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Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil

(WT/DS241)

ORAL STATEMENT OF THE UNITED STATES AT THE THIRD-PARTY SESSION WITH THE PANEL

September 26, 2002

Mr Chairman, members of the Panel,

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

Preliminary Objection

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

3. Argentina argues that the Panel should refuse to make findings on Brazil's claims because Brazil previously challenged the Argentine measure under MERCOSUR dispute settlement rules. In Argentina's view, the Panel must take account of those rules and consider

the consequences of Brazil's decision to use them. Alternatively, Argentina argues that the Panel should apply the principle of estoppel because Brazil has, in the past, accepted the scope of those rules. Mr. Chairman, neither argument provides a basis for the Panel to refuse to make findings on Brazil's claims.

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

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

to no textual basis for its request reflects the fact that Members have not consented to provide for the application of any such principle of estoppel in WTO dispute settlement. The term estoppel appears nowhere in the text nor does Argentina cite to any provision which in substance provides Argentina the type of defense it asserts.

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

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

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

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

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

Conclusion

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