10 does not prove the contrary.

4.824 Rather, the opposite is true. Exhibit EC-10 confirms that, after the meeting of 11 May 1999, the exporters continued to expect that the DCD would make a model-to-model comparison. Exhibit EC-10 mentions that Bismantova should waive the confidentiality of the conversion table (*tabla de comparación*) between domestic and export models and that the other exporters should submit similar tables (Mr. Cyrulnik, the author of the document provided as Exhibit EC-10, made an error when he suggested that the other three exporters should submit also conversion tables between domestic and export models. As already explained, the other exporters sold all the models under the same name and code in both markets. Thus, unlike in the case of Bismantova, a conversion table was not necessary in order to allow the DCD to make a model-to-model comparison). Yet the submission of those tables would have been totally pointless if the exporters had acquiesced to the DCD's alleged decision not to make a model-to-model comparison.

4.825 The passage quoted by the Panel contains a personal suggestion of Mr. Cyrulnik, the author of the document, and not something that was discussed, let alone agreed, with the case-handlers. Mr. Cyrulnik's suggestion is not mentioned in Mr. Di Gianni's report to the exporters of 19 May 1999 and was not followed by the exporters.

4.826 The meaning of Mr. Cyrulnik's suggestion is, in any event, rather obscure. To begin with, the quoted passage refers to the selection of "non-confidential invoices". Yet the preceding paragraph correctly states that the supporting invoices had to be provided on a confidential basis only.

4.827 Also, it is far from clear to which "segments" alludes Mr. Cyrulnik. The EC recalls that each model is sold in different sizes. In their responses, the exporters reported separately the sales of each size category within a given model. Casalgrande went even further by calculating itself the weighted average domestic price and the weighted average export price for each size category within each model. Thus, Mr. Cyrulnik could have been referring to the weighted average for the size "segment"

within each model rather than to the weighted average for all the tiles of the same size, regardless of the model, as implied in the Panel's question.

4.828 A misunderstanding on the part of Mr. Cyrulnik cannot be ruled out either. Ecolatina was little else than a mail box for Van Bael & Bellis. Mr. Cyrulnik was not involved in the preparation of the responses, which was carried out exclusively by Van Bael & Bellis. Therefore, he had only a superficial knowledge of the information contained in the responses and of the issues raised by the investigation.

4.829 At any rate, even if the exporters had become aware at a certain point in time of the DCD's alleged decision to make the comparison "per size", it would not follow from this that they acquiesced to such decision, nor that such decision was consistent with the AD Agreement.

2. Argentina

- (a) Arguments of Argentina in its first written submission relating to the EC's claim under Article 2.4 of the AD Agreement

4.830 In its first written submission, Argentina made the following arguments relating to the EC's claim under Article 2.4 of the AD Agreement.

4.831 Argentina first presented a number of facts relevant to its legal arguments.

4.832 To begin with, when considering the differences which affect price comparability, account was taken, essentially, of the dimensions of the product in question.

4.833 The implementing authority had to establish some kind of criterion for facilitating a fair comparison of different products which, because they were designer products, were very difficult to compare. The task was made even more difficult by the fact that there were 78 manufacturers of *porcellanato*, each of which produced dozens of different varieties which, in their turn, could be discontinued at any time or replaced by similar articles with a different product code or trade name. This applies to each supplier. Since these circumstances made the implementing authority's job infinitely more difficult, it decided to establish as a basis for comparison the only variable that applied to all of the articles from all of the suppliers and that was not affected by market considerations from one supplier to the other as could be the case with the other variables, such as colour or design. Since the sizes 20 cm x 20 cm, 30 cm x 30 cm and 40 cm x 40 cm were the most representative, it was these sizes that were considered according to the volume exported.

4.834 Once the investigation had been initiated, all of the parties concerned were given ample opportunity to supply as much information as possible so that the implementing authority could rely on homogeneous data in order to make a fair comparison.

4.835 Moreover, the exporting firms did not submit, during the procedure, any evidence to invalidate the product breakdown applied at the opening of the investigation and maintained in the final determination.

4.836 It should be stressed that the DCD always tries to put some order into its investigations by seeking a criterion for ensuring the homogeneity of the products under analysis. In this case, Argentina stresses that there was no objection by the parties to the use of product size as a criterion. Thus, Argentina considers that the implementing authority acted properly and objectively on the basis of a criterion agreed upon by the parties.

4.837 Argentina presented next its legal arguments concerning the EC's claim under Article 2.4.

4.838 The EC has argued that there has been an infringement of Article 2.4, which states that:

A fair comparison shall be made between the export price and the normal value
Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale ... physical characteristics

- (i) *The standard of review applicable to the case*

4.839 The obligation to make a "fair comparison", an obligation qualified by the words "on its merits", is inspired by the standard of review applied in the framework of the AD Agreement as defined in Article 17.6 thereof.

4.840 This peculiarity of the AD Agreement, the only agreement to contain a specific standard for the review of provisional or definitive anti-dumping measures or price undertakings when they are questioned under the DSU, has been recognized in a number of precedents, such as *United States – Underwear*: “We note that the ATC does not establish a standard of review for panels, contrary, for example, to the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, where Article 17.6 defines the standard of review that panels have to apply when reviewing cases arising under that Agreement. We further note that the DSU does not contain a provision mandating a specific standard of review” (Panel Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, at para. 7.8).

4.841 This same point, that the only exception to the general standard of review set forth in Article 11 of the DSU is the AD Agreement, was also made in *EC – Hormones* with reference to the treatment that should be given to the facts (“Only Article 17.6(i) of the Anti-Dumping Agreement has language on the standard of review to be employed by panels engaged in the ‘assessment of the facts of the matter’”. We find no indication in the SPS Agreement of an intent on the part of the Members to adopt or incorporate into that Agreement the standards set out in Article 17.6(i) of the Anti-Dumping Agreement. Textually, Article 17.6(i) is specific to the Anti-Dumping Agreement”. Appellate Body Report, *EC – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, adopted 13 February 1998, at page 49), and in a general sense both with respect to the facts and the standards of the Agreement, in *Argentina – Footwear* (“We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels. The only exception is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement”. Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000).

4.842 Ultimately, these precedents reflect the principle of “deference” towards the methodology applied by the investigating authorities in anti-dumping cases in accordance with Article 17.6(i) and 17.6(ii) of the AD Agreement.

4.843 Indeed, the second sentence of Article 17.6(ii) states that “Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authority’s measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.” The wording of this provision suggests that it requires the principle of deference to be subjected to a sort of double test before it can be invoked to defend an interpretation of the Agreement, i.e.:

- There should be several permissible interpretations;
- The measure should rest upon one of those permissible interpretations.

4.844 This had been described by Jackson as follows in his book *The Jurisprudence of GATT and the WTO*: “subsection (ii) seems to establish a two-step process ... First, the Panel must consider whether the provisions of the agreement in question admit of more than one interpretation. If not, the Panel must vindicate the provision’s only permissible interpretation. If, on the other hand, the Panel determines that the provisions indeed admit of more than one interpretation, the Panel shall proceed to the second step of the analysis and consider whether the national interpretation is within the set of permissible interpretations. If so, the Panel must defer to the interpretation given to the provision by the national government” (Jackson, page 148).

4.845 The concept of deference refers to the existence of various permissible interpretations that may arise from the text of the Agreement, in this case Article 2.4 which calls for a “fair” comparison taking account of the “merits” of each case, inter alia, physical characteristics.

4.846 The permissibility of the interpretation made by the Authority, in this case of the criterion used as a basis for making a “fair” comparison, according to the standard of “deference” established in Article 17.6, is precisely what enables the authority, as a matter of law, to rely, within the limits of the Article, on its own discretion in choosing a method for making the comparison.

4.847 In other words if two different approaches or methodologies are reasonable, and derive from an interpretation of the text, then both are permitted under the Agreement, even if they result in totally different conclusions.

4.848 Generally speaking, and originally in connection with the weighing of the facts, this concept of “deference” towards the national authority forms part of GATT/WTO jurisprudence and has been addressed on a number of occasions in the past, in particular in the case *United States–Salmon*:

... the mere fact that in a given case reasonable, unprejudiced minds could differ as to the weight to be accorded to certain facts was not a sufficient ground to find that a determination of material injury based on such facts was not based on positive evidence ... The question of whether a determination of injury was based on positive evidence therefore was distinct from the question of the weight to be accorded to the facts before the investigating authorities ... (GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 28 April 1994, at para. 494).

(ii) *Deference to the investigating authority*

4.849 The EC states that it recognizes the discretion of the investigating authorities or the margin available to them in applying Article 2.4: “Admittedly, the terms ‘due allowance’ leave some discretion to the investigating authorities ... the DCD could have chosen to make ‘due allowance’ for the differences at issue by using a different method from that suggested by the exporters ...”. The problem arises when the EC goes on to suggest an alternative method of adjustment – “by making adjustment a posteriori to the normal value or the export price” – and argues that the fact that the DCD did not apply the alternative method proposed by the EC in itself invalidates the DCD’s option of making an adjustment on the basis of differences in size.

4.850 This begs the question of why an a posteriori adjustment of the normal value would be a valid way of complying with the obligation of making a “fair” comparison.

4.851 As indicated, the authority developed the idea of “homogenization” which ultimately amounts to a standardization based on certain parameters which by their nature reflect a certain universality within the product investigated.

4.852 Why, then, should one consider that whereas an adjustment of the kind proposed by the EC would be consistent with Article 2.4, the fact that the authority should base its comparison on a factor such as “physical characteristics” invalidates the comparison?

4.853 What the DCD did, in keeping with Article 2.4, was to use the physical characteristics as a basis and to make a fair comparison. This unquestionably resulted in an adjustment which ultimately produced lower final margins of dumping than those relied upon to initiate the investigation.

4.854 In the end, the authority chose to interpret the scope of the obligation contained in the Agreement on the basis of a physical characteristic of the product, i.e. its size (20 x 20, 30 x 30 or 40 x 40), which was the most universal feature. This factor, applicable to the greatest quantity of imports of the product investigated, would permit the authority, on the basis of the greatest quantity of elements in common, to make the most comprehensive fair comparison “on the merits” of the case (infinite number of models according to colour, design etc.).

4.855 The DCD made a fair comparison taking account of the diversity of the ceramic tiles investigated and chose to use a factor which, in its view, established a “reasonable” basis for comparison and met the Article 2.4 requirement. Thus the DCD made a “reasonable” analysis of the facts, applying to them the obligations set forth in the Agreement, in accordance with the text thereof, and without having to resort to procedures such as the a posteriori adjustment, which does not appear in the text of Article 2.4. To follow the approach suggested by the EC would have meant sacrificing some of the “deference” owed to the investigating authority and specifically recognized in Article 17.6 of the AD Agreement. This double standard involving acceptance of what can reasonably be inferred from the facts available and the interpretation of the obligations arising from the text of the Agreement has been recognized by GATT panels, in particular the *United States – Salmon* Panel cited above.

4.856 In that case, the Panel first examined whether the Agreement imposed an obligation on the United States to use the methodology put forward by Norway: “The Panel noted ... that ... it had specifically requested Norway to present arguments as to why ... the text of Article 2.4 mandated the use of acquisition prices paid by exporters ... “ (GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 28 April 1994, at para. 406, emphasis added by Argentina). Similarly: “the Panel ... found that ... the United States was not under an obligation to first consider the use of export prices to third countries as a basis for the establishment of normal values before resorting to the use of constructed normal values” (GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 28 April 1994, at para. 393, emphasis added by Argentina). This required an analysis of the text, which included ascertaining whether it contained criteria which the Panel could review to determine whether the Department had used the methodology correctly. Otherwise, the Panel review was limited to examining whether the methodology used could “reasonably ... be sufficient to serve its stated purpose” (GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 28 April 1994, at para. 414) or whether the Department of Commerce had acted reasonably in the light of the information before it (GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 28 April 1994, at para. 442) Similarly, in the case at issue, the Panel should assess whether the “homogenization” criterion selected by the implementing authority for the purposes of making a fair comparison was, first of all, reasonable, and whether in addition, the Argentine interpretation of the obligations arising from Article 2.4 was consistent with the requirements of the Agreement, regardless of whether there existed another permissible interpretation.

4.857 In this case, the EC submits that its interpretation of the obligations of the Agreement should be substituted for those of the national authorities in a specific context such as the AD Agreement, Article 17.6 of which refers both to the assessment of the facts and to the scope of the interpretations of the Agreement. Thus, even though an interpretation of the obligation different from that made by Argentina may be permissible, provided the “fair comparison” methodology used is in keeping with Article 2.4 – and here the EC does not disagree, but maintains that the methodology should be replaced by its own – the comparison made by Argentina must be considered consistent with that Article.

(b) Arguments of Argentina in its first oral statement relating to the EC's claim under Article 2.4 of the AD Agreement

4.858 In its first oral statement, Argentina made the following arguments relating to the EC's claim under Article 2.4 of the AD Agreement.

4.859 Particularly relevant with respect to the analysis of compliance with the obligation set forth in Article 2.4 of the AD Agreement is the standard of review contained in Article 17.6 thereof.

4.860 In its first written submission, Argentina discussed the various elements of that article as regards both the interpretation of the scope of the Agreement (Article 17.6(ii)) and the assessment of the facts on the basis of the above provision (Article 17.6(i)).

4.861 The determination of whether the "fair comparison" made by the authority was consistent with the AD Agreement should be based on the definition of the content or scope of the obligation, without having to resort to Article 17.6(ii) (legal interpretations).

4.862 In paragraph 83 of its first written submission, the EC specifically stated that it recognized that the Agreement left some discretion to the investigating authorities ("Admittedly, the terms 'due allowance' leave some discretion to the investigating authorities"). This being the case, the discussion concerns not so much the scope of the obligation laid down in the Agreement regarding the content of the "due allowance" as the assessment of the facts (differences in the ceramic tiles) requiring an adjustment in order to make a "fair comparison", a process which should make it possible to evaluate the facts in an "unbiased" and "objective" manner.

4.863 Having confirmed this, i.e. that the authority evaluated the facts in an "unbiased" and "objective" manner in conformity with the principle of deference contained in Article 17.6(i), the Panel must respect the authority's evaluation even though it could reach a different conclusion.

4.864 Can the fact that the authority opted for the common parameter which reflected the greatest universality, i.e. the size, a physical characteristic, as a criterion on which to base the fair comparison, be qualified as "biased" or "unobjective"? It would be difficult to find a more universal criterion on which to base an adjustment than the physical characteristics of the product, i.e. the size of the tiles. The authority's final determination, following the market segmentation duly established by the authority and accepted by the exporting firms, states that the volume of 30 cm x 30 cm tiles exported to Argentina represented 70.04 per cent of the total, while 40 cm x 40 cm tiles represented 16.17 per cent and 20 cm x 20 cm tiles 13.08 per cent. Argentina wonders whether the EC actually expected the DCD to make the adjustment for the 0.71 per cent that was not included in any of these categories.

(i) *Information requested*

4.865 It is important, at this point, to refer to the information duly requested by the authority. It must be borne in mind that Annex II of the questionnaire for producers/exporters is entitled "Identification of the product at issue". One of the questions in that Annex refers to "technical specifications for each model/type/code of goods sold in the domestic market and those exported to Argentina".

4.866 The answer given to this question by some of the exporting firms was the following: "The technical characteristics of the *porcellanato* are specified in detail in the catalogues annexed hereto." However, Annex II also asks for general catalogues and/or brochures and/or plans. In other words, it seems clear that the submission of catalogues or brochures could not make up for the lack of information referring to the technical specifications for each model/type/code, no matter what the producing/exporting firms may erroneously have understood.

4.867 Moreover, the EC's questions suggesting that the segmentation of the product by the DCD represented a breach of Article 2.4 is incomprehensible. The only way in which the DCD could have carried out an a posteriori adjustment once the investigation had been opened would have been on the basis of new information submitted by the interested parties, more specifically the producers/exporters.

4.868 However, even accepting the hypothesis that a posteriori adjustment was the way to make the fair comparison (and the text of Article 2.4 does not suggest this), as stated above with respect to the information from the producers/exporters relating to the technical specifications for the product under investigation, the producers/exporters did not provide the documentation the DCD would have needed to carry out a new analysis in this connection.

4.869 This attitude of the producers/exporters during the investigation is consistent with the fact that at no time during the proceedings did these interested parties raise any objections to the segmentation of the product and the adjustments made.

(ii) *The authority's decision*

4.870 One wonders how the DCD could have obtained technical characteristics of the product under investigation, without prejudice to the segmentation applied at the opening of the investigation, on the basis of catalogues containing an infinite number of models, designs, uses, etc.: not only is this not the DCD's responsibility, but it would have been impossible to do.

4.871 Perhaps Annex IV (Information on the producer/exporter market) would have helped, since it contains an item referring to "model/code/type". However, the reply given by all of the producers/exporters to this question was: "This type of information is not available by model, code or type. The information provided refers to *porcellanato* in general".

4.872 What other parameter could have provided a common standard on which to base the adjustment? There are an infinite number of colours, for example. The same applies to designs, not to mention the other characteristics listed in Article 2.4 of the Agreement. What other non-confidential criterion supplied during the investigation could the authority rely on?

4.873 How could the EC require an undefined a posteriori adjustment without specifying the parameters on which it should be based? Indeed, Argentina is certain that, as with Article 6.8, the EC itself recognizes the difficulties involved in making an adjustment on the basis of information on which the DCD could not rely. In other words, even if, for instance, the methodology used by the EC (a code by which its sales in its domestic market would be made comparable to export sales) had been adopted for the purpose, the exporters did not supply any quantification of the adjustments to be made either to the normal value or to the export price. Consequently, making an adjustment was not feasible.

4.874 This being so, the Panel should confirm that in this case, as in the case of *US – Salmon from Norway*, the DCD "acted reasonably in the light of the information before it".

4.875 In the end, the DCD was inhibited by the confidential and incomplete nature of the information submitted. In the circumstances, what the DCD had to do was to reach a factual determination in the light of the information available (non-confidential summaries), in which connection Article 17.6(i) prescribes the standard of deference to the national authorities ("That standard provides that panels shall ask only whether the authority's factual determinations were 'proper' and whether an authority's evaluation of those facts was 'unbiased and objective'"). John Jackson, *The Jurisprudence of GATT & the WTO*, at page 154).

4.876 It is clear from the above that the DCD did not have the possibility of carrying out a new segmentation of the product under investigation and making the corresponding adjustments, since the information needed to do so was not provided. The DCD unquestionably acted in good faith and on good advice, using, in its determination of dumping, all of the information submitted. In the case of the segmentation of the product and the corresponding adjustments, the producers/exporters, i.e. the parties in possession of the information, did not provide any alternative to the DCD's analysis, nor did they object to that analysis.

4.877 If, as the EC claims, there was any other way of making the adjustment, the elements required for doing so should have been included in the record of the case as non-confidential summaries. Argentina is not aware of the existence of any other summaries in connection with this question of "due allowance". Consequently, there was no other information that could be taken into account.

4.878 Furthermore, if there had been any other information submitted as confidential information that would refute this and the EC wanted to prove its point, it should have removed the confidentiality and contributed it to this Panel. Since no further non-confidential summaries were provided and the confidentiality was not removed, it can only be inferred that there was insufficient information and that the DCD's conclusion was reasonable.

(c) Replies of Argentina to the first set of questions by the Panel relating to the EC's claim under Article 2.4 of the AD Agreement

4.879 Argentina replied to the first set of questions by the Panel relating to the EC's claim under Article 2.4 of the AD Agreement as follows.

4.880 The Panel asked the parties to clarify whether the exporters that replied to the questionnaire requested the DCD at some point to calculate the dumping margin on the basis of model-based comparisons. If so, the Panel further asked, what specific model-matching methodology was proposed? Could the parties provide the Panel with the relevant references either in the report or in the administrative record? The Panel also asked the EC to comment on the relevance in this respect of Exhibit EC-10.

4.881 To this question, Argentina provided the following reply.

4.882 Upon opening the investigation, the DCD decided on the segmentation of the product according to the universal criterion that offered the greatest homogeneity, i.e. *porcellanato* in its different sizes, establishing three categories: 20 x 20, 30 x 30 and 40 x 40. This segmentation not only met with no objection at any time during the investigation, but in fact, as shown by point 2 of Exhibit EC-10, it was suggested in the note sent by the representative of Assopiastrelle to its principal on 12 May 1999: "... Regarding non-confidential invoices, I suggest to select the some invoices of each segment (20 x 20, 30 x 30, etc.), with prices closer to the weight average of the segment." The first time the EC suggested that model-based comparisons could have been used was during the formal consultations under the DSU.

4.883 With respect to model-based determinations, Argentina submits the following: although certain submissions by some of the participating firms suggest that they were interested in model-based comparisons for the goods previously segmented according to their physical dimensions (30 x 30, 20 x 20 and 40 x 40), the documentation and information supplied for that purpose did not enable the implementing authority to carry out the required analysis with any accuracy. Moreover, the implementing authority was not in a position to conduct a comprehensive analysis of all of the information and documentation in the record of the proceedings since it did not have at its disposal all of the documentation to back the assertions of the interested parties and to permit a correlation with the information contained in the official registers.

4.884 If the exporters did request the DCD to do its margin calculations on the basis of models, the Panel asked the parties to clarify what was the DCD's response to that request.

4.885 Argentina answered that its reply to this question was implicit in its reply to the previous question.

4.886 The Panel recalled that, independently of whether the exporters asked for a model-based comparison of normal value and export prices, the record suggested that prices of tiles vary significantly, even within a single size category, on account of differences in processing (polished/unpolished), quality, and colour (for instance, Bismantova's price list submitted to the Panel as Exhibit EC-5 C). The DCD itself recognized (in page 28 of the Final Dumping Determination) that the exporters' sales information revealed considerable price differences in products of equal size and lower sales prices for the larger sizes than for the smaller sizes. On account of this situation, the Panel asked the parties whether they were of the view that the requirement to adjust for physical differences affecting price comparability could be met in this investigation by comparing normal values and export prices corresponding to the same size category.

4.887 Argentina replied to this question in the affirmative. In the circumstances of this case, the only way in which a price comparison could be made was to take the size as a basis for comparison.

4.888 The Panel asked Argentina whether it was of the view that the infinite number of physical differences made adjustment beyond size impracticable, and that Article 2.4 would recognize an exception in this respect. Additionally, was Argentina's view that the exporters failed to support such an adjustment by not providing sufficient data? The Panel further asked Argentina, if the data were considered inadequate, to what extent was such inadequacy based on the confidential nature of the information supplied, and were the exporters informed thereof?

4.889 Argentina replied that, while the physical differences made it almost impossible to carry out an adjustment, this is not an exception to Article 2.4, but a reasonable application in a specific case of the obligation contained therein, particularly given the irrelevance of the information supplied to that end by the exporters. However, the fact that the exporters did not provide sufficient information also contributed to the impossibility of making other adjustments for physical characteristics. The inadequacy of the information was not due to its confidentiality, but to its insufficiency.

4.890 The Panel recalled Argentina's statement to the effect that the exporters did not object to the DCD's adjusting only for size, and not for quality or other physical differences affecting price comparability. The Panel asked the EC whether it agreed with this characterization of the evidence. The Panel further asked the parties to comment on the relevance this fact could have under Article 2.4. In other words, the Panel asked, if the investigating authorities have reason to believe that certain physical differences, in fact, affect price comparability, and if the record contains evidence sufficient to make such an adjustment, would the acceptance by the exporters of the adjustments actually made relieve the authorities of the need to make further adjustments?

4.891 Argentina replied that the relevance of that fact under Article 2.4 is that the criterion used was the only possible criterion for analysing the like product in all of its sizes, and this is why the exporters accepted the DCD's approach. Moreover, given the facts of this case, the question is a hypothetical one, since the record did not contain evidence sufficient to make other adjustments that would permit a fair comparison.

4.892 Argentina addressed the three questions by the Panel transcribed below at once.

4.893 The Panel recalled that the EC argued in its first written submission (at para. 77) that the DCD did adjust normal value in order to reflect the physical differences between polished and

unpolished tiles. However, the DCD's report raised this issue exclusively in the context of margin calculations for one of the exporters (Caesar), and, even in this case (see page 29 of the Final Dumping Determination), it suggested that the information on home prices provided by the exporter concerned was rejected by the DCD on the grounds that that home sales of polished tiles could not be compared to export sales of unpolished tiles. The Panel asked the parties to clarify whether the adjustment concerned was made.

4.894 The Panel recalled that, for initiation purposes, it appeared that the DCD calculated normal value according to price quotations for unpolished, first quality tiles and that this estimate of normal value, adjusted on account of the evidence provided during the course of the proceedings, was also used for calculating normal value for the final determination. The Panel asked Argentina to indicate whether the pricing data used for calculating normal value for the final determination corresponds in effect to unpolished, first quality tiles, or was this pricing data expanded at some point to cover all kinds of tiles. In either case, the Panel further asked Argentina, could the Panel be provided with the relevant references in either the report or in the administrative record?

4.895 The Panel also recalled that it appeared that the DCD calculated the export price for the final determination on the basis of unit prices, drawn from official import records. The Panel asked Argentina whether this export price referred to unpolished, first quality tiles or rather to all kinds of tiles. In either case, the Panel further asked Argentina, could the Panel be provided with the relevant references in either the report or in the administrative record?

4.896 To these questions, Argentina provided the following reply.

4.897 To begin with, it should be pointed out that during the investigation at issue, the implementing authority always considered, in its various determinations, the unpolished product.

4.898 Evidence of this can be found in the administrative record in the various technical reports referring to the determinations, which reveal that the implementing authority considered information relating to the unpolished product and discarded any information relating to flags and paving tiles of fine earthenware *porcellanato*, polished.

4.899 Regarding the recognition of the differences in value, in order to illustrate precisely how the documentation supplied to the implementing authority was treated, specific reference is made to the case of the Italian manufacturing export company Caesar. As stated in the report on the final determination of the margin of dumping in the relevant Annex, in that case information was provided on the relevant adjustment to be made and, as stated, it was considered in the treatment of the information.

4.900 At the same time, Argentina reiterates that the export price considered in the various determinations corresponds to the unpolished product only, whether the analysis was conducted on the basis of the information provided by official sources or on the basis of information provided by the various firms involved in the proceedings.

4.901 Thus, the entire dumping analysis was conducted on the basis of the information in the record of the proceedings in respect of unpolished *porcellanato*.

4.902 Finally, the fact that the product considered was the unpolished product is reflected in the decision contained in the final resolution introducing the definitive anti-dumping measure.

- (d) Arguments of Argentina in its second written submission relating to the EC's claim under Article 2.4 of the AD Agreement

4.903 In its second written submission, Argentina made the following arguments relating to the EC's claim under Article 2.4 of the AD Agreement.

4.904 Argentina submits that it acted in accordance with Article 2.4, since the DCD made a fair comparison taking account of the physical characteristics (the diversity of the investigated tiles) in the light of the "particular circumstances" (infinite number of models, colours, designs etc.) and opted for a factor, size, which reflected the greatest universality and applied to the greatest quantity of imports of the product under investigation.

4.905 Indeed, the size is the element which provided the best possibility of making the adjustments, since it formed part of the segmentation decided upon at the opening of the investigation and, as stated in paragraphs 103 *et seq.* of Argentina's first written submission, it enabled the authority to make the most comprehensive "fair comparison on the merits of the case" (infinite number of models, colours, etc.).

4.906 At the same time this "fair comparison" on the basis of the size of the tiles is consistent with the Article 2.4 obligation, which mentions "physical characteristics". Or are the differences in size perhaps not a physical characteristic of the tiles that should be taken into consideration?

4.907 Moreover, this reasoning on the part of the authority is consistent with the definition of the like product that includes the different sizes of tiles, and at the same time makes it possible to carry out the adjustment for 99.29 per cent of the imports. It is difficult to see how it would be possible to carry out a more comprehensive "fair comparison" using a different criterion, one which covers the remaining 0.71 per cent of the imports that do not fall within any of these three size categories.

4.908 It should be stressed that what the DCD in fact did was to make a fair comparison on the basis of the physical characteristics of the models in keeping with the obligation to carry out a "fair comparison" on the basis of the physical characteristics which the Appellate Body understands as an essential obligation under Article 2.4 ("Article 2.4 sets forth a general obligation to make a 'fair comparison' between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'. Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that 'due allowance' be made for differences affecting 'price comparability'. We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for 'differences in ... physical characteristics'. Moreover, Article 2.4 contains the specific obligation to make the comparisons at the same level of trade and at as nearly as possible the same time. It adds that 'due account shall be made ... for differences which affect price comparability'. We note, in particular, that Article 2.4 requires the investigating authority to make due allowance for 'differences in ... physical characteristics' ". Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, at para. 59, emphasis added by Argentina).

4.909 Additionally, Argentina would ask the panel, in considering this point, to consider the standard of review applied within the framework of the AD Agreement, as stipulated in Article 17.6 thereof.

4.910 As the Agreement speaks of deference to the investigating authority, the evaluation of the facts that the authority conducted cannot be considered inconsistent with the Agreement. The conclusion reached in the light of the facts of the case (diversity of models, colours, etc.) that the size

of the tiles was the main physical characteristic that permitted the segmentation of the product for the purposes of making a fair comparison cannot be qualified as “biased” or “unobjective”.

4.911 As stated in paragraphs 96 to 101 of Argentina’s first written submission, it is the standard of deference established in Article 17.6(i) and 17.6(ii) of the AD Agreement that gives the authority the discretion to decide on the method by which it makes the comparison. This has been recognized in a number of past cases which upheld the “principle of deference” with respect to the methodology applied by the investigating authorities in anti-dumping cases (“... the Panel was not faced with a choice among multiple ‘permissible’ interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the by the European Communities”, Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, adopted 12 March 2001, WT/DS/141/AB/R, at para. 65).

4.912 In this case, the authority’s criterion for making a “fair” comparison was “homogenization” which, as mentioned, ultimately amounts to a standardization based on certain parameters which by their nature reflect a certain universality within the product investigated.

4.913 As mentioned in paragraph 87 of Argentina’s first written submission, there were 78 manufacturers of *porcellanato*, each of which produced dozens of different varieties which, in their turn, could be discontinued at any time or replaced by similar articles with a different product code or trade name. The above applied to each supplier. This is why the implementing authority decided to establish as a basis for comparison the most representative dimensions in terms of the volume exported, since this was the only variable that applied to all of the articles from all of the suppliers and was not affected by market considerations from one supplier to the other.

4.914 On this basis, the DCD “reasonably” analysed the facts, applying to them the obligations set forth in the actual text of the agreement and without having to introduce criteria such as a posteriori adjustment which are not specifically provided for in the text of Article 2.4.

(e) Arguments of Argentina in its second oral statement relating to the EC’s claim under Article 2.4 of the AD Agreement

4.915 In its second oral statement, Argentina made the following arguments relating to the EC’s claim under Article 2.4 of the AD Agreement.

4.916 Argentina refutes the EC’s statement in paragraph 76 of its second written submission, since Exhibit ARG-22 makes it clear that the supporting documentation provided by the exporters was not sufficiently explanatory for the authority to be able to make a fair comparison owing to differences in the physical characteristics of the different models.

4.917 Similarly, the differences revealed by Exhibit ARG-22 illustrate the diversity of models and colours. Taking account of the information supplied during the proceedings with respect to the physical characteristics, the investigating authority, in conformity with Article 17.6(i), concluded that the size of the tiles was the prevailing factor – physical characteristic – for the purposes of making a fair comparison. This cannot be qualified as a “biased” or “unobjective” evaluation in the light of the facts of the case.

4.918 Hence Argentina has argued, and continues to argue, that the difference in size is a physical characteristic which has real effects on prices.

4.919 This is consistent with the Appellate Body’s statement in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* that Article 2.4 requires that “due allowance” be made for differences affecting price comparability. The size of the tiles is precisely the

difference which has a great impact on price comparability. The implementing authority is required to make due allowance for these differences, and the DCD did so in the present case on the basis of the duly adopted segmentation.

4.920 The EC apparently does not accept that a comparison should have been made on the basis of size, as if this were not a physical characteristic of the tiles.

4.921 As stated in one of Argentina's reply to a question by the Panel following the first meeting, and in confirmation of what has already been said, the implementing authority examined information relating to the unpolished product and discarded any information relating to flags and paving tiles of fine earthenware *porcellanato*, polished.

4.922 As regards Caesar, which only sold polished *porcellanato* on its domestic market, a fair adjustment was duly made, as recorded in the report on the final determination of the margin of dumping, and this was considered during the investigation.

4.923 Argentina does not understand why the EC asserts, in paragraph 79 of its second written submission, that due allowance must be made for all the differences in physical characteristics when the Article 2.4 obligation is subject to or limited by the particular circumstances surrounding the subject of the investigation. Indeed, the relevant part of the article stipulates that "... Due allowance shall be made in each case, on its merits, for differences which affect price comparability ...".

(f) Replies of Argentina to the second set of questions by the Panel relating to the EC's claim under Article 2.4 of the AD Agreement

4.924 Argentina replied to the second set of questions by the Panel relating to the EC's claim under Article 2.4 of the AD Agreement as follows:

4.925 The Panel asked Argentina whether it was of the view that there were other physical differences affecting price comparability apart from size. The Panel further asked Argentina what was the basis for the DCD's assumption that, by adjusting for size, it had adjusted for other physical differences affecting price comparability.

4.926 Argentina replied that the DCD's approach was to resort to the basic and elementary physical characteristic of product size (20 x 20, 30 x 30, 40 x 40, etc.). This classification was not questioned at any time during the proceedings and it enabled the implementing authority to make a proper and irrefutable comparison.

4.927 There were probably other physical differences that affected price comparability, but the implementing authority, on the basis of the evidence in the record of the proceedings, considered that the physical characteristic that affected price comparability was the physical size or dimensions.

4.928 If the adjustments for physical differences are only granted upon good cause shown, the Panel asked the parties whether the calculation of the dumping margin by model should not be subject to the same requirement. If this was so, the Panel further asked the parties whether the calculation of the dumping margin by model would be necessary when the same models are sold in both markets in the same proportions.

4.929 Argentina replied that the investigation of adjustments, for example, for physical characteristics, involves evaluating whether such adjustments, if they affect price comparability, should be made. If so, they should only be made where the implementing authority has evidence. With respect to the calculation by model, when the same models are sold in both markets in the same proportions, no adjustments are necessary.

4.930 The Panel recalled that in a reply to question posed by the Panel following the first meeting, Argentina stated that “Upon opening the investigation, the DCD decided on the segmentation of the product according to the universal criterion that offered the greatest homogeneity, i.e. *porcellanato* in its different sizes, establishing three categories: 20 x 20, 30 x 30 and 40 x 40”. The Panel asked Argentina to direct the Panel to the evidence on the record showing that the DCD had made this determination from the moment of initiating the investigation. In addition, the Panel recalled that, in its reply to the same question, the EC argued that the exporters requested that a model-to-model comparison be made. The Panel also asked the EC to direct the Panel to the evidence on the record that demonstrated that the exporters explicitly requested such a comparison.

4.931 Argentina replied that the classification applied by the DCD on the basis of the mentioned criterion was defended during the various stages of the investigation and is based on a technical report on the feasibility of initiating an investigation which was provided to the Panel as Exhibit ARG-25. Moreover, the report in Exhibit EC-10 by the representative of the Italian exporting firms in Argentina recognizes this segmentation:

Regarding non-confidential invoices, I suggest to select some invoices of each segment (20 x 20, 30 x 30, etc.) with prices closer to the weight average of the segment.

4.932 The Panel recalled that, according to Exhibit EC-10 (at page 2), the local counsel to the exporters in Argentina suggested to the counsel to the exporters in Brussels to provide the DCD invoices with prices “closer to the weight average of the segment”. The Panel asked the parties whether this statement suggested that the representatives of the exporters were aware of the fact that the DCD would calculate the normal value for any size category on the basis of all of the home prices available for that size category, irrespective of the model to which those prices referred to. The Panel further asked the parties to comment on the implications of this statement, if any. Did this suggest that the exporters were aware of the fact that their information was going to be compared per size rather than per model?

4.933 To this question, Argentina provided the following reply.

4.934 The meeting held by the DCD technical staff was not a formal meeting, and the report by the legal representatives of the Italian exporting firms in Argentina falls outside this technical sphere.

4.935 Argentina notes, however, that the Argentine authority does not know what is behind the thinking of the exporting firms. Argentina reiterates that any comparison made must be based on technical criteria, supported by documentation which reflects the arguments made during the proceedings.

4.936 During the investigation, the authority communicated its conclusions through a series of technical reports reflecting the technical criteria used. Thus, the comparison and classification criteria were duly examined by the authority, and the parties involved had the opportunity to familiarize themselves with them and contribute evidence in support of their respective positions. In other words, the classification used throughout the investigation did not give rise to any comments, and as the investigation proceeded, the classification was effectively endorsed.

4.937 As stated in the previous reply, it has been clearly shown that the exporters were informed that the criterion that the implementing authority would continue to use for the purposes of calculating the margin of dumping, based on the information supplied, would be the physical dimensions of the product at issue.

4.938 Finally, it would have been inconceivable for the DCD to have used another criterion, considering that the exporters themselves, in their replies to the questionnaire (in the different Annexes) stated that the information was not available according to code, model or type. What kind of adjustment did the EC expect the DCD to make?

4.939 Argentina refers the Panel to Exhibit ARG-24 which contains the following documentation.

4.940 Casalgrande: File No. 061-010304/98 of 10 December 1998 – folio 876.

- Annex IV. Information on producer/exporter market. “Information not available by model, code or type, but overall information is available concerning gres porcellanato.”
- Annex V. Summary of producer/exporter sales. “Information not available by model, code or type, but overall information is available concerning gres porcellanato.”
- Annex VI. Summary of producer/exporter sales. “Information not available by model, code or type, but overall information is available concerning *gres porcellanato*.”

4.941 Caesar: File No. 061-010305/98 of 10 December 1998 – folio 879.

- Annex IV. Information on the producer/exporter market. “This type of information is not available by model, code or type. The information provided refers to porcellanato in general.”
- Annex V. Summary of producer/exporter sales. “This type of information is not available by model, code or type. The information provided refers to porcellanato in general.”
- Annex VI. Summary of producer/exporter sales. “This type of information is not available by model, code or type. The information provided refers to *porcellanato* in general.”

4.942 Marazzi: File No. 061-010306/98 of 10 December 1998 – folio 880.

- Annex IV. *Information on the producer/exporter market.* “This type of information is not available by model, code or type. The information provided refers to *porcellanato* in general.”
- Annex V. *Summary of producer/exporter sales.* “This type of information is not available by model, code or type. The information provided refers to *porcellanato* in general.”
- Annex VI. *Summary of producer/exporter sales.* “This type of information is not available by model, code or type. The information provided refers to *porcellanato* in general.”

4.943 Bismantova: File No. 061-010307/98 of 10 December 1998 – folio 881.

- Annex IV. Information on the producer/exporter market. “This type of information is not available by model, code or type. The information provided refers to *porcellanato* in general.”
- Annex V. Summary of producer/exporter sales. “The description of the model/code/type is provided in Sections B and C. The information provided in this table corresponds to the total amounts of sales made.”

4.944 Casalgrande: File No. 061-010304/98 of 10 December 1998 – folio 876.

- Annex III. List of importers in Argentina and third countries of the goods under investigation.
- Annex IV. Information on the producer/exporter market.
- Annex V. Summary of producer/exporter sales.
- Annex VI. Summary of producer/exporter sales.
- Annex VII. Actual exports to Argentina (1997 and 1998).
- Annex VIII. Sales in the Italian domestic market (1997 and 1998).
- Annex IX. Exports to third countries.
- Annex X. Cost structure of the goods under investigation in the Italian domestic market in 1997 and 1998.
- Annex XI. Cost structure of the exported goods.

4.945 Caesar: File No. 061-010305/98 of 10 December 1998 – folio 879.

- Annex III. List of importers in Argentina and third countries of the goods under investigation.
- Annex IV. Information on the producer/exporter market.
- Annex V. Summary of producer/exporter sales.
- Annex VI. Summary of producer/exporter sales.
- Annex VII. Actual exports to Argentina (1997 and 1998).
- Annex VIII. Sales in the Italian domestic market.
- Annex IX. Exports to third countries.
- Annex X. Cost structure of the goods under investigation in the Italian domestic market.
- Annex XI. Cost structure of the exported goods.

4.946 Marazzi: File No. 061-010306/98 of 10 December 1998 – folio 880.

- Annex III. List of importers in Argentina and third countries of the goods under investigation.
- Annex IV. Information on the producer/exporter market.
- Annex V. Summary of producer/exporter sales.
- Annex VI. Summary of producer/exporter sales.
- Annex VII. Actual exports to Argentina (1997 and 1998).
- Annex VIII. Sales in the Italian domestic market.
- Annex IX. Exports to third countries.
- Annex X. Cost structure of the goods under investigation in the Italian domestic market.
- Annex XI. Cost structure of the exported goods.

4.947 Bismantova: File No. 061-010307/98 of 10 December 1998 – folio 881.

- Annex III. List of importers in Argentina and third countries of the goods under investigation.
- Annex IV. Information on the producer/exporter market.
- Annex V. Summary of producer/exporter sales.
- Annex VI. Summary of producer/exporter sales.
- Annex VII. Actual exports to Argentina (1997 and 1998).
- Annex VIII. Sales in the Italian domestic market.
- Annex IX. Exports to third countries.
- Annex X. Cost structure of the goods under investigation in the Italian domestic market.
- Annex XI. Cost structure of the exported goods.

3. Third Parties: Japan

4.948 Japan did not address the EC's claim under Article 2.4 of the AD Agreement either in its written submission nor in its oral statement.

4. Third Parties: Turkey

4.949 Turkey did not address the EC's claim under Article 2.4 of the AD Agreement either in its written submission nor in its oral statement.

5. Third Parties: The United States

- (a) Arguments of the United States in its written submission relating to the EC's claim under Article 2.4 of the AD Agreement

4.950 In its written submission, the United States made the following arguments relating to the EC's claim under Article 2.4 of the AD Agreement.

4.951 The EC submits that Argentina violated Article 2.4 of the AD Agreement by not making a fair comparison between the export price and normal value because Argentina did not make "due allowance" for certain differences in physical characteristics between the models of the subject merchandise exported to Argentina and those sold in Italy. Argentina replies that it made a reasonable adjustment for differences in physical characteristics which is entitled to deference under Article 17.6(i).

4.952 Article 2.1 and 2.2 of the AD Agreement establish that the essence of the determination of dumping is a comparison of export sales with sales of the like product in the home market or third country. Article 2.6, in turn, defines "like product" as "a product which is identical, i.e. alike in all respects to the product under consideration" or, in the absence of such a product, one which "has characteristics closely resembling those of the product under consideration." Finally, Article 2.4 lists differences in physical characteristics as differences for which adjustment may be warranted.

4.953 The United States submits that determining whether the obligation in Article 2.4 has been met is very fact-sensitive. For example, in this case, the United States does not know which differences in physical characteristics of ceramic floor tiles are sufficiently important that adjustments would need to be made. Therefore, the United States cannot comment on whether Argentina made reasonable adjustments. Instead, the United States urges the Panel, in reviewing such a fact-intensive issue, to pay particular attention to the mandate of Article 17.6(i): if the establishment of the facts is proper, and their evaluation unbiased and objective, the Panel should not overturn that evaluation even if the Panel would have reached a different conclusion (see, Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, at para 7.94).

4.954 The United States did not address in its oral statement the EC's claim relating to Article 2.4 of the AD Agreement.

D. CLAIM UNDER ARTICLE 6.9 OF THE AD AGREEMENT

1. The EC

- (a) Arguments by the EC in its first written submission in support of its claim under Article 6.9 of the AD Agreement

4.955 In its first written submission, the EC made the following arguments in support of its claim under Article 6.9 of the AD Agreement.

4.956 According to the EC, the DCD did not inform the exporters of the “essential” facts concerning the existence of dumping which would form the basis for the decision whether to apply definitive measures. As a result, the exporters were prevented from defending adequately their interests. By not disclosing those “essential facts” to the exporters before the imposition of the definitive anti-dumping measures, the DCD violated Article 6.9 of the AD Agreement.

4.957 The EC presented first a number of facts relevant for its legal arguments.

4.958 By letter dated 28 August 1999, the DCD informed the exporters that the “*etapa probatoria*” of the investigation had been concluded and invited them to examine the public file and, should they consider it necessary, to submit their final allegations (“*alegato final*”) no later than 10 September.

4.959 On 3 September 1999, representatives of the exporters inspected the public file. Unlike the Final Injury Determination, the Final Dumping Determination was not available in the public file. Nor did the public file contain any other document prepared by the DCD which identified the “essential facts” that would form the basis of the Final Dumping Determination.

4.960 On 6 September 1999, the exporters addressed a letter to the DCD in which they requested the DCD to disclose the essential facts under consideration which would form the basis for the DCD’s final determination of dumping. The request invoked expressly Article 6.9 of the AD Agreement.

4.961 By letter dated 9 September 1999, the DCD informed the exporters that, as far as the dumping determination was concerned, the Argentinean authorities considered that the disclosure requirements imposed by Article 6.9 were fully complied with by granting to the interested parties access to the public file.

4.962 Specifically, the DCD attempted to justify its refusal to disclose the “essential facts” concerning dumping as follows:

... el procedimiento habitual implementado por la SUBSECRETARIA DE COMERCIO EXTERIOR en lo referente al tratamiento de este aspecto del Acuerdo Relativo a la aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio de 1994 en su artículo 6.9, recogido en la legislación argentina por la Ley No. 24.425, queda absolutamente cumplimentado por parte de la Autoridad de Aplicación al momento que la DIRECCION DE COMPETENCIA DESLEAL de la SUBSECRETARIA DE COMERCIO EXTERIOR ha comunicado por medio fehaciente a todas las partes intervinientes en el procedimiento el cierre de la etapa probatoria, conjuntamente con la invitación a tomar vista de todo lo actuado en el expediente en cuestión a fin de informarse de todos los hechos esenciales producidos a esa fecha y presentar en base a toda la información recabada en ese momento y, si lo desean, su correspondiente alegato.

4.963 The EC presented next its legal arguments relating to its claim under Article 2.4 of the AD Agreement.

4.964 The EC recalled that Article 6.9 of the AD Agreement provides that:

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

4.965 Article 6.9 imposes upon the investigating authorities a duty “to inform” the interested parties. The ordinary meaning of that term (“to give knowledge of something”, “to tell”, “to acquaint with”, *Webster’s New World Dictionary*, Third College Edition) demands a positive action from the investigating authorities, which goes beyond merely granting access to the file.

4.966 The public file of an anti-dumping investigation consists essentially of questionnaire responses and allegations submitted by the different interested parties, which are often contradictory. Thus, the mere examination of the public file does not, as such, allow the interested parties to identify the “essential facts” on the basis of which the authorities intend to impose definitive measures. Indeed, it is precisely for that reason that Article 6.9 requires the investigating authorities to indicate to the interested parties which, of all the facts contained in the file, are the “essential facts” that will form the basis for their decision, so that the interested parties can defend their interests adequately.

4.967 If, as contended by the DCD, the disclosure requirements imposed by Article 6.9 could be fulfilled simply by granting access to the file, that provision would become redundant, since the requirement to provide access to the file is already stipulated in very comprehensive terms in Article 6.4, which provides that

The authorities shall whenever practicable provide timely opportunities for all the interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

4.968 On Argentina’s interpretation, Article 6.9 would add nothing to the requirements already imposed by Article 6.4. Argentina’s reading of Article 6.9, therefore, must be rejected in accordance with the basic principle of interpretation that requires to give effective meaning to all the terms of a treaty (“An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996. See also the Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, at page 12; and Appellate Body Report, *US – Restrictions on Imports of Cotton and Man Made Fibre Underwear*, WT/DS24/AB/R, adopted on 25 February 1997, at page 16).

(b) Arguments in the EC’s first oral statement in support of its claim under Article 6.9 of the AD Agreement

4.969 In its first oral statement, the EC made the following arguments in support of its claim under Article 6.9 of the AD Agreement.

4.970 There is no disagreement between the parties with respect to the relevant facts. The only issue before the Panel is one of legal interpretation, namely whether the investigating authorities can fulfil the obligation imposed by Article 6.9 simply by giving access to the file to the interested parties.

4.971 This issue has been settled by the Panel on *Guatemala – Cement II*, which rejected in rather categorical terms the position maintained by Argentina in this case (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.22). In its submission, Argentina seeks to distinguish the two cases by arguing that the Guatemalan authorities offered to provide a copy of the public file, while the DCD allowed the exporters access to the file. With respect, the EC fails to see the relevance of this distinction.

4.972 Argentina also argues that, at any rate, the violation of Article 6.9 would be a “harmless error”. As mentioned before, the EC considers that this is not a valid defence under the WTO Agreement.

4.973 The EC is concerned by Argentina’s extraordinary assertion that a violation of Article 6.9 is “by its own nature” a harmless error, because “it lacks the necessary importance to vary the conclusions of the investigating authority” (the original Spanish text states: “*un error que, por su propia naturaleza, carece de la entidad suficiente como para variar las conclusiones de la Autoridad de Aplicación*”). This suggests that, not only in this case but also as a matter of general practice, the DCD regards the disclosure of essential facts as an empty formality and pays no attention to the comments submitted by interested parties. The EC believes that, quite to the contrary, the disclosure provided in Article 6.9 constitutes an essential procedural safeguard, the omission of which vitiates necessarily the final determination.

(c) Replies of the EC to the first set of questions by the Panel relating to the EC’s claim under Article 6.9 of the AD Agreement

4.974 The EC replied to the first of questions by the Panel relating to the EC’s claim under Article 6.9 of the AD Agreement as follows.

4.975 The Panel asked the parties what was, in their view, the object and purpose of the requirement of Article 6.9 AD Agreement to disclose “the essential facts under consideration”.

4.976 The EC replied that the essential purpose of Article 6.9 was to allow the parties to defend adequately their interests.

4.977 If the purpose of Article 6.9 was to enable parties better to defend their interests, the Panel asked the parties whether this interpretation suggested that a Party claiming a violation of Article 6.9 also should present information to the Panel on how its exporters were impeded in their defence.

4.978 The EC replied to this question in the negative. The wording of Article 6.9 was unqualified. It required the investigating authority to make always disclosure of the “essential facts”. This reflected the assumption that the omission of this essential procedural safeguard will necessarily prejudice the rights of defence of interested parties.

4.979 According to the EC, the violation of the obligation imposed by Article 6.9, like the violation of any other obligation imposed by the WTO Agreement, is presumed, in accordance with Article 2.3 of the DSU, to cause nullification or impairment. It is for Argentina to rebut that presumption.

4.980 The Panel recalled that, in paragraph 79 of its first written submission, Argentina distinguished the DCD’s practice from that of the Guatemalan authority which the Panel in the

Guatemala – Cement (II) case found to be inconsistent with Article 6.9 AD Agreement. Argentina asserted that “it should be stressed that although “*dar copia*” (“providing a copy”) was not sufficient to comply with the Article 6.9 obligations, the scope of the expression “*dar vista*” (“give sight”) is different, since contrary to the expression “*dar copia*”, it implies notifying the interested parties of the record of the proceedings”. The Panel asked the parties to comment on the importance of this difference, if any.

4.981 The EC replied that it failed to see the relevance of the distinction drawn by Argentina. If anything, the attitude of the Guatemalan authorities seemed to be more advantageous to the exporters, since by providing the exporters with copies of the file, instead of simply allowing them to inspect it in situ, they gave the exporters the possibility to study the file more carefully

4.982 The Panel asked the parties what, if any, were the essential facts under consideration that the exporters were not informed of.

4.983 The EC replied that, as a minimum, the DCD should have disclosed which “facts available” would be relied upon for establishing the normal value and the export price.

4.984 The Panel asked the parties whether, in their view, the fact that the information from the exporters was disregarded for the calculation of normal value and export price was an essential fact of which the exporters should have been informed under Article 6.9 AD Agreement.

4.985 The EC replied that this question in the affirmative and stated that this was without prejudice to the specific requirements imposed by paragraph 6 of Annex II.

(d) Arguments in the EC’s second written submission in support of its claim under Article 6.9 of the AD Agreement

4.986 In its second written submission, the EC made the following arguments in support of its claim under Article 6.9 of the AD Agreement.

4.987 There is no disagreement between the parties with respect to the relevant facts underlying the EC’s claim under Article 6.9. The only issue before the Panel is one of legal interpretation, namely whether the investigating authorities can fulfil the obligation imposed by Article 6.9 simply by giving access to the file to the interested parties.

4.988 This issue has been settled by the panel on *Guatemala – Cement (II)*, which rejected in categorical terms the position maintained by Argentina in this case (see Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.22). In its first written submission, Argentina seeks to distinguish the two cases by arguing that the Guatemalan authorities offered to provide a copy of the public file, while the DCD allowed the exporters access to the file. The EC fails to see the relevance of this distinction.

4.989 The EC agrees with Argentina, and with the United States, that Article 6.9 does not prescribe any particular method of disclosure. Thus, for instance, the investigating authority may choose to make the disclosure at a “disclosure conference”, as suggested by Japan in its third party submission, or in a written document sent to the parties (the usual practice in the EC). This does not mean, however, that Article 6.9 leaves complete discretion to the investigating authority for choosing the method of disclosure. For the reasons explained by the Panel in *Guatemala – Cement (II)*, merely granting access to the file is *per se* an inapt method to achieve the result mandated by Article 6.9 and, therefore, incompatible with that provision.

4.990 The textual analysis of Article 6.9 made by the United States is selective and flawed. Contrary to the US assertion, Article 6.9 does not “describe the facts of which interested parties must be informed as the ‘essential facts under consideration’”. The United States gloss over the terms “which form the basis for the decision whether to apply definitive measures”. Those terms qualify the phrase “essential facts under consideration” and are of crucial importance for the correct interpretation of Article 6.9. They indicate clearly that the investigating authority is required to identify which facts will be relied upon in the decision whether to impose measures.

4.991 The United States contends that the EC’s interpretation would prevent interested parties from defending their interests, because they would not be informed of those facts that do not support the determination that the authority intends to make. According to the United States, “if a party is not informed of a fact under Article 6.9, it may never know that fact exists at all”. This is not correct. The United States overlook that other provisions of Article 9 already ensure that the parties are informed of all relevant facts. In particular, the United States disregard that Article 6.4 requires the investigating authorities to give access to all “information that is relevant for the presentation of their cases ... and that is used by the authorities in an anti-dumping investigation”.

4.992 As noted correctly by the panel in *Guatemala – Cement (II)*, the interpretation of Article 6.9 made by Argentina and the United States in this case would render redundant that provision (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.230). The contorted arguments advanced by the United States in order to distinguish its reading of Article 6.9 from the requirements imposed by Article 6.4 are contrived and unconvincing. In light of those arguments, it is ironic that the United States accuses the EC and Japan of engaging in a “tortured” interpretation of Article 6.9.

4.993 Furthermore, in order to give meaning to Article 6.9, the United States is forced to make an unduly narrow interpretation of Article 6.4. According to the United States, Article 6.9 would address the situation where an investigating authority may legitimately refuse access to the file on the grounds that it would be “impracticable” to do so. However, Article 6.4 does not say that interested parties will be given access to the file only “if practicable”, but rather that they will do so “whenever practicable” (this difference comes even clearer in the French version, which reads “*chaque fois que cela sera réalisable*”). The terms “whenever practicable” do not address the question of “whether” the investigating authority must grant access to the file, but exclusively the question of “when” to do so. Those terms reflect the assumption that it will always be “practicable” for the investigating authority to grant “timely opportunities” for seeing the file. They do not carve out an exception to the obligation imposed by Article 6.4, but rather reinforce such obligation. They make clear that, although the investigating authority is not required to make the file permanently accessible to the public, it must do so every time that it is practicable, rather than, for example, once at the end of the investigation.

4.994 The United States themselves recognise that a Member claiming that access to the record is not practicable “faces a heavy burden”. Furthermore, at the third party session, the representatives of the United States admitted that the instances where a Member could refuse legitimately access to the file would be “exceptional”. Thus, on the United States’ own interpretation, Article 6.9 would be no more than a safeguard of last resort, which would become operational only in the exceptional situation where the investigation authority is not required to give access to the file pursuant to Article 6.4.

4.995 However, the interpretation of treaty provision cannot start from the unsupported premise that it is intended to apply only in exceptional circumstances. There is simply no indication in Article 6.9, or elsewhere in the AD Agreement, or in its drafting history, that Article 6.9 was designed to address only the very exceptional situation described by the United States (indeed, so exceptional that it is likely to remain purely hypothetical), or that the obligation imposed by Article 6.9 is subsidiary in any manner to that imposed by Article 6.4.

4.996 Argentina also argues that, at any rate, the violation of Article 6.9 is “by nature” a “harmless error”. As mentioned above, the EC considers that this is not a valid defence. In any event, the EC believes that the disclosure provided for in Article 6.9 constitutes an essential procedural safeguard, the omission of which, “by nature”, prejudices the rights of defence of interested parties and, therefore, vitiates necessarily and irreparably the final determination.

4.997 In its second oral statement, the EC did not address its claim under Article 6.9 of the AD Agreement.

4.998 The Panel did not ask the EC any questions following the second meeting relating to the EC’s claim under Article 6.9 of the AD Agreement.

2. Argentina

(a) Arguments in Argentina's first written submission relating to the EC's claim under Article 6.9 of the AD Agreement

4.999 In its first written submission, Argentina made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1000 Argentina first presented a number of facts relevant for its legal arguments.

4.1001 In its first written submission, the EC states as its fourth claim that contrary to the requirements set out in Article 6.9 of the AD Agreement, the DCD failed to inform exporters of the "essential facts" concerning the existence of dumping which would form the basis for the decision whether to apply the definitive measures.

4.1002 Article 6.9 of the AD Agreement stipulates that:

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

4.1003 By Notes DCD No. 273-000586/99, 273-000587/99, 273-000588/99, 273-000589/99, 273-000590/99, 273-000591/99 and 273-000592/99 of 11 May 1999, the DCD informed the representatives of Canteras Cerro, Casalgrande, Caesar, Bismantova, Marazzi and Assopiastrelle, respectively, that "... the judicial decision concerning the evidence duly provided by the firms involved in this investigation has been taken, so that those that so wish may consult the corresponding document and familiarize themselves with the decision contained therein ...".

4.1004 On 18 June 1999, the representative of Assopiastrelle confirmed that she had consulted file No. 061-000794/98 consisting of 25 sections with 7,368 folios and taken full note of the proceedings.

4.1005 The EC's first written submission cites a Note of 28 August 1999 in which the DCD informs exporters that the evidence-gathering stage of the investigation has terminated and invites them to consult the record and, where they deem necessary, submit their final pleadings before 10 September.

4.1006 On 3 September 1999, representatives of the exporters consulted the record, as recorded in Note DCD No. 273-001040/99. According to the EC submission, the Final Dumping Determination was not available in the record, nor did the record contain any other document prepared by the DCD which identified the "essential facts" that would form the basis of the Final Dumping Determination.

4.1007 As stated in the EC submission, by letter dated 9 September 1999, the DCD informed the exporters that, as far as the dumping determination was concerned, the Argentine authorities considered that the disclosure requirements imposed by Article 6.9 were fully complied with by granting to the interested parties access to the record.

4.1008 Indeed, in Note DCD No. 273-001040/99 of 9 September 1999 to Assopiastrelle, Bismantova, Casalgrande, Caesar and Marazzi, the DCD pointed out that "... the usual procedure applied by the Undersecretariat for Foreign Trade when addressing this aspect of Article 6.9 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994, incorporated into Argentine legislation through Law No. 24.425, was respected in full by the implementing authority when the DCD clearly notified all of the parties concerned in the procedure of the termination of the evidence-gathering stage, inviting them to consult the full record of the proceedings

in order to acquaint themselves with all of the essential facts to date and to submit, on the basis of all of the information gathered thus far, and providing they so wished, their final pleadings.”

4.1009 On 21 September 1999, the representative of Assopiastrelle confirmed that she had consulted File No. 061-000794/98 consisting of 28 sections and taken full note of the proceedings.

4.1010 Argentina presented next its legal arguments relating to the EC’s claim under Article 6.9 of the AD Agreement.

4.1011 Article 6.9 does not specify in what way the authorities shall inform all interested parties of the essential facts under consideration which form the basis of the decision whether to apply definitive measures. It stipulates that the authorities “... shall inform all interested parties of the essential facts”. The obligation in the Article is to inform; the text does not specify how, but simply imposes a minimum standard (to inform) and leaves it up to the authority to choose the means. This is what would be defined as an obligation of results, as opposed to an obligation of means.

4.1012 The EC submission cites (in a footnote) the recent Panel on *Guatemala – Cement (II)*, in which the Panel concluded that Guatemala did not comply with Article 6.9 by offering to provide interested parties with copies of all information in the file.

4.1013 In that case, Guatemala argued that the Ministry had revealed the “essential facts” by placing a copy of the file at the disposal of the interested parties. However, in the case of Argentina, the DCD did not merely offer to provide the interested parties with a copy of all of the information contained in the record, but expressly invited them to consult the full record of the proceedings.

4.1014 In this connection it should be stressed that although “*dar copia*” (“providing a copy”) was not sufficient to comply with the Article 6.9 obligations, the scope of the expression “*dar vista*” (“give sight”) is different, since contrary to the expression “*dar copia*”, it implies notifying the interested parties of the record of the proceedings.

4.1015 In this specific case, the entire record of the proceedings was being made available, which implies that the essential facts on which the implementing authority would base its final decision in the subsequent stage were also being made available.

4.1016 Indeed, the fact of having made available the record of the proceedings implies that the requirements set forth in Article 6.9 of the AD Agreement were met. The parties, through this procedural step, were informed of the record of the proceedings “in toto”. In other words, since no single fact considered by the implementing authority remained unknown to the interested parties, their rights were not impaired.

4.1017 Nor did the exporters at any time demonstrate that they had suffered injury as a result of this interpretation. Thus, it is clear that the requirements of Article 6.9 of the AD Agreement were met by the implementing authority, and that exporters had access to all of the information on the basis of which the said authority reached its conclusions.

4.1018 In any case, even if one were to assume that the procedure followed by the implementing authority was not in keeping with Article 6.9 of the AD Agreement, *quod non*, Argentina considers that this would be a case of “harmless error”. In other words, an error which, by its nature, is not sufficiently important to alter the implementing authority’s conclusions.

4.1019 Also important with respect to the content of the Article 6.9 obligation is the work carried out by the Ad Hoc Group on Implementation of the AD Agreement (see Documents G/ADP/W/401 and G/ADP/W/400) created by the Committee on Anti-Dumping Practices to prepare recommendations on

issues on which the Agreement is more lax and on issues where agreement among Members seems possible.

4.1020 At its meeting of 29 and 30 April 1997, the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices, analysing the question of the information making up the essential facts under consideration before making a final determination, addressed the practical issue of how such information should be provided, recognizing that the specific nature of the investigation and decision-making processes in the systems of the different Members also implied differences as to the way in which this obligation was met. On the one hand, it was suggested that the information should be supplied at as early as possible a stage of the process; on the other hand, it was considered important that the information should be supplied once all of the various stages of the investigation process had been completed and the investigating authority was in a position to make a determination. In fact, this is a provision of the Agreement which leaves WTO Members a certain amount of room for interpretation of the obligation involved. So much so that the Ad Hoc Group tried to find a solution that would conciliate the different positions within the WTO – all of them permissible under the Agreement, owing in particular to Article 17.6. The fact that the Ad Hoc Group did not adopt a recommendation implies that the Member countries still differ on the matter on how to notify the essential facts. In other words, the text of Article 6.9 does not specify a means of fulfilling the obligation.

4.1021 In short, Argentina considers that its interpretation of Article 6.9 did not cause any injury to the exporters concerned. Moreover, the said exporters at no time demonstrated that they had suffered any prejudice as a result of that interpretation. Thus, even if one were to accept that Argentina's application of Article 6.9 was erroneous, this would be, *quod non*, a harmless error.

(b) Arguments of Argentina in its first oral statement relating to the EC's claim under Article 6.9 of the AD Agreement

4.1022 In its first oral statement, Argentina made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1023 Argentina submits that the DCD acted in conformity with Article 6.9 in that it informed the exporters of the "essential facts" concerning the existence of dumping.

4.1024 While Article 6.9 lays down the obligation to inform the interested parties of the essential facts, it does not specify the way in which this should be done. In other words, the implementing authority has the discretion to choose the way in which it informs the parties.

4.1025 Thus, the text of the article simply lays down a minimum standard (to inform) and leaves it up to the authority to choose the means. This is what would be defined as an obligation of results, as opposed to an obligation of means, as stated in Argentina's first written submission, a view which is also shared by other WTO Members.

4.1026 Since the article in question, in laying down the obligation to inform, does not lay down a method or means for doing so, Argentina considers that the DCD met that obligation when it duly notified all the parties concerned in the procedure of the termination of the evidence – gathering stage, inviting them to consult the full record of the proceedings in order to acquaint themselves with all of the essential facts to date and to submit, on the basis of all the information gathered thus far, their final pleadings.

4.1027 As stated in Argentina's first written submission, this is reflected in Notes DCD Nos. 273-000586/99, 273-000587/99, 273-000588/99, 273-000589/99, 273-000590/99, 273-000591/99 and 273-000592/99 of 11 May 1999, and Note DCD No. 273-001040/99 of 9 September 1999.

4.1028 No single fact considered by the implementing authority remained outside the knowledge of the interested parties: they were invited to consult the record of the proceedings, and thus, the requirements of Article 6.9 of the AD Agreement were met. In other words, the parties, through this procedural step, were informed of what had taken place in the proceedings.

4.1029 Moreover, the implementing authority, in reaching its conclusion, analysed all of the elements of the case, which implies that every action taken was important. Thus, by inviting the parties to consult the full record, the implementing authority complied with the obligation contained in Article 6.9 of the AD Agreement, the purpose of which is to ensure that the parties are informed of the essential facts so that they can defend their interests.

(c) Arguments of Argentina in its oral statement at the third-party session of the first meeting of the Panel with the parties, relating to the EC's claim under Article 6.9 of the AD Agreement

4.1030 In its oral statement at the third-party session of the first meeting of the Panel with the parties, Argentina made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement

4.1031 Like the EC, Japan sees in Article 6.9 a requirement that it does not contain, i.e. the obligation to produce a special, separate publication containing the essential facts, or to conduct a so-called "disclosure conference".

4.1032 Moreover, Japan appears to meld the obligation in Article 6.8 and paragraph 6 of Annex II with Article 6.9 when it states that "The DCD never informed the exporters at any time during the investigation that the information they had supplied on normal value and export prices had been disregarded". This statement appears to confuse the obligations set forth in Article 6.8 and paragraph 6 of Annex II with the provisions of Article 6.9 requiring that the parties be informed of the essential facts. If this interpretation were correct, Annex II, paragraph 6 would be meaningless. And neither the text itself nor its context warrants such an interpretation.

4.1033 The DCD met its obligation under Article 6.9 by duly notifying the interested parties in writing of the closure of the investigation and inviting them to inspect the file containing all of the essential facts and to submit their pleadings. Argentina reiterates that there was a notification with all of the legal consequences implied by something different from merely allowing the interested parties to "inspect" the file in the sense suggested by Japan.

4.1034 Article 6.9 imposes a result, i.e. to enable the parties to defend their interests in the knowledge of the essential facts. The same point is made in Turkey's submission and in the United States' submission. This is exactly what Argentina did by duly notifying the parties.

(d) Replies of Argentina to the first set of questions by the Panel relating to the EC's claim under Article 6.9 of the AD Agreement

4.1035 Argentina replied to the first set of questions by the Panel relating to the EC's claim under Article 6.9 of the AD Agreement as follows.

4.1036 The Panel asked the parties what was, in their view, the object and purpose of the requirement of Article 6.9 AD Agreement to disclose "the essential facts under consideration".

4.1037 Argentina replied that the purpose of this provision is to enable the parties, in full knowledge of the essential facts, to fully defend their interests prior to the final determination by the implementing authority.

4.1038 If the purpose of Article 6.9 was to enable parties better to defend their interests, the Panel asked the parties whether this interpretation suggested that a Party claiming a violation of Article 6.9 also should present information to the Panel on how its exporters were impeded in their defence.

4.1039 Argentina replied that its answer to the previous question did not imply that the parties must prove that they were unable to defend their interests. This was not an obligation under Article 6.9. The Article 6.9 obligation was to disclose the essential facts. Thus, a party claiming violation of Article 6.9 had to prove that this obligation of the AD Agreement was violated.

4.1040 The Panel recalled that, in paragraph 78 of its first written submission, Argentina distinguished the DCD's practice from that of the Guatemalan authority which the Panel in the *Guatemala – Cement (II)* case found to be inconsistent with Article 6.9 AD Agreement. Argentina asserted that "it should be stressed that although "dar copia" ("providing a copy") was not sufficient to comply with the Article 6.9 obligations, the scope of the expression "dar vista" ("give sight") is different, since contrary to the expression "dar copia", it implies notifying the interested parties of the record of the proceedings". The Panel asked the parties to comment on the importance of this difference, if any.

4.1041 Argentina replied that, as pointed out in paragraph 75 of its first written submission, Article 6.9 contained an obligation of results, i.e. to inform the parties of the essential facts, and not an obligation of means, i.e. the means by which the parties are informed of the facts and hence duly notified thereof.

4.1042 Similarly, paragraph 78 of Argentina's first written submission should not be taken out of its context: it forms part of the Argentine counter-argument developed in paragraphs 76 to 80 to the EC's argument concerning the Panel's interpretation in the *Guatemala – Cement (II)* case.

4.1043 The Panel asked the parties what, if any, were the essential facts under consideration that the exporters were not informed of.

4.1044 Argentina replied that the parties were informed of all of the essential facts.

4.1045 The Panel asked the parties whether, in their view, the fact that the information from the exporters was disregarded for the calculation of normal value and export price was an essential fact of which the exporters should have been informed under Article 6.9 AD Agreement.

4.1046 Argentina replied that it was of the view that all of the facts in the record were essential.

4.1047 The Panel recalled that, on several occasions in its first written submission, Argentina referred to the concept of "harmless error". The Panel asked Argentina to define this concept in international law and explain what, in its view, the role of this concept was in WTO dispute settlement proceedings.

4.1048 Argentina replied that a harmless error was an error which did not cause injury or adversely affected the rights of one of the parties – in other words, it was irrelevant as regards the consequences of the challenged act. The concept of harmless error has been accepted in a number of different WTO cases.

4.1049 This was confirmed, for example, in *Korea–Dairy Products* in which the Appellate Body maintained that " ...the European Communities' request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the Articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at

the oral hearing ..." (emphasis added by Argentina). (Appellate Body Report, *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/SD98/AB/R, adopted 12 January 2000, at para. 131).

4.1050 Clearly, to arrive at these conclusions, the Appellate Body accepted the concept of "harmless error". Otherwise, the Appellate Body's ruling would be without foundation.

4.1051 Thus, as part of the WTO's legal precedent with respect to disputes under the DSU, the concept of harmless error is relevant to the legal settlement of a dispute.

(e) Arguments of Argentina in its second written submission relating to the EC's claim under Article 6.9 of the AD Agreement

4.1052 In its second written submission, Argentina made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1053 Argentina reaffirms that it complied with the obligation arising from the text of paragraph 6.9 of the AD Agreement, which stipulates that the authorities "... shall inform all the interested parties of the essential facts", without indicating the method by which the authorities must fulfil that obligation.

4.1054 Argentina submits that the implementing authority informed the exporters of the "essential facts" concerning the existence of dumping, which would form the basis for the decision to apply definitive measures.

4.1055 In paragraph 68 of its first written submission, Argentina mentioned the notes sent to the representatives of Cerro Negro, Casalgrande, Caesar, Bismantova, Marazzi and Assopiastrelle, in which it stated that "... the judicial decision concerning the evidence duly provided by the firms involved in this investigation has been taken, so that those that so wish may consult the corresponding document and familiarize themselves with the decision contained therein ...".

4.1056 Argentina then went on, in paragraphs 69 and 71 of its first written submission, to state that the representative of Assopiastrelle had confirmed that she had consulted the file, consisting of 25 sections with 7,368 folios, on 18 June 1999, and taken full note of the proceedings, and again on 3 September 1999, as recorded in Note DCD No. 273-001040/99.

4.1057 Similarly, paragraph 70 of the said submission cites a note of 28 August 1999 in which the DCD informs exporters that the evidence-gathering stage of the investigation has terminated and invites them to consult the record and, where they deem necessary, submit their final pleadings before 10 September.

4.1058 At the same time, paragraph 72 cites a letter from the EC stating that "... the DCD informed the exporters that, as far as the dumping determination was concerned, the Argentine authorities considered that the disclosure requirements imposed by Article 6.9 were fully complied with by granting to the interested parties access to the record" (Note DCD No. 273-001040/99 of 9 September 1999 to Assopiastrelle, Bismantova, Casalgrande, Caesar and Marazzi).

4.1059 It is clear from the above notes that the exporters were given access to the entire record of the proceedings, and hence, to the essential facts on which the implementing authority would base its final decision, which Argentina considers to be all of the facts making up the record. It should be stressed on the basis of the above that no single fact considered by the implementing authority remained unknown to the interested parties, since the exporters were given access to all of the information on the basis of which the authority reached its conclusions.

4.1060 Similarly, the EC argues in paragraph 69 of its first oral statement that “Finally, Argentina contends that the violation of Article 6.10 would be a “harmless” error since the EC has not demonstrated that it caused a prejudice to the exporters concerned. For the reasons set out by the Panel in *Guatemala – Cement (II)*, the EC considers that this is not a valid defence under the WTO Agreement. In accordance with Article 3.8 of the DSU, all violations of the WTO Agreement are presumed to cause nullification or impairment. It is for Argentina to rebut that presumption” (emphasis added by the EC).

4.1061 Apart from its importance in international law and the WTO, the concept of “harmless error” has clearly not been overlooked by the WTO in resolving specific issues, especially those relating to concepts such as “nullification or impairment”.

4.1062 This is confirmed, for example, in the report of the Appellate Body in *Korea – Dairy Products* of 14 December 1999 in which the Appellate Body maintained that “... the European Communities’ request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the Articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant’s submission nor at the oral hearing ... “ (see Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted on 12 January 2000, at para. 131). Clearly, to arrive at these conclusions, the Appellate Body accepted the concept of “harmless error” – i.e. an error which, by its nature, cannot change the result. In other words, the fact that the EC’s request “should have been more detailed” did not cause Korea “nullification or impairment”. This is precisely what makes this particular situation harmless. Otherwise, the Appellate Body’s ruling would be without foundation.

4.1063 In this particular case, even if one assumed that the procedure followed by the implementing authority contained an error, *quod non*, the EC did not suffer nullification or impairment of any kind as a result.

4.1064 A harmless error is an error which does not cause injury or adversely affect the rights of one of the parties – in other words, it is irrelevant as regards the consequences of the challenged act. In this context, the concept of harmless error has implicitly been accepted in a number of WTO cases (Appellate Body Report, *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/SD98/AB/R, adopted 12 January 2000, at para. 131).

4.1065 As a part of WTO’s case history relating to the dispute settlement procedure, the concept of harmless error forms part of the Organization’s “*acquis*”, and is therefore of considerable importance in connection with GATT/WTO disputes.

4.1066 The interpretation of the obligations contained in Article 6.9 must be based on an adjusted definition of its content, i.e. the content of what Article 6.9 describes or specifies as an obligation of results and not of means (a position shared by Argentina and other WTO Members).

4.1067 In other words, the definition of an obligation as being one of results is a definition which may contemplate different means but which is only in fact met when the objective has been reached: informing the parties of the essential facts.

4.1068 It should be noted that an interpretation whereby the Article 6.9 obligation is an obligation of means, i.e. an obligation which prescribes one of the forms of disclosure presented by the EC or Japan – a separate report in the case of the EC, or the so-called “disclosure conference” in the case of Japan – could result in a situation where the parties are informed only partially of the facts, since either the authority may be restricted as regards what is defined or considered, under the

methodology, as an essential fact, or a party may be deprived access to a particular fact that is essential.

4.1069 At the same time, a restrictive interpretation would mean that the separate report, as proposed by the EC, would ultimately only contain such essential elements as support the authority's decision whether to apply a measure. What would happen, in this case, with the essential facts that did not support the decision to apply a measure and that, following the EC's logic, should not form part of the report on the essential facts supporting the determination? Should a fact lose its essential character just because it does not support the decision to apply a measure? And do such facts therefore cease to be part of the essential facts which must be disclosed? Other delegations have also argued that this is not the case.

4.1070 The United States makes an interesting point in its oral submission as a third party on the question of how to reconcile the object and purpose of Article 6.9, i.e. to permit parties to defend their interests, with the result that would be obtained through a report containing only the essential facts which supported a determination, when there could very well be cases in which certain facts which support another conclusion were of particular importance to a party in defending its interests.

4.1071 Argentina's approach as regards the particular case at issue was to consider that all of the facts forming part of the record were essential for the purposes of the determination. For example, would it have made any sense, following the EC's logic, for Argentina to refer to the samples of models which it submitted as Exhibit ARG-22, which certainly did not constitute any kind of basis for making an adjustment by model? Indeed, this information did not permit the authority to make the necessary adjustment, so that it would not have formed part of the essential facts that led to an affirmative determination for which only an adjustment by size was made. As this information was not relevant for the purposes of the adjustment by size, it would not have formed part of the essential facts to be disclosed under Article 6.9. Nevertheless, this information is included in the record and was relevant in a negative sense, since it was not relied upon for the purposes of the determination. How, following the EC's definition of the essential facts, should Argentina have treated this information? Should it have included it in a separate report or not?

4.1072 Ultimately, by considering the entire record to be made up of the essential facts, the implementing authority places the parties in a better position to defend their interests.

(f) Arguments of Argentina in its second oral statement relating to the EC's claim under Article 6.9 of the AD Agreement

4.1073 In its second oral statement, Argentina made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1074 Argentina reaffirms that it complied with the Article 6.9 obligation to inform the interested parties of all of the essential facts.

4.1075 In its reply a question by the Panel following the first meeting, the EC recognizes that the Article 6.9 obligation is an obligation of results and not of means when it states that "... the essential purpose of Article 6.9 is to allow the parties to defend adequately their interests".

4.1076 Indeed, the text of this provision does not establish an obligation to inform by any particular means: as revealed by the discussions of the Ad Hoc Group of the Anti-Dumping Committee on this subject, the means are left to the discretion of Members.

4.1077 Similarly, Argentina does not agree with the EC's reply to a question by the Panel following the first meeting to the effect that Article 6.9 "... requires the investigating authority to make always

disclosure of the essential facts ...” Argentina submits, in reply, that according to the text of Article 6.9, “The authority shall ... inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures ...”.

4.1078 It is Argentina’s understanding, and the text of the provision does not contradict this, that the essential facts are above all those which are included in the record of the investigation, since all of these facts would be weighed by the authority in arriving at an affirmative or negative determination of dumping.

4.1079 Argentina therefore submits that there was no violation of Article 6.9, and that hence, there is no *prima facie* nullification or impairment under Article 3.8 of the DSU.

4.1080 In any case, Argentina considers that even if it is assumed that there was *prima facie* nullification or impairment under Article 3.8 of the DSU, and Argentina does not accept that there was in this case, several WTO precedents, in connection with the concept of “harmless error”, have pointed to the importance of the existence of injury (see Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/ABR, adopted 12 January 2000, at para. 162 and Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122, adopted 5 April 2000, at paras. 95 and 96).

4.1081 In its reply to a question by the Panel following the first meeting, the EC states that the DCD should have disclosed which facts available would be relied on for establishing the normal value and the export price. In Argentina’s view, the implementing authority is under no obligation to anticipate its decision, which is made once the evidence-gathering stage is concluded and the pleadings submitted.

4.1082 The Panel did not ask Argentina any questions following the second meeting relating to the EC’s claim under Article 6.9 of the AD Agreement.

3. Third Parties: Japan

- (a) Arguments of Japan in its written submission relating to the EC's claim under Article 6.9 of the AD Agreement

4.1083 In its written submission, Japan made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1084 The account in the EC first written submission indicates that DCD failed to conduct a disclosure conference with exporters or their representatives, as required by Article 6.9 of the AD Agreement. According to the EC, DCD invited the exporters to inspect the public file, which did not include the final dumping determination or any other document prepared by DCD which identified the "essential facts" that would form the basis of that determination. In response to a request by the exporters for a disclosure conference, DCD took the position that the requirements of Article 6.9 are fully fulfilled by allowing interested parties to inspect the public file.

4.1085 Every investigating authority is required under Article 6.4 of the AD Agreement to maintain a file for each antidumping investigation of all information that is relevant and that the authority uses in the investigation, and to provide timely opportunities for interested parties to have access to this information. Japan fully supports the EC position that the provisions of Article 6.9 must be read as imposing obligations that go beyond those in Article 6.4; otherwise Article 6.9 would be rendered mere surplusage.

4.1086 The issue of what Article 6.9 requires has already been settled in the recently- adopted panel report on *Guatemala – Cement (II)*. In that case, Guatemala simply offered to provide interested parties with copies of the information in the file. As the panel noted, the public file typically contains large amounts of information that will not be relied on; the key obligation in Article 6.9 is the requirement that the antidumping authority disclose the essential facts that it will actually rely on, in time for interested parties to defend their interests (Panel Report, *Guatemala – Definitive Anti-dumping Measures on Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at paras. 8.229-8.230).

4.1087 The requirements of Article 6.9 are not satisfied by merely opening for inspection a file that includes both facts that will be relied upon and facts that will not.

4.1088 If Argentina's position were accepted, then an antidumping authority could simply provide a voluminous file of relevant and irrelevant facts, refuse to identify which facts it will actually rely on, and inform the interested parties of its reasoning as a surprise, only when it is too late to defend their interests. The panel must reject this position.

4.1089 In addition, Japan we would like to point out the logical consequence of this violation. The Argentine authority, by violating the requirements of the Article 6.9, nullifies the provisions which require the Panel to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective, pursuant to the Article 17.6 of the AD Agreement, or to make an objective assessment of the matter pursuant to the Article 11 of the DSU.

- (b) Arguments of Japan in its oral statement relating to the EC's claim under Article 6.9 of the AD Agreement

4.1090 In its oral statement, Japan made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1091 Article 6.9 of the AD Agreement requires national authorities to inform all interested parties of the “essential facts” under consideration. Japan has already stated in its third party submission that the provisions of Article 6.9 must be read as imposing obligations that go beyond those in Article 6.4 of the Agreement. Japan wishes to further respond to the arguments on Article 6.9 in Argentina’s first written submission.

4.1092 Japan agrees with Argentina’s argument in paragraph 75 that the AD Agreement does not impose a particular methodology by which national authorities should “inform” interested parties of the key facts that will be relied upon in the decision whether to apply definitive measures. The relevant question before the Panel in the present case is: have the interested parties actually been informed of the “essential facts” under consideration, by the methodology chosen by Argentina? In Japan’s view, the answer to this question would appear to be no.

4.1093 Argentina states in paragraph 77 that it did not even provide a copy (“*dar copia*”) of the file, as Guatemala did in *Guatemala – Cement (II)*. Instead, DCD simply invited interested parties to examine the contents of the file, by a mere viewing (“*tomar vista*”) of the entire file. Argentina argues in paragraphs 77-80 that Article 6.9 is complied with if the entire administrative file is made available for inspection, since the essential facts are by definition included in the entire file. Thus, according to Argentina, no fact considered by the authorities was unknown to the interested parties, including the essential facts.

4.1094 The Panel should reject this method as insufficient under Article 6.9. As the *Guatemala – Cement (II)* panel found, the administrative file in an antidumping investigation usually contains large amounts of information that will not be relied on. The key obligation in Article 6.9 is the requirement that the antidumping authority disclose the essential facts that it will actually rely on, in time for interested parties to defend their interests (Panel Report, *Guatemala – Definitive Anti-dumping Measures on Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at paras. 8.229-8.230).

4.1095 Argentina also argues in paragraph 81 that the exporters never indicated they had been injured by Argentina’s interpretation of Article 6.9. If Argentina argues that the rights of a WTO Member under the WTO Agreement are (or could be) diminished because of actions taken or not taken by private parties during an antidumping investigation, this argument must be rejected. WTO Members have rights under the WTO Agreement as a matter of international law (see Panel Report, *Guatemala – Definitive Anti-dumping Measures on Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.24, rejecting Guatemala’s arguments alleging acquiescence and estoppel). In the past the United States argued that a government should be legally barred from making a legal argument to a panel if (private) respondents had not previously made the same argument to the investigating authority during the underlying antidumping investigation. That US argument was squarely rejected both by panels (see GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 28 April 1994, at paras. 347-351. See also GATT Panel Report, *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted 28 April 1994, at paras. 216-220), and in the Uruguay Round negotiations on antidumping.

4.1096 Even if Argentina’s argument is that the EC as a litigant has failed to identify during this dispute any prejudice to EC exporters from denial of Article 6.9 rights, this argument must be rejected. The right to information under Article 6.9 is absolute, not conditional. Requiring a showing of damage to exporters would impose a new condition not provided for by the AD Agreement, in a manner inconsistent with of Article 3.2. of DSU.

4.1097 Moreover, Argentina argues in paragraph 84 that because Article 6.9 is under consideration in the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices, Argentina has

acted in conformity with this provision by merely making the entire file available for inspection by interested parties. However, the fact that a matter or an interpretation is under consideration by a WTO body, or has been under consideration by a WTO body that was deadlocked, does not mean that a panel cannot make a ruling on the matter or interpret the relevant provisions of the WTO Agreement (see also Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, at para. 102).

4.1098 The US third party submission of March 23 makes certain statements regarding Article 6.9 of the AD Agreement, on which Japan has the following comments. The United States argues in paragraph 10 that the Panel should interpret Article 6.9 in such a way as to allow Members to “choose to establish an investigative process which allows interested parties to be presented with all of the facts as they are presented to the authority, as well as all arguments made about those facts.” The United States finds support for this broad interpretation of Article 6.9 in some of the findings in *Guatemala – Cement (II)* (Panel Report, *Guatemala – Definitive Anti-dumping Measures on Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para 8.228.).

4.1099 The US account of the *Guatemala – Cement (II)* panel findings is too selective. That panel found in paragraph 8.228 that disclosure of the “essential facts” forming the basis of a preliminary determination is clearly inadequate when the factual basis of the preliminary determination differs substantially from the factual basis of the final determination. Japan agrees, and apparently so does the United States. However, in the present case, DCD never provided anything more than “*dar vista*” of the file at any point during the antidumping investigation. The United States dismisses the key findings in paragraphs 8.229-8.330 of *Guatemala – Cement (II)* with a footnote noting that it “does not understand the basis for the Panel’s conclusion”. But these findings are still valid and strongly support the argument that the method Argentina has applied in the present case would fall outside the range of possible methodologies that could have been applied under Article 6.9 (Panel Report, *Guatemala – Definitive Anti-dumping Measures on Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.228).

4.1100 Finally, the United States argues in paragraph 20 for an interpretation of Article 6.4 and 6.9 that would allow for a situation where there would be little, if any, practical difference between the two provisions. Japan cannot accept the US interpretation, as the Panel on *Guatemala – Cement (II)* observed that Article 6.9 imposes more substantive requirements than Article 6.4 (Panel Report, *Guatemala – Definitive Anti-dumping Measures on Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.230).

4. Third Parties: Turkey

(a) Arguments by Turkey in its written submission relating to the EC's claim under Article 6.9 of the AD Agreement

4.1101 In its written submission, Turkey made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1102 The EC submits that, Argentina infringed Article 6.9 of the AD Agreement, by failing to inform the exporters of the "essential facts" underlying the dumping determination before imposing definitive measures.

4.1103 Turkey considers that Article 6.9 is very clear in wording and leaves no room for misinterpretations. It puts the investigating authorities under obligation of informing all interested parties of the essential facts which form the basis for the decision whether to apply definitive measures.

4.1104 Furthermore, it specifies that such disclosure should take place before a final determination is made and in sufficient time for the parties to defend their interests.

4.1105 Turkey further considers that, if the intention of Article 6.9 was no more than providing timely opportunities for all interested parties to see information, there would be no need for Article 6.9 when Article 6.4 stood for such intention.

4.1106 In Turkey's view, it is clear that this Article requires the authorities to inform the interested parties and grant them the right to defend their interests before the final determination is made.

(b) Arguments of Turkey in its oral statement relating to the EC's claim under Article 6.9 of the AD Agreement

4.1107 In its oral statement, Turkey made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1108 Turkey is of the view that, as Article 6.8 and paragraph 6 of Annex II, Article 6.9 also contributes to conduction of fair investigations and predictable results.

4.1109 In this respect, Turkey submits that, the purpose of Article 6.9, in the very essence, is to permit the interested parties to fully defend their interests. To that end, provisions of Article 6.9 are obligatory taken the ordinary meanings of the words. It obliges the investigating authorities to inform the interested parties of the essential facts before the final determination is made. The "essential facts under consideration" in Turkey's understanding refers to all the factual information that the authority had at this hand and considered in deciding whether or not to take anti-dumping action. Moreover, the Article requires such disclosure of essential facts to take place at an appropriate time so that the respondents should be provided and not be deprived of their right of defence.

4.1110 This two basic requirements brings us to a point where authorities, under any given condition, are obliged to inform the interested parties of the essential facts with the aim to provide them an opportunity to make a possible final statement, if any, before the final determination is made.

4.1111 Given such explicit obligations, authorities providing opportunities for interested parties only to see relevant information, where practicable, shall not be deemed to satisfy the requirements of Article 6.9.

4.1112 Furthermore, Turkey also wishes to note that, the problem addressed by the EC in its first written submission, considering the inconsistency with Article 6.9 was not solely on means of disclosure. The EC appears to allege that the public file provided by DCD did not include the “final dumping determination”. If that is the case, Turkey is of the view that this panel should also address this matter.

5. Third Parties: The United States

- (a) Arguments of the United States in its written submission relating to the EC's claim under Article 6.9 of the AD Agreement

4.1113 In its written submission, the United States made the following arguments relating to the EC's claim under Article 6.9 of the AD Agreement.

4.1114 The EC claims that the DCD failed to inform the exporters of the "essential facts" concerning the existence of dumping, contrary to the requirements of Article 6.9 of the Agreement. The brief of the EC states that the Argentinian authority did not include in the public file a "document prepared by the DCD which identified the 'essential facts' that would form the basis of the final determination". The EC also states that "Article 6.9 requires the investigating authorities to indicate to the interested parties which, of all the facts contained in the file, are the "essential facts" that will form the basis for their decision".

4.1115 The United States does not take a position on whether, under the facts of this case, the measure in question is consistent with Article 6.9. However, in the view of the United States the EC has read requirements into Article 6.9 which simply are not there, and which are inconsistent with the language as well as the object and purpose of that provision. As Argentina observes, Article 6.9 requires only that interested parties be "informed" of the essential facts, and that this requirement does not impose a particular means of disclosure.

4.1116 Article 6.9 permits a Member wide discretion in choosing the manner in which it will inform interested parties of the essential facts under consideration which form the basis for the Member's decision regarding an antidumping measure. Contrary to the argument of the EC, Article 6.9 does not require a document setting out essential facts. It does not establish any other particular means of disclosure which must be followed or define the parameters of "essential facts under consideration." Article 6.9 only requires that, as applied, the selected method actually discloses to interested parties the facts which may be necessary for a defence of their interests. Thus, when a panel is considering whether the obligation in Article 6.9 has been breached, the analysis must turn on whether, under the specific facts of the dispute, the objective set out in Article 6.9 has been met, not on whether any particular mechanism or approach has been used by the Member.

4.1117 Article 6.9 reads as follows:

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

4.1118 As the Appellate Body has stated, the Agreement must be interpreted based on the ordinary meaning of its terms, in context, and in light of the object and purpose of the Agreement (see, e.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 23; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, at 12; and Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, adopted 16 June 2000, at para. 6.25. See also Article 31 of the *Vienna Convention of the Law of Treaties* providing that, when examining the meaning of a treaty's terms, one must consider those terms "in light of the treaty's object and purpose." The United States' interpretation of Article 6.9 is supported by the ordinary meaning of the text of Article 6.9, as well as the object and purpose of this particular provision).

- (i) *Article 6.9 obligates Members to “inform” interested parties; it does not prescribe any particular means of disclosure*

4.1119 As pointed out by Argentina in its submission, Article 6.9 requires that the investigating authority “inform” interested parties of the essential facts under consideration, but it does not prescribe the method by which this obligation must be fulfilled. Thus, while Article 6.9 establishes a required result, it leaves the method of achieving that result to individual Members.

4.1120 The ordinary meanings of the word “inform” include to “make a fact or occurrence known” (*The New Shorter Oxford English Dictionary*, Clarendon Press Oxford 1993). Thus, the word “inform” defines a result, not how that result is achieved. Furthermore, nothing elsewhere in the AD Agreement dictates or suggests any particular method for how parties are to be informed (A panel may not “add to or diminish the rights and obligations provided in the covered agreements.” *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 19.2. See also Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW, adopted 20 March 2000, at p. 7.69). The AD Agreement only requires that parties, in fact, be informed in a timely manner so they are able to defend their interests.

4.1121 This understanding of the ordinary meaning of the language of Article 6.9 is reinforced by the object and purpose of Article 6.9. The object and purpose are clear from Article 6.9 itself: “Such disclosure should take place in sufficient time for the parties to defend their interests.” Regardless of the means of disclosure chosen, as long as the object and purpose are achieved, the obligation in Article 6.9 is satisfied (the object and purpose of Article 6.9 are further informed by the discussions of Members on the predecessor provisions under the former Anti-Dumping Code. In 1983, the Committee on Anti-Dumping Practices recognized that “the right of parties to defend their interests during the course of an anti-dumping proceeding can only be guaranteed if they have the right to see all the information that is relevant to their case providing that it is not confidential”. Committee on Anti-Dumping Practices, *Recommendation concerning transparency of anti-dumping proceedings*, 15 November 1983, ADP/17, GATT B.I.S.D. (30th Supp.) 1984, at 24).

4.1122 Thus, Members may implement their obligations under Article 6.9 in a variety of ways. Some Members may choose to implement Article 6.9 by requiring the investigating authority to prepare a separate document of essential facts under consideration, as the EC has suggested. Other Members may choose to establish an investigative process which allows interested parties to be presented with all of the facts as they are presented to the authority, as well as all arguments made about those facts. Other Members may choose some combination of these two approaches, or some other method entirely.

4.1123 It is critical, however, to bear in mind that whether the obligation in Article 6.9 has been satisfied cannot be determined by looking in the abstract at the means of disclosure used. In reviewing a challenge under Article 6.9, the question before the panel is this: under the facts of this case, were the essential facts under consideration made known to interested parties in a timely manner? Because Article 6.9 requires a result rather than a particular method, a claim that Article 6.9 has been violated must be assessed based on the facts of the particular case and whether the particular means of disclosure used, as applied in that instance, satisfied the objective behind Article 6.9. In the case at hand, the Panel must assess whether the Italian exporters were informed of the facts they needed to defend their interests, not whether the Argentinian authorities prepared a particular type of document.

4.1124 The only prior case in which a panel has been directly called upon to interpret the requirements of Article 6.9 provides a good example of why review of a claim under Article 6.9 must be made on a case-by-case basis. In *Guatemala – Cement (II)*, the panel found that disclosing the essential facts in an interim determination was insufficient to fulfill Guatemala’s obligations with

respect to Article 6.9 in an investigation where: (1) the basis of the interim determination was threat of material injury, whereas the basis of the definitive determination was actual material injury; (2) the period of investigation was different for the interim determination and the definitive determination; and (3) much of the evidence was obtained after the interim determination (Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.228). The panel also found that providing access to the authority's file was insufficient to fulfill Guatemala's obligations under Article 6.9 because an authority's file is "likely" to contain vast amounts of information, some of which may not be relied upon by the authority in making its definitive determination. *Id.* at para. 8.229. Admittedly, the United States does not understand the basis for the panel's conclusion that such a situation is "likely." In any event, as discussed below, this Panel should not interpret this statement from *Guatemala – Cement (II)* to mean that facts which do not ultimately support the determination reached are not essential to that determination and to a party's ability to defend its interests).

4.1125 Thus, the panel in *Guatemala – Cement (II)* focused on the facts of the case before it. For example, disclosing facts in the interim determination could not satisfy Article 6.9 in that case because, after the interim determination, the period of investigation changed. The parties were given no notice of this change. This meant that they did not even know which sales were being examined for dumping. The *Guatemala – Cement (II)* panel might have reached a different conclusion had there been no change in the period of investigation or injury determination, and had all of the facts been gathered before the interim determination. Thus, the same procedures may satisfy Article 6.9 in some cases, but not in others, demonstrating the need for the Panel to undertake a case-by-case analysis, rather than attempting to enunciate a general rule.

(ii) *The scope of "essential facts under consideration" should not be interpreted in a restrictive manner*

4.1126 The Panel should evaluate compliance with Article 6.9's obligation to "inform" by focusing on the facts of the particular case, rather than adopting the EC's suggestion that a particular means of disclosure is required. However, in interpreting Article 6.9, the Panel also must address the scope of the term "essential facts under consideration" in determining whether Article 6.9 has been violated. In the view of the United States, the language as well as the object and purpose of Article 6.9 argue that the Panel not adopt a restrictive interpretation of the scope of "essential facts under consideration." Thus, not only is the methodology suggested by the EC not required by Article 6.9, the EC's statement that authorities should be required to select certain "essential facts" for disclosure could defeat the object and purpose of that provision.

4.1127 Article 6.9 describes the facts of which interested parties must be informed as the "essential facts under consideration." To understand what that phrase means, one must examine the ordinary meaning of the individual terms. Ordinary meanings of the word "essential" include "of or pertaining to a thing's essence" and "absolutely indispensable or necessary" (*The New Shorter Oxford English Dictionary*, Clarendon Press Oxford 1993).

4.1128 In the context of the AD Agreement, the essential facts are those that are necessary to the determination of whether definitive measures are warranted. This may include all the facts before the investigating authority. In such a situation, the EC's suggestion that an authority had to designate certain facts as the essential facts has no meaning. For example, in identifying material injury, the authority must necessarily weigh all of the facts submitted, which typically includes some contradictory information. Similarly, in determining whether dumping has taken place, every sale considered, every adjustment made, and every issue addressed influences whether the ultimate margin found is above the *de minimis* threshold (see AD Agreement, Article 5.8) and definitive measures warranted. Accordingly, the Panel should not adopt a restrictive interpretation of "essential facts

under consideration” since that would have the potential to improperly circumscribe the facts disclosed under Article 6.9.

4.1129 Additionally, Article 6.9 refers to the essential facts “under consideration”. The term “consideration” has been defined, *inter alia*, as “the action of taking into account” (*The New Shorter Oxford English Dictionary*, Clarendon Press Oxford 1993). With respect to any specific issue, the investigating authority may have conflicting information, all of which is weighed, i.e., “taken into account,” in reaching its final determination (this understanding of “essential facts under consideration” is further supported by the use of the phrase “the decision *whether* to apply definitive measures.” The word “whether” is used to express two alternatives. *The New Shorter Oxford English Dictionary*, Clarendon Press Oxford 1993. Consequently, the facts referred to are those which support both alternatives). Thus, all such evidence is under consideration in the determination (the *Guatemala – Cement (II)* panel seem to suggested that Article 6.9 might function to reveal, *inter alia*, information not relied upon because it has been “shown to be inaccurate upon verification”. Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, at para. 8.229. However, Article 6.7 independently provides for disclosure of the results of verification, and Article 6.9 should not be interpreted in a manner redundant of Article 6.7).

4.1130 Further, the scope of “essential facts under consideration” must be interpreted in a manner consistent with the object and purpose of Article 6.9. As discussed above, the object and purpose of Article 6.9 are to permit interested parties to defend their interests. To allow for a proper defence, that provision must be interpreted to require that interested parties be informed of all essential facts under consideration, including those that militate against the decision ultimately reached.

4.1131 The interpretation of Article 6.9 suggested by the EC, which would require authorities to select certain facts for disclosure as the “essential facts” would permit authorities only to designate the facts which supported their ultimate findings as “essential.” Such an interpretation would work against the object and purpose of this provision. It would permit an authority to disclose all of the facts supporting its decision, while not disclosing facts which would support a contrary decision (even assuming an authority is acting in good faith to inform parties of all facts it believes would be necessary for their defence, such an authority will not necessarily know which facts the party would consider necessary). Such an interpretation of Article 6.9 would prevent interested parties from defending their interests. In order to defend its interests, a party must be informed of those facts which militate against that decision, as well as any other facts which would permit an affirmative defence. Thus, limiting the facts of which parties are informed under Article 6.9 to those which support one particular outcome would defeat the expressed purpose of that provision.

4.1132 Additionally, if Article 6.9 only addresses facts in support of the determination ultimately reached, then an authority which changed its determination as a result of an argument presented late in the proceeding would have to provide a new disclosure of essential facts. This amounts to a requirement of multiple interim determinations. However, the AD Agreement does not *require* an interim determination at all. Even where a Member chooses to issue such a determination in order to apply provisional measures under Article 7, Articles 7.1 and 12.2 only contemplate a single interim determination (further, reading Article 6.9 to require disclosure only of those facts relied upon in support of the ultimate decision would amount to a requirement that parties be provided with information to defend their interests only after the authorities have decided on the outcome of the case – a plainly absurd result. The object and purpose of Article 6.9 being to allow parties to defend their interests, those parties must be permitted to mount such a defence before the authority has decided whether to impose definitive measures. Moreover, reading a requirement of multiple disclosures under Article 6.9 into the AD Agreement runs the risk of preventing an authority from meeting the deadlines for completion of an investigation set forth in Article 5.10).

4.1133 Finally, the interaction of Article 6.9 and 6.4 does not dictate a restrictive interpretation of the facts of which interested parties must be informed under Article 6.9. Article 6.4 is not mandatory, but specifies a procedure: parties must be allowed to “see” the public information, but only if the authorities determine that it is “practicable.” On the other hand, as discussed above, Article 6.9 is mandatory, but does not specify a procedure. In other words, whether or not an authority determines that it is practicable to let the parties see the record under Article 6.4, in every case interested parties must be informed of the “essential facts under consideration”. Thus, it may be in a particular case that liberal disclosure under Article 6.4 also satisfies Article 6.9 (this does not necessarily mean that every disclosure under Article 6.4 will satisfy Article 6.9. For example, allowing parties to see a very large record for a very short time may not be sufficient. On the other hand, allowing parties to have unrestricted access to the record, including all arguments about the facts in that record, as it is being developed throughout the investigation, will inform those parties of the essential facts under consideration in accordance with Article 6.9. The Panel must determine under Article 6.9 whether the parties were actually informed).

4.1134 This does not mean that Article 6.9 is redundant of Article 6.4. Article 6.9 requires that interested parties be informed of the essential facts under consideration regardless of whether the authorities have found it practicable to allow those parties to see the public record under Article 6.4.

4.1135 In conclusion, Article 6.9 does not prescribe a particular means of disclosure. Rather, that provision requires a reviewing panel to determine, on a case-by-case basis, whether the method employed, in fact, informed the interested parties of all of the “essential facts under consideration” in sufficient time to allow for a defence of their interests.

(b) Arguments of the United States in its oral statement relating to the EC’s claim under Article 6.9 of the AD Agreement

4.1136 In its oral statement, the United States made the following arguments relating to the EC’s claim under Article 6.9 of the AD Agreement.

4.1137 The United States addressed first the arguments regarding the proper interpretation of Article 6.9. Article 6.9 of the AD Agreement furthers the goal of transparency in dumping proceedings by requiring that investigating authorities inform interested parties of all essential facts under consideration prior to making a final determination of dumping. Both the United States and Argentina have argued in their written submissions that Article 6.9 is concerned with a particular result, and does not prescribe the process for reaching that result. By contrast, the EC, joined in some respects by Japan and Turkey, has suggested that Article 6.9 requires the preparation and issuance of a single document prior to the final determination that contains all the supporting facts that the investigating authority will actually rely on when it makes the final determination.

4.1138 In considering the arguments the United States are presenting regarding the proper interpretation of Article 6.9, the United States wishes the Panel to keep in mind a single important consideration apparently overlooked by the EC and Japan: if a party is not informed of a fact under Article 6.9, it may never know that fact exists at all. Article 6.9 is the only guarantee in the Agreement that a party will be informed of all the facts it might need to mount its defence. Under the interpretation advanced by the EC and Japan, parties may find themselves in a situation where the only facts of which they have been informed are those which support the determination the authority intends to reach.

4.1139 Why is this the case? With respect to facts gathered by the authority (and thus not subject to a service requirement under Article 6.1), the only provisions of Article 6 which address disclosure to the parties are Articles 6.4 and 6.9. Note, however, that the language of Article 6.4 holds out the possibility that, in a particular case, and given the appropriate circumstances, an authority could find

that it is only practicable to permit interested parties to view the public record for a very brief period of time, or that it is only practicable to permit them to view it at a stage before all of the information has been gathered. Thus, the disclosure under Article 6.4 may be very limited.

4.1140 Article 6.9, on the other hand, guarantees that parties have access to all facts relevant to the final determination. If the more limited interpretation of Article 6.9 offered by the EC and Japan were adopted, the authority would reach its conclusions and inform the parties only of the facts on which it actually intends to rely in support of those conclusions. The parties would then be permitted to defend their interests, informed of only the facts which support one determination and facing an authority which has already made a decision on the outcome of the case.

4.1141 The United States finds it difficult to believe that any interpretation of Article 6.9 which would permit the goal of transparency to be thwarted in this manner is a proper interpretation. Fortunately, as discussed in our written submission, a careful examination of the language, including the express object and purpose of that provision, reveals that the interpretation offered by the EC and Japan is not correct. Rather, Article 6.9 permits a Member wide discretion in choosing the manner in which it will inform interested parties of the essential facts under consideration which form the basis for the Member's decision regarding an antidumping measure. Moreover, the facts addressed by Article 6.9 are all those which are relevant to the determination of whether definitive measures are warranted – facts which argue for, as well as those which argue against, application of such measures.

4.1142 The language of Article 6.9 does not support the interpretation advanced by the EC and Japan. First, as Argentina also pointed out, Article 6.9 only requires that interested parties be informed, and does not specify a means of disclosure. Article 6.9 makes no mention of the disclosure document discussed by the EC, or the disclosure conference discussed by Japan. Second, Article 6.9 requires that parties be informed of the “essential facts under consideration.” As discussed in the United States' submission, those words cannot be read as limited to the facts which will be actually relied upon in support of a particular outcome.

4.1143 In interpreting Article 6.9, the Panel must also bear in mind the object and purpose of that provision. The object and purpose is expressed in the provision itself: to permit parties to defend their interests. This object and purpose would not be served if parties were only informed of the facts which support one outcome of the case.

4.1144 The object and purpose of Article 6.9 is further informed by the purpose of the other provisions of Article 6. The provisions of Article 6 of the AD Agreement are aimed at ensuring that parties know what is required of them, and have a full opportunity to be informed of the evidence presented by other parties and gathered by the authorities. For example, Article 6.1.2 requires that “evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.” Article 6.2 requires authorities to “provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.” Article 6.3 requires that oral information only be taken into account “insofar as it is subsequently reproduced in writing and made available to other interested parties.” Thus, the provisions of Article 6 appear to reflect a concern that parties be given as much information as possible, so that they may be fully in control of their own defence.

4.1145 By contrast, the arguments advanced by the EC and Japan with respect to Article 6.9 appear to reflect a concern that parties may be given too much information, and that the authority conducting the investigation must be required to sort through that information and inform the parties only of the facts on which it will rely. Such an argument is paternalistic and an invitation for mischief. It might be possible that an authority, acting in bad faith, could fill the record with such vast amounts of irrelevant information that parties would be effectively precluded from defending their interests. However, in the view of the United States, the danger posed by this unlikely scenario is vastly

outweighed by the very real concern, reflected in the rest of Article 6, that parties must receive all of the information about the investigations to which they are subject in order to adequately defend their interests.

4.1146 In light of this concern, the United States does not understand Japan's suggestion that a dumping file is likely to contain large amounts of irrelevant information. The very purpose of Article 6 is to allow parties to judge for themselves in the first instance whether they believe a particular fact is relevant to arguments they wish to raise, rather than leaving such a judgment to the authority. Recall that if a party is not informed of a fact under Article 6.9, it may not know the fact exists at all, and thus will have no way of determining whether that fact would be relevant to its arguments.

4.1147 In reviewing the arguments raised by the EC and Japan, in this respect joined by Turkey, that Article 6.9 must be interpreted to "go beyond" the requirements of Article 6.4, the source of this misunderstanding of Article 6.9 becomes clear. Because these parties have interpreted Article 6.4 in an excessively broad manner, and have not recognized the limitations of that provision, they are forced into a tortured reading of Article 6.9 in order to avoid a redundancy. However, a proper reading of the language of Article 6.4 reveals that it is not redundant of Article 6.9, and that these Articles can operate independently of and harmoniously with each other.

4.1148 The misunderstanding of Article 6.4 is best summarized by the following sentence from Japan's submission: "[e]very investigating authority is required under Article 6.4 of the AD Agreement to maintain a file for each antidumping investigation of all information that is relevant and that the authority uses in the investigation, and to provide timely opportunities for interested parties to have access to this information". While the United States finds this a laudable ideal, the fact is that the language of Article 6.4 is not quite so broad.

4.1149 Article 6.4 is not mandatory in all circumstances: the requirement to allow parties to see the record under Article 6.4 could be limited by a finding by the authority that such disclosure is not practicable. Thus, while a Member claiming that access to the record is not practicable faces a heavy burden, it is possible that this burden could be met in certain cases such that disclosure under Article 6.4 may be very brief, or occur at a time before all of the information has been gathered. Article 6.9 ensures that, even if the authority is able to support a finding that it is not practicable under Article 6.4 to allow parties to see the full record, that authority must still find a way to inform those parties of the facts contained in that record. Of course, in the view of the United States, allowing liberal access to the record under Article 6.4 goes a long way toward satisfying the requirements of Article 6.9. However, the key point for the Panel to bear in mind is that only Article 6.9, and not Article 6.4, guarantees that parties will be informed of all of the facts they need to defend their interests in every case.

4.1150 On the other hand, Article 6.4 does "go beyond" Article 6.9 in that it requires a particular means of disclosure. When an authority implements Article 6.4, it can only do so by allowing parties to see the original source documents in the record. This firsthand access may be of particular value to parties in assuring them of the completeness and accuracy of the information. Although the United States believes that this also may be the best method of implementing Article 6.9, as the United States has frequently stated, Article 6.9 does not prescribe a particular means of disclosure. To sum up, Article 6.9 is mandatory, but does not prescribe a means of disclosure, whereas Article 6.4 is conditional, but does prescribe a means of disclosure.

4.1151 Thus, the concern that Article 6.9 not be interpreted as redundant of Article 6.4 flows from a misreading of Article 6.4. Article 6.4 and Article 6.9 simply address different concerns, and represent different obligations. The fact that an authority can devise a single means of disclosure which satisfies both provisions does not mean that it is interpreting those provisions in an improper manner.

4.1152 Japan also argues that the logical consequence of not adopting its interpretation of Article 6.9 is that it would nullify a panel's ability to determine whether the authority's establishment of the facts was proper and whether the authority's evaluation of the facts was unbiased and objective, in accordance with Article 17.6 of the AD Agreement. The United States respectfully disagrees. As long as the investigating authority has chosen a method which informs the interested parties of the essential facts under consideration and the authority sets forth in its final determination its reasoning in support of its decision, a reviewing panel should be able to make the necessary determinations under Article 17.6.

4.1153 The United States also addressed certain arguments by Japan which go well beyond what the EC and Turkey have argued with respect to Article 6.9. First, Japan states that Article 6.9 requires authorities to conduct a so-called "disclosure conference" with exporters or their representatives. However, Article 6.9 makes no mention of "disclosure conferences." Indeed, as discussed previously, Article 6.9 does not require any particular method for informing parties of the essential facts under consideration.

4.1154 Second, Japan also appears to argue that in addition to requiring that parties be informed of the essential facts under consideration, Article 6.9 requires that interested parties be informed of the authority's reasoning prior to its final determination. However, the language of Article 6.9 only addresses facts and not legal reasoning. Moreover, this argument would, in essence, require the investigating authorities to make multiple interim determinations, contrary to what is contemplated by Articles 7 and 12.

V. INTERIM REVIEW

5.1 On 20 August 2001, the EC submitted a written request for review by the Panel of particular aspects of the interim report issued on 25 July 2001. Argentina did not provide any comments on the interim report. Argentina commented on the EC's request for interim review on 28 August 2001. Neither party requested an additional meeting with the Panel.

5.2 We have reviewed the comments presented by the EC and the reaction thereto by Argentina and have finalized our report, taking into account these comments which we considered justified.

5.3 The EC notes that the second sentence of paragraph 6.30 of the Panel's interim report does not accurately reflect its position and suggests certain language to the Panel for completing the text. We are of the view that paragraph 6.30 is an accurate reflection of the EC's position on this issue. We note that the language suggested by the EC in its interim review comments was not used by the EC in its submissions to the Panel. Accordingly, we saw no reason to amend the text as requested by the EC.

5.4 The EC states that the exporters had provided the evidence specifically requested by the DCD and that therefore the Panel's statement in paragraph 6.62 of the interim report that "no documentary evidence of any kind was submitted" is inaccurate. Argentina comments that the Panel's statement is correct in so far as it refers to supporting documentation for the information supplied. We decided to amend the text of this paragraph taking into account the comments made.

5.5 The EC notes, in respect of footnote 89, that in *United States – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, the Appellate Body has confirmed that in Article 9.4 the words "margins" means the individual margin determined for each investigated exporter. The EC makes no suggestion as to how the Panel should use the ruling cited. Argentina comments that the EC should not be allowed to rely on this decision in support of its argument since this decision was issued well after the time for presentation of arguments by the parties. We considered that since footnote 89 refers to the arguments presented by the EC on this issue, it would not be appropriate to incorporate any reference to this decision which was not and could not have been part of the EC's argument as it was issued only days before the issuance of the interim report. Accordingly, we decided to leave footnote 89 unchanged.

5.6 The EC suggests that the Panel completes the last sentence of paragraph 6.89 by adding language used by the EC in its first submission to the Panel. Argentina comments that it is up to the Panel to decide on the language chosen to represent a party's position. In light of the EC's comments, we decided to amend the report as suggested by the EC in order to fully reflect the EC's position on this issue.

5.7 The EC notes that the first sentence of paragraph 6.90 should refer to exporters who are selected for examination under the second sentence of Article 6.10, rather than the second paragraph. We considered it was appropriate to amend the text as suggested by the EC.

5.8 The EC requests the Panel to redraft the last sentence of paragraph 6.118. The EC proposes specific language which it believes more accurately reflects its arguments. We have in response to this comment modified the text of this paragraph.

5.9 The EC notes that, in its view, the interpretation of the Panel of the requirements of Article 6.9 as offered in paragraph 6.125 is incorrect. Argentina comments that it sees no problem with the Panel's interpretation of the language of this provision, and requests the Panel to reject the EC's comments and leave the text unchanged. In light of the EC's comments, we decided it was appropriate to briefly clarify our interpretation of Article 6.9 and we amended paragraph 6.125 accordingly.

VI. FINDINGS

A. STANDARD OF REVIEW

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

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

6.2 We note that the Panel in the case *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* considered that Article 17.6(i):

"speaks not only to the establishment of the facts, but also to their evaluation. Therefore, the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in an unbiased and objective manner. This concerns the according of a certain weight to the facts in their relation to each other; it is not a legal evaluation".¹³

6.3 Accordingly, it is not our role as a panel to perform a *de novo* review of the evidence which was before the investigating authority at the time it made its determination. Rather, we must review the determination the investigating authority made on the basis of the information before it in order to determine whether the establishment of the facts was proper and the evaluation of the facts was unbiased and objective. With respect to the latter aspect of our review, we consider that the task before us is to examine whether, on the basis of the information before it, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions it did.¹⁴

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

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

6.5 We consider the first part of this subparagraph to be a clear reference to the customary rules of interpretation as laid down in Articles 31-32 of the Vienna Convention on the Law of Treaties.

¹³ Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, para. 6.18.

¹⁴ We note that this is the same standard as that applied by the Panel in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the US* ("*Mexico – HFCS*"), which, in considering whether the Mexican investigating authorities had acted consistently with Article 5.3 in determining that there was sufficient evidence to justify initiation, stated: "Our approach in this dispute will ... be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation." Panel Report, *Mexico – HFCS*, WT/DS132/R, adopted 24 February 2000, para. 7.95.

Article 31 of the Vienna Convention provides that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Article 17.6(ii) of the AD Agreement provides that in the case where this method leads the panel to the conclusion that the provision in question admits of more than one permissible interpretation, the panel shall find the measure in conformity if it is based on one such permissible interpretation.

B. BURDEN OF PROOF

6.6 We recall that the burden of proof in WTO dispute settlement proceedings rests with the party that asserts the affirmative of a particular claim or defence.¹⁵ It implies that the complaining party will be required to make a *prima facie* case of violation of the relevant provisions of the WTO AD Agreement, which is for the defendant, in this case Argentina, to refute.¹⁶ In this regard, the Appellate Body has stated that "... a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".¹⁷ Our role as a panel is not to make the case for either party, but we may pose questions to the parties "in order to clarify and distill the legal arguments".¹⁸

C. FACTUAL INTRODUCTION

6.7 This dispute concerns the imposition of definitive anti-dumping measures by the Argentine Ministry of the Economy on imports of ceramic floor tiles ("*porcellanato*") from Italy. The European Community raises claims with respect to several aspects of those measures. In particular, the European Community considers that the measures concerned are inconsistent with Articles 6.8 (in conjunction with Annex II), 6.10, 2.4 and 6.9 of the AD Agreement.

6.8 On 30 January 1998, Cerámica Zanon filed an application for an anti-dumping investigation with the Dirección de Competencia Desleal (DCD – Directorate of Unfair Trade) of the Ministry of the Economy alleging that ceramic tiles were being exported to Argentina at dumped prices.¹⁹ On 25 September 1998, the Ministry of the Economy published a public notice announcing the initiation of an anti-dumping investigation on imports of ceramic tiles from Italy. The DCD selected the years 1997 and 1998 as the period of investigation. At initiation, as in the subsequent stages of the investigation, the DCD divided the subject product into 3 size categories (tiles of 20 x 20 cm, tiles of

¹⁵ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 14.

¹⁶ We note that the Appellate Body stated in *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products* ("*Korea – Dairy Safeguards*"): "We find no provision in the DSU or in the Agreement on Safeguards that requires a Panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence." Appellate Body Report, *Korea – Dairy Safeguards*, WT/DS98/AB/R, adopted 12 January 2000, para. 145. The Appellate Body confirmed this view in the *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*") case: "In our view a panel is not required to make a separate and specific finding in each and every instance that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case." Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122AB/R, adopted 5 April 2001, para. 134.

¹⁷ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products* ("*EC – Hormones*"), WT/DS26/AB/R – WT/DS48/AB/R, adopted 13 February 1998, para. 104.

¹⁸ Appellate Body Report, *Thailand – H-Beams*, para. 136.

¹⁹ The DCD was responsible for conducting the dumping investigation. The injury investigation was conducted separately by the Comisión Nacional de Comercio Exterior (CNCE – National Foreign Trade Commission). As the EC did not make any injury claims, no reference is made here to the injury aspects of the investigation.

30 x 30 cm and tiles of 40 x 40 cm), and determined a dumping margin specific to each size category.²⁰ For the purposes of initiation, the DCD calculated normal values for each size category by averaging several estimates of domestic prices taken from price lists and specialized publications submitted by the petitioner.²¹ In turn, the DCD determined the export price for each size category according to two sources: a unit price calculated by the petitioner on the basis of import documents, and a unit price calculated by the DCD itself on the basis of official import statistics.²²

6.9 On 30 November 1998, Assopiastrelle, the association of Italian producers of ceramic tiles, requested that the DCD limit the calculation of individual dumping margins to 4 or 5 exporters accounting for around 70 per cent of the exports of the subject product from Italy to Argentina.²³ On 12 December 1998, the DCD accepted this request.²⁴ On 10 December 1998, four Italian exporters (Ceramica Bismantova, Ceramiche Casalgrande, Ceramiche Caesar, and Marazzi Ceramiche) filed responses to the investigation questionnaire. On 24 March 1999, the DCD issued an affirmative preliminary determination.²⁵ In that determination, the DCD disregarded the questionnaire replies submitted by the above-mentioned exporters.²⁶ The DCD determined the dumping margin on the basis of the information available on the record, other than that presented by the exporters. In particular, for each size category, the DCD calculated normal value on the basis of an average domestic price drawn from price lists (i.e., the price lists submitted by the petitioner in the complaint, and supplementary price lists submitted by the petitioner and by one of the importers following initiation) and sale invoices (submitted by the petitioner following initiation).²⁷ In turn, for each size-category, the DCD calculated the export price according to the unit price derived from official import statistics.²⁸

6.10 On 23 September 1999, the DCD issued an affirmative final determination. In this determination, the DCD relied predominantly on the information available on the record, other than that submitted by the exporters. Specifically, for each size category, the DCD determined two dumping margins. Both calculations used the same export price but different normal values.²⁹ The first normal value was an average domestic price drawn from the price lists and sale invoices referred to above.³⁰ This was the same pricing information used by the DCD for the purpose of the preliminary determination.³¹ The second normal value was an average domestic price that reflected the same price lists and sales invoices, plus the pricing information submitted by the exporters, taken as a whole.³² In the latter calculation, the pricing information submitted by the exporters received a

²⁰ Final Dumping Determination, p. 43. Exhibit EC-2.

²¹ Final Dumping Determination, pages 20 –22. Exhibit EC-2. In the case of the 20 x 20 cm size-category, when calculating normal value the DCD only relied on estimates of domestic prices taken from specialized publications.

²² Final Dumping Determination, pages 30 –32. Exhibit EC-2.

²³ Exhibit EC-3A.

²⁴ Exhibit EC-3B.

²⁵ Preliminary Dumping Determination. Exhibit ARG-8.

²⁶ Preliminary Dumping Determination, p. 34. Exhibit ARG-8. Final Dumping Determination, p. 23. Exhibit EC-2.

²⁷ Final Dumping Determination, pages 23 –24 and p. 44. Exhibit EC-2. In the case of the 20 x 20 cm category, when calculating normal value the DCD only relied on estimates of domestic prices taken from price lists.

²⁸ Final Dumping Determination, pages 32-34 and p. 44. Exhibit EC-2. These import statistics referred to the period January-September 1998. We note that following the preliminary determination, the DCD sent three letters to the exporters requesting that additional public information be provided. See Exhibits ARG-7, Exhibit ARG-10 and Exhibit ARG-11.

²⁹ Final Dumping Determination, p. 45. Exhibit EC-2.

³⁰ Final Dumping Determination, pages 44 – 45. Exhibit EC-2.

³¹ Final Dumping Determination, pages 44 and 24. Exhibit EC-2.

³² Final Dumping Determination, p. 45. Exhibit EC-2.

weight of one third.³³ The DCD did not provide any justification for this approach of combining the information on normal value submitted by the exporters with the information on normal value filed by other parties.³⁴ The DCD simply stated that for its normal value calculations it was relying on the totality of the information at hand.³⁵ The final determination does not explain with clarity how the DCD calculated the export price.³⁶ However, from an annex to the Final Determination, we can conclude that the DCD calculated the export price by averaging the unit price drawn from official import statistics³⁷ and the import prices reported by two importers. The DCD did not explain why it had disregarded entirely the information submitted by the exporters with regard to the export price, even though for calculating normal value it had relied upon their data to some degree.

6.11 On 12 November 1999, the Ministry of the Economy, based upon the affirmative Final Determination regarding the existence of dumping issued by the DCD on 23 September 1999, and the affirmative Final Determination regarding the existence of injury and causality issued by the CNCE on 3 September 1999, imposed definitive anti-dumping measures on imports of ceramic tiles originating in Italy.³⁸ The measures were fixed for a period of 3 years and took the form of specific anti-dumping duties applied in variable amounts. In particular, under this system importers are subject to an anti-dumping duty equivalent to the absolute difference between the FOB export price invoiced in any one shipment and a designated “minimum export value”, also fixed in FOB terms, provided that the export price concerned is lower than the designated “minimum export value”. The measures were established according to the three size categories described above. However, the notice of imposition of definitive measures does not explain which of the two normal values calculated by the DCD in its Final Determination for each size category was retained as “minimum export value” in each case, nor how the calculated normal values were converted into “minimum export values”.³⁹

D. CLAIM 1: FACTS AVAILABLE UNDER ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

1. Arguments of the parties

6.12 The EC argues that the DCD disregarded the information concerning normal value and export price provided by the four Italian exporters included in the sample and instead relied on information from other sources such as the petitioner and importers. The EC submits that under Article 6.8 of the AD Agreement, an investigating authority may make a determination on the basis of the facts available and resort to secondary source information only where the exporter: (i) refuses access to necessary information; (ii) does not timely submit the necessary information; or (iii) significantly impedes the investigation. The EC asserts that all four exporters included in the sample provided complete and timely responses to the questionnaires and agreed to the verification of the information submitted. Nevertheless, the EC submits, the Argentine authority discarded the information and made a dumping determination on the basis of facts available.

³³ Final Dumping Determination, p. 30. Exhibit EC-2. As an exception, in the case of the 20 x 20 cm category, the pricing information submitted by the exporters received a weight of one-half, given that there was only one alternative source of information (price lists) for the calculation of normal value.

³⁴ The DCD did not explain either why it considered the normal value information submitted by the exporters as a block, instead of considering that information by individual exporter (we recall in this connection the fact that the exporters filed individual questionnaire replies).

³⁵ Final Dumping Determination, p. 30. Exhibit EC-2.

³⁶ Final Dumping Determination, p. 37. Exhibit EC-2.

³⁷ For the period October 1997-September 1998.

³⁸ Exhibit EC-1.

³⁹ It would appear that the “minimum export values” are the FOB-adjusted normal values. However, as pointed out above, this is not clear in the text of the notice of imposition of definitive measures.

6.13 According to the EC, the DCD considered the exporters' responses on an equal footing with the information from the petitioner and eventually decided to rely on the latter. The EC submits that the DCD cannot pick and choose data from different sources in the establishment of the dumping margin, since this would render Article 6.8 and Annex II totally redundant. In particular, the EC points to paragraph 7 of Annex II which, according to the EC, explicitly recognises the hierarchy between primary and secondary sources. The EC argues that the primary source of information is the normal value and export price information supplied by the exporters concerned, and only under the specific circumstances set out in Article 6.8 is an authority allowed to resort to secondary source information.

6.14 The EC further submits that the Argentine authority never informed the exporters that their responses had been rejected, nor did it explain why the information was rejected, as required by paragraph 6 of Annex II of the AD Agreement.

6.15 **Argentina** submits that the DCD was forced to resort to the use of facts available since the exporters significantly impeded the investigation and failed to provide the necessary information within a reasonable period, thereby *de facto* refusing access to necessary information. Argentina argues that all three of the conditions of Article 6.8 of the AD Agreement applied. Argentina identifies the following problems concerning the information supplied by the exporters included in the sample which, in its view, justified the use of facts available by the DCD. First, according to Argentina, the exporters did not provide sufficiently detailed non-confidential summaries for the confidential information in the questionnaire replies, thereby making it impossible for the DCD to rely on this confidential information in its public determination. Second, Argentina argues that the exporters failed to provide supporting documentation for the information they were supplying, in spite of being explicitly requested to do so by the DCD. Third, according to Argentina, the exporters failed to comply with a number of formal requirements set forth in the questionnaire, concerning translation of documents and the need to provide the information in US\$. Argentina further asserts that the information was provided late, and proved to be incomplete. For these reasons, Argentina submits, the exporters significantly impeded the investigation and refused access to information which was necessary for the DCD's final determination of dumping. The DCD was therefore entitled to resort to facts available under Article 6.8 of the AD Agreement.

6.16 Argentina asserts that the DCD applied facts available so meticulously that it was willing to take the deficient exporter information into account as far as possible, thereby in fact reducing the margin of dumping. Argentina submits that the willingness to accommodate the exporters by extending deadlines and requesting additional information to complement the questionnaire replies show that the Argentine authorities complied with the requirement of paragraph 7 of Annex II to use secondary sources with special circumspection.

6.17 Argentina submits that the DCD informed the exporters on several occasions that they had not provided the necessary information. Argentina points to the DCD's letter of 30 April 1999 in which additional elements of proof and additional public information were requested. A further letter was sent to the exporters on 22 June 1999 with a request to withdraw the request for confidential treatment of certain information or to provide more detailed summaries. A third and final letter of a similar nature was sent on 3 August 1999 with regard to cost of production information. Argentina submits that these letters were warnings that the information provided was not sufficient.⁴⁰ Argentina argues that in any case, and even if we were to find that the DCD did not comply with the requirement to inform the supplying party that its information was rejected as set forth in paragraph 6 of Annex II, this constituted "harmless error" of a procedural nature which did not cause any prejudice to the exporters.

⁴⁰ Argentina refers to pages 29 and 39 of the DCD's Final Dumping Determination (Exhibit EC-2) in this respect.

6.18 The EC refutes the procedural and substantive arguments presented by Argentina in defence of the DCD's decision to reject the exporters' information. The EC argues that the exporters fully cooperated with the DCD and provided very detailed non-confidential summaries. Moreover, the EC asserts, the exporters provided supporting documentation for the information submitted to the extent they were requested to do so by the DCD. Finally, the EC argues that the exporters' questionnaire replies were submitted in a timely manner and in accordance with domestic procedures. The EC therefore submits that the DCD was not justified in resorting to the use of best information available since none of the conditions of Article 6.8 of the AD Agreement applied.

2. Analysis by the Panel

6.19 In considering this issue, we first note that Article 6.8 of the AD Agreement governs the use by an investigating authority in an anti-dumping investigation of the "facts available". That article provides as follows:

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

6.20 It is clear to us, and both parties agree, that an investigating authority may disregard the primary source information and resort to the facts available only under the specific conditions of Article 6.8 and Annex II of the AD Agreement.⁴¹ Thus, an investigating authority may resort to the facts available only where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation.

6.21 We recall that Article 6.8 provides that "the provisions of Annex II shall be observed in the application of this paragraph". Paragraph 6 of Annex II is highly relevant to the case before us. It provides as follows:

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

Accordingly, Article 6.8, read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information.

6.22 Argentina advances four bases for its decision to disregard certain information submitted by the exporters and to resort to the use of facts available. First, Argentina asserts that the exporters failed to provide complete non-confidential summaries of confidential information submitted by them, as required by Article 6.5.1 of the AD Agreement. Second, Argentina contends that the exporters failed to provide sufficient documentation in support of the information provided in their questionnaire responses. Third, Argentina contends that the exporters failed to comply with the

⁴¹ Argentina's answers to questions from the Panel at the first meeting, question 1, p. 1; EC's first written submission, para. 47.

formal requirements of the questionnaire, such as requirements to translate materials into Spanish and to express value in US\$. Finally, Argentina contends that the exporters failed to provide requested information within a reasonable period.

6.23 The EC notes that the arguments presented by Argentina to justify the DCD's decision not to rely exclusively on information concerning normal value and export price provided by the exporters, are *ex post* justifications which are nowhere to be found in the DCD's Final Determination or in any other documents on the record. Argentina disagrees and asserts that all the arguments it is presenting are present in the DCD's determinations or other documents on the record.

6.24 Under the applicable standard of review of Article 17.6 of the AD Agreement, we are to examine whether the investigating authority properly established the facts and whether its evaluation of those facts was unbiased and objective. Our review of the measure is based on all the facts on the record, and we examined both the Final Determination⁴² as well as other documents on the record in order to determine whether the evaluation of the DCD was unbiased and objective. Upon careful examination, we find that neither in the Final Determination nor in any other document on the record does the investigating authority explain its evaluation of the information that apparently led it to the conclusion that it was allowed to disregard the exporters' information and resort to the use of facts available. While it is true that the Final Determination contains a discussion of the use of confidential information as an insufficient basis for the public determination, and the subsequent request for additional non-confidential summaries, the report does not draw any conclusions from these or other considerations. With regard to normal value, the report also mentions certain factual considerations concerning supporting documentation, or problems relating to the reliability of the information provided. But again, the DCD does not draw any conclusions from these factual considerations in its report or in any other document on the record. It does not explain anywhere how it evaluated these facts and what weight it accorded to each of these factual considerations. The DCD merely states that: "subject to the qualifications mentioned in each item with respect to the merits of the evidence submitted in general and in particular the evidence set forth in the item on normal value in Italy, it is possible to establish the following percentage margins of dumping"⁴³ and then provides the two sets of margins of dumping mentioned above, one based in part on exporters' information concerning normal value mixed with petitioner and importer information, and a second one not using any of the information provided by the exporters. In both sets, the information from the exporters concerning export price is completely disregarded.

6.25 We are mindful of the Appellate Body's findings in the case of *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*") that the procedural and due process provisions of Articles 12 and 6 should not be mistaken for the substantive provisions of the Agreement. However, it is important to recall that the legal issue before the Appellate Body was:

"whether the terms "positive evidence" and "objective examination" in Article 3.1 require that "the reasoning supporting the determination be 'formally or explicitly stated' in documents in the record of the investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final

⁴² In accordance with Article 12 of the AD Agreement this public determination of the authorities is to set out the finding on fact and law of the authority. Since we have not been asked to rule on the question whether the explanations provided in the DCD's Final Determination are sufficient under Article 12 of the AD Agreement, we will not make any findings as to whether the Final Determination as a public report complies with the requirements of Article 12 of the AD Agreement.

⁴³ Final Dumping Determination, p. 44. Exhibit EC-2.

determination”, and, further, that “the factual basis relied upon by the authorities must be discernible from those documents””. (footnotes omitted) ⁴⁴

6.26 We further note that the Appellate Body stated that:

"[...] The “facts” referred to in Articles 17.5(ii) and 17.6(i) thus embrace “all facts confidential and non-confidential”, made available to the authorities of the importing Member in conformity with the domestic procedures of that Member. Article 17.6(i) places a limitation on the panel in the circumstances defined by the Article. The aim of Article 17.6(i) is to prevent a panel from “second-guessing” a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective. Whether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of procedure and due process. These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the *Anti-Dumping Agreement*.

118. Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination”. ⁴⁵ (emphasis added)

6.27 The question before us, however, is not whether the evaluation of the authority is provided in a public document or not, but rather whether any such reasoning has been provided in any document on the record.⁴⁶ Under Article 17.6 of the AD Agreement we are to determine whether the DCD

⁴⁴ Appellate Body Report, *Thailand – H-Beams*, para. 107.

⁴⁵ Appellate Body Report, *Thailand – H-Beams*, paras. 117-118.

⁴⁶ In the past, this has also been the view of panels reviewing the determination of injury by the authorities. We refer for example to the report of the Panel in the case *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, para. 7.140. The Panel stated as follows:

"7.140 The final determination reflects no meaningful analysis of a number of the Article 3.4 factors: the Mexican sugar industry's profits, output, productivity, utilization of capacity, employment, wages, growth, or ability to raise capital.⁶¹⁰ Moreover, there is no analysis of the condition of the Mexican sugar industry during the period of investigation, or projected for the near future. It is therefore not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Yet without an understanding of the condition of the industry, it is not possible, in our view, for SECOFI to have come to a reasoned conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must, in our view, reflect the projected impact of further imports on the particular domestic industry, in light of its condition. In order to conclude that there is a threat of material injury to a domestic industry that is apparently not currently injured, despite the effects of dumped imports during the period of investigation, it is necessary to have an understanding of the current condition of the industry as a background".

⁶¹⁰There is some information concerning some of these elements reflected in the determination. However, the mere recitation of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements of Article 12.2 of the AD Agreement. Mexico also pointed to certain working papers in the administrative file which contain information on certain of the Article 3.4 factors. However, unless consideration of a factor is reflected in the final determination, we do not take cognizance of

established the facts properly and whether the evaluation performed by the DCD was unbiased and objective. In other words, we are asked to review the evaluation of the DCD made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made.⁴⁷

6.28 We find that the DCD failed to provide any evaluation of the facts on the record that could have formed the basis for its apparent decision to disregard in large part the information provided by the exporters. We consider that on this basis alone we could have reached the conclusion that the DCD failed to perform an objective and unbiased evaluation of the facts. Nevertheless, for the sake of

underlying evidence in the record. See *Korea – Resins Panel Report*, paras. 210, 212, *Argentina – Footwear Safeguard Panel Report*, para. 8.126. Moreover, as discussed further below, SECOFI's references to this information are limited to a discussion of that part of domestic production of sugar sold in the industrial market.

⁴⁷ We note that our view is similar to that of the Panel in the case of *Guatemala – Cement (II)* which stated as follows:

"8.245. Before determining whether the Ministry was justified in having recourse to the "best information available" for the purpose of calculating normal value, we note that Guatemala's justification for the Ministry's use of "best information available" does not correspond to that provided by the Ministry in its final Resolution of 17 January 1997. In that Resolution, the Ministry considered that:

the information submitted by the exporter cannot be taken into account when calculating the normal value of the product investigated **because it could not be verified** and the technical accounting evidence submitted by the exporter on 18 December 1996 (confidential information) could not replace verification of the information by the Guatemalan investigating authority, as required by Article 6.6 of the Anti-Dumping Code (emphasis supplied, footnote omitted).

Thus, the Ministry clearly based its recourse to the "best information available" on its inability to verify the data submitted by Cruz Azul. The Ministry did not, according to its final Resolution, rely on the "best information available" because of Cruz Azul's failure to provide certain sales and cost data, as alleged by Guatemala in these Panel proceedings. Even if the additional factors identified by Guatemala before the Panel could justify the use of "best information available", such *ex post* justification by Guatemala should not form part of our assessment of the conduct of the Ministry leading up to the imposition of the January 1997 definitive anti-dumping measure. The issue before us is whether the Ministry complied with the AD Agreement. In examining that issue, we shall confine ourselves to the reasoning provided by the Ministry in its determinations. We note that this approach is similar to that adopted by the panel in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, which ignored explanatory statements made in Korea's first submission to the panel that were not reflected in the Korean authorities' analysis at the time of the investigation". (footnotes omitted);

Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement (II)*"), WT/DS156/R, adopted 17 November 2000, para. 8.245. We note that the Panel in this case nevertheless continued to discuss the *ex post* justifications given by Guatemala and found that even if its findings were to have been based on those justifications, the authorities would still not have been entitled to use facts available. (Panel report, *Guatemala – Cement (II)*, para. 8.254.)

completeness, we will continue our analysis and discuss the arguments presented by Argentina in its submissions to the Panel in defence of the DCD's decision to disregard the exporters' information.

- (a) Confidentiality of the information submitted and the failure to provide non-confidential summaries

6.29 **Argentina** argues that in order to reach objective and valid conclusions, an investigating authority may base its determination on confidential information only if a sufficiently detailed summary of this information is provided in accordance with Article 6.5.1 of the AD Agreement.⁴⁸ According to Argentina, the exporters failed to provide complete non-confidential summaries. Argentina submits that the summaries provided for certain annexes of the questionnaire relating to normal value and export price information (Annexes VII-XI) were not sufficiently detailed so as to permit a reasonable understanding of the substance of the information, and could therefore not be used by the DCD as a basis for its final determination.⁴⁹ Moreover, Argentina asserts, even after the declassification of the information concerning product codes and cost of production, substantial information to determine normal value and export price remained confidential. Further, Argentina argues that the exporters failed to provide sufficiently detailed public summaries with regard to certain other essential questionnaire annexes (Annexes IV, V and VI).⁵⁰ According to Argentina, by failing to provide sufficiently detailed non-confidential summaries, the exporters withheld necessary information and significantly impeded the investigation, and the DCD was therefore allowed under Article 6.8 to resort to facts available.

6.30 The **EC** considers that the exporters fully cooperated with the investigating authority and, instead of merely providing a detailed non-confidential summary, even disclosed all of the relevant confidential information. The EC also takes issue with Argentina's argument that in the absence of a detailed non-confidential summary the authorities are not to rely on the confidential information submitted. In sum, the EC argues, the DCD was not entitled to resort to facts available for reasons relating to the confidentiality of the information supplied.

6.31 We note that, in effect, Argentina argues that an investigating authority may not base its determination on confidentially submitted exporter information. Argentina contends that unless a non-confidential summary is provided that is sufficiently detailed to permit the calculation of normal value, export price and the margin of dumping⁵¹ confidential information may not form the basis for the authority's determination.⁵² Therefore, Argentina argues, the failure to provide such a detailed non-confidential summary amounts to a refusal to provide access to information that is necessary for the authority in the determination of a dumping margin determination.

6.32 In considering this question, we first look to the text of Article 6.5 of the AD Agreement, which is the key provision with regard to the protection of confidential information. Article 6.5 provides as follows:

"6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive

⁴⁸ Argentina's answers to questions from the Panel at the first meeting, question 3, p. 15.

⁴⁹ Argentina's oral statement at the first meeting, para. 18.

⁵⁰ Argentina's first submission, paras. 19-21.

⁵¹ Argentina's answers to questions from the Panel at the first meeting, question 7, page 17.

⁵² According to Argentina, "confidentiality imposes a limit on the authority by preventing it from relying on public elements that can be invoked against the parties or third parties, particularly when the information in question is not accompanied by non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence and hence to allow the determination reached, which must be public, to be backed". Argentina's answers to questions from the Panel at the first meeting, question 3, p. 16.

advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.¹⁷

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct".¹⁸

¹⁷ Members are aware that in the territory of certain Members disclosure pursuant to a narrowly drawn protective order may be required.

¹⁸ Members agree that requests for confidentiality should not be arbitrarily rejected.

6.33 Article 6.5 of the AD Agreement thus requires an investigating authority to treat information which is by nature confidential or which is provided on a confidential basis as confidential information and prescribes that such information shall not be disclosed without specific permission of the party submitting it.

6.34 In our view, the presence in the AD Agreement of a requirement to protect confidential information indicates that investigating authorities might need to rely on such information in making the determinations required under the AD Agreement. The AD Agreement therefore contains a mechanism that allows parties to provide investigating authorities with such information for the purposes of making their determinations, while ensuring that the information is not used for other purposes. In accordance with the accepted principles of treaty interpretation, we are to give meaning to all the terms of the Agreement.⁵³ It would be contradictory to suggest that the AD Agreement creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. If that were the case, then there would be no reason for the investigating authority to seek such information in the first place.

⁵³ As the Appellate Body noted in the case of *United States – Standards for reformulated and Conventional Gasoline*, “one of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 21.

6.35 We find confirmation for this conclusion in Article 12 of the AD Agreement, which sets forth requirements regarding the contents of public notices:

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

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

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

6.36 Thus, the transparency requirement which obligates the authority to explain its determination in a public notice is subject to the need to have regard to the requirement for the protection of confidential information of Article 6.5 of the AD Agreement. Confidentiality of the information submitted therefore limits the manner in which the authority explains its decision and supports its determination in a public notice. In sum, Article 12 implies, to our mind, that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information.

6.37 We find support for our view in a recent Appellate Body Report on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*") which addressed the question of the use of confidential information by the investigating authority as a basis for its final determination. The Appellate Body stated that:

"An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the Anti-Dumping Agreement, involves the collection and assessment of both confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the Anti-Dumping Agreement must be based on the totality of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information".⁵⁴

6.38 We are aware that, for the purpose of transparency, Article 6.5.1 obliges an authority to require the parties providing confidential information to furnish non-confidential summaries which shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. We consider that this is an important element of the AD Agreement which reflects the balance struck by the Agreement between the need to protect the confidentiality of certain information, on the one hand, and the need to ensure that all parties have a full opportunity to defend their interests, on the other. However, we see nothing in Article 6.5.1, nor elsewhere in Article 6.5, that authorizes a Member to disregard confidential information solely on the basis that the non-confidential summary of that information contains insufficient detail to permit authorities to calculate normal value, export price and the margin of dumping.⁵⁵

6.39 Consistent with our view that authorities may rely on confidential information in making their determination, the purpose of the non-confidential summaries provided for in Article 6.5.1 is to inform the interested parties so as to enable them to defend their interests. We do not consider that the purpose of the non-confidential summaries is to enable the authorities to arrive at public conclusions, as Argentina contends.⁵⁶ Thus, an authority would not in our view be justified in rejecting the exporters' responses simply because the information in the non-confidential summaries was not sufficient to allow the calculation of normal value, export price, and the margin of dumping.

6.40 Turning now to the facts of this case, we consider that, even if the DCD had been entitled under Article 6.8 to resort to the facts available in a case where the exporters failed to declassify confidential information concerning normal value and export price or to provide adequate non-confidential summaries thereof, we find no factual basis on the record for Argentina's assertion before us that the exporters did not respond fully to the DCD's request for the declassification of the confidential information and failed to provide adequate non-confidential summaries thereof.

6.41 The events concerning confidentiality of the information and the requests for non-confidential summaries are summarized in the DCD's Final Determination.⁵⁷ The DCD states that for most of the information provided in their questionnaire reply the exporters requested confidentiality. In its report, the DCD further explains that on 30 April 1999 the DCD sent letters to the firms in question requesting the exporting firms to consider providing a more detailed non-confidential summary than that already provided in the questionnaire replies, to elaborate on the information supplied, or to remove the requested confidentiality that had been granted by the investigating authority so that the authority would have the information it required to reach a public conclusion to the investigation. More specifically, information on sales in the Italian market (Annex VIII) and the cost structure of the goods in the domestic Italian market (Annex X) was requested. On 4 June 1999, the exporting firms

⁵⁴ Appellate Body Report, *Thailand – H-Beams*, para. 107.

⁵⁵ We note that Article 6.5.2 of the AD Agreement specifically provides for a situation in which the authorities may disregard confidentially submitted information: in case the authorities consider that a request for confidentiality is not warranted and the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form. We note, however, that the DCD considered the request for confidential treatment was warranted and treated the information as such. Argentina has not invoked Article 6.5.2 as a justification for the DCD's rejection of the exporters' information either.

⁵⁶ Argentina's answers to questions from the Panel at the first meeting, question 5, p. 16.

⁵⁷ Final Dumping Determination, pages 25-27. Exhibit EC-2.

submitted public and confidential information concerning domestic sales of the product concerned with conversion tables that were submitted as confidential information. On 7 June 1999, Bismantova and Casalgrande further submitted as confidential information sales invoices relating to the Italian domestic market. By its letters of 22 June 1999 and 3 August 1999, the DCD requested the exporting firms to reconsider the requested confidentiality of the information concerning product codes and the production costs or else to provide a sufficiently detailed non-confidential summary, so that the authority could issue a precise determination in its final report as to the existence of an unfair trade practice. The DCD's report acknowledges that the exporting firms agreed by letters of 23 and 24 June that the product code item could be made non-confidential. On 10 August 1999, the exporting firms further agreed to remove the confidentiality of the item concerning cost of production provided that the names of the companies relating to each cost structure were not revealed.

6.42 In light of the contradictory arguments presented by the parties before us, we sought further clarification of this matter. From the parties' replies to our questions, we conclude that the record shows that the exporters requested confidential treatment for most of the information provided in the questionnaire replies. In particular, confidential treatment was requested concerning information of a more general nature concerning the home market of the exporters and their sales performance both in volume and in value terms. This information contained in the following annexes of the questionnaire reply was presented in indexed form in a non-confidential summary submitted together with the confidential questionnaire reply:⁵⁸

- the producers/exporters' home market (Annex IV);
- summary of producers/exporters' sales (physical volume) (Annex V);
- summary of producers/exporters' sales (value) (Annex VI).

6.43 In the course of the investigation, the DCD never suggested that it was dissatisfied with the information presented in indexed form, nor did it suggest that this summary was not sufficiently detailed.

6.44 The exporters also requested that the information concerning normal value, export price and cost of production be given confidential treatment. At the time of the original questionnaire reply on 10 December 1998, the exporters did not provide a meaningful non-confidential summary for the information concerning:

- list of importers (Annex III);
- exports to Argentina (Annex VII);
- sales made in the domestic (Italian) market (Annex VIII);
- exports to third countries (Annex IX);
- cost structure of products sold in the domestic market (Annex X);
- cost structure of products when exported (Annex XI).

6.45 In its preliminary determination of dumping, the DCD expressed the view that the confidentiality of the information was a limiting factor and that it implied a restricted and differential

⁵⁸ The non-confidential summaries of these annexes were submitted by Argentina as Exhibit ARG-24.

treatment of this information.⁵⁹ By letter of 30 April 1999, the DCD requested that a more detailed non-confidential summary be provided or that the request for confidential treatment with regard to these six annexes (III, VII, VIII, IX, X, XI) be waived. In a follow-up meeting of exporters with the case-handlers on 11 May 1999, it was agreed that more detailed summaries be provided for Annexes VII, VIII and IX.⁶⁰

6.46 On 4 June 1999, the exporters submitted non-confidential summaries of the information of Annexes VII, VIII and IX, in the format agreed upon at the meeting of the exporters with the case-handlers on 11 May 1999, replacing the names of the products with a code and attaching a confidential conversion table in which the codes are explained.⁶¹ On 7 and 10 June 1999, Bismantova and Casalgrande provided confidential copies of invoices of their domestic and export sales, as had been agreed during the meeting of 11 May 1999.

6.47 On 22 June 1999, the DCD sent a second letter to the exporters in which it requested that the product code information be declassified. On 24 June 1999, the exporters agreed to make the product codes public. On 3 August 1999, the DCD made an additional request to declassify or provide a more detailed summary of information on the cost structure of the domestically sold products (Annex X) and of the products when exported to Argentina (Annex XI). Such information was provided on 10 August 1999, as the exporters agreed to remove the confidentiality of the item concerning cost of production, provided that the names of the companies relating to each cost structure were not revealed.

6.48 The non-confidential summaries of Annexes IV, V and VI presented the information in indexed form, permitting a reasonable understanding of the substance of the confidential information. This appears also to have been the opinion of the investigating authority which, in the course of the investigation, never requested a more detailed public summary for these three annexes. The remainder of the confidential information (with regard to normal value and export price information as well as data concerning cost of production, Annexes VII-XI) was declassified by the exporters upon the request of the DCD and the only difference between the public and the confidential information related to the names of customers and the precise identity of the exporter whose cost of production information was being reported. We consider that such a non-confidential "summary" contained all the information the DCD would have needed to calculate normal value, export price and the margin of dumping, and therefore clearly permitted a reasonable understanding by the interested parties of the substance of the confidential information.

6.49 In conclusion, we find that following the preliminary determination the issue of non-confidential summaries was resolved by the positive replies of the exporters to the repeated requests for declassification of the information by the DCD. The facts on the record demonstrate that non-confidential summaries were provided for all the confidential information. Therefore, leaving aside the question of whether the failure to furnish non-confidential summaries which satisfy the requirements of Article 6.5.1 could in any case justify the application of the facts available under Article 6.8 of the AD Agreement, we find that, in this case, the exporters did provide such detailed non-confidential summaries and declassified most if not all of the confidential information concerning normal value and export price. Accordingly, we find that the DCD was not justified in law or in fact in disregarding in large part the information from the exporters for reasons relating to the confidentiality of the information.

⁵⁹ Preliminary Dumping Determination, pages 34-35. Exhibit ARG-8.

⁶⁰ Report of Ecolatina of the meeting with the case-handlers, Exhibit EC-10; EC's answers to questions from the Panel at the first meeting, question 6, para. 27.

⁶¹ Exhibit EC-12 provides an example. We note that the information in the confidential and non-confidential documents appears identical apart from product codes and customer codes.

6.50 We further recall our conclusion in paragraph 6.21 that Article 6.8 read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information. We find that the DCD never informed the exporters that their information was going to be rejected for this reason, as required by that provision. As discussed above, the requests for declassification of the information contained in the three letters sent by the DCD were all complied with, and the exporters could therefore legitimately have assumed that their information was not going to be rejected for reasons relating to the confidentiality of the information. Neither were the reasons for the rejection of such evidence or information given in any published determinations, as required by paragraph 6 of Annex II. We therefore find that the DCD also acted inconsistently with paragraph 6 of Annex II of the AD Agreement.

(b) Lack of documentary evidence

6.51 **Argentina** argues that the exporters failed to provide sufficient supporting documentation, in spite of being explicitly requested to do so on numerous occasions by the DCD both in the questionnaire and in subsequent letters to the exporters. According to Argentina, the exporters failed to meet even the minimum requirement of providing a statistically valid sample of invoices for their domestic sales' information.⁶² Argentina submits that the DCD was allowed to resort to facts available since the required supporting documentation which was necessary to prove the reliability of the information and which was explicitly requested, was not provided by the exporters. In addition, Argentina argues, this refusal to provide the required documentary evidence significantly impeded the investigation.

6.52 The **EC** contests Argentina's argument that the exporters failed to provide the requested supporting documentation. The EC asserts that the exporters were not requested to provide any supporting documentation until very late in the investigation. According to the EC, the exporters were informed only towards the end of the investigation that no verification visit was going to take place and that the DCD required certain exporters to supply supporting documentary evidence instead.⁶³ The EC argues that the exporters complied with the request and that therefore the DCD was not justified in resorting to facts available for failure to provide supporting documentation.

6.53 The question before us is whether the DCD was entitled to resort to facts available because of the alleged failure of the exporters to provide sufficient supporting documentation.⁶⁴ We recall our view that, under Article 6.8, resort to the facts available is authorized only where a party refuses access to, or otherwise does not provide, necessary information, or where a party significantly impeded the investigation. Thus, the question before us is whether the DCD acted consistently with Article 6.8 by resorting to facts available on the grounds that the exporters allegedly failed to provide sufficient supporting documentation.

6.54 In considering this question, we first observe that a basic obligation concerning the evidence-gathering process is for the investigating authorities to indicate to the interested parties the information they require for their determination. This obligation is set forth in Article 6.1 of the AD Agreement which states as follows:

⁶² Argentina refers in this respect to the lack of representativeness of the supporting documentation concerning domestic sales of the exporters which covered only 1.92 per cent of total domestic sales made by the sampled exporters. Final Dumping Determination, p. 29. Exhibit EC-2.

⁶³ The EC emphasizes that the exporters were willing to accept any verification visits of the DCD.

⁶⁴ We note that the facts on the record referred to by Argentina in support of its argument only relate to the lack of documentary evidence of the domestic sales information, and not with regard to the information provided by the exporters concerning export price. Nevertheless, as was noted above, the export price information supplied by the exporters was completely disregarded.

"All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question".

Article 6.1 of the AD Agreement thus requires that interested parties be given notice of the information which the authorities require. In our view, it follows that, independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.

6.55 This consideration is particularly relevant to the question of whether an authority is justified in resorting to the use of facts available under Article 6.8 of the AD Agreement. Paragraph 1 of Annex II of the AD Agreement on the "Use of Best Information Available in Terms of Paragraph 8 of Article 6" reiterates the obligation of Article 6.1. It states that:

"1. As soon as possible after the initiation of the investigation, the investigating authorities should *specify in detail the information required* from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that *if information is not supplied within a reasonable time*, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry". (emphasis added).

Thus, the first sentence of paragraph 1 requires the investigating authority to "specify in detail the information required", while the second sentence requires it to inform interested parties that, if information is not supplied within a reasonable time, the authorities may make determinations on the basis of the facts available. In our view, the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.

6.56 We recall that the documentary evidence in this case appears to have been required in order to verify the information supplied by the exporters in their questionnaire replies since the DCD decided not to conduct any on-the-spot verification in Italy. In the context of this factual situation, we find further confirmation for the view that an investigating authority may not resort to facts available due to failure of a party to provide information that was not clearly requested in Articles 6.6 and 6.7 of the AD Agreement, which relate to the question of verification of information. They provide as follows:

"6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants".

6.57 Article 6.6 of the AD Agreement thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying. We note that in this case, all four exporters stated that they were willing to accept any kind of verification visits. The DCD decided however not to conduct such an on-the spot-verification.⁶⁵ We believe that if no on-the-spot verification is going to take place but certain documents are required for verification purposes, the authorities should in a similar manner inform the exporters of the nature of the information for which they require such evidence and of any further documents they require.

6.58 For the foregoing reasons, we conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided unless the investigating authority has clearly requested that the party provide such supporting documentation.

6.59 In light of this conclusion, the first question we address is whether the DCD clearly informed the exporters that they were required to submit supporting documentation and the kind of information requested. We examined the requests to provide supporting documentation in the questionnaire on which Argentina bases its argument. We find that these requests are very vague and general in nature and are made in the general introductory part of the questionnaire setting out the goals and objectives of the questionnaire and in the section entitled "General Instructions".

6.60 In the section on goals and objectives, the questionnaire indicates that "the producer/exporter shall be required to reply to this questionnaire as precisely as possible, attaching supporting documents for its replies, or in case this is not possible, indicating the source of the information"⁶⁶ Similarly, the general instructions of the questionnaire state that: "1. The exporter is required to mention on each of the pages it presents, the case number, and is to reply to all questions in a detailed manner and to give information with regard to the sources used, attaching as a necessary condition to back up the veracity of the source, the corresponding documentation." A final reference to the need to provide supporting documentation is found in Section B of the questionnaire which relates to export price information. It requires the party supplying the information to provide "that information to be provided that assists the authority in getting a better understanding of the transaction be it through a buy order, sales contracts, commercial invoices, credit notes, ..., etc."⁶⁷

6.61 We note that point 7 of the general instructions section of the questionnaire also provides that all information may be subject to verification by the authority. In this respect, the questionnaire provides that in the case where such verification takes place the exporters will be informed which documentation it will have to put at the disposal of the verification team. The exporters are requested to express their willingness to accept such verification visits. All exporters agreed to such verification visits.⁶⁸

⁶⁵ There does not exist a requirement in the Agreement to carry out investigations in the territory of other Members for verification purposes. Article 6.7 of the AD Agreement merely provides for this possibility. While such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfill its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based.

⁶⁶ We note that the questionnaire thus actually allowed exporters the choice of either providing supporting documentation or identifying the sources of the data reported (presumably to facilitate verification, see ARG-5, p. 2). We are aware of at least one exporter, Casalgrande, which complied with the second possibility, as it identified in its questionnaire response the sources of the information reported (Exhibit EC-4, pp. 16-17).

⁶⁷ Exhibit ARG-5.

⁶⁸ Exhibit ARG-5, p. 4.

6.62 At the time of the preliminary determination, no supporting documentation (e.g. invoices, orders, price lists) had been submitted by the exporters. After the preliminary determination the DCD sent a letter to the exporting firms in the context of the above discussed need for additional public information. This letter of 30 April 1999⁶⁹ also mentions the question of supporting documents. It states that: "We therefore request the cooperation of the firm you represent, since it is of the utmost importance for the analysis being conducted by the DCD based on the inclusion of fresh evidence or the adaptation of the information already in the record in order to ensure that the implementing authority has information that enables it to reach a public conclusion on the matter at issue."⁷⁰

6.63 Argentina refers to two other letters of 22 June 1999⁷¹ and 3 August 1999⁷² which the DCD sent to the exporters with a request to declassify certain information in support of its argument that on several occasions throughout the investigation the DCD requested to be provided with additional supporting documents. We find however that these two later letters do not in any way refer to the need for supporting documents at all. They are requests for declassification.

6.64 The EC states that during the 11 May 1999 meeting with the case-handlers, the exporters were for the first time informed that the DCD was not going to conduct an on-the-spot verification. At that meeting, the EC asserts, the exporters or at least the two major exporters, Casalgrande and Bismantova, were requested to provide copies of the invoices covering an important number of sales.⁷³ The EC argues that, in response to this request, the exporters concerned submitted copies of invoices covering approximately 50 per cent of the sales in Italy and to Argentina and third countries.⁷⁴ Argentina, however, submits that the DCD, in its final determination, found that the supporting documentation provided by the four exporting companies with regard to the information supplied concerning domestic sales of the product concerned only covered about 1.92 per cent of the total volume of domestic sales made by these four sampled exporters. We requested further clarification from Argentina on how the DCD calculated this figure in light of the statement of the exporters that they were submitting a large number of sales invoices. Argentina argued that for reasons relating to the confidentiality of the information it was unable to provide the numerical calculations made.⁷⁵ After the submission of the invoices by the two largest Italian exporters, the DCD did not make any further request for additional supporting documentation.

⁶⁹ Exhibit ARG-7.

⁷⁰ Exhibit ARG-7.

⁷¹ Exhibit ARG-10.

⁷² Exhibit ARG-11.

⁷³ EC's second written submission, para. 39. According to the report of this meeting by the representative of the Italian exporters in Argentina, Ecolatina (Exhibit EC-10), the following request was made: *"Additionally, this information must cover an "important" part of total sales in the domestic market (you said 50 per cent – I don't know, I guess that is largely enough), the coverage must be September 1997 – October 1998, and we have to present invoices (with confidential status) supporting this non-confidential version"*.

⁷⁴ The DCD's Final Dumping Determination also reports that Bismantova and Casalgrande, on 7 June 1999 and 10 June 1999 respectively, submitted copies of invoices concerning sales in the domestic market as well as export sales. Final Dumping Determination, pages 26, 36. Exhibit EC-2. We note that the submission of the invoices is mentioned in the DCD report as part of the account of events concerning confidential information and the requests for more detailed non-confidential summaries or the declassification of the information.

⁷⁵ Argentina's answers to questions from the panel at the second meeting, question 8, p. 4. Argentina replied that "as already stated on several occasions, the implementing authority interrelated the information available in the questionnaires provided in the course of the proceedings, and concluded that the documentation supplied covered that percentage in relation to total sales on the Italian domestic market. Unfortunately, this is a good example of the limitations facing the implementing authority as a result of the request for confidentiality of the information provided. In this case, the Argentine authority is limited in the reply it can give to the question, in that it cannot reveal the numerical calculation made, but for the purposes of that calculation, it considered the information corresponding to the aggregate total amount of sales reported for the Italian domestic market by the

6.65 We note that the DCD in its Final Determination stated that:

"The sample documentation relating to sales on the Italian domestic market supplied by all of the manufacturing export companies concerned in the case – and as affirmed at the time of their participation in the proceedings by the National Association of Italian Ceramic Tile and Refractories Manufacturers (Assopiastrelle), of which these firms are members, they are major representatives of the Italian *porcellanato* production market – covers no more than approximately 1.92 per cent of the physical volume (m²) and 1.35 per cent of the total estimated value (Italian lire) of sales in the domestic market according to the information duly supplied".

This statement of fact in the Final Determination forms the basis for Argentina's argument that the DCD was justified to resort to the facts available under Article 6.8. We note that the DCD did not draw any conclusions from this factual consideration concerning the representativeness of the normal value information submitted by the exporters.⁷⁶

6.66 In light of the ambiguity of the questionnaire regarding documentary evidence and given that the verification methodology to be used was not clearly indicated, some precision by the DCD as to what supporting documentation was expected from the exporters was necessary. We are of the view that the very general references to the need to provide supporting documentation in the introductory section of the questionnaire did not meet this requirement. Neither do we consider the one general reference in the letter of 30 April 1999 to the need for new probative elements expressed in the context of a request to declassify certain information or provide more detailed public summaries thereof to be a sufficient notice to the exporters to provide documentary evidence. Therefore, and especially in light of the complex nature of the kind of information that might be needed to demonstrate the accuracy of certain information, we do not consider that any clear request for supporting documentation was made to the exporters. We further do not believe that, independent of any clear request, an interested party is required to provide any particular number of documents to support the information supplied. At the meeting of 11 May 1999, the case-handlers requested at least some exporters to provide certain supporting documentation. The exporters concerned supplied the requested documentation and were never informed by the DCD that the documentation provided was insufficient or that their understanding of the DCD's request was incorrect. We therefore are unable to accept Argentina's argument that the exporters significantly impeded the investigation or refused access to necessary information by not providing more supporting documentation. We find that the DCD was not justified in disregarding in large part the information supplied by the exporters for this reason.

6.67 We further recall our conclusion in paragraph 6.21 that Article 6.8 read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information. In this case, the exporters were never informed that in the absence of a certain number of supporting documents their information was going to be

four firms in relation to the total obtained from the documentation contributed by those firms during the proceedings".

⁷⁶ In its second submission to the Panel, Argentina summarized its conclusion of this paragraph of the DCD's report in the following manner: "We repeat that upon examining the supporting documentation – submitted late and at the DCD's specific request – the authority found that the firms making up the sample proposed by Assopiastrelle itself only represented approximately 1.92 per cent of the physical volume (m²) and 1.35 per cent of the total estimated value (in Italian lire) of sales on the domestic market." Argentina's second written submission to the Panel, para. 25. Other explanations have been offered by Argentina in the course of the proceedings. In light of our finding on this issue in para. 6.65, we believe it is only necessary to understand that the DCD was not satisfied as to the completeness of the responses regarding sales in the Italian market.

rejected, much less were they provided an opportunity to offer further explanations. Nor were the reasons for the rejection of such evidence or information given in any published determinations. We therefore find that the DCD also acted inconsistently with paragraph 6 of Annex II of the AD Agreement.

(c) Failure to comply with formal requirements of the questionnaire

6.68 **Argentina** argues that certain exporters provided information in Italian lire and not in US\$ as requested by the questionnaire. Argentina further submits that three of the four exporters⁷⁷ failed to provide a Spanish translation of their balance sheets while the exporters were clearly informed both in the general instructions of the questionnaire and in the follow-up letter of 30 April 1999 that all their information needed to be translated into Spanish in order for it to be taken into consideration. Argentina submits that the unjustified refusals to provide the information in US\$ and properly translated into Spanish significantly impeded the investigation. Finally, Argentina argues that two exporters, Caesar and Marazzi, refused to provide the requested information with regard to exports to third countries (Annex IX of the questionnaire), and that Marazzi also failed to provide any information with regard to the cost structure for the exported goods (Annex XI). Argentina submits that these firms thus refused to provide access to necessary information.

6.69 The **EC** argues that the exporters complied with all the formal requirements of the questionnaire. The EC acknowledges that certain individual exporters did not provide a translation of their balance sheets, but argues that this constituted a minor omission which could not have justified disregarding all of the exporters' information.

6.70 The facts on the record show that in fact only one exporting company, Bismantova, provided certain information in one annex of the questionnaire reply in Italian lire rather than in US\$. This exporting company moreover provided the relevant exchange rates together with the information. The fact that this company did not provide the information directly in US\$ as required, according to the questionnaire's instructions, in our view, does not amount to significantly impeding the investigation, nor did it constitute in this case a failure to provide necessary information.

6.71 We further consider that in general it is important that translations be provided whenever requested. However, the facts of this case indicate that what was not translated were certain lines of the balance sheets of three of the four exporting companies. We do not believe that this absence of translation of a balance sheet significantly impeded the investigation. We note that the translation which was provided by one of the exporting companies of its balance sheet was accepted while it contained only a minor translation from Italian into Spanish of two terms of the balance sheet.⁷⁸ We do not believe that the DCD was justified in disregarding the exporters' information because of this minor omission on the part of the exporters to translate certain parts of the balance sheets, as this did not significantly impede the investigation.⁷⁹

6.72 With regard to the two exporters which did not provide information under certain of the questionnaire's annexes, we note that the questionnaire explicitly allowed the exporters not to provide such information if there existed sufficient domestic sales made in the ordinary course of trade. The two exporting firms concerned, Caesar and Marazzi, expressly relied on this possibility.⁸⁰ It appears that Marazzi did not refuse to provide information under Annex XI either (cost of production for the subject product when exported), but rather it replied that the costs for domestically sold and exported

⁷⁷ Marazzi is the only exporter that did provide such a translation of its balance sheet.

⁷⁸ Exhibit EC-13.

⁷⁹ We note that most of the information which the DCD used as the facts available also lacked any translations, which did not prevent the DCD from using this information as a basis for its determination.

⁸⁰ Preliminary Dumping Determination, pages 15 and 18. Exhibit ARG-8

products did not differ, except for differences in selling expenses.⁸¹ Based on the facts of this case, we find that an unbiased and objective evaluation of these facts would have led the authority to the conclusion that these omissions do not amount to a refusal to provide necessary information, nor that the exporters concerned can be considered to have significantly impeded the investigation.⁸²

6.73 We therefore find that the DCD was not justified in disregarding the exporters' information under Article 6.8 of the AD Agreement for reasons relating to the failure to comply with certain formal requirements.

6.74 We further recall our conclusion that Article 6.8 read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information. We find that the DCD never informed the exporters that their information would be rejected for having failed to comply with the formal requirements of the questionnaire, much less provided an opportunity to provide further explanations. Nor were the reasons for the rejection of such evidence or information given in any published determinations. We therefore find that the DCD also acted inconsistently with paragraph 6 of Annex II of the AD Agreement.

(d) Late submission of the information

6.75 **Argentina** argues that the exporters failed to provide the requested information within a reasonable period. Argentina asserts that, due to the many requests for extension of deadlines by the exporters, information which originally was supposed to be given by 30 November 1998 was submitted as late as 10 August 1999.⁸³ Argentina submits that the late submission of information towards the end of the investigation constituted a failure to provide the information within a reasonable period which significantly impeded the investigation and entitled the DCD to resort to facts available under Article 6.8 of the AD Agreement.

6.76 The **EC** submits that the exporters supplied the information in a timely manner. According to the EC, additional information was submitted late into the investigation because of the repeated requests for additional public information from the DCD. The EC stresses that in fact no new factual data was submitted, but rather confidential information provided at the time of the questionnaire response was declassified and supplied to the DCD together with supporting documentary evidence that was requested.

⁸¹ Preliminary Dumping Determination, p. 18. Exhibit ARG-8.

⁸² We note that, in its last set of answers to questions from the Panel, Argentina for the first time appeared to argue that the information supplied by the exporters was not authenticated as allegedly required by the questionnaire. We note that there does not exist a factual basis for this argument in the record. In any case, it appears that Argentina itself does not consider that the DCD rejected the information for this reason, since it argues that "in spite of" this failure to have the information authenticated, the DCD proceeded to cross-check the information supplied. Argentina's answers to questions from the Panel at the second meeting, question 1.

⁸³ We note that in its first written submission, Argentina argued that the submission of the questionnaire replies by the exporters was late by one day. In its answers to questions from the Panel at the first meeting (question 8, p. 17) Argentina admitted that in fact the questionnaire replies were submitted within the grace period provided by administrative Decree No. 1759/72, as amended by Decree 1883/1991. Article 25 of the Argentine Decree 1759/72, as amended by Decree 1883/1991 provides that information supplied within two hours of the day following the expiration of the deadline is considered to have been submitted in a timely fashion. Exhibit EC-8. The deadline for the questionnaire replies was 9 December 1998. The exporters supplied their questionnaire responses in the morning of 10 December 1998, and thus within the grace period provided in the Decree mentioned above.

6.77 We find that, according to the case record, the exporters requested an extension of the deadline for the submission of information on two occasions only. Both times the authority granted the request. An extension of the deadline for the filing of the questionnaire reply was requested from 30 November 1998 to 9 December 1998. This request was granted and the replies were submitted within the deadline during the morning of 10 December 1998.⁸⁴ On 30 April 1999, the DCD sent a letter to the exporters requesting additional public information to be provided within 15 days. The exporters requested an extension of the deadline on 14 May 1999. The request was granted and the information was submitted before the new deadline of 7 June 1999. Additional requests for declassification of the information made on 22 June and 3 August were almost immediately complied with.

6.78 In sum, all of the information was submitted in a timely manner. Additional requests for information implied that additional information, consisting of non-confidential summaries as well as supporting documentation, would of course be submitted long after the deadline for the submission of the questionnaire replies. In these circumstances, the exporters are not responsible for these additional requests for information. Therefore, the facts do not support Argentina's argument that the exporters were uncooperative and failed to submit the information within a reasonable period. We therefore find that the DCD was not justified in disregarding the exporters' information under Article 6.8 on this basis.

6.79 We further recall our conclusion that Article 6.8 read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information. We find that the DCD never informed the exporters that their information would be rejected for having failed to provide the information within a reasonable period, much less provided an opportunity to provide further explanations. Nor were the reasons for the rejection of such evidence or information given in any published determinations. We therefore find that the DCD also acted inconsistently with paragraph 6 of Annex II of the AD Agreement.

3. Conclusion

6.80 For the foregoing reasons, we find that the DCD acted inconsistently with Article 6.8 of the AD Agreement when it disregarded completely the exporters' information concerning export price and disregarded in large part the exporters' normal value information by mixing the primary source exporters' information with information from secondary sources such as the petitioner, importers and official statistics. We further find that the DCD acted inconsistently with Article 6.8 read in conjunction with paragraph 6 of Annex II, in that the DCD (i) did not inform the exporters why certain information supplied by them was not accepted (ii) did not provide the exporters an opportunity to provide further explanations within a reasonable period; and (iii) did not give, in any published determinations, the reasons for the rejection of evidence or information.

6.81 We are conscious that our finding that the DCD incorrectly disregarded the exporter's information and resorted to facts available in a manner inconsistent with Article 6.8 of the AD Agreement casts doubt on the entire final determination of dumping. In this respect, we recall the statements of the Appellate Body on "judicial economy" in the dispute on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States – Shirts and Blouses*") that "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."⁸⁵ Nevertheless, as the Appellate Body stated in a subsequent

⁸⁴ See footnote 83.

⁸⁵ Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States – Shirts and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, p. 20.

dispute on *Australia – Measures Affecting the Importation of Salmon*, “[T]o provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings ‘in order to ensure effective resolution of disputes to the benefit of all Members’.”⁸⁶ Mindful of the Appellate Body’s comments in this respect, we will continue with our analysis of the other claims made before us “because it could prove of utility depending on any appeal”⁸⁷ and in order “to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance with those recommendations and rulings”⁸⁸.

E. CLAIM 2: ARTICLE 6.10: REQUIREMENT TO CALCULATE INDIVIDUAL MARGINS OF DUMPING FOR ALL EXPORTERS INCLUDED IN THE SAMPLE

1. Arguments of the parties

6.82 The EC submits that the DCD did not determine an individual margin of dumping for each of the four exporters included in the sample, as required by Article 6.10 of the AD Agreement, but rather calculated dumping margins for each of the three size categories of *porcellanato* and imposed the same duty rate on all imports irrespective of the exporter concerned. The EC argues that Article 6.10 of the AD Agreement requires that as a rule an individual margin be established for each exporter or, in the case this is not practicable because of the large number of exporters for example, an individual margin is to be established for each exporter included in the sample. The EC also points to Article 9.4 in support of its argument that an individual margin of dumping should have been established for each of the four Italian exporters that formed part of the sample.⁸⁹

6.83 **Argentina** argues that the information provided by the four exporters included in the sample was not sufficient to allow an individual dumping margin to be established for each exporter. Argentina submits that the EC wrongly presupposes that it was possible to determine an individual margin for all four exporters included in the sample. Argentina recalls that the exporters themselves through their representative organization, Assopiastrelle, requested that the investigation be conducted on the basis of a sample to facilitate the task of the authority. However, Argentina submits, it proved impossible for the DCD to determine an individual dumping margin for each of the four exporters. According to Argentina, two producers, Caesar and Marazzi, did not provide price information for tiles in the size categories 30 x 30 cm and 20 x 20 cm. Argentina alleges that one exporter, Marazzi, did not even submit information with regard to the third size category (40 x 40 cm) either.⁹⁰ A third

⁸⁶ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 223.

⁸⁷ Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea (“United States – Korea Steel”)*, WT/DS179/R, adopted 1 February 2001, para. 5.11.

⁸⁸ Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia (“United States – Lamb Safeguards”)*, WT/DS177/AB/R and WT/DS178/AB/R, adopted 16 May 2001, para. 194.

⁸⁹ Article 9.4 of the AD Agreement relates to the determination of an anti-dumping duty for those exporters not included in the sample, which shall not exceed “the weighted average margin of dumping established with respect to the selected exporters or producers”. The EC argues that this suggests that for those exporters included in the sample individual margins shall be established which may then be averaged in order to determine the rate for the exporters outside the sample. In other words, the EC submits that Article 9.4 and its reference to weighted averages and *de minimis* margins presupposes the determination of individual margins for exporters included in the sample.

⁹⁰ Argentina notes that the exporters replied to the questionnaires without making any objection concerning the use of size as the determining parameter and they should therefore have provided information with regard to all size categories, as requested.

producer, Bismantova, reported that 56 per cent of its domestic sales for tiles in the category 30 x 30 cm and up to 93 per cent of the domestic sales in the 40 x 40 cm category were made to a related company, Rondine.

6.84 Argentina submits that the use of a sample in this case was justified in light of the large number of exporters. However, Argentina argues, the sample which was proposed by the exporters' association, Assopiastrelle, and accepted by the DCD, did not serve its purpose since the information provided by the exporters in the sample was deficient and insufficient. According to Argentina, the requirement to determine an individual dumping margin has to be read in light of the requirement under Article 2 of the AD Agreement to determine a dumping margin for the product subject to the investigation. Argentina submits that the product under investigation was ceramic tiles in all their sizes, and the DCD from the outset calculated a dumping margin for each of the sizes that together formed the subject product (20 x 20 cm, 30 x 30 cm, 40 x 40 cm). According to Argentina, the exporters accepted this segmentation as they replied to the questionnaires without any objections in this respect. However, the exporters included in the sample failed to provide the necessary documents that would allow the DCD to determine such product/size specific margins. Argentina asserts that the DCD was therefore justified in looking for an alternative to supplement the missing necessary information. Argentina argues that in any case, even if the Panel were to find that the DCD acted inconsistently with Article 6.10 by not determining an individual margin of dumping for each exporter, this constituted a harmless error.

6.85 The EC takes issue with Argentina's argument that it was not practicably possible to determine an individual margin of dumping for each of the four exporters.⁹¹ The EC argues that Argentina cannot, for example, claim that no margin could be established because information was not presented for all size categories if the exporter in question only exports tiles of a certain size (for example, 40 x 40 cm). Finally, the EC submits, it is not because a number of sales are made to related parties that no margin can be established. According to the EC, under the facts of this case, nothing prevented the DCD from calculating an individual margin of dumping for each of the exporters included in the sample, as required by Article 6.10 of the AD Agreement.

2. Analysis by the Panel

6.86 The DCD's Final Determination establishes a dumping margin for three size categories of *porcellanato* irrespective of the exporter.⁹² According to the EC, the DCD thus failed to establish a dumping margin for each investigated exporter individually, as is required under Article 6.10 of the AD Agreement.

6.87 Article 6.10 provides as follows:

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

⁹¹ The EC notes that in the case of Casalgrande no explanation is provided as to why this was not possible.

⁹² Similarly, the *Resolución* which imposes the final anti-dumping duty also sets a minimum FOB export price for each size of ceramic tiles imported from Italy irrespective of the exporter concerned.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged". (emphasis added)

6.88 We consider also relevant in this respect Article 9.4 of the AD Agreement which provides as follows:

"When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6". (emphasis added)

6.89 The first sentence of Article 6.10 of the AD Agreement sets forth a general rule that the authorities determine an individual margin of dumping for each known exporter or producer of the product under investigation. The second sentence of Article 6.10 permits an investigating authority to deviate from the general rule by permitting the investigating authorities to "limit their examination either to a reasonable number of interested parties or products by using samples . . . or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated", in cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable. Article 9.4 provides that, where the authorities have limited their examination in accordance with the second sentence of Article 6.10, the anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed an amount calculated on the basis of the margins of dumping for exporters or producers that were included in the examination. Finally, in cases where the authorities have limited their examination under Article 6.10, subparagraph 2 of Article 6.10 provides that the authorities shall nevertheless determine an individual margin of dumping for any exporter not initially selected who submits the necessary information in time for that information to be considered, except where the number of exporters is so large that individual examination would be unduly burdensome to the authorities and prevent timely completion of the investigation.

6.90 In our view, the general rule in the first sentence of Article 6.10, that individual margins of dumping be determined for each known exporter or producer of the product under investigation, is fully applicable to exporters who are selected for examination under the second sentence of Article 6.10. While the second sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters or producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that are examined. To the contrary, Article 9.4 provides that, where the authorities limit their examination under Article 6.10, the anti-dumping duty for exporters or producers that are not examined shall not exceed a level determined on the basis of the results of the examination of those exporters or producers that were examined. That Article 9.4 does not provide any methodology for determining the level of duties applicable to exporters or producers that are examined in our view confirms that the general rule requiring individual margins remains applicable to those exporters or producers. We find further confirmation in Article 6.10.2, which requires that, in general, an individual margin of dumping must be calculated even for the producers/exporters not initially included in the sample, if they provide the necessary information and if to do so is not unduly burdensome. If even producers not included in the original sample are entitled to an individual margin calculation, then it follows that producers that were included in the original sample are so entitled as well.⁹³ Indeed, the parties appear to agree that Article 6.10 of the AD Agreement requires that as a rule an individual margin of dumping has to be determined for each exporter with regard to the product subject to investigation.⁹⁴

6.91 Argentina argues, however, that, for substantive reasons relating to the reliability of the information as well as the absence of information with regard to sales by certain exporters included in the sample, it was simply not possible for the DCD to determine a margin of dumping for each exporter individually.

6.92 In considering Argentina's assertion, we first note that there is no explanation in the DCD's Final Determination or in any other document on the record as to why, in this case, it was not possible to determine an individual margin for each exporter that was investigated. We consider that the DCD failed to provide any evaluation of the facts on the record that could have formed the basis for such a conclusion. We consider that on this basis alone we could have concluded that the DCD failed to perform an objective and unbiased evaluation of the facts which, under the applicable standard of review, we are asked to review. Nevertheless, for the sake of completeness, we will continue our analysis and address the arguments presented by the parties in their submissions to the Panel.

6.93 We first observe that neither the DCD in its Final Determination nor Argentina in its submissions to the Panel provides any reasons why, with regard to the information provided by one exporter, Casalgrande, for which no discrepancies were noted, it was not possible to determine an individual margin of dumping.

⁹³ As the Panel in *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (“*EC – Bed Linen*”) stated:

"the fact that Article 2.4.2 refers to the existence of margins of dumping in the plural is a general statement, taking account of the fact that, as is made clear in Article 6.10 and 9 of the AD Agreement, individual dumping margins are determined for each producer or exporter under investigation, and for each product under investigation" (emphasis added). Panel Report, *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (“*EC – Bed Linen*”) *EC – Bed Linen*, WT/DS141/R, adopted as reversed in part by WT/DS141/AB/R, 12 March 2001, para. 6.118.

⁹⁴ Argentina's answers to questions from the Panel at the first meeting, question 17; EC's answers to questions from the Panel at the first meeting, question 17.

6.94 We examined the arguments presented by Argentina with regard to the other three exporters included in the sample, Bismantova, Caesar and Marazzi. We find that there were no valid reasons for not determining an individual margin of dumping under Article 6.10 for each of these companies for the product subject to the investigation. Argentina argues that in the case of Bismantova it was not possible to determine an individual margin of dumping because, for a certain size of tiles, up to 93 per cent of its domestic sales were made to a related party. Caesar, as the EC acknowledges, only reported domestic sales information concerning tiles of the size 40 x 40 cm, and did not provide any data on domestic sales of tiles of the two remaining size categories, 20 x 20 cm and 30 x 30 cm. Argentina submits that it was for this reason that the DCD could not determine an exporter-specific margin of dumping for this exporter. According to the DCD's Final Determination, a third exporter, Marazzi, only provided lists of average prices without specifying total volumes sold or the total value of the sales. It was therefore not possible to determine an individual margin of dumping for this exporter either, Argentina contends.

6.95 We understand Argentina's argument to be that, in the absence of reliable and useful information with regard to each of the size categories of the product subject of the investigation, no individual margin of dumping could be calculated for each exporter for the product under investigation, i.e. ceramic tiles in all sizes.

6.96 We consider however that while it may have been the case that Bismantova made an important part of its sales to a related party, this should not have impeded the DCD from determining an individual margin of dumping for this exporter. The issue of domestic sales to a related party may lead, in certain cases, to the use of a constructed normal value or third country export price under Article 2 of the AD Agreement.⁹⁵ The question of sufficient domestic sales in the ordinary course of trade does not, in our view, stand in the way of an individual margin of dumping determination under Article 6.10 of the AD Agreement, be this based on normal value information consisting of prices of sales made in the home market, on third country export prices, or a construction of the normal value as defined in Article 2.2 of the AD Agreement.⁹⁶ The basis of the normal value determination has no bearing on the ability to calculate an individual dumping margin for the producer whose normal value is in question.

6.97 With regard to the two other exporting firms, Caesar and Marazzi, we also fail to see why it was not possible for the DCD to determine an individual margin of dumping for each exporter. Based on the facts on the record, we understand that Caesar only exports tiles of the size 40 x 40 cm to Argentina and therefore only reported similar size domestic sales. In accordance with the DCD's own analysis concerning the requirement of making a fair comparison between normal value and export price by adjusting for size, it appears the DCD would have had to base its determination in any event on the information provided with regard to this one size category of 40 x 40 cm. Marazzi provided lists of average prices without any specification of the total amount sold or the total value of the sales. The DCD does not explain how this impeded it from determining an exporter-specific margin of dumping for Marazzi. If the DCD was dissatisfied with the information provided, it could have requested the exporter to provide additional and more specific information. It chose not to do so.

⁹⁵ This is not to say that in this case we believe there existed such a need for the use of third country export price or to construct the normal value under Article 2.2.

⁹⁶ We believe that the provisions of Article 2 concerning the determination of dumping and Article 6.8 AD Agreement concerning facts available are intended to allow the investigating authority to complete the data with regard to a particular exporter in order to determine a dumping margin in case the information provided is unreliable or necessary information is simply not provided. It is precisely because of Articles 2 and 6.8, among others, that it will remain possible to determine an individual margin of dumping for each exporter on the basis of facts.

6.98 In effect, Argentina's argument in defence of the DCD's failure to determine an individual margin of dumping for all three exporters seems to be based on the fact that the DCD did not possess sufficient information for each size category to determine a separate margin of dumping for each producer for each of the size categories. The product subject to investigation was ceramic tiles "en todas sus medidas", i.e. in all sizes, or in other words, irrespective of size, and not ceramic tiles of 20 x 20 cm, 30 x 30 cm and 40 x 40 cm.⁹⁷ As a consequence, the DCD was required to determine an individual margin of dumping for each exporter with regard to this product as a whole and not just a section of the product or a certain size category. As the Appellate Body stated in the *EC – Bed Linen* case:

"Having defined the product as it did, the EC was bound to treat that product consistently thereafter in accordance with that definition. ... We see nothing in Article 2.4.2 or any other provision of the AD Agreement that provides for the establishment of "the existence of margins of dumping" for types or models of the product under investigation. ... Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the product under investigation as a whole".⁹⁸

6.99 In our view, it is important not to confuse the usefulness of grouping (by size, model, type) for the purpose of making a fair comparison under Article 2.4 and the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole. We consider that the use of types or models is a valid method of ensuring a fair comparison between normal value and export price under Article 2.4. We see nothing in the Appellate Body Report in the *EC – Bed Linen* case that suggests otherwise so long as the investigating authority goes on to determine a margin of dumping for the product as a whole. The product under investigation in the case before us is ceramic tiles of any size, and the authority was thus required to establish an individual dumping margin for each exporter for this product as a whole and not for each size category. Nor was the DCD entitled to invoke any problems it encountered with regard to the use of such models, such as lack of information concerning a certain size category, as a reason for not determining an individual margin of dumping for the product as a whole, in this case ceramic floor tiles of any size from Italy. Therefore, even if the DCD was entitled to disregard data concerning certain size categories for one reason or another, this should not have stopped the DCD from determining an individual margin of dumping for each of the exporters included in the sample for the product subject to the investigation.

6.100 Even if Argentina had been entitled to determine margins of dumping with respect to each of three sizes of tile rather than with respect to the product subject to investigation as a whole, we believe the DCD was not justified in not determining an individual margin for each exporter for each of the three sizes of tiles. In our view, even if the DCD were to have doubted the reliability of the information for one or two size categories in the case of Bismantova because of the significant quantity of sales made to a related party, this should not have impeded the DCD from determining an exporter specific margin of dumping for at least the one or two remaining size categories for which the DCD did not identify any problems. Similarly, in the case of Caesar, which only exported one size of tiles, this exporter should have at least received an individual margin for that size based on the information submitted.

3. Conclusion

6.101 We conclude that the DCD should have determined an individual margin of dumping for each of the four exporters included in the sample. Our conclusion holds, whether the product as defined by the DCD was in fact ceramic tiles in all their sizes or whether it consisted of three different categories

⁹⁷ Final Dumping Determination, p. 2. Exhibit EC-2.

⁹⁸ Appellate Body Report, *EC – Bed Linen*, para. 53.

of tiles distinguished from each other on the basis of size. We therefore find that the DCD acted inconsistently with Article 6.10 of the AD Agreement by not determining an individual margin of dumping for each of the four exporters included in the sample.

6.102 Argentina raises as a final defence the concept of harmless error, and argues that the EC failed to demonstrate that the Italian exporters were prejudiced by the failure to determine an individual margin of dumping. In its answers to questions from the Panel, Argentina asserts that the concept of harmless error – i.e., an error that does not cause injury or affect the rights of one of the parties⁹⁹ – has been accepted in WTO law. Argentina refers in particular to the Report of the Appellate Body in the *Korea – Dairy Safeguards* case.¹⁰⁰

6.103 We note, however, that the Appellate Body Report in the *Korea – Dairy Safeguards* case, to which Argentina refers in support of its argument, dealt with the question of whether the request for establishment met the requirements of Article 6.2 of the DSU. The issue before the Appellate Body was whether Article 6.2 of the DSU was complied with or not. The Appellate Body, in deciding that question, concluded that one element to be considered was whether the defending Member was prejudiced in its ability to defend itself by a lack of clarity or specificity in the request for establishment. The Appellate Body did not address the question whether, once it had been established that a provision of the Agreement is violated, it needs in addition to be demonstrated that this violation had prejudiced the rights of the complaining party.¹⁰¹ Thus, we do not agree that this Appellate Body decision supports Argentina's argument that the concept of harmless error has been accepted in WTO law.

6.104 Quite the contrary is true. Article 3.8 of the DSU provides that:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Member parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge".

6.105 Article 3.8 of the DSU thus provides that there is a presumption that benefits are nullified or impaired – i.e., there is a presumption of “harm” – where a provision of the Agreement has been violated. Article 3.8 of the DSU also provides for the possibility that the Member found to have violated a provision may rebut the presumption. In light of the presumption of Article 3.8 of the DSU, the EC having established that Argentina has acted in a manner inconsistent with the AD Agreement, it is up to Argentina to show that the failure to determine an individual dumping margin has not nullified or impaired benefits accruing to the EC under the Agreement. Argentina has failed to adduce any evidence in this respect. Accordingly, we find that the presumption of nullification or impairment of benefits caused by the violation of Article 6.10 of the AD Agreement has not been rebutted by Argentina.¹⁰²

⁹⁹ Argentina's answers to questions from the Panel at the first meeting, para. 31, p. 23.

¹⁰⁰ Argentina's answers to questions from the Panel at the first meeting, para. 31, p. 23.

¹⁰¹ Appellate Body Report, *Korea – Dairy Safeguards*, para. 127: “Along the same lines, we consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated.”

¹⁰² We note that our view is similar to that of the Panel in the case of *Guatemala – Cement (II)*, (Panel Report, *Guatemala – Cement (II)*, paras. 8.22 and 8.111-112), and Panel Report, *Guatemala – Anti-Dumping*

F. CLAIM 3: ARTICLE 2.4: THE NEED TO MAKE ADJUSTMENTS FOR DIFFERENCES IN PHYSICAL CHARACTERISTICS

1. Arguments of the parties

6.106 The EC submits that the DCD failed to make due allowance for all the physical differences between the various models of *porcellanato* exported to Argentina and those sold domestically.¹⁰³ The EC argues that although the DCD acknowledged that differences in physical characteristics, not adjusted for, could have had a significant impact on price, it nevertheless, without any justification, rejected the exporters' request for a model-to-model comparison and failed to apply any alternative method for making due allowance for differences in physical characteristics affecting price comparability, thereby violating Article 2.4 of the AD Agreement. The EC argues that by failing to make the necessary adjustments, Argentina failed to make a fair comparison between normal value and export price as required by Article 2.4 of the AD Agreement.

6.107 Argentina submits that the DCD made due allowance for differences in physical characteristics affecting price comparability by distinguishing three types of ceramic tiles based on the one variable common to all models and types sold: size. Argentina argues that with 78 Italian producers selling a variety of models with different colours and designs, the DCD was justified to take into account the one parameter common to all models and on that basis the DCD distinguished three size categories. Argentina asserts that the exporters did not present any convincing reasons to invalidate the segregation of products on this basis and never objected to the determination of a margin of dumping per size category.

6.108 Argentina submits that, in light of the standard of review applicable to anti-dumping disputes set out in Article 17.6 of the AD Agreement, deference should be given to the national authority's methodology if it is based on a reasonable interpretation of the text of the Agreement. Argentina submits that Article 2.4 requires that the authority make due allowance for differences in physical characteristics in each case on its merits. Argentina argues that in this case, concerning a large variety of tiles of different colours and with so many different designs, the DCD distinguished between three different types of tiles based on the one physical characteristic common to all: size. This homogeneous standard used by the DCD, Argentina submits, is a reasonable basis for making due allowance for differences in physical characteristics affecting price comparability and the DCD's determination should therefore be upheld by the Panel.

6.109 Argentina emphasizes that when the DCD requested the exporters to identify the product by model/type or code the exporters merely referred to a catalogue containing an enormous number of models without any further explanation. In Argentina's view, this made any *a posteriori* adjustments, if at all required, practically impossible for lack of information. Argentina argues that the exporters also failed to give any market information per model or type of tiles and never submitted any concrete proposals for adjustments. Therefore, Argentina argues, the DCD's decision to distinguish the products on the basis of size was a reasonable and objective decision especially in light of the confidential nature and incomplete character of the information.

Investigation Regarding Portland Cement from Mexico ("Guatemala – Cement (I)"), WT/DS60/R, adopted as reversed on other grounds by WT/DS60/AB/R, 25 November 1998, para. 7.42.

¹⁰³ By way of example, the EC refers to a 100 per cent price difference between two types of unpolished 30 x 30 cm tiles, which was found in a price list relied upon by the DCD (Exhibit EC-5D) which the EC submits suggests that other factors apart from size impacted prices.

2. Analysis by the Panel

6.110 The EC's claim concerns the scope of the requirement of Article 2.4 of the AD Agreement to make due allowance for differences in physical characteristics affecting price comparability.

6.111 Article 2.4 of the AD Agreement provides as follows:

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.⁷ In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties". (emphasis added)

⁷ It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

6.112 We recall our findings on claims 1 and 2 that the DCD was not justified in disregarding in large part the exporters' information and erred in failing to determine an exporter-specific margin of dumping. We are asked to rule now whether the DCD made due allowance for the physical differences affecting price comparability between the products sold in the domestic market and the products exported to Argentina. We recall that our task is to review the determination of the DCD and examine whether the DCD properly established the facts and whether it evaluated those facts in an objective and unbiased manner.

6.113 Article 2.4 places the obligation on the investigating authority to make due allowance, in each case on its merits, for differences which affect price comparability, including differences in physical characteristics. The last sentence of Article 2.4 provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison. We believe that the requirement to make due allowance for such differences, in each case on its merits, means at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement, and to adjust where necessary.

6.114 We note that the DCD determined the export price of the product under investigation on the basis of information provided by the petitioner, as well as official import statistics. We note that these import statistics related to all products exported from Italy and not just to products of those four producers included in the sample. The DCD further calculated two normal values for each size, one based on petitioner and importers' information, a second one based on the two aforementioned sources together with information from the exporters. In general, the information on the record suggests that ceramic tiles may be distinguished on the basis of a number of characteristics, such as dimensions (length and width), colour, degree of processing (polished/unpolished), and quality, and that the price of the products differs as a function of these differences in physical characteristics. The

record indicates that the DCD collected information concerning first-quality, unpolished tiles. The DCD also distinguished the product on the basis of differences in size within the various models of tiles sold on the domestic market and exported to Argentina.

6.115 In the Preliminary Determination, the DCD acknowledged that there existed a large variety of types and models of ceramic tiles with significant price differences between them.¹⁰⁴ In the Final Determination, the DCD further specifies that there existed significant price differences between various models of the same size, and that for certain models the smaller size tiles were sometimes more expensive than certain other models' larger size tiles.¹⁰⁵ We note that, in spite of this acknowledgement, the DCD failed to make any further adjustments for these apparent differences in price caused by factors other than size. Neither did the DCD indicate to the parties what information it required in order to make these further adjustments. Argentina argues that the DCD did in fact request the exporters to provide information per model in the questionnaire but that the exporters replied that such model specific information was not available. We note that the information requested in Annexes IV-VI of the questionnaire, to which Argentina refers in support of its argument, does not relate to information necessary to determine normal value and export price but concerns information of a more general nature concerning the domestic market of the exporters and their sales performance in general. If the DCD was dissatisfied with the information provided by the exporters concerning the technical characteristics of the models in their questionnaire responses, it could have and should have, according to Article 2.4, requested additional information. The DCD did not do so.

6.116 In addition to accounting for size differences, the DCD's methodology took account of two other physical differences affecting price comparability. As to quality, the DCD collected data only on first-quality tiles, thereby avoiding the need to make adjustments for tile quality. By the same token, the DCD's methodology made due allowance for the degree of processing, in that data were collected only on unpolished tiles.¹⁰⁶ In effect then, the DCD made due allowance within the meaning of Article 2.4 for three physical differences affecting price comparability. Nonetheless, other important differences remained, as the DCD acknowledged in its final determination. We do not agree with Argentina's view that Article 2.4, through the qualifying language that due allowance shall be made "in each case" "on its merits", permits an investigating authority to adjust only for the most important of the physical differences that affect price comparability, even if making the remaining adjustments would have been, as the parties agree, complex. The DCD chose not to conduct a model-by-model comparison and it was then left to find other means to account for the remaining physical differences affecting price comparability. It did not do so.

3. Conclusion

6.117 In conclusion, we consider that, in light of the facts on the record, there were other factors significantly affecting price comparability. An objective and unbiased evaluation of the facts of this case would have required the DCD to make additional adjustments for physical differences affecting price comparability. We therefore find that the DCD acted inconsistently with Article 2.4 by failing to make adjustments for physical differences affecting price comparability.

¹⁰⁴ Preliminary Dumping Determination, p. 34, Exhibit ARG-8.

¹⁰⁵ Final Dumping Determination, p. 28. Exhibit EC-2.

¹⁰⁶ Moreover, when advised that one exporter, Marazzi, sold one model of tiles as a polished tile on the domestic market while this model was sold under the same name in Argentina as an unpolished tile, the DCD accepted the need to make an adjustment to account for this physical difference affecting price comparability.

G. CLAIM 4: ARTICLE 6.9: FAILURE TO INFORM THE EXPORTERS OF THE “ESSENTIAL FACTS” ON WHICH THE DECISION IS BASED

1. Arguments of the parties

6.118 The EC submits that Argentina failed to disclose the essential facts under consideration which form the basis for the decision whether to apply definitive measures as required by Article 6.9 of the AD Agreement. The EC argues that Article 6.9 of the AD Agreement entails a positive action by the investigating authorities, and requires the authorities to actively disclose those essential facts on which the decision whether to apply definitive measures is based. According to the EC, Argentina merely invited interested parties to examine the public file.¹⁰⁷ The EC asserts that the public file of an anti-dumping investigation essentially consists of often contradictory questionnaire responses and allegations of different interested parties and thus clearly does not identify the “essential facts” on which the decision to impose a measure is based. The EC argues that in this case the final dumping determination (unlike the final injury determination) was not available in the public file. Nor did the public file contain any other document prepared by the DCD which identified the “essential facts” that would form the basis for the final dumping determination.

6.119 **Argentina** argues that the DCD complied with the requirement of Article 6.9 of the AD Agreement to inform the interested parties of the essential facts which form the basis for the decision whether to apply definitive measures by inviting the exporters to view the complete file. According to Argentina, the exporters viewed the file that contained all the information on which the determination was based, including the essential facts. Argentina argues that what is important is that the result envisaged by Article 6.9 is achieved, not how this result was achieved. Argentina asserts that the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices has discussed the kind of information which needs to be disclosed under Article 6.9. Argentina submits that the fact that the Ad Hoc Group has not yet issued a recommendation on this matter demonstrates the diversity of criteria used by the Members in complying with this requirement. Finally, Argentina argues that in any case the exporters did not suffer any injury from this alleged lack of notification of the essential facts. In case the Panel were to find a violation of Article 6.9 of the AD Agreement, Argentina submits this constituted a harmless error.

6.120 The EC submits that the requirement concerning the disclosure of essential facts is not an empty formality, as Argentina seems to suggest, and therefore rejects Argentina’s argument that the alleged failure to comply with Article 6.9 constituted a harmless error.

6.121 We also recall in this respect some of the arguments made by the third parties on this matter. **Japan**, as a third party, fully supports the EC position that the provisions of Article 6.9 of the AD Agreement must be read as imposing obligations that go beyond those in Article 6.4 of the AD Agreement to provide timely opportunities for interested parties to have access to all relevant information. Japan asserts that the requirement of Article 6.9 to disclose the essential facts that the authority will actually rely on is not satisfied by merely opening for inspection a file that includes both facts that will be relied upon and facts that will not be. **Turkey**, as a third party, also considers that the requirement of Article 6.9 goes beyond the obligation to provide timely opportunities to see all information as set out in Article 6.4 of the AD Agreement.

6.122 The **United States**, as a third party, does not take a position on whether, under the facts of this case, the measure is consistent with Article 6.9 of the AD Agreement. However, the United

¹⁰⁷ Exhibit EC-7C. The EC asserts that if all that was required is to provide access to the public file, Article 6.9 would not add anything to the requirement of Article 6.4 to provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their case. Argentina, on the other hand, argues that it complied with Article 6.9 by having provided an opportunity to view the complete file.

States agrees with Argentina that Article 6.9 requires only that interested parties be informed of the essential facts and that this requirement does not impose a particular means of disclosure. According to the United States, Members may implement the obligation under Article 6.9 in a variety of ways. In particular, the United States argues, Members may choose to establish an investigative process which allows interested parties to be presented with all of the facts as they are presented to the authority, as well as arguments made about those facts.

2. Analysis by the Panel

6.123 We note that there does not exist any disagreement between the parties concerning the relevant facts in respect of this claim. The record shows that the exporters were invited to view the information on the record, and made use of this possibility on 18 June 1999, 3 September 1999 and 21 September 1999. The EC submits, however, that by merely being given the opportunity to view the complete file the exporters were not informed of the essential facts under consideration which form the basis for the decision whether to apply definitive measures as required by Article 6.9 of the AD Agreement.

6.124 Article 6.9 provides that:

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

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

6.126 The question before us is whether, under the facts of this case, the DCD complied with its obligation under Article 6.9 of the AD Agreement to inform the interested parties of the essential facts under consideration which form the basis for the determination whether to apply definitive measures. The DCD in this case invited the exporters to view the entire file.

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

6.128 In considering this question, we observe that the file contained *inter alia* the Preliminary Dumping Determination, in which the DCD explained that it considered that the confidential nature of the information supplied by the exporters in the questionnaire responses concerning normal value and export price limited the use it could make of this information. In the Preliminary Determination, the DCD calculated the dumping margin without relying on any of the information supplied by the exporters in confidence. The file also contained the three letters the DCD sent to the exporters following the preliminary determination with the requests for declassification of the information discussed above in paras. 6.41 – 6.47. The exporters were further advised of the DCD’s request for additional supporting documentation, as discussed above in paras. 6.59 - 6.65. We note in this regard that a meeting took place between the exporters’ representatives and the case-handlers. As Argentina clarified, this was an informal meeting convened at the request of the exporters and no official record, which could have been included in the file, exists of what was agreed upon at that meeting. The exporters nonetheless supplied the invoices covering about 50 per cent of their reported domestic sales which they considered had been requested by the DCD.¹⁰⁸ We found above that the exporters also complied with the various requests for declassification of the information and never received any deficiency letters nor were any such deficiency notices put on the record. The file further contained a large variety of data from various sources such as the petitioner, importers and official registers.

3. Conclusion

6.129 In light of the state of the record, we find that the exporters could not be aware in this case, simply by reviewing the complete record of the investigation, that evidence submitted by petitioners and derived from secondary sources, rather than facts submitted by the exporters, would, despite the responses of the exporters to the DCD’s information requests as summarized above, form the primary basis for the determination of the existence and extent of dumping. The DCD thus failed to put the exporters on notice of an essential fact under consideration. As a result, the exporters were unable to defend their interests within the meaning of Article 6.9, for example, by giving reasons why their responses should not be rejected and by suggesting alternative sources for facts available if their responses were nonetheless disregarded. Under these circumstances, we find that the DCD did not, by referring the exporters to the complete file of the investigation, fulfil its obligation under Article 6.9 to inform the exporters of the “essential facts under consideration which form the basis for the decision whether to apply definitive measures”.¹⁰⁹

6.130 Argentina again raises the concept of harmless error as a defence. As discussed above, in our view it does not suffice to merely raise the issue of harmless error. Indeed, Article 3.8 of the DSU provides for a presumption that, in the case of an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. Article 3.8 of the DSU also provides for the possibility that the Member found to have violated a provision may rebut the presumption. In light of the presumption of Article 3.8 of the DSU, the EC having established that Argentina has acted in a manner inconsistent with the AD Agreement, it is up to Argentina to show that the failure to determine an individual dumping margin has not nullified or impaired benefits accruing to the EC under the Agreement. Argentina has failed to adduce any evidence in this respect. Accordingly, we find that the presumption of nullification or impairment of benefits caused by the violation of Article 6.9 of the AD Agreement has not been rebutted by Argentina.

¹⁰⁸ Exhibit EC-10.

¹⁰⁹ In light of our findings under the facts of this case, we need not reach the larger question discussed by the Panel in the case of *Guatemala – Cement (II)* concerning the relationship between Article 6.9 and Article 6.4 of the AD Agreement.

6.131 In conclusion, we find that the DCD acted inconsistently with Article 6.9 as it failed to inform the interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures thereby failing to allow the exporters to defend their interests.

VII. CONCLUSIONS AND RECOMMENDATION

7.1 In light of the findings above, we conclude

- (a) that Argentina acted inconsistently with Article 6.8 and Annex II AD Agreement by disregarding in large part the information provided by the exporters for the determination of normal value and export price, and this without informing the exporters of the reasons for the rejection;
- (b) that Argentina acted inconsistently with Article 6.10 AD Agreement by not determining an individual margin of dumping for each exporter included in the sample for the product under investigation;
- (c) that Argentina acted inconsistently with Article 2.4 AD Agreement by failing to make due allowance for differences in physical characteristics affecting price comparability;
- (d) that Argentina acted inconsistently with Article 6.9 AD Agreement by not disclosing to the exporters the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

7.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Argentina has failed to adduce any evidence to rebut this presumption. Accordingly, we conclude that, to the extent Argentina has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to the EC under that Agreement.

7.3 We recommend that the Dispute Settlement Body request Argentina to bring its measure into conformity with its obligations under the AD Agreement.
