

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

Report of the Panel

The report of the Panel on *Argentina - Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 28 September 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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.

[Parties' and Third Parties' Arguments in Section IV deleted from this version.]

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/DS122/AB/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.
