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**EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL  
FROM ARGENTINA**

AB-2016-4

*Report of the Appellate Body*

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## ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Basic Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), <i>Official Journal of the European Union</i> , L Series, No. 343 (22 December 2009), pp. 51-73, and corrigendum thereto, L Series, No. 7 (12 January 2010), pp. 22-23 (Panel Exhibit ARG-1)
CARBIO	Cámara Argentina de Biocombustibles (Association of Argentine Biodiesel Producers)
Council Regulation (EC) No. 384/96	Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, <i>Official Journal of the European Communities</i> , L Series, No. 56 (6 March 1996), p.1 (Panel Exhibit ARG-4)
Council Regulation (EC) No. 1972/2002	Council Regulation (EC) No. 1972/2002 of 5 November 2002 amending Regulation (EC) No. 384/96 on the protection against dumped imports from countries not members of the European Community, <i>Official Journal of the European Communities</i> , L Series, No. 305 (7 November 2002), pp. 1-3 (Panel Exhibit ARG-5)
Definitive Disclosure	General Disclosure Document (Annex 1), AD593 – Anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, Proposal to impose definitive measures, 1 October 2013 (Panel Exhibit ARG-35)
Definitive Regulation	Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, <i>Official Journal of the European Union</i> , L Series, No. 315 (26 November 2013), pp. 2-26 (Panel Exhibit ARG-22)
DET	Differential Export Tax
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBB	European Biodiesel Board
EU authorities	European Commission and the Council of the European Union
FOB	free on board
GAAP	generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
IP	investigation period
Provisional Regulation	Commission Regulation (EU) No. 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, <i>Official journal of the European Union</i> , L Series, No. 141 (28 May 2013), pp. 6-25 (Panel Exhibit ARG-30)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
surrogate price for soybeans	The average of the reference prices of soybeans published by the Argentine Ministry of Agriculture for export FOB Argentina during the investigation period, minus fobbing costs
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, UN Treat Series, Vol. 1155, p. 331
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

## PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Description
ARG-1	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), <i>Official Journal of the European Union</i> , L Series, No. 343 (22 December 2009), pp. 51-73, and corrigendum thereto, L Series, No. 7 (12 January 2010), pp. 22-23
ARG-3	Council Regulation (EC) No. 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, <i>Official Journal of the European Communities</i> , L Series, No. 349 (31 December 1994), p. 1
ARG-4	Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, <i>Official Journal of the European Communities</i> , L Series, No. 56 (6 March 1996), p.1
ARG-5	Council Regulation (EC) No. 1972/2002 of 5 November 2002 amending Regulation (EC) No. 384/96 on the protection against dumped imports from countries not members of the European Community, <i>Official Journal of the European Communities</i> , L Series, No. 305 (7 November 2002), pp. 1-3
ARG-6	E. Borovikov and B. Evtimov, "EC's Treatment of Non-Market Economies in Anti-Dumping Law: Its History: An Evolving Disregard of International Trade Rules; Its State of Play: Inconsistent with the GATT/WTO?", <i>Revue des Affaires Européennes</i> (2001-2002) (Kluwer, 2002), pp. 875-896
ARG-7	Olesia Engelbutzeder, "EU Anti-Dumping Measures Against Russian Exporters – In View of Russian Accession to the WTO and the EU Enlargement 2004" (Peter Lang AG, 2004), (excerpt) pp. 159-160
ARG-8	Council Regulation (EC) No. 1891/2005 of 14 November 2005 amending Regulation (EEC) No. 3068/92 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, <i>Official Journal of the European Union</i> , L Series, No. 302 (19 November 2005), pp. 14-21
ARG-9	Council Regulation (EC) No. 1050/2006 of 11 July 2006 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus and Russia, <i>Official Journal of the European Union</i> , L Series, No. 191 (12 July 2006), pp. 1-25
ARG-10	Council Regulation (EC) No. 954/2006 of 27 June 2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, repealing Council Regulations (EC) No. 2320/97 and (EC) No. 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, <i>inter alia</i> , in Russia and Romania and terminating the interim reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, <i>inter alia</i> , in Russia and Romania and in Croatia and Ukraine, <i>Official Journal of the European Union</i> , L Series, No. 175 (29 June 2006), pp. 4-38
ARG-11	Council Regulation (EC) No. 812/2008 of 11 August 2008 amending Regulation (EC) No. 954/2006 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating, <i>inter alia</i> , in Russia, <i>Official Journal of the European Union</i> , L Series, No. 220 (15 August 2008), pp. 1-5
ARG-12	Council Implementing Regulation (EU) No. 1269/2012 of 21 December 2012 amending Implementing Regulation (EU) No. 585/2012 imposing a definitive anti-dumping duty on imports of certain seamless pipes, of iron or steel, originating, <i>inter alia</i> , in Russia, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No. 1225/2009, <i>Official Journal of the European Union</i> , L Series, No. 357 (28 December 2012), pp. 1-6
ARG-13	Council Regulation (EC) No. 1911/2006 of 19 December 2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Algeria, Belarus, Russia and Ukraine following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, <i>Official Journal of the European Union</i> , L Series, No. 365 (21 December 2006), pp. 26-49
ARG-14	Council Regulation (EC) No. 238/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Russia, <i>Official Journal of the European Union</i> , L Series, No. 75 (18 March 2008), pp. 14-21

Panel Exhibit	Description
ARG-15	Council Implementing Regulation (EU) No. 1251/2009 of 18 December 2009 amending Regulation (EC) No. 1911/2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating, <i>inter alia</i> , in Russia, <i>Official Journal of the European Union</i> , L Series, No. 338 (19 December 2009), pp. 5-11
ARG-16	Council Regulation (EC) No. 236/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of ammonium nitrate originating in Russia, <i>Official Journal of the European Union</i> , L Series, No. 75 (18 March 2008), pp. 1-7
ARG-17	Council Regulation (EC) No. 661/2008 of 8 July 2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) and a partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96, <i>Official Journal of the European Union</i> , L Series, No. 185 (12 July 2008), pp. 1-34
ARG-18	Council Regulation (EC) No. 237/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of ammonium nitrate originating, <i>inter alia</i> , in Ukraine, <i>Official Journal of the European Union</i> , L Series, No. 75 (18 March 2008), pp. 8-13
ARG-19	Council Regulation (EC) No. 907/2007 of 23 July 2007 repealing the anti-dumping duty on imports of urea originating in Russia, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, and terminating the partial interim reviews pursuant to Article 11(3) of such imports originating in Russia, <i>Official Journal of the European Union</i> , L Series, No. 198 (31 July 2007), pp. 4-19
ARG-20	Council Regulation (EC) No. 240/2008 of 17 March 2008 repealing the anti-dumping duty on imports of urea originating in Belarus, Croatia, Libya and Ukraine, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, <i>Official Journal of the European Union</i> , L Series, No. 75 (18 March 2008), pp. 33-48
ARG-21	Council Regulation (EC) No. 1256/2008 of 16 December 2008 imposing a definitive anti-dumping duty on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Belarus, the People's Republic of China and Russia following a proceeding pursuant to Article 5 of Regulation (EC) No. 384/96, originating in Thailand following an expiry review pursuant to Article 11(2) of the same Regulation, originating in Ukraine following an expiry review pursuant to Article 11(2) and an interim review pursuant to Article 11(3) of the same Regulation, and terminating the proceedings in respect of imports of the same product originating in Bosnia and Herzegovina and Turkey, <i>Official Journal of the European Union</i> , L Series, No. 343 (19 December 2008), pp. 1-38
ARG-22	Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, <i>Official Journal of the European Union</i> , L Series, No. 315 (26 November 2013), pp. 2-26
ARG-23	Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-235/08, <i>Acron OAO and Dorogobuzh OAO v Council of the European Union</i>
ARG-30	Commission Regulation (EU) No. 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, <i>Official Journal of the European Union</i> , L Series, No. 141 (28 May 2013), pp. 6-25
ARG-31	Consolidated version of the new anti-dumping complaint concerning imports of biodiesel originating in Argentina and Indonesia – Complaint to the Commission of the European Union under Council Regulation (EC) No. 1225/2009
ARG-32	Notice of initiation of an anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, <i>Official Journal of the European Union</i> , C Series, No. 260 (29 August 2012), pp. 8-16
ARG-33	Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia, <i>Official Journal of the European Union</i> , C Series, No. 342 (10 November 2012), pp. 12-20
ARG-35	General Disclosure Document (Annex 1), AD593 – Anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, Proposal to impose definitive measures, 1 October 2013

Panel Exhibit	Description
ARG-36	Commission Regulation (EU) No. 1198/2013 of 25 November 2013 terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No. 330/2013 making such imports subject to registration, <i>Official Journal of the European Union</i> , L Series, No. 315 (26 November 2013), pp. 67-68
ARG-37	Written Submission by CARBIO of 5 November 2012 in AD593 – Anti-dumping investigation concerning imports of biodiesel originating in, <i>inter alia</i> , Argentina
ARG-39	Letter dated 17 October 2013 from CARBIO and its members providing comments on the Definitive Disclosure
ARG-43	CARBIO and its Members, PowerPoint presentation on AD593 – Anti-dumping investigation concerning imports of biodiesel originating in, <i>inter alia</i> , Argentina, presented at the hearing held on 14 December 2012
ARG-46	CARBIO, PowerPoint presentation on AD593 – Biodiesel originating in Argentina, presented at the hearing held on 8 July 2013
ARG-51	Letter dated 1 July 2013 from CARBIO providing comments on the Provisional Disclosure
ARG-52	Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-118/10, <i>Acron OAO v Council of the European Union</i>
ARG-53	Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-459/08, <i>EuroChem Mineral and Chemical Company OAO (Eurochem MCC) v Council of the European Union</i>
ARG-54	Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-84/07, <i>EuroChem Mineral and Chemical Company OAO (Eurochem MCC) v Council of the European Union</i>
EU-3	Commission Decision of 13 February 2013 terminating the anti-dumping proceeding concerning imports of white phosphorus, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan, <i>Official Journal of the European Union</i> , L Series, No. 43 (14 February 2013), pp. 38-58
EU-4	Commission Regulation (EC) No. 988/2004 of 17 May 2004 imposing provisional anti-dumping duties on imports of okoumé plywood originating in the People's Republic of China, <i>Official Journal of the European Union</i> , L Series, No. 181 (18 May 2004), pp. 5-23
EU-8	Tietje et al., "Cost of Production Adjustments in Anti-dumping Proceedings: Challenging Raw Material Inputs Dual Pricing Systems in EU Anti-dumping Law and Practice" (2011) 45(5) <i>Journal of World Trade</i> , pp. 1071-1102
EU-24	Commission Regulation (EC) No. 1235/2003 of 10 July 2003 imposing a provisional anti-dumping duty on imports of silicon originating in Russia, <i>Official Journal of the European Union</i> , L Series, No. 173 (11 July 2003), pp. 14-34



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<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , <a href="#">WT/DS438/AB/R</a> / <a href="#">WT/DS444/AB/R</a> / <a href="#">WT/DS445/AB/R</a> , adopted 26 January 2015
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , <a href="#">WT/DS56/AB/R</a> and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , <a href="#">WT/DS339/AB/R</a> / <a href="#">WT/DS340/AB/R</a> / <a href="#">WT/DS342/AB/R</a> , adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , <a href="#">WT/DS414/AB/R</a> , adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , <a href="#">WT/DS431/AB/R</a> / <a href="#">WT/DS432/AB/R</a> / <a href="#">WT/DS433/AB/R</a> , adopted 29 August 2014, DSR 2014:III, p. 805
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , <a href="#">WT/DS141/AB/RW</a> , adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/AB/R</a> , adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , <a href="#">WT/DS397/AB/RW</a> and Add.1, adopted 12 February 2016
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , <a href="#">WT/DS375/R</a> / <a href="#">WT/DS376/R</a> / <a href="#">WT/DS377/R</a> , adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , <a href="#">WT/DS69/AB/R</a> , adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , <a href="#">WT/DS337/R</a> , adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/AB/R</a> , adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/R</a> , adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/AB/R</a> , adopted 1 June 2011, DSR 2011:I, p. 7
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , <a href="#">WT/DS211/R</a> , adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , <a href="#">WT/DS50/AB/R</a> , adopted 16 January 1998, DSR 1998:I, p. 9
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , <a href="#">WT/DS295/AB/R</a> , adopted 20 December 2005, DSR 2005:XXII, p. 10853

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<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/AB/R</a> , adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/R</a> , adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , <a href="#">WT/DS136/AB/R</a> , <a href="#">WT/DS162/AB/R</a> , adopted 26 September 2000, DSR 2000:X, p. 4793
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<i>US – Continued Zeroing</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , <a href="#">WT/DS350/R</a> , adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
<i>US – Corrosion Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , <a href="#">WT/DS244/AB/R</a> , adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , <a href="#">WT/DS449/AB/R</a> and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS108/AB/RW</a> , adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , <a href="#">WT/DS176/AB/R</a> , adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , <a href="#">WT/DS152/R</a> , adopted 27 January 2000, DSR 2000:II, p. 815
<i>US – Shrimp II (Viet Nam)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , <a href="#">WT/DS429/AB/R</a> , and Corr.1, adopted 22 April 2015
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/R</a> , adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS264/AB/RW</a> , adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , <a href="#">WT/DS344/AB/R</a> , adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , <a href="#">WT/DS464/AB/R</a> and Add.1, adopted 26 September 2016

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Short Title	Full Case Title and Citation
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , <a href="#">WT/DS294/AB/R</a> , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , <a href="#">WT/DS322/AB/R</a> , adopted 23 January 2007, DSR 2007:I, p. 3

**WORLD TRADE ORGANIZATION**  
APPELLATE BODY

**European Union – Anti-Dumping Measures on Biodiesel from Argentina**

AB-2016-4

European Union, *Appellant/Appellee*  
Argentina, *Other Appellant/Appellee*

Appellate Body Division:

Australia, *Third Participant*  
China, *Third Participant*  
Colombia, *Third Participant*  
Indonesia, *Third Participant*  
Mexico, *Third Participant*  
Norway, *Third Participant*  
Russia, *Third Participant*  
Saudi Arabia, *Third Participant*  
Turkey, *Third Participant*  
United States, *Third Participant*

Bhatia, Presiding Member  
Van den Bossche, Member  
Zhang, Member

## 1 INTRODUCTION

1.1. The European Union and Argentina each appeals certain issues of law and legal interpretations developed in the Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*<sup>1</sup> (Panel Report). The Panel was established on 25 April 2014 to consider a complaint by Argentina with respect to two measures of the European Union<sup>2</sup>: (i) the anti-dumping measure imposed by the European Union on imports of biodiesel originating in Argentina<sup>3</sup>; and (ii) the second subparagraph of Article 2(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community<sup>4</sup> (Basic Regulation).<sup>5</sup>

1.2. The anti-dumping measure on biodiesel challenged by Argentina was adopted upon conclusion of an investigation on imports of biodiesel originating in Argentina and Indonesia.<sup>6</sup> The European Commission initiated the investigation on 29 August 2012, following a complaint submitted by the European Biodiesel Board (EBB).<sup>7</sup> Provisional anti-dumping duties were imposed

<sup>1</sup> WT/DS473/R, 29 March 2016.

<sup>2</sup> Panel Report, para. 2.1. See also Request for the Establishment of a Panel by Argentina, WT/DS473/5.

<sup>3</sup> Panel Report, para. 2.3 (referring to Commission Regulation (EU) No. 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, *Official Journal of the European Union*, L Series, No. 141 (28 May 2013), pp. 6-25 (Provisional Regulation) (Panel Exhibit ARG-30); and Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, *Official Journal of the European Union*, L Series, No. 315 (26 November 2013), pp. 2-26 (Definitive Regulation) (Panel Exhibit ARG-22)). In this Report, we refer to both the Provisional Regulation and Definitive Regulation collectively as the "anti-dumping measure on biodiesel".

<sup>4</sup> Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), *Official Journal of the European Union*, L Series, No. 343 (22 December 2009), pp. 51-73, and corrigendum thereto, L Series, No. 7 (12 January 2010), pp. 22-23 (Panel Exhibit ARG-1).

<sup>5</sup> Panel Report, para. 2.2 (referring to Basic Regulation (Panel Exhibit ARG-1)).

<sup>6</sup> Panel Report, para. 2.3.

<sup>7</sup> Panel Report, para. 2.3 (referring to Notice of initiation of an anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, *Official Journal of the European Union*, C Series, No. 260 (29 August 2012), pp. 8-16 (Notice of initiation of the anti-dumping investigation) (Panel Exhibit ARG-32); and Consolidated version of the new anti-dumping complaint concerning imports of biodiesel originating in Argentina and Indonesia – Complaint to the Commission of the European Union under Council Regulation (EC) No. 1225/2009 (Consolidated version of the complaint) (Panel Exhibit ARG-31)). In addition, and also following a complaint by the EBB, on 10 November 2012, the EU authorities initiated a countervailing duty investigation with regard to imports of biodiesel from Argentina and Indonesia. The EU authorities

on 29 May 2013 through the Provisional Regulation, and definitive anti-dumping duties on 27 November 2013 through the Definitive Regulation.<sup>8</sup> With regard to the Argentine producers/exporters, the rates of the provisional anti-dumping duties applied were equal to the dumping margins ranging from 6.8% to 10.6%.<sup>9</sup> In the Definitive Regulation, the EU authorities<sup>10</sup> confirmed the provisional findings of dumping and injury, and calculated dumping margins ranging from 41.9% to 49.2%. As these dumping margins exceeded the injury margins calculated by the EU authorities, which ranged from 22% to 25.7%, the EU authorities applied duties corresponding to the injury margins.<sup>11</sup>

1.3. Argentina claimed before the Panel that the anti-dumping measure on biodiesel is inconsistent with several provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994) relating to the dumping margin determination, the injury and causation determinations, and the imposition of duties. Specifically, Argentina alleged that the European Union acted inconsistently with: (i) Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of records kept by the Argentine producers<sup>12</sup>, and by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (ii) Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin<sup>13</sup>; (iii) Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement by failing to base the profit-margin component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii); (iv) Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for differences affecting price comparability and thus precluding a fair comparison between the normal value and the export price; (v) Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement; (vi) Articles 3.1 and 3.4 of the Anti-Dumping Agreement with regard to the EU authorities' injury determination; and (vii) Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the EU authorities' non-attribution analysis and finding that the injury suffered by the EU domestic industry did not result from factors other than dumped imports.<sup>14</sup>

1.4. Furthermore, Argentina claimed before the Panel that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with: (i) Article 2.2.1.1 and, as a consequence, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data in the records of producers or exporters under investigation when those costs reflect prices that are "abnormally or

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terminated that investigation on 27 November 2013 following the withdrawal of the complaint by the domestic industry. (Panel Report, fn 15 to para. 2.3 (referring to Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia, *Official Journal of the European Union*, C Series, No. 342 (10 November 2012), pp. 12-20 (Notice of initiation of the countervailing duty investigation) (Panel Exhibit ARG-33); and Commission Regulation (EU) No. 1198/2013 of 25 November 2013, terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No. 330/2013 making such imports subject to registration, *Official Journal of the European Union*, L Series, No. 315 (26 November 2013), pp. 67-68 (Notice of termination of the countervailing duty investigation) (Panel Exhibit ARG-36))

<sup>8</sup> Panel Report, para. 2.3 (referring to Provisional Regulation (Panel Exhibit ARG-30); and Definitive Regulation (Panel Exhibit ARG-22)).

<sup>9</sup> Panel Report, para. 7.179 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recital 179).

<sup>10</sup> The European Commission conducts investigations and adopts preliminary determinations; the Council of the European Union adopts final determinations on the basis of proposals from the European Commission. (Panel Report, fn 17 to para. 2.3) We refer to both collectively as the "EU authorities".

<sup>11</sup> Panel Report, para. 7.179. The factual aspects of this dispute are set forth in greater detail in paragraphs 2.1-2.3, 7.72-7.73, 7.179-7.184, 7.279-7.281, 7.311-7.316, 7.374-7.379, 7.441-7.448, 7.473-7.476, 7.491-7.496, and 7.512-7.517 of the Panel Report, and in section 5 and paragraphs 6.117-6.118 of this Report.

<sup>12</sup> Argentina claimed that, as a consequence of this inconsistency, the European Union also acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. (Panel Report, paras. 3.1.b.i, 7.193, and 7.250)

<sup>13</sup> Argentina claimed that, as a result of the inconsistencies in (i) to (ii) above, the EU authorities also acted inconsistently with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. (Panel Report, para. 3.1.b.iv)

<sup>14</sup> Panel Report, para. 3.1.b.

artificially low" as a result of an alleged market distortion<sup>15</sup>; (ii) Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by providing that the costs shall be adjusted or established in certain cases "on any other reasonable basis, including information from other representative markets"<sup>16</sup>; and, as a consequence, (iii) Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) and Article 18.4 of the Anti-Dumping Agreement.<sup>17</sup>

1.5. The European Union requested the Panel to reject Argentina's claims in their entirety.<sup>18</sup> In addition, the European Union submitted a request for a preliminary ruling, arguing that certain claims in Argentina's panel request fell outside the Panel's terms of reference because: (i) the panel request failed to identify the specific measures at issue; (ii) the panel request failed to meet the requirement in Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly"; and/or (iii) they were not included in Argentina's request for consultations.<sup>19</sup> The Panel declined to issue the ruling requested by the European Union; finding, instead, that Argentina's panel request fulfils the requirements of Article 6.2 of the DSU<sup>20</sup>, and that "the claims in the panel request may reasonably be said to have evolved from those in the request for consultations".<sup>21</sup> The Panel therefore ruled that the claims subject to the European Union's request for a preliminary ruling fell within the Panel's terms of reference.<sup>22</sup>

1.6. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 29 March 2016, the Panel found that:

- a. With respect to Argentina's claims concerning the anti-dumping measure imposed by the European Union on imports of biodiesel from Argentina:
  - i. The European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers<sup>23</sup>;
  - ii. The European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" for inputs that was not the cost prevailing "in the country of origin", namely, Argentina<sup>24</sup>;
  - iii. Argentina had not established that the European Union acted inconsistently with the requirement under Article 2.4 of the Anti-Dumping Agreement to make a "fair comparison"<sup>25</sup>;

<sup>15</sup> Panel Report, para. 3.1.a.i.

<sup>16</sup> Panel Report, para. 3.1.a.ii.

<sup>17</sup> Panel Report, para. 3.1.a.iii.

<sup>18</sup> Panel Report, para. 3.3.

<sup>19</sup> Panel Report, paras. 7.9-7.10. See also paras. 7.17, 7.35, and 7.58; and Executive summary of the European Union's request for a preliminary ruling, Panel Report, Annex C-5.

<sup>20</sup> Panel Report, para. 7.34. See also paras. 7.32-7.33.

<sup>21</sup> Panel Report, para. 7.54. See also paras. 7.62-7.64.

<sup>22</sup> These claims include: (i) the claim under Article 9.3 of the Anti-Dumping Agreement; and (ii) claims concerning the consistency of the second subparagraph of Article 2(5) of the Basic Regulation with Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. (See Panel Report, paras. 7.34, 7.55, 7.64, and 8.1.a.i-8.1.a.iii) With respect to the other claims subject to the European Union's preliminary ruling request, the Panel noted that Argentina had not pursued those claims. The Panel therefore considered the aspects of the European Union's request regarding those claims to be moot, and made no findings on them. (Ibid., paras. 7.12-7.14 and 8.1.a.iv)

<sup>23</sup> Panel Report, para. 8.1.c.i. See also para. 7.249. The Panel did not reach findings as to whether, as a consequence, the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. (Ibid., para. 8.1.c.i; see also para. 7.250)

<sup>24</sup> Panel Report, para. 8.1.c.ii. See also para. 7.260. The Panel did not find it necessary, for the effective resolution of this dispute, to reach findings as to: (i) whether the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it included costs not associated with the production and sale of biodiesel in the calculation of the cost of production; or (ii) whether the European Union acted inconsistently with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 as a result of inconsistencies with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. (Ibid., paras. 8.1.c.iii and 8.1.c.iv; see also paras. 7.269 and 7.276)

- iv. Argentina had not established that the European Union acted inconsistently with Articles 2.2.2(iii) and 2.2 of the Anti-Dumping Agreement in its determination of the amount for profits applied in the construction of the Argentine producers' normal value<sup>26</sup>;
  - v. The European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively<sup>27</sup>;
  - vi. The European Union acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its examination of the impact of the dumped imports on the domestic industry, insofar as such examination related to production capacity and capacity utilization<sup>28</sup>; and
  - vii. Argentina had not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>29</sup>
- b. With respect to Argentina's claims concerning the EU Basic Regulation:
- i. Argentina had not established that the second subparagraph of Article 2(5) is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement and, as a consequence, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994<sup>30</sup>;
  - ii. Argentina had not established that the second subparagraph of Article 2(5) is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994<sup>31</sup>; and, therefore
  - iii. Argentina had not established that the second subparagraph of Article 2(5) is inconsistent "as such" with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.<sup>32</sup>

1.7. On 20 May 2016, the European Union notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>33</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>34</sup> (Working Procedures). On 25 May 2016, Argentina notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal<sup>35</sup> and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 7 June 2016, the European Union and Argentina each filed an appellee's submission.<sup>36</sup> On 10 June 2016, Australia, China, Colombia, Indonesia, Mexico, Russia,

<sup>25</sup> Panel Report, para. 8.1.c.v. See also para. 7.306.

<sup>26</sup> Panel Report, para. 8.1.c.vi. See also para. 7.351.

<sup>27</sup> Panel Report, para. 8.1.c.vii. See also para. 7.367.

<sup>28</sup> Panel Report, para. 8.1.c.viii. See also para. 7.431. The Panel found that Argentina's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the EU authorities' evaluation of return on investments fell outside the Panel's terms of reference. (*Ibid.*, para. 8.1.c.ix; see also para. 7.429)

<sup>29</sup> Panel Report, para. 8.1.c.x. See also para. 7.529.

<sup>30</sup> Panel Report, para. 8.1.b.i. See also paras. 7.153-7.154.

<sup>31</sup> Panel Report, para. 8.1.b.ii. See also paras. 7.169-7.174.

<sup>32</sup> Panel Report, para. 8.1.b.iii. See also para. 7.175.

<sup>33</sup> Notification of an Appeal by the European Union, WT/DS473/10.

<sup>34</sup> WT/AB/WP/6, 16 August 2010.

<sup>35</sup> Notification of an Other Appeal by Argentina, WT/DS473/11.

<sup>36</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

Saudi Arabia, and the United States each filed a third participant's submission.<sup>37</sup> On the same day, Norway and Turkey each notified its intention to appear at the oral hearing as a third participant.<sup>38</sup>

1.8. By letter of 1 June 2016, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had notified the Chair of the DSB of its decision to authorize Appellate Body Member Mrs Yuejiao Zhang to complete the disposition of this appeal, even though her second term was due to expire before the completion of the appellate proceedings.

1.9. On 30 June 2016, the Appellate Body Division hearing this appeal received two letters from the European Union. In the first letter, the European Union requested a period of 50 minutes to deliver its oral statement at the hearing. The European Union expressed the view that there is "an unusual volume of third participant submissions in this appeal", and that these submissions "refer to a number of points that have not been raised by Argentina". The European Union asserted that it needed to have a full opportunity to address these additional points on its "own motion" and "in an appropriately structured way". In the second letter, the European Union requested that additional procedures be adopted for: (i) public observation of the oral hearing; and (ii) viewing of a recording of the oral hearing by third participants. On 1 July 2016, the Division invited Argentina and the third participants to comment on these requests by 12 noon on Tuesday, 5 July 2016. In response, Argentina, China, Mexico, and the United States submitted comments.

1.10. Having received comments on the request made by the European Union in its first letter<sup>39</sup>, on 6 July 2016, pursuant to Rule 28(1) of the Working Procedures, the Division invited the European Union to submit an additional memorandum by 11 July 2016 to identify the precise points referred to by the third participants that allegedly had not been raised by Argentina, and to explain the reasons for its concerns with these points. In the same letter, the Division also invited Argentina and the third participants to respond in writing, if they so wished, by 14 July 2016.<sup>40</sup> By the deadlines set out above, the European Union submitted a "non-exhaustive list" of arguments raised by certain third participants that it claimed had not been developed in Argentina's written submissions, and Argentina and China each provided a written response.<sup>41</sup> By letter dated 15 July 2016, the Division informed the participants and third participants that they would be accorded, respectively, 35 minutes each and 7 minutes each for their oral statements at the hearing. With respect to the requests made by the European Union in its second letter, the Division received comments from Argentina, China, Mexico, and the United States.<sup>42</sup> On 11 July

<sup>37</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>38</sup> Pursuant to Rule 24(2) of the Working Procedures. Malaysia, which was a third party before the Panel, neither filed a third participant's submission nor notified its intention to appear at the oral hearing.

<sup>39</sup> Argentina argued that the length of the third participants' submissions in these proceedings did not appear exceptionally long, and that it was unable to identify any issue in these submissions that had not been raised by the participants. In Argentina's view, the request to extend the time for the opening statements to 50 minutes was unwarranted, and an extension of five to ten minutes to the time usually allocated to each participant would suffice. Mexico expressed support for retaining sufficient flexibility to ensure that the participants and third participants could make their statements.

<sup>40</sup> On 8 July 2016, the European Union and China each requested an extension of the time period for filing, respectively, the additional memorandum, and the response thereto. The Division declined these requests in a Procedural Ruling issued on 9 July 2016. The Procedural Ruling can be found in Annex D-1 of the Addendum to this Report, contained in document WT/DS473/AB/R/Add.1.

<sup>41</sup> Argentina argued that the points identified in the non-exhaustive list of the European Union either were addressed by Argentina or were points that responded to the European Union's own arguments. Therefore, Argentina considered that an additional five-minute period would suffice to allow the European Union to respond to these points in its oral statement. China stated that third participants frequently raise points not developed by the participants, and that the European Union had not identified any extraordinary circumstances in this dispute that would justify an extension of time for its oral statement.

<sup>42</sup> Regarding the request to open the oral hearing to public observation, Argentina expressed regret that the European Union chose to make this request on a unilateral basis, and indicated that it would prefer not to have the hearing open to public observation in these proceedings. Mexico indicated that it would not object to the request, while China stated that it wished to keep its statements and answers to questions confidential should the hearing be opened to public observation. Both China and Mexico emphasized that their positions in this dispute are without prejudice to their systemic positions on this issue. The United States confirmed its support for the European Union's request, as well as its wish to make its statements and answers to questions public. Regarding the European Union's request to adopt additional procedures for viewing a video recording of the oral hearing by the third participants, Argentina questioned the purposes to be served by such procedures and expressed concerns as to the administrative burden such procedures would entail. None of the third participants supported this request. Further details regarding the comments by Argentina and the



2016, the Division issued a Procedural Ruling in which the Division declined the European Union's request to adopt additional procedures: (i) to allow public observation of the oral hearing, and (ii) to enable the third participants to view a video recording of the oral hearing. The Procedural Ruling can be found in Annex D-2 of the Addendum to this Report.

1.11. By letter of 19 July 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.<sup>43</sup> The Chair of the Appellate Body explained that this was due to a number of factors, including the number and complexity of the issues raised in this and concurrent appellate proceedings, the demands on the WTO Secretariat's translation services, the shortage of staff in the Appellate Body Secretariat, as well as the scheduling difficulties arising from a substantial workload of the Appellate Body, with several appeals proceeding in parallel, and overlap in the composition of the Divisions hearing the different appeals. On 9 August 2016, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 6 October 2016.<sup>44</sup>

1.12. The oral hearing in these appellate proceedings was held on 21-22 July 2016.<sup>45</sup> The participants and nine third participants (Australia, China, Colombia, Indonesia, Mexico, Norway, Russia, Saudi Arabia, and the United States) made oral statements and/or responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>46</sup> The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS473/AB/R/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission are reflected in the executive summaries of those submissions provided to the Appellate Body<sup>47</sup>, and are contained in Annex C of the Addendum to this Report, WT/DS473/AB/R/Add.1.

## 4 ISSUES RAISED

4.1. The following issues are raised in this appeal with respect to the anti-dumping measure on biodiesel:

- a. in respect of the determination of dumping:
  - i. whether the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with this provision when constructing the normal value by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the investigated producers (raised by the European Union);

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third participants can be found in Annex D-2 of the Addendum to this Report, contained in document WT/DS473/AB/R/Add.1.

<sup>43</sup> WT/DS473/12.

<sup>44</sup> WT/DS473/13.

<sup>45</sup> The oral hearing in this appeal was originally scheduled to commence in the afternoon of 21 July 2016. By letter of 6 July 2016, the participants and third participants were informed that, in view of the size and complexity of the submissions by the participants and third participants, the start of the oral hearing would be advanced by half a day.

<sup>46</sup> Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

<sup>47</sup> Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

- ii. whether the Panel erred in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina (raised by the European Union); and
  - iii. whether the Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement in finding that Argentina had not established that the European Union failed to make a "fair comparison" between the normal value and the export price within the meaning of this provision (raised by Argentina);
- b. whether the Panel erred in its interpretation and application of Article 9.3 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and, consequently, Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively (raised by the European Union); and
  - c. whether the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement in finding that Argentina had not established that the EU authorities' non-attribution analysis, insofar as it related to the allegation of "overcapacity" as an "other factor" causing injury to the EU domestic industry, is inconsistent with these provisions (raised by Argentina).

4.2. The following issues are raised in this appeal with respect to the second subparagraph of Article 2(5) of the EU Basic Regulation:

- a. whether, in finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement, the Panel erred in ascertaining the scope and meaning of the second subparagraph of Article 2(5) and thereby erred in its application of Article 2.2.1.1 of the Anti-Dumping Agreement, and acted inconsistently with Article 11 of the DSU (raised by Argentina);
- b. whether, in finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the Panel:
  - i. erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in finding that these provisions do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" (raised by Argentina);
  - ii. erred in ascertaining the meaning of the second subparagraph of Article 2(5) and thereby erred in its application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, and acted inconsistently with Article 11 of the DSU (raised by Argentina); and
  - iii. applied an erroneous legal standard for assessing whether the second subparagraph of Article 2(5) is inconsistent "as such" with the relevant provisions of the covered agreements (raised by Argentina); and
- c. whether the Panel erred in finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article XVI:4 of the WTO Agreement and Article 18:4 of the Anti-Dumping Agreement (raised by Argentina).

## 5 BACKGROUND AND OVERVIEW OF THE MEASURES AT ISSUE

5.1. Before addressing the issues of law and legal interpretation raised in this dispute, we provide an overview of the measures challenged by Argentina, as well as certain background information.

We begin by summarizing the aspects of the anti-dumping measure on biodiesel from Argentina that are relevant to these appellate proceedings, before briefly describing the second subparagraph of Article 2(5) of the Basic Regulation and other relevant aspects of this Regulation.

### 5.1 The EU anti-dumping measure on biodiesel from Argentina

5.2. The investigation underlying the anti-dumping measure on biodiesel was initiated by the EU authorities on 29 August 2012<sup>48</sup>, following a complaint lodged on 16 July 2012 by the EBB.<sup>49</sup> The European Union published the Provisional Regulation on 28 May 2013, imposing provisional anti-dumping duties on imports of biodiesel originating in Argentina.<sup>50</sup> On 1 October 2013, the EU authorities issued a Definitive Disclosure and proposal for definitive anti-dumping duties, and invited comments from the interested parties.<sup>51</sup> On 26 November 2013, the Definitive Regulation was published in the *Official Journal of the European Union*.<sup>52</sup>

5.3. The investigation on dumping and injury covered the period from 1 July 2011 to 30 June 2012 (investigation period, or IP), and the examination of trends relevant for the assessment of injury covered the period from 1 January 2009 to 30 June 2012 (period considered).<sup>53</sup> The EU authorities defined the product concerned as biodiesel originating in, *inter alia*, Argentina, and found that soybeans are "the main raw material purchased and used in the production of biodiesel" in Argentina.<sup>54</sup> It is undisputed that the cost of raw materials is the largest cost component in producing biodiesel.<sup>55</sup>

5.4. In the Provisional Regulation, the EU authorities found that the biodiesel market in Argentina was heavily regulated by the State, and considered that, under these circumstances, domestic sales of biodiesel were not made in the ordinary course of trade.<sup>56</sup> As this meant that the prices paid for biodiesel in domestic sales could not form the basis for the determination of the normal value, the EU authorities decided to construct the normal value for the investigation period on the basis of the Argentine producers' own production costs in their records<sup>57</sup>, the selling, general and administrative expenses incurred, and a profit margin of 15% based on turnover.<sup>58</sup>

5.5. In constructing the normal value in the Provisional Regulation, the EU authorities noted the allegation by the EBB in relation to the Differential Export Tax (DET) system. Under this system, Argentina imposes differential taxes on exports of soybeans, soybean oil, and biodiesel, and the taxes imposed on exports of raw materials are higher than the taxes imposed on exports of the

<sup>48</sup> Panel Report, para. 7.179 (referring to Notice of initiation of the anti-dumping investigation (Panel Exhibit ARG-32)).

<sup>49</sup> Panel Report, para. 7.179 (referring to Consolidated version of the complaint (Panel Exhibit ARG-31)).

<sup>50</sup> Panel Report, para. 7.179 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recital 179).

<sup>51</sup> Panel Report, para. 7.179 (referring to General Disclosure Document (Annex 1), AD593 – Anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, Proposal to impose definitive measures (1 October 2013) (Definitive Disclosure) (Panel Exhibit ARG-35)).

<sup>52</sup> Panel Report, para. 7.179 (referring to Definitive Regulation (Panel Exhibit ARG-22)).

<sup>53</sup> Panel Report, para. 7.375. See also Provisional Regulation (Panel Exhibit ARG-30), Recital 5; and Definitive Regulation (Panel Exhibit ARG-22), Recital 3.

<sup>54</sup> Panel Report, para. 7.182 (quoting Definitive Disclosure (Panel Exhibit ARG-35), para. 35). See also Definitive Regulation (Panel Exhibit ARG-22), Recital 39. Before the Panel, Argentina explained that soybeans are not a direct input in the production of biodiesel, but must be "crush[ed]" to obtain soybean oil before biodiesel can be obtained from the oil by way of transesterification. (Panel Report, fn 265 to para. 7.185) Like the Panel, we refer to both soybean and soybean oil when describing the relevant findings in the Provisional and Definitive Regulations.

<sup>55</sup> Evidence on the Panel record suggests that the costs of raw materials account for 75%–85% of the total cost of production of biodiesel. (Consolidated version of the complaint (Panel Exhibit ARG-31), para. 137)

<sup>56</sup> See Panel Report, para. 7.180 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recitals 44–45). Specifically, blending fossil diesel and biodiesel is mandatory in Argentina (at 7% biodiesel), and the total amount of biodiesel needed to meet this blending requirement is apportioned among a select number of Argentine biodiesel producers. Oil companies are obliged to purchase biodiesel from these producers at prices fixed by the State and published by Argentina's Ministry of Energy. (See Provisional Regulation (Panel Exhibit ARG-30), Recital 44)

<sup>57</sup> Panel Report, para. 7.364. See also Provisional Regulation (Panel Exhibit ARG-30), Recital 45.

<sup>58</sup> Panel Report, para. 7.312 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recitals 44 and 46).

finished product.<sup>59</sup> The EBB alleged that the DET system depresses the domestic price of soybeans and soybean oil, and therefore distorts the costs of production of biodiesel producers in Argentina.<sup>60</sup> The EU authorities considered, however, that, due to a lack of information for purposes of deciding the most appropriate way to address this allegation, the question as to whether the Argentine biodiesel producers' records reasonably reflect the costs associated with the production of biodiesel would be further examined at the definitive stage, as well as in the parallel countervailing duty investigation.<sup>61</sup> Thus, despite the EBB's allegation, the EU authorities used the actual costs of soybeans reported in the Argentine producers' records in calculating the constructed normal value in the Provisional Regulation.<sup>62</sup> On the basis of the constructed normal value and the relevant export price, the EU authorities established dumping margins ranging from 6.8% to 10.6% for the Argentine producers/exporters.<sup>63</sup> Having concluded that the dumped imports had caused material injury to the domestic biodiesel industry of the European Union, and that the injury margins exceeded the dumping margins<sup>64</sup>, the EU authorities imposed provisional duties at rates equal to the above dumping margins.<sup>65</sup>

5.6. Subsequently, in both the Definitive Disclosure and Definitive Regulation, the EU authorities found that the DET system in Argentina depressed the domestic price of soybeans and soybean oil to an artificially low level that, as a consequence, affected the costs of the Argentine biodiesel producers.<sup>66</sup> The EU authorities noted that, on the one hand, the amount of the export tax on soybeans and soybean oil was calculated on the basis of a "reference price" that "reflect[ed] the level of international prices"<sup>67</sup>, namely, the daily FOB price for soybeans and soybean oil published by the Argentine Ministry of Agriculture, Livestock and Fisheries.<sup>68</sup> On the other hand, the domestic prices of soybeans and soybean oil reflected the prevailing conditions in the Argentine domestic market, and followed the trends of the international prices.<sup>69</sup> The EU authorities established that "the difference between the international and the domestic price of soya beans and soya bean oil is the export tax on the product and other expenses incurred for exporting it."<sup>70</sup> In other words, the domestic prices of soybeans and soybean oil, albeit set according to supply and demand in the Argentine market, were essentially equivalent to the international prices minus exporting expenses and the amount of the export tax.

<sup>59</sup> As the EU authorities found:

[E]xport taxes on raw material (35% on soya beans and 32% on soybean oil) were significantly higher than the export taxes on the finished product (nominal rate of 20% on biodiesel, with an effective rate of 14.58% taking into account a tax rebate)

(Panel Report, para. 7.181 (quoting Definitive Disclosure (Panel Exhibit ARG-35), para. 31))

<sup>60</sup> Panel Report, para. 7.180 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recital 45). We note that, in the context of the non-attribution analysis regarding imports of biodiesel by the EU domestic industry, the EU authorities found that "during some months of the [investigation period] the import price of soybean oil from Argentina was higher than the import price of [biodiesel]." (Ibid., para. 7.473 (quoting Provisional Regulation (Panel Exhibit ARG-30), Recital 135))

<sup>61</sup> Panel Report, para. 7.180 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recital 45). As noted above, the EU authorities conducted a parallel countervailing duty investigation on imports of biodiesel from Argentina and Indonesia, which was initiated on 10 November 2012 following a complaint by the EBB. In the case of Argentina, the alleged subsidies consisted of the provision of inputs (i.e. soybeans or soybean oil) at below market prices, by means of a government policy of DET that obliges input producers to sell on the domestic market, creating an excess of supply, depressing prices to a below-market level, and artificially reducing the costs of the biodiesel producers. The countervailing duty investigation was terminated on 25 November 2013, following the EBB's withdrawal of its complaint on 7 October 2013. (Ibid., fn 252 to para. 7.180 (referring to Notice of initiation of the countervailing duty investigation (Panel Exhibit ARG-33); and Notice of termination of the countervailing duty investigation (Panel Exhibit ARG-36)))

<sup>62</sup> Panel Report, para. 7.364. See also Provisional Regulation (Panel Exhibit ARG-30), Recital 45.

<sup>63</sup> Panel Report, para. 7.179 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recital 179).

<sup>64</sup> Injury margins in the Provisional Regulation ranged from 27.8% to 31.8%. (Provisional Regulation (Panel Exhibit ARG-30), Recital 179, referred to in Panel Report, para. 7.179)

<sup>65</sup> Panel Report, para. 7.179 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recital 179).

<sup>66</sup> Panel Report, para. 7.181 (referring to Definitive Disclosure (Panel Exhibit ARG-35), para. 26).

See also Definitive Regulation (Panel Exhibit ARG-22), Recital 30.

<sup>67</sup> Definitive Disclosure (Panel Exhibit ARG-35), para. 32; Definitive Regulation (Panel Exhibit ARG-22), Recital 36. The EU authorities indicated that the Chicago Board of Trade is the main source for such international prices. (Definitive Regulation (Panel Exhibit ARG-22), fn 2 to Recital 36)

<sup>68</sup> Definitive Disclosure (Panel Exhibit ARG-35), para. 32; Definitive Regulation (Panel Exhibit ARG-22), Recital 36. See also Panel Report, paras. 7.182, 7.184, 7.257, and 7.299, and fn 441 to para. 7.259.

<sup>69</sup> Panel Report, para. 7.181 (quoting Definitive Disclosure (Panel Exhibit ARG-35), para. 33).

<sup>70</sup> Panel Report, para. 7.181 (quoting Definitive Disclosure (Panel Exhibit ARG-35), para. 33). See also Definitive Regulation (Panel Exhibit ARG-22), Recital 37.

5.7. The EU authorities concluded that "the domestic prices of the main raw material used by biodiesel producers in Argentina were ... lower than the international prices due to the distortion created by the Argentine export tax system and, consequently, the costs of the main raw material were not reasonably reflected in the records kept by the Argentinean producers under investigation in the meaning of Article 2(5)" of the Basic Regulation.<sup>71</sup> The EU authorities therefore decided to revise the construction of the normal value in the Provisional Regulation and "disregard the actual costs of soya beans (the main raw material purchased and used in the production of biodiesel) as recorded by the companies concerned in their accounts".<sup>72</sup> Instead, such actual costs were replaced by "the average of the reference prices of soya beans published by the Argentine Ministry of Agriculture for export FOB Argentina"<sup>73</sup>, "minus fobbing costs"<sup>74</sup>, during the investigation period. In this Report, we refer to this replacement used by the EU authorities in the Definitive Regulation as the "surrogate price for soybeans".<sup>75</sup>

5.8. As the Panel found, the surrogate price for soybeans used by the EU authorities as part of its construction of the normal value was based on "the reference price used by the Argentine government for the calculation of the export tax on soybeans"<sup>76</sup>, that is, a "reference price" that "reflected the level of international prices".<sup>77</sup> At the same time, the EU authorities considered that this surrogate price for soybeans "would have been the price paid by the Argentine producers in the absence of the export tax system".<sup>78</sup> On the basis of, *inter alia*, the revised constructed normal value, the EU authorities calculated dumping margins ranging from 41.9% to 49.2% for the Argentine exporters/producers.<sup>79</sup>

5.9. The Definitive Regulation confirmed the provisional findings of injury and causation<sup>80</sup>, although certain aspects of the findings were modified. In particular, the figures relating to two of the macroeconomic indicators examined by the EU authorities – the production capacity and capacity utilization rate of the EU industry – were modified in light of revised data submitted by the EBB subsequent to the Provisional Regulation. The EBB claimed that the data previously submitted regarding the total EU production capacity included "idle capacity" and should therefore be reduced.<sup>81</sup> The EU authorities accepted the revised data on production capacity submitted by the EBB, which led to a downward adjustment to the production capacity figures and an upward adjustment to the capacity utilization rates in the Definitive Regulation.<sup>82</sup>

5.10. Finally, the EU authorities found that the injury margins, at rates ranging from 22% to 25.7%, were lower than the dumping margins. The EU authorities applied the "lesser duty rule", and imposed definitive anti-dumping duties on imports of biodiesel from Argentina at rates equal to the injury margins.<sup>83</sup>

## 5.2 The second subparagraph of Article 2(5) of the Basic Regulation

5.11. The Basic Regulation is the basic EU legal instrument on the protection against dumped imports from countries that are not member States of the European Union.<sup>84</sup> It contains language identical or similar to that used in the Anti-Dumping Agreement, together with additional

<sup>71</sup> Panel Report, para. 7.181 (quoting Definitive Disclosure (Panel Exhibit ARG-35), para. 34). See also Definitive Regulation (Panel Exhibit ARG-22), Recital 38.

<sup>72</sup> Definitive Regulation (Panel Exhibit ARG-22), Recital 39. See also Panel Report, para. 7.182 (referring to Definitive Disclosure (Panel Exhibit ARG-35), para. 35).

<sup>73</sup> Definitive Regulation (Panel Exhibit ARG-22), Recitals 39-40. See also Panel Report, para. 7.182 (referring to Definitive Disclosure (Panel Exhibit ARG-35), para. 35).

<sup>74</sup> Panel Report, para. 7.257.

<sup>75</sup> See *infra*, para. 6.63. See also Panel Report, para. 7.364.

<sup>76</sup> Panel Report, fn 441 to para. 7.259. See also paras. 7.182, 7.184, and 7.299.

<sup>77</sup> Panel Report, para. 7.257. See also Definitive Disclosure (Panel Exhibit ARG-35), para. 32; Definitive Regulation (Panel Exhibit ARG-22), Recital 36.

<sup>78</sup> Panel Report, para. 7.257 (referring to Definitive Disclosure (Panel Exhibit ARG-35), para. 32). See also Definitive Regulation (Panel Exhibit ARG-22), Recital 42, quoted in Panel Report, para. 7.184.

<sup>79</sup> Panel Report, para. 7.179. See also Definitive Regulation (Panel Exhibit ARG-22), Recital 65.

<sup>80</sup> Panel Report, para. 7.179.

<sup>81</sup> Panel Report, para. 7.376.

<sup>82</sup> Panel Report, para. 7.379 (quoting Definitive Regulation (Panel Exhibit ARG-22), Recitals 131-133). See also Definitive Disclosure (Panel Exhibit ARG-35), paras. 105-106; and *infra*, para. 6.117.

<sup>83</sup> Panel Report, para. 7.365 and fn 616 thereto (referring to Definitive Regulation (Panel Exhibit ARG-22), Recital 215).

<sup>84</sup> See European Union's first written submission to the Panel, para. 29.

provisions and details that have no direct counterpart in the Anti-Dumping Agreement.<sup>85</sup> Article 2 of the Basic Regulation, entitled "Determination of dumping", contains provisions setting out rules relating to normal value, export price, comparison between normal value and export price, and dumping margin. The rules relating to normal value are set out in Articles 2(1) through 2(7). Of particular relevance to this dispute are Articles 2(3) and 2(5). The second subparagraph of the latter provision is the only provision of the Basic Regulation that Argentina has challenged "as such" in this dispute.

5.12. The first subparagraph of Article 2(3) of the Basic Regulation, which contains language similar to Article 2.2 of the Anti-Dumping Agreement, sets out two methods for determining the normal value "[w]hen there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison".<sup>86</sup> In such circumstances, "the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative."<sup>87</sup>

5.13. Article 2(5) of the Basic Regulation contains four subparagraphs. It begins with a subparagraph that largely replicates the language in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, providing that "[c]osts shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration."<sup>88</sup> The text of the second subparagraph of Article 2(5) does not directly correspond to any specific provision of the Anti-Dumping Agreement. It provides that, "[i]f costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets."<sup>89</sup>

5.14. The following table juxtaposes the above-mentioned provisions of the Anti-Dumping Agreement and the Basic Regulation, with the provision subject to Argentina's challenge – the second subparagraph of Article 2(5) of the Basic Regulation – underlined.

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<sup>85</sup> The preamble of the Basic Regulation explicitly refers to the GATT 1994 as well as the Anti-Dumping Agreement, and states that, "[i]n order to ensure a proper and transparent application of [the detailed rules set out in the Anti-Dumping Agreement], the language of the agreement should be brought into Community legislation as far as possible". (Basic Regulation (Panel Exhibit ARG-1), 3rd preambular recital)

<sup>86</sup> Article 2(3) of the Basic Regulation (Panel Exhibit ARG-1). See also Panel Report, para. 7.72.

<sup>87</sup> Article 2(3) of the Basic Regulation (Panel Exhibit ARG-1). See also Panel Report, para. 7.72. The second subparagraph of Article 2(3) goes on to provide the definition of "[a] particular market situation", which is not contained in the Anti-Dumping Agreement. The determination of a reasonable amount for selling, general and administrative costs and for profits is set out in Article 2(6) of the Basic Regulation.

<sup>88</sup> Article 2(5) of the Basic Regulation (Panel Exhibit ARG-1). See also Panel Report, para. 7.72.

<sup>89</sup> Article 2(5) of the Basic Regulation (Panel Exhibit ARG-1). See also Panel Report, para. 7.72. The other subparagraphs of Article 2(5) are not pertinent for purposes of this dispute.

**Table 1 Juxtaposition of certain provisions of the Anti-Dumping Agreement and the EU Basic Regulation**

Article	Anti-Dumping Agreement	Article	EU Basic Regulation
2.2	When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country [footnote omitted], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.	2(3)	<p>When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.</p> <p>A particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.</p>
2.2.1.1	For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. ...	2(5)	<p>Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.</p> <p><u>If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.</u></p> <p>...</p>

Source: Anti-Dumping Agreement and Basic Regulation (Panel Exhibit ARG-1). (underlining added)



## 6 ANALYSIS OF THE APPELLATE BODY

### 6.1 Claims concerning the EU anti-dumping measure on imports of biodiesel from Argentina

#### 6.1.1 Determination of dumping

6.1. In this section, we address the claims of error raised by both the European Union and Argentina relating to the determination of dumping under Article 2 of the Anti-Dumping Agreement and Article VI of the GATT 1994. These claims of error are closely related and concern the Panel's findings under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement regarding the EU authorities' calculation of the cost of production in constructing the normal value of biodiesel, and under Article 2.4 of the Anti-Dumping Agreement regarding the comparison between that normal value and the export price of biodiesel. The European Union and Argentina disagree on whether Article 2.2.1.1 allows an investigating authority to disregard the records of a producer under investigation if the authority determines that the costs in such records are not "reasonable". The European Union and Argentina also disagree on whether Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 allow an investigating authority to use certain evidence other than the records kept by the investigated producer, in particular information from outside the country of origin, when determining the cost of production in the country of origin under Article 2.2. Finally, the European Union and Argentina disagree on the circumstances in which Article 2.4 requires due allowance to be made where the investigating authority has constructed the normal value on the basis of costs that are not those in the records kept by the investigated producer.

6.2. We begin by examining the European Union's and Argentina's claims of error regarding the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement. We then turn to the European Union's claims of error under Article 2.2 of the Anti-Dumping Agreement. In that section, we also examine Argentina's claim of error regarding the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>90</sup> Finally, we examine Argentina's claims of error under Article 2.4 of the Anti-Dumping Agreement.

#### 6.1.1.1 Article 2.2.1.1 of the Anti-Dumping Agreement

##### 6.1.1.1.1 Introduction

6.3. The European Union appeals the Panel's finding that "the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers".<sup>91</sup> In the view of the European Union, the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1, in particular by finding that this condition refers to the actual costs incurred by the specific exporter or producer under investigation<sup>92</sup>, and that this condition does not include a general standard of "reasonableness".<sup>93</sup> The European Union requests us to reverse the findings in paragraphs 7.247-7.249 and 8.1.c.i of the Panel Report, and further argues that we should not complete the analysis.<sup>94</sup> In contrast, Argentina requests us to uphold the Panel's findings at issue. In the event that we reverse the Panel's findings under Article 2.2.1.1,

<sup>90</sup> Argentina raises this claim of error in connection with the Panel's finding on the second subparagraph of Article 2(5) of the Basic Regulation. Given that, however, this claim of error also concerns the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement, we address this aspect of Argentina's appeal in this section together with the European Union's claims concerning the Panel's finding under Article 2.2. See also *infra*, para. 6.58.

<sup>91</sup> Panel Report, para. 7.249. (fn omitted) See also European Union's appellant's submission, para. 55 (referring to Panel Report, paras. 7.247-7.249 and 8.1.c.i).

<sup>92</sup> European Union's appellant's submission, paras. 96, 114, 126, 128-130, 135, 165-166, 169, 172-173, 175-176, 179, 187-189, and 209.

<sup>93</sup> See European Union's appellant's submission, paras. 84, 87-92, 95, 105-107, 110-111, 126-127, 131, 133, 135, 137-138, 153, 159-160 and 210-211.

<sup>94</sup> European Union's appellant's submission, paras. 55, 153, and 211-212.



Argentina requests us to complete the legal analysis and find that the European Union acted inconsistently with Article 2.2.1.1.<sup>95</sup>

6.4. Before examining the European Union's claim of error on appeal, we summarize the relevant Panel findings with respect to Article 2.2.1.1 of the Anti-Dumping Agreement. We then set out our understanding of the second condition in the first sentence of Article 2.2.1.1. Thereafter, we turn to examine the merits of the European Union's claim that the Panel erred in its interpretation and application of this provision.

#### 6.1.1.1.2 The Panel's findings

6.5. The Panel first recalled that, in certain situations where domestic sales do not permit a proper comparison, the normal value may be constructed on the basis of the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".<sup>96</sup> To the Panel, the opening phrase in Article 2.2.1.1 of the Anti-Dumping Agreement — "For the purpose of paragraph 2" — indicates that Article 2.2.1.1 elaborates on how the "cost of production in the country of origin" referred to in Article 2.2 is to be determined in constructing the normal value. Moreover, the first sentence of Article 2.2.1.1 establishes the records of the investigated exporter or producer as the preferred source of information for determining the costs of production. The Panel noted that the term "shall" in the first sentence of Article 2.2.1.1 indicates that it establishes a mandatory rule in this respect, whereas the term "normally" suggests that this rule may be derogated from under certain conditions. In this regard, the Panel considered that, in the two conditions that it sets out, the first sentence of Article 2.2.1.1 expressly provides for two circumstances in which an investigating authority need not follow the general rule to calculate costs on the basis of the records kept by the exporter or producer under investigation.<sup>97</sup>

6.6. Regarding the second of these conditions — that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration — the Panel observed that the focus of this condition is on the specific exporter or producer under investigation, and what is contained in its records.<sup>98</sup> Since it is the "records" that must reasonably reflect the costs of production and sale of the product, and given that "reflect" connotes the faithful and accurate depiction of information and that "reasonably reflect" concerns the degree or manner of reflection of costs in the records, the Panel considered that "reasonably reflect" in Article 2.2.1.1 means that the records of an exporter or producer must depict all the costs it has incurred in a manner that is — within acceptable limits — accurate and reliable.<sup>99</sup>

6.7. To the Panel, the context provided by the first condition in the first sentence of Article 2.2.1.1, namely, that the records be "in accordance with the generally accepted accounting principles of the exporting country", suggests that the first sentence of Article 2.2.1.1 is concerned with the reasonable reflection of the costs that producers actually incur in the production of the product at issue.<sup>100</sup> In addition, the Panel took the view that, under Article 2.2 of the Anti-Dumping Agreement, the purpose of calculating the cost of production and constructing the normal value on the basis of the cost is to identify an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when such price cannot be used. It flows from this purpose that the "costs associated with the production and sale of the product under consideration" are those that a producer actually incurred, "since these would yield such a proxy more accurately".<sup>101</sup> The Panel did not consider that the arguments made

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<sup>95</sup> Argentina makes this request with respect to both of its claims of inconsistency before the Panel, namely, that the European Union acted inconsistently with Article 2.2.1.1 because, in the anti-dumping measure at issue, the EU authorities: (i) failed to calculate the cost of production of biodiesel on the basis of the records kept by the Argentine producers (Argentina's appellee's submission, paras. 95 and 118-119); and (ii) included costs not associated with the production and sale of biodiesel in the calculation of the cost of production. (Argentina's other appellant's submission, paras. 373-374, 378-379, and 390-391)

<sup>96</sup> Panel Report, para. 7.225 (quoting Article 2.2 of the Anti-Dumping Agreement).

<sup>97</sup> Panel Report, para. 7.227.

<sup>98</sup> Panel Report, para. 7.228.

<sup>99</sup> Panel Report, paras. 7.230-7.231.

<sup>100</sup> Panel Report, para. 7.232.

<sup>101</sup> Panel Report, para. 7.233.

by the parties pertaining to the object and purpose of the Anti-Dumping Agreement shed light on the interpretative question before it, and thus did not examine those arguments in detail.<sup>102</sup>

6.8. On this basis, the Panel understood that the second condition in the first sentence of Article 2.2.1.1 relates to whether the costs set out in a producer's or exporter's records "correspond – within acceptable limits – in an accurate and reliable manner[] to all the actual costs incurred by the particular producer or exporter for the product under consideration".<sup>103</sup> In its view, this calls for a comparison between, on the one hand, the costs as reported in the records kept by the producer or exporter and, on the other hand, the costs actually incurred by that producer or exporter. To the Panel, this does not mean that an investigating authority must automatically accept whatever is reflected in the records. Rather, it is free to examine the reliability and accuracy of the costs reported in the records and, thus, whether those records reasonably reflect the costs associated with the production and sale of the product under consideration. In the Panel's view, however, the examination of the records for purposes of determining whether they "reasonably reflect" costs within the meaning of Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, as proposed by the European Union. The Panel considered that the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred.<sup>104</sup>

6.9. The Panel found support for its understanding in previous panel reports. After conducting a detailed examination of the findings of the panels in *US – Softwood Lumber V*<sup>105</sup>, *Egypt – Steel Rebar*<sup>106</sup>, and *EC – Salmon (Norway)*<sup>107</sup>, the Panel considered that the reasoning in each of those reports suggests that Article 2.2.1.1 focuses on the actual costs of production of the exporter or producer under investigation.

6.10. Turning to the anti-dumping measure at issue, the Panel noted that the EU authorities decided not to use the cost of soybeans in the production of biodiesel in Argentina because "the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system".<sup>108</sup> The Panel considered that this did not constitute a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs

<sup>102</sup> Panel Report, para. 7.238.

<sup>103</sup> Panel Report, para. 7.247. See also para. 7.242.

<sup>104</sup> Panel Report, para. 7.242 and fn 400 thereto.

<sup>105</sup> The Panel noted that, in *US – Softwood Lumber V*, the panel examined whether the records of the producers of softwood lumber "reasonably reflected" the level of profit derived from selling a by-product generated in the production of softwood lumber that, in turn, offset the cost of production of softwood lumber. The Panel considered that, by assessing the extent to which the profits derived from the sales of the by-product reduced the cost of production of softwood lumber, that panel sought to ascertain the actual cost of production to the producer in question. (Panel Report, para. 7.243 (referring to Panel Report, *US – Softwood Lumber V*, para. 7.312))

<sup>106</sup> The Panel explained that the panel in *Egypt – Steel Rebar* was faced with the question of whether certain short-term interest income was related to the production and sale of rebar, such that it could be used to offset the cost of production of rebar. Since none of the investigated companies had provided sufficient evidence that the interest income was related to their cost of production of rebar, that panel found that Turkey had not demonstrated that the investigating authority acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement in deciding not to factor this income as an offset in its calculation of the cost of production of rebar. The Panel considered that this approach calls for an assessment of each producer's actual cost of production, and whether the evidence on the record of the investigation demonstrates that those costs were offset by a certain income. (Panel Report, para. 7.245 (referring to Panel Report, *Egypt – Steel Rebar*, paras. 7.422-7.426))

<sup>107</sup> In the Panel's view, the panel in *EC – Salmon (Norway)* faulted the investigating authority for allocating, and thus associating, the full amount of certain non-recurring costs to the cost of production of farmed salmon despite the fact that these non-recurring costs did not relate exclusively to the farming-related activities for a given salmon generation. That panel considered that, to comply with Article 2.2.1.1, the allocation methodology to determine the cost of production must reflect the relationship that exists between the costs being allocated and the production activities to which they are "associated". The Panel considered that panel's approach to be focused on the actual costs of production incurred by producers, because it tested whether a rational relationship existed between the costs allocated and the production activities in order to yield an accurate outcome. (Panel Report, para. 7.246 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.506-7.507 and 7.514))

<sup>108</sup> Panel Report, para. 7.248 (quoting Definitive Regulation (Panel Exhibit ARG-22), Recital 38).

associated with the production and sale of biodiesel.<sup>109</sup> Thus, the Panel found that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.<sup>110</sup>

#### **6.1.1.1.3 The second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement**

6.11. The European Union's appeal calls for us to examine the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The European Union claims that the Panel erred in considering that this condition calls for an assessment of costs actually incurred by the producer at issue.<sup>111</sup> The European Union contends that this condition permits an examination of the "reasonableness" of the reported costs themselves.<sup>112</sup> The European Union's arguments highlight the interconnected nature of the various provisions of Article 2 of the Anti-Dumping Agreement as a whole. In its view, these provisions are imbued with a general standard of "reasonableness", which endows an investigating authority with discretion, under Article 2.2.1.1, to disregard the records kept by the exporter or producer when the authority considers that the costs recorded therein are not reasonable.<sup>113</sup> Argentina's arguments focus on the constraints that the text of Article 2.2.1.1 places on an investigating authority's determinations. Argentina also emphasizes that other interpretative elements do not support the general standard of "reasonableness" posited by the European Union.<sup>114</sup>

6.12. We observe that Article 2.2.1.1 of the Anti-Dumping Agreement forms part of the disciplines concerning the determination of dumping in Article 2 of the Anti-Dumping Agreement. Article 2.1 of the Anti-Dumping Agreement provides that a product is being dumped when it is "introduced into the commerce of another country" at an export price that is "less than its normal value".<sup>115</sup> The other provisions of Article 2 then set out the rules regarding the determination of normal value and export price, and the comparison to be made between the two for purposes of determining the margin of dumping.

6.13. Article 2.2 of the Anti-Dumping Agreement identifies the circumstances in which an investigating authority need not determine the normal value on the basis of domestic sales.<sup>116</sup> Article 2.2 further provides that, in such circumstances, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, "or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

6.14. Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement, in turn, further elaborate on various aspects of Article 2.2. Article 2.2.1 sets forth rules concerning when sales of the like product in the domestic market or to a third country may be treated as not being in the ordinary course of trade and disregarded in determining the normal value. Article 2.2.2 regulates the determination of the amounts for administrative, selling and general costs and for profits.

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<sup>109</sup> The Panel noted that it had neither been alleged that the costs of soybeans in the records kept by the producers do not represent the actual price paid by those producers, nor that the records themselves are inconsistent with the GAAP. (Panel Report, para. 7.222)

<sup>110</sup> Panel Report, paras. 7.248-7.249.

<sup>111</sup> European Union's appellant's submission, paras. 96, 114, 126, 128-130, 135, 165-166, 169, 172-173, 175-176, 179, 187-189, and 209.

<sup>112</sup> European Union's appellant's submission, paras. 153, 158-159 (referring to Panel Report, fn 400 to para. 7.242), and 211.

<sup>113</sup> See European Union's appellant's submission, paras. 84, 87-92, 95, 105-107, 110-111, 126-127, 131, 133, 135, 137-138, 153, 159-160, and 210-211.

<sup>114</sup> Argentina's appellee's submission, paras. 10, 14-16, 32-34, 95, and 118.

<sup>115</sup> Pursuant to Article 2.1, the normal value of the product refers to "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

<sup>116</sup> One circumstance identified in Article 2.2 of the Anti-Dumping Agreement is "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country". The other circumstance outlined in Article 2.2 is "when ... such sales do not permit a proper comparison", either because of "the particular market situation" or "the low volume of the sales in the domestic market of the exporting country".

6.15. Article 2.2.1.1 and footnote 6 of the Anti-Dumping Agreement provide:

For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, *provided that such records* are in accordance with the generally accepted accounting principles of the exporting country and *reasonably reflect the costs associated with the production and sale of the product under consideration*. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[\*]<sup>117</sup>

[\*fn original]<sup>6</sup> The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

6.16. In examining the second condition in the first sentence of Article 2.2.1.1, we first analyse the structure of that sentence and the obligation contained therein. Thereafter, we examine the specific wording of the second condition in the first sentence, which is italicized in the above quotation and is at issue in this dispute. Subsequently, we turn to the other relevant interpretative elements.

6.17. Article 2.2.1.1 of the Anti-Dumping Agreement begins with the phrase: "For the purpose of paragraph 2". "[P]aragraph 2" refers to Article 2.2 of the Anti-Dumping Agreement, which provides that, where the normal value cannot be determined on the basis of domestic sales, it shall instead be determined using one of two alternative bases, one of which is the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.<sup>118</sup> Accordingly, Article 2.2.1.1 includes rules pertaining to the calculation of the "cost of production" for purposes of determining the normal value under Article 2.2. The first sentence of Article 2.2.1.1 further provides that "costs shall normally" be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records meet two conditions. The reference to the records kept by the exporter or producer under investigation indicates that this sentence is concerned with establishing the cost *for the specific exporter or producer* under investigation. This is confirmed by the fact that the subject of both conditions in the first sentence of Article 2.2.1.1 is the records kept by the exporter or producer.

6.18. Article 2.2.1.1 thus identifies the records of the investigated exporter or producer as the preferred source for cost of production data<sup>119</sup>, and directs the investigating authority to base its calculations of costs on such records when the two conditions are met.<sup>120</sup> The second condition that triggers the obligation in the first sentence of Article 2.2.1.1 is that the records "reasonably reflect the costs associated with the production and sale of the product under consideration". On the basis of the relevant dictionary definitions<sup>121</sup>, we understand that the term "records" refers to

<sup>117</sup> Emphasis added.

<sup>118</sup> We recall that Article 2.2.2 of the Anti-Dumping Agreement concerns the determination of the amounts for administrative, selling and general costs and for profits.

<sup>119</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 99.

<sup>120</sup> As the Panel noted, the EU authorities relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to discard the records kept by the Argentine producers under investigation insofar as they pertained to the cost of soybeans. (See Panel Report, paras. 7.221 and 7.227; and Definitive Regulation (Panel Exhibit ARG-22), Recital 38) Thus, for purposes of resolving this dispute, it is the meaning of this condition that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply.

<sup>121</sup> The definition of the word "record" includes: "[a]n account of the past; a piece of evidence about the past; ... a written or otherwise permanently recorded account of a fact or event; ... a document ... on which such an account is recorded". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 2, p. 2491) The definition of the word "cost" includes: "[w]hat must be given in order to acquire, produce,

a written or documented account of facts or past events, and that the term "costs" refers to the price paid or to be paid to acquire or produce something.

6.19. The term "costs" in the second condition in the first sentence of Article 2.2.1.1 is followed by the phrase "associated with the production and sale of the product under consideration". From the relevant dictionary definitions<sup>122</sup>, the phrase "associated with" can be understood as connected to, or united with. In the first sentence of Article 2.2.1.1, the phrase "associated with" thus makes a connection, and recognizes a relationship, between the "costs", on the one hand, and the "production and sale of the product under consideration", on the other hand. We see the phrase "product under consideration" as a reference to the product at issue in the anti-dumping investigation.<sup>123</sup> Thus, the phrase "costs associated with the production and sale of the product under consideration" refers to the costs that have a relationship with the production and sale of the specific product from the exporting Member with respect to which dumping is being assessed. In our view, when this text is read together with the reference to "records kept by the exporter or producer under investigation", it is clear that this condition refers to those costs incurred by the investigated exporter or producer that have a relationship with the production and sale of the product under consideration.

6.20. The phrase "costs associated with the production and sale of the product under consideration" in the first sentence of Article 2.2.1.1 is preceded by the phrase "reasonably reflect". Relevant dictionary definitions<sup>124</sup> suggest that the term "reasonably reflect" means to mirror, reproduce, or correspond to something suitably and sufficiently. In Article 2.2.1.1, the term "reasonably" qualifies the reproduction or correspondence of the costs. Given the structure of the first sentence of Article 2.2.1.1, and in particular the fact that "reasonably reflect" refers to "such records", it is clear that it is the "records" of the individual exporters or producers under investigation that are subject to the condition to "reasonably reflect" the "costs".

6.21. Turning to the relevant context for the interpretation of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, we note that the first condition specified in that sentence is that the "records [be] in accordance with the generally accepted accounting principles of the exporting country". The generally accepted accounting principles (GAAP) refer to principles, standards, and procedures that are commonly used, within a specific jurisdiction, for financial accounting and reporting purposes. Thus, the first condition in the first sentence of Article 2.2.1.1 relates to whether the records of a specific exporter or producer conform to the accounting principles, standards and procedures that are generally accepted and apply to such records in the relevant jurisdiction – i.e. the exporting country. This is a condition that concerns the *general accounting and reporting practices* of the exporter or producer. In contrast, the second condition in the first sentence of Article 2.2.1.1 concerns the records' reasonable reflection of the costs associated with the production and sale of the *product under consideration in a specific anti-dumping proceeding*.<sup>125</sup> Indeed, conformity with the GAAP does not necessarily ensure that the records "reasonably reflect the costs associated with the production and sale of the product under consideration"<sup>126</sup> because the manner in which costs are recorded in

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or effect something; the price (to be) paid for a thing", and "[c]harges, expenses". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 531)

<sup>122</sup> The term "associated with" may be defined as "join[ed], unite[d]", "combine[d]", and "[c]onnect[ed] as an idea". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 137)

<sup>123</sup> This is consistent with the way in which the same phrase is used in footnote 2 and Article 2.6 of the Anti-Dumping Agreement. Footnote 2 provides that sales of the like product in the domestic market shall be considered of a sufficient quantity for the determination of the normal value if such sales constitute a certain percentage of the sales of the "product under consideration to the importing Member". Article 2.6 defines "like product" in relation to the "product under consideration". This suggests that the "product under consideration" is the specific product from the exporting Member with respect to which dumping is being assessed.

<sup>124</sup> The word "reasonably" is defined as "sufficiently, suitably", and "at a reasonable rate; to a reasonable extent". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 2, p. 2481) The word "reflect" is defined as "[r]eproduce or display after the fashion of a mirror; correspond in appearance or effect to; have as a cause or source". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 2, p. 2506)

<sup>125</sup> In our view, the panel report in *US – Softwood Lumber V* also stands for the understanding that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement concerns the reasonable reflection of the costs associated with the production and sale of the product under consideration in a specific anti-dumping investigation. See *supra*, fn 105.

<sup>126</sup> Emphasis added.

financial statements in general may not necessarily correspond to how the product under consideration is defined for purposes of a specific anti-dumping investigation.<sup>127</sup>

6.22. Our understanding of the second condition in the first sentence of Article 2.2.1.1 is confirmed by the second and third sentences of Article 2.2.1.1, and footnote 6 of the Anti-Dumping Agreement. These provisions set out rules for an investigating authority's allocation and adjustment of costs. These rules recognize that certain types of expenses have effects beyond the period in which the costs are incurred. They also imply that it may be inappropriate to attribute certain company costs entirely to the production and sale of the product under consideration.<sup>128</sup> These provisions reinforce the understanding that the inquiry envisaged under Article 2.2.1.1 is one relating to the circumstances of each investigated exporter or producer in the exporting country. The cost allocations and adjustments contemplated in the second and third sentences of Article 2.2.1.1 and footnote 6 allow an investigating authority to obtain a more precise calculation of the costs associated with the product under consideration for the specific exporter or producer by ensuring or verifying that there is a genuine relationship between the costs reflected in the exporter's or producer's records and the costs associated with the production and sale of the specific product under consideration. This context supports the understanding that the second condition in the first sentence of Article 2.2.1.1 relates to whether the records of the exporter or producer suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration.

6.23. Furthermore, Article 2.2 of the Anti-Dumping Agreement refers to "the cost of production in the country of origin". In our view, given the fact that Article 2.2.1.1 starts with the phrase "[f]or the purpose of paragraph 2", the interpretation of the term "costs" in Article 2.2.1.1, for purposes of calculating the costs of production, must be consistent with how the term "cost" is understood in Article 2.2. Thus, insofar as the cost of production is concerned, the costs "calculated on the basis of records kept by the exporter or producer" under Article 2.2.1.1 must lead to a cost "in the country of origin". The context provided by Article 2.2 suggests that the second condition in the first sentence of Article 2.2.1.1 should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin.

6.24. In addition, in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales.<sup>129</sup> The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy. This supports the view that the "costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 are those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the price of the like product if it were sold in the ordinary course of trade in the domestic market.

6.25. Looking beyond the relevant context, we turn to the object and purpose of the Anti-Dumping Agreement. We first note that the Anti-Dumping Agreement does not contain a preamble to guide the inquiry into its object and purpose. The object and purpose of this

<sup>127</sup> While the product under consideration in a particular anti-dumping investigation may be limited to a single model, size, type or specification of a product, the exporter or producer under investigation may export or produce a number of different products. The records of such exporter or producer may include costs that concern multiple products without allocating them on a product-by-product or model-by-model basis. Thus, the manner in which an exporter or producer registers its costs may not reasonably reflect the costs associated with the production and sale of the product under consideration in a specific anti-dumping investigation.

<sup>128</sup> The second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement requires an investigating authority to consider "all available evidence on the proper allocation of costs" including, specifically, evidence provided by the relevant exporter or producer, provided that the allocation is one that the exporter or producer has historically utilized. The third sentence of Article 2.2.1.1 requires an investigating authority, to the extent not already accomplished by applying the second sentence, to make appropriate adjustments to take account of non-recurring items of cost which benefit future and/or current production, and of costs affected by start-up operations. Footnote 6 provides that adjustments made by an investigating authority for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authority during the investigation.

<sup>129</sup> See Panel Reports, *Thailand – H-Beams*, para. 7.112; and *US – Softwood Lumber V*, para. 7.278.

Agreement can, nonetheless, be discerned from its content and structure. The Anti-Dumping Agreement defines the concept of "dumping"<sup>130</sup> and the remedies available to Members whose domestic industries are injured by such "dumping".<sup>131</sup> At the same time, the Anti-Dumping Agreement conditions the right to apply such remedies to counteract dumping on the demonstrated existence of three substantive conditions — dumping, injury, and a causal link between the two<sup>132</sup> — as well as on compliance with certain procedural and additional substantive rules. Taken as a whole, the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures.<sup>133</sup> The understanding we have derived from the text and context of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement is, in our view, consistent with such object and purpose.

6.26. Thus, interpreting the condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement that the "records ... reasonably reflect the costs associated with the production and sale of the product under consideration", in accordance with the ordinary meaning of the terms in their context and in light of the object and purpose of the Anti-Dumping Agreement, we understand this condition as referring to whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration. With this understanding in mind, we turn to examine the European Union's claim that the Panel erred in its interpretation and application of Article 2.2.1.1 of the Anti-Dumping Agreement.

#### 6.1.1.1.4 Whether the Panel erred in its interpretation and application of Article 2.2.1.1 of the Anti-Dumping Agreement

6.27. The European Union contends that, in finding the biodiesel anti-dumping measure at issue to be inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement, the Panel erred in its interpretation and application of the second condition in the first sentence of this provision.<sup>134</sup> The European Union submits that the Panel failed to conduct a holistic and proper interpretation of Article 2.2.1.1 consistent with Article 31 of the Vienna Convention on the Law of Treaties<sup>135</sup> (Vienna Convention). The European Union alleges multiple discrete errors by the Panel and contends that each of them amounts to error requiring reversal of the Panel's ultimate finding of inconsistency.<sup>136</sup> We first examine the two main arguments of the European Union, namely, that the Panel erred in finding that the second condition in the first sentence of Article 2.2.1.1 refers to the "actual" costs incurred by the specific exporter or producer under investigation, and that this condition does not include a general standard of "reasonableness".<sup>137</sup> Thereafter, we turn to the European Union's remaining arguments.

6.28. The first main argument made by the European Union is that the Panel erred in finding that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement refers to the *actual* costs incurred by the specific exporter or producer under investigation.<sup>138</sup> The European Union submits that the phrase "associated with the production and sale" in this condition is drafted in relatively general and abstract terms, and cannot be interpreted to mean "actual" costs of production and sale.<sup>139</sup> The European Union adds that the Panel erred by failing properly

<sup>130</sup> Pursuant to Article 2.1 of the Anti-Dumping Agreement, a product is to be considered "dumped" when it is "introduced into the commerce of another country" at an export price that is "less than its normal value". The Appellate Body has explained that dumping is the result of the pricing behaviour of individual exporters or foreign producers. (See Appellate Body Reports, *US – Zeroing (Japan)*, paras. 111 and 156; *US – Zeroing (EC)*, para. 129; and *US – Stainless Steel (Mexico)*, para. 95 and fn 208 to para. 94)

<sup>131</sup> See Articles 2, 3, 4, 7, 8, and 9 of the Anti-Dumping Agreement.

<sup>132</sup> See Articles 2 and 3 of the Anti-Dumping Agreement.

<sup>133</sup> See Appellate Body Report, *US – Washing Machines*, para. 5.52.

<sup>134</sup> European Union's appellant's submission, paras. 55, 113, and 154.

<sup>135</sup> Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

<sup>136</sup> European Union's appellant's submission, paras. 113, 156, and 190.

<sup>137</sup> See European Union's appellant's submission, paras. 84, 87-92, 95, 105-107, 110-111, 126-127, 131, 133, 135, 137-138, 153, 159-160, and 210-211.

<sup>138</sup> See European Union's appellant's submission, paras. 96, 114, 126, 128-130, 135, 165-166, 169, 172-173, 175-176, 179, 187-189, and 209.

<sup>139</sup> European Union's appellant's submission, para. 96. In the European Union's view, the term "associated" has a broader meaning than the phrase "actually incurred". (Ibid., para. 165)

to interpret the term "associated".<sup>140</sup> In the European Union's view, a proper interpretation of the term "associated" leads to the conclusion that "the European Union was fully entitled to consider which costs would pertain [or relate] to the production and sale of biodiesel in normal circumstances, i.e. in the absence of the distortion caused by Argentina's differential export tax system."<sup>141</sup> In their third participant's submissions, Australia and the United States express views similar to that of the European Union, and consider that the condition at issue should not be interpreted as referring to the actual costs incurred by the producer or exporter under investigation.<sup>142</sup>

6.29. Argentina submits that the term "costs" in the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement refers to charges or expenses that have actually been incurred by a given producer for the production and sale of the product under consideration. To Argentina, the Panel correctly concluded that this condition is concerned with the reasonable reflection of the costs that producers actually incur in the production of the product at issue.<sup>143</sup> In their third participant's submissions, China, Indonesia, and Saudi Arabia also argue that the condition at issue refers to an investigated producer's actual costs of producing the product under consideration.<sup>144</sup>

6.30. As explained above, we understand the phrase "costs associated with the production and sale of the product under consideration" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to refer to costs incurred by the investigated exporter or producer that are genuinely related to the production and sale of the product under consideration. We do not consider that the Panel's interpretation conflicts with our understanding of this phrase. Although Article 2.2.1.1 does not explicitly refer to "actual" costs, the Panel stated that the condition at issue relates to whether the costs set out in a producer's or exporter's records "correspond – within acceptable limits – in an accurate and reliable manner[] to all the actual costs incurred by the particular producer or exporter for the product under consideration".<sup>145</sup> To the Panel, this "calls for a comparison between, on the one hand, the costs as they are reported in the producer['s]/exporter's records and, on the other, the costs actually incurred by that producer."<sup>146</sup> When comparing the two conditions in the first sentence of Article 2.2.1.1, the Panel considered that, "while the costs in the records might be consistent with GAAP, they may still not accord with how they would need to be considered in the context of an anti-dumping investigation, such as in respect of the proper allocation of costs for depreciation or amortization or the relevant time periods."<sup>147</sup> In addition, when examining the panel findings in *EC – Salmon (Norway)*, the Panel noted that the panel in that case focused on the *actual* costs of production incurred by the producers, "because the panel tested whether there existed, in actuality, a rational relationship between the costs allocated and the production activities".<sup>148</sup> Reading the Panel's use of the word *actual* in light of the broader reasoning of the Panel findings, we understand the Panel to have considered that the second condition in the first sentence of Article 2.2.1.1 concerns the costs incurred by the producer under investigation that are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation. Thus, we do not consider that the Panel's use of the word "actual" is in error. Nor do we consider, as the European Union argues, that the condition at issue allows the EU authorities to consider which costs would pertain to the production and sale of biodiesel in normal circumstances, i.e. in the absence of the alleged distortion caused by Argentina's export tax system. Rather, we agree with Argentina that such interpretation would add words to the condition at issue that are not present in Article 2.2.1.1, namely, the costs that "*would pertain*" and "*in normal circumstances*".<sup>149</sup>

6.31. The European Union also submits that, because the first condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement already instructs companies to record costs that

<sup>140</sup> European Union's appellant's submission, paras. 164-166.

<sup>141</sup> European Union's appellant's submission, para. 170. (emphasis omitted)

<sup>142</sup> Australia's third participant's submission, paras. 9 and 11; United States' third participant's submission, paras. 11 and 19-20.

<sup>143</sup> Argentina's appellee's submission, paras. 28-30 (referring to Panel Report, paras. 7.232-7.233).

<sup>144</sup> China's third participant's submission, paras. 36, 40, and 70; Indonesia's third participant's submission, paras. 23 and 27-28; Saudi Arabia's third participant's submission, para. 16.

<sup>145</sup> Panel Report, para. 7.247. See also para. 7.242.

<sup>146</sup> Panel Report, para. 7.242.

<sup>147</sup> Panel Report, para. 7.232.

<sup>148</sup> Panel Report, para. 7.246 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.514).

<sup>149</sup> Argentina's appellee's submission, para. 26. (emphasis original; underlining omitted)



they have actually incurred, the second condition in that sentence must be interpreted to mean something more than that.<sup>150</sup>

6.32. Argentina submits that the GAAP are merely a set of rules for accounting and financial reporting, and that, even when records conform to such rules, those records may not reasonably reflect the costs incurred by the producer or exporter in relation to the product under consideration in a particular anti-dumping investigation.<sup>151</sup>

6.33. We do not consider that the first condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement renders the second condition in that sentence<sup>152</sup> superfluous or meaningless because, as noted above, while the first condition concerns the activity of the exporter or producer generally, the second condition is specific to the costs associated with the production and sale of the product under consideration. In this regard, we agree with the Panel that records that are GAAP-consistent<sup>153</sup> may nonetheless be found not to reasonably reflect the costs associated with the production and sale of the product under consideration. This may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records, or where transactions involving such inputs are not at arm's length.<sup>154</sup> Thus, we do not consider that the Panel erred in this respect.

6.34. The European Union also takes issue with the Panel's statement that "the context provided by Article 2.2.2 [of the Anti-Dumping Agreement] suggests to [it] that, as a general principle, the actual data of producers/exporters is to be preferred in constructing the normal value"<sup>155</sup>, and disputes that this supports the Panel's interpretation of Article 2.2.1.1. The European Union suggests that the Panel erroneously imported the word "actual" from Article 2.2.2 without considering that this provision refers to "actual data" pertaining to production and sale "in the ordinary course of trade" of the like product. To the European Union, it would be arbitrary to import the word "actual" while at the same time excluding the phrase "in the ordinary course of trade".<sup>156</sup> To us, however, it is clear from the Panel Report that, in making this statement, the Panel was addressing, and rejecting, the European Union's reliance on Article 2.2.2 as context to argue that "the express reference to the 'actual data' of the producer/exporter in that provision relates only to production and sales *in the ordinary course of trade*, and *a contrario*, their actual data need not be used where the like product is not sold in the ordinary course of trade."<sup>157</sup> In the Panel's view, contrary to the European Union's argument, "the structure of Article 2.2.2 indicates a preference for the actual data of the exporter and like product in question, with an incremental progression away from these principles before reaching 'any other reasonable method' in Article 2.2.2(iii)".<sup>158</sup> In our view, the Panel's reading of Article 2.2.2 is consistent with the overall structure and logic of this provision.

6.35. The second main argument raised by the European Union is that the Panel erred in finding that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

<sup>150</sup> European Union's appellant's submission, para. 176. See also para. 128. The United States submits similar views in paragraph 16 of its third participant's submission.

<sup>151</sup> Argentina's appellee's submission, paras. 36-37 and 102-104. China and Indonesia submit similar views in their third participant's submission. (See China's third participant's submission, paras. 44-49, and 70; and Indonesia's third participant's submission, para. 27)

<sup>152</sup> As set out above, the first sentence of Article 2.2.1.1 provides:

For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

<sup>153</sup> As the Panel pointed out, it is undisputed between the parties that GAAP generally instruct companies truly to record all the costs that have actually been incurred in the production of the items. (Panel Report, para. 7.232)

<sup>154</sup> Panel Report, para. 7.232.

<sup>155</sup> Panel Report, para. 7.236.

<sup>156</sup> European Union's appellant's submission, para. 135.

<sup>157</sup> Panel Report, para. 7.236 (referring to European Union's first written submission to the Panel, paras. 247-248). (emphasis original)

<sup>158</sup> Panel Report, para. 7.236.

does not include a general standard of "reasonableness".<sup>159</sup> The European Union submits that the Panel failed to recognize that Article 2.2.1.1 is informed by a standard of "reasonableness" that permits an investigating authority to disregard the records kept by the exporter or producer if the authority determines that the costs in such records are not reasonable.<sup>160</sup> The European Union argues that the costs referred to in the second condition in the first sentence of Article 2.2.1.1 "must themselves be 'reasonable' if the records are to reasonably reflect them".<sup>161</sup> The European Union considers that a standard of "reasonableness" informs not only the term "reflect", but also the determination of the costs associated with the production and sale of the product under consideration.<sup>162</sup> In its third participant's submission, Australia submits that an investigating authority should be permitted to consider whether the costs in the records are reasonable and, where they are not, to adjust or replace those costs in an appropriate manner.<sup>163</sup>

6.36. Argentina submits that there is no textual basis for the European Union's argument that a standard of "reasonableness" informs the determination of the costs associated with the production and sale of the product under consideration under Article 2.2.1.1. Argentina also notes that the word "reasonably" is an adverb that qualifies the verb "reflect" and not the word "costs".<sup>164</sup> Similarly, in their third participant's submissions, China, Indonesia, and Saudi Arabia contend that Article 2.2.1.1 does not allow an investigating authority to assess whether the recorded costs meet some general standard of "reasonableness" through a comparison with hypothetical costs that might prevail in a hypothetical market, free from government regulation.<sup>165</sup>

6.37. We fail to see any textual support in Article 2.2.1.1 of the Anti-Dumping Agreement for the argument made by the European Union. Indeed, we observe that the European Union itself accepts that the adverb "reasonably" modifies the verb "reflect" in a phrase where the subject of the sentence is the producer's or exporter's "records".<sup>166</sup> In our view, the plain meaning of the terms used in the condition at issue, as well as the structure of the first sentence of Article 2.2.1.1, do not support the European Union's reading of the term "costs" in the second condition of this provision. To the extent that costs are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation, we do not consider that there is an additional or abstract standard of "reasonableness" that governs the meaning of "costs" in the second condition in the first sentence of Article 2.2.1.1.

6.38. The European Union further contends that the relationship among Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement supports its interpretation of the second condition in the first sentence of Article 2.2.1.1 as containing a standard of "reasonableness" that informs the determination of "costs". Specifically, the European Union contends that the calculation of costs pursuant to Article 2.2.1.1 is relevant not only for constructing the normal value under Article 2.2, but also in determining whether domestic sales or sales to a third country are not in the ordinary course of trade by reason of price under Article 2.2.1. The European Union submits that, in order to determine whether, under Article 2.2.1, sales of the like product are "below per unit ... costs of production plus administrative, selling and general costs", an authority must first establish the "costs" pursuant to Article 2.2.1.1.<sup>167</sup> Thus, in the European Union's view, the word "costs" in the first sentence of Article 2.2.1.1 refers to "all costs"<sup>168</sup>, which includes not only the cost of production but also administrative, selling and general costs. Given that the amount of

<sup>159</sup> European Union's appellant's submission, paras. 84, 87-92, 95, 105-107, 110-111, 126-127, 131, 133, 135, 137-138, 153, 159-160, and 210-211.

<sup>160</sup> European Union's appellant's submission, paras. 105, 111, 126, 153, 159, and 210-211.

<sup>161</sup> European Union's appellant's submission, para. 159.

<sup>162</sup> European Union's appellant's submission, paras. 153, 159, and 210. Australia and the United States express a similar view. (Australia's third participant's submission, para. 9; United States' third participant's submission, para. 21)

<sup>163</sup> Australia's third participant's submission, para. 22.

<sup>164</sup> Argentina's appellee's submission, paras. 17-19, 22-23, and 32. China, Indonesia, and Saudi Arabia express a similar view. (China's third participant's submission, para. 34; Indonesia's third participant's submission, para. 20; Saudi Arabia's third participant's submission, para. 24)

<sup>165</sup> China's third participant's submission, paras. 24 and 35-36. See also Indonesia's third participant's submission, paras. 19, 26, 32-34, and 36; Saudi Arabia's third participant's submission, paras. 16, 21, 26, 30, 33, and 48.

<sup>166</sup> European Union's appellant's submission, para. 159.

<sup>167</sup> European Union's appellant's submission, paras. 69, 72, and 74-75.

<sup>168</sup> European Union's appellant's submission, para. 76. (emphasis omitted)

"administrative, *selling* and general costs"<sup>169</sup> must, pursuant to Article 2.2, be "reasonable", the European Union contends that it would be internally inconsistent to interpret the second condition in the first sentence of Article 2.2.1.1 as meaning that a standard of "reasonableness" informs the determination of the costs associated with *sales*, but not those associated with production.<sup>170</sup> In this respect, the European Union notes the "repeated use" of the term "reasonable" in Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, and 2.4, and footnote 6 of the Anti-Dumping Agreement, which, in the European Union's view, supports its interpretation of the second condition in the first sentence of Article 2.2.1.1.<sup>171</sup>

6.39. We understand the European Union to contend that Article 2.2.1.1 contains a standard of "reasonableness" pertaining to "administrative, selling and general costs" that is present more generally in the Anti-Dumping Agreement, and in particular in Articles 2.2, 2.2.1, and 2.2.2. Again, we do not find support in these provisions for the European Union's argument that Article 2.2.1.1 contains a general standard of "reasonableness" that informs not only the reflection of the costs in a producer's records, but also the "costs" themselves. The adverb "reasonably" in the second condition of the first sentence of Article 2.2.1.1 modifies the verb "reflect", rather than the word "costs". Moreover, none of the references to "reasonable" in the provisions cited by the European Union suggests that the investigating authority enjoys unfettered discretion to define subjectively, and to apply, a benchmark of "reasonableness" for purposes of assessing whether the costs in a producer's or exporter's records are "unreasonable".<sup>172</sup>

6.40. The European Union also characterizes the Panel as having found that "no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do."<sup>173</sup>

6.41. We do not subscribe to the European Union's reading of the Panel Report. We note that, to the Panel, the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement requires a comparison between the costs in the producer's or exporter's records and the costs incurred by such producer or exporter. The Panel emphasized that "the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more 'reasonable' than the costs actually incurred."<sup>174</sup> In this connection, the Panel explained that its understanding of this condition does not imply that "whatever is recorded in the records of the producer or exporter must be automatically accepted."<sup>175</sup> To the Panel, an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters" to determine, in particular, whether all costs incurred are captured; whether the costs incurred have been over- or understated; and whether non-arms-length transactions or other practices affect the reliability of the reported costs.<sup>176</sup> The Panel further stated that "Article 2.2.1.1 does not involve an examination of the 'reasonableness' of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful."<sup>177</sup> In light of these statements, we consider the Panel's interpretation of Article 2.2.1.1 to be more nuanced than the European Union's argument suggests.

<sup>169</sup> Emphasis added.

<sup>170</sup> European Union's appellant's submission, paras. 73-76 and 78.

<sup>171</sup> European Union's appellant's submission, paras. 77-78 and 90.

<sup>172</sup> For instance, what may constitute the "reasonable" amount for administrative, selling and general costs and for profit, referred to in Article 2.2, is further elaborated pursuant to the concrete rules set out in Article 2.2.2. In this regard, we agree with Argentina that this is not tantamount to a general and abstract "reasonableness" test. (Argentina's appellee's submission, paras. 50 and 105) Similarly, where the term "reasonable" is used in Article 2.2.1, it refers to something concrete, i.e. a "period of time". In footnote 6 of the Anti-Dumping Agreement, where the term "reasonably" is less directly connected to a specific determination, it refers to the phrase "be taken into account by the authorities during the investigation", and not to "costs", much less to "costs" in the second condition in the first sentence of Article 2.2.1.1.

<sup>173</sup> European Union's appellant's submission, para. 84.

<sup>174</sup> Panel Report, para. 7.242. (emphasis omitted)

<sup>175</sup> Panel Report, fn 400 to para. 7.242.

<sup>176</sup> Panel Report, fn 400 to para. 7.242.

<sup>177</sup> Panel Report, fn 400 to para. 7.242. At the end of its interpretative analysis, the Panel concluded that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement "calls for an

6.42. We now turn to address the multiple discrete errors that the European Union alleges that the Panel made in interpreting the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The European Union claims that the Panel erred in stating that the opening phrase — "For the purpose of paragraph 2" — in Article 2.2.1.1 makes clear that this provision elaborates on how the cost of production in the country of origin in Article 2.2 is to be determined in constructing the normal value.<sup>178</sup> The European Union submits that the purpose of Article 2.2 is to "elaborate rules for determining a value that is normal, or a normal value".<sup>179</sup> The European Union argues that the Panel's statement erroneously narrows the purpose of Article 2.2, arbitrarily excluding the other aspects of this provision.<sup>180</sup>

6.43. Argentina underlines that the claim it raised before the Panel concerned the determination of the "cost of production" for the purpose of constructing the normal value for the Argentine producers in the anti-dumping measure on biodiesel. Argentina considers that the Panel's statement is correct in view of the claim that Argentina raised in this dispute.<sup>181</sup>

6.44. We do not consider that the Panel statement challenged by the European Union erroneously narrows the purpose of Article 2.2 of the Anti-Dumping Agreement. In our view, this statement does not address what other costs, in addition to costs of production, may also be governed by Article 2.2.1.1. Rather, the Panel's statement comports with our understanding, explained above, that the calculation of "cost of production", for purposes of determining the normal value under Article 2.2, is subject to Article 2.2.1.1 of the Anti-Dumping Agreement. Thus, we do not consider that the Panel erred in making this statement.

6.45. The European Union also takes issue with the Panel's observation that "[t]he first sentence of Article 2.2.1.1 ... establishes the records of the investigated producer as the preferred source of information for the establishment of the costs of production."<sup>182</sup> The European Union points out that this language is not used in the first sentence of Article 2.2.1.1.<sup>183</sup> Argentina submits that the Panel did not err in its description of the first sentence of Article 2.2.1.1, and that the Panel's observation reflects the fact that the records of the producer shall normally be used, provided that the conditions in the first sentence are fulfilled.<sup>184</sup>

6.46. We agree with this observation by the Panel. By requiring that costs normally be calculated on the basis of the records kept by the exporter or producer under investigation, "Article 2.2.1.1 identifies the 'records kept by the exporter or producer under investigation' to be the preferred source for cost of production data", as the Appellate Body explained in *EC – Tube or Pipe Fittings*.<sup>185</sup>

6.47. The European Union points to the contextual significance of Article 2.4 of the Anti-Dumping Agreement for interpreting Article 2.2.1.1 of the Anti-Dumping Agreement. According to the European Union, there is an overlap between Articles 2.2 and 2.4 in the sense that adjustments will be justified pursuant to the latter provision only to the extent that they have not already been made pursuant to the former provision. Thus, the European Union argues that, if a tax adjustment would be justified under Article 2.4, such adjustment could, alternatively, be made under Article 2.2.<sup>186</sup>

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assessment of whether the costs set out in a producer's records correspond – within acceptable limits – in an accurate and reliable manner, to all the actual costs incurred by the particular producer or exporter for the product under consideration". (Ibid., para. 7.247)

<sup>178</sup> European Union's appellant's submission, para. 115 (referring to Panel Report, para. 7.227). The European Union contends that the Panel also made the same error later in paragraph 7.233 of its Report. (See European Union's appellant's submission, para. 133)

<sup>179</sup> European Union's appellant's submission, para. 115.

<sup>180</sup> European Union's appellant's submission, para. 115.

<sup>181</sup> Argentina's appellee's submission, para. 98.

<sup>182</sup> Panel Report, para. 7.227.

<sup>183</sup> European Union's appellant's submission, para. 116.

<sup>184</sup> Argentina's appellee's submission, para. 99.

<sup>185</sup> See Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 99.

<sup>186</sup> European Union's appellant's submission, para. 101.

6.48. To us, the European Union's argument risks conflating the obligations in Article 2.2.1.1 and Article 2.4 of the Anti-Dumping Agreement.<sup>187</sup> The manner in which the normal value is calculated pursuant to Article 2.2 of the Anti-Dumping Agreement may inform the types of adjustments required under Article 2.4. This, however, does not mean that any adjustment envisaged under Article 2.4 – in particular adjustments for taxation – may instead be taken into account in determining the normal value pursuant to Article 2.2. Rather, Article 2.2.1.1 and Article 2.4 serve different functions in the context of determinations of dumping: the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price. Thus, we do not consider that Article 2.4 supports the European Union's interpretation of the first sentence of Article 2.2.1.1.

6.49. Referring to Article XI of the GATT 1994, the European Union also argues that, because export taxes are not covered by this provision, other disciplines must be interpreted so as to permit a reasonable and appropriately calibrated response to the existence of such discriminatory and highly trade-distorting measures.<sup>188</sup> We do not see the European Union's argument that export taxes are not prohibited by Article XI of the GATT 1994 to be contextually relevant to the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

6.50. Finally, the European Union submits that the Panel made certain erroneous statements as to the object and purpose of the Anti-Dumping Agreement.<sup>189</sup> After briefly summarizing the arguments made by Argentina and the European Union pertaining to the object and purpose of the Anti-Dumping Agreement, the Panel stated:

The Anti-Dumping Agreement does not contain a preamble or an explicit indication of its object and purpose. Moreover, we do not consider that an interpretation of the text of Article 2.2.1.1 in context leaves its meaning equivocal or ambiguous. We therefore do not consider that arguments pertaining to the object and purpose of the Anti-Dumping Agreement shed light on the meaning of the particular question of interpretation before us, and we therefore do not examine those arguments in detail.<sup>190</sup>

6.51. The European Union reads these sentences as a statement by the Panel that, because the Anti-Dumping Agreement contains no preamble, considerations of the object and purpose of the Anti-Dumping Agreement are not relevant.<sup>191</sup> We note, however, that the Panel stated only that "[t]he Anti-Dumping Agreement does not contain a preamble or an explicit indication of its object and purpose", referring to an Appellate Body report where the same statement is found.<sup>192</sup>

6.52. The European Union also reads the above sentences as embodying the view that, because the interpretation of Article 2.2.1.1 does not leave the meaning of the condition at issue equivocal or ambiguous, the object and purpose of the Agreement at issue is irrelevant. The European Union submits that, in adopting such a view, the Panel erroneously relegated the object and purpose to a supplementary means of interpretation.<sup>193</sup>

6.53. It is true that it would be incorrect to treat the object and purpose of an agreement as a supplementary means of interpretation. Rather, examining the terms of a treaty in light of the object and purpose of that treaty is part of the interpretative exercise under Article 31(1) of the Vienna Convention. This is because Article 31(1) provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*."<sup>194</sup> We, however, do not share the European Union's reading of the sentences of the Panel Report quoted above. The Panel simply

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<sup>187</sup> Article 2.4 provides that a fair comparison shall be made between the export price and the normal value. Article 2.4 also provides that due allowance shall be made for differences which affect price comparability, and includes an illustrative list of the factors for which such allowance shall be made.

<sup>188</sup> European Union's appellant's submission, para. 108.

<sup>189</sup> European Union's appellant's submission, para. 136. See also paras. 190-208.

<sup>190</sup> Panel Report, para. 7.238. (fns omitted)

<sup>191</sup> European Union's appellant's submission, para. 136.

<sup>192</sup> Panel Report, para. 7.238 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 118).

<sup>193</sup> European Union's appellant's submission, para. 136.

<sup>194</sup> Emphasis added.

made the observation that it "[did] not consider that an interpretation of the text of Article 2.2.1.1 in context leaves its meaning equivocal or ambiguous".<sup>195</sup> The Panel further stated that the "arguments pertaining to the object and purpose of the Anti-Dumping Agreement" did not shed light on the particular interpretative question before it.<sup>196</sup> The Panel then concluded that, for this reason, it was not necessary to engage in an *in-depth* analysis of those arguments.<sup>197</sup>

6.54. We now turn to the European Union's claim that the Panel erred in its application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to the anti-dumping measure on biodiesel.<sup>198</sup> The Panel noted that the EU authorities determined not to use the cost of soybeans in the production of biodiesel because "the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system".<sup>199</sup> To the Panel, this was not a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel. For this reason, the Panel found that the European Union acted inconsistently with Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.<sup>200</sup>

6.55. Concerning its claim that the Panel erred in applying Article 2.2.1.1, the European Union does not advance any argument that is separate and different from its arguments concerning the alleged errors in the Panel's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement. In light of our understanding of Article 2.2.1.1, explained above, we agree with the Panel's statement that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel. For this reason, we agree with the Panel's finding that the European Union acted inconsistently with Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.<sup>201</sup>

#### 6.1.1.1.5 Conclusions

6.56. In sum, we consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement – that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration – relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration. The Panel's interpretation, which is more nuanced than the European Union's arguments on appeal suggest, does not conflict with our understanding of this provision. In our view, the Panel did not err in rejecting the European Union's argument that the second condition in the first sentence of Article 2.2.1.1 includes a general standard of "reasonableness". With respect to the application of Article 2.2.1.1 to the anti-dumping measure on biodiesel, we agree with the Panel that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel.

6.57. We therefore find that the Panel did not err in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Consequently, we uphold the Panel's finding, in paragraphs 7.249 and 8.1.c.i of its Report, that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing

<sup>195</sup> Panel Report, para. 7.238. (fn omitted)

<sup>196</sup> Panel Report, para. 7.238. (emphasis added)

<sup>197</sup> Panel Report, para. 7.238.

<sup>198</sup> European Union's appellant's submission, paras. 55, 113, and 154.

<sup>199</sup> Panel Report, para. 7.248 (quoting Definitive Regulation (Panel Exhibit ARG-22), Recital 38).

<sup>200</sup> Panel Report, paras. 7.248-7.249.

<sup>201</sup> Panel Report, paras. 7.248-7.249.

to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. Having upheld this Panel finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.

### **6.1.1.2 Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994**

#### **6.1.1.2.1 Introduction**

6.58. We now turn to the Panel's interpretation and application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The European Union and Argentina<sup>202</sup> each appeals different aspects of the Panel's interpretation of these provisions. The European Union also appeals the Panel's application of these provisions to the anti-dumping measure on biodiesel. Argentina, for its part, appeals the Panel's application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 to the second subparagraph of Article 2(5) of the Basic Regulation.<sup>203</sup> We deal with this latter part of Argentina's appeal in section 6.2 below.

6.59. The European Union claims that the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and, in particular, in its understanding of the phrase "cost of production in the country of origin" in this provision.<sup>204</sup> The European Union further claims that the Panel erred in finding that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value in the anti-dumping measure on biodiesel.<sup>205</sup> The European Union contends that the soybean prices used by the EU authorities reflected the soybean costs that the producers of biodiesel would pay in Argentina absent the distortion caused by the Argentine DET system. For this reason, the European Union argues that these prices were costs "in the country of origin" within the meaning of Article 2.2.<sup>206</sup> The European Union requests us to reverse the Panel finding at issue<sup>207</sup>, but maintains that we should not complete the analysis.<sup>208</sup> In contrast, Argentina requests us to uphold the Panel's application of Article 2.2 to the anti-dumping measure on biodiesel, contending that the Panel correctly found that the EU authorities did not rely on the cost of production in Argentina when constructing the normal value.<sup>209</sup> Should we reverse the Panel's finding under Article 2.2, Argentina requests us to complete the legal analysis and find that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 with respect to the anti-dumping measure on biodiesel.<sup>210</sup>

6.60. Argentina claims that the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 when stating that these provisions neither "limit the sources of information that may be used in establishing the costs of production", nor "prohibit an authority [from] resorting to sources of information other than producers' costs in the country of origin", but do "require that the costs of production established by the authority reflect conditions prevailing in the country of origin".<sup>211</sup> Argentina requests us to reverse the Panel's interpretation.<sup>212</sup> In Argentina's view, these provisions do not permit the use of

<sup>202</sup> See *supra* fn 90.

<sup>203</sup> In this context, Argentina claims that the Panel erred: (i) in ascertaining the scope and meaning of the second subparagraph of Article 2(5) of the Basic Regulation; and (ii) in rejecting Argentina's alternative claim and finding that Argentina had not demonstrated that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner. (Argentina's other appellant's submission, paras. 194 and 196-197)

<sup>204</sup> European Union's appellant's submission, paras. 218 and 227. The European Union has not advanced specific arguments regarding the Panel's finding under Article VI:1(b)(ii) of the GATT 1994.

<sup>205</sup> European Union's appellant's submission, paras. 213, 227, and 240.

<sup>206</sup> European Union's appellant's submission, paras. 229-230. For the factual aspects of the anti-dumping measure on biodiesel from Argentina, see section 5.1 of this Report.

<sup>207</sup> European Union's appellant's submission, paras. 213, 240, and 263 (referring to Panel Report, paras. 7.260 and 8.1.c.ii).

<sup>208</sup> European Union's appellant's submission, para. 241.

<sup>209</sup> Argentina's appellee's submission, paras. 121, 152, and 179.

<sup>210</sup> Argentina's appellee's submission, para. 153.

<sup>211</sup> Argentina's other appellant's submission, para. 195 (referring to Panel Report, para. 7.171).

<sup>212</sup> Argentina's other appellant's submission, paras. 234 and 391.

any information other than the producers' costs in the country of origin.<sup>213</sup> The European Union submits that we should reject Argentina's claim because Argentina has not demonstrated that the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in making the above statements.<sup>214</sup>

6.61. Before examining the claims of error on appeal, we first summarize the Panel's interpretation and application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. We then examine the participants' claims that the Panel erred in its interpretation of these provisions. Subsequently, we turn to consider the European Union's claim that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement to the anti-dumping measure on biodiesel. Thereafter, we consider Argentina's request for us to complete the legal analysis.

#### 6.1.1.2.2 The Panel's findings

6.62. In assessing Argentina's claim that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the Panel made certain statements expressing its understanding of these provisions. The Panel noted that it was not in dispute between the parties that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 require the construction of the normal value on the basis of the "cost of production" "in the country of origin". The parties disagreed, however, as to whether these provisions permit the use of *information* from outside the country of origin in constructing the cost of production. The Panel explained:

Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information that may be used in establishing the costs of production; what they do require, however, is that the authority construct the normal value on the basis of the "cost of production" "in the country of origin". While this would, in our view, require that the costs of production established by the authority reflect conditions prevailing in the country of origin, we do not consider that the two provisions prohibit an authority resorting to sources of information other than producers' costs in the country of origin.<sup>215</sup>

6.63. Later in its Report, the Panel addressed Argentina's claim that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in the anti-dumping measure on biodiesel by failing to construct the normal value on the basis of the cost of production in Argentina. The Panel recalled that the EU authorities had found domestic prices of soybeans in Argentina to be "artificially lower" than international prices due to the distortion created by the Argentine DET system. For this reason, the EU authorities did not use the "average actual purchase price of soybeans during the [investigation period]"<sup>216</sup>, i.e. the cost of soybeans as reflected in the producers' records. Instead, the EU authorities replaced this cost with the average reference price of soybeans for export published by the Argentine Ministry of Agriculture, minus fobbing costs<sup>217</sup> (which we have defined above as the surrogate price for soybeans).<sup>218</sup> The Panel also noted that the EU authorities considered that the surrogate price for soybeans reflected the level of international prices and that the Argentine producers would have paid prices at that level in the absence of the DET system.<sup>219</sup> In the view of the Panel, however, the surrogate price for soybeans used by the EU authorities did not represent the cost of soybeans in Argentina for domestic purchasers of soybeans, including the Argentine producers and exporters of biodiesel under investigation.<sup>220</sup> For these reasons, the

<sup>213</sup> Argentina's other appellant's submission, paras. 195, 205, and 234 (referring to Panel Report, para. 7.171).

<sup>214</sup> European Union's appellee's submission, paras. 6, 67, 70-71, and 171.

<sup>215</sup> Panel Report, para. 7.171.

<sup>216</sup> Panel Report, para. 7.257.

<sup>217</sup> Panel Report, para. 7.257.

<sup>218</sup> See *supra*, para. 5.7.

<sup>219</sup> Panel Report, paras. 7.257 (referring to Definitive Disclosure (Panel Exhibit ARG-35), para. 32) and 7.259 (referring to European Union's response to Panel question No. 45, para. 60).

<sup>220</sup> Panel Report, paras. 7.258-7.259. The Panel considered that the EU authorities selected the surrogate price for soybeans precisely because it was *not* the cost of soybeans in Argentina. (*Ibid.*, para. 7.258)



Panel found that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using, in the construction of the normal value, a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina.<sup>221</sup>

#### **6.1.1.2.3 Whether the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994**

6.64. Like the Panel finding at issue, the European Union's arguments before the Panel and on appeal distinguish between "cost", on the one hand, and "information" or "evidence", on the other hand.<sup>222</sup> To the European Union, the cost of production to be determined under Article 2.2 of the Anti-Dumping Agreement is that of the country of origin, but this provision does not forbid the use of information from countries other than the country of origin in the calculation of such cost of production.<sup>223</sup>

6.65. Argentina submits, however, that the distinction made by the European Union and the Panel is artificial, given that "cost of production" refers to expenses incurred in the production of the product concerned in the country of origin, which necessarily implies that the information and evidence used are those from the country of origin. Argentina thus argues that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not permit the use of information other than the producers' costs in the country of origin.<sup>224</sup>

6.66. The interpretative question on appeal concerns the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production of the product in the country of origin" in Article VI:1(b)(ii) of the GATT 1994. Specifically, the participants disagree as to whether these phrases encompass information or evidence from outside the country of origin.

6.67. Article 2.2 of the Anti-Dumping Agreement provides:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.<sup>225</sup>

6.68. Article VI:1(b)(ii) of the GATT 1994 provides:

1. The Members recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

...

(b) in the absence of such domestic price, is less than either

<sup>221</sup> Panel Report, para. 7.260.

<sup>222</sup> Panel Report, paras. 7.95-7.96 and 7.171; European Union's appellee's submission, paras. 67-70; appellant's submission, para. 222.

<sup>223</sup> European Union's appellant's submission, paras. 222-223 and 238-239; appellee's submission, paras. 67 and 70.

<sup>224</sup> Argentina's other appellant's submission, paras. 205, 212, and 234; appellee's submission, paras. 129-130 and 148-149. See also Panel Report, para. 7.83.

<sup>225</sup> Fn omitted.

...

- (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

6.69. As noted above, the definition of the term "cost" refers to the expenses paid or to be paid for something. This definition does not include a reference to information or evidence. The term "cost" in both Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 is followed by "of production" and then by "in the country of origin". On the basis of the text of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the phrase "cost of production [...] in the country of origin" may be understood as a reference to the price paid or to be paid to produce something within the country of origin.

6.70. We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country. The reference to "in the country of origin", however, indicates that, whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin".<sup>226</sup>

6.71. Turning to the relevant context, we recall that Article 2.2.1.1 of the Anti-Dumping Agreement identifies the "records kept by the exporter or producer under investigation" as the preferred source for cost of production data to be used in such calculation.<sup>227</sup> We do not see, however, that the first sentence of Article 2.2.1.1 *precludes* information or evidence from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the "country of origin".<sup>228</sup> While such documents, information, or evidence are from outside the country of origin, they would, nonetheless, be relevant to the calculation of the cost of production *in the country of origin*. These considerations support the understanding that the determination of the "cost of production in the country of origin" may take account of evidence from outside the country of origin.

6.72. The second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement provides that the authorities "shall consider all available evidence on the proper allocation of costs". Argentina considers that this sentence does not assist in understanding the meaning of "cost" in Article 2.2, because the evidence referred to in this sentence relates only to the "proper allocation of costs" and not to the costs themselves.<sup>229</sup> We, however, read the sentence above as suggesting that the "evidence" used to establish a "cost" can be different from that cost itself. This is because this sentence refers separately to "evidence" and to "cost".

6.73. We further observe that, while both obligations apply harmoniously when an investigating authority constructs the normal value, the scope of the obligation to calculate the costs on the basis of the records in the first sentence in Article 2.2.1.1 is narrower than the scope of the obligation to determine the cost of production in the country of origin in Article 2.2. In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or

<sup>226</sup> China expresses a similar view in paragraph 89 of its third participant's submission.

<sup>227</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 99.

<sup>228</sup> This may be so e.g. where the producer under investigation purchases inputs from outside the country of origin to produce the product under consideration. We note, in this regard, that Article 6.6 of the Anti-Dumping Agreement provides that authorities shall satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

<sup>229</sup> Argentina's appellee's submission, paras. 130-131. See also Indonesia's third participant's submission, para. 43.

where relevant information from the exporter or producer under investigation is not available<sup>230</sup>, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin". Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects.<sup>231</sup> It is in this sense that we understand the Panel to have stated that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 "require that the costs of production established by the authority reflect conditions prevailing in the country of origin".<sup>232</sup>

6.74. In light of our examination above of the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production ... in the country of origin" in Article VI:1(b)(ii) of the GATT 1994, we consider that these provisions do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin.<sup>233</sup> For this reason, we do not consider that Argentina has demonstrated that the Panel erred in stating that these provisions "do not limit the sources of information that may be used in establishing the costs of production", and do not "prohibit an authority [from] resorting to sources of information other than producers' costs in the country of origin" but do "require that the costs of production established by the authority reflect conditions prevailing in the country of origin".<sup>234</sup>

6.75. In its appeal, although it "partially agrees" with the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement<sup>235</sup>, the European Union nevertheless claims that the Panel erred in its interpretation of this provision. This is because, according to the European Union, the Panel failed to recognize that "Article 2.2.1.1 does not preclude an investigating authority from having regard to evidence relating to matters outside the country of origin, if to do so would be helpful in determining the costs associated with the production and sale of the product under consideration; and in then determining what data to use to reject/replace/adjust the records kept by the investigated firm".<sup>236</sup> The European Union does not identify any particular passage in the Panel Report that reveals the Panel's alleged error in interpreting Article 2.2. Nor do we see that the European Union's argument accurately describes the Panel's analysis and understanding of Article 2.2.1.1. In any event, we understand the European Union's argument to mean that its claim of error under Article 2.2 is dependent upon its claim that the Panel erred in its interpretation of Article 2.2.1.1. As we have found that the Panel did not err in its interpretation of Article 2.2.1.1, we reject the European Union's claim challenging the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement.

<sup>230</sup> This may occur e.g. where the producer under investigation refuses access to and does not provide information concerning costs, and the investigating authority relies on "best information available" under Article 6.8 and Annex II to the Anti-Dumping Agreement.

<sup>231</sup> Pursuant to Articles 12.2.1(iii) and 12.2.2 of the Anti-Dumping Agreement, a public notice of the imposition of provisional or final measures shall contain, *inter alia*, 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 of the Anti-Dumping Agreement. Thus, we understand that, with respect to any information or evidence used to determine the cost of production in the country of origin, an investigating authority is required to explain how the information or evidence informed the calculation of the cost of production.

<sup>232</sup> Panel Report, para. 7.171. Accordingly, we disagree with Argentina's assertion that, in making this statement, the Panel was reading words into the provisions at issue. (See Argentina's other appellant's submission, para. 212 (referring to Panel Report, para. 7.171))

<sup>233</sup> This interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 is without prejudice to our interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

<sup>234</sup> Argentina's other appellant's submission, para. 195 (quoting Panel Report, para. 7.171).

<sup>235</sup> European Union's appellant's submission, para. 231 (referring to Panel Report, para. 7.171).

<sup>236</sup> European Union's appellant's submission, para. 227.

#### 6.1.1.2.4 Whether the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement to the anti-dumping measure at issue

6.76. We now turn to the European Union's claim that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement to the anti-dumping measure at issue in finding that the European Union acted inconsistently with this provision by not using the cost of production in Argentina when constructing the normal value of biodiesel.<sup>237</sup>

6.77. The Panel observed that the EU authorities replaced the "average actual purchase price of soybeans during the [investigation period], as reflected in the producers' records" with the surrogate price for soybeans.<sup>238</sup> The Panel also noted that the EU authorities considered that the surrogate price for soybeans reflected the level of international prices and that this would have been the price paid by the Argentine producers in the absence of the DET system.<sup>239</sup> The Panel, however, was not persuaded that the surrogate price for soybeans used by the EU authorities represented the cost of soybeans in Argentina for producers or exporters of biodiesel, and highlighted that "the EU authorities selected this cost precisely because it was *not* the cost of soybeans in Argentina."<sup>240</sup> For these reasons, the Panel found that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" that was not the cost prevailing in Argentina when constructing the normal value of biodiesel.<sup>241</sup>

6.78. In challenging these Panel findings on appeal, the European Union first argues that they "are based upon and vitiated by [the Panel's] legally erroneous findings with respect to Article 2.2.1.1, and for this reason alone, with the reversal of the latter, the former should also be reversed".<sup>242</sup> Given, however, that we have already found that the European Union has not established that the Panel erred in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, we reject this argument by the European Union.

6.79. The European Union further argues that the Panel failed to recognize that: (i) a price derived from a price at the border can, by definition, be characterized as both an international price and a price in Argentina; and (ii) the subtraction of the fobbing costs from the published reference price renders the surrogate price for soybeans used by the EU authorities a reasonable proxy for the undistorted price of soybeans in Argentina.<sup>243</sup> The European Union contends that the surrogate price for soybeans used by the EU authorities reflected the soybean costs *that would have existed* in Argentina in the absence of the distortion caused by the Argentine DET system, and thus constituted the "cost of production in the country of origin" within the meaning of Article 2.2 of the Anti-Dumping Agreement.<sup>244</sup>

6.80. Argentina emphasizes that the European Union itself considered that the reference price for soybeans, which was the basis for the surrogate price for soybeans used by the EU authorities, reflected the level of international prices. It follows, for Argentina, that the Panel correctly concluded that the surrogate price for soybeans was not "the cost of production in the country of origin" because it was not the cost of soybeans in Argentina.<sup>245</sup> Argentina contends that the European Union cannot argue that the surrogate price for soybeans used by the EU authorities constituted the "cost of production" in Argentina merely by claiming that this would be the price that Argentine producers of biodiesel "would pay domestically" in the absence of the Argentine DET system.<sup>246</sup>

6.81. As noted earlier, when relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement, an

<sup>237</sup> European Union's appellant's submission, paras. 213 and 240 (referring to Panel Report, paras. 7.260 and 8.1.c.ii).

<sup>238</sup> Panel Report, para. 7.257.

<sup>239</sup> Panel Report, para. 7.257 (referring to Definitive Disclosure (Panel Exhibit ARG-35), para. 32).

<sup>240</sup> Panel Report, para. 7.258. (emphasis original) See also para. 7.259.

<sup>241</sup> Panel Report, para. 7.260.

<sup>242</sup> European Union's appellant's submission, para. 225.

<sup>243</sup> European Union's appellant's submission, para. 226.

<sup>244</sup> European Union's appellant's submission, para. 230.

<sup>245</sup> Argentina's appellee's submission, para. 146.

<sup>246</sup> Argentina's appellee's submission, para. 150. (emphasis omitted)

investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this may require the investigating authority to adapt that information.<sup>247</sup> In our view, domestic prices may reflect world prices and, in such circumstances, a price at the border could, as the European Union argues, be simultaneously characterized as both an international and a domestic price. We do not consider, however, that the Panel failed to take such considerations into account. Rather, the Panel's analysis focused on the EU authorities' understanding of the surrogate price for soybeans. In line with the Panel's understanding, we consider that the mere fact that a reference price is published by the Argentine Ministry of Agriculture does not necessarily make this price a domestic price in Argentina.<sup>248</sup> In addition, we note, as the Panel did, that the EU authorities considered that the reference price published by the Argentine Ministry of Agriculture reflected the level of international prices of soybeans.<sup>249</sup> Other than pointing to the deduction of fobbing costs, the European Union has not asserted, either before the Panel or before us, that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production *in Argentina*. On the contrary, the EU authorities specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina. As the Panel stated, the EU authorities selected and used this particular information precisely because it did *not* represent the cost of soybeans in Argentina.<sup>250</sup> Thus, we agree with the Panel that the surrogate price for soybeans used by the EU authorities did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel.<sup>251</sup> Accordingly, we do not consider that the European Union has established that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel.

#### 6.1.1.2.5 Conclusions

6.82. In sum, we consider that the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production ... in the country of origin" in Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information or evidence that may be used in establishing the cost of production in the country of origin to sources inside the country of origin. When relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this may require the investigating authority to adapt that information. In this case, like the Panel, we consider that the surrogate price for soybeans used by the EU authorities to calculate the cost of production of biodiesel in Argentina did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel.

6.83. We therefore find that the Panel did not err in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, and that the European Union has not established that the Panel erred in its application of these provisions to the biodiesel measure at issue. Consequently, we uphold the Panel's finding, in paragraphs 7.260 and 8.1.c.ii of its Report, that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel. Having upheld this finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.

#### 6.1.1.3 Article 2.4 of the Anti-Dumping Agreement

6.84. Argentina appeals the Panel's finding that Argentina did not establish that the European Union acted inconsistently with the requirement to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement by failing to make "[d]ue allowance" for "differences

<sup>247</sup> See *supra*, para. 6.73.

<sup>248</sup> Panel Report, para. 7.259.

<sup>249</sup> Panel Report, para. 7.257 (referring to Definitive Disclosure (Panel Exhibit ARG-35), para. 32).

<sup>250</sup> Panel Report, para. 7.258.

<sup>251</sup> Panel Report, para. 7.259.

which affect price comparability" within the meaning of this provision.<sup>252</sup> Argentina alleges that the Panel erred in its interpretation and application of Article 2.4.<sup>253</sup> According to Argentina, the Panel's "general proposition" – that "differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as 'differences affecting price comparability'" – is not supported by the text of Article 2.4 or relevant Appellate Body findings in past disputes.<sup>254</sup> Argentina further contends that the Panel erred in finding that the "difference" identified by Argentina, which resulted from the EU authorities' use of the surrogate price for soybeans in constructing the normal value, was not a difference affecting price comparability within the meaning of Article 2.4.<sup>255</sup> On this basis, Argentina requests us to reverse the Panel's finding under Article 2.4 of the Anti-Dumping Agreement, and to find, instead, that the difference at issue is a "difference[] affecting price comparability" under Article 2.4, and that the European Union acted inconsistently with this provision.<sup>256</sup> The European Union considers that the Panel did not err in its analysis, and requests us to uphold the relevant Panel findings.<sup>257</sup>

6.85. We recall that, in constructing the normal value, the EU authorities replaced the actual costs of soybeans in the Argentine producers' records with the surrogate price of soybeans.<sup>258</sup> As a result, "the level of distortion mitigated by the [EU] authorities more or less amounted to the level of the export tax" on soybeans, given that the difference between the surrogate price of soybeans and actual costs of soybeans "roughly equalled the export tax".<sup>259</sup> In its comments on the Definitive Disclosure, the Association of Argentine Biodiesel Producers (CARBIO) argued that the EU authorities effectively compared a normal value that reflected the inclusion of the export tax on soybeans with an export price that did not take into account such tax, and hence did not make a fair comparison between the normal value and the export price.<sup>260</sup> The EU authorities rejected this argument by CARBIO, finding, instead, that "[t]he fact that from a pure numerical point of view the result is similar does not mean that the methodology applied by the Commission consisted in simply adding the export taxes to the costs of the raw material."<sup>261</sup> Before the Panel, Argentina alleged that, by constructing the normal value on the basis of the surrogate price for soybeans, the EU authorities introduced a difference between the normal value and export price that affected price comparability within the meaning of Article 2.4 of the Anti-Dumping Agreement, for which "due allowance" should have been made.<sup>262</sup>

6.86. In analysing Argentina's claim, the Panel began by noting that the third sentence of Article 2.4 of the Anti-Dumping Agreement elaborates on the means of ensuring that the "comparison" between the normal value and the export price is "fair" by requiring "[d]ue allowance" to be made "for differences which affect price comparability".<sup>263</sup> In the Panel's view, such "differences" are those in the characteristics of the compared transactions that have an impact, or are likely to have an impact, on the prices involved in the transactions.<sup>264</sup> Turning to the anti-dumping measure on biodiesel, the Panel considered that the "difference" alleged by Argentina under Article 2.4 arose from the decision of the EU authorities to construct the normal value by, *inter alia*, using what it considered to be the undistorted price for the main raw material input.<sup>265</sup> In the Panel's view, this difference is not a difference which affects price comparability within the meaning of Article 2.4 because it does not "represent[] a tax – or some other

<sup>252</sup> Argentina's other appellant's submission, para. 294 (referring to Panel Report, paras. 7.292-7.306 and 8.1.c.v).

<sup>253</sup> Argentina's other appellant's submission, paras. 294, 298, 300, and 308.

<sup>254</sup> Argentina's other appellant's submission, paras. 298 and 300 (referring to Panel Report, para. 7.304).

<sup>255</sup> Argentina's other appellant's submission, para. 300.

<sup>256</sup> Argentina's other appellant's submission, paras. 318 and 324-325.

<sup>257</sup> European Union's appellee's submission, paras. 6 and 171.

<sup>258</sup> Panel Report, para. 7.299 (referring to Definitive Disclosure (Panel Exhibit ARG-35), paras. 32 and 35-36; and Definitive Regulation (Panel Exhibit ARG-22), Recitals 36 and 39-40).

<sup>259</sup> Panel Report, para. 7.299 (referring to European Union's first written submission to the Panel, para. 284; and Argentina's first written submission to the Panel, paras. 302-304).

<sup>260</sup> Panel Report, para. 7.280 (referring to Letter dated 17 October 2013 from CARBIO and its members providing comments on the Definitive Disclosure (Panel Exhibit ARG-39), p. 12). See also Definitive Regulation (Panel Exhibit ARG-22), Recital 41.

<sup>261</sup> Panel Report, para. 7.281 (quoting Definitive Regulation (Panel Exhibit ARG-22), Recital 42).

<sup>262</sup> Panel Report, paras. 7.282-7.283.

<sup>263</sup> Panel Report, para. 7.294.

<sup>264</sup> Panel Report, para. 7.295 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 157 and Panel Report, *US – Stainless Steel (Korea)*, para. 6.77).

<sup>265</sup> Panel Report, para. 7.300.

identifiable characteristic – that was incorporated into the constructed normal value; by the EU authorities".<sup>266</sup> Rather, "the alleged 'difference' is one that arose exclusively from the methodology used to construct the normal value ... a matter that is primarily governed by Article 2.2 of the Anti-Dumping Agreement."<sup>267</sup> The Panel then stated that its conclusion, in this respect, is consistent with the view of the Appellate Body in *EC – Fasteners (China)* (Article 21.5 – China).<sup>268</sup> Specifically, the Panel read the Appellate Body's findings in that dispute "as consistent with the *general proposition* that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as 'differences affecting price comparability'".<sup>269</sup>

6.87. We observe that, in referring to the "general proposition" after having reached its conclusion under Article 2.4, the Panel was supplementing its earlier analysis as to why the difference at issue does not fall within the scope of the "differences" under Article 2.4 of the Anti-Dumping Agreement. The Panel's statement, in which it referred to the "general proposition", merely expresses its understanding of the Appellate Body's findings in *EC – Fasteners (China)* (Article 21.5 – China). We do not share this understanding. The Appellate Body report in *EC – Fasteners (China)* (Article 21.5 – China) does not contain any such "general proposition". The reasoning in that report is tailored to the circumstances of that dispute, in which the analogue country methodology was used. The Appellate Body explained that Article 2.4 of the Anti-Dumping Agreement had to be read in the context of the second *Ad Note* to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol.<sup>270</sup> Neither of those provisions is relevant for purposes of this dispute. Moreover, we would have serious reservations regarding what the Panel referred to as the "general proposition". The text of Article 2.4 itself makes clear that "[d]ue allowance shall be made *in each case, on its merits*".<sup>271</sup> This indicates that the need to make due allowance must be assessed in light of the specific circumstances of each case.

6.88. In any event, we recall the Panel's findings that, in constructing the normal value, the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement.<sup>272</sup> At the oral hearing, the European Union expressed the view that, should we uphold the Panel's findings under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement, there would be no need to further examine the Panel's finding under Article 2.4 of the Anti-Dumping Agreement.<sup>273</sup> In contrast, Argentina contended that the errors it alleged under Article 2.4 of the Anti-Dumping Agreement would remain relevant even if we were to uphold the Panel's findings under Articles 2.2.1.1 and 2.2.

6.89. We have upheld the Panel's findings that the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement in constructing the normal value for the reasons set out above.<sup>274</sup> Given these findings, and notwithstanding our reservations about certain aspects of the Panel's analysis under Article 2.4 of the Anti-Dumping Agreement, we do not consider it fruitful, in the particular circumstances of this dispute, to examine further whether the EU authorities also failed to conduct a "fair comparison" in comparing the constructed normal value to the export price. We therefore find it unnecessary to rule on Argentina's claim on appeal regarding the Panel's finding under Article 2.4 of the Anti-Dumping Agreement.

<sup>266</sup> Panel Report, para. 7.301. See also para. 7.302.

<sup>267</sup> Panel Report, para. 7.301.

<sup>268</sup> Panel Report, paras. 7.303-7.304 (referring to Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), paras. 5.207, 5.214, and 5.231).

<sup>269</sup> Panel Report, para. 7.304. (emphasis added)

<sup>270</sup> Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.2 and fn 46 thereto and para. 5.207. In that context, the Appellate Body noted that "an investigating authority has to 'take steps to achieve clarity as to the adjustment claimed' and *determine whether, on its merits, the adjustment is warranted* because it reflects a difference affecting price comparability or *whether it would lead to adjusting back to costs or prices that were found to be distorted* in the exporting country." (Ibid., para. 5.207 (quoting Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519, in turn quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158) (emphasis added))

<sup>271</sup> Emphasis added.

<sup>272</sup> Panel Report, paras. 7.249 and 7.260.

<sup>273</sup> As a third participant, China expressed a similar view, stating that we could declare moot the Panel's findings under Article 2.4 of the Anti-Dumping Agreement. (China's third participant's submission, para. 109 (referring to European Union's appellee's submission, para. 124))

<sup>274</sup> See *supra*, paras. 6.56-6.57 and 6.82-6.83.

### 6.1.2 Imposition of anti-dumping duties: Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

6.90. The European Union requests us to reverse the Panel's finding that "[t]he European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively".<sup>275</sup> The European Union contends that the Panel erred in its interpretation and application of Article 9.3 of the Anti-Dumping Agreement by: (i) considering that Article 9.3 of the Anti-Dumping Agreement calls for a comparison between the amount of duties and the dumping margins that should have been calculated consistently with Article 2 of that Agreement<sup>276</sup>; and that a violation of Article 2 automatically results in a violation of Article 9.3<sup>277</sup>; and (ii) relying on the margins of dumping calculated in the Provisional Regulation in applying Article 9.3 to the facts of this dispute.<sup>278</sup> Argentina maintains that the European Union's appeal of the Panel's findings under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 is without merit and should be dismissed.<sup>279</sup>

6.91. We begin with a brief overview of the relevant Panel findings before considering the interpretation of Article 9.3 of the Anti-Dumping Agreement and whether the Panel erred in reaching its findings.

#### 6.1.2.1 The Panel's findings

6.92. Argentina alleged before the Panel that, as a result of its erroneous construction of the normal value and the consequent unduly high margin of dumping, the European Union imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement, and thereby acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.<sup>280</sup>

6.93. In addressing Argentina's claim, the Panel considered that the question before it was whether the phrase "margin of dumping as established under Article 2" in Article 9.3 of the Anti-Dumping Agreement "refers to the margin of dumping that an investigating authority would have established in the absence of any errors or inconsistencies with [Article 2]".<sup>281</sup> Analysing the text of Article 9.3, the Panel considered that the term "margin of dumping" in Article 9.3 "relates to a margin that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines".<sup>282</sup> The Panel added that an error or inconsistency under Article 2 "does not necessarily or automatically mean that the anti-dumping duty actually applied will exceed the correct margin of dumping", and hence be inconsistent with Article 9.3.<sup>283</sup> This is because, even in situations in which the dumping margin is not determined consistently with Article 2, the actual anti-dumping duty rate could still be lower than the correct margin of dumping, for example, due to the application of the lesser duty rule.<sup>284</sup>

6.94. The Panel recalled its finding that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 in establishing the dumping margins in the Definitive Regulation due to the "use of

<sup>275</sup> Panel Report, para. 8.1.c.vii. See also para. 7.367; and European Union's appellant's submission, para. 262.

<sup>276</sup> European Union's appellant's submission, paras. 253 and 255-256.

<sup>277</sup> European Union's appellant's submission, para. 248.

<sup>278</sup> European Union's appellant's submission, para. 260. The European Union has not advanced specific arguments in support of its claim under Article VI:2 of the GATT 1994.

<sup>279</sup> Argentina's appellee's submission, para. 157.

<sup>280</sup> Panel Report, paras. 7.355 and 7.357. The Panel noted the European Union's argument that Argentina's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are "entirely consequential on the [Article 2] claims", and recalled that it had sustained some of Argentina's claims under Article 2 of the Anti-Dumping Agreement. (Ibid., fn 606 to para. 7.357 (quoting European Union's first written submission to the Panel, para. 288))

<sup>281</sup> Panel Report, para. 7.358.

<sup>282</sup> Panel Report, para. 7.359.

<sup>283</sup> Panel Report, para. 7.363. (fn omitted)

<sup>284</sup> Panel Report, para. 7.363.



surrogate input prices in the construction of each investigated Argentine producer's normal value".<sup>285</sup> The Panel contrasted this with the EU authorities' use of actual input prices when constructing the normal value and calculating dumping margins at the provisional stage. The Panel also noted that Argentina highlighted that the duties imposed in the Definitive Regulation are "two to three times higher" than the dumping margins calculated in the Provisional Regulation.<sup>286</sup> While acknowledging that it could not "infer the exact dumping margins that would have been established had the determinations been done in accordance with Article 2", the Panel nevertheless expressed the view that "the dumping margins established in the Provisional Regulation provide a reasonable approximation of what margins calculated in accordance with Article 2 of the Anti-Dumping Agreement might have been."<sup>287</sup> To the Panel, the fact that the anti-dumping duties imposed in the Definitive Regulation were substantially higher than the dumping margins calculated in the Provisional Regulation suggested that the definitive anti-dumping duties "exceeded what the dumping margins could have been had they been established in accordance with Article 2".<sup>288</sup>

6.95. The Panel therefore concluded that Argentina had made a *prima facie* case that the European Union had acted inconsistently with Article 9.3 of the Anti-Dumping Agreement. Applying its reasoning under Article 9.3 of the Anti-Dumping Agreement, *mutatis mutandis*, to Argentina's claim under Article VI:2 of the GATT 1994, the Panel found that the European Union also acted inconsistently with the latter provision. On the basis of the foregoing, the Panel found that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement.<sup>289</sup>

#### 6.1.2.2 Whether the Panel erred in its interpretation of Article 9.3 of the Anti-Dumping Agreement

6.96. Article 9 of the Anti-Dumping Agreement contains several provisions relating to the imposition and collection of anti-dumping duties. Article 9.3, in particular, provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The words "shall not exceed" indicate that Article 9.3 sets a ceiling for the maximum amount of the anti-dumping duty that may be imposed and collected. This maximum level is "the margin of dumping *as established under Article 2*".<sup>290</sup> The phrase "as established under" is immediately followed by the reference to "Article 2". Article 2, in turn, sets out detailed rules that govern various aspects of a dumping determination, including the determination of the normal value and the export price and their comparison, for purposes of calculating the margin of dumping. Read in light of the detailed rules on dumping determinations set out in Article 2, the phrase "as established under Article 2" indicates that the "margin of dumping" in Article 9.3 is a margin that is established in a manner consistent with these rules. We therefore share the Panel's understanding that the "'margin of dumping' referred to in Article 9.3 relates to a margin that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines".<sup>291</sup>

6.97. Furthermore, we note that Article 9.3 is the chapeau to three provisions concerning the assessment and collection of anti-dumping duties.<sup>292</sup> All three provisions are "subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty 'shall not exceed the margin of dumping as established under Article 2'" of the Anti-Dumping Agreement.<sup>293</sup> The "margin of dumping" referred to in Article 9.3 thus provides the benchmark against which the consistency of the amount of the anti-dumping duty with Article 9.3 must be examined under any

<sup>285</sup> Panel Report, para. 7.364.

<sup>286</sup> Panel Report, para. 7.365 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recitals 59 and 179; and Definitive Regulation (Panel Exhibit ARG-22), Recital 215).

<sup>287</sup> Panel Report, para. 7.365.

<sup>288</sup> Panel Report, para. 7.365.

<sup>289</sup> Panel Report, paras. 7.365-7.367.

<sup>290</sup> Emphasis added.

<sup>291</sup> Panel Report, para. 7.359.

<sup>292</sup> Articles 9.3.1 and 9.3.2 provide, respectively, rules specific to duties assessed on a retrospective and a prospective basis, and Article 9.3.3 sets out rules for determining "whether and to what extent a reimbursement should be made when the export price is constructed in accordance with" Article 2.3 of the Anti-Dumping Agreement.

<sup>293</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102.

of the duty assessment systems envisaged in Articles 9.3.1 to 9.3.3. In our view, it would frustrate the benchmark function of Article 9.3 if the margin of dumping were itself inconsistent with the Anti-Dumping Agreement. We also note that, pursuant to Article 9.2 of the Anti-Dumping Agreement, "[w]hen an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected *in the appropriate amounts* in each case".<sup>294</sup> Read in light of Article 9.2, the benchmark provided by Article 9.3 is one specific demarcation of when the amounts of anti-dumping duties will be *appropriate*.

6.98. Our understanding of the phrase "margin of dumping as established under Article 2" is supported by the context provided by Article VI:2 of the GATT 1994. This Article provides that a WTO Member "may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". It further states that, "[f]or the purposes of this Article, the margin of dumping is the price difference determined *in accordance with* [Article VI:1]".<sup>295</sup> As the Panel correctly pointed out, the term "in accordance with" in the second sentence of this provision "makes it clear ... that Article VI:2 prohibits the levying of anti-dumping duties in excess of the dumping margin *determined consistently* with Article VI:1 of the GATT 1994 in the same way as the phrase 'as established under Article 2' does in Article 9.3".<sup>296</sup>

6.99. The Appellate Body's findings in past disputes under Article 9.3 of the Anti-Dumping Agreement further support the interpretation above. In *US — Zeroing (EC)*, the Appellate Body took note of the reference in Article 9.3 to Article 2. The Appellate Body considered that it followed from this reference that, under Article 9.3, the amount of the assessed anti-dumping duties may not exceed the relevant margin of dumping, namely, a margin that has been established consistently with Article 2.<sup>297</sup>

6.100. Similarly, in *US — Zeroing (Japan)*, having found that margins of dumping calculated using zeroing in original investigations are margins of dumping inconsistent with Article 2 of the Anti-Dumping Agreement<sup>298</sup>, the Appellate Body disagreed with that panel's view that the term "margins of dumping" can have different meanings under different provisions of the Anti-Dumping Agreement.<sup>299</sup> That panel had relied, in support of its view, on the differences between the retrospective and prospective duty assessment systems referred to under Article 9.3. The Appellate Body, however, noted that "the introductory clause of Article 9.3 applies equally to prospective and retroactive duty assessment systems."<sup>300</sup> The Appellate Body emphasized that, under either system, "the authority is required to ensure that the total amount of anti-dumping duties collected ... does not exceed the total amount of dumping ... calculated according to the margin of dumping established for that exporter or foreign producer without zeroing"<sup>301</sup> and that, "[u]nder any system of duty collection, the margin of dumping established *in accordance with Article 2* operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter."<sup>302</sup>

6.101. In our view, therefore, the Panel properly considered that the Appellate Body's findings in *US — Zeroing (EC)* and *US — Zeroing (Japan)* confirm that Article 9.3 prohibits the amount of the

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<sup>294</sup> Emphasis added.

<sup>295</sup> Emphasis added.

<sup>296</sup> Panel Report, para. 7.366. (emphasis original)

<sup>297</sup> Appellate Body Report, *US — Zeroing (EC)*, para. 127. Specifically, the Appellate Body found that, because Article 2.1 defines dumping in relation to the product as a whole, and because "Article 9.3 refers to Article 2", it "follows" that the "margin of dumping" referred to in Article 9.3 of the Anti-Dumping Agreement must also be established "for the product as a whole". (Ibid.) This chain of reasoning is built on the premise that the "margin of dumping" referred to in Article 9.3 must be one that is established consistently with the requirements of Article 2.

<sup>298</sup> Specifically, the Appellate Body found the use of zeroing, when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations, to be inconsistent with Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement. (Appellate Body Report, *US — Zeroing (Japan)*, paras. 138 and 147, respectively)

<sup>299</sup> Appellate Body Report, *US — Zeroing (Japan)*, para. 151.

<sup>300</sup> Appellate Body Report, *US — Zeroing (Japan)*, para. 156.

<sup>301</sup> Appellate Body Report, *US — Zeroing (Japan)*, para. 156.

<sup>302</sup> Appellate Body Report, *US — Zeroing (Japan)*, para. 162. (emphasis added) See also Appellate Body Report, *US — Stainless Steel (Mexico)*, para. 102.

anti-dumping duties from exceeding a dumping margin that is determined consistently with Article 2 of the Anti-Dumping Agreement.<sup>303</sup>

6.102. The European Union acknowledges that "[i]t is undisputed that the ordinary meaning of the phrase 'the margin of dumping as established under Article 2' is that of a margin of dumping established *in accordance with the provisions of Article 2*."<sup>304</sup> The European Union nonetheless asserts that, contrary to the Panel's interpretation, "what the text of Article 9.3 requires is merely a comparison between the anti-dumping duties actually imposed and *the dumping margin actually calculated by the investigating authority, irrespective of the investigating authority's possible errors* when calculating the dumping margin."<sup>305</sup> We have difficulty reconciling these two statements of the European Union. We fail to see how a dumping margin "actually calculated" by the investigating authority, which nonetheless contains "errors" in light of the requirements of Article 2, could at the same time be a margin "established in accordance with the provisions of Article 2".

6.103. The European Union contends that the WTO-consistency of the calculation of the margin of dumping under Article 2, on the one hand, and the comparison called for in Article 9.3, on the other hand, are "two different stages in the analysis", and the finding of a WTO-inconsistency in one stage should not automatically lead to a finding of WTO-inconsistency in the other stage.<sup>306</sup> At the oral hearing, the European Union further clarified that it takes issue with the Panel's understanding that an inconsistency with Article 2 *automatically* leads to an inconsistency with Article 9.3.<sup>307</sup> The Panel, however, did not interpret Article 9.3 in this way. To the contrary, the Panel explicitly made clear that "[a]n error or inconsistency under Article 2 does *not* necessarily or automatically mean that the anti-dumping duty actually applied will exceed the correct margin of dumping."<sup>308</sup> According to the Panel, "it is possible that an anti-dumping duty could be applied at a rate that is lower than the WTO-inconsistent dumping margin."<sup>309</sup> The Panel referred, by way of example, to the lesser duty rule under Article 9.1 of the Anti-Dumping Agreement.<sup>310</sup> According to the Panel, where the lesser duty rule is applied, it is conceivable that the final duties imposed will "not only be lower than the WTO-inconsistent dumping margin, but also lower than the dumping margin that would have been established in accordance with Article 2"<sup>311</sup>, and hence not inconsistent with Article 9.3 of the Anti-Dumping Agreement.

6.104. We agree with the above analysis of the Panel. Indeed, understanding the "margin of dumping" referred to in Article 9.3 as one established consistently with Article 2 of the Anti-Dumping Agreement does *not* mean that *any error* in the calculation of the dumping margin will *necessarily* lead to a violation of Article 9.3. The application of the lesser duty rule provides one example of when this may not be the case. Moreover, because Article 9.3 is concerned with the maximum amount of anti-dumping duties that may be collected, the errors under Article 2 that matter for purposes of Article 9.3 are those that result in a *higher* dumping margin than the one that would have been calculated had the authority acted consistently with Article 2. Not all breaches of Article 2 will invariably or predictably entail such a result. In this respect, we also share the European Union's understanding that a complainant "must show something more than a simple erroneous calculation of normal value" in order to succeed with a claim under Article 9.3.<sup>312</sup> In our view, the complainant must show that anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2.

6.105. In some cases, such a showing may be straightforward. For example, in the disputes concerning "zeroing" discussed above, it was clear that the use of zeroing, which is inconsistent with Article 2 of the Anti-Dumping Agreement, led to higher margins of dumping. Furthermore, the lesser duty rule was not applied in the anti-dumping proceedings at issue in those disputes. Under

<sup>303</sup> Panel Report, para. 7.361.

<sup>304</sup> European Union's appellant's submission, para. 250. (emphasis original)

<sup>305</sup> European Union's appellant's submission, para. 255. (emphasis added)

<sup>306</sup> European Union's appellant's submission, para. 256.

<sup>307</sup> European Union's response to questioning at the oral hearing.

<sup>308</sup> Panel Report, para. 7.363. (fn omitted; emphasis added)

<sup>309</sup> Panel Report, para. 7.363.

<sup>310</sup> Article 9.1 of the Anti-Dumping Agreement provides that "[i]t is desirable ... that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry".

<sup>311</sup> Panel Report, para. 7.363.

<sup>312</sup> European Union's appellant's submission, para. 256.

such circumstances, the fact that the duties were imposed at rates equal to the margins of dumping established with the use of zeroing necessarily meant that those duties were in excess of the margins that would have been established had the margins been calculated consistently with Article 2 (i.e. without "zeroing"), and hence inconsistent with Article 9.3 of the Anti-Dumping Agreement. We emphasize, however, that what is required for a complainant to meet its burden of proof under Article 9.3 will depend on the specific circumstances of each dispute.

### 6.1.2.3 Whether the Panel erred in its application of Article 9.3 of the Anti-Dumping Agreement

6.106. The European Union advances two sets of arguments alleging that the Panel erred in its application of Article 9.3 of the Anti-Dumping Agreement. First, the European Union contends that the Panel "erred when it inferred from its previous findings" under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement that the European Union also breached Article 9.3 of that Agreement.<sup>313</sup> In the European Union's view, because the Panel's interpretations of Articles 2.2.1.1 and 2.2 are flawed and should be reversed, we should also reverse the Panel's finding under Article 9.3. As we have upheld the Panel's findings under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement<sup>314</sup>, we reject the European Union's contention that the Panel erred under Article 9.3 as a consequence of the alleged errors in its findings under Articles 2.2.1.1 and 2.2.

6.107. Second, the European Union maintains that the Panel erred by seeking to rely on the dumping margins calculated in the Provisional Regulation, "effectively implying that this is what the [dumping margin] determination should have been".<sup>315</sup> In doing so, the European Union argues, the Panel exceeded "the authority vested in it pursuant to the DSU and the special or additional rules" under Article 17.6(i) of the Anti-Dumping Agreement, pursuant to which "the Panel should have limited itself to determining if the investigating authority's evaluation of the facts was unbiased and objective".<sup>316</sup>

6.108. As noted above<sup>317</sup>, in applying Article 9.3 to the facts of the case, the Panel began by recalling its findings that "the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement ... in their establishment of the dumping margins in the Definitive Regulation due to their use of surrogate input prices in the construction of each investigated Argentine producer's normal value."<sup>318</sup> The Panel further recalled that, "[b]y contrast, at the provisional stage, the EU authorities had used each Argentine producer's actual input prices when constructing the normal value used in calculating that producer's dumping margin."<sup>319</sup> The Panel then noted that "Argentina contrast[ed] the margins calculated in the Provisional Regulation, ranging from 6.8% to 10.6%, with the duties imposed by the EU authorities in the Definitive Regulation, which ranged from 22.0% to 25.7%, i.e. two to three times higher."<sup>320</sup>

6.109. Contrary to the European Union's argument, the Panel did not "effectively imply[]" that the dumping margins calculated in the Provisional Regulation constituted "what the determination should have been".<sup>321</sup> Rather, the Panel was careful not to draw such a conclusion, observing that "[w]e cannot infer the exact dumping margins that would have been established had the determinations been done in accordance with Article 2."<sup>322</sup> Rather, the Panel considered that the dumping margins in the Provisional Regulation served as a "reasonable approximation" for what the margins "might have been".<sup>323</sup> The Panel further stated that "[t]he substantial difference between the margins calculated at the provisional stage and the duties imposed in the

<sup>313</sup> European Union's appellant's submission, para. 259.

<sup>314</sup> See *supra*, paras. 6.56-6.57 and 6.82-6.83.

<sup>315</sup> European Union's appellant's submission, para. 260 (referring to Panel Report, paras. 7.364-7.365).

<sup>316</sup> European Union's appellant's submission, para. 260.

<sup>317</sup> See *supra*, para. 6.94.

<sup>318</sup> Panel Report, para. 7.364.

<sup>319</sup> Panel Report, para. 7.364.

<sup>320</sup> Panel Report, para. 7.365 (referring to Provisional Regulation (Panel Exhibit ARG-30), Recitals 59 and 179; and Definitive Regulation (Panel Exhibit ARG-22), Recital 215). The Panel further noted that, "[i]n application of the 'lesser duty rule', these duty rates corresponded to the injury margins calculated by the EU authorities; the dumping margins calculated by the EU authorities in the Definitive Regulation were significantly higher, ranging from 41.9% to 49.2%." (Ibid., fn 616 thereto)

<sup>321</sup> European Union's appellant's submission, para. 260.

<sup>322</sup> Panel Report, para. 7.365.

<sup>323</sup> Panel Report, para. 7.365.

Definitive Regulation suggests that the [definitive anti-dumping duties] exceeded what the dumping margins *could have been* had they been established in accordance with Article 2."<sup>324</sup>

6.110. In our view, the Panel's reliance on the margins calculated in the Provisional Regulation was appropriate in light of the specific circumstances of this case. As noted, the change in the basis for constructing the normal value that the EU authorities made between the Provisional and Definitive Regulations is exactly the one found to be inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. More specifically, in the Definitive Regulation, the EU authorities replaced the actual purchase price of soybeans as reflected in the producers' records, which was used in calculating the cost of production at the provisional stage, with the surrogate price for soybeans.<sup>325</sup> This change significantly increased the cost of production determined by the EU authorities, hence the normal value and the corresponding margin of dumping, for each of the Argentine producers in comparison to the provisional stage.<sup>326</sup> As Argentina showed before the Panel, definitive duties were imposed at rates "two to three times higher" than the dumping margins in the Provisional Regulation.<sup>327</sup> Furthermore, even though the lesser duty rule was applied in the Definitive Regulation, the duty rates applied were still substantially higher than the margins of dumping calculated in the Provisional Regulation on the basis of a constructed normal value whose consistency with Article 2 has not been questioned.<sup>328</sup>

6.111. In this respect, we recall the European Union's contention that a complainant "must show something more than a simple erroneous calculation of normal value in order to put forward a successful claim under Article 9.3 of the Anti-Dumping Agreement".<sup>329</sup> As Argentina rightly points out, "[t]his is precisely what Argentina did" in this dispute.<sup>330</sup> Specifically, in addition to demonstrating error in the construction of the normal value, Argentina also showed that the amount of the definitive anti-dumping duties "exceeded what the dumping margins could have been had they been established in accordance with Article 2."<sup>331</sup> Accordingly, and in light of the specific circumstances of this dispute, we find that the Panel did not err in finding that "Argentina has made a *prima facie* case that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement, which the European Union has failed to rebut."<sup>332</sup>

#### 6.1.2.4 Conclusions

6.112. In sum, we consider that the Panel correctly interpreted Article 9.3 of the Anti-Dumping Agreement in stating that the "'margin of dumping' referred to in Article 9.3 relates to a margin that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines."<sup>333</sup> Furthermore, in our view, the Panel did not err in considering that, in light of the specific circumstances of this dispute, "Argentina has made a *prima facie* case that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement, which the European Union has failed to rebut."<sup>334</sup> We also agree with the Panel that the same considerations that guided its assessment of Argentina's Article 9.3 claim apply *mutatis mutandis* to its assessment of Argentina's claim under Article VI:2 of the GATT 1994.<sup>335</sup>

6.113. For these reasons, we uphold the Panel's finding, in paragraphs 7.367 and 8.1.c.vii of its Report, that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively.

<sup>324</sup> Panel Report, para. 7.365. (emphasis added)

<sup>325</sup> Panel Report, paras. 7.182 and 7.257. See also Definitive Regulation (Panel Exhibit ARG-22), Recitals 39-40.

<sup>326</sup> Panel Report, paras. 7.182 and 7.257.

<sup>327</sup> Panel Report, para. 7.365.

<sup>328</sup> Panel Report, para. 7.365.

<sup>329</sup> European Union's appellant's submission, para. 256.

<sup>330</sup> Argentina's appellee's submission, para. 165.

<sup>331</sup> Panel Report, para. 7.365.

<sup>332</sup> Panel Report, para. 7.365.

<sup>333</sup> Panel Report, para. 7.359.

<sup>334</sup> Panel Report, para. 7.365.

<sup>335</sup> Panel Report, para. 7.366.

### 6.1.3 Non-attribution analysis in causation determination: Articles 3.1 and 3.5 of the Anti-Dumping Agreement

6.114. Argentina appeals the Panel's finding that Argentina failed to establish that the EU authorities' treatment of "overcapacity" as an "other factor" causing injury to the EU domestic industry was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>336</sup> Specifically, Argentina alleges that the Panel erred in its interpretation of these provisions in considering that it was relevant to examine whether the revised data on production capacity submitted by the EBB had "a significant role" in the EU authorities' non-attribution analysis on overcapacity.<sup>337</sup> Argentina further claims that the Panel erred in its application of Articles 3.1 and 3.5 by: (i) concluding that the EU authorities' non-attribution analysis regarding overcapacity was not based on or affected by the revised data<sup>338</sup>; (ii) failing to distinguish overcapacity from capacity utilization<sup>339</sup>; and (iii) failing to note the inconsistency of the EU authorities' conclusion in light of the evidence before them.<sup>340</sup> Argentina requests us to reverse the Panel's finding under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and to find that the European Union acted inconsistently with these provisions in its non-attribution analysis relating to overcapacity.<sup>341</sup>

6.115. The European Union responds that Argentina's claims regarding the Panel's alleged errors should be dismissed.<sup>342</sup> The European Union emphasizes the Panel's "clear findings" that the revised data did not have a role in the EU authorities' conclusion on overcapacity<sup>343</sup>, and endorses the Panel's observation that overcapacity and capacity utilization are two logically related concepts.<sup>344</sup> The European Union requests that we uphold the Panel findings challenged by Argentina.<sup>345</sup>

6.116. In addressing Argentina's appeal, we begin by briefly recalling the relevant factual background regarding the EU authorities' determinations of injury and causation, as well as the Panel findings relevant to Argentina's appeal. We then address the provisions at issue in this dispute. Finally, we examine each of Argentina's claims regarding the Panel's alleged errors.

#### 6.1.3.1 Relevant background and the Panel's findings

6.117. In assessing injury to the domestic industry, the EU authorities evaluated certain macroeconomic indicators in the Provisional and Definitive Regulations, including production capacity and capacity utilization.<sup>346</sup> Following the issuance of the Provisional Regulation, the EBB claimed that the total EU production capacity data that it had previously submitted to the EU authorities were too high because they included "idle capacity". Accordingly, the EBB submitted revised production capacity data excluding "idle capacity", which the EU authorities accepted "after close scrutiny".<sup>347</sup> This led to a downward adjustment to the production capacity figures, and an upward adjustment to the capacity utilization rates. In turn, the revised findings in the Definitive Regulation stated that production capacity had decreased and capacity utilization had increased during the period considered<sup>348</sup>, which marked a contrast from the findings in the Provisional Regulation that production capacity had increased and capacity utilization had decreased during the same period.<sup>349</sup> Portions of the tables in the Provisional and

<sup>336</sup> Argentina's other appellant's submission, para. 326 (referring to Panel Report, paras. 7.462-7.472 and 8.1.c.x) and para. 327.

<sup>337</sup> Argentina's other appellant's submission, para. 334 (quoting Panel Report, para. 7.466).

<sup>338</sup> Argentina's other appellant's submission, para. 346 (quoting Panel Report, para. 7.465).

<sup>339</sup> Argentina's other appellant's submission, paras. 327 and 350.

<sup>340</sup> Argentina's other appellant's submission, paras. 327 and 350.

<sup>341</sup> Argentina's other appellant's submission, para. 372.

<sup>342</sup> European Union's appellee's submission, paras. 150, 159, and 171.

<sup>343</sup> European Union's appellee's submission, para. 150 (referring to Panel Report, paras. 7.463 and 7.465).

<sup>344</sup> European Union's appellee's submission, para. 157.

<sup>345</sup> European Union's appellee's submission, para. 171.

<sup>346</sup> Panel Report, fn 679 to para. 7.396.

<sup>347</sup> Panel Report, para. 7.377 (quoting Definitive Disclosure (Panel Exhibit ARG-35), para. 105).

<sup>348</sup> The period considered refers to the period for examining trends relevant for the assessment of injury, which was from 1 January 2009 to the end of the investigation period (or the IP), i.e. 30 June 2012. (See *supra*, para. 5.3)

<sup>349</sup> Definitive Regulation (Panel Exhibit ARG-22), Recitals 131-132. See also Panel Report, para. 7.379.



Definitive Regulations regarding the production capacity, production volume, and capacity utilization figures are reproduced below.<sup>350</sup>

**Table 2 Macroeconomic indicators from the Provisional Regulation**

	2009	2010	2011	IP
Production capacity (tonnes)	20 359 000	21 304 000	21 517 000	22 227 500
Production volume (tonnes)	8 754 693	9 367 183	8 536 884	9 052 871
Capacity utilisation	43%	44%	40%	41%

**Table 3 Macroeconomic indicators from the Definitive Regulation<sup>351</sup>**

	2009	2010	2011	IP
Production capacity (tonnes)	18 856 000	18 583 000	16 017 000	16 329 500
Production volume (tonnes)	8 729 493	9 367 183	8 536 884	9 052 871
Capacity utilisation	46%	50%	53%	55%

6.118. In addressing causation, the EU authorities undertook a non-attribution analysis regarding several "other factors" that were allegedly causing injury to the domestic industry at the same time as the dumped imports. Of particular relevance to this appeal, under the heading "Capacity of the Union industry", the EU authorities identified, in the Provisional Regulation, an argument that had been raised by CARBIO that the injury to the EU industry was "due to overcapacity caused by over-expansion ... without a commensurate increase in demand".<sup>352</sup> In responding to this argument, the EU authorities observed that, while the domestic industry became less profitable during the period considered, capacity utilization remained low and stable throughout the period. The EU authorities therefore found that there appeared to be no causal link between low capacity utilization and injury to the domestic industry.<sup>353</sup> This conclusion was confirmed in the Definitive Regulation.<sup>354</sup>

6.119. Before the Panel, Argentina challenged the EU authorities' analysis of several indicators of injury as being inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>355</sup> Argentina also challenged the EU authorities' analysis of causation, contending that the EU authorities failed to separate and distinguish appropriately the injurious effects of overcapacity from those of the dumped imports, as required by Articles 3.1 and 3.5.<sup>356</sup> In particular, Argentina contended that the EU authorities acted inconsistently with these provisions in their non-attribution analysis by relying on the revised figures on production capacity and capacity utilization in the Definitive Regulation.<sup>357</sup> In addition, Argentina maintained that, in such analysis, the EU authorities confused overcapacity as an "other factor" causing injury with capacity utilization as

<sup>350</sup> Panel Report, para. 7.375 (quoting Provisional Regulation (Panel Exhibit ARG-30), Table 4 in Section 7.1) and para. 7.379 (quoting Definitive Regulation (Panel Exhibit ARG-22), Table to Recital 131). See also Definitive Disclosure (Panel Exhibit ARG-35), paras. 105-106.

<sup>351</sup> The EBB also corrected the production volume figure for 2009, which is reproduced in this table.

<sup>352</sup> Provisional Regulation (Panel Exhibit ARG-30), Recital 137.

<sup>353</sup> Provisional Regulation (Panel Exhibit ARG-30), Recitals 139-140.

<sup>354</sup> Definitive Regulation (Panel Exhibit ARG-22), Recitals 162-171.

<sup>355</sup> Panel Report, para. 7.368.

<sup>356</sup> Panel Report, para. 7.441.

<sup>357</sup> Panel Report, para. 7.449.

an injury indicator, and erred in focusing on the capacity utilization rates rather than overcapacity in absolute terms.<sup>358</sup>

6.120. The Panel began by recalling its finding that the EU authorities' treatment of the revised production capacity data submitted by the EBB was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>359</sup> The Panel then considered whether this finding of inconsistency should render the EU authorities' non-attribution analysis with regard to overcapacity inconsistent with Articles 3.1 and 3.5 for the same reasons.<sup>360</sup> Having reviewed certain recitals in the Provisional and Definitive Regulations, the Panel considered that the revised data "did not taint the EU authorit[ies'] determination on overcapacity as an 'other factor' causing injury to the domestic industry, as this determination was not based on or affected by the revised data".<sup>361</sup> In the Panel's view, the revised data "did not have a significant role in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an 'other factor' causing injury".<sup>362</sup> Consequently, the Panel concluded that the fact that the EU authorities' evaluation of capacity and capacity utilization was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement did not, in and of itself, render the EU authorities' non-attribution analysis of overcapacity inconsistent with Articles 3.1 and 3.5 thereof.<sup>363</sup>

6.121. The Panel then examined, and rejected, Argentina's argument that the EU authorities improperly focused on capacity utilization as opposed to the increase in overcapacity in absolute terms. The Panel considered that capacity utilization is logically related to overcapacity, in the sense that the rate of capacity utilization reflects the amount of excess capacity of the domestic industry in relative terms. The Panel disagreed with Argentina that focusing on the increase in overcapacity in absolute terms, rather than on trends in capacity utilization rates, would have altered the conclusion reached by the EU authorities in this regard. Moreover, the Panel saw no basis in Article 3 of the Anti-Dumping Agreement to support the proposition that an investigating authority must give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms.<sup>364</sup>

6.122. After rejecting several other arguments advanced by Argentina<sup>365</sup>, the Panel considered that the EU authorities' conclusion with respect to overcapacity is one that an unbiased and objective investigating authority could have reached in light of the facts before it.<sup>366</sup> Consequently, the Panel rejected Argentina's allegations that the European Union acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in rejecting overcapacity as an "other factor" of injury to the EU domestic industry.<sup>367</sup>

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<sup>358</sup> Panel Report, para. 7.450. The Panel's findings with respect to other arguments raised by Argentina that challenged the causation analysis made by the EU authorities are not subject to appeal. (Ibid., paras. 7.469-7.471)

<sup>359</sup> Panel Report, para. 7.462. More specifically, the Panel found that the EU authorities had not exercised sufficient care in assessing the accuracy and reliability of the revised data submitted by the EBB in the circumstances of the anti-dumping investigation at issue. The Panel considered that, due to their treatment of the revised data, the EU authorities had failed to base their evaluation of production capacity and capacity utilization on positive evidence and had failed to conduct an objective examination of the impact of dumped imports on the domestic industry relating to these two factors, thereby acting inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. (Ibid., paras. 7.411, 7.413, and 7.415) The Panel's findings under Articles 3.1 and 3.4 are not subject to appeal.

<sup>360</sup> Panel Report, para. 7.462.

<sup>361</sup> Panel Report, para. 7.463.

<sup>362</sup> Panel Report, para. 7.466.

<sup>363</sup> Panel Report, para. 7.466.

<sup>364</sup> Panel Report, para. 7.468.

<sup>365</sup> See *supra*, fn 358.

<sup>366</sup> Panel Report, para. 7.472.

<sup>367</sup> Panel Report, para. 7.472.



### 6.1.3.2 Relevant provisions

6.123. Before turning to Argentina's claims, we discuss briefly the relevant provisions of the Anti-Dumping Agreement. Articles 3.1 and 3.5 of the Anti-Dumping Agreement provide:

#### Article 3

#### *Determination of Injury*<sup>368</sup>

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

...

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. *The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.* Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.<sup>369</sup>

6.124. Article 3.1 of the Anti-Dumping Agreement "is an overarching provision that sets forth a Member's fundamental, substantive obligation" concerning the injury determination and "informs the more detailed obligations in the succeeding paragraphs" of Article 3.<sup>370</sup> The Appellate Body has interpreted the term "positive evidence" as focusing on the facts underpinning and justifying the injury determination.<sup>371</sup> The term relates to the quality of the evidence that an investigating authority may rely on in making a determination, and requires that such evidence be "affirmative, objective, verifiable, and credible".<sup>372</sup> Furthermore, the Appellate Body has found that an "objective examination" requires an authority to conduct an investigation "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".<sup>373</sup>

6.125. Article 3.5 requires that the determination of a causal relationship between the dumped imports and the injury to the domestic industry be based on "an examination of all relevant evidence before the authorities". Article 3.5 also requires an investigating authority to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and to ensure that "the injuries caused by these other factors [are not]

<sup>368</sup> Fn omitted.

<sup>369</sup> Emphasis added.

<sup>370</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.137 (quoting Appellate Body Report, *China – GOES*, para. 126). See also Appellate Body Reports, *Thailand – H-Beams*, para. 106; and *EC – Bed Linen (Article 21.5 – India)*, para. 110.

<sup>371</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.138 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193).

<sup>372</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.138 (quoting Appellate Body Report, *China – GOES*, para. 126). See also Appellate Body Report *US – Hot Rolled Steel*, para. 192.

<sup>373</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.138 (quoting Appellate Body Report, *China – GOES*, para. 126). See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

attributed to the dumped imports".<sup>374</sup> The non-attribution language in Article 3.5 calls for an assessment that involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports"<sup>375</sup> and requires "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports".<sup>376</sup>

6.126. With the above-mentioned considerations in mind, we turn to consider Argentina's claims that the Panel erred in its interpretation and application of these provisions.

### 6.1.3.3 Whether the Panel erred in its interpretation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement

6.127. We begin with the interpretative error that, according to Argentina, is found in the first sentence of paragraph 7.466 of the Panel Report, which states:

We therefore conclude that the revised data did not have a significant role in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an "other factor" causing injury.

6.128. In Argentina's view, the Panel erred in considering that it was relevant to examine whether the revised data concerning production capacity "[did or] did not have a *significant role* in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an 'other factor' causing injury".<sup>377</sup> For Argentina, the obligation to make an injury determination, including of the other known factors causing injury, on the basis of "positive evidence" and involving an "objective examination" is an "absolute" one.<sup>378</sup> Argentina refers to the following statements by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* in support of its argument:

These obligations are absolute. They provide for no exceptions, and they include no qualifications. They must be met by every investigating authority in every injury determination.<sup>379</sup>

6.129. In Argentina's view, to the extent that the EU authorities relied, even partly, on evidence that was not "positive" and did not involve an "objective examination", the EU authorities' non-attribution analysis of overcapacity is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>380</sup> The European Union considers that Argentina's argument should be dismissed on the basis of the Panel's "clear findings" in the paragraphs immediately preceding the statement challenged by Argentina, which indicate that the EU authorities did not rely on the revised data in their non-attribution analysis.<sup>381</sup>

6.130. As a preliminary matter, we are not persuaded that the Appellate Body's statements in *EC – Bed Linen (Article 21.5 – India)* support Argentina's position. In our view, the Appellate Body's statement that "[t]hese obligations are absolute" concerns *the fundamental nature* of the obligations imposed by Articles 3.1 and 3.2, in the sense that "[t]hey must be met by every investigating authority in every injury determination."<sup>382</sup> These statements of the Appellate Body do not speak to the issue of whether the extent to which certain evidence plays a role in an injury determination is relevant in assessing the WTO-consistency of that determination.

<sup>374</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283 (quoting Appellate Body Report, *China – GOES*, para. 151).

<sup>375</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283 (quoting Appellate Body Report, *China – GOES*, para. 151). See also Appellate Body Reports, *US – Hot Rolled Steel*, para. 223, and *EC – Tube or Pipe Fittings*, para. 188.

<sup>376</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

<sup>377</sup> Argentina's other appellant's submission, para. 334 (quoting Panel Report, para. 7.466). (emphasis added by Argentina) See also para. 337; and response to questioning at the oral hearing.

<sup>378</sup> Argentina's other appellant's submission, para. 345.

<sup>379</sup> Argentina's other appellant's submission, para. 336 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109).

<sup>380</sup> Argentina's other appellant's submission, para. 345.

<sup>381</sup> European Union's appellee's submission, para. 150.

<sup>382</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109.

6.131. In any event, reading the Panel's statement in paragraph 7.466 in its context, we do not consider that the Panel intended to articulate or apply an interpretation of Articles 3.1 and 3.5.<sup>383</sup> Rather, in making the impugned statement in paragraph 7.466, the Panel merely affirmed the view that it had expressed in the preceding paragraphs of its Report regarding the irrelevance of the revised data to the specific non-attribution analysis undertaken by the EU authorities in the investigation on biodiesel from Argentina.

6.132. More specifically, the Panel considered that it was "clear" from the EU authorities' findings that their conclusions regarding overcapacity in the Provisional and Definitive Regulations "were not dependent on, or even affected by, the use of the revised vs. the initial data and/or the trends associated with these data, *as in either case, the data showed a low rate of capacity utilization*".<sup>384</sup> The Panel therefore found that the revised data did not "taint" the EU authorities' determination on overcapacity as an "other factor" causing injury to the domestic industry, as this determination "was not based on or affected by the revised data".<sup>385</sup> Finally, in examining Argentina's argument concerning a specific statement in Recital 165 of the Definitive Regulation, the Panel considered that "this statement does not convince us that the EU authorities' conclusion with respect to the issue of overcapacity was based on, or affected by, the revised data."<sup>386</sup> After conducting the analysis above, the Panel made the statement challenged by Argentina, namely, that "the revised data *did not have a significant role* in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an 'other factor' causing injury."<sup>387</sup>

6.133. Thus, even though the Panel did not use exactly the same words in the first sentence of paragraph 7.466 as it did in the preceding paragraphs of its Report, the totality of the Panel's analysis makes it clear that the Panel found that the EU authorities' non-attribution analysis was *not based on or affected by* the revised data. Therefore, contrary to Argentina's argument, we do not consider the Panel to have articulated a standard whereby it is relevant to examine whether the revised data played a significant role in the EU authorities' non-attribution analysis.<sup>388</sup> We thus do not find an error of interpretation in the Panel's analysis under Articles 3.1 and 3.5 of the Anti-Dumping Agreement. Rather, we consider that Argentina's appeal regarding the Panel's analysis of the relevance of the revised data concerns the Panel's alleged errors in its application of Articles 3.1 and 3.5, to which we now turn.

#### **6.1.3.4 Whether the Panel erred in concluding that the EU authorities did not rely on the revised data**

6.134. Argentina claims that, "even if the Appellate Body were to conclude that the Panel was right in examining the role played by the revised data in the determination of the EU authorities, ... the Panel did not correctly apply Article 3.1 when concluding that 'the issue of overcapacity was [not] based on, or affected by, the revised data.'"<sup>389</sup> Argentina refers to two instances, Recitals 165 and 170 of the Definitive Regulation, in which the EU authorities referred to the revised data in connection with their analysis of whether the injury to the EU industry was caused by the alleged overcapacity of the EU industry, as opposed to dumped imports of biodiesel. In Argentina's view, these references demonstrate that the EU authorities relied on the revised data.<sup>390</sup> The European Union considers it unnecessary, in light of the Panel's "clear finding" that the non-attribution analysis was not "based on, or affected by, the revised data"<sup>391</sup>, to engage in a comparative analysis of the evolution of production capacity, capacity utilization, and overcapacity in the Provisional and Definitive Regulations.<sup>392</sup>

6.135. We observe that Recital 165 of the Definitive Regulation states:

<sup>383</sup> See Argentina's other appellant's submission, paras. 334, 337, and 345.

<sup>384</sup> Panel Report, para. 7.463. (emphasis added) The Panel emphasized that the EU authorities had found that low capacity utilization was not a major cause of injury on the basis of the original data in the Provisional Regulation, and that the Definitive Regulation "merely confirmed these findings, after addressing comments of interested parties". (Ibid. (fn omitted))

<sup>385</sup> Panel Report, para. 7.463.

<sup>386</sup> Panel Report, para. 7.465.

<sup>387</sup> Panel Report, para. 7.466. (emphasis added)

<sup>388</sup> Panel Report, para. 7.466.

<sup>389</sup> Argentina's other appellant's submission, para. 346 (quoting Panel Report, para. 7.465).

<sup>390</sup> Argentina's other appellant's submission, paras. 347-349.

<sup>391</sup> Panel Report, para. 7.465.

<sup>392</sup> European Union's appellee's submission, paras. 151-152.

In addition, following the inclusion of the revised data on capacity and utilisation, the Union industry decreased capacity during the period considered, and increased capacity utilisation, from 46% to 55%. This shows that the capacity utilisation of the Union industry would be significantly higher in the absence of dumped imports than the 53% mentioned above.

6.136. Argentina contests the Panel's characterization of the first sentence of Recital 165 as "a subsidiary point made by the EU authorities in response to a specific argument [described in Recital 163] that even in the absence of any imports from Argentina and Indonesia, capacity utilization would have been low at 53% during the [investigation period]".<sup>393</sup> Rather, for Argentina, the first sentence constitutes a response to an interested party's argument, which pointed out that, based on the original data in the Provisional Regulation, "the increase in production capacity from 2009 to the end of the [investigation period] ... has led to a reduction in capacity utilisation during the period under consideration".<sup>394</sup>

6.137. We note that, in addressing Argentina's argument concerning Recital 165, the Panel reviewed not only Recitals 163 and 165, but also Recital 164. In this recital, the EU authorities rejected the interested party's comment in Recital 163 because "no evidence was provided to support the view that the low capacity utilization rate was causing injury to such an extent as to break the causal link between dumped imports and the injury".<sup>395</sup> The EU authorities then added that fixed costs represented only a small proportion of the total production costs, explaining that low capacity utilization was only one factor causing injury, but not a decisive one.<sup>396</sup> In making these observations, the EU authorities did not make reference to the revised data. Rather, the authorities referred generally to the phenomenon of "low capacity utilization" that, in their view, existed at both the provisional and definitive stages. The Panel emphasized that "[i]t is only after making these points that the EU authorities posited [in Recital 165] that, in view of the revised capacity utilization rates, in the absence of any dumped imports, capacity utilization would have been significantly higher than the 53% figure cited by the interested parties."<sup>397</sup>

6.138. Reading Recitals 163, 164, and 165 together, we concur with the Panel that the first sentence of Recital 165, which refers to the revised data, constitutes "a subsidiary point" in response to the interested party's argument that capacity utilization would have been low even in the absence of imports. In our view, therefore, the Panel did not err in stating that the reference to the revised data in Recital 165 does not demonstrate that the EU authorities' conclusion regarding overcapacity was based on the revised data.<sup>398</sup>

6.139. Argentina further highlights that, in Recital 170 of the Definitive Regulation, the EU authorities noted that "[t]he revised macroeconomic indicators also show that companies were during the period taking capacity out of possible use, and closer to the end of the [investigation period] were starting a process of closing plants that are no longer viable."<sup>399</sup> We note that, during the Panel proceedings, neither Argentina nor the Panel specifically addressed this recital in considering whether the EU authorities relied on the revised data in their non-attribution analysis.<sup>400</sup> Furthermore, apart from quoting the sentence above, Argentina has not provided us with additional arguments as to why a mere reference to the revised data in Recital 170 supports the view that the non-attribution analysis was based on the revised data. Such passing reference does not change the fact that the conclusion regarding overcapacity in the Provisional Regulation remained unchanged in the Definitive Regulation, despite the revised capacity utilization rates.

<sup>393</sup> Argentina's other appellant's submission, para. 347 (quoting Panel Report, para. 7.465).

<sup>394</sup> Argentina's other appellant's submission, para. 347 (quoting Definitive Regulation (Panel Exhibit ARG-22), Recital 163).

<sup>395</sup> Panel Report, para. 7.465 (referring to Definitive Regulation (Panel Exhibit ARG-22), Recital 164).

<sup>396</sup> Panel Report, para. 7.465 (referring to Definitive Regulation (Panel Exhibit ARG-22), Recital 164).

<sup>397</sup> Panel Report, para. 7.465 (referring to Definitive Regulation (Panel Exhibit ARG-22), Recital 164).

<sup>398</sup> Panel Report, para. 7.465.

<sup>399</sup> Argentina's other appellant's submission, para. 348 (quoting Definitive Regulation (Panel Exhibit ARG-22), Recital 170).

<sup>400</sup> The Panel referred to Recital 170 of the Definitive Regulation in its summary of the factual background to Argentina's claim, in paragraph 7.446 of its Report. Argentina referred to Recital 170 in footnote 224 to paragraph 228 of its second written submission to the Panel, but not as support for its argument that the EU authorities relied on the revised data in the Definitive Regulation.

6.140. In light of the above, we do not consider that Argentina has established that the Panel erred in its application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement in considering that the EU authorities' non-attribution analysis concerning overcapacity in the Definitive Regulation was not "based on" or "affected by" the revised data.<sup>401</sup>

**6.1.3.5 Whether the Panel erred in failing to distinguish overcapacity from capacity utilization and in failing to note the inconsistency of the EU authorities' conclusion in light of the evidence before them**

6.141. As noted above, Argentina makes two additional claims of error regarding the Panel's application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, namely, that the Panel erred in failing to distinguish overcapacity from capacity utilization and in failing to note the inconsistency of the EU authorities' conclusion in light of the evidence before them.<sup>402</sup>

6.142. First, Argentina claims that the Panel erred in considering that the EU authorities did not improperly focus on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered. In Argentina's view, the Panel failed to acknowledge that "overcapacity" and "capacity utilization" are two distinct concepts when it stated that the concepts are "logically related".<sup>403</sup> Argentina submits that, while "overcapacity" refers to a situation where a producer has capacity larger than what is required by the demand in a particular market, "capacity utilization" refers to the actual production as a percentage of the total capacity.<sup>404</sup> For its part, the European Union considers that the Panel was correct in stating that capacity utilization is "logically related" to overcapacity and that an objective and unbiased investigating authority may examine overcapacity on the basis of capacity utilization.<sup>405</sup>

6.143. We recall that, in rejecting Argentina's argument that the EU authorities improperly focused on capacity utilization, as opposed to the increase in overcapacity in absolute terms, the Panel considered that the concepts of "overcapacity" and "capacity utilization" are "logically related ... in the sense that the rate of capacity utilization reflects the amount of excess capacity of the domestic industry in relative terms."<sup>406</sup> This statement by the Panel is consistent with the way in which the concepts of "overcapacity" and "capacity utilization" were used in the investigation at issue. Specifically, both terms were used in a complementary manner to refer to the same phenomenon, namely, a situation in which production capacity exceeds production volume, resulting in excess or unused capacity. While "overcapacity" describes, in absolute terms, the production capacity that the EU domestic industry *had not* used, "capacity utilization" describes, in relative terms, the production capacity that the EU domestic industry *had* used. Moreover, both the "overcapacity" figures referred to by Argentina and the "capacity utilization" rates shown in the Provisional Regulation were derived from the same data, namely, the original data concerning production volume and production capacity. Thus, contrary to Argentina's contention, we do not consider that the Panel failed to distinguish between overcapacity and capacity utilization. Rather, as the Panel found, "an objective and unbiased investigating authority may well have proceeded to examine the issue of overcapacity on the basis of capacity utilization rather than in terms of the evolution of the domestic industry's overcapacity."<sup>407</sup>

6.144. In relation to Argentina's first claim of error, Argentina also contends that the Panel erred in considering that there is no basis in Article 3 to support the proposition that an investigating authority would have to consider or give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms. Argentina submits that the obligation under Article 3.5 to examine other "known factors" must involve an "objective examination" as required by Article 3.1. Argentina further submits that, to act objectively, the

<sup>401</sup> Panel Report, para. 7.465.

<sup>402</sup> Argentina's other appellant's submission, paras. 327 and 350.

<sup>403</sup> Argentina's other appellant's submission, para. 356.

<sup>404</sup> Argentina's other appellant's submission, para. 357. To calculate "overcapacity" for a given year, Argentina subtracts the production volume in tonnes from the production capacity in tonnes for the same year. (*Ibid.*, Table 1 to para. 365; second written submission to the Panel, Table 1 to para. 230) By comparison, the "capacity utilization" figures as presented in the Provisional and Definitive Regulations are derived by dividing the production volume by the production capacity for the same period. (See e.g. Provisional Regulation (Panel Exhibit ARG-30), Table 4)

<sup>405</sup> European Union's appellee's submission, para. 158.

<sup>406</sup> Panel Report, para. 7.468.

<sup>407</sup> Panel Report, para. 7.468.

EU authorities should have examined the overcapacity figures raised by CARBIO during the investigation and explained why, despite the substantial increase in overcapacity, they could still conclude that the injury suffered by the domestic industry was caused by the alleged dumped imports.<sup>408</sup>

6.145. As explained above, "overcapacity" and "capacity utilization" are "logically related" concepts that describe the same phenomenon – excess or unused capacity – in complementary terms. Given this relationship, we do not consider that the obligation to conduct an "objective examination" based on "positive evidence" necessarily required the EU authorities to examine the evidence regarding these concepts *in exactly the same format* as it was submitted by the interested parties. We also note that the interested parties themselves (including CARBIO) referred not only to overcapacity in absolute terms<sup>409</sup>, but also to capacity utilization in relative terms in their submissions and presentations to the EU authorities.<sup>410</sup> In our view, therefore, the Panel did not err in finding that the EU authorities were not required to give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms.<sup>411</sup> Based on our understanding of "overcapacity" and "capacity utilization" as two related and complementary concepts, we also disagree with Argentina's argument that the Panel erred in finding that "focusing on the increase in overcapacity in absolute terms, rather than on trends in capacity utilization rates, would [not] have altered the conclusion reached by the EU authorities".<sup>412</sup>

6.146. Finally, Argentina claims that the Panel erred "by failing to note the inconsistency of the EU authorities' conclusion that this factor could not be 'a major cause of injury' on the basis of the evidence before [them]".<sup>413</sup> For Argentina, the EU authorities' conclusion that capacity utilization "remained low throughout the ... period [considered]"<sup>414</sup> is contradicted by the data in the Provisional Regulation, which showed a decrease in "utilization capacity" from 43% to 41% and, hence, demonstrated a link between the deterioration of capacity utilization and the situation of the EU producers concerned.<sup>415</sup> In our view, the above-mentioned figures appear consistent with the EU authorities' assessment that capacity utilization "remained low throughout the ... period [considered]".<sup>416</sup> Thus, we consider that the Panel did not err in finding no inconsistency with Articles 3.1 and 3.5 in this regard.

### 6.1.3.6 Conclusions

6.147. We consider that the Panel was not expressing, and therefore did not err in, its interpretation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when it stated that the revised data did not have a significant role in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an "other factor" causing injury. Furthermore, the Panel committed no error in its application of these provisions. Specifically, the Panel did not err in: (i) stating that the EU authorities' conclusion in their non-attribution analysis was not based on or affected by the revised data; (ii) rejecting Argentina's argument that the EU authorities improperly

<sup>408</sup> Argentina's other appellant's submission, para. 361.

<sup>409</sup> It appears that CARBIO did not submit to the EU authorities the specific "overcapacity" figures that Argentina submitted to the Panel and to us. (Argentina's response to questioning at the oral hearing) Nonetheless, the European Union agreed that the specific "overcapacity" figures submitted by Argentina are the result of a simple subtraction of the production volume figures from the total production capacity figures. (European Union's response to questioning at the oral hearing)

<sup>410</sup> See Definitive Regulation (Panel Exhibit ARG-22), Recitals 163 and 166; Written Submission by CARBIO of 5 November 2012 in AD593 – Anti-dumping investigation concerning imports of biodiesel originating in, *inter alia*, Argentina (Panel Exhibit ARG-37), paras. 66-74; CARBIO and its Members, PowerPoint presentation on AD593 – Anti-dumping investigation concerning imports of biodiesel originating in, *inter alia*, Argentina, presented at the hearing held on 14 December 2012 (Panel Exhibit ARG-43), slides 17-18; CARBIO, PowerPoint presentation on AD593 – Biodiesel originating in Argentina, presented at the hearing held on 8 July 2013 (Panel Exhibit ARG-46), slides 18-21; and Letter dated 1 July 2013 from CARBIO providing comments on the Provisional Disclosure (Panel Exhibit ARG-51), pp. 14-18.

<sup>411</sup> Panel Report, para. 7.468.

<sup>412</sup> Argentina's other appellant's submission, paras. 359 and 363 (quoting Panel Report, para. 7.468).

<sup>413</sup> Argentina's other appellant's submission, para. 368 (quoting Provisional Regulation (Panel Exhibit ARG-30), Recital 139). See also Definitive Regulation (Panel Exhibit ARG-22), Recital 181.

<sup>414</sup> Argentina's other appellant's submission, para. 368.

<sup>415</sup> Argentina's other appellant's submission, para. 369. See also Definitive Regulation (Panel Exhibit ARG-22), Recital 161.

<sup>416</sup> Provisional Regulation (Panel Exhibit ARG-30), Recital 139.



focused on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered; or (iii) finding no fault in the EU authorities' conclusion that, on the basis of the evidence before them, overcapacity could not be "a major cause of injury". More generally, we agree with the Panel that the EU authorities' conclusion with respect to overcapacity is one that an unbiased and objective investigating authority could have reached in light of the facts before it.<sup>417</sup>

6.148. For these reasons, we find that Argentina has not established that the Panel erred in finding that the EU authorities' treatment of overcapacity in its non-attribution analysis as an "other factor" causing injury to the EU domestic industry was not inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. Consequently, we uphold the Panel's finding, in paragraphs 7.472 and 8.1.c.x of its Report, that Argentina had not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

## 6.2 Claims concerning the second subparagraph of Article 2(5) of the Basic Regulation

### 6.2.1 Introduction

6.149. Argentina appeals the Panel's findings that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>418</sup> Furthermore, Argentina appeals the Panel's consequential finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.<sup>419</sup> Argentina requests us to reverse these findings of the Panel. Argentina further requests us to complete the legal analysis and find that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement, Article VI:1(b)(ii) of the GATT 1994, Article XVI:4 of the WTO Agreement, and Article 18.4 of the Anti-Dumping Agreement.<sup>420</sup>

6.150. Specifically, with respect to its claim under Article 2.2.1.1 of the Anti-Dumping Agreement, Argentina contends that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.<sup>421</sup> Argentina further claims that, in ascertaining the meaning of that provision of the Basic Regulation, the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective, thorough, and holistic examination of all the different elements put forward by Argentina.<sup>422</sup>

6.151. In respect of its claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina alleges, first, that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.<sup>423</sup> Argentina further submits that, in ascertaining the meaning of that provision, the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective, thorough, and holistic examination of all the different elements put forward by Argentina.<sup>424</sup> Argentina also contends that the Panel erred in finding that, the second subparagraph of Article 2(5) of the Basic Regulation is not WTO-inconsistent because Argentina had not demonstrated that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner.<sup>425</sup>

6.152. The European Union contends that the Panel correctly found that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as

<sup>417</sup> Panel Report, para. 7.472.

<sup>418</sup> Argentina's other appellant's submission, paras. 28 and 194 (referring to Panel Report, paras. 8.1.b.i-ii, 7.153-7.154, and 7.169-7.174).

<sup>419</sup> Argentina's other appellant's submission, para. 291 (referring to Panel Report, paras. 7.175 and 8.1.b.iii).

<sup>420</sup> Argentina's other appellant's submission, paras. 3-5, 33, 176, and 193.

<sup>421</sup> Panel Report, paras. 7.153-7.154.

<sup>422</sup> Argentina's other appellant's submission, paras. 32 and 135.

<sup>423</sup> Argentina's other appellant's submission, para. 196 (referring to Panel Report, paras. 7.169 and 7.172).

<sup>424</sup> Argentina's other appellant's submission, para. 269.

<sup>425</sup> Argentina's other appellant's submission (referring to Panel Report, para. 7.174).

such" with the relevant provisions of the covered agreements. Therefore, the European Union requests that we uphold these findings.<sup>426</sup>

## 6.2.2 The assessment of the meaning of municipal law

6.153. Before the Panel, Argentina claimed that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement, Article VI:1(b)(ii) of the GATT 1994, Article XVI:4 of the WTO Agreement, and Article 18.4 of the Anti-Dumping Agreement. The Panel found that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with these provisions of the covered agreements. Argentina challenges these findings. Before addressing Argentina's claims of error, we set out, as the Panel did<sup>427</sup>, certain considerations that are relevant to ascertaining the meaning of a municipal law.

6.154. These considerations are particularly relevant in the context of a claim that the municipal law at issue is inconsistent "as such" with WTO obligations. We recall that a claim that a measure is inconsistent "as such" challenges a measure of a Member that has general and prospective application<sup>428</sup>, whereas a claim that a measure is inconsistent "as applied" challenges one or more specific instances of the application of such a measure.<sup>429</sup>

6.155. Where a Member's municipal law is challenged "as such", a panel must ascertain the meaning of that law for the purpose of determining whether that Member has complied with its obligations under the covered agreements. Accordingly, "[a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law."<sup>430</sup> In this regard, a panel must conduct an independent assessment of the meaning of the municipal law at issue, and should not simply defer to the meaning attributed to that law by a party to the dispute.<sup>431</sup> A panel's assessment of municipal law for the purpose of determining its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.<sup>432</sup> Just as it is necessary for the panel to seek a detailed understanding of the municipal law at issue, so too is it necessary for the Appellate Body to review the panel's examination of that municipal law.<sup>433</sup>

6.156. A party asserting that another party's municipal law is inconsistent "as such" with relevant WTO obligations bears the burden of introducing evidence as to the meaning of such law to substantiate that assertion.<sup>434</sup> When a municipal law is challenged "as such", the starting point for the analysis will be the text of that municipal law, on its face.<sup>435</sup> A complainant may seek to support its understanding of the meaning of the municipal law on the basis of the text of that municipal law only. A complainant may also seek to support its understanding of the meaning of the municipal law at issue with additional elements such as "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".<sup>436</sup> Likewise, in addition to setting out its

<sup>426</sup> European Union's appellee's submission paras. 17-19, 38, 62, 74, 112, 122, and 171.

<sup>427</sup> Panel Report, paras. 7.119-7.126.

<sup>428</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172. A measure may be challenged "as such" even where that measure has never been applied. (See Appellate Body Report, *US – 1916 Act*, paras. 92-93)

<sup>429</sup> Appellate Body Report, *US – 1916 Act*, para. 60. The terms "as applied" and "as such" do not exhaustively define the types of measures that are susceptible to challenge in WTO dispute settlement. (Appellate Body Reports, *US – Continued Zeroing*, paras. 179-181; *US – 1916 Act*, paras. 60-61; *US – Corrosion-Resistant Steel Sunset Review*, para. 81; *Argentina – Import Measures*, paras. 5.102 and 5.109; see also Panel Report, *US – Continued Zeroing*, para. 7.46)

<sup>430</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 200 (referring to Appellate Body Report, *India – Patents (US)*, paras. 66-67).

<sup>431</sup> Panel Report, para. 7.121 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.445, (in turn referring to Appellate Body Report, *India – Patents (US)*, para. 66).

<sup>432</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.

<sup>433</sup> Appellate Body Report, *India – Patents (US)*, para. 68.

<sup>434</sup> The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case. (Appellate Body Report, *US – Carbon Steel*, para. 157)

<sup>435</sup> Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 168.

<sup>436</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.100 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157).



understanding of the text of the municipal law at issue, the respondent may submit evidence relating to such additional elements to rebut the complainant's arguments. In conducting its independent assessment of the meaning of the municipal law at issue, a panel must undertake a holistic assessment of all the relevant elements before it.<sup>437</sup>

6.157. In the present dispute, before the Panel, Argentina took the position that confining the analysis to the text of the second subparagraph of Article 2(5) of the Basic Regulation would not suffice to arrive at a proper understanding of this provision.<sup>438</sup> In this regard, Argentina requests us to review not only the Panel's examination of the text of the second subparagraph of Article 2(5), but also the Panel's reading of the legislative history that led to the introduction of the second subparagraph of Article 2(5) into the Basic Regulation, the alleged consistent practice of the EU authorities, and certain judgments of the General Court of the European Union.<sup>439</sup>

6.158. Below we examine Argentina's contention that the Panel erred in addressing Argentina's claims concerning the second subparagraph of Article 2(5) of the Basic Regulation. We begin with Argentina's claims under Article 2.2.1.1 of the Anti-Dumping Agreement. Thereafter, we turn to Argentina's claims under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. Finally, we examine Argentina's claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

### 6.2.3 Article 2.2.1.1 of the Anti-Dumping Agreement

6.159. Argentina argues that the Panel erred in finding that the second subparagraph of Article 2(5) deals only with "what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph".<sup>440</sup> Argentina contends that the Panel committed legal error in concluding that the second subparagraph of Article 2(5) does not require the European Union to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion.<sup>441</sup> For Argentina, the Panel's conclusions are based on an erroneous assessment of the text of the measure and of its context, as well as of the practice of the EU authorities, and certain judgments of the General Court of the European Union.<sup>442</sup> Argentina further argues that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective and thorough examination of all the different elements put forward by Argentina beyond the text of the measure, thereby failing to make a proper holistic assessment of all these elements taken together in order to ascertain the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.<sup>443</sup>

6.160. The European Union highlights that it is the first subparagraph of Article 2(5) of the Basic Regulation that is concerned with the application of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The European Union points out that the first subparagraph of Article 2(5) of the Basic Regulation replicates, in large part, the language of Article 2.2.1.1 of the Anti-Dumping Agreement. By contrast, the second subparagraph of Article 2(5) of the Basic Regulation sets out what is to be done, as a matter of EU law, when costs need not be established on the basis of the records of the exporter or producer under investigation, because one of the two conditions set out in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement is not met.<sup>444</sup> For these reasons, the European Union submits that Argentina's attempts to argue that the second subparagraph of Article 2(5) of the Basic Regulation

<sup>437</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

<sup>438</sup> Panel Report, para. 7.125.

<sup>439</sup> Argentina's other appellant's submission, paras. 133 and 254.

<sup>440</sup> Panel Report, para. 7.153. The Panel found that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement and, as a consequence, Article 2.2 of the same Agreement and Article VI:1(b)(ii) of the GATT 1994. (Panel Report, para. 7.154) On appeal, Argentina limits its claims to the Panel's finding under Article 2.2.1.1 of the Anti-Dumping Agreement, and does not expressly challenge the Panel's consequential findings under Article 2.2 of the same Agreement and Article VI:1(b)(ii) of the GATT 1994. (Argentina's other appellant's submission, para. 28)

<sup>441</sup> Panel Report, para. 7.153.

<sup>442</sup> Argentina's other appellant's submission, paras. 28-30 and 123-124.

<sup>443</sup> Argentina's other appellant's submission, para. 32.

<sup>444</sup> European Union's appellee's submission, paras. 39-41.

is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement must fail, because, conceptually, "there is simply no match between the two provisions."<sup>445</sup>

6.161. We begin with a summary of the relevant findings of the Panel before addressing each of Argentina's claims of error.

### 6.2.3.1 The Panel's findings

6.162. The Panel understood the essence of Argentina's claim under Article 2.2.1.1 of the Anti-Dumping Agreement to be founded on the following meaning of the second subparagraph of Article 2(5) of the Basic Regulation, advanced by Argentina. When the EU authorities take the view that the costs reported in an investigated producer's records reflect prices that are "abnormally low" or "artificially low" because of what they consider to be a "distortion"<sup>446</sup>, the second subparagraph of Article 2(5) of the Basic Regulation requires the EU authorities to determine that the costs of production and sale of the product under investigation are not "reasonably reflected" in the producer's records and, consequently, to reject or adjust those costs in establishing the investigated producer's costs of production and sale.<sup>447</sup> The Panel noted that, according to Argentina, this understanding of the provision necessarily means that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>448</sup>

6.163. The Panel examined the text of the second subparagraph of Article 2(5) of the Basic Regulation, together with the other elements relied on by Argentina, in order to determine whether they support Argentina's understanding of this provision. The other elements consisted of the legislative history that led to the introduction of the second subparagraph of Article 2(5) into the Basic Regulation in 2002, the alleged consistent practice of the EU authorities, and judgments of the General Court of the European Union.

6.164. With respect to the text, the Panel found that the second subparagraph of Article 2(5) only lays down what the authorities can do – and allows them to select any one of the listed options for determining the costs of production – *after* they have made a determination under the first subparagraph that the records do not reasonably reflect the costs.<sup>449</sup> With respect to the legislative history, the Panel considered that neither Recital 4 of Council Regulation (EC) No. 1972/2002<sup>450</sup> nor the second subparagraph of Article 2(3) of the Basic Regulation supports the notion that the determination that records do not reasonably reflect the costs of production if prices are artificially low due to a market distortion is made pursuant to the second subparagraph of Article 2(5) in certain situations.<sup>451</sup> Further, the Panel found that the decisions of the EU authorities, submitted by Argentina as evidence of the alleged consistent practice, did not undermine the Panel's preliminary conclusion, reached on the basis of the text of the impugned provision and of its legislative history, that the relevant determination is made pursuant to the first subparagraph of Article 2(5).<sup>452</sup> Finally, the Panel found that nothing in the judgments of the General Court of the European Union cited by Argentina supports Argentina's reading of the relationship between the first two subparagraphs of Article 2(5), that is, that the determination of whether the producer's records reasonably reflect the costs of production

<sup>445</sup> European Union's appellee's submission, para. 42.

<sup>446</sup> Panel Report, para. 7.113. The Panel noted Argentina's explanation that it had used the terms "abnormally" and "artificially" to indicate that the prices are "lower" as a result of an alleged "distortion" in the form of price regulation, an export tax, or other government intervention. Argentina pointed out that these terms, and the terms "distorted or affected by a distortion" and "do not reflect market values or prices", which it used in describing the measure at issue, are not included in the text of the second subparagraph of Article 2(5) of the Basic Regulation. However, these terms were used in the other evidence Argentina had submitted to the Panel in support of its understanding of the scope and meaning of the second subparagraph of Article 2(5) of the Basic Regulation. (*Ibid.*, and fn 188 thereto)

<sup>447</sup> Panel Report, para. 7.112.a.

<sup>448</sup> Panel Report, para. 7.112.a.

<sup>449</sup> Panel Report, para. 7.134.

<sup>450</sup> Council Regulation (EC) No. 1972/2002 of 5 November 2002 amending Regulation (EC) No. 384/96 on the protection against dumped imports from countries not members of the European Community, *Official Journal of the European Communities*, L Series, No. 305 (7 November 2002), pp. 1-3 (Panel Exhibit ARG-5).

<sup>451</sup> Panel Report, para. 7.143.

<sup>452</sup> Panel Report, para. 7.148.

is made pursuant to the first subparagraph in certain situations and pursuant to the second subparagraph in other situations.<sup>453</sup>

6.165. The Panel concluded that the second subparagraph of Article 2(5) of the Basic Regulation does not require the EU authorities to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when these records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. The Panel understood that the second subparagraph of Article 2(5) applies to an entirely different issue, that is, the issue of what has to be done *after* the EU authorities have determined, under the first subparagraph of Article 2(5), that a producer's records do not reasonably reflect the costs of production. Hence, the Panel concluded that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement, because Argentina had not established its case regarding the meaning of the challenged measure on which its claim was based.<sup>454</sup>

#### **6.2.3.2 Whether the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation**

6.166. We understand the question raised by Argentina on appeal to be whether the Panel erred in finding that the second subparagraph of Article 2(5) of the Basic Regulation comes into play only after a determination has been made under the first subparagraph of Article 2(5) that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>455</sup> Argentina contests the Panel's understanding, emphasizing that the second subparagraph of Article 2(5) requires the European Union to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration in circumstances where such records reflect prices considered to be artificially or abnormally low as a result of a distortion.

6.167. We recall our interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement at paragraphs 6.18-6.26. As discussed, the first sentence of Article 2.2.1.1 identifies the records of the investigated exporter or producer as the preferred source for cost of production data, and directs the investigating authority to base cost calculation on such records when the two conditions set out in this provision are met. The second of those conditions is that the "records ... reasonably reflect the costs associated with the production and sale of the product under consideration". To us, the second condition in the first sentence of Article 2.2.1.1 relates to whether the records of the exporter or producer suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration.

6.168. According to Argentina, its reading of the second subparagraph of Article 2(5) of the Basic Regulation necessarily means that the measure at issue is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, because Article 2.2.1.1 does not allow an investigating authority to reject or adjust costs simply because such costs are considered to be abnormally or artificially low due to a distortion. For Argentina, when prices of some inputs or raw materials are "abnormally or artificially low" in comparison to prices in other markets due to an alleged market distortion, they still qualify as the costs actually incurred by the particular exporter or producer. Thus, the records of the exporter or producer containing such costs would, for the purpose of Article 2.2.1.1 of the Anti-Dumping Agreement, still be considered as reasonably reflecting the costs associated with the production and sale of the product under consideration. Argentina argues, therefore, that by providing that the EU authorities shall reject or adjust the cost data of the exporter as included in its records when those costs reflect prices which are "abnormally or artificially low" due to an alleged market distortion, the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>456</sup>

<sup>453</sup> Panel Report, para. 7.152.

<sup>454</sup> Panel Report, paras. 7.153-7.154.

<sup>455</sup> Panel Report, paras. 7.132 and 7.153.

<sup>456</sup> Argentina's other appellant's submission, paras. 123-124 and 189-191; first written submission to the Panel, para. 132.

6.169. Like the Panel, we begin our review with the text of the legal instrument containing the measure at issue, being mindful of the overall structure and logic of the Basic Regulation<sup>457</sup>, before we review the other elements submitted by Argentina in support of its understanding of the meaning of the measure at issue.

6.170. The measure at issue, namely, the second subparagraph of Article 2(5), is one of the provisions of Article 2 of the Basic Regulation.<sup>458</sup> Article 2, section A, of the Basic Regulation governs the determination of the normal value in anti-dumping investigations. Article 2 of the Basic Regulation provides, in relevant part:

*Article 2*

**Determination of dumping**

A. NORMAL VALUE

...

3. When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

A particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.

...

5. Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.

If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.<sup>459</sup>

...

6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. ...

6.171. The first subparagraph of Article 2(3) identifies two alternative methods for determining the normal value. Articles 2(5) and 2(6) focus on the application of the first alternative method identified in the first subparagraph of Article 2(3), that is, the construction of the normal value on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits.

<sup>457</sup> Appellate Body Reports, *China – Auto Parts*, para. 238.

<sup>458</sup> Basic Regulation (Panel Exhibit ARG-1). A general description of Article 2 of the Basic Regulation is contained in section 5.2 of this Report.

<sup>459</sup> Underlining added.

6.172. As the Panel observed, the first subparagraph of Article 2(5) reproduces, in large part, the text of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>460</sup> The first subparagraph of Article 2(5) identifies the records of the "party under investigation" as the source of the data that is to be preferred in the calculation of costs. The text of the first subparagraph of Article 2(5) indicates that this provision sets the conditions that, when satisfied, require the EU authorities to rely on the records of the "party under investigation" in the construction of the costs associated with the production and sale of the product under consideration. These two conditions are: that the records are consistent with the GAAP of the exporting Member; and that they reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>461</sup>

6.173. The second subparagraph of Article 2(5) does not directly correspond to any specific provision of the Anti-Dumping Agreement. It begins by noting: "*If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned*".<sup>462</sup> It seems to us that the first clause of the second subparagraph of Article 2(5), which begins with the word "if", and repeats the reference to costs being reasonably reflected in the records, refers to the circumstances in which the second condition set out in the first subparagraph is not met. In such circumstances, the second subparagraph of Article 2(5) directs the EU authorities to adjust or establish the costs "on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets". Thus, we share the Panel's view that the wording and structure of the first two subparagraphs of Article 2(5) suggest that the second subparagraph of Article 2(5) comes into play only following a determination made in applying the first subparagraph that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under investigation.<sup>463</sup>

6.174. We note that, before the Panel, Argentina argued that the clause "shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets" in the second subparagraph of Article 2(5) constitutes or informs the reasons why information from the domestic market cannot be used to determine the costs of production.<sup>464</sup> In rejecting this argument by Argentina, the Panel stated that "the text of the first and the second subparagraphs do not provide any criteria for the determination of whether the costs are reasonably reflected in a producer's records."<sup>465</sup> On appeal, Argentina contends that the Panel contradicted itself in finding both that the first subparagraph of Article 2(5) does not provide "any criteria for the determination of whether the costs are reasonably reflected in a producer's records" and that the issue as to when the EU authorities are to determine that the producer's records do not reasonably reflect the costs is "an issue that is governed by the first subparagraph of Article 2(5) of the Basic Regulation."<sup>466</sup>

6.175. In our view, in stating that "the text of the first and the second subparagraphs do not provide any criteria for the determination of whether the costs are reasonably reflected in a producer's records"<sup>467</sup>, the Panel was rejecting Argentina's argument that the *second* subparagraph of Article 2(5) constitutes or informs the reasons why information from the domestic market cannot be used to determine the costs of production. The second subparagraph refers to "where such information is not available or cannot be used", but it does not specify the reasons for which, or circumstances in which, the EU authorities may find themselves in such a situation. Moreover, as discussed at paragraph 6.172 above, we understand that the obligation in the first subparagraph of Article 2(5) to calculate the costs on the basis of the records kept by the party under investigation is triggered only if, *inter alia*, the records reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, contrary to Argentina's argument, it is in applying the first subparagraph of Article 2(5), rather than the

<sup>460</sup> Panel Report, para. 7.131.

<sup>461</sup> Panel Report, para. 7.131.

<sup>462</sup> Emphasis added.

<sup>463</sup> Panel Report, para. 7.132.

<sup>464</sup> Panel Report, para. 7.133 (referring to Argentina's second written submission to the Panel, paras. 19-22 and 63).

<sup>465</sup> Panel Report, para. 7.133.

<sup>466</sup> Argentina's other appellant's submission, para. 43 (referring to Panel Report, paras. 7.131-7.133).

<sup>467</sup> Panel Report, para. 7.133.

second, that the EU authorities determine whether the records reasonably reflect the costs associated with the production and sale of the product under consideration.

6.176. We therefore understand the options identified in the second subparagraph to be those that would apply *after* the EU authorities make the determination, pursuant to the first subparagraph of Article 2(5), that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration. Nor do we consider that the Panel erred in finding that the text of the first and second subparagraphs of Article 2(5) does not provide any criteria for the determination of whether the costs are reasonably reflected in a producer's records.<sup>468</sup>

6.177. Argentina also asserts that Article 2(3) of the Basic Regulation, and, in particular, the second subparagraph thereof, supports Argentina's view that it is the second subparagraph of Article 2(5) that governs the determination by the EU authorities that the records of the "party under investigation" do not reasonably reflect the costs associated with the production and sale of the product under consideration. Argentina considers it especially relevant that the second subparagraphs of Articles 2(3) and 2(5), respectively, were introduced into the Basic Regulation at the same time, through the same amendment.<sup>469</sup>

6.178. The Panel considered it to be "a matter of considerable significance to the meaning and content of both of the subparagraphs of Article 2(5) that neither subparagraph contains any of the terms or concepts used by Argentina to describe the measure at issue, i.e. 'artificially low', 'abnormally low', 'distortion', 'reflects market values'; 'regulated market', 'artificially distorted', etc."<sup>470</sup> Argentina contests this statement by the Panel, arguing that all these terms and concepts used by Argentina to describe the measure at issue can be found in the other elements referred to by Argentina including, for example, Article 2(3) of the Basic Regulation.<sup>471</sup>

6.179. We recall that, pursuant to Article 2(3), the EU authorities may decide that domestic sales do not permit a proper comparison for the purposes of a determination of dumping. In such a case, the normal value would have to be arrived at through different means, one of which — calculation on the basis of the cost of production — is addressed by Article 2(5) that governs the calculation of costs. Thus, we understand Articles 2(3) and 2(5) to concern different determinations by the EU authorities. It is true, as Argentina contends, that the second subparagraph of Article 2(3) contains the words "artificially low", which Argentina seeks to rely on in explaining its understanding of the second subparagraph of Article 2(5).<sup>472</sup> Yet, on its face, the second subparagraph of Article 2(3) provides no guidance as to which subparagraph of Article 2(5) governs the determination by EU authorities that the records of the "party under investigation" do not reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>473</sup>

6.180. Based on an examination of the text of the second subparagraph of Article 2(5), taking into account the overall structure and logic of Article 2 of the Basic Regulation, we do not consider that the Panel erred in expressing the preliminary view that the second subparagraph of Article 2(5) comes into play only *after* a determination has been made under the

<sup>468</sup> Panel Report, para. 7.134.

<sup>469</sup> Argentina submits that the second subparagraph of Article 2(3) of the Basic Regulation, and the reasons for its introduction into the Basic Regulation, are part of the legislative history that should have informed the Panel's understanding of the meaning of the second subparagraph of Article 2(5). (Argentina's other appellant's submission, paras. 62-63 and 72-73) We note that the Panel addressed Article 2(3) as part of the legislative history that led to the introduction of the second subparagraph of Article 2(5). (Panel Report, paras. 142-143) In our view, while the reasons for the introduction of the second subparagraph of Article 2(3) may be pertinent as evidence of the legislative history relevant to this dispute, Article 2(3) itself is part of the context, structure, and overall logic of Article 2 of the Basic Regulation. Therefore, we review it as such.

<sup>470</sup> Panel Report, para. 7.134.

<sup>471</sup> Argentina's other appellant's submission, para. 50.

<sup>472</sup> In Argentina's view, these words support the understanding that the scope of the second subparagraph of Article 2(5) is not to set out alternative sources for records that are found not to reasonably reflect costs in general. For Argentina, the second subparagraph of Article 2(5) addresses the situations in which costs are "distorted". (Argentina's other appellant's submission, para. 49)

<sup>473</sup> We take note that Argentina also relies on Article 2(3) of the Basic Regulation, read together with Recital 4 of Council Regulation (EC) No. 1972/2002, to support its understanding of the legislative history. We address this further at *infra*, paras. 6.182-6.185.

first subparagraph that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>474</sup>

6.181. In support of its claim of error, Argentina relies on three additional elements that, in its view, make clear that the second subparagraph of Article 2(5) does not have the meaning attributed to it by the Panel. These elements are the legislative history that led to the introduction of the measure at issue into the Basic Regulation, the alleged consistent practice of the EU authorities, and judgments of the General Court of the European Union.

6.182. Regarding the legislative history, as Argentina points out, the provisions that appear in the Basic Regulation as the first subparagraphs of Article 2(3) and 2(5), respectively, existed in Council Regulation (EC) No. 3283/94<sup>475</sup> and Council Regulation (EC) No. 384/96<sup>476</sup>, both of which preceded the Basic Regulation. However, the provisions that appear in the Basic Regulation as the second subparagraphs of Articles 2(3) and 2(5), respectively, were introduced only in 2002, through Council Regulation (EC) No. 1972/2002.

6.183. Argentina argues that the Panel erred in finding that "neither Recital 4 [of Council Regulation (EC) No. 1972/2002] nor the second subparagraph of Article 2(3) support the notion that the determination that records do not reasonably reflect the costs of production if prices are artificially low due to a market distortion is made pursuant to the second subparagraph of Article 2(5) in certain situations, while in other situations, the determination is made pursuant to the first subparagraph of Article 2(5)".<sup>477</sup> For Argentina, Recital 4 clarifies that, if data have to be obtained from sources that are unaffected by distortions, this necessarily implies that, when the costs in the records are affected by a distortion, the authorities automatically have to determine that such records do not reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>478</sup>

6.184. Recital 4 of Council Regulation (EC) No. 1972/2002 states:

It is considered appropriate to give some guidance as to what has to be done if, pursuant to Article 2(5) of Regulation (EC) No 384/96, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, in particular in situations where because of a particular market situation sales of the like product do not permit a proper comparison. In such circumstances, the relevant data should be obtained from sources which are unaffected by such distortions. Such sources can be the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, any other reasonable basis, including information from other representative markets. The relevant data can be used either for adjusting certain items of the records of the party under consideration or, where this is not possible, for establishing the costs of the party under consideration.

6.185. Recital 4 provides guidance as to "what has to be done *if, pursuant to Article 2(5) of Regulation (EC) No 384/96*, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration".<sup>479</sup> In Council Regulation (EC) No. 384/96 (a preceding version of the Basic Regulation), what now appears as the first subparagraph of Article 2(5) was the only provision of Article 2(5). Thus, we do not see the text of Recital 4, in particular its first sentence, as supporting Argentina's argument. Rather, like the Panel, we read Recital 4 of Council Regulation (EC) No. 1972/2002 as suggesting that the determination that the records do not reasonably reflect the costs associated with the production and sale of the product

<sup>474</sup> Panel Report, para. 7.132.

<sup>475</sup> Council Regulation (EC) No. 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, *Official Journal of the European Communities*, L Series, No. 349 (31 December 1994), p. 1 (Panel Exhibit ARG-3).

<sup>476</sup> Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal of the European Communities*, L Series, No. 56 (6 March 1996), p. 1 (Panel Exhibit ARG-4).

<sup>477</sup> Panel Report, para. 7.143.

<sup>478</sup> Argentina's other appellant's submission, paras. 67-73.

<sup>479</sup> Emphasis added.

under consideration has always been one made pursuant to the provision that now appears in the Basic Regulation as the first subparagraph of Article 2(5).<sup>480</sup>

6.186. Argentina also challenges the Panel's assessment of three academic articles relating to the legislative history of the second subparagraph of Article 2(5).<sup>481</sup> According to Argentina, the Panel made contradictory statements in reviewing these articles. Specifically, the Panel recognized that these articles suggest that the "2002 amendments" "enable" the EU authorities to conclude that the records do not "reasonably reflect" costs where prices are artificially low. At the same time, the Panel considered that these articles do not suggest that it is the second subparagraph of Article 2(5) that governs the determination of whether costs are reasonably reflected in a producer's records.<sup>482</sup>

6.187. The articles referred to by Argentina appear to focus on the correlation between the timing of the introduction of the second subparagraphs of Articles 2(3) and 2(5), on the one hand, and the granting of full and unconditional market economy status to Russia, on the other hand. However, as the Panel rightly observed, none of these articles "suggest that it is the second subparagraph of Article 2(5) that governs the determination [of] whether costs are reasonably reflected in a producer's records."<sup>483</sup>

6.188. Argentina further challenges the Panel's evaluation of the alleged consistent practice of the EU authorities, arguing that the Panel erred in finding that:

the decisions cited by Argentina do not establish, or even suggest, that the second subparagraph of Article 2(5) is the provision pursuant to which these determinations of whether the costs were reasonably reflected in the records were made. The decisions in general refer to Article 2(5) without distinguishing between its two subparagraphs; contrary to Argentina's assertions, the wording used by the EU authorities in the regulations does not suggest that their determinations that its records did not 'reasonably reflect' a producer's costs were made pursuant to Article 2(5), second subparagraph.<sup>484</sup>

6.189. Specifically, Argentina contends that, in ascertaining the meaning of the second subparagraph of Article 2(5), the Panel erred in the conclusions it drew from its review of the following decisions of the EU authorities in a series of anti-dumping proceedings following the introduction of the second subparagraph of Article 2(5) of the Basic Regulation<sup>485</sup>: Potassium Chloride from Belarus, Russia or Ukraine<sup>486</sup>; Seamless Pipes and Tubes of Iron or Steel from Croatia, Romania, Russia and Ukraine<sup>487</sup>; Solutions of Urea and Ammonium Nitrate from,

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<sup>480</sup> Panel Report, para. 7.141. We also take note of Argentina's argument that the Panel ignored other phrases in Recital 4, read in conjunction with Article 2(3) of the Basic Regulation. These other phrases include: "in particular in situations where because of a particular market situation sales of the like product do not permit a proper comparison"; and "the relevant data should be obtained from sources which are unaffected by such distortions." (Argentina's other appellant's submission, paras. 67 and 69) However, we consider Argentina's reliance on the other phrases of Recital 4 to be unavailing, because they relate to what should be done *after* it has been found that the records do not reasonably reflect the relevant costs.

<sup>481</sup> Argentina's other appellant's submission, para. 75 (referring to Tietje et al., "Cost of Production Adjustments in Anti-Dumping Proceedings" (2011) 45(5) *Journal of World Trade*, pp. 1071-1102 (Panel Exhibit EU-8); E. Borovikov and B. Evtimov, "EC's Treatment of Non-Market Economies in Anti-Dumping Law: Its History: An Evolving Disregard of International Trade Rules; Its State of Play: Inconsistent with the GATT/WTO?", *Revue des Affaires Européennes* (2001-2002) (Kluwer, 2002), pp. 875-896 (Panel Exhibit ARG-6); and Olesia. Engelbutzeder, *EU Anti-Dumping Measures Against Russian Exporters – In View of Russian Accession to the WTO and the EU Enlargement 2004* (Peter Lang AG, 2004), (excerpt) pp. 159-160 (Panel Exhibit ARG-7)).

<sup>482</sup> Argentina's other appellant's submission, para. 76 (referring to Panel Report, para. 7.144).

<sup>483</sup> Panel Report, para. 7.144.

<sup>484</sup> Panel Report, para. 7.148. (fn omitted) In these proceedings, Argentina does not challenge the alleged consistent practice of the EU authorities as a measure at issue. Rather, Argentina relies on this alleged consistent practice as an element supporting its understanding of the second subparagraph of Article 2(5) of the Basic Regulation.

<sup>485</sup> Panel Report, paras. 7.146-7.147.

<sup>486</sup> Council Regulation (EC) No. 1891/2005 (Panel Exhibit ARG-8); Council Regulation (EC) No. 1050/2006 (Panel Exhibit ARG-9).

<sup>487</sup> Council Regulation (EC) No. 954/2006 (Panel Exhibit ARG-10); Council Regulation (EC) No. 812/2008 (Panel Exhibit ARG-11); Council Implementing Regulation (EU) No. 1269/2012 (Panel Exhibit ARG-12).



*inter alia*, Russia and Algeria<sup>488</sup>; Ammonium Nitrate from Russia<sup>489</sup>; Ammonium Nitrate from Ukraine<sup>490</sup>; Urea from Russia<sup>491</sup>; Urea from, *inter alia*, Croatia and Ukraine<sup>492</sup>; and Certain Welded Tubes and Pipes of Iron or Non-Alloy Steel from, *inter alia*, Russia.<sup>493</sup>

6.190. All of these decisions concern, *inter alia*, determinations that were made by the EU authorities pursuant to Article 2(5) of the Basic Regulation. We observe that, in these decisions, each time a reference was made to Article 2(5), such reference was made in connection with a determination by the EU authorities to adjust the "costs". Accordingly, we understand these references to concern, in particular, the second subparagraph of Article 2(5), which directs the EU authorities to adjust the "costs", or establish the "costs": (i) on the basis of the costs of other producers or exporters in the same country, or, where such information is not available or cannot be used; (ii) on any other reasonable basis, including information from other representative markets.<sup>494</sup>

6.191. However, none of the references to Article 2(5) in these decisions expressly identifies the second subparagraph of Article 2(5) as the provision that governs the determination that the records of the party under investigation do not reasonably reflect the costs of the production and sale of the product under consideration, when those records reflect prices that are considered to be artificially or abnormally low as a result of a market distortion.

6.192. Before the Panel, Argentina also referred to the Definitive Regulation issued following the anti-dumping investigation concerning imports of biodiesel from Argentina, the subject of Argentina's "as applied" claims in the present dispute.<sup>495</sup> In the Definitive Regulation, the EU authorities referred to certain jurisprudence of the General Court of the European Union, noting:

The General Court also concluded that it is apparent from the first subparagraph of Article 2(5) of the basic Regulation that the records of the party concerned do not serve as a basis for calculating normal value if the costs associated with the production of the product under investigation are not reasonably reflected in those records. In that case, the [second subparagraph] provides that the costs are to be adjusted or established on the basis of sources of information other than those records. That information may be taken from the costs incurred by other producers or exporters [in the same country] or, when that information is not available or cannot

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<sup>488</sup> Council Regulation (EC) No. 1911/2006 (Panel Exhibit ARG-13); Council Regulation (EC) No. 238/2008 (Panel Exhibit ARG-14); Council Implementing Regulation (EU) No. 1251/2009 (Panel Exhibit ARG-15).

<sup>489</sup> Council Regulation (EC) No. 236/2008 (Panel Exhibit ARG-16); Council Regulation (EC) No. 661/2008 (Panel Exhibit ARG-17).

<sup>490</sup> Council Regulation (EC) No. 237/2008 (Panel Exhibit ARG-18).

<sup>491</sup> Council Regulation (EC) No. 907/2007 (Panel Exhibit ARG-19).

<sup>492</sup> Council Regulation (EC) No. 240/2008 (Panel Exhibit ARG-20).

<sup>493</sup> Council Regulation (EC) No. 1256/2008 (Panel Exhibit ARG-21).

<sup>494</sup> For example, in *Solutions of Urea and Ammonium Nitrate from, inter alia, Russia and Algeria*, the EU authorities considered that the gas prices paid in Algeria during the review investigation period could not reasonably reflect the costs associated with the production and distribution of gas. The EU authorities determined that, "as provided for in Article 2(5) of the basic Regulation, the gas costs borne by one cooperating exporting producer, Fertial, were adjusted on the basis of information from other representative markets." (Council Regulation (EC), No. 1911/2006 (Panel Exhibit ARG-13), Recital 28) During a subsequent review, the EU authorities established that the prices paid by the Russian exporting producers were abnormally low. Since gas costs were not reasonably reflected in their records, the EU authorities had to adjust them accordingly. The decision states: "[i]n the absence of any undistorted gas prices relating to the Russian domestic market, and in accordance with Article 2(5) of the basic Regulation, gas prices had to be established on 'any other reasonable basis, including information from other representative markets'." (Council Regulation (EC), No. 238/2008, (Panel Exhibit ARG-14), Recital 21) In *Urea from Russia*, the EU authorities established that the prices paid by the Russian producers were abnormally low. Since gas costs were not reasonably reflected in the four companies' records, the EU authorities decided that "they had to be adjusted pursuant to Article 2(5) of the basic Regulation." (Council Regulation (EC) No. 907/2007 (Panel Exhibit ARG-19), Recital 33) Similar findings were made in Council Regulation (EC) No. 237/2008 (Panel Exhibit ARG-18), Recital 19; Council Regulation (EC) No. 240/2008 (Panel Exhibit ARG-20), Recital 26; and Council Regulation (EC) No. 1256/2008 (Panel Exhibit ARG-21), Recital 111.

<sup>495</sup> Definitive Regulation (Panel Exhibit ARG-22).

be used, any other reasonable source of information, including information from other representative markets.<sup>496</sup>

6.193. These statements in the Definitive Regulation indicate that the EU authorities considered that Article 2(5) involves a two-step structure, and that the EU authorities understood the General Court to have expressed the same view.<sup>497</sup> First, pursuant to the first subparagraph of Article 2(5), the EU authorities determine whether the records of the party under investigation reasonably reflect the costs of the production and sale of the product under consideration. If they do not, then, pursuant to the second subparagraph of Article 2(5), the costs are to be adjusted or established on the basis of sources of information other than those records.

6.194. For these reasons, we agree with the Panel that the decisions cited by Argentina do not suggest, much less suffice to demonstrate, that it is the second subparagraph that governs the determination by the EU authorities that the records of the party under investigation do not reasonably reflect the costs of the production and sale of the product under consideration.<sup>498</sup>

6.195. In addition, we take note of Argentina's assertion that the Panel erred in concluding that nothing in the four judgments of the General Court of the European Union, cited by Argentina, supports Argentina's view that the determination of whether the producer's records reasonably reflect the costs of production is made pursuant to the first subparagraph in certain situations and pursuant to the second subparagraph in other situations.<sup>499</sup> Argentina referred the Panel to four judgments of the General Court of the European Union relating to Case T-235/08 (*Acron I*)<sup>500</sup>, Case T-118/10 (*Acron II*)<sup>501</sup>, Case T-459/08<sup>502</sup>, and Case T-84/07.<sup>503</sup>

6.196. We see some significance in the statement of the General Court, which appears in all four judgments, that it is "apparent from the first subparagraph of Article 2(5) of the basic regulation that the records of the party concerned do not serve as a basis for calculating normal value if the costs associated with the production of the product under investigation are not reasonably reflected in those records."<sup>504</sup> This statement suggests that it is in applying the first subparagraph of Article 2(5), rather than the second, that the EU authorities determine whether the records of the party under investigation reasonably reflect the costs associated with the production and sale of the product under consideration. Our view is reinforced by the fact that, in all four judgments, the sentence that immediately follows the quoted statement identifies the role of the second subparagraph of Article 2(5) as governing the adjustment or establishment of

<sup>496</sup> Definitive Regulation (Panel Exhibit ARG-22), Recital 32. In this regard, we recall the Panel's clarification, in fn 110 to paragraph 7.73 of its Report, that "the General Court of the European Union has referred to the [second subparagraph] as the 'second sentence of the first subparagraph' of Article 2(5) of the Basic Regulation."

<sup>497</sup> See also European Union's appellee's submission, paras. 12 and 54.

<sup>498</sup> Panel Report, para. 7.148. Like the Panel, we do not consider it necessary to decide on whether the decisions cited by Argentina can properly be characterized as reflecting, or constitutive of, a consistent practice by the EU authorities.

<sup>499</sup> Argentina's other appellant's submission, paras. 93-114 (referring to Panel Report, paras. 7.150-7.152).

<sup>500</sup> Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-235/08, *Acron OAO and Dorogobuzh OAO v Council of the European Union* (General Court of the European Union, Case T-235/08 (*Acron I*)) (Panel Exhibit ARG-23).

<sup>501</sup> Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-118/10, *Acron OAO v Council of the European Union* (General Court of the European Union, Case T-118/10 (*Acron II*)) (Panel Exhibit ARG-52).

<sup>502</sup> Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-459/08, *EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v Council of the European Union* (General Court of the European Union, Case T-459/08) (Panel Exhibit ARG-53).

<sup>503</sup> Judgment of the General Court of the European Union (Eighth Chamber) of 7 February 2013, Case T-84/07, *EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v Council of the European Union* (General Court of the European Union, Case T-84/07) (Panel Exhibit ARG-54).

<sup>504</sup> Judgments of the General Court of the European Union, Case T-235/08 (*Acron I*) (Panel Exhibit ARG-23), para. 39; Case T-118/10 (*Acron II*) (Panel Exhibit ARG-52), para. 46; Case T-459/08 (Panel Exhibit ARG-53), para. 60; Case T-84/07 (Panel Exhibit ARG-54), para. 53.

the costs established on the basis of sources of information other than those records that have been found, pursuant to the first subparagraph, to be unfit for use.<sup>505</sup>

6.197. For these reasons, we see no error in the Panel's statements that:

nothing in the judgments cited by Argentina supports Argentina's reading of the relationship between the first two subparagraphs of Article 2(5), i.e. that the determination of whether the producer's records reasonably reflect the costs of production is made pursuant to the first subparagraph in certain situations and pursuant to the second subparagraph in other situations. Rather, the four judgments of the General Court cited by Argentina point in the direction of this determination being made pursuant to the first subparagraph of Article 2(5).<sup>506</sup>

6.198. In sum, having reviewed the Panel's evaluation of all the elements submitted by Argentina, we find that Argentina has not established that the Panel erred in its assessment of the second subparagraph of Article 2(5) of the Basic Regulation. Like the Panel, we do not see support in the text of the Basic Regulation, or in the other elements relied on by Argentina, for the view that it is in applying the second subparagraph of Article 2(5) that the EU authorities are to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion.

### 6.2.3.3 Whether the Panel acted inconsistently with Article 11 of the DSU

6.199. Argentina argues that the Panel failed to make an objective assessment of the matter before it, thereby acting inconsistently with Article 11 of the DSU. According to Argentina, although the Panel recognized the need to follow a holistic approach in examining the various elements submitted by Argentina and the European Union for purposes of discerning the meaning and content of Article 2(5) of the Basic Regulation, it failed to do so. Specifically, Argentina asserts that the Panel failed to make a thorough examination of all the different elements put forward by Argentina beyond the text of the measure and failed to make a proper holistic assessment of all these elements taken together in order to ascertain the meaning of the second subparagraph of Article 2(5).<sup>507</sup>

6.200. Article 11 of the DSU states in relevant part that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". For a claim under Article 11 of the DSU to prevail, an appellant must identify specific errors regarding the objectivity of the panel's assessment<sup>508</sup>, and "it is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error *meets* the standard of review under that provision".<sup>509</sup> An appellant should not simply recast arguments that it made before the panel in the guise of a claim under Article 11.<sup>510</sup> Moreover, a claim that a panel has failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, is "a very serious allegation".<sup>511</sup> With respect to a panel's assessment of the facts, the Appellate Body has stressed that "not every error allegedly committed by a panel amounts to a violation of Article 11 of the

<sup>505</sup> Judgments of the General Court of the European Union, Case T-235/08 (*Acron I*) (Panel Exhibit ARG-23), para. 39; Case T-118/10 (*Acron II*) (Panel Exhibit ARG-52), para. 46; Case T-459/08 (Panel Exhibit ARG-53), para. 60; Case T-84/07 (Panel Exhibit ARG-54), para. 53.

<sup>506</sup> Panel Report, para. 7.152.

<sup>507</sup> Argentina's other appellant's submission, paras. 32 and 142-175.

<sup>508</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>509</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442 (emphasis original)).

<sup>510</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>511</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133).

DSU"<sup>512</sup>, but only those that are so material that, "taken together or singly"<sup>513</sup>, they undermine the objectivity of the panel's assessment of the matter before it.<sup>514</sup>

6.201. With particular regard to a panel's duties in ascertaining the meaning of municipal law, the Appellate Body has found that, "[a]s part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it".<sup>515</sup> In doing so, "a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies".<sup>516</sup> When parties refer to elements in addition to the text of the municipal law, a panel must take account of all such elements, in order to engage in an objective assessment of the matter. As the Appellate Body clarified in *US – Carbon Steel (India)*:

[I]t is incumbent on a panel to engage in a thorough analysis of the measure on its face and to address evidence submitted by a party that the alleged inconsistency with the covered agreements arises from a particular manner in which a measure is applied. While a review of such evidence may ultimately reveal that it is not particularly relevant, that it lacks probative value, or that it is not of a nature or significance to establish a *prima facie* case, this can only be determined after its probative value has been reviewed and assessed.<sup>517</sup>

6.202. Thus, in ascertaining the meaning of a municipal law, a panel is required to undertake a "holistic assessment" of all the relevant elements. At the same time, we emphasize that a review of whether a panel undertook a holistic assessment, and by so doing met its obligation under Article 11 of the DSU, should be guided by the specific circumstances of each case, the nature of the measure and the obligation at issue, and the evidence submitted by the parties. In other words, there is no single methodology that every panel must employ before it can be found to have undertaken a proper "holistic assessment".

6.203. Turning to the present dispute, we understand the crux of Argentina's claim under Article 11 of the DSU to be that the Panel failed to make an objective assessment of the matter because the Panel failed to undertake a "holistic assessment" of all the relevant elements in order to ascertain the meaning of the second subparagraph of Article 2(5).<sup>518</sup> Additionally, Argentina contends that the Panel's examination of the legislative history of the provision at issue, the academic articles, the alleged consistent practice of the EU authorities, and judgments of the General Court, was cursory and failed to address properly the details of each of these elements.<sup>519</sup>

6.204. We disagree with Argentina's assertion that the Panel's examination of the relevant elements was cursory. The Panel examined each of the elements referred to by the parties.<sup>520</sup> The mere fact that the Panel disagreed with Argentina's understanding of the various elements and agreed, in some respects, with the European Union's view does not equate to a breach of the Panel's duties under Article 11 of the DSU. It seems to us that Argentina has, in large part, recast the arguments that it made before the Panel in the guise of a claim under Article 11, which does not suffice as a basis for us to find that the Panel acted inconsistently with Article 11 of the DSU.<sup>521</sup>

6.205. As regards Argentina's assertion that the Panel failed to undertake a proper holistic assessment of all the relevant elements *taken together* in order to ascertain the meaning of the second subparagraph of Article 2(5), we recall that the Appellate Body addressed a similar

<sup>512</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>513</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318. See also Appellate Body Report, *EC – Fasteners (China)*, para. 499.

<sup>514</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.179.

<sup>515</sup> Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.98; *US – Carbon Steel (India)*, para. 4.445.

<sup>516</sup> Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Shrimp II (Viet Nam)*, para. 4.32.

<sup>517</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.454.

<sup>518</sup> Argentina's other appellant's submission, paras. 32, 148-155, and 161-175.

<sup>519</sup> Argentina's other appellant's submission, paras. 144-146.

<sup>520</sup> Panel Report, paras. 7.136-7.152.

<sup>521</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

claim by Viet Nam in *US – Shrimp II (Viet Nam)*. In that case, the panel began its examination with the text of the measure at issue. The panel set out its preliminary finding on the basis of the text of the measure, before proceeding to its examination of the other elements submitted by the parties. In rejecting Viet Nam's arguments that the panel failed to undertake a "holistic assessment", and therefore was in breach of its duty under Article 11 of the DSU, the Appellate Body noted, with respect to the panel's preliminary conclusion on the basis of the text of the measure at issue, that:

[t]hese statements, read in isolation, might unfortunately give the impression that the Panel was drawing a conclusion regarding the meaning and effect of Section 129(c)(1) on the basis of the text of that provision, taken alone. Yet, as noted above, these statements form part of a paragraph that clearly indicates at the outset that, at this step of its analysis, the Panel was examining the text of Section 129(c)(1). In subsequent paragraphs, the Panel proceeded to examine the relevance and import of argumentation and elements – beyond the text of Section 129(c)(1) – submitted by the parties regarding the meaning and effect of Section 129(c)(1).<sup>522</sup>

6.206. In that dispute, having reviewed the panel's reasoning in its entirety, the Appellate Body concluded that the panel properly relied on the various elements that it examined to inform its understanding of the meaning and effect of the measure at issue. Therefore, the Appellate Body found that the panel had complied with its duty under Article 11 of the DSU.<sup>523</sup>

6.207. Similarly, in the present dispute, the Panel made clear that the initial conclusion that it reached on the basis of its examination of the text of the second subparagraph of Article 2(5) of the Basic Regulation was only the first step in a multi-pronged analysis. At the outset of this section of its Report, the Panel preceded its assessment of the second subparagraph of Article 2(5) by explaining that it would proceed as follows:

[M]indful of the need to conduct a "holistic assessment" of the evidence put forward by the parties, we proceed to determine the scope, meaning and content of the measure at issue, as they pertain to each of Argentina's two claims.

We first consider the text of Article 2(5), second subparagraph, and the other evidence submitted by Argentina in order to determine whether they support Argentina's allegations concerning the scope, meaning, and content of this provision.<sup>524</sup>

6.208. Having examined the text of the second subparagraph of Article 2(5), the Panel explicitly characterized the results of that examination as a preliminary conclusion on the basis of the text, indicating that it would proceed to consider "the other evidence submitted by Argentina".<sup>525</sup> Thereafter, the Panel examined, and made intermediate findings<sup>526</sup>, with respect to the legislative history that led to the introduction of the second subparagraph of Article 2(5), the alleged consistent practice of the EU authorities, and the four judgments of the General Court of the European Union, before coming to a conclusion based on its "holistic assessment" of all the evidence submitted by Argentina.<sup>527</sup>

6.209. Based on our review of the Panel's findings, we consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU, in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

6.210. Given our finding in paragraph 6.198 above, and our rejection of Argentina's claim under Article 11 of the DSU, we find that the Panel did not err in concluding that Argentina did not establish its case regarding the meaning of the challenged measure, or in finding, for this reason,

<sup>522</sup> Appellate Body Report, *US – Shrimp II (Viet Nam)*, para. 4.36.

<sup>523</sup> Appellate Body Report, *US – Shrimp II (Viet Nam)*, paras. 4.50-451.

<sup>524</sup> Panel Report, paras. 7.126-7.127.

<sup>525</sup> Panel Report, para. 7.135.

<sup>526</sup> Panel Report, paras. 7.135, 7.143-7.144, 7.148, and 7.152.

<sup>527</sup> Panel Report, paras. 7.153-7.154.

that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>528</sup>

#### 6.2.3.4 Conclusions

6.211. Regarding Argentina's claim of error with respect to the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement, having reviewed the Panel's evaluation of all the elements submitted by Argentina, we do not consider that Argentina has established that the Panel erred in its assessment of the second subparagraph of Article 2(5) of the Basic Regulation. Like the Panel, we do not see support in the text of the Basic Regulation, or in the other elements relied on by Argentina, for the view that it is in applying the second subparagraph of Article 2(5) that the EU authorities are to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. In this regard, we further consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

6.212. Accordingly, we find that the Panel did not err, and did not fail to comply with its duties under Article 11 of the DSU, in concluding that Argentina had not established its case regarding the meaning of the challenged measure, or in finding, for this reason, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>529</sup>

6.213. For these reasons, we uphold the Panel's finding, in paragraphs 7.154 and 8.1.b.i of its Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.

#### 6.2.4 Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

6.214. Argentina requests us to reverse the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>530</sup> Argentina advances three grounds in support of its appeal.<sup>531</sup>

6.215. First, Argentina argues that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation, by finding that, even when "information from other representative markets" is used, the second subparagraph of Article 2(5) does not require the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries.<sup>532</sup> Second, Argentina contends that, in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation, the Panel acted inconsistently with Article 11 of the DSU by failing to conduct an objective, thorough, and holistic examination of all of the different elements put forward by Argentina.<sup>533</sup> Third, Argentina alleges that the Panel erred in finding that Argentina had to demonstrate that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner.<sup>534</sup> In Argentina's view, the approach by the Panel wrongly suggests that, in order to prevail with a claim that a measure is inconsistent "as such", the complaining party must establish that the measure at issue leads to WTO-inconsistent results in all instances in which the measure is applied. For Argentina, this finding also erroneously

<sup>528</sup> Panel Report, para. 7.154.

<sup>529</sup> Panel Report, para. 7.154.

<sup>530</sup> Panel Report, paras. 7.169-7.174 and 8.1.b.ii.

<sup>531</sup> Argentina also appeals the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, which is contained in paragraph 7.171 of the Panel Report. This aspect of Argentina's appeal is addressed in section 6.1.1.2 of this Report.

<sup>532</sup> Panel Report, para. 7.172 (referring to Argentina's opening statement at the second Panel meeting, para. 24).

<sup>533</sup> Argentina's other appellant's submission, paras. 267-275.

<sup>534</sup> Panel Report, paras. 7.174 and 8.b.ii.

suggests that, in order to prevail with a claim that a measure is inconsistent "as such", it is necessary that the measure being challenged is mandatory.<sup>535</sup>

6.216. The European Union requests us to reject Argentina's claims of error and uphold the Panel's finding that the second subparagraph of Article 2(5) of the Basic Regulation is not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. As regards Argentina's first ground of appeal, the European Union highlights that the second subparagraph of Article 2(5) grants broad discretion to the EU authorities to resort to various options in constructing costs when they have determined, in applying the first subparagraph of Article 2(5), that the records kept by the party under investigation do not reasonably reflect the costs associated with production and sale.<sup>536</sup> Second, the European Union avers that the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU.<sup>537</sup> In response to Argentina's third ground of appeal, the European Union contends that, in order for a claim that a measure is inconsistent "as such" to prevail, it must be shown that the measure will necessarily be applied in a manner that is inconsistent with that Member's WTO obligations. For the European Union, this means that the measure at issue can only be found to be inconsistent "as such" if it "unavoidably" or "compulsorily" requires the EU authorities to act contrary to the European Union's WTO obligations.<sup>538</sup>

6.217. We begin with a summary of the relevant findings of the Panel before addressing each of Argentina's claims of error in turn.

#### 6.2.4.1 The Panel's findings

6.218. Before the Panel, Argentina raised two alternative lines of argument in support of its claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. First, Argentina contended that the second subparagraph of Article 2(5) of the Basic Regulation *mandates* WTO-inconsistent conduct. This line of argument was based on Argentina's understanding of the second subparagraph of Article 2(5) as *requiring* the EU authorities to adjust or establish a producer's costs on the basis of information from countries other than the country of origin, if the EU authorities have determined that the records reflect prices that are artificially or abnormally low as a result of a distortion and if information from other producers/exporters from the same country is not available or cannot be used.<sup>539</sup> Argentina submitted that the references to "any other reasonable basis" and to "information from other representative markets" in the second subparagraph of Article 2(5) *mandate* the use of costs from outside the country of origin.<sup>540</sup> The European Union disagreed with Argentina, arguing that the second subparagraph of Article 2(5) grants wide discretion to the EU authorities to resort to various options where they have determined under the first subparagraph of Article 2(5) that the costs are not reasonably reflected in the records.<sup>541</sup> For the Panel, the disagreement between the parties centred on the "discretion" afforded to the EU authorities to resort to information from "other representative markets" in establishing or adjusting the costs when they have concluded that a producer's records do not reasonably reflect the costs of production of the product under consideration.<sup>542</sup>

6.219. The Panel considered the text of the second subparagraph of Article 2(5) of the Basic Regulation, together with the other elements submitted by Argentina, in ascertaining the meaning of this provision. These elements consist of other relevant provisions of the Basic Regulation, the legislative history that led to the introduction of the second subparagraph of Article 2(5) into the Basic Regulation in 2002, the alleged consistent practice of the EU authorities, and certain judgments of the General Court of the European Union.

<sup>535</sup> Argentina's other appellant's submission, para. 277.

<sup>536</sup> European Union's appellee's submission, paras. 74-75.

<sup>537</sup> European Union's appellee's submission, para. 112.

<sup>538</sup> European Union's appellee's submission, para. 120 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172).

<sup>539</sup> Panel Report, para. 7.155. We recall that, in paragraphs 6.211-6.213 of this Report, we upheld the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation requires the EU authorities to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration.

<sup>540</sup> Panel Report, para. 7.155.

<sup>541</sup> Panel Report, paras. 7.117 and 7.155.

<sup>542</sup> Panel Report, paras. 7.117 and 7.155.

6.220. The Panel found that the text of the second subparagraph of Article 2(5) does not support Argentina's argument that this measure requires the EU authorities, when they take the view that the costs of other domestic producers or exporters are not available or cannot be used, to construct the normal value on the basis of costs that do not reflect the costs of production in the country of origin.<sup>543</sup> Instead, the Panel found that the second subparagraph of Article 2(5) lays out a series of options for the EU authorities to establish the costs of production once it has been determined that the producer's records do not reasonably reflect the costs associated with the production and sale of the product being investigated. According to the Panel, on its face, the phrase "on any other reasonable basis, including information from other representative markets" in the second subparagraph of Article 2(5) is formulated in permissive terms, and does not require that the costs reported in the producer's records be replaced by costs in another country.<sup>544</sup>

6.221. With respect to the legislative history, the Panel considered that neither Recital 4 of Council Regulation (EC) No. 1972/2002 nor the second subparagraph of Article 2(3) of the Basic Regulation suggests that the options available under the second subparagraph of Article 2(5) are constrained in such a way that the EU authorities must systematically resort to information or prices not in the country of origin.<sup>545</sup> Further, the Panel stated that, while the decisions of the EU authorities submitted by Argentina as evidence of a consistent practice reveal that the EU authorities *may* resort to prices in countries other than the country of origin, any consistent practice emanating from these examples does not demonstrate that the second subparagraph of Article 2(5) *requires* them to do so.<sup>546</sup> Finally, the Panel found that the judgments of the General Court of the European Union cited by Argentina show that, in a situation in which the EU authorities determine that a producer's records do not reasonably reflect the costs of production because they are affected by a distortion, the EU authorities are *entitled* to establish the producer's costs on the basis of sources that are unaffected by that distortion, and may have recourse to sources of information outside the country of origin. The Panel considered this understanding to be consistent with its reading of the text of the second subparagraph of Article 2(5).<sup>547</sup>

6.222. Based on its consideration of the arguments of the parties, and of all the relevant elements submitted by Argentina, the Panel concluded that, even where the EU authorities do resort to information from other countries to construct the normal value, it does not necessarily follow that they act contrary to Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>548</sup> In the Panel's view, the language of the second subparagraph of Article 2(5) pertains to the *sources of information* (as opposed to the *costs* themselves) that may be used to establish an investigated producer's/exporter's costs in constructing the normal value. As a result, the Panel found that, even when information from "other representative markets" is used, the second subparagraph of Article 2(5) does not *require* the EU authorities to establish the costs of production so as to reflect *costs* prevailing in other countries."<sup>549</sup>

6.223. In its second line of argument, Argentina maintained that, even if the Panel were to find that the second subparagraph of Article 2(5) is discretionary, in the sense that it does not *require* the EU authorities to use costs not prevailing in the country of origin, the second subparagraph of Article 2(5) would still be inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. In Argentina's view, even if the second subparagraph of Article 2(5) were discretionary, in the sense that it provides for the possibility to use a basis other than the cost of production in the country of origin, this renders that measure inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>550</sup> In

<sup>543</sup> Panel Report, para. 7.160.

<sup>544</sup> Panel Report, para. 7.169.

<sup>545</sup> Panel Report, para. 7.163.

<sup>546</sup> Panel Report, para. 7.166.

<sup>547</sup> Panel Report, para. 7.168.

<sup>548</sup> Panel Report, para. 7.171. Argentina's appeal of this paragraph of the Panel Report is addressed in section 6.1.1.2 of this Report.

<sup>549</sup> Panel Report, para. 7.172. (emphasis original; fn omitted)

<sup>550</sup> Panel Report, para. 7.118 (referring to Argentina's opening statement at the first Panel meeting, para. 74; response to Panel question No. 24, para. 69; and second written submission to the Panel, paras. 147-149 and 162).



response, the European Union submitted that Argentina needed to establish that the measure mandates WTO-inconsistent action for its claim to succeed.<sup>551</sup>

6.224. The Panel found that Argentina had established that the second subparagraph of Article 2(5) permits the EU authorities to resort to costs outside the country of origin in some circumstances. Thus, the Panel found that Argentina had shown that this measure is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. However, the Panel stated that Argentina had not demonstrated that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner. The Panel found, as a consequence, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>552</sup>

#### 6.2.4.2 The assessment of a complaint that a measure is inconsistent "as such" with WTO obligations

6.225. In respect of its claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina asserts that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation. Argentina also contends that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5). In addition, Argentina argues that the Panel employed an erroneous legal standard that a complainant must meet in order to prevail in a claim that a measure is inconsistent "as such".

6.226. Argentina's appeal raises questions concerning the legal standard for establishing whether a measure is inconsistent "as such" with WTO obligations.<sup>553</sup> As we stated in paragraph 6.154 above, a claim that a measure is inconsistent "as such" challenges a measure that has general and prospective application<sup>554</sup>, whereas a claim that a measure is inconsistent "as applied" challenges one or more specific instances of the application of such a measure.<sup>555</sup> Indeed, a measure need not have been applied to be the subject of an "as such" challenge.<sup>556</sup> Given that complainants bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct, the "implications of such challenges are ... more far-reaching than 'as applied' claims."<sup>557</sup>

6.227. Under the GATT 1947, panels distinguished between mandatory and discretionary legislation, finding that only legislation that mandated a violation of GATT obligations could be found to be inconsistent "as such" with those obligations.<sup>558</sup> The distinction between mandatory and discretionary legislation turned on whether there was relevant discretion vested in the executive branch of government.<sup>559</sup> The Appellate Body has since clarified that, as with any analytical tool, the importance of the "mandatory/discretionary" distinction may vary from case to case, and has, for this reason, cautioned against applying the distinction "in a mechanistic fashion".<sup>560</sup>

6.228. Moreover, there is no basis, either in the practice of the GATT and the WTO generally, or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measures can

<sup>551</sup> Panel Report, para. 7.118 (referring to European Union's first written submission to the Panel, paras. 184-187; and second written submission to the Panel, paras. 38 and 82).

<sup>552</sup> Panel Report, para. 7.174 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483).

<sup>553</sup> Argentina's appeal also raises questions concerning the considerations that are relevant to ascertaining the meaning of a municipal law. In respect of this, we recall our discussion in paragraphs 6.153-6.156 above.

<sup>554</sup> Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172; *US – 1916 Act*, paras. 92-94.

<sup>555</sup> Appellate Body Reports, *US – 1916 Act*, paras. 60-61; *US – Continued Zeroing*, paras. 179-181; *US – Corrosion-Resistant Steel Sunset Review*, para. 81; *Argentina – Import Measures*, para. 5.103. See also Panel Report, *US – Continued Zeroing*, para. 7.46.

<sup>556</sup> Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 82; *US – 1916 Act*, paras. 92-94. See also Panel Report, *US – Section 301 Trade Act*, paras. 7.80-7.81.

<sup>557</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

<sup>558</sup> Appellate Body Report, *US – 1916 Act*, para. 88 (referring to various GATT Panel Reports).

<sup>559</sup> Appellate Body Report, *US – 1916 Act*, para. 100.

<sup>560</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

be challenged "as such". As the Appellate Body explained in *US – Corrosion-Resistant Steel Sunset Review*, allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members, enshrined in Article 3.2 of the DSU, to resort to dispute settlement to preserve their rights and obligations under the covered agreements.<sup>561</sup> The Appellate Body, therefore, saw "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'".<sup>562</sup>

6.229. Thus, the discretionary nature of the measure is no barrier to a challenge "as such". Furthermore, measures involving discretionary aspects may be found to violate certain WTO obligations "as such".<sup>563</sup> Appellate Body findings in past disputes recognize this possibility. For example, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body reversed the panel's finding that the measure at issue was "not a mandatory legal instrument obligating a certain course of conduct and thus can not, in and of itself, give rise to a WTO violation."<sup>564</sup> Similarly, in *US – Carbon Steel*, the Appellate Body found that the complainant did not satisfy its burden of proving either that the measure at issue mandated the investigating authority to act inconsistently with the relevant provision of WTO law, or that such law "restrict[ed] in a material way" the authority's discretion to make a determination consistent with WTO law.<sup>565</sup>

6.230. As the Panel noted, consistent with the generally applicable principles regarding the burden of proof in WTO disputes, it is for the complainant to establish the WTO-inconsistency of the challenged municipal law.<sup>566</sup> The complainant bears the burden of introducing evidence as to the meaning of that municipal law to substantiate its claim of WTO-inconsistency.<sup>567</sup> Such evidence will typically be produced in the form of the text of the relevant legislation or legal instrument, and may be supported by evidence of other elements such as the consistent application of such law, the pronouncements of domestic courts on the meaning of such law, the opinions of legal experts, and the writings of recognized scholars. Precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure and the WTO obligations at issue.<sup>568</sup>

6.231. With these considerations in mind, we turn to Argentina's claims on appeal. We recall that, before the Panel, Argentina's challenge under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 consisted of two alternative lines of argument: (i) that the second subparagraph of Article 2(5) *requires* WTO-inconsistent action; and (ii) that, even if the second subparagraph of Article 2(5) does not *require* WTO-inconsistent action, it is nevertheless WTO-inconsistent because it provides for the possibility that such action may be taken. Argentina's appeal concerns the Panel's findings with respect to both lines of argument.

6.232. We begin with Argentina's contention that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation by finding that the provision does not *require* the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries. Next, we address Argentina's related claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation. Thereafter, we examine Argentina's assertion that the Panel employed an erroneous legal standard for an "as such" challenge in stating that Argentina had not demonstrated that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner.

<sup>561</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

<sup>562</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

<sup>563</sup> Appellate Body Report, *US – 1916 Act*, fn 59 to para. 99 (referring to Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54).

<sup>564</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 100. (fn omitted)

<sup>565</sup> Appellate Body Report, *US – Carbon Steel*, para. 162.

<sup>566</sup> Panel Report, para. 7.120.

<sup>567</sup> Appellate Body Report, *US – Carbon Steel*, para. 157 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1991:I, p. 335).

<sup>568</sup> Appellate Body Report, *US – Carbon Steel*, para. 157; Panel Reports, *EC – IT Products*, para. 7.112.

#### 6.2.4.3 Whether the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation

6.233. Argentina appeals the Panel's finding that, even when "information from other representative markets" is used, the second subparagraph of Article 2(5) does not "*require* the EU authorities to establish the costs of production so as to reflect *costs* prevailing in other countries".<sup>569</sup> We understand the question raised by Argentina on appeal to be whether the Panel erred in finding that the phrase "on any other reasonable basis, including information from other representative markets" in the second subparagraph of Article 2(5) is formulated in permissive terms, and does not require that the costs reported in the producer's records be replaced by costs in another country.<sup>570</sup> Argentina contends that the second subparagraph of Article 2(5) is formulated in *mandatory* terms because, in circumstances where the records of an investigated producer do not reasonably reflect costs associated with the production and sale of the product, and the costs of other domestic producers or exporters cannot be used, the EU authorities *must* use information from other representative markets that does not reflect the costs of production in the country of origin.

6.234. We recall our interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in paragraphs 6.69-6.73 above. In particular, we recall that the phrase "cost of production [...] in the country of origin" in these provisions makes clear that the determination to be made is of a cost of production *in the country of origin*. These provisions do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin. However, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production" "in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects.<sup>571</sup>

6.235. In support of its claim before the Panel, Argentina relied on the text of the Basic Regulation, the legislative history that led to the introduction of the second subparagraph of Article 2(5), the alleged consistent practice by the EU authorities, and judgments of the General Court of the European Union. We begin our review with the Panel's examination of the text of the legal instrument containing the measure at issue, being mindful of the overall structure and logic of the Basic Regulation. Thereafter, we review the Panel's examination of the other elements submitted by Argentina. Finally, we draw our conclusion regarding the meaning of the second subparagraph of Article 2(5) from the assessment of all the relevant elements taken together.

6.236. As we have seen, the second subparagraph of Article 2(5) of the Basic Regulation states:

If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

6.237. For the reasons discussed in section 6.2.3.2 above, we agree with the Panel's finding that the second subparagraph of Article 2(5) comes into play only *after* a determination has been made under the first subparagraph that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>572</sup> The second subparagraph of Article 2(5) indicates that, in such circumstances, the costs associated with the production and sale of the product under investigation "shall" be adjusted or established on the basis of the alternative means provided for in the second clause of that subparagraph. To us, the text of the second subparagraph of Article 2(5), and in particular the word "shall", indicates that, once a determination is made, in applying the first subparagraph, that the costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, then the EU authorities *must* "adjust" or "establish" the costs on the basis

<sup>569</sup> Panel Report, para. 7.172. (emphasis original)

<sup>570</sup> Panel Report, para. 7.169.

<sup>571</sup> See *supra*, paras. 6.69-6.73.

<sup>572</sup> Panel Report, para. 7.132.

of the alternative means provided for under the second subparagraph.<sup>573</sup> The second subparagraph provides several options<sup>574</sup> for the EU authorities to use as a basis for adjusting or establishing the costs.<sup>575</sup>

6.238. Moreover, our reading of the text of the second subparagraph of Article 2(5) suggests that there is a progression, or an order of preference, for the alternative bases contained therein. When this provision applies, the EU authorities are directed to adjust or establish these costs on the basis of the costs of other producers or exporters in the same country. Only in situations where such information is not available or cannot be used can the EU authorities proceed to adjust or establish the costs "on any other reasonable basis, including information from other representative markets".

6.239. As regards the specific alternative bases that the second subparagraph of Article 2(5) provides for adjusting or establishing the relevant "costs", Argentina argues that the Panel erred when it found that the language of the second subparagraph of Article 2(5) refers to the *sources of information* as opposed to the *costs* themselves.<sup>576</sup> The European Union agrees with the Panel's finding.<sup>577</sup>

6.240. We observe that, unlike Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, which refer only to "costs", the second subparagraph of Article 2(5) of the Basic Regulation uses both the words "costs" and "information". As discussed in paragraph 6.69 above, the word "costs" refers to the price paid or to be paid to produce something.<sup>578</sup> The definition of the word "information" is broader<sup>579</sup>, and could encompass knowledge communicated concerning *costs*.

6.241. Our reading of the text of the second subparagraph of Article 2(5) suggests that the meaning of the word "information", which appears twice in the Basic Regulation, is dependent on the context in which it is used. For instance, the second subparagraph of Article 2(5) directs the EU authorities to adjust or establish the "*costs* associated with the production and sale of the product under investigation" on the basis of the "*costs* of other producers or exporters in the same country", except "where such *information* is not available or cannot be used".<sup>580</sup> Given the immediate context of the word "information" in that phrase, it could be read as referring to the "costs of other producers or exporters in the same country". However, when the information concerning the costs of other producers or exporters in the same country is not available or cannot be used, the second subparagraph of Article 2(5) directs the EU authorities to adjust or establish the relevant costs "on any other reasonable basis, including *information* from other representative markets".<sup>581</sup> Argentina and the European Union disagree as to whether the phrase "information from other representative markets" must be read as a reference to information regarding costs from outside the country of origin.<sup>582</sup> To us, the text of the second subparagraph of Article 2(5),

<sup>573</sup> We observe that both participants also appear to accept this view. Argentina contends that the use of the word "shall" in this provision implies that the second subparagraph of Article 2(5) "is formulated in mandatory terms". (Argentina's other appellant's submission, para. 239) Likewise, in response to questioning at the oral hearing, the European Union acknowledged that the second subparagraph of Article 2(5) imposes an obligation on the investigating authority as to what it *must* do following a determination, pursuant to the first subparagraph, that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.

<sup>574</sup> The second subparagraph of Article 2(5) identifies these alternative bases as: the costs of other producers or exporters in the same country; or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

<sup>575</sup> The Panel made a similar observation, stating that "the text of Article 2(5), second subparagraph, provides a number of alternative bases on which the EU authorities may establish or adjust the costs where they have determined pursuant to the first subparagraph of Article 2(5) that the costs reported in a producer's records do not 'reasonably reflect' the costs of production of the investigated product." (Panel Report, para. 7.157; see also European Union's appellee's submission, para. 76)

<sup>576</sup> Argentina's other appellant's submission, paras. 255-261.

<sup>577</sup> European Union's appellee's submission, para. 89.

<sup>578</sup> *Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 528.

<sup>579</sup> The definition of "information" includes: "[k]nowledge communicated concerning some particular fact, subject, or event". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 1379)

<sup>580</sup> Emphasis added.

<sup>581</sup> Emphasis added.

<sup>582</sup> At the oral hearing, Argentina argued that, because the EU authorities can adjust or establish costs "on any other reasonable basis, including information from other representative markets" only if the costs of

on its face, makes clear that "any other reasonable basis, including information from other representative markets", refers to information relating to something other than the "costs of other producers or exporters in the same country". However, it is not apparent to us that the words "information from other representative markets" are necessarily to be understood in a narrow sense, as Argentina suggests, as only referring to *the costs of production* of the product under consideration from outside the country of origin.<sup>583</sup>

6.242. Moreover, we recall that the second subparagraph of Article 2(5) directs the EU authorities to "adjust" or "establish" the relevant costs: (i) on the basis of the costs of other producers or exporters in the same country; or, where such information is not available or cannot be used; (ii) on any other reasonable basis, including information from other representative markets. The words "adjust" and "establish" have very broad definitions.<sup>584</sup> This suggests that they cover a wide range of possible actions by the EU authorities, and do not exclude that the authorities could adapt out-of-country information to ensure that it reflects the cost of production in the country of origin. For example, the EU authorities may consider that the costs associated with the production and sale of the product under consideration are reasonably reflected in the records of the producer or exporter under investigation, save for a minor discrepancy relating to one of the manufacturing inputs. In such a case, the alternative bases proposed in the second subparagraph of Article 2(5), including "information from other representative markets", could be used as a reference point for correcting the discrepancy. However, this information would not *replace* the costs reflected in the records of the producer or exporter under investigation. Likewise, the EU authorities may encounter a situation in which the information concerning the costs of the other producers or exporters in the same country is not available or cannot be used, in which case the EU authorities would have to construct the cost of production relying on "any other reasonable basis", including information from other representative markets. In such a scenario, nothing in the language of the second subparagraph of Article 2(5) precludes the possibility that the EU authorities may use the "information from other representative markets" in order to arrive at the cost of production without adapting it to reflect the costs of production in the country of origin. At the same time, nothing in the language of the second subparagraph of Article 2(5) precludes the possibility that the EU authorities may adapt information from outside the country of origin to reflect the costs of production in the country of origin.<sup>585</sup>

6.243. For these reasons, we are of the view that the second subparagraph of Article 2(5) may be read to encompass the possibility that the EU authorities may use "information from other representative markets", as the basis for arriving at the costs of production, without adapting it to reflect the costs of production in the country of origin. Nevertheless, the existence of that possibility does not mean, as Argentina contends, that the second subparagraph of Article 2(5) *requires* the EU authorities to construct the normal value on the basis of the costs prevailing in countries other than the country of origin.

6.244. Based on the foregoing, we agree with the Panel's preliminary view, following the first step in its analysis that, on its face, the text of the second subparagraph of Article 2(5) "does not require that the costs reported in the producer's records be replaced by *costs* in another country."<sup>586</sup> At the same time, nothing in the text of the second subparagraph of Article 2(5)

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other producers or exporters in the same country are not available or cannot be used, then the "information from other representative markets" must necessarily refer to information regarding costs from outside the country of origin. For its part, the European Union maintained that the reference to "information from other representative markets" cannot be automatically equated with information from outside the country of origin. According to the European Union, "other representative markets" may include other relevant product markets in the country of origin, a geographical market, or even a temporal market. (European Union's appellee's submission, para. 86)

<sup>583</sup> Panel Report, para. 7.159.

<sup>584</sup> The definition of the word "adjust" includes: "[a]rrange suitably in relation to something else or to some standard or purpose" and "[a]rrange, compose, harmonize differences, discrepancies, accounts". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 28) The definition of the word "establish" includes: "place beyond dispute, ascertain, demonstrate, prove". (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 865)

<sup>585</sup> We note that, in response to questioning at the oral hearing, both Argentina and the European Union acknowledged that the second subparagraph of Article 2(5) could be understood broadly enough to capture any one of the scenarios described above. However, as the European Union commented, the treatment of any such "information from other representative markets" would necessarily be dependent on the circumstances of each anti-dumping investigation.

<sup>586</sup> Panel Report, para. 7.169. (*italics original; underlining added*)

precludes the possibility that the EU authorities may use "information from other representative markets" as the basis for arriving at the costs of production without adapting it to reflect the costs of production in the country of origin.<sup>587</sup>

6.245. As part of our "holistic assessment", we now turn to consider the various other elements relied on by Argentina to support its understanding of the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.<sup>588</sup> On appeal, Argentina challenges the Panel's assessment of these elements.

6.246. With respect to the legislative history that led to the introduction of the second subparagraph of Article 2(5) into the Basic Regulation, before the Panel, Argentina referred to Recitals 3 and 4 of Council Regulation (EC) No. 1972/2002, read in conjunction with the second subparagraph of Article 2(3) of the Basic Regulation. In this regard, the Panel found:

[O]ur reading of the second subparagraph of Article 2(3) in conjunction with Recital 4 of Council Regulation 1972/2002 suggests that when the authorities determine that a particular market situation exists on the basis of the existence, *inter alia*, of "artificially low" prices due to a distortion, they should establish or adjust the costs of a producer on a basis that is not affected by that distortion. However, neither the second subparagraph of Article 2(3) nor Recital 4 of Council Regulation 1972/2002 suggests that the options available to the EU authorities are constrained in such a way that they must systematically resort to information or prices not in the country of origin.<sup>589</sup>

6.247. Argentina contests this reasoning by the Panel and instead contends that Recitals 3 and 4 of Council Regulation (EC) No. 1972/2002 support Argentina's view that the "information from other representative markets" referred to in the second subparagraph of Article 2(5) of the Basic Regulation constitutes the information that will have to be used to adjust or replace the costs included in the records of the producer or exporter concerned precisely because those costs are affected by a country-wide distortion.<sup>590</sup>

6.248. As described at paragraph 6.182 above, Council Regulation (EC) No. 1972/2002 is the legal instrument that introduced the two provisions that now appear in the Basic Regulation as the second subparagraphs of Articles 2(3) and 2(5) respectively.<sup>591</sup> Recitals 3 and 4 of Council Regulation (EC) No. 1972/2002 state, in relevant part:

(3) ... It is prudent to provide for a clarification as to what circumstances could be considered as constituting a particular market situation in which sales of the like product do not permit a proper comparison. Such circumstances can, for example, occur because of the existence of barter-trade and other non-commercial processing arrangements or other market impediments. As a result market signals may not properly reflect supply and demand which in turn may have an impact on the relevant costs and prices and may also result in domestic prices being out of line with world-market prices or prices in other representative markets. ...

(4) It is considered appropriate to give some guidance as to what has to be done if, pursuant to Article 2(5) of Regulation (EC) No 384/96, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, in particular in situations where because of a particular market situation

<sup>587</sup> Argentina's contention that the existence of this possibility is sufficient to demonstrate that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 is addressed in section 6.2.4.5 of this Report.

<sup>588</sup> These elements consist of the legislative history that led to the introduction of Article 2(5) into the Basic Regulation, the alleged consistent practice of the EU authorities, and certain judgments of the General Court of the European Union.

<sup>589</sup> Panel Report, para. 7.163. (fn omitted)

<sup>590</sup> Argentina's other appellant's submission, paras. 244 and 262; see also response to Panel question No. 99.

<sup>591</sup> In response to questioning at the oral hearing, the European Union clarified that Recitals 3 and 4 of Council Regulation (EC) No. 1972/2002 do not contain obligations in themselves, but explain the reasons for the legislation.

sales of the like product do not permit a proper comparison. In such circumstances, the relevant data should be obtained from sources which are unaffected by such distortions. Such sources can be the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, any other reasonable basis, including information from other representative markets. The relevant data can be used either for adjusting certain items of the records of the party under consideration or, where this is not possible, for establishing the costs of the party under consideration.<sup>592</sup>

6.249. At the oral hearing, Argentina highlighted that Recital 3, like the second subparagraph of Article 2(5) of the Basic Regulation, uses the words "other representative markets". In particular, Argentina points to the phrase "domestic prices being out of line with world-market prices or prices in *other representative markets*".<sup>593</sup> Argentina argues that, given the juxtaposition of "domestic prices", on the one hand, with "world market prices" and "other representative markets", on the other hand, when the Basic Regulation refers to "other representative markets", this necessarily means markets other than the domestic market of the exporting country. Moreover, Argentina contends that Recital 4 clarifies that there is no discretion left to the authorities. For Argentina, whenever the records do not reasonably reflect the costs because they are affected by a distortion, the EU authorities must obtain data from sources that are not affected by such distortions. Argentina adds that, in circumstances where the distortion affects the costs of all domestic exporters/producers, the EU authorities *must* use information from other representative markets, and this data "will necessarily not reflect the costs prevailing in the country of origin".<sup>594</sup>

6.250. Recital 3 of Council Regulation (EC) No. 1972/2002 explains the rationale for the introduction of the second subparagraph of Article 2(3)<sup>595</sup> of the Basic Regulation. This Recital clarifies the circumstances that could be considered as constituting a particular market situation in which sales of the like product do not permit a proper comparison. Recital 4 of Council Regulation (EC) No. 1972/2002 contains the rationale for the introduction of the second subparagraph of Article 2(5) of the Basic Regulation, the measure at issue in this dispute. As discussed above, Article 2(5) elaborates on the application of the first alternative method identified in the first subparagraph of Article 2(3)<sup>596</sup>, namely, construction of the normal value on the basis of the costs of production in the country of origin. While Recitals 3 and 4 concern different determinations by the EU authorities, it is significant that both use the words "other representative markets". In our view, this confirms our initial understanding, expressed in paragraph 6.241 above, that the phrase "information from other representative markets" in the second subparagraph of Article 2(5) refers to something other than the "costs of other producers or exporters in the same country".

6.251. However, contrary to Argentina's assertion, we do not read Recitals 3 and 4 of Council Regulation (EC) No. 1972/2002 to suggest that, pursuant to the second subparagraph of Article 2(5) of the Basic Regulation, "[w]here the distortion affects the costs of all domestic exporters/producers, the EU authorities must use information" that will necessarily not reflect the costs of production in the country of origin.<sup>597</sup> Recital 4 clarifies that, where the EU authorities find that a particular market results in "distortions", the EU authorities should obtain data from sources that are unaffected by such distortions. Recital 4 indicates that such sources can be "the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, any other reasonable basis, including information from other representative markets." In the event that the scenario posited by Argentina occurs, that is, a distortion affects the costs of all the producers or exporters in the same country, then the EU authorities are to use "any other reasonable basis, including information from other representative markets". Thus, even

<sup>592</sup> Panel Exhibit ARG-5.

<sup>593</sup> Emphasis added.

<sup>594</sup> Argentina's other appellant's submission, para. 244. See also para. 262.

<sup>595</sup> The second subparagraph of Article 2(3) states that: "[a] particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements."

<sup>596</sup> The two alternative methods identified in the first subparagraph of Article 2(3) are: (i) "on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits"; and (ii) "on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative".

<sup>597</sup> Argentina's other appellant's submission, para. 244.



if, according to Argentina, the term "other representative markets" necessarily refers to markets outside the country of origin, the word "including" makes clear that the information from other representative markets is but one illustration of what may constitute "any other reasonable basis".

6.252. Recital 4 adds that the "relevant data can be used either for adjusting certain items of the records of the party under consideration or, where this is not possible, for establishing the costs of the party under consideration." As discussed at paragraph 6.242 above, the words "adjust" and "establish" in the second subparagraph of Article 2(5) have very broad definitions. They could cover a wide range of possible actions by the EU authorities, and do not exclude adaptation of out-of-country information to reflect the costs of production in the country of origin.

6.253. For these reasons, we agree with the Panel that the legislative history relied on by Argentina does not suggest that the options available to the EU authorities are constrained in such a way that the EU authorities are required to resort to information or prices not in the country of origin.<sup>598</sup>

6.254. Argentina also challenges the Panel's evaluation of the alleged consistent practice of the EU authorities.<sup>599</sup> As the Panel noted, in the majority of the examples cited by Argentina, the EU authorities adjusted the actual costs incurred by the producer on the basis of prices prevailing in other countries or on the basis of the price for export of the input concerned. In the investigation on biodiesel from Argentina, the EU authorities replaced the actual input costs with a surrogate price for soybeans that, in their view, reflected what the domestic prices for the inputs would have been in the absence of the distortions created by the export tax system maintained by Argentina.<sup>600</sup> The Panel took the view that, while the examples of application cited by Argentina reveal that the EU authorities *may* resort to prices prevailing in countries other than the country of origin, these examples do not demonstrate that the second subparagraph of Article 2(5) *requires* them to do so.<sup>601</sup>

6.255. We note that, in the investigations in: Seamless Pipes and Tubes of Iron or Steel from Croatia, Romania, Russia and Ukraine; Ammonium Nitrate from Russia; and Urea from Russia, having found that the gas costs were not reasonably reflected in the exporting producers' records as provided for in Article 2(5) of the Basic Regulation, the EU authorities considered it appropriate to base the adjustment, in all three decisions, on information from "other representative markets".<sup>602</sup> In the investigation on biodiesel that is the subject of Argentina's "as applied" claims in the present dispute, the EU authorities noted the confirmation of the General Court of the European Union that:

... the records of the party concerned do not serve as a basis for calculating normal value if the costs associated with the production of the product under investigation are not reasonably reflected in those records. In that case, the [second subparagraph] provides that the costs are to be adjusted or established on the basis of sources of information other than those records.<sup>603</sup>

6.256. Accordingly, we concur with the Panel that "[t]he decisions of the EU authorities cited by Argentina contain explicit statements by the EU authorities to the effect that Article 2(5) allows recourse to data from other representative markets including third countries."<sup>604</sup> However, as the Panel observed, while the examples cited by Argentina reveal that the EU authorities *may* resort to

<sup>598</sup> Panel Report, para. 7.163.

<sup>599</sup> The Panel's assessment concerned the same decisions of the EU authorities that we discussed in paragraphs 6.189-6.194 above.

<sup>600</sup> Panel Report, para. 7.165.

<sup>601</sup> Panel Report, paras. 7.164-7.166.

<sup>602</sup> For all three investigations, the adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs. (Council Implementing Regulation (EU) No. 1269/2012 (Panel Exhibit ARG-12), Recital 21; Council Regulation (EC) No. 238/2008 (Panel Exhibit ARG-14), Recital 22; Council Regulation (EC) No. 907/2007 (Panel Exhibit ARG-19), Recitals 33 and 34)

<sup>603</sup> Definitive Regulation (Panel Exhibit ARG-22), Recital 32.

<sup>604</sup> Panel Report, para. 7.165. (fn omitted)

prices prevailing in countries other than the country of origin, they do not demonstrate that the second subparagraph of Article 2(5) of the Basic Regulation *requires* them to do so.<sup>605</sup>

6.257. Still in this regard, we note that the European Union refers to evidence submitted to the Panel concerning other decisions of the EU authorities.<sup>606</sup> Notably, in response to questioning at the oral hearing, the European Union pointed to the EU authorities' decision on Silicon from Russia. According to the European Union, this decision provides a clear example of a situation when the phrase "information from other representative markets" in the second subparagraph of Article 2(5) was understood to refer to information from a different geographical market, but one within the country of origin. However, we observe that, in that decision, the EU authorities explained that the investigation was initiated before the date of entry into force of the amendment to the Basic Regulation by Council Regulation (EC) No. 1972/2002.<sup>607</sup> Therefore, the new regime following from that amendment, which includes the second subparagraph of Article 2(5) of the Basic Regulation, did not apply to that investigation. We share Argentina's view that the examples cited by the European Union shed no light on the meaning of the words "on any other reasonable basis including information from other representative markets" in the second subparagraph of Article 2(5) of the Basic Regulation.

6.258. Argentina also considers that the Panel erred in its understanding of the four judgments of the General Court of the European Union. In particular, Argentina contends that the Panel wrongly considered these judgments to show that, when the EU authorities determine that a producer's records do not reasonably reflect the costs of production because they are affected by a distortion, "the EU authorities are *entitled* to establish the producer's costs on the basis of sources that are unaffected by that distortion, and may have recourse to sources of information outside the country of origin."<sup>608</sup> In Argentina's view, these judgments, instead, clearly indicate the mandatory nature of the second subparagraph of Article 2(5). Argentina asserts that the judgments demonstrate that, when the EU authorities conclude that the exporter's records do not reasonably reflect the costs due to a distortion, the authorities *have to* adjust the distorted item by having recourse to information from other representative markets, and have no discretion to do otherwise.<sup>609</sup>

6.259. In each of the judgments relied on by Argentina, the General Court concluded that the EU authorities were "fully entitled to conclude that one of the items in the applicants' records could not be regarded as reasonable and that, consequently, that item *had to* be adjusted by having recourse to other sources from markets which the institutions regarded as more representative and, consequently, the price of gas had to be adjusted."<sup>610</sup> We read these statements by the Court as suggesting that, once the EU authorities determine that the records of the producer or exporter under investigation do not reasonably reflect the costs of production and sale of the product under consideration, the authorities *must* resort to the alternative bases identified in the second subparagraph of Article 2(5) of the Basic Regulation.

6.260. We also take note that, in each of the cases, the General Court found that "the [second subparagraph] provides that the costs are to be adjusted or established on the basis of

<sup>605</sup> Panel Report, para. 7.166.

<sup>606</sup> European Union's appellee's submission, paras. 104-106 (referring to Commission Decision of 13 February 2013 terminating the anti-dumping proceeding concerning imports of white phosphorus, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan, *Official Journal of the European Union*, L Series, No. 43 (14 February 2013), pp. 38-58 (Panel Exhibit EU-3); Commission Regulation (EC) No. 988/2004 of 17 May 2004 imposing provisional anti-dumping duties on imports of okoumé plywood originating in the People's Republic of China, *Official Journal of the European Union*, L Series, No. 181 (18 May 2004), pp. 5-23 (Panel Exhibit EU-4); and Council Regulation (EC) No. 240/2008 (Panel Exhibit ARG-20)). For example, in one decision, the EU authorities relied on the accounts of the parent company in the country of origin (which included the data of the activities of the exporting producer under investigation) to correct an aspect of the records of the exporting producer. ((Panel Exhibit EU-3), Recitals 36-37)

<sup>607</sup> Commission Regulation (EC) No. 1235/2003 of 10 July 2003 imposing a provisional anti-dumping duty on imports of silicon originating in Russia, *Official Journal of the European Union*, L Series, No. 173 (11 July 2003), pp. 14-34 (Panel Exhibit EU-24), Recital 15.

<sup>608</sup> Argentina's other appellant's submission, para. 250 (quoting Panel Report, para. 7.168 (emphasis original)).

<sup>609</sup> Argentina's other appellant's submission, paras. 250-253.

<sup>610</sup> Judgments of the General Court of the European Union, Case T-235/08 (*Acron I*) (Panel Exhibit ARG-23), para. 46; Case T-118/10 (*Acron II*) (Panel Exhibit ARG-52), para. 53; Case T-459/08 (Panel Exhibit ARG-53), para. 67; and Case T-84/07 (Panel Exhibit ARG-54), para. 60. (emphasis added)

sources of information other than those records."<sup>611</sup> In each of these cases, the EU authorities relied on information concerning costs from outside the country of origin. However, in each of these cases, the General Court stressed the order of preference set out in the second subparagraph of Article 2(5), noting that, where adjustments are to be made, the "information may be taken from the costs incurred by other producers or exporters [in the same country] or, when that information is not available or cannot be used, any other reasonable source of information, including information from other representative markets".<sup>612</sup> Accordingly, we are not persuaded by Argentina's contention that "[t]he fact that the General Court did not discuss or even refer to allegedly other possible options" means that, "[w]hen there is a distortion affecting the domestic market, the authorities *have to* adjust the item affected by the distortion by having recourse to information from other representative markets".<sup>613</sup> Rather, these judgments are consistent with the view that the EU authorities can turn to any other reasonable basis, including information from other representative markets, only in the event that the costs of other producers or exporters in the same country were not available or could not be used.

6.261. In our view, while the judgments reveal that the EU authorities *may* resort to information from sources outside the country of origin, they do not demonstrate that the second subparagraph of Article 2(5) of the Basic Regulation *requires* the EU authorities to use that information without adapting it to reflect the costs of production in the country of origin. Hence, we do not consider the Panel to have erred in finding that these judgments show that, when the EU authorities determine that a producer's records do not reasonably reflect the costs of production because they are affected by a distortion, "the EU authorities are *entitled* to establish the producer's costs on the basis of sources that are unaffected by that distortion, and may have recourse to sources of information outside the country of origin."<sup>614</sup>

6.262. In sum, having reviewed the Panel's evaluation of all the relevant elements, we find that Argentina has not established that the second subparagraph of Article 2(5) of the Basic Regulation means that, where the costs of other domestic producers or exporters in the same country cannot be used, the EU authorities are *required* to use information from other representative markets that does not reflect the costs of production in the country of origin.

#### 6.2.4.4 Whether the Panel acted inconsistently with Article 11 of the DSU

6.263. Argentina claims that, in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation, the Panel failed to make an objective assessment of the matter before it, thereby acting inconsistently with Article 11 of the DSU. Specifically, Argentina argues that the Panel failed to conduct an objective examination of the elements submitted by Argentina. Argentina contends that the Panel's analysis of the elements beyond the text of the Basic Regulation was limited to some cursory observations and failed to provide any reasoning for the Panel's conclusions. Argentina also argues that the Panel failed to make a true "holistic assessment" of these different elements because, having reached a preliminary conclusion on the basis of the text of the challenged provision, the Panel examined the remaining elements separately and in isolation from each other, and failed to base its final conclusion on a holistic assessment of all relevant elements taken together.<sup>615</sup> The European Union submits that the Panel's analysis of the various elements cannot be construed as a failure to fulfil its obligations under Article 11 of the DSU. The European Union considers that the Panel carefully analysed all the arguments advanced by Argentina and justified its conclusions with respect to each of them.<sup>616</sup>

6.264. We reiterate our discussion, at paragraphs 6.200-6.202 above, regarding a panel's duties, under Article 11 of the DSU, in the context of ascertaining the meaning of municipal law. We consider that, like the arguments it advanced in support of its other claim under Article 11 of

<sup>611</sup> Judgments of the General Court of the European Union, Case T-235/08 (*Acron I*) (Panel Exhibit ARG-23), para. 39; Case T-118/10 (*Acron II*) (Panel Exhibit ARG-52), para. 46; Case T-459/08 (Panel Exhibit ARG-53), para. 60; Case T-84/07 (Panel Exhibit ARG-54), para. 53.

<sup>612</sup> Judgments of the General Court of the European Union, Case T-235/08 (*Acron I*) (Panel Exhibit ARG-23), para. 39; Case T-118/10 (*Acron II*) (Panel Exhibit ARG-52), para. 46; Case T-459/08 (Panel Exhibit ARG-53), para. 60; Case T-84/07 (Panel Exhibit ARG-54), para. 53. See also European Union's appellee's submission, paras. 108-111.

<sup>613</sup> Argentina's other appellant's submission, para. 253. (emphasis added)

<sup>614</sup> Panel Report, para. 7.168. (emphasis original)

<sup>615</sup> Argentina's other appellant's submission, paras. 267-275.

<sup>616</sup> European Union's appellee's submission, paras. 112-117.

the DSU<sup>617</sup>, Argentina's arguments that the Panel acted inconsistently with Article 11 of the DSU in reaching its findings regarding the consistency of the second subparagraph of Article 2(5) of the Basic Regulation with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 amount to no more than a recasting of the arguments that Argentina made before the Panel. This does not suffice as a basis for us to find that the Panel acted inconsistently with Article 11 of the DSU.<sup>618</sup>

6.265. Argentina also asserts that the Panel failed to undertake a proper holistic assessment of all the relevant elements *taken together* in order to ascertain the meaning of the second subparagraph of Article 2(5) of the Basic Regulation. Relying on the Appellate Body's reasoning in *US – Shrimp II (Viet Nam)*<sup>619</sup>, it is our view, for the same reasons as those discussed in paragraphs 6.199-6.209 above, that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

6.266. Based on our finding in paragraph 6.262 above and our rejection of Argentina's claim under Article 11 of the DSU, we consider that the Panel did not err in finding that, "even when information from 'other representative markets' is used, Article 2(5), second subparagraph, does not ... *require* the EU authorities to establish the costs of production so as to reflect *costs* prevailing in other countries."<sup>620</sup>

6.267. As described in paragraphs 6.231-6.232 above, before the Panel, Argentina's challenge under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 consisted of two alternative lines of argument: (i) that the second subparagraph of Article 2(5) requires WTO-inconsistent action; and (ii) that, even if the second subparagraph of Article 2(5) does not require WTO-inconsistent action, it is nevertheless WTO-inconsistent because it provides for the possibility that such action may be taken. Having addressed Argentina's appeal concerning its first line of argument above, we now turn to Argentina's appeal concerning the Panel's finding on Argentina's second line of argument. Specifically, we examine Argentina's assertion that the Panel employed an erroneous legal standard for an "as such" challenge in stating that Argentina had not demonstrated that the second subparagraph of Article 2(5) of the Basic Regulation cannot be applied in a WTO-consistent manner.

#### **6.2.4.5 Whether the Panel erred by employing an erroneous legal standard to find that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994**

6.268. Before the Panel, Argentina put forward an alternative to its argument that the second subparagraph of Article 2(5) of the Basic Regulation is mandatory. For Argentina, even if it does not mandate recourse to out-of-country costs, the fact that the second subparagraph of Article 2(5) permits the authorities to construct the cost of production using a basis other than the costs of production in the country of origin renders that measure inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>621</sup> The Panel, however, rejected this alternative argument, finding instead that, "while Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and ... Article VI:1(b)(ii) of the GATT 1994, ... Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner."<sup>622</sup>

<sup>617</sup> At para. 6.209 above, we rejected Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in reaching its findings regarding the consistency of the second subparagraph of Article 2(5) of the Basic Regulation with Article 2.2.1.1 of the Anti-Dumping Agreement.

<sup>618</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>619</sup> Appellate Body Report, *US – Shrimp II (Viet Nam)*, paras. 4.36 and 4.50.

<sup>620</sup> Panel Report, para. 7.172. (emphasis original)

<sup>621</sup> Panel Report, para. 7.118 (referring to Argentina's opening statement at the first Panel meeting, para. 74; response to Panel question No. 24, para. 69; and second written submission to the Panel, paras. 147-149 and 162).

<sup>622</sup> Panel Report, para. 7.174 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483).

6.269. On appeal, Argentina submits that this Panel finding is erroneous because it suggests that, in order to prevail with a claim that a measure is inconsistent "as such", a complaining party must establish that the measure at issue leads to WTO-inconsistent results in all instances in which the measure is applied.

6.270. We understand Argentina and the European Union to have advanced several possible tests as to what must be established in order for a measure to be found to be inconsistent "as such" with WTO obligations. Argentina contends that a complainant challenging a measure "as such" has to demonstrate that a certain aspect of that measure would lead to an outcome that is necessarily inconsistent with WTO rules.<sup>623</sup> In addition, Argentina suggests that, to the extent that a WTO provision at issue prohibits certain conduct, the fact that the challenged measure *permits* such conduct renders it inconsistent "as such" with that WTO provision.<sup>624</sup> The European Union, for its part, asserts that for a measure to be found inconsistent "as such", the measure must "unavoidably" or "compulsorily" require the domestic authorities to act contrary to WTO obligations in all cases.<sup>625</sup> We also take note of the views of two of the third participants in this regard. China submits that, in order to show that a legislative measure is inconsistent "as such" with a WTO obligation, a complainant need not show that the measure leads to a WTO-inconsistent outcome in every instance. Instead, in China's view, the claim will prevail as long as a measure necessarily operates, at least in certain circumstances, to preclude conduct required under the covered agreements.<sup>626</sup> For its part, the United States opines that, where a Member may apply a measure in a WTO-consistent manner, there is no basis to find that the Member has, through that measure, breached its WTO obligations because of the potential for a future WTO-inconsistent application.<sup>627</sup>

6.271. As we have discussed in paragraphs 6.228-6.229 above, the discretionary nature of a measure is no barrier to an "as such" challenge, and measures involving some discretionary aspects "may violate certain WTO obligations".<sup>628</sup> Consistent with the generally applicable principles regarding the burden of proof in WTO disputes, it is for the complainant to establish the WTO-inconsistency of the challenged measure.<sup>629</sup> Precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure and the WTO obligations at issue.<sup>630</sup>

6.272. In the present dispute, the Panel began its analysis of Argentina's claims concerning the Basic Regulation by recalling "the relevant principles established under WTO jurisprudence" on, *inter alia*, the examination of a complaint that a Member's municipal law is inconsistent "as such".<sup>631</sup> The Panel noted the Appellate Body's clarification that challenges to a Member's legislation "as such" are "'serious challenges', particularly as Members are presumed to have enacted their laws in good faith."<sup>632</sup> The Panel added that, consistent with the generally applicable principles regarding the burden of proof in WTO disputes, it is for the complainant to establish the WTO-inconsistency of provisions of domestic law.<sup>633</sup> In that section of its analysis, the Panel made no additional statements in connection with the examination of a complaint that a measure is inconsistent "as such".

<sup>623</sup> Argentina's other appellant's submission, paras. 279-280 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172). Argentina maintains that it has demonstrated that, in cases in which the records of the producer or exporter under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration because of a "distortion" affecting the domestic market, the EU authorities necessarily use "information from other representative markets", which are not the costs of production in the country of origin. (*Ibid.*, para. 281)

<sup>624</sup> Argentina's other appellant's submission, paras. 284-285 (referring to Panel Report, para. 7.171).

<sup>625</sup> European Union's appellee's submission, paras. 120 and 122.

<sup>626</sup> China's third participant's submission, paras. 97-98 (quoting Appellate Body Reports, *US – Shrimp II (Viet Nam)*, para. 4.24; *Argentina – Textiles and Apparel*, para. 62; and *US – FSC (Article 21.5 – EC)*, para. 221).

<sup>627</sup> United States' third participant's submission, para. 47.

<sup>628</sup> Appellate Body Report, *US – 1916 Act*, fn 59 to para. 99 (referring to Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54).

<sup>629</sup> Panel Report, para. 7.120.

<sup>630</sup> Appellate Body Report, *US – Carbon Steel*, para. 157; Panel Reports, *EC – IT Products*, para. 7.112.

<sup>631</sup> Panel Report, paras. 7.119-7.126.

<sup>632</sup> Panel Report, para. 7.120 and fn 192 thereto (quoting and referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173).

<sup>633</sup> Panel Report, para. 7.120.

6.273. Our review of the Panel's analysis of Argentina's claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 suggests to us that the Panel proceeded as follows. The Panel first ascertained the meaning of the second subparagraph of Article 2(5) of the Basic Regulation<sup>634</sup> before examining the nature of the WTO obligations in Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>635</sup> The Panel then compared the two to assess whether the second subparagraph of Article 2(5) is inconsistent "as such" with those WTO obligations.<sup>636</sup> In our view, the Panel did not err in adopting this approach.

6.274. In addressing Argentina's alternative line of argument, the Panel stated that, "while Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and ... Article VI:1(b)(ii) of the GATT 1994, ... Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner."<sup>637</sup> In a footnote to this statement, the Panel indicated that it found guidance in certain statements in the Appellate Body report in *US – Carbon Steel (India)* containing language that is quite similar to that used by the Panel in its Report.<sup>638</sup>

6.275. In *US – Carbon Steel (India)*, the Appellate Body reversed the panel's findings under Article 12.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) because it found that the panel had failed to comply with its duty under Article 11 of the DSU.<sup>639</sup> India requested the Appellate Body to complete the legal analysis and address its claim that the US measures at issue in that case were inconsistent "as such" with Article 12.7 of the SCM Agreement.<sup>640</sup>

6.276. With respect to the nature of the obligation at issue in that dispute, the Appellate Body found that, pursuant to Article 12.7 of the SCM Agreement, an investigating authority must use "facts available" that reasonably replace the information that an interested party failed to provide, with a view to arriving at an accurate determination.<sup>641</sup> The Appellate Body rejected India's argument that Article 12.7 prohibits the use of an inference that is "adverse to the interests" of a non-cooperating party. Instead, the Appellate Body clarified that using an inference that is "adverse to the interests" of a non-cooperating party is not, in itself, inconsistent with Article 12.7. Rather, whether the "facts available" used are reasonable replacements of the missing information, and whether an adverse inference is drawn in accordance with Article 12.7, is to be determined in light of the particular circumstances of a given case.<sup>642</sup>

6.277. As regards the measure at issue in that dispute, India argued that the measure was inconsistent "as such" with Article 12.7 of the SCM Agreement because, despite the "innocuous" language of the text of the measure<sup>643</sup>, other evidence<sup>644</sup>, including the United States Department of Commerce (USDOC) practice, allegedly demonstrated "a consistent and systematic application of the measure, which contribute[d] to proving the existence, as part of the measure, of a system created to punish non-cooperation by drawing adverse inferences in every case of

<sup>634</sup> Panel Report, paras. 7.157-7.170.

<sup>635</sup> Panel Report, para. 7.171.

<sup>636</sup> Panel Report, para. 7.172.

<sup>637</sup> Panel Report, para. 7.174.

<sup>638</sup> Panel Report, fn 241 to para. 7.174.

<sup>639</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.456.

<sup>640</sup> Article 12.7 of the SCM Agreement provides that: "[i]n cases in which any interested Member or 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 may be made on the basis of the facts available.

<sup>641</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 293-294).

<sup>642</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.467-4.469.

<sup>643</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.471.

<sup>644</sup> In addition to the text of the measure at issue, India submitted evidence of judicial decisions, the Statement of Administrative Action, and USDOC practice. (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.452)

non-cooperation."<sup>645</sup> The Appellate Body made intermediate findings with respect to each of the elements before it<sup>646</sup>, and concluded that those elements:

[did] not establish conclusively that the measure requires an investigating authority to consistently apply inferences in a manner that would not comport with Article 12.7 in all cases of non-cooperation. Where inferences are drawn, this evidence of the use of "adverse inferences" does not establish conclusively that the measure at issue cannot be applied in a manner that comports with Article 12.7.<sup>647</sup>

6.278. In light of the obligation under Article 12.7 of the SCM Agreement, the Appellate Body examined all the relevant elements and found that India had failed to establish that the measure bore the meaning that India attributed to it.<sup>648</sup> As noted above, Article 12.7 directs an investigating authority to use "facts available" that reasonably replace the information that an interested party failed to provide, with a view to arriving at an accurate determination. For this reason, evidence that an adverse inference was drawn in a particular instance, or in several instances, could not, in itself, have sufficed to establish that the information selected did not reasonably replace the information in a manner consistent with Article 12.7. Thus, the finding of the Appellate Body related to the nature of the WTO obligation at issue, and the burden of proof with regard to India's assertion as to the meaning of the municipal law at issue.

6.279. For these reasons, we consider that the Panel in the present dispute took the Appellate Body's statements in *US – Carbon Steel (India)* out of context. To the extent that the Panel was expressing a legal standard for an "as such" challenge when it stated that "Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner"<sup>649</sup>, the Panel misread the Appellate Body's statements in *US – Carbon Steel (India)*.

6.280. We recall that the WTO obligation at issue in the present dispute is found in Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. As stated at paragraph 6.234 above, Article 2.2 and Article VI:1(b)(ii) do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin. However, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production" "in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects.

6.281. We further recall our finding, at paragraph 6.266 above, that the Panel did not err in finding that, "even when information from 'other representative markets' is used, Article 2(5), second subparagraph, does not ... *require* the EU authorities to establish the costs of production so as to reflect *costs* prevailing in other countries."<sup>650</sup> We also recall our view that nothing in the second subparagraph of Article 2(5) precludes the possibility that, when the EU authorities rely on

<sup>645</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.479.

<sup>646</sup> The Appellate Body's intermediate findings, with respect to each of the elements before it, were as follows. With respect to the text of the measure at issue, the Appellate Body did not consider that the measure, on its face, required the investigating authority to act inconsistently with Article 12.7. The Appellate Body also found that the judicial decisions did not support India's proposition that the measure at issue was mandatory in requiring the use of the worst possible information in all cases of non-cooperation. Likewise, the Appellate Body was of the view that the Statement of Administrative Action and the legislative history of the measure did not support India's proposition that the measure was mandatorily applied in all cases of non-cooperation without examining all evidence or engaging in a comparative assessment of such evidence so as to use the most appropriate or fitting information. Finally, on the basis of its review of the "practice" in the application of the measure, the Appellate Body was not convinced by India's assertion that the measure required the USDOC to draw the worst possible inference in all cases of non-cooperation, or to assume that those "facts available" with adverse consequences were the only facts that it could use. (Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.470, 4.477-4.478, and 4.481)

<sup>647</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483.

<sup>648</sup> For example, India submitted documents to the Panel arguing that they illustrated that the measure had been applied in many instances routinely and mechanically to always draw the worst possible inference. In rebuttal, the United States placed a number of cases on the Panel record where the "worst possible inference" was not applied in instances of non-cooperation. For the Appellate Body, the evidence concerning the application of the measure suggested that, even if the "practice" in respect of its application were relevant to ascertaining its meaning in that case, it did not conclusively support the proposition advanced by India. (Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.479-4.481)

<sup>649</sup> Panel Report, para. 7.174.

<sup>650</sup> Panel Report, para. 7.172. (emphasis original)



"information from other representative markets", they could adapt that information to reflect the costs of production in the country of origin, in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. We therefore find that Argentina has not satisfied its burden of proving that the second subparagraph of Article 2(5) of the Basic Regulation restricts, in a material way, the discretion of the EU authorities to construct the costs of production in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>651</sup>

6.282. Like the Panel, we consider that "Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and ... Article VI:1(b)(ii) of the GATT 1994."<sup>652</sup> However, the mere fact that the application of the second subparagraph of Article 2(5) could, in some circumstances, lead to WTO-inconsistency is not sufficient to discharge Argentina's burden to make a *prima facie* case that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. Accordingly, we find that the Panel did not err in finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.<sup>653</sup>

#### 6.2.4.6 Conclusions

6.283. Regarding Argentina's claims of error with respect to the Panel's findings under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, having reviewed the Panel's evaluation of all the relevant elements, we find as follows. As regards Argentina's first line of argument, we find that Argentina has not established that the Panel erred in rejecting the assertion that the second subparagraph of Article 2(5) of the Basic Regulation means that, where the costs of other domestic producers or exporters in the same country cannot be used, the EU authorities are *required* to use information from other representative markets that does not reflect the costs of production in the country of origin. In this regard, we further consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

6.284. For these reasons, we find that the Panel did not err, and did not fail to comply with its duties under Article 11 of the DSU, in stating that, "even when information from 'other representative markets' is used, Article 2(5), second subparagraph, does not ... *require* the EU authorities to establish the costs of production so as to reflect *costs* prevailing in other countries."<sup>654</sup>

6.285. With respect to Argentina's second line of argument, precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure and the WTO obligations at issue. As regards the nature of the WTO obligations at issue, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin. However, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production" "in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects. As regards the measure at issue, we understand that nothing in the second subparagraph of Article 2(5) of the Basic Regulation precludes the possibility that, when the EU authorities rely on "information from other representative markets", they could adapt that information to reflect the costs of production in the country of origin, in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. We therefore find that Argentina has not satisfied its burden of proving that the second subparagraph of Article 2(5) of the Basic Regulation restricts, in a material way, the discretion of the EU authorities to construct the costs of production in a

<sup>651</sup> See Appellate Body Report, *US – Carbon Steel*, para. 162.

<sup>652</sup> Panel Report, para. 7.174.

<sup>653</sup> Panel Report, para. 7.174.

<sup>654</sup> Panel Report, para. 7.172. (emphasis original)

manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

6.286. Like the Panel, we consider that "Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and ... Article VI:1(b)(ii) of the GATT 1994."<sup>655</sup> To the extent that the Panel may have been expressing a legal standard for an "as such" challenge when it stated that "Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner"<sup>656</sup>, we consider that this would be a misreading of a statement by the Appellate Body in *US – Carbon Steel (India)*. In any event, the mere fact that the application of the second subparagraph of Article 2(5) could, in some circumstances, lead to WTO-inconsistency is not sufficient to discharge Argentina's burden to make a *prima facie* case that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

6.287. Consequently, we uphold the Panel's finding, in paragraphs 7.174 and 8.1.b.ii of its Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

#### **6.2.5 Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement**

6.288. Argentina submits that, because it has demonstrated that the Panel erred in finding that the second subparagraph of Article 2(5) of the Basic Regulation is not inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, it necessarily follows that the European Union has not ensured the conformity of its laws, regulations, and administrative procedures with the provisions of the Anti-Dumping Agreement and the GATT 1994 and, as a consequence, has violated Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.<sup>657</sup>

6.289. As discussed above, we have upheld the Panel's findings that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The Panel's finding under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement was consequential. On appeal, Argentina advances no arguments in support of its claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement that are separate from its arguments in support of its claims under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

6.290. Consequently, we uphold the Panel's finding, in paragraphs 7.175 and 8.1.b.iii of its Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

## **7 FINDINGS AND CONCLUSIONS**

### **7.1 Claims concerning the EU anti-dumping measure on imports of biodiesel from Argentina**

7.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

<sup>655</sup> Panel Report, para. 7.174.

<sup>656</sup> Panel Report, para. 7.174.

<sup>657</sup> Argentina's other appellant's submission, paras. 291-293.

### 7.1.1 Determination of dumping

#### 7.1.1.1 Article 2.2.1.1 of the Anti-Dumping Agreement

7.2. We consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement – that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration – relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration. The Panel's interpretation, which is more nuanced than the European Union's arguments on appeal suggest, does not conflict with our understanding of this provision. In our view, the Panel did not err in rejecting the European Union's argument that the second condition in the first sentence of Article 2.2.1.1 includes a general standard of "reasonableness". With respect to the application of Article 2.2.1.1 to the anti-dumping measure on biodiesel, we agree with the Panel that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel. We therefore find that the Panel did not err in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.249 and 8.1.c.i of the Panel Report, that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. Having upheld this Panel's finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.

#### 7.1.1.2 Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

7.3. We consider that the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production ... in the country of origin" in Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information or evidence that may be used in establishing the cost of production in the country of origin to sources inside the country of origin. When relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this may require the investigating authority to adapt that information. In this case, like the Panel, we consider that the surrogate price for soybeans used by the EU authorities to calculate the cost of production of biodiesel in Argentina did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel. We therefore find that the Panel did not err in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, and that the European Union has not established that the Panel erred in its application of these provisions to the biodiesel measure at issue.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.260 and 8.1.c.ii of the Panel Report, that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel. Having upheld this finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.

#### 7.1.1.3 Article 2.4 of the Anti-Dumping Agreement

7.4. We have upheld the Panel's findings that the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement in constructing the normal value for the

reasons set out above.<sup>658</sup> Given these findings, and notwithstanding our reservations about certain aspects of the Panel's analysis under Article 2.4 of the Anti-Dumping Agreement, we do not consider it fruitful, in the particular circumstances of this dispute, to examine further whether the EU authorities also failed to conduct a "fair comparison" in comparing the constructed normal value to the export price.

- a. We therefore find it unnecessary to rule on Argentina's claim on appeal regarding the Panel's finding under Article 2.4 of the Anti-Dumping Agreement.

### **7.1.2 Imposition of anti-dumping duties: Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994**

7.5. We consider that the Panel correctly interpreted Article 9.3 of the Anti-Dumping Agreement in stating that the "'margin of dumping' referred to in Article 9.3 relates to a margin that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines".<sup>659</sup> Furthermore, in our view, the Panel did not err in considering that, in light of the specific circumstances of this dispute, "Argentina has made a *prima facie* case that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement, which the European Union has failed to rebut."<sup>660</sup> We also agree with the Panel that the same considerations that guided its assessment of Argentina's Article 9.3 claim apply *mutatis mutandis* to its assessment of Argentina's claim under Article VI:2 of the GATT 1994.<sup>661</sup>

- a. For these reasons, we uphold the Panel's finding, in paragraphs 7.367 and 8.1.c.vii of the Panel Report, that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively.

### **7.1.3 Non-attribution analysis in causation determination: Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

7.6. We consider that the Panel was not expressing, and therefore did not err in, its interpretation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when it stated that the revised data did not have a significant role in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an "other factor" causing injury. Furthermore, the Panel committed no error in its application of these provisions. Specifically, the Panel did not err in: (i) stating that the EU authorities' conclusion in their non-attribution analysis was not based on or affected by the revised data; (ii) rejecting Argentina's argument that the EU authorities improperly focused on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered; or (iii) finding no fault in the EU authorities' conclusion that, on the basis of the evidence before them, overcapacity could not be "a major cause of injury". More generally, we agree with the Panel that the EU authorities' conclusion with respect to overcapacity is one that an unbiased and objective investigating authority could have reached in light of the facts before it.<sup>662</sup> For these reasons, we find that Argentina has not established that the Panel erred in finding that the EU authorities' treatment of overcapacity in its non-attribution analysis as an "other factor" causing injury to the EU domestic industry was not inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.472 and 8.1.c.x of the Panel Report, that Argentina had not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

<sup>658</sup> See *supra*, paras. 6.56-6.57 and 6.82-6.83.

<sup>659</sup> Panel Report, para. 7.359.

<sup>660</sup> Panel Report, para. 7.365.

<sup>661</sup> Panel Report, para. 7.366.

<sup>662</sup> Panel Report, para. 7.472.

## 7.2 Claims concerning the second subparagraph of Article 2(5) of the Basic Regulation

### 7.2.1 Article 2.2.1.1 of the Anti-Dumping Agreement

7.7. Having reviewed the Panel's evaluation of all the elements submitted by Argentina, we do not consider that Argentina has established that the Panel erred in its assessment of the second subparagraph of Article 2(5) of the Basic Regulation. Like the Panel, we do not see support in the text of the Basic Regulation, or in the other elements relied on by Argentina, for the view that it is in applying the second subparagraph of Article 2(5) that the EU authorities are to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. In this regard, we further consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation. Accordingly, we find that the Panel did not err, and did not fail to comply with its duties under Article 11 of the DSU, in concluding that Argentina had not established its case regarding the meaning of the challenged measure, or in finding, for this reason, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>663</sup>

- a. For these reasons, we uphold the Panel's finding, in paragraphs 7.154 and 8.1.b.i of the Panel Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.

### 7.2.2 Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

7.8. Having reviewed the Panel's evaluation of all the relevant elements, we find as follows. As regards Argentina's first line of argument, we find that Argentina has not established that the Panel erred in rejecting the assertion that the second subparagraph of Article 2(5) of the Basic Regulation means that, where the costs of other domestic producers or exporters in the same country cannot be used, the EU authorities are *required* to use information from other representative markets that does not reflect the costs of production in the country of origin. In this regard, we further consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

7.9. For these reasons, we find that the Panel did not err, and did not fail to comply with its duties under Article 11 of the DSU, in stating that, "even when information from 'other representative markets' is used, Article 2(5), second subparagraph, does not ... *require* the EU authorities to establish the costs of production so as to reflect *costs* prevailing in other countries."<sup>664</sup>

7.10. With respect to Argentina's second line of argument, precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure and the WTO obligations at issue. As regards the nature of the WTO obligations at issue, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin. However, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production" "in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects. As regards the measure at issue, we understand that nothing in the second subparagraph of Article 2(5) of the Basic Regulation precludes the possibility that, when the EU authorities rely on "information from other representative markets", they could adapt that information to reflect the costs of production in the country of origin, in a manner consistent with Article 2.2 of the Anti-Dumping Agreement

<sup>663</sup> Panel Report, para. 7.154.

<sup>664</sup> Panel Report, para. 7.172. (emphasis original)

and Article VI:1(b)(ii) of the GATT 1994. We therefore find that Argentina has not satisfied its burden of proving that the second subparagraph of Article 2(5) of the Basic Regulation restricts, in a material way, the discretion of the EU authorities to construct the costs of production in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.11. Like the Panel, we consider that "Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and ... Article VI:1(b)(ii) of the GATT 1994."<sup>665</sup> To the extent that the Panel may have been expressing a legal standard for an "as such" challenge when it stated that "Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner"<sup>666</sup>, we consider that this would be a misreading of a statement by the Appellate Body in *US – Carbon Steel (India)*. In any event, the mere fact that the application of the second subparagraph of Article 2(5) could, in some circumstances, lead to WTO-inconsistency is not sufficient to discharge Argentina's burden to make a *prima facie* case that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.174 and 8.1.b.ii of the Panel Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

### **7.2.3 Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement**

7.12. We have upheld the Panel's findings that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The Panel's finding under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement was consequential. On appeal, Argentina advances no arguments in support of its claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement that are separate from its arguments in support of its claims under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.175 and 8.1.b.iii of the Panel Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

### **7.3 Recommendation**

7.13. The Appellate Body recommends that the DSB request the European Union to bring its measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994 into conformity with those Agreements.

<sup>665</sup> Panel Report, para. 7.174.

<sup>666</sup> Panel Report, para. 7.174.

Signed in the original in Geneva this 6th day of September 2016 by:

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Ujal Singh Bhatia  
Presiding Member

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Peter Van den Bossche  
Member

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Yuejiao Zhang  
Member

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6 October 2016

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## **EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA**

AB-2016-4

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS473/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A-1****EUROPEAN UNION'S NOTICE OF APPEAL\***

Pursuant to Article 16.4 of the DSU the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (WT/DS473). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

- a. the Panel erred when finding that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by "failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers". As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.247, 7.248, 7.249 and 8.1(c)(i) of its Report, which are based on its legally erroneous reasoning in paragraphs 7.220-7.246;<sup>2</sup>
- b. the Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by "using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value". As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.260 and 8.1(c)(ii) of its Report, which are based on its legally erroneous reasoning in paragraphs 7.255-7.259;
- c. the Panel erred when finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by "imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement". In view of those errors, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.367 and 8.1(c)(vii) of its Report, which are based on its legally erroneous reasoning in paragraphs 7.357-7.366.

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\* This Notice, dated 20 May 2016, was circulated to Members as document WT/DS473/10.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Only for the avoidance of doubt, we clarify that we include in the scope of our appeal the statement in the second sentence of paragraph 7.296 of the Panel Report, to the effect that, supposedly, nothing in Article 2.4 provides guidance when it comes to considering how normal value and export price should be determined, including the question of whether or not a standard of reasonableness informs not just the term reflect but also the determination of the costs associated with production and sale. We provide this clarification without prejudice to our right to refer to and disagree with other aspects of the Panel's reasoning in our submissions.

**ANNEX A-2****ARGENTINA'S NOTICE OF OTHER APPEAL\***

1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures"), Argentina hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law covered in the Panel Report in *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (WT/DS473/R) ("Panel Report") and certain legal interpretations developed by the Panel in that Report.

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Argentina simultaneously files this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat. Argentina is providing as well an Executive Summary of the Other Appellant Submission, in accordance with the Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice of Argentina's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

4. Argentina requests the Appellate Body to reverse various findings and conclusions of the Panel as a result of the errors of law and of legal interpretation contained in the Panel Report as identified below.

**1 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIM UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT CONCERNING ARTICLE 2(5) OF THE BASIC REGULATION**

5. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that Article 2(5), second subparagraph, of Council Regulation No. 1225/2009 ("the Basic Regulation") is inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement. The Panel erred in its application of Article 2.2.1.1 of the Anti-Dumping Agreement and failed to make an objective assessment, as required by Article 11 of the DSU, when it concluded that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article 2.2.1.1.<sup>1</sup> In particular, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation only deals with what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that Article 2(5), second subparagraph, is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement;
- the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation does not require the European Union to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when these records reflect prices that are considered to be artificially low or abnormally low as a result of a distortion. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that Article 2(5),

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\* This Notice, dated 25 May 2016, was circulated to Members as document WT/DS473/11.

<sup>1</sup> Panel Report, paras. 7.127–7.154 and 8.1(b)(i).

second subparagraph, is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement;

- the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, contrary to Article 11 of the DSU.

6. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to complete the analysis by finding that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement.

7. Consequently, the Appellate Body should also reverse the Panel's findings and conclusions that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.<sup>2</sup>

## **2 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIM UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994 CONCERNING ARTICLE 2(5) OF THE BASIC REGULATION**

8. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The Panel erred in its interpretation and application of Article 2.2 and of Article VI:1(b)(ii) and acted inconsistently with Article 11 of the DSU when it concluded that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with these provisions.<sup>3</sup> In that respect, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994 when finding that these provisions "do not limit the sources of information that may be used in establishing the costs of production", that they do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" but would "require that the costs of production established by the authorities reflect conditions prevailing in the country of origin"<sup>4</sup>;
- the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 when finding that Article 2(5), second subparagraph, "is formulated in permissive terms" and only lays out a series of options for the EU authorities in establishing the costs and when finding that this measure concerns "the sources of information" as opposed to the costs themselves. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that the measure at issue is not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994;
- the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, contrary to Article 11 of the DSU;
- the Panel applied an erroneous legal standard for the establishment of the "as such" claim when it found that Argentina was required to demonstrate that Article 2(5), second subparagraph "cannot be applied in a WTO-consistent manner".<sup>5</sup>

9. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that Article 2(5), second subparagraph, of the Basic Regulation is, as such, inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

<sup>2</sup> Panel Report, paras. 7.175 and 8.1(b)(iii).

<sup>3</sup> Panel Report, paras. 7.155–7.174 and 8.1(b)(ii).

<sup>4</sup> Panel Report, para. 7.171.

<sup>5</sup> Panel Report, para. 7.174.

10. Consequently, the Appellate Body should also reverse the Panel's findings that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18:4 of the Anti-Dumping Agreement.<sup>6</sup>

### **3 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL FROM ARGENTINA**

#### **3.1 Review of the Panel's findings with respect to Argentina's claim under Article 2.4 of the Anti-Dumping Agreement**

11. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that the European Union violated Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between normal value and export price, and in particular, by failing to make due allowances for differences affecting price comparability.<sup>7</sup> The Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement, amongst others, in the following respects:

- the Panel erred in finding that the difference at issue is not a difference affecting price comparability, in particular because it is one that arose from the methodology used to construct the normal value;
- the Panel erred when finding that its conclusion is consistent with the views of the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)*.

12. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that the European Union violated Article 2.4 of the Anti-Dumping Agreement because by failing to make adjustment for differences affecting price comparability, including differences in taxation, it failed to make a fair comparison between the normal value and the export price.

#### **3.2 Review of the Panel's findings with respect to Argentina's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

13. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that the European Union violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement in failing to ensure that the injury caused by the overcapacity of the European Union industry was not attributed to the allegedly dumped imports.<sup>8</sup> The Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when it concluded that the European Union did not act inconsistently with Articles 3.1 and 3.5 with respect to the treatment of overcapacity as an "other factor" of injury to the EU domestic industry. In that respect, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in its interpretation and application of the obligation to make an "objective examination" based on "positive evidence" of the overcapacity of the EU industry pursuant to Articles 3.1 and 3.5 of the Anti-Dumping Agreement;
- the Panel erred in its application of Articles 3.1 and 3.5 when it failed to distinguish overcapacity from capacity utilization and when it failed to note the inconsistency of the EU authorities' conclusion in light of the evidence before it.

14. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions with respect to Argentina's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the issue of overcapacity, and to find that the European Union violated these provisions with respect to overcapacity as an "other factor" of injury to the EU domestic industry.

<sup>6</sup> Panel Report, paras. 7.175 and 8.1(b)(iii).

<sup>7</sup> Panel Report, paras. 7.292–7.306 and 8.1(c)(v).

<sup>8</sup> Panel Report, paras. 7.462–7.472 and 8.1(c)(x).

**3.3 Review of the Panel's findings with respect to Argentina's claim under Article 2.2.1.1 of the Anti-Dumping Agreement**

15. If the Appellate Body reverses the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement concerning the European Union's failure to calculate the cost of production of the product under investigation on the basis of the records kept by Argentinean producers, Argentina requests the Appellate Body to complete the analysis of Argentina's second claim under Article 2.2.1.1 of the Anti-Dumping Agreement for which the Panel did not make findings.<sup>9</sup>

16. In that regard, Argentina requests the Appellate Body to find that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production of that product.

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<sup>9</sup> Panel Report, paras. 7.268–7.269 and 8.1(c)(iii).



**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

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## ANNEX B-1

### EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION

#### 1 EXECUTIVE SUMMARY

##### 1.1 THE PANEL ERRED BY FINDING THAT THE EUROPEAN UNION "FAILED TO CALCULATE THE COST OF PRODUCTION OF THE PRODUCT UNDER INVESTIGATION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS" PURSUANT TO ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

###### 1.1.1 Overview of the correct interpretation of the condition at issue, considered in its context and in light of the relevant object and purpose

1. The condition at issue is the phrase "records ... reasonably reflect the costs ..." in Article 2.2.1.1. The **specific and narrow** issue that is before the Appellate Body is how the **condition at issue** should have been interpreted and applied **to the specific factual and evidential pattern in this case**. The Appellate Body should not adjudicate on other issues that might arise under the Anti-Dumping Agreement or Article VI of the GATT 1994.
2. Article 2 sets out a **definition** which contains **the most fundamental elements** of the determination of dumping, including **normal value** and **price comparability**. Article 2.2.1.1 is framed as a provision to be applied "for the **purpose of paragraph 2**", namely **for the purpose of establishing a normal value**.
3. It is important to note that an investigating authority may need to apply Article 2.2.1.1 **more than once** in the same dumping margin calculation: for example, in determining whether or not domestic sales are in the ordinary course of trade by reason of price; and then again in determining normal value based on costs of production, SG&A and profit.
4. The interpretation and application of Article 2.2 should be systematic and coherent with reference to several issues: in particular, the consistent references to **all costs**, and the consistent references to **reasonableness**.
5. **There are no costs excluded from Article 2.2.1**, which refers to "**all costs**". By definition, when Article 2.2.1 refers to "selling ... costs" it is also referring to the cost of sales. The first sentence of Article 2.2.1.1 refers to **all costs**. It is with respect to **all costs** that the records kept by the investigated firm must be in accordance with the local GAAP. And it is with respect to **all costs** that the records kept by the investigated firm must reasonably reflect the costs associated with the production and sale of the product under consideration.
6. A standard of reasonableness is referenced in several parts of Article 2.2 as a whole and throughout that provision, and, in the condition at issue, informs not only the term reflect, but also the determination of the costs of production and sale. Any unreasonable costs cannot be reasonably reflected in the records of an investigated firm.
7. The first sentence of Article 2.2.1.1 contains two **conditions**. The first relates to GAAP, whilst the second is the condition at issue ("records ... reasonably reflect the costs ..."). This is not an obligation, but a condition. Such a condition – consequence structure is **not the same**, as a matter of law, to a general rule – exception structure.
8. If the relevant conditions are fulfilled, then, according to Article 2.2.1.1, a particular **consequence** follows: **normally** the costs shall be calculated on the basis of the records of the investigated firm. The meaning of this part of the provision is not before the Appellate Body in this appeal.

9. Article 2.2.1.1 indicates some of the circumstances in which it may be justified to replace or adjust specific cost items in the records of the investigated firm, although **these issues are not before the Appellate Body in this appeal** (cost allocations "historically utilized", non-recurring items of cost and start-up operations, and the existence of an "association or compensatory arrangement").
10. Articles 2.2.1.1 and Article 2.2.2 are not mutually exclusive. The phrase at issue cannot be properly interpreted as meaning that a standard of reasonableness informs the term "reflect", but not the determination of the costs associated with production and sale.
11. There are several indicators supporting the EU's view in the overall context. *First*, the repeated use of the term "**normal**" throughout the relevant provisions, including in Articles 2 of the Anti-Dumping Agreement and VI of the GATT 1994. *Second*, the repeated references to the concept of a "**proper comparison**" or "comparable prices" or a "fair comparison" throughout the relevant provisions. *Third*, the references to the concept of something that is "**representative**" throughout the relevant provisions. *Fourth*, the repeated use of the term "reasonable" throughout the relevant provisions. **How could it be that, in the condition at issue, a standard of reasonableness informs the determination of the costs associated with sales, but not production?**
12. *Fifth*, it may be reasonable/necessary in certain circumstances to refer to an external proxy for the purposes of applying the two conditions in the first sentence of Article 2.2.1.1. This is exactly what the first condition foresees, by reference to local GAAP, which is an **external** element to the records kept by the investigated firm.
13. *Sixth*, the phrase "**associated** with the production and sale" is drafted in relatively general and abstract terms and should govern the matter, not the term "actual", which does not appear in the text.
14. *Seventh*, Article 2.2.1.1 provides that the investigating authority must consider **all available evidence** on the proper allocation of costs, **not limited** to the evidence coming from the investigated firm.
15. *Eighth*, if one of the conditions provided for in Article 2.2.1.1 is not satisfied, then the obligation to normally use the records kept by the investigated firm does not apply. The provision is silent as to what method is to be used to establish the costs of production and sale in such circumstances, which should be **informed by a standard of reasonableness**.
16. *Ninth*, an investigating authority could either replace or **adjust** specific costs in the records kept by the investigated firm. The reference to taxation in Article 2.4 confirms that an adjustment pursuant to the first sentence of Article 2.2.1.1 is an appropriate and objective response to a de jure discriminatory export tax designed precisely to have the effect of masking the dumping. **As a matter of law**, dumping is also **defined** as arising when the export price is less than the normal value calculated on the basis the **costs** associated with production and sale, **properly and reasonably determined**.
17. *Tenth*, it is precisely because export taxes are not covered by Article XI of the GATT 1994 that one must be careful to make sure that other disciplines are correctly understood so as to permit a reasonable and appropriately calibrated response to the existence of such de jure discriminatory and trade-distorting measures.

### 1.1.2 Legal errors in the Panel's reasoning, findings and conclusions

18. Even before embarking on its analysis, the Panel appears to have pre-judged the issue by framing the question using tendentious language.
19. The Panel opined that the **purpose** of paragraph 2 is to elaborate rules for determining the cost of production in the country of origin. Rather, the purpose of paragraph 2 is to elaborate rules for determining a value that is normal, or a normal value.

20. The Panel opined that the first sentence of Article 2.2.1.1 consists of a "**general rule**" and two "**derogations**". None of the three previous cases invoked supports the Panel's statement.
21. The Panel considered that the focus of the condition at issue is on the specific producer/exporter under investigation, and what is contained in its records. Instead, the focus of the condition is **equally** on **both** the **records** kept by the investigated firm and the costs associated with the production and sale of the product under consideration.
22. The Panel's reference to **Article 6.10** is misplaced. Article 2 provides that, in certain circumstances, the same data from the same source may be used in order to determine, in part, the dumping margins of several exporters.
23. The Panel opines that GAAP generally encompass a requirement that all costs have actually been incurred, concluding then that the second condition must also be referring to the "actual" costs. The Panel fails to explain how its observation relates to its line of reasoning. The Panel's reference to an **association or compensatory arrangement** between the investigated firm and one of its suppliers sheds contextual light on what situations might justify replacing or adjusting the records kept by the investigated firm.
24. The Panel makes a series of statements that confirm that one should search for a "proxy" that is "appropriate", "accurate" and "reliable".
25. The Panel erroneously finds support in **footnote 6**, which it construes as suggesting that the cost data must in all circumstances be specific to each individual exporter or producer.
26. The Panel fails to look properly at the context in Article 2.2.2, as it refers to actual data pertaining to production and sales **in the ordinary course of trade**.
27. The Panel makes three erroneous statements about object and purpose, relating to the lack of a preamble of the Anti-Dumping Agreement, a confusion with the supplementary means of interpretation and the very language of Article 2.2.1.1. The Panel rejects the EU's submission that the second Ad note to Articles VI:2 and VI:3 of the GATT 1994 (on multiple currency practices) supports its arguments in this case.
28. The Panel makes certain assertions about provisions in the protocols of accession of certain Members.
29. Having concluded this part of its analysis, the Panel then reviews three other panel reports. In fact, each of them (*US – Softwood Lumber V*, *Egypt – Steel Rebar* and *EC – Salmon (Norway)*) lends support to EU's position. Investigating authorities may at least test the recorded costs against market values, in order to determine whether the records reasonably reflect the costs. Taken together, those findings confirm that previous panels did not foreclose the possibility that an investigating authority may disregard or adjust costs which do not reflect market values.

**1.1.3 The Panel erred not only in its interpretation but also in its application of Article 2.2.1.1 and particularly the condition at issue, in light of the Vienna Convention and the existing case law**

30. The Panel failed to conduct a holistic analysis of the ordinary meaning, context and object and purpose of Article 2.2.1.1.
31. With respect to its **ordinary meaning**, the Panel understood the first sentence of Article 2.2.1.1 to relate exclusively to a cost allocation issue. This is contradicted by the panel's findings in *US – Softwood Lumber V*.
32. The phrase "costs associated with" refers to the costs related to, which cannot be equated to "costs actually incurred". Article 2.2.1.1 does not include the words "expenses actually incurred by the producer".

33. The immediate **context of the phrase** at issue suggests that to "reasonably reflect costs associated with production and sale", records must reflect something more than simply the "expenses actually incurred".
34. The Panel's reliance on Article 6.10 fails for several reasons, related to the calculation of the normal value or the export price.
35. The **object and purpose** of the WTO anti-dumping rules can be discerned from Article VI:1 of the GATT 1994, as to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low, because of some abnormal condition (hence the reference to "normal" value), within reasonable limits. The second Ad Note to Articles VI:2 and VI:3 of the GATT 1994 confirms that in certain *circumstances price distortion caused by governmental action can also cause dumping*.

## **1.2 THE PANEL ERRED WHEN FINDING THAT THE EUROPEAN UNION "FAILED TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN" AS REQUIRED BY ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT**

### **1.2.1 Legal standard under Article 2.2 of the AD Agreement**

36. A distinction must be made between "cost...in the country of origin" and the evidence pertaining to such cost. Indeed, Article 2.2, as a whole, does not forbid outright the use of data on the cost of production from countries other than the country of origin. Article 2.2.2(iii) expressly refers to the use of "any other reasonable method".
37. The Anti-Dumping Agreement contains no rule that precludes securing evidence from outside the country of origin in order to identify the costs in the country of origin. Article 6 does not impose any limits on the countries from which evidence may be obtained.
38. Article 2.5 is instructive: normal value is based on the comparable price either in the country of export or in the country of origin, according to the circumstances.

### **1.2.2 The Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement by "not using the actual costs "in the country of origin" when constructing the normal value"**

39. The Panel stated that certain claims of Argentina under Article 2.2 were consequential, and it did not make findings in that respect. However, the Panel opined that the measure at issue is inconsistent with Article 2.2 because the normal value was not constructed on the basis of the "actual" costs "in the country of origin".
40. A price derived from a price at the border can by definition be simultaneously characterised as both an international price and a price in Argentina. The Panel fails to recognise that the subtraction of the fobbing costs renders the result a reasonable proxy for the normal price of soya in Argentina.
41. During the first substantive meeting, Argentina confirmed that the prices used by the European Union's investigating authority were indeed "constructed" by the Government of Argentina on the basis of various sources, including information from **Argentinean** ports. Accordingly, they were prices "in the country of origin" as per Article 2.2.
42. Costs and evidence pertaining to those costs are separate elements. First, the notion of "the cost of production in the country of origin" set out in Article 2.2 is a legal one, while establishing the cost in a particular case involves determinations of fact, made with the aid of evidence. Second, the possibility of using "any other reasonable method" in Article 2.2.2(iii) implies that Article 2.2, as a whole, does not impose an absolute prohibition on the use of data on the cost of production from countries other than the country of origin (when sales are not in the "ordinary course of trade").

### **1.3 THE PANEL ERRED WHEN FINDING THAT THAT THE EUROPEAN UNION "IMPOSED ANTI-DUMPING DUTIES IN EXCESS OF THE MARGINS OF DUMPING THAT SHOULD HAVE BEEN ESTABLISHED UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT"**

#### **1.3.1 Legal standard under Article 9.3 of the Anti-Dumping Agreement**

43. It is undisputed that the ordinary meaning of the phrase "the margin of dumping as established under Article 2" is that of a margin of dumping established *in accordance with the provisions of Article 2*.
44. A Member's failure to comply with the provisions of Article 2 does not automatically constitute a failure to comply with Article 9.3.

#### **1.3.2 The Panel's errors regarding Argentina's claim under Article 9.3 of the Anti-Dumping Agreement**

45. The Panel made several errors in interpreting and applying Article 9.3 to the facts of the present case.
46. *First*, the European Union submits that Article 9.3 addresses the comparison between the anti-dumping duties and the dumping margins, as opposed to addressing the calculation of the normal value
47. *Second*, the Panel erred when it inferred from its previous findings with regard to Articles 2.2.1.1 and 2.2 that the European Union also breached Article 9.3.
48. *Third*, the Panel erred by seeking to rely on the dumping margins calculated in the Provisional Regulation, effectively implying that this is what the determination should have been, thus exceeding the authority vested in it pursuant to the DSU and the rules in the Anti-Dumping Agreement, which is to determine whether or not the measure at issue is WTO consistent. The Panel should have limited itself to determining if the investigating authority's evaluation of the facts was unbiased and objective, as provided for in Article 17(6)(i).

### **1.4 CONCLUSIONS**

49. As a consequence, the European Union requests the Appellate Body to find that the Panel erred when finding that the European Union acted inconsistently with Articles 2.2.1.1, 2.2 and 9.3, reverse the Panel's findings and conclusions in paragraphs 7.247, 7.248, 7.249, 7.260, 7.367 and 8.1 (c)(i),(ii) and (vii) of its Report.
50. Having reversed the Panel's respective findings and conclusions the Appellate Body is not in a position to complete the legal analysis, and should not do so.

**ANNEX B-2****EXECUTIVE SUMMARY OF ARGENTINA'S OTHER APPELLANT'S SUBMISSION****1 INTRODUCTION**

1. The Report issued by the Panel in the case *European Union – Anti-Dumping Measures on Biodiesel from Argentina* contains several legal errors of interpretation and application of the provisions of the Anti-Dumping Agreement and the GATT 1994, which led the Panel to erroneous findings and conclusions with respect to Argentina's claims against Article 2(5), second subparagraph, of the Basic Regulation and the anti-dumping measures imposed by the European Union on imports of biodiesel originating in Argentina. The Panel also acted inconsistently with Article 11 of the DSU. More specifically, in this submission, Argentina presents six claims of errors, including one conditional appeal, with respect to the Panel's findings regarding Argentina's claims under Articles 2.2, 2.2.1.1, 2.4, 3.1, 3.5 and 18.4 of the Anti-Dumping Agreement, Article VI:1(b)(ii) of the GATT 1994 and Article XVI:4 of the WTO Agreement.

**2 THE PANEL ERRED WHEN FINDING THAT ARTICLE 2(5), SECOND SUBPARAGRAPH, OF THE BASIC REGULATION IS NOT "AS SUCH" WTO INCONSISTENT****2.1 The Measure at Issue**

2. The measure at issue is Article 2(5), second subparagraph, of Council Regulation (EC) No 1225/2009 ("the Basic Regulation"), laying down the rules governing the determination of costs *inter alia* for the purpose of constructing normal value. It is crucial to note that the second subparagraph of Article 2(5) was not included in the original version of Article 2(5), as adopted in 1994 to implement the Anti-Dumping Agreement. Instead, the second subparagraph was only added in 2002 by Council Regulation (EC) No 1972/2002. The latter instrument, provided for two other modifications: (i) Article 2(3) of the Basic Regulation was amended in order to clarify what circumstances could be considered as constituting a "particular market situation" in which sales of the like product do not permit a proper comparison, and (ii) the Russian Federation was granted full market economy status. Both of these modifications are highly relevant for understanding the scope of the second subparagraph of Article 2(5).

**2.2 The Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement**

3. Argentina submits that the Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.

4. First, Argentina submits that the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation only deals with what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph. Such a conclusion is based on an erroneous assessment of the meaning of the text of the measure and of its context, as well as of the understanding flowing from the practice of the EU authorities and the General Court's judgments.

5. The Panel erred in its assessment of the meaning of the text of Article 2(5), second subparagraph, in particular because the Panel wrongly based its analysis on the consideration that the second subparagraph of Article 2(5) begins with a condition, and thus, only takes effect following a determination under the first subparagraph that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under investigation. The Panel also erred when reading the two parts of Article 2(5), second subparagraph, in isolation from each other. Argentina submits that the fact that the authorities must adjust or establish the costs on any other reasonable basis, including information

from other representative markets where costs of other domestic producers or exporters "cannot be used" implies that the very reason why such information cannot be used is also relevant when examining the records of the producers/exporters subject to the investigation. Furthermore, the Panel erred when reading a sequential order between the two sub-paragraphs of Article 2(5). The Panel also erred when it ignored the fact that the terms or concepts used by Argentina to describe the measure at issue, such as "distortion", "abnormally low" and "artificially low", can be found in the contextual elements referred to by Argentina and are reflected in the consistent practice of the EU authorities as well as the judgments of the General Court of the European Union.

6. The Panel further erred in its analysis of the different contextual elements submitted by Argentina, namely the legislative history of Article 2(5), second subparagraph, Recital 4 of Regulation No 1972/2002, Article 2(3) of the Basic Regulation and the writings of scholars. All these elements support Argentina's interpretation of Article 2(5), second subparagraph.

7. The Panel also erred in its analysis of the consistent practice of the EU authorities in applying Article 2(5), second subparagraph, of the Basic Regulation. In particular, the Panel erred in concluding that the decisions cited by Argentina do not establish that Article 2(5), second subparagraph, is the provision pursuant to which the determinations that the costs were not reasonably reflected in the records were made. The Panel also erred in finding that the decisions cited by Argentina cannot be regarded as establishing a "consistent practice". Absent any case on the record in which, although costs were found to be artificially or abnormally low as a result of a distortion, the EU authorities considered that the records reasonably reflected the costs of the product under consideration, the Panel should have concluded that the cases referred to by Argentina established a consistent practice.

8. The Panel erred in its analysis of the judgments of the General Court of the European Union. Indeed, contrary to the Panel's assessment, the judgments of the General Court confirm that where the records contain costs which are artificially or abnormally low due to a distortion, they do not reasonably reflect the costs associated with the production of a product. These judgments also confirm that such determination is made pursuant to the second subparagraph of Article 2(5), and not pursuant to the first subparagraph.

9. The Panel erred in its assessment of the meaning of Article 2(5) because its analysis is based on two erroneous premises: (i) that the first and the second subparagraphs necessarily concern different steps and (ii) that the determination that the records do not reasonably reflect the costs is necessarily distinct from the determination as to which data to use when the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.

10. Second, the Panel committed a legal error to the extent that it concluded that Article 2(5), second subparagraph, of the Basic Regulation does not "require" the European Union to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when these records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. Argentina submits that the text of Article 2(5), second subparagraph, its context, the consistent practice of the EU authorities and the judgments of the General Court of the European Union clearly indicate the mandatory nature of Article 2(5), second subparagraph.

11. Third, the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, thereby acting inconsistently with Article 11 of the DSU. More specifically, the Panel failed to make a thorough examination of all the elements put forward by Argentina beyond the text of the measure. The Panel also failed to make a holistic assessment of all these elements taken together in order to determine the real meaning of Article 2(5), second subparagraph. The Panel first erred in that it reached its conclusion as to the scope, meaning and content of the measure at issue mainly on the basis of the text, only examining the context, consistent practice of the EU authorities and the judgments of the General Court to confirm the conclusion already reached on the basis of the text. Secondly, the Panel erred in examining each of the other elements submitted by Argentina in isolation. Indeed, the Panel examined individual pieces of evidence, finding that they failed to contradict its prior conclusion reached on the basis of the text of Article 2(5), rather than examining the evidence as a whole and assessing the interplay of each element with the others. By failing to evaluate each element in relation to the others and all of the elements together, the



Panel made a fragmented analysis which did not reveal the actual scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation.

12. If the Appellate Body reverses the Panel's finding that Article 2(5), second subparagraph, only deals with "what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph" and confirms that this measure covers the determination that the records do not reasonably reflect the costs where costs are found to be artificially low or abnormally low as a result of a distortion, Argentina requests the Appellate Body to complete the analysis determining that Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2.1.1 of the Anti-Dumping Agreement.

13. Argentina considers that Article 2(5), second subparagraph, of the Basic Regulation *requires* the EU authorities to determine that a producer's records do not reasonably reflect the costs of production in situations in which the records reflect prices which are artificially or abnormally low, by reference to prices prevailing in other markets. However, even if Article 2(5), second subparagraph, were to be found as only providing for the possibility (and not requiring) to make such a determination, *quod non*, it should still be found to be inconsistent with Article 2.2.1.1. Indeed, to the extent that Article 2.2.1.1 prohibits the rejection of data in the exporter/producer's records merely because those data are found to be "abnormally low" or "artificially low" because of an alleged distortion, Article 2(5), second subparagraph, must be found to be inconsistent with Article 2.2.1.1 because such rejection falls within the category of what is prohibited under Article 2.2.1.1 of the Anti-Dumping Agreement.

**2.3 The Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994**

14. Argentina submits that the Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.

15. First, the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994, when finding that these provisions "do not limit the sources of information that may be used in establishing the costs of production", that they do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" but "would [...] require that the costs of production established by the authority reflect conditions prevailing in the country of origin". The Panel reached its conclusion without making any analysis of the ordinary meaning of the terms included in Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, nor of their context or the object and purpose of the relevant agreements, as required by the general rules of treaty interpretation. It is clear that the ordinary meaning of the terms "cost of production in the country of origin" refers to the costs, i.e. the charges or expenses incurred, for producing the product concerned in the country of origin. This understanding is further supported by the immediate context, in particular Articles 2.1, 2.2, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement, the *Ad Note* to Article VI:1 of the GATT 1994, as well as by the object and purpose of the Anti-Dumping Agreement. Having reversed the Panel's findings, the Appellate Body should conclude that Article 2(5), second subparagraph, is inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

16. Second, the Panel erred in its determination of the meaning, scope and content of Article 2(5), second subparagraph of the Basic Regulation. In particular, the Panel erred in finding that the phrase at issue is formulated in "permissive terms" and that the provision "lays out a series of options for the EU authorities in establishing the costs of production once it has been determined that the producers' records do not reasonably reflect the costs associated with the production and sale of the product being investigated". The analysis of the text of Article 2(5), second subparagraph, demonstrates that this provision imposes an obligation on the EU investigating authorities to use "any other reasonable basis, including information from other representative markets", every time information of other domestic producers/exporters "is not available or cannot be used". This is further confirmed by the legislative history of this provision, the consistent practice of the EU authorities and the judgments of the General Court. Furthermore, the Panel also erred in considering that the language of Article 2(5), second subparagraph,

"pertains to the *sources of information*", "as opposed to the *costs themselves*". Article 2(5), second subparagraph, expressly describes the "costs of other producers or exporters" as being "information". Thus "costs" constitute "information". This understanding is supported by the legislative history and the consistent practice of the EU authorities. Argentina further notes that given that information from other representative markets is used in order to correct ("adjust") or replace ("establish") the costs of the producer/exporter concerned, the information that is used will inevitably reflect the conditions prevailing in such other market. Thus, even if the Appellate Body were to uphold the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 (namely that these provisions do not prohibit an authority resorting to sources of information other than producers' costs in the country of origin but only require that the costs of production reflect conditions prevailing in the country of origin), Argentina submits that the Appellate Body should still conclude that Article 2(5), second subparagraph, violates those provisions.

17. The Panel also failed to make an objective assessment of the matter as required by Article 11 of the DSU. In particular, the Panel failed to make a thorough examination of the elements submitted by Argentina, in particular in relation to the legislative history and the consistent practice of the EU authorities and failed to make a true "holistic assessment" of these different elements. Given that the Panel failed to make a thorough analysis of these different elements and because it examined all of them separately, it failed to see that, together, they show how Article 2(5), second subparagraph, operates in practice. Indeed, once the text of Article 2(5), second subparagraph, is seen in the context of its legislative history and in light of the manner in which it has been consistently applied by the EU authorities since its adoption, it leaves no doubt that it requires the use of information from other representative markets which is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

18. Third, the Panel applied an erroneous legal standard for the establishment of the "as such" claim when it found that Argentina was required to demonstrate that Article 2(5), second subparagraph "cannot be applied in a WTO-consistent manner" and erroneously found, as a consequence, that Argentina has not established that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994. Argentina submits that in order to succeed with a claim of "as such" violation, the complainant is not required to demonstrate that the measure will be applied in a WTO-inconsistent manner *in all instances* in which that measure is applied. The Panel also erred to the extent that its findings imply that the measure being challenged must "require" the authorities to act in a WTO-inconsistent manner and that the authorities cannot have any discretion. Argentina submits that even though the authorities may have discretion whether or not to use information which reflects costs prevailing in countries other than the country of origin, every time they do so, this will necessarily be inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

#### **2.4 The Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement**

19. Argentina submits that the Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

20. Argentina requests the Appellate Body to reverse the Panel's findings and to find instead that given that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the European Union failed to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement and the GATT 1994 thereby violating Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

### **3 THE PANEL'S LEGAL ERRORS WITH REGARD TO ARGENTINA'S CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL FROM ARGENTINA**

#### **3.1 The Panel erred when finding that the European Union did not violate Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between the normal value and the export price**

21. Argentina claims that the Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement when finding that the European Union did not violate Article 2.4 by failing to make a fair comparison between the normal value and the export price.

22. First, the Panel erred in finding that the difference identified by Argentina was not a difference which affects price comparability within the meaning of Article 2.4. The Panel specifically erred when finding that this difference does not represent "a tax" or "some other identifiable characteristic". The difference at issue results from the use in the normal value of the reference FOB price, minus FOB costs, for soybeans, which includes the export tax, while the export price is based on the domestic cost for soybeans and does not include any export tax at all. To the extent that this difference "more or less amounted to the level of the export tax", it is in fact equivalent to a difference in taxation. In any case, even if the difference was not regarded as being a difference in "taxation", it nonetheless constitutes an identifiable characteristic.

23. The Panel is also wrong when stating that "[i]t was a methodological approach that affected the *price* of biodiesel, but it did not affect the *price comparability* of the normal value and the export price. Argentina fails to see how the methodological approach, leading to such a difference, can be held to affect the *price* of biodiesel but not the *price comparability* of the normal value and the export price.

24. The Panel also erred when concluding that there is a "general proposition" that differences arising from the methodology used to construct the normal value are not "differences affecting price comparability" within the meaning of Article 2.4. There is nothing in Article 2.4 or any other provision of the Anti-Dumping Agreement which would support such a proposition. This implies that the fact that a difference is the result of a particular methodology does not render it irrelevant for the purpose of Article 2.4 of the Anti-Dumping Agreement.

25. Based on a proper interpretation of Article 2.4, correctly applied to the difference at issue, the Appellate Body should conclude that the difference at issue is a "difference affecting price comparability" within the meaning of Article 2.4.

26. Second, the Panel erred when concluding that its conclusion is consistent with the Appellate Body's findings in *EC – Fasteners (China) (Article 21.5 – China)*. In fact, contrary to what has been argued by the Panel, the Appellate Body in that case held that the fact that certain differences affecting price comparability may be the result of a methodology used for establishing the normal value does not disqualify such differences from being subject to adjustment under Article 2.4 of the Anti-Dumping Agreement.

27. In light of the foregoing, Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that the European Union violated Article 2.4 because, by failing to make adjustments for differences affecting price comparability, it failed to make a fair comparison as required by that provision.

#### **3.2 The Panel erred in finding that the European Union's non-attribution analysis did not violate Article 3.1 and Article 3.5 of the Anti-Dumping Agreement**

28. Argentina claims that the Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when assessing Argentina's claim concerning the European Union's treatment of overcapacity in the non-attribution analysis.

29. First, the Panel erred in its interpretation and application of the obligation to make an "objective examination" based on "positive evidence" of the overcapacity of the EU industry pursuant to Articles 3.1 and 3.5 of the Anti-Dumping Agreement. More specifically, the Panel erred

in considering that it was relevant to examine whether "the revised data [did or] did not have a *significant role* in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an 'other factor' causing injury". Argentina submits that to the extent the EU authorities relied on the revised data, which do not constitute "positive evidence" and did not involve an objective examination, this should lead to the conclusion that the analysis made by the European Union regarding "overcapacity" is not consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In any event, even if the Appellate Body were to conclude that the Panel was right in examining the role played by the revised data in the determination of the EU authorities, *quod non*, the Panel did not correctly apply Article 3.1 when concluding that "the issue of overcapacity was [not] based on, or affected by, the revised data".

30. Second, the Panel erred in its application of Articles 3.1 and 3.5 as it relates to the EU authorities' conclusions regarding "capacity" as another "known factor" in its causation analysis. In particular, the Panel failed to distinguish overcapacity from capacity utilization. Argentina submits that, although related, overcapacity and capacity utilization are two distinct concepts that should not be equated. In the present case, in order to act "in an unbiased manner", the EU authorities should have examined "overcapacity", as this was the factor identified by the interested parties during the investigation as causing injury. In addition to the fact that the EU authorities failed to address the substantial increase in overcapacity, Argentina notes that the Panel further failed to note the inconsistency of the EU authorities' conclusion that this factor could not be "a major cause of injury" on the basis of the evidence before it.

31. On the basis of the above, Argentina requests that the Appellate Body reverse the Panel's findings and find that the European Union acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the issue of overcapacity.

### **3.3 Review of the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement**

32. Argentina submits that if the Appellate Body were to reverse the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement concerning the European Union's failure to calculate the cost of production of the product under investigation on the basis of the records kept by Argentinean producers, the Appellate Body should complete the analysis with regard to Argentina's second claim under Article 2.2.1.1 that the European Union acted inconsistently with that provision by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production, for which the Panel did not make any findings.

33. Argentina requests the Appellate Body to find that the European Union violated Article 2.2.1.1 of the Anti-Dumping Agreement because by using the FOB reference price of soybean instead of the actual price of soybean incurred by Argentinean producers, it included costs not associated with the production and sale of biodiesel in the calculation of the cost of production of the product under consideration pursuant to Article 2.2.1.1.

## **4 CONCLUSION**

34. For the reasons set out in this submission, Argentina respectfully requests the Appellate Body to reverse the Panel's findings and conclusions,

- a. with regard to Argentina's "as such" claims concerning Article 2(5), second subparagraph, of the Basic Regulation under Articles 2.2, 2.2.1.1 and 18:4 of the Anti-Dumping Agreement, Article VI:1(b)(ii) of the GATT 1994 and Article XVI:4 of the WTO Agreement. Argentina also request that the Appellate Body complete the analysis with regard to Argentina's "as such" claim under Article 2.2.1.1.
- b. with regard to Argentina's claims concerning the anti-dumping measures on imports of biodiesel under Articles 2.4, 3.1 and 3.5 of the Anti-Dumping Agreement, and to complete the analysis with regard to Argentina's claim under Article 2.2.1.1 of the Anti-Dumping Agreement if the Appellate Body reverses the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement concerning the European Union's failure to calculate the cost of production of the product under investigation on the basis of the records kept by Argentinean producers.

**ANNEX B-3****EXECUTIVE SUMMARY OF ARGENTINA'S APPELLEE'S SUBMISSION****1 INTRODUCTION**

1. Argentina requests the Appellate Body to reject all European Union's claims of error presented in its Appellant Submission, which are all without merit. Argentina is concerned about what it considers as an attempt by the European Union to seek to disregard an entire set of rules (mainly those contained in Article 2 of the Anti-Dumping Agreement), a well-established jurisprudence and a common understanding amongst Members about a given set of principles.

**2 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION ACTED INCONSISTENTLY WITH ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT "BY FAILING TO CALCULATE THE COST OF PRODUCTION OF THE PRODUCT UNDER INVESTIGATION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS"**

2. Argentina submits that the Panel correctly interpreted and applied Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, the Appellate Body should reject the European Union's arguments and uphold the Panel's findings in paragraphs 7.247, 7.248, 7.249 and 8.1(c)(i) of its Report.

3. Although each party is free to determine how it presents its arguments, in Argentina's view, the European Union has followed an incorrect approach when starting to examine the "broad" context and object and purpose in the first place. The interpretation of the provisions of the covered agreements must be based on the customary rules of interpretation as included in the Vienna Convention. Consequently, the interpretation of Article 2.2.1.1, first sentence, should start by the ordinary meaning of the relevant terms of that provision in their context and in the light of the object and purpose of the relevant agreement.

**2.1 Interpretation of Article 2.2.1.1, first sentence, and, in particular, of the part of that sentence which provides that the records "reasonably reflect the costs associated with the production and sale of the product under consideration"**

4. The analysis of the first sentence of Article 2.2.1.1, pursuant to the customary rules of interpretation set out in the Vienna Convention, does not support the European Union's position that a standard of reasonableness informs the determination of the costs associated with the production and sale of the product under consideration.

5. First, the analysis of the structure and the ordinary meaning of the terms used in the first sentence of Article 2.2.1.1 demonstrates that the condition that the records "reasonably reflect the costs associated with the production and sale of the product under consideration" does not permit a test as to whether the costs included in the records are "reasonable" including by reference to international prices or hypothetical costs, which, the investigating authorities consider as more "reasonable", as argued by the European Union.

6. Second, the context provided by Article 2.2.1.1, Article 2.2.2, Article 2.2 and the definition of dumping confirms that the second condition in the first sentence of Article 2.2.1.1 is concerned with the costs that have actually been incurred by the exporter/producer at issue and whether such costs are reasonably reflected in the records kept by this exporter/producer. The contextual arguments put forward by the European Union in the first section of its Appellant Submission are either distorted or taken out of their context and should therefore all be rejected.

7. Third, the object and purpose of the Anti-Dumping Agreement also does not support the interpretation put forward by the European Union. The purpose of the Anti-Dumping Agreement can be described as being to increase and improve GATT disciplines relating to the use of anti-dumping measures and not, as argued by the European Union, "to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low, because of some abnormal condition".

## 2.2 The alleged legal errors in the Panel's reasoning, findings and conclusions

8. The European Union addresses a number of "legal errors" that the Panel would have allegedly committed when finding that the European Union acted inconsistently with Article 2.2.1.1. These claims of error must all be rejected.

9. First, the Panel did not make any error when addressing the purpose of paragraph 2. Second, the Panel correctly noted that the records of the investigated producer are the preferred source of information for the establishment of the costs of production. Third, the Panel correctly emphasised that there is a "general rule" in Article 2.2.1.1, first sentence, expressed by the use of the verb "shall" and that the word "normally" indicates that this rule is not "absolute", namely that there may be situations in which the general rule does not need to be followed. Fourth, the Panel's statement that the focus of the condition at issue is on the specific exporter/producer under investigation is not "inaccurate and tendentious". In fact, it merely reflects the fact that the subject of both conditions in Article 2.2.1.1, first sentence, is the producer/exporter's records. Fifth, the Panel's analysis of the immediate context in Article 2.2.1.1 is correct and coherent. Sixth, the Panel did not err when examining Article 2.2.2. There is simply no legal basis to claim that "a standard of reasonableness does inform Article 2.2.2 as a whole" and even less with respect to the costs of production. Seventh, while the Panel could have addressed in more detail the arguments with regard to the object and purpose of the Anti-Dumping Agreement, it would ultimately have to reach the same conclusion and therefore, the European Union's arguments on that issue are without merit. Eighth, contrary to what is claimed by the European Union, all the cases referred to by the Panel provide support to the Panel's understanding of Article 2.2.1.1. Indeed, the reports of the panels in *US – Softwood Lumber V*, *Egypt – Steel Rebar* and *EC – Salmon (Norway)* confirm that the second condition in Article 2.2.1.1, first sentence, focuses on the records of the exporter/producer concerned, the purpose of the test being to determine whether such records appropriately reflect the costs that are associated with the production and sale of the product under consideration for that exporter/producer in that case.

## 3 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION VIOLATED ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994 BY FAILING TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE "COST OF PRODUCTION IN THE COUNTRY OF ORIGIN"

10. Argentina submits that all aspects of the European Union's appeal with regard to Argentina's claims under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 are without merit and should be dismissed in their entirety. The Panel correctly concluded that the costs of production used by the EU investigating authority when constructing the normal value were not costs "in the country of origin" and that therefore the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. It follows that the Appellate Body should uphold the Panel's findings in paragraphs 7.260 and 8.1(c)(ii) of its Report.

11. With regard to the legal standard under Article 2.2 of the Anti-Dumping Agreement, Argentina notes that the distinction made by the European Union between the "cost" and the "evidence" is artificial. Even if one were to make a distinction between the "cost" and the evidence pertaining to such cost, the terms "cost of production in the country of origin" mean "domestic costs" or charges or expenses incurred for the production in the country of origin. Consequently, the "evidence pertaining to such costs" is the evidence pertaining to the domestic costs. Therefore, it necessarily prevents the use of data relating to or pertaining to costs other than the "domestic costs", such as costs in markets other than the domestic market of the country of origin.

12. Argentina submits that the Panel correctly found that the European Union violated Article 2.2 of the Anti-Dumping Agreement by not using the costs "in the country of origin" when constructing the normal value and that all arguments to the contrary as raised by the European Union should be rejected. Indeed, the reference price (reflecting the level of international prices) used by the European Union is not consistent with the requirement in Article 2.2 to construct normal value on the basis of the "cost of production in the country of origin". The "cost of production in the country of origin" is not a hypothetical cost, but the domestic cost actually incurred in that country.



**4 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION VIOLATED ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994 BY IMPOSING ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN OF DUMPING THAT SHOULD HAVE BEEN ESTABLISHED UNDER ARTICLE 2**

13. Argentina submits that the Panel correctly interpreted and applied Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Therefore, the Appellate Body should uphold the Panel's findings regarding Argentina's claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in paragraphs 7.367 and 8.1(c)(vii) of the Report. All three aspects of the European Union's appeal with regard to Article 9.3 are without merit and should, consequently, be dismissed in their entirety.

14. First, the Panel correctly found that Article 9.3 requires a comparison between the anti-dumping duties actually imposed and the dumping margin that should have been calculated by the investigating authority, in the absence of any errors or inconsistencies with Article 2 of the Anti-Dumping Agreement.

15. Second, the Panel did not err when inferring from its previous findings with regard to Articles 2.2.1.1 and 2.2 that the European Union also breached Article 9.3. To the extent that the European Union violated Articles 2.2.1.1 and 2.2, this violation leading to the determination of margins of dumping that are higher than what should have been if the margins had been calculated in accordance with Article 2, the Panel appropriately relied on its previous findings when examining Argentina's claim under Article 9.3. However, even if the Appellate Body were to reverse some of the Panel's findings with regard to Argentina's claims under Article 2.2.1.1 or 2.2, this should not automatically result in the reversal of the Panel's findings with respect to Article 9.3.

16. Third, the Panel did not violate Article 17.6(i) of the Anti-Dumping Agreement by seeking to rely on the dumping margins as calculated in the Provisional Regulation. Since the European Union did not include a claim of violation of Article 17.6(i) of the Anti-Dumping Agreement in its Notice of Appeal, this claim of error is not properly before the Appellate Body in this appeal. In any event, this claim should be rejected as the Panel used the findings from the Provisional Regulation only as a "reasonable approximation" and did not suggest that the same results should have been reached had the dumping margins determination been done in accordance with Article 2, as erroneously argued by the European Union.

**5 CONCLUSIONS**

17. The claims raised by the European Union in its Appellant Submission are without merit. Argentina therefore respectfully requests the Appellate Body to reject the European Union's appeal in its entirety.

18. Argentina notes, however, that if the Appellate Body decides to reverse some of the Panel's findings, given that the Panel record contains sufficient factual findings and undisputed facts, the Appellate Body should complete the analysis, contrary to what has been suggested by the European Union.

**ANNEX B-4****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION****1 EXECUTIVE SUMMARY****1.1 ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT AND THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION "AS SUCH"**

1. The **first** sub-paragraph of Article 2(5) is concerned with the application of the **first** sentence of Article 2.2.1.1 as a matter of EU law. If a simple comparison is made between the two provisions it is clear that there is no "as such" inconsistency.
2. By contrast, the **second** sub-paragraph of Article 2(5) is concerned to set out what is to be done, as a matter of EU law, if one of the two conditions is not met: in effect, it partially completes the **silence**, for the purposes of EU law.
3. With regard to **the text of the second sub-paragraph** of Article 2(5), *first*, a provision can govern a particular question even if it does not elaborate further detailed criteria. *Second*, just because one provision might be context for another does not mean that the determination provided for in the first is in fact made pursuant to the second. *Third*, the European Union does not understand how the second sub-paragraph can be applied before the first.
4. With regard to **the context of the second sub-paragraph** of Article 2(5), *first*, Argentina confuses the alleged preparatory work (supplementary means of interpretation) with the context. None of Argentina's assertions lends support to its interpretation. *Second*, in EU law recitals do not "establish rules", they provide **reasons**. The relevant EU law rule is in the first sub-paragraph. *Third*, the sequence of determinations mooted by Argentina does not demonstrate that the second sub-paragraph does anything other than partially complete the silence, for the purposes of EU law. *Fourth*, none of the quoted authors suggests that the second sub-paragraph of Article 2(5) governs the question at issue.
5. With regard to the **alleged consistent EU practice**, Argentina did not seek its review "as such" before the Panel. An analysis of all cases invoked reveals that, conceptually, each of them has a two-step structure.
6. With regard to the **judgments of the General Court of the European Union**, they clearly reflect the two-step structure. The Court found that the second sub-paragraph partially completes the silence as a matter of EU law.
7. Argentina asserts that the **Panel's analysis is vitiated by two erroneous premises**. However, the rule in the first sub-paragraph of Article 2(5) provides for the relevant criteria, and no further criteria are supplied by the second sub-paragraph.
8. With regard to the **so-called mandatory/discretionary analytical tool**, the language that concerns the determination of whether or not the records of the firm reasonably reflect the costs associated with production and sale is contained in the first sub-paragraph.
9. With regard to **Article 11 of the DSU**, the Panel made an objective assessment of the matter before it, including an objective assessment of the facts.
10. The Appellate Body does not need to reach the stage of **completing the legal analysis**, because Argentina's submission does not disclose any basis on which to reverse the Panel's findings.



## 1.2 ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION "AS SUCH"

11. With regard to the **interpretation of Article 2.2**, the Panel did not err by finding that it does not limit the sources of information that may be used in establishing the costs of production. Argentina ignores the possibility that there may be situations where information from the country of origin is deficient or absent.
12. The Panel did not err in its determination of the scope, meaning and content of Article 2(5), second sub-paragraph.
13. With regard to the **text of Article 2(5), second sub-paragraph**, *first*, resort to "any other reasonable basis" is part of several options that the authorities have at their disposal. There is no obligation to use information from "other representative markets". *Second*, there may be other reasonable "bases" in the country of origin. *Third*, "other representative markets" may include other relevant product markets in the country of origin. *Fourth*, Article 2(5), second sub-paragraph, refers to the **sources of information** that may be used to establish an investigated producer's costs, as opposed to the **costs** themselves.
14. With regard to the **legislative history**, neither the second sub-paragraph of Article 2(3) nor Recital 4 of Regulation 1972/2002 suggest that the EU authorities must systematically resort to information not in the country of origin. They both inform only the case of a "particular market situation".
15. With regard to the **alleged consistent practice of the EU authorities**, Argentina did not challenge the alleged practice itself. The practice, as a (potential) measure, should be distinguished from the instrument. Several examples confirm that the authorities enjoy a broad discretion.
16. With regard to the **judgments of the General Court of the European Union**, they show that the EU authorities are *entitled* to establish the producer's costs on the basis of sources that are unaffected by that distortion.
17. Finally, the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU.
18. **The Panel did not apply an erroneous legal standard for the establishment of the "as such" claim.** Argentina has not demonstrated that the provision at issue cannot be applied in a WTO-consistent manner and that it *will necessarily be inconsistent with the EU's WTO obligations*. The second sub-paragraph does not *require* the investigating authority to use information from outside the country *in all cases*, as confirmed by the practice.

## 1.3 ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT AND THE EU ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

19. The claims and arguments under Article 2.2.1.1 and Article 2.4 are closely related. Fundamentally, the EU is arguing that an adjustment was justified, because a standard of **reasonableness** informs the interpretation and application of the entirety of the second condition in the first sentence of Article 2.2.1.1.
20. Article 2.4 is important context for understanding the circumstances in which it is justified to make an adjustment under Article 2.2.1.1. Article 2.4 expressly mentions taxation, which is an action done by the State. Furthermore, Article VI of the GATT 1994 relates to both dumping and subsidisation.
21. It is not disputed in this case that there is an approximate **correlation** between the rate of the export tax and the consequent reduction in the price of soya in Argentina. The **difference** in Article 2.4 is not the **result** of the comparison. The "difference" pertains to what has to be adjusted **before** the comparison is made.

22. The measure at issue did not make the adjustment pursuant to Article 2.4, but following the determination that the second condition in the first sentence of Article 2.2.1.1 was not fulfilled; and on the basis of the second sub-paragraph of Article 2(5), which partially completes the silence for EU law purposes. If the adjustment was reasonable and justified, there is no basis for making an un-adjustment under Article 2.4. If the measure is inconsistent with Article 2.2.1.1, the position under Article 2.4 is moot.

#### **1.4 THE PANEL'S FINDINGS UNDER ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT**

23. The EU authorities concluded that (i) during the period considered the state of the domestic industry deteriorated, while (ii) low capacity utilization was a constant or permanent feature of the EU biodiesel industry.
24. The conclusion of the EU authorities on the issue of overcapacity is unchanged from the Provisional to the Definitive Regulation. The Panel did not err when finding that the revised data in the Definitive Regulation did not have a role in the EU authorities' conclusion on overcapacity as an "other factor" causing injury. The EU authorities relied on what Argentina accepts as the correct data (Provisional Regulation), determining that overcapacity was a constant during the investigation period and therefore could not be a relevant factor.
25. A finding of inconsistency with Articles 3.1 and 3.4 does not automatically render the non-attribution analysis with respect to overcapacity inconsistent with Articles 3.1 and 3.5.
26. The absolute figures revealed nothing about the significance of the increase. An objective and unbiased investigating authority may examine the issue of overcapacity on the basis of capacity utilization.

#### **1.5 REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2.1.1**

27. *First*, Argentina has not requested the Appellate Body to reverse the Panel's exercise of judicial economy with respect to Argentina's second claim under Article 2.2.1.1.
28. *Second*, the first sentence of Article 2.2.1.1 does not create an obligation on importing Members to only use, in the construction of normal value, costs associated with the production and sale of the product under consideration.
29. *Third*, Argentina merely repeats its prior claims and arguments.
30. *Fourth*, the process to which Argentina is referring is not governed by the first sentence of Article 2.2.1.1, but by the second sub-paragraph of Article 2(5), which partially completes the silence for the purposes of EU law.
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**ANNEX C****ARGUMENTS OF THE THIRD PARTICIPANTS**

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## **ANNEX C-1**

### **EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Australia addresses the standard of review under the Anti-Dumping Agreement, the interpretation of Article 2.2.1.1, and the flexibility drafted into the Agreement.
2. Taking into account the appropriate principles of standard of review and interpretation under the Anti-Dumping Agreement, the phrase "reasonably reflects the costs" does not have to require only a reasonable reflection, or reasonable costs. The word "reasonable" relates to both the reasonableness of the reflection, as well as the reasonableness of the costs, depending on the circumstances.
3. Specifically, in determining what it means for records to "reasonably reflect the costs" for the purposes of Article 2.2.1.1 of that Agreement, Australia maintains that a holistic analysis of costs may be warranted in order to arrive at a proper cost calculation. All costs, not merely "actual costs", that would be reasonably related to the production of the goods may be relevant to such an analysis.
4. In addition, while the first sentence of Article 2.2.1.1 provides a rule which "shall normally" be followed in constructing the costs of production, panels have found that there could be situations which are not "normal", where the records of a producer or exporter's costs should not determine what constitutes costs under Articles 2.2.1.1 and 2.2.
5. The flexibility highlighted by these interpretations is important and ought to be maintained to ensure investigating authorities can respond appropriately to different circumstances which could arise in anti-dumping investigations.

**ANNEX C-2****EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION****I. INTRODUCTION: THE CONCEPT OF "DUMPING"**

1. This dispute raises an important interpretive issue regarding the foundational concept of "dumping" that applies throughout the *Anti-Dumping Agreement*. "Dumping" involves *international price discrimination by individual producers and/or exporters*. Anti-dumping measures may counteract such discriminatory pricing practices when they cause injury to domestic competitors. Anti-dumping measures are not a tool for importing countries to counteract the *regulatory policies of exporting countries*, such as WTO-consistent export duties. These government actions may be the subject of specifically negotiated commitments, or they may be disciplined under the *SCM Agreement*, as specific subsidies. However, it would subvert the carefully negotiated balance of rights and obligations to allow importing countries to impose anti-dumping measures to counteract the effects of another government's regulatory policies, by permitting an upward adjustment to an individual producer/exporter's normal value in anti-dumping proceedings.

**II. APPEALS REGARDING THE INTERPRETATION AND APPLICATION OF ARTICLE 2.2.1.1**

2. Under Article 2.2.1.1, an authority must calculate the producer's costs on the basis of its records, provided that they: (i) are in accordance with the generally accepted accounting principles ("GAAP") of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under investigation.

3. The issue is whether an investigating authority is entitled to reject specific items of the production costs in a producer's GAAP-compliant records because it considers that the costs are lower than *hypothetical* costs that might prevail in a *hypothetical* market in which governmental policies do not "distort" costs.

4. The ordinary meaning of the first sentence of Article 2.2.1.1, in light of its context, and the object and purpose of the *Anti-Dumping Agreement*, means that an authority can reject a producer's GAAP-compliant records only if those records do not reflect the true costs – what the Panel calls "actual" costs – incurred by a producer to produce the product under consideration.

5. Article 2.2.1.1, first sentence, states that "costs shall normally be calculated on the basis of records kept by the export or producer under investigation". As noted by the Panel, the subject of this clause is the *records* kept by the *exporter or producer* under investigation. This indicates that this requirement is focused on the costs incurred by that *specific producer* to make the product. As such, Article 2.2.1.1 is focussed on the economic costs borne by the producer when producing the investigated product.

6. Article 2.2.1.1, first sentence, also requires that records of costs are compliant with the exporting country's GAAP. The reference to GAAP is relevant in two respects. *First*, GAAP clarifies that Article 2.2.1.1 deals with a producer's accounting records and the amounts recorded therein, which by their nature are specific to that producer. These costs, therefore, cannot be judged against a hypothetical benchmark that does not reflect that producer's economic reality. *Second*, the reference is to the GAAP of the *exporting country*, thereby confirming the focus of the provision is on the exporter under investigation and their true costs.

7. Article 2.2.1.1, first sentence, also requires that producers' records "reasonably reflect the costs associated with... production". This element of the first sentence of Article 2.2.1.1 forms the heart of the dispute before the Appellate Body. To China, the treaty text does not ask an abstract question about generic costs of producing the product under consideration. Rather, it asks a much more specific question about whether the investigated producer is engaged in discriminatory pricing practices and about the true costs incurred by the producer when producing the product under investigation. As such, the recorded costs should be measured against the true costs incurred, and not a hypothetical benchmark that does not reflect a producer's economic reality.

8. The ordinary meaning of the first sentence of Article 2.2.1.1 is confirmed by the context provided, *inter alia*, by the second and third sentences of that same Article, which provide examples of where recorded GAAP-compliant records may not "reasonably reflect" a producer's costs of production. Each of the factors listed is an accounting consideration that reflects the particular accounting choices made by a specific producer or exporter. This supports China's understanding that "reasonably reflect" in Article 2.2.1.1 requires an assessment of whether recorded costs are a true account of a producer's economic reality.

9. China's understanding is supported by the object and purpose of the *Anti-Dumping Agreement*, which addresses the discriminatory pricing practices of exporters/producers and is, thereby, exporter-focussed. Consequently, a determination of whether a producer's records "reasonably reflect" the costs of production requires an assessment of whether these costs reflect the true costs to the producer and not factors exogenous to the producer.

### III. APPEALS REGARDING THE INTERPRETATION AND APPLICATION OF ARTICLE 2.2

10. Article 2.2 requires that domestic prices normally be used to establish normal value. In some circumstances, however, an authority may construct normal value on the basis of the "cost of production in the country of origin" plus administrative, selling and general costs and profit.

11. There are two broad issues before the Appellate Body. *First*, whether the "cost of production" under Article 2.2 refers to the costs incurred by producers to produce the product, or whether it refers to hypothetical costs that producers "would have" borne, had they sourced inputs from a market other than the country of origin. *Second*, whether information used by an authority to establish the costs of production in the country of origin must *necessarily* be limited to the country of origin.

12. With respect to the *first* issue, the ordinary meaning of "cost of production in the country of origin" in light of the context surrounding Article 2.2 and the object and purpose of the *Anti-Dumping Agreement*, demonstrates that the costs of production must be those of the exporter in their domestic market. Article 2.2 does not refer to *hypothetical* costs that producers "would have" borne.

13. With respect to the *second* issue, the task of establishing "costs of production in the country of origin" begins with the producer's records, which, by definition, reveal costs "in the country of origin". Where a producer's true costs are not reflected in its records, the "cost of production in the country of origin" need to be determined through evidence other than the producer's own accounts. In such a case, the authority must clearly look for evidence *in the country of origin* because this evidence is the *best* evidence of the true cost to the producer "in the country of origin". China does not exclude that in exceptional circumstances – i.e. when there is no evidence in the country of origin – an investigating authority may need to turn to evidence outside of the country of origin. However, the investigating authority is not permitted to *substitute* the costs prevailing in another market for the "cost of production in the country of origin". This means that any evidence used must be revealing of the *producer's* true costs (which, by definition, are incurred "in the country of origin"). This, in turn, means that any such evidence must be adjusted so that it is representative of the costs of production within the country of origin. An investigating authority must take full account of specific market conditions in the exporter's domestic market, including any government intervention in the market that may affect the price of the inputs, for example, trade policy measure such as an export tax on certain commodities.

### IV. APPEAL REGARDING THE LEGAL CHARACTERIZATION OF ARTICLE 2(5), SECOND SUBPARAGRAPH, BASIC REGULATION AND ARGENTINA'S "AS SUCH" CLAIMS

14. The issues before the Appellate Body are: (i) whether, due to errors in its legal characterization of the second sub-paragraph of Article 2(5) of the Basic Regulation, the Panel erred in its application, as such, of Articles 2.2.1.1 and 2.2 to this provision and (ii) the Panel violated DSU Article 11 when considering the Basic Regulation.

15. To show that a legislative measure is, as such, inconsistent with a WTO obligation, a complainant need not show that the measure leads to a WTO-inconsistent outcome in every

instance. Argentina demonstrated, in China's view, that the relevant provision of the Basic Regulation leads to WTO-inconsistent conduct in certain circumstances.

16. Specifically, China agrees with Argentina that the relevant provision leads the EU authority to reject a producer's GAAP-compliant records as not "reasonably reflect[ing]" costs when there a finding by the authority that the costs are lower than they would have been if the producer had incurred hypothetical costs from a different market. This flows from the text of the relevant provision, read together with the first sub-paragraph of Article 2(5), and read in light of its context. This is also demonstrated by the manner in which the authority, in practice, consistently applies the relevant provision to reject producer's records in anti-dumping proceedings. Court decisions concerning this practice support the same view.

17. When assessing whether the Panel erred in its legal characterization of the Basic Regulation, the Appellate Body should also consider whether the Panel undertook a sufficiently holistic analysis of all of the relevant elements the Basic Regulation, starting with the text of the law and moving to, *inter alia*, relevant practice and General Court decisions.

#### **V. APPEAL REGARDING THE INTERPRETATION AND APPLICATION OF ARTICLE 2.4**

18. The question whether, under Article 2.4, an allowance was required to ensure fair comparison should not have arisen in connection with the Biodiesel case, since the producers' records "reasonably reflect[ed]" the "costs of production" and the relevant cost adjustments should never have been made. Nevertheless, assuming (*quod non*) that the adjustments made by the EU authority in the Biodiesel investigation were permissible, China considers that, under Article 2.4, the EU authority bore an obligation to make a *fair comparison* and, therefore, to make due allowance for differences affecting price comparability introduced by adding the amount of export tax to the producers' costs when constructing normal value. The addition of the amount for export tax introduced an asymmetry between the components reflected in the normal value and export price sides of the comparison.

**ANNEX C-3****EXECUTIVE SUMMARY OF COLOMBIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Colombia will provide its views on: 1. Whether the Panel erred in its assessment of the meaning of the text and context of Article 2(5), second subparagraph, of the Basic Regulation and; 2. Whether the Panel erred in finding that the European Union's non-attribution analysis did not violate Article 3.5 of the Anti-Dumping Agreement.
2. First, Colombia notes that there was not an in depth analysis of the text of Article 2(5) of Council Regulation and other domestic law and regulations as context<sup>1</sup>, in order to provide an objective assessment of Argentina's "as such claim". In spite of the fact that the Panel underlined "the need to conduct a 'holistic assessment' of the evidence put forward by the parties"<sup>2</sup>, it examined Article 2(5) alone and it isolated most of its elements from relevant legal texts found in EU's municipal law. In view of this, Colombia notes with concern the fact that the Panel seems to be doing a superficial analysis of Article 2(5); hence, taking a stance that completely supports one Party over the other, with no trace of an objective assessment of the facts. Consequently, Colombia respectfully requests the Appellate Body to determine whether the Panel erred when analyzing and interpreting the scope of article 2(5) and whether it disregarded its obligation under Article 11 of the DSU.
3. In Colombia's opinion, the Panel's analysis is primarily based on the fact that the second subparagraph of Article 2(5) begins with a condition; which is why it "strongly suggests that this provision takes effect *following* a determination under the first subparagraph that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under investigation."<sup>3</sup> In hope of rectifying this, Colombia calls upon the Appellate Body to determine whether the analysis and interpretation of Article 2(5) made by the Panel is pursuant to the obligations acquired under Article 11 of the DSU.
4. Second, Colombia is of the opinion that the magnitude of the margin of dumping included in ADA Article 3.4, after being re-calculated, might have been a determinant cause of injury, along with the rest of factors listed in such Article.
5. Colombia also agrees with Argentina when stating that Article 3 contemplates a "logical progression" for the IA's examination, leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry. This process entails a consideration of the volume of dumped imports and their price effects, and requires an examination of the impact of such imports on the state of the domestic industry as revealed by a number of economic factors. These elements are linked through a causation and non-attribution analysis between the dumped imports and the injury to the domestic industry, taking into account all factors that must be considered and evaluated."<sup>4</sup>
6. Finally, Colombia recognizes that the object and purpose of the WTO Agreement is to liberalize trade and eliminate distortions that provide unfair advantages to products. It also acknowledges that the EU's power to conduct investigations of products that are imported under conditions that favor the imported product or causes damages to the national industry. However, Colombia also recognizes that the WTO provides Members with tools designed to address different barriers to trade under different Agreements, and that Members should use these tools accordingly.

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<sup>1</sup> Panel Report, para. 7.127 -7-144.

<sup>2</sup> Ibid, para. 7.126.

<sup>3</sup> Ibid, para. 7.132.

<sup>4</sup> AB Report, China – HP-SSST, para. 5.140.



**ANNEX C-4****EXECUTIVE SUMMARY OF INDONESIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Indonesia agrees with the Panel's interpretation of Article 2.2.1.1. Rather than first examining the "*ordinary meaning*" and, as a second step, examining the context and the object and purpose, the European Union's holistic interpretation is focused on an examination of the broad context and the object and purpose of the provision and not its ordinary meaning.
2. Indonesia submits that neither the ordinary meaning nor the context, object and purpose of Article 2.2.1.1 support the presence of a reasonableness standard linked to costs. By linking the word "*reasonable*" to costs, the European Union is reading words into that provision that are simply not there.
3. That the focus in the first sentence of Article 2.2.1.1 is on the records and not on whether costs are reasonable is supported by the context and the object and purpose. The first sentence of Article 2.2.1.1 confirms that, in its analysis of the two conditions in that sentence, an authority must limit itself to the universe of the records.
4. Indonesia considers it particularly instructive that, to the extent Article 2.2.2 contains a "reasonableness test", such a separate "reasonableness test" is absent from Article 2.2.1.1 and that while Article 2.2 refers to "*a reasonable amount for administrative, selling and general costs*", the qualifier "reasonable" is absent before the words "*cost of production*".
5. Indonesia is therefore concerned that were the Appellate Body to side with the interpretation of the European Union, this will have far-reaching repercussions resulting in significant uncertainty and unpredictability in anti-dumping proceedings. Such an interpretation would also result in findings of dumping no longer being the result of the pricing behaviour of individual entities, but the result of any perceived government intervention in a market.
6. On the interpretation of Article 2.2, by creating a distinction between the costs and the evidence pertaining to such costs, the European Union is attempting to invent a distinction which is not supported by the text, context, object and purpose of Article 2.2.
7. Indonesia is also not persuaded by the European Union's reference to (1) Article 2.2.1.1 – that provision addressing cost allocations and not the costs themselves – and (2) the possibility of using "*any other reasonable method*" under Article 2.2.2 (iii) as that provision addresses the determination of administrative, selling and general costs only.

**ANNEX C-5****EXECUTIVE SUMMARY OF MEXICO'S THIRD PARTICIPANT'S SUBMISSION\***

1. In Mexico's view, the Panel's interpretation of the expression "reasonably reflect the costs associated with the production and sale of the product under consideration" is inappropriate because: (1) it is not consistent with Article 2.2, 2.2.1.1, 2.2.2 and 2.7 of the Anti-Dumping Agreement (ADA); and (2) does not take into account the fact that the preference of the ADA for the actual data is only that, a predilection which never seeks to limit the methodological options to use secondary sources different from the actual data.
2. Mexico considers that a proper interpretation of ADA Article 2.2 and 2.2.1.1 and of the meaning of the word "normally" contained in the latter subparagraph allows it to be concluded that calculation of the costs does not have to be based exclusively on the costs incurred by the specific producer/exporter.
3. Moreover, Mexico believes that certain problems might arise from the Panel's interpretation on this point. As part of its reasoning in arriving at this determination, the Panel qualifies the second condition in Article 2.2.1.1 as exceptional and subsidiary to the first requirement, which, in Mexico's opinion, is contrary to the text of the provision. Likewise, Mexico considers that some of the Panel's reasoning in fact supports the EU's position.
4. Mexico disagrees with the Panel's interpretation in *US — Softwood Lumber V*, as, in this dispute, data from the accounting records were indeed disregarded, despite the fact that they reflected actual data.
5. Mexico further considers that the preference of the ADA for the actual information does not justify limiting the methodological options to replace it. This is evidenced by the fact that Article 2.2.2 of the ADA, which also refers to the construction of normal value, provides the flexibility of replacing the actual data by "any other reasonable method". In addition, Mexico considers that some of the Panel's determinations contradict the basic premises on which it relies.
6. Along those same lines, Mexico considers that the Panel's interpretations, taken to the extreme, would imply that the "facts available" provisions may not be used either, although these are set out in the ADA itself, because they imply an option other than that of the costs incurred.
7. Lastly, Mexico considers that, on account of the distortions, the prices of soya in Argentina might not be "accord with how they would need to be considered in the context of an anti-dumping investigation", and since the Panel itself recognizes that this might be a reason to use a source other than the actual data, Mexico's opinion is that this aspect should have been examined.

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\* This text was originally submitted in Spanish by Mexico.

## **ANNEX C-6**

### **EXECUTIVE SUMMARY OF RUSSIA'S THIRD PARTICIPANT'S SUBMISSION**

1. The Russian Federation agrees with Argentina that the Panel's approach towards the analysis of contextual elements of the contested measure, characterized as *fragmentation technique*, interfered with its obligation to make an objective assessment of the matters before it regarding "as such" claims. Contrary to the requirements of Article 11 of the DSU, the Panel held a fragmented analysis of contextual elements of the text of Article 2(5) of the Basic Regulation, as if they existed autonomously from the contested measure.
2. Furthermore, the Russian Federation shares Argentina's view that the Panel has improperly shifted the European Union's burden of proof to Argentina, in fact suggesting that the Complaining Party needs to demonstrate the facts supporting the European Union's position on "as such" claims. This approach is inconsistent with due process principles as established in the WTO jurisprudence.
3. Finally, the Russian Federation believes that the Panel in its analysis of Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994 has neither established the ordinary meaning of the term "costs of production in the country of origin", nor examined this term in its context. Thus, the Panel's findings that Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994 "require that the costs of production established by the authority reflect conditions prevailing in the country of origin" but do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" appear to be legally flawed.

**ANNEX C-7****EXECUTIVE SUMMARY OF SAUDI ARABIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Saudi Arabia's comments concern two important systemic issues that are central to this appeal. Saudi Arabia refrains from expressing a view on the underlying facts or the Panel's application of the law to the facts of the dispute.

2. First, Saudi Arabia submits that Article 2.2.1.1 of the Anti-Dumping Agreement does not permit the rejection of the producers' recorded costs simply because the investigating authority considers those to be "artificially low" or distorted by virtue of some regulatory or tax measure in operation in the country of export. The rule set forth in Article 2.2.1.1 is simple. It provides that "costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation". The term "reasonably" is an adverb that qualifies the reflection of the costs in the records. It does not qualify the costs. The adverb is used to ensure that the records are a reliable source of relevant cost information. This requirement is the substantive counterpart to the first condition that the records must be kept in accordance with the generally accepted accounting principles of the exporting country. Both conditions seek to ensure that the records in question form a reliable basis for the actual costs related to the production and sale of the product under consideration. This provision concerns the records and their reliability to accurately present the actual costs incurred for the production of the product under consideration. This provision does not relate to the amount of the costs and does not require that the costs be reasonable.

3. The aim of the anti-dumping instrument is to discipline the response of Members to private pricing behavior of foreign producers causing material injury to domestic producers of the importing country. It is not aimed at preventing Members from adopting WTO-consistent measures or undoing Members' comparative advantages by correcting the reported costs of production in light of international reference prices and costs different from those actually incurred by the producer that are reasonably associated with the product under consideration. The allegedly "low" level of the input costs does not affect the comparison between normal value and export price.

4. Saudi Arabia has systemic concerns with a contrary reading. The Anti-Dumping Agreement cannot be used to circumvent the disciplines on countervailing measures imposed by the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). In addition, the anti-dumping instrument cannot be used to counteract what otherwise could not be obtained through multilateral, bilateral or accession negotiations such as the elimination of export taxes.

5. Second, Article 2.2 of the Anti-Dumping Agreement imposes a clear obligation on investigating authorities to base the normal value on costs in the country of origin. Article 2.2 requires a direct "comparison with" the cost of production in the country of origin and does not permit constructing costs based on international reference prices or even a proxy that merely "relates to" the country of origin but that is not the cost of production "in" the country of origin. Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement elaborate "for the purpose of paragraph 2" on the basis for constructing normal value. Both reflect a producer-specific and a country-specific focus. Article 2.2 allows the construction of the normal value but not the construction of the costs, irrespective of whether these costs are considered to have been "affected" or "distorted" by government measures in the country of exportation.

**ANNEX C-8****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION**

1. In this submission, the United States addresses a number of issues related to the Panel's interpretation of Article 2 of the AD Agreement and the consideration of "as such" claims.

2. First, the United States agrees with the EU that the Panel's interpretation of the second condition of Article 2.2.1.1 of the AD Agreement is in error. The United States first recalls that where records are kept in accordance with generally accepted accounting principles ("GAAP") of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration, the investigating authority is normally obligated to use those records. However, when considering the meaning of the second condition in Article 2.2.1.1, whether the records "reasonably reflect" costs associated with production and sale, the Panel erred by failing to properly evaluate the text of Article 2.2.1.1. In particular, the Panel's analysis of "costs associated with production and sale" relied on a misunderstanding of the purpose of Article 2.2, and the text of Article 6.10, rather than the ordinary meaning of the text of Article 2.2.1.1. An appropriate reading of this provision would result in a finding that it is not restricted to consideration of costs *actually* incurred. Further, with respect to the second condition of Article 2.2.1.1, the Panel also erred in its analysis of the phrase "reasonably reflects." In total the second condition of Article 2.2.1.1 should be interpreted in a manner that does not render the condition superfluous when considering the meaning of other elements of Article 2.2.1.1.

3. Second, as raised by the EU's appeal, the Panel erred in its interpretation of Article 2.2 of the AD Agreement. In particular, the text of Article 2.2 does not contain the evidentiary limitations suggested by the Panel. Third, contrary to the claims of Argentina, the Panel did not err with respect to its interpretation of Article 2.4 of the AD Agreement.

4. Fourth, with respect to the "as such" claims raised by Argentina, the United States notes that the arguments made by Argentina are appropriately considered under Article 11 of the DSU. The arguments presented by Argentina regarding the Panel's analysis of context, legislative history, consistent practice, and judgments of EU's General Court are issues of a factual nature, and thus, the Appellate Body may resolve the issue by examining whether the Panel failed to make an objective assessment of the meaning of Article 2(5) of the Basic Regulation within the EU legal system under DSU Article 11. Finally, the United States views the legal standard applied by the Panel to the "as such" claims as appropriate. The Panel correctly based its conclusion upon whether Article 2(5), subparagraph two, requires WTO-inconsistent conduct, and not whether, if the investigating authority exercises its discretion to take a particular action, that action would be WTO-inconsistent.

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**ANNEX D**

PROCEDURAL RULINGS

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## **ANNEX D-1**

### **PROCEDURAL RULING OF 9 JULY 2016**

1. On 30 June 2016, we received a letter from the European Union requesting a period of fifty minutes to deliver its oral statement at the hearing. The European Union expressed the view that there is an "unusual volume of third participant submissions in this appeal", that these "refer to a number of points that have not been raised by Argentina", and asserted that it needs to have a full opportunity to address these additional points on "its own motion" and in "an appropriately structured way".

2. After requesting and receiving comments from Argentina and the third participants, and pursuant to Rule 28(1) of the Working Procedures for Appellate Review, on 6 July 2016 we invited the European Union to submit an additional memorandum by 11 July 2016 to identify the precise points referred to by the third participants that allegedly have not been raised by Argentina, and to explain the reasons for its concerns with these points. In the same communication, and pursuant to Rule 28(2) and (3) of the Working Procedures, we also invited Argentina and the third participants to respond, if they so wish, in writing to the European Union's additional memorandum by 14 July 2016.

3. In the afternoon of 8 July 2016, we received a letter from the European Union, requesting us to extend the deadline for filing the additional memorandum by 4 days, to 15 July, due to the exceptional circumstance that all of the lawyers representing the European Commission in this appeal are currently unavailable. Earlier the same day, we had received a letter from China requesting that we extend the deadline to respond to the European Union's additional memorandum by 1 day, to 15 July. China expressed the view that the amount of time granted to third participants is "disproportionately brief compared to the amount of time allowed to the European Union to prepare its additional memorandum", and noted in this regard that third participants cannot begin to prepare their responses until after they have received the European Union's additional memorandum.

4. In view of the timing of the above requests, the short time-frame between now and the oral hearing, the need to strike an appropriate balance between the respective time periods for the European Union to prepare its written memorandum and for Argentina and the third participants to prepare any memoranda in response, and taking account of the need for the Division to have sufficient time to consider the requested memoranda before the oral hearing, we decline the requests by the European Union and China to extend the time-periods for filing additional memoranda. Accordingly, and as indicated in our letter of 6 July 2016, the Division invites the European Union to submit its additional memorandum by 5 p.m. on Monday, 11 July 2016, and further invites Argentina and the third participants in this appeal, should they wish to respond to such memorandum, to do so by 5 p.m. on Thursday, 14 July 2016. Such additional memoranda should be submitted in writing to the Appellate Body Secretariat, and served on the participants and the third participants.



**ANNEX D-2****PROCEDURAL RULING OF 11 JULY 2016**

1. On 30 June 2016, we received a letter from the European Union requesting that we adopt additional procedures concerning: (i) public observation of the oral hearing; and (ii) viewing of a recording of the oral hearing by third participants. On 1 July 2016, we invited Argentina and any third participant that wished to comment on these requests to do so by 12 noon on Tuesday, 5 July 2016. In response, Argentina, China, Mexico, and the United States submitted comments.<sup>1</sup>

**1 REQUEST TO OPEN THE ORAL HEARING TO PUBLIC OBSERVATION**

2. With respect to the oral hearing in this appeal, the European Union requests that we allow public observation of the statements and answers to questions of the participants, as well as those of third participants who agree to make their statements and responses to questions public. The European Union proposes that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off when issues involving confidential information are discussed, or if a third participant indicates that it wishes to keep its oral statements and responses to questions confidential.

3. Argentina expresses regret that the European Union chose to make this request on a unilateral basis rather than approaching Argentina and seeking to proceed on a joint basis. Argentina states that it is not aware of any valid reason for opening the hearing to public observation at the appellate stage when this was not done at the panel stage and notes, in this regard, that the European Union did not make such a request to the Panel in this dispute. While stating that it is not opposed to increasing the transparency of dispute settlement proceedings, Argentina expresses reservations about the timing of the request, and questions the extent of the benefit that the public could derive from observing a highly technical discussion of an anti-dumping measure without having had the opportunity to be informed, as well, of the underlying facts. For these reasons, Argentina indicates that it would prefer not to have the oral hearing opened to public observation in the present case.

4. China states that, without prejudice to its systemic position on issues concerned by the European Union's request, should the oral hearing be open to public observation, it wishes to keep its oral statements and responses to questions confidential. Mexico submits that it does not object to allowing the oral hearing to be opened to public observation in these appellate proceedings, but maintains that its position in these proceedings is without prejudice to its systemic opinions on this issue. The United States suggests that we grant the request by the European Union for public observation of the oral hearing, and confirms its intent to make its oral statements and answers to questions open to public observation.

5. We recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in 12 previous appeals.<sup>2</sup> In its rulings, the Appellate Body has held that it has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. We take note of the reasons previously expressed by the Appellate Body and its interpretation of Article 17.10 of the DSU, and consider that such interpretation also applies in these appellate proceedings.

6. We note that the request to open the oral hearing in these proceedings was made by only one of the participants, the European Union. According to Argentina, the European Union did not consult with Argentina or seek to persuade Argentina to make a joint request to allow public

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<sup>1</sup> Australia indicated by email that it would not be making written comments with respect to these requests by the European Union.

<sup>2</sup> The first time the Appellate Body authorized, at the request of the participants, public observation of the oral hearing was in 2008 in *United States / Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R / WT/DS321/AB/R); most recently the Appellate Body authorized public observation of the oral hearing in *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 by Canada and Mexico* (WT/DS384/AB/RW/ WT/DS386/AB/RW).

observation of the oral hearing. We also take note of the concerns expressed by Argentina regarding the European Union's request, and its preference not to have the oral hearing open to public observation. Moreover, we observe that the request was made merely three weeks prior to the oral hearing.

7. In the light of the above, we decline the European Union's request to allow public observation of the oral hearing in these appellate proceedings.

## **2 REQUEST TO ALLOW THIRD PARTICIPANTS TO VIEW A VIDEO RECORDING OF THE ORAL HEARING**

8. The European Union further requests that we adopt additional procedures to enable third participants to view a video recording of the oral hearing, including from a location other than Geneva. Specifically, the European Union proposes that a password protected, electronic version of the video recording be made available as soon as practicable upon conclusion of the oral hearing, to which third participants would have access during a limited period of one week. The European Union further proposes that the video recording could be viewable by each third participant once, without pausing, re-winding or fast-forwarding, and that only persons who would be entitled to be members of that third participant's delegation at the oral hearing would be authorized to be present during the viewing. The European Union also suggests procedures to prevent recording, reproduction, or dissemination of the video recording of the oral hearing, and to protect the confidentiality of business information.

9. Argentina states that it does not oppose the European Union's request in principle, although it is uncertain what transparency requirement or purpose would be served by the adoption of the proposed procedures. Argentina observes that those Members allowed to view the recording of the oral hearing would be the same Members allowed to take part in the oral hearing, and that none of the third participants in this dispute are least-developed country Members. Argentina also wonders about the extra administrative burden that this request might entail if granted, in particular in view of the already scarce WTO resources available for the dispute settlement system. Mexico maintains that we should not allow the hearing to be recorded, considering that this request should be reviewed carefully and that the possible benefits or downsides of recording an oral hearing should be discussed openly by the entire WTO Membership. The United States submits that it sees neither the purpose of the additional procedures proposed by the European Union, nor the value that such procedures would add. The United States considers that the proposed additional procedures would be complex and burdensome for third participants while not giving the participants significant confidence in the control maintained on the recording, and adds that it is not clear that such procedures would be technically feasible.

10. We note that, to date, procedures such as those proposed by the European Union have not been adopted in WTO dispute settlement proceedings. Moreover, although the proposed procedures appear complex, both technically and administratively, the request was made only three weeks before the oral hearing in these proceedings. We further note that, while the European Union indicates that its proposed procedures are for the benefit of third participants, its request has not been expressly supported by any of the third participants in these appellate proceedings.

11. For these reasons, we decline the European Union's request to adopt additional procedures to enable third participants to view a video recording of the oral hearing.

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