WORLD TRADE ORGANIZATION

WT/DS473/R

29 March 2016

(16-1756)

EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

REPORT OF THE PANEL

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
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
BCI	Business Confidential Information
CARBIO	Cámara Argentina de Biocombustibles (association of Argentine biodiesel producers)
DET	Differential export tax
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBB	European Biodiesel Board (complainant, association of EU biodiesel producers)
FOB	Free on Board
GAAP	Generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
IP	Investigation period
SG&A	Selling, general and administrative costs
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Argentina

1.1. On 19 December 2013, Argentina requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to 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 (the Basic Regulation[1]) and with respect to the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia*, Argentina.[2]

1.2. Consultations were held on 31 January 2014 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 13 March 2014, Argentina requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 17.4 of the Anti-Dumping Agreement with standard terms of reference.[3] At its meeting on 25 April 2014, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Argentina in document WT/DS473/5, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Argentina in document WT/DS473/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 13 June 2014, Argentina requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 23 June 2014, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Arumugamangalam V. Ganesan
Members:	Mr Gilles Le Blanc Mr Scott Gallacher[6]

1.6. Mr Scott Gallacher resigned from the Panel on 15 February 2015. On 18 February 2015, the Director-General appointed a new member of the Panel, Mr Mathias Francke. Accordingly, the Panel is composed as follows:

Chairperson:	Mr Arumugamangalam V. Ganesan
Members:	Mr Gilles Le Blanc Mr Mathias Francke[7]

1.7. Australia, China, Colombia, Indonesia, Malaysia, Mexico, Norway, the Russian Federation, the Kingdom of Saudi Arabia, Turkey and the United States notified their interest in participating in the Panel proceedings as third parties.

[1] Exhibit ARG-1.
[2] WT/DS473/1.
[3] WT/DS473/5.
[4] WT/DSB/M/344.
[5] WT/DS473/6.
[6] WT/DS473/6.
[7] WT/DS473/8.

1.3 Panel proceedings

1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Working Procedures[8] and timetable on 21 August 2014.[9] On 25 November 2014, the Panel adopted Additional Working Procedures Concerning Business Confidential Information (BCI).[10]

1.9. The Panel held a first substantive meeting with the parties on 18 and 19 March 2015. A session with the third parties took place on 19 March 2015. The Panel held a second substantive meeting with the parties on 9 and 10 June 2015. On 16 July 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 8 December 2015. The Panel issued its Final Report to the parties on 23 February 2016.

1.3.2 Request for preliminary ruling

1.10. On 24 November 2014, the European Union submitted to the Panel a request for a preliminary ruling, arguing that certain of Argentina's claims were outside the Panel's terms of reference.[11] On 18 December 2014, Argentina submitted a response to the European Union's request.[12] The parties further addressed each other's arguments in their subsequent submissions to the Panel. Some third parties also commented on the European Union's request in their third-party submission.

1.11. The Panel addresses the European Union's request for a preliminary ruling in its findings below.

2 FACTUAL ASPECTS AND MEASURES AT ISSUE

2.1. This dispute concerns two sets of measures of the European Union.

2.2. First, Argentina makes "as such" claims against Article 2(5), second subparagraph, of Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (the Basic Regulation).

2.3. Second, Argentina challenges certain aspects of the anti-dumping measures imposed by the European Union on imports of biodiesel from Argentina. These measures were adopted at the conclusion of an investigation on imports of biodiesel originating in Argentina and Indonesia that was initiated by the European Commission on 29 August 2012[13] following a complaint submitted by the European Biodiesel Board (EBB).[14] Provisional anti-dumping duties were imposed on 29 May 2013[15], and definitive anti-dumping duties on 27 November 2013.[16] With regard to Argentine producers/exporters, in the Definitive Regulation, the EU authorities[17] calculated dumping margins ranging from 41.9% to 49.2% and applied anti-dumping duties corresponding to

[8] Working Procedures of the Panel (last revised on 27 January 2015), Annex A-1.
[9] Last revised on 23 September 2015.
[10] Additional Working Procedures of the Panel Concerning Business Confidential Information, Annex A-2.
[11] See Executive summary of the European Union's request for a preliminary ruling, Annex C-5.
[12] See Executive summary of the response of Argentina to the European Union's request for a preliminary ruling, Annex B-5.
[13] Notice of initiation of the anti-dumping investigation, (Exhibit ARG-32).
[14] Consolidated version of the complaint, (Exhibit ARG-31).
[15] Provisional Regulation, (Exhibit ARG-30). In addition, on 10 November 2012, the EU authorities initiated an anti-subsidy proceeding with regard to imports of biodiesel from Argentina and Indonesia and commenced a separate investigation. (Notice of initiation of the countervailing duty investigation, (Exhibit ARG-33)). On 7 October 2013, the domestic industry withdrew its complaint. The EU authorities terminated the anti-subsidy investigation on 27 November 2013. (Notice of termination of the countervailing duty investigation, (Exhibit ARG-36))
[16] Definitive Regulation, (Exhibit ARG-22).
[17] The European Commission conducts investigations and adopts preliminary determinations; the European Council is a decision-making body that adopts final determinations on the basis of proposals from the European Commission.

the injury margins they calculated, which ranged from 22.0% to 25.7%.[18] The duties were applied in the form of specific duties expressed as a fixed amount in euro/tonne.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Argentina requests that the Panel find that:[19]

a. Article 2(5), second subparagraph, of the Basic Regulation is "as such" inconsistent with:

i. Articles 2.2.1.1 and 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 of the exporters as included in their records when those costs reflect prices which are "abnormally or artificially low", because the costs do not reflect market prices or because they are allegedly affected by a distortion;

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", even though neither provision allows for an establishment of the costs on this basis; and

iii. As a result, with Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the Anti-Dumping Agreement.

b. The anti-dumping measures imposed by the European Union on imports of biodiesel from Argentina are inconsistent with:

i. Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because the European Union failed to calculate the cost of production on the basis of the records kept by the producers under investigation;

ii. Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because the European Union failed to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin;

iii. Article 2.2.1.1 of the Anti-Dumping Agreement because the European Union included costs not associated with the production and sale of biodiesel in the calculation of the cost of production;

iv. Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 as a result of the inconsistencies in points (i) – (iii) above affecting the dumping margin determinations;

v. Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because the European Union failed to base the profit margin as a component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement;

vi. Article 2.4 of the Anti-Dumping Agreement because the European Union failed to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and the normal value;

vii. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because the European Union imposed and levied anti-dumping duties in excess of

[18] Provisional and definitive anti-dumping duties were imposed on imports from both Argentina and Indonesia.

[19] Argentina's first written submission, paras. 468-470; second written submission, paras. 252-254.

the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement;

viii. Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the European Union's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the European Union industry; and

ix. Articles 3.1 and 3.5 of the Anti-Dumping Agreement since the European Union failed to conduct an objective examination, based on positive evidence, of known factors other than the allegedly dumped imports in its non-attribution analysis; hence, the European Union failed to ensure that the injury suffered by the domestic industry of the European Union resulting from other factors was not attributed to the allegedly dumped imports.

3.2. Argentina requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-Dumping Agreement and the GATT 1994.[20]

3.3. The European Union requests that the Panel reject Argentina's claims in their entirety.[21]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries provided to the Panel in accordance with paragraphs 19 and 21 of the Working Procedures adopted by the Panel (see Annexes B-1 to B-5 and C-1 to C-5).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, China, Colombia, Indonesia, Mexico, Norway, the Russian Federation, the Kingdom of Saudi Arabia, Turkey, and the United States are reflected in their executive summaries provided to the Panel in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 to D-10). Malaysia did not submit any written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 8 December 2015, the Panel issued its Interim Report to the parties. On 22 December 2015, Argentina and the European Union each submitted written requests for the Panel to review aspects of the Interim Report. On 15 January 2016, both parties submitted comments on the other party's requests for review. Neither party requested an interim review meeting. In addition, on 5 February 2016, the Panel provided an opportunity for the parties to comment on the relevance for the present dispute of the Appellate Body Report in *EC – Fasteners (China) (Article 21.5 – China)*, which was circulated after the issuance of the Interim Report. In this context, the Panel invited the parties to comment on a proposed revision to paragraph 7.302 of the Interim Report (paragraph 7.303 of the Final Report).

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the parties' requests for modifications made at the interim review stage as well as the Panel's response to these requests. In addition, the Panel has made a number of changes of an editorial

[20] Argentina's first written submission, para. 472; second written submission, para. 256.

[21] European Union's first written submission, para. 348; second written submission, para. 170. In addition, as noted above in paragraph 1.10, the European Union considers that certain claims pursued by Argentina are not properly before the Panel.

nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, certain of which were suggested by the parties.

6.3. The numbering of some of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Final Report and, where appropriate, includes the corresponding numbering in the Interim Report.

6.2 Specific requests for review submitted by the parties

Paragraph 7.13

6.4. Argentina requests that the Panel modify paragraph 7.13 to properly reflect its position, namely, that for most of the claims identified in this paragraph, Argentina did not raise claims that it decided not to pursue, but rather, the European Union raised procedural objections with regard to non-existent issues. The European Union objects to Argentina's request and notes that the text suggested by Argentina is already included in a footnote.

6.5. In addition, the European Union requests the Panel to reformulate the penultimate sentence of paragraph 7.13 to indicate that the absence of claims being made or pursued pertains to points arising from Argentina's panel request. Argentina does not comment on this request.

6.6. We have amended the text of paragraph 7.13 to better reflect Argentina's arguments and the Panel's reasoning. We note however that footnote 45 to paragraph 7.13 already quotes the text suggested by Argentina; we therefore did not repeat this text in the body of paragraph 7.13. The changes suggested by the European Union are, in our view, unwarranted, and we decline to make them. We have, however, amended the penultimate sentence of paragraph 7.13 to express with more clarity the point made in this sentence.

Paragraphs 7.56-7.57

6.7. The European Union requests the Panel to reformulate paragraphs 7.56 and 7.57 and to amend footnote 105 to paragraph 7.59. According to the European Union, paragraph 2(A)(2) of Argentina's panel request introduced two new elements, both of which the European Union challenged: (a) a reference to Article 2.2 of the Anti-Dumping Agreement; and (b) a reference to a "second reason", namely, "that the costs used be associated with the production and sale of the product". In the European Union's view, this second element was properly covered in paragraphs 7.12 and 7.13, and has no place in the section beginning with paragraph 7.56. Argentina requests the Panel to reject the reformulations proposed by the European Union. Argentina considers it appropriate in paragraph 7.56 to refer to the entire objection raised by the European Union pertaining to "new claims" against Article 2(5) of the Basic Regulation.

6.8. We are not persuaded that the specific changes requested by the European Union would add any clarity to the paragraphs and footnote concerned or are necessary. We note, in this regard, that footnote 99 to paragraph 7.56 refers back to paragraph 7.12, which relates to the first element of paragraph 2(A)(2) of Argentina's panel request challenged by the European Union. We further note that, in paragraph 7.57, we clarify that we will consider the European Union's objection pertaining to Article 2.2 of the Anti-Dumping Agreement. However, in order to avoid any risk of confusion, we have made certain amendments to the text of paragraphs 7.56 and 7.57 with a view to clarifying those aspects of the European Union's objection to paragraph 2(A)(2) of Argentina's panel request that the European Union no longer appears to pursue, in contrast to those aspects that the European Union continues to "invite" the Panel to consider.

Paragraph 7.67

6.9. The European Union suggests adding language ("due to an alleged distortion in the operation of the markets of the exporting country resulting from a measure of the government of the exporting country; and") to qualify the term "distortion" at the end of the last sentence of subparagraph (a) to paragraph 7.67 to avoid confusion and to render it consistent with paragraph 7.113. Moreover, the European Union suggests adding language – "and when information on the costs of other producers or exporters in the same country is not available, or cannot be used" – at the end of subparagraph (b) of the same paragraph to make it clear that a

determination that a producer/exporter's records do not reasonably reflect the costs is not the only condition for the recourse to "prices prevailing on other markets than the market of the country of origin". Argentina opposes these requests. Argentina considers that subparagraph (a) of paragraph 7.67 accurately reflects its claim, as consistently referred to in its submissions, and that the description is consistent with the wording included in paragraphs 7.69 and 7.74 of the Interim Report. Argentina also considers that the wording of subparagraph (b) correctly reflects the issue raised by Argentina's claim.

6.10. We decline to add the language suggested by the European Union. In our view, the two sub-paragraphs of paragraph 7.67 accurately reflect the questions of interpretation that arise from Argentina's claims.

Paragraph 7.112

6.11. Argentina requests that the Panel add a third subparagraph to paragraph 7.112 to clarify that with respect to both of its "as such" claims, Argentina also claimed that even if it granted the EU authorities the discretion alleged by the European Union, Article 2(5), second subparagraph, of the Basic Regulation would nonetheless be inconsistent with Articles 2.2.1.1 and 2.2. The European Union objects to Argentina's request. The European Union notes that paragraph 7.112 reflects the Panel's understanding of the "essence of Argentina's claims" and that Argentina seems to accept the Panel's summary of its arguments in relation to this claim as it does not request any changes to paragraphs 7.74 to 7.86. The European Union submits that the Panel's understanding is accurate, while the new text suggested by Argentina is inaccurate. Moreover, the European Union submits that the purpose of the interim review is not to allow the complaining party to dictate to the Panel the understanding that the Panel should have, or the reasoning the Panel should follow.

6.12. We note that the Interim Report already included several references to the alternative line of argumentation that Argentina would have us reflect in paragraph 7.112, notably in footnote 189 of the Interim Report. Nonetheless, we have added the language requested by Argentina, albeit with some minor changes, but have included it in a new paragraph after paragraph 7.117 rather than as a new subparagraph of paragraph 7.112. Consequently, we have deleted footnote 189 of the Interim Report. We have also included a brief summary of the European Union's response to this argument in the new paragraph, and amended paragraph 7.81 to reflect the alternative argument as it pertains to Argentina's Article 2.2.1.1 claim in the summary of its arguments.

Paragraphs 7.116, 7.142 and 7.143

6.13. The European Union suggests adding the qualifier "government induced" to the term "distortion" in paragraphs 7.116 and 7.142 and to the term "market distortion" in paragraph 7.143. Argentina objects to the modification proposed by the European Union, which, it submits, is a new terminology that the European Union seeks to introduce at a late stage of the proceedings. Argentina submits that the current wording is clear and is in line with Argentina's claims as formulated in its submissions to the Panel.

6.14. We decline to make the change requested by the European Union, particularly as the European Union did not itself refer to a "government induced" distortion in these contexts. Nor do Recital 4, Article 2(3), second subparagraph, or Argentina's submissions use such a qualifier.

Paragraph 7.132

6.15. The European Union suggests replacing the terms "after a determination is made" with "after a determination has been made". Argentina objects to this request.

6.16. We have made the amendment suggested by the European Union.

Paragraph 7.133

6.17. Argentina requests the addition of footnote references to its second written submission at the end of the second sentence of paragraph 7.133. The European Union does not object to the

Panel adding the footnote suggested by Argentina provided that the text of the main body of the paragraph is not modified.

6.18. We have added the footnote references suggested by Argentina.

Paragraph 7.140

6.19. Argentina requests that paragraph 7.140 be amended to more accurately reflect its arguments to the Panel regarding the relevance of Recital 4 for purposes of interpreting Article 2(5), second subparagraph. The European Union objects to the proposed amendments on the ground that the paragraph already accurately describes Argentina's argument and contains the references to Argentina's submissions which Argentina suggests adding.

6.20. We have modified paragraph 7.140 to more accurately reflect Argentina's arguments albeit in somewhat different terms than suggested by Argentina.

Paragraph 7.142

6.21. The European Union suggests reformulating the last sentence of paragraph 7.142 to ensure consistency with paragraphs 7.138 and 7.141, which indicate that Recital 4 relates to Article 2(5) of the Basic Regulation. Argentina does not comment on this request.

6.22. We have amended the last sentence of paragraph 7.142 in accordance with the European Union's request.

Paragraph 7.146

6.23. Argentina requests the addition of language at the end of paragraph 7.146 to clarify its arguments before the Panel. The European Union objects to Argentina's request as it considers the proposed changes unnecessary and considers the paragraph in its current form to be satisfactory. The European Union submits that if the Panel were to accept the redundant new text requested by Argentina, it should also move the content of footnote 224 into the main body of the Report and explain in detail the reason for which Argentina's assertions are erroneous, as already reflected in footnote 224.

6.24. We have, in the light of Argentina's request, modified footnote 224 to better reflect Argentina's arguments.

Paragraph 7.149

6.25. Argentina requests that we add language to paragraph 7.149 in order to more completely reflect the arguments it presented with respect to the judgments of the General Court. The European Union objects to Argentina's request. The European Union submits that it is unnecessary to reproduce in this paragraph all of the arguments presented by Argentina on the judgments of the General Court given that the following paragraphs directly address all of these arguments.

6.26. We decline to add the language suggested by Argentina, which we do not consider to be necessary particularly as, in this section, the Panel addresses the relevant arguments submitted by Argentina with respect to the judgments of the General Court.

Paragraphs 7.149-7.152

6.27. The European Union suggests adding language to paragraphs 7.149-7.152 to reflect the Panel's conclusion that the judgments confirm that the EU authorities are not "required" or "mandated" to act in any particular way, which is already reflected in paragraphs 7.167-7.168. Argentina opposes this request, noting that in this section of its Report, the Panel only examines the judgments in relation to the issue of the relationship between the first two subparagraphs of Article 2(5) of the Basic Regulation. Argentina takes the view that paragraphs 7.167-7.168 relate to a different issue; the conclusion in these paragraphs therefore cannot merely be transposed in paragraphs 7.149-7.152 and the latter cannot include any conclusion regarding the issue whether

the authorities are "required" or "mandated" to act in a particular way without examining this issue in detail.

6.28. We agree with Argentina, and therefore decline the European Union's request.

Paragraph 7.150

6.29. Argentina requests that the Panel add a footnote in the second sentence of paragraph 7.150 to refer to the relevant paragraphs of the judgments. The European Union does not comment on this request.

6.30. We have included footnote references to the relevant paragraphs of the judgments at issue.

Footnote 227 to paragraph 7.150

6.31. Argentina requests that, in footnote 227 to paragraph 7.150, the Panel include a reference to its response to Panel question No. 98. The European Union does not object to Argentina's request in this regard, provided that the rest of the footnote and of the paragraph are not modified.

6.32. We have included the additional reference requested by Argentina.

Paragraph 7.155

6.33. Argentina requests that the Panel modify paragraph 7.155 in order to clarify that it also submits that Article 2(5) of the Basic Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement regardless of whether it is mandatory. The European Union opposes this request because, it submits, this point is already addressed in paragraphs 7.173 and 7.174, whereas paragraph 7.155 presents the Panel's understanding of Argentina's main claim, which is that Article 2(5) mandates the investigating authorities to act in a certain way.

6.34. As indicated above, in our response to Argentina's request concerning paragraph 7.112, the Interim Report already included several references to the alternative line of argumentation that Argentina would have us reflect in paragraph 7.155, and we have added such a reference in a new paragraph, paragraph 7.118. Moreover, footnote 229 to paragraph 7.155 already referred to Argentina's alternative line of argumentation. In light of the foregoing, we do not consider it necessary to modify paragraph 7.155 as requested by Argentina. We have, instead, amended footnote 229 to clarify it and to refer back to paragraph 7.118.

Paragraph 7.165

6.35. Argentina requests the Panel to identify in a footnote the examples of EU determinations supporting the statement contained in paragraph 7.165. The European Union does not comment on this request.

6.36. We have amended paragraph 7.165 and added a footnote to add greater precision to the discussion of the examples of EU determination cited by Argentina.

Paragraph 7.166

6.37. The European Union suggests reformulating the final sentence of paragraph 7.166. Argentina does not comment on this request.

6.38. We have revised the final sentence of paragraph 7.166 in the light of the European Union's comment.

Paragraph 7.172

6.39. The European Union suggests reformulating paragraph 7.172 to clarify the conclusion that, under Article 2(5) of the Basic Regulation, the authorities *may* use the listed sources of information to establish an investigated producer/exporter's costs in constructing its normal value,

but are not required to do so. Argentina objects to this request as it considers that the paragraph as currently worded is clear and does not need to be modified.

6.40. We note that the European Union did not explain the reason for its suggested revision. In our view, paragraph 7.172 is sufficiently clear. Accordingly, we see no reason to modify it.

Paragraphs 7.173 and 7.174

6.41. The European Union suggests merging paragraphs 7.173 and 7.174 and treating the arguments of Argentina addressed in these paragraphs as different formulations of the same legal interpretation. Argentina takes the view that the two paragraphs deal with different arguments and requests that the Panel reject this request.

6.42. We reject the request of the European Union. Paragraphs 7.173 and 7.174 address different, alternative arguments submitted by Argentina with respect to what it must establish for its "as such" claims to succeed.

Paragraph 7.174

6.43. The European Union suggests breaking up the second sentence of paragraph 7.174 into separate sentences because the present formulation may create some confusion as to what "as discussed above" refers to. Argentina considers that paragraph 7.174 is clear and does not need to be modified.

6.44. We have amended paragraph 7.174 to eliminate the risk of confusion identified by the European Union.

Paragraph 7.240

6.45. Argentina requests that paragraph 7.240 be modified to include the word "alleged" before the words "distortion arising out of government actions or circumstances". The European Union objects to this request, noting that Argentina acknowledged in its reply to Panel question No. 43 that its export tax system has a significant "impact on soybean prices as an input material for biodiesel".

6.46. We decline to make the change requested by Argentina. Paragraph 7.240 discusses distortions in the abstract as they might relate to the second *Ad* Note to Articles VI:2 and VI:3 of GATT 1994, rather than articulating any conclusions with respect to Argentina's export tax system in particular.

Footnote 421 to paragraph 7.249

6.47. The European Union suggests that it would be more accurate in footnote 421 to paragraph 7.249 to preface the word "regulated" with the word "directly". Argentina requests the Panel to reject this modification because, in its view, the parties did not dispute that the domestic prices of soybean are not regulated.

6.48. In light of the considerations raised by the parties, we have reformulated the last sentence of footnote 421 to paragraph 7.249.

Paragraph 7.257

6.49. The European Union suggests that the Panel add a sentence at the end of paragraph 7.257 to reflect Argentina's acknowledgement that the prices used by the EU authorities "would have been the prices paid by the Argentine producers of biodiesel in the absence of the export tax system, possibly with small variations depending on the particular terms of each transaction." In the European Union's view, this addition would make the description of the facts in that paragraph more accurate. Argentina objects, asserting that it did not agree that the price to be paid by exporters would be the reference price minus fobbing costs.

6.50. We see no basis for making the change suggested by the European Union. The paragraph at issue contains a brief restatement of pertinent aspects of the findings of the EU authorities, whereas the addition suggested by the European Union concerns Argentina's arguments before the Panel, which are addressed elsewhere in the Report.

Paragraphs 7.261-7.269

6.51. Argentina requests the Panel to complete its reasoning with respect to its second "as applied" claim concerning Article 2.2.1.1 of the Anti-Dumping Agreement. In Argentina's view, its second claim is of a different nature to its first claim. In Argentina's view, a finding on this second claim would be necessary to preserve its rights at subsequent stages of the proceeding. The European Union does not consider that Argentina's request is justified. In the European Union's view, in light of its finding in paragraph 7.249, the Panel is justified in concluding in paragraph 7.269 that a finding on a logically identical claim under Article 2.2.1.1 of the Anti-Dumping Agreement is not necessary for the effective resolution of the dispute.

6.52. We reject Argentina's request. For the reasons explained in paragraph 7.269, we maintain our view that a finding on Argentina's second claim under Article 2.2.1.1 of the Anti-Dumping Agreement is not necessary for the effective resolution of this dispute.

Paragraph 7.293

6.53. The European Union requests that we delete the words "pursuant to Article 2.1" from the first sentence of paragraph 7.293 given that these words are not mentioned in the text of Article 2.4 of the Anti-Dumping Agreement. Argentina requests that we reject the request of the European Union. Argentina considers that the European Union misreads the sentence at issue and that the sentence is accurate.

6.54. Although the sentence at issue did not, as the European Union suggests, state that the opening sentence of Article 2.4 refers to Article 2.1, in order to avoid any risk of confusion, we have omitted the words "pursuant to Article 2.1" from the first sentence of paragraph 7.293.

Footnote 511 to paragraph 7.296

6.55. The European Union suggests that the Panel delete the text in footnote 511 starting with "[w]e note, however …". The European Union does not see the connection between this text and the reference to the panel report in *EU – Footwear (China)*, nor between this text and the sentence in paragraph 7.296 to which footnote 511 is appended. Argentina requests the Panel to reject the request of the European Union. According to Argentina, the text that the European Union seeks to delete is related to the content of paragraph 7.296.

6.56. The text that the European Union seeks to delete in footnote 511 to paragraph 7.296 reflects a nuance that is not otherwise reflected in the attendant quotations and considerations in paragraph 7.296. As we explain in that paragraph, the subject matter of Article 2.4 can be contrasted with that of Articles 2.1, 2.2, and 2.3, which pertain to the methodology of determining the normal value and the export price. However, as we explain in footnote 511 to that paragraph, the fourth and fifth sentences of Article 2.4 pertain to the construction of the export price under Article 2.3. Omitting this nuance would dilute the accuracy of the Panel's discussion. Nonetheless, in order to avoid any risk of confusion, and since the text referred to by the European Union is not directly connected to the reference to *EC – Footwear (China)* in the same footnote, we have moved this text to a new footnote at the end of the following sentence (footnote 512).

Paragraphs 7.303 and 7.304

6.57. In the evaluation of Argentina's claim under Article 2.4 of the Anti-Dumping Agreement, the Interim Report made reference to certain findings of the panel in *EC – Fasteners (China) (Article 21.5 – China)*. On 18 January 2016, the Appellate Body issued its Report in the same dispute. In this Report, the Appellate Body addressed, *inter alia*, the findings of the *EC – Fasteners (China) (Article 21.5 – China)* panel referred to in this Panel's Interim Report. This being the case, on 5 February 2016, the Panel amended paragraph 7.303 and included a new paragraph (now paragraph 7.304) in order to reflect the reasoning of the Appellate Body, and invited the parties to

provide their comments, if any, on these revisions. Argentina provided comments, and the European Union provided comments on Argentina's comments.

6.58. Argentina does not request any changes to the revised paragraph 7.303, but makes three sets of requests for revisions to paragraph 7.304. First, Argentina takes issue with the statement in that paragraph that, in *EC – Fasteners (China) (Article 21.5 – China)*, the "Appellate Body *agreed* with the panel that, in the context of an investigation in which the analogue country methodology is applied, the investigating authority is not required under Article 2.4 to adjust for differences in costs where this would lead it to adjust back to the costs in the NME industry that it had found to be distorted".[22] Argentina considers that rather than agreeing with the panel, the Appellate Body faulted the panel for the lack of care and detailed evaluation in assessing whether the investigating authority had complied with its duty to determine whether the adjustments requested were warranted pursuant to Article 2.4. As a consequence, Argentina requests that we replace the term "agreed" in the first sentence with the term "found". Second, Argentina considers that the Appellate Body's findings in *EC – Fasteners (China) (Article 21.5 – China)* do not stand for the "broad, unqualified and far-reaching" proposition that methodological approaches for establishing the normal value cannot be challenged under Article 2.4 as "differences affecting price comparability" without more, as – in Argentina's view – the Panel's language seems to suggest. Rather, Argentina considers that the Appellate Body (like the panel) found that recourse to the analogue country methodology did not relieve the investigating authority from the obligation to make a fair comparison under Article 2.4, and the Appellate Body clarified the conditions under which a determination as to whether adjustments are warranted should be made. Argentina therefore suggests that we make certain changes to the last sentence of paragraph 7.304, specifically that we qualify the term "proposition" in that sentence with the term "general", and that we add "provided that the fair comparison requirement is not affected" at the end of that sentence. Finally, Argentina requests that we qualify the term "distortion" in footnote 527 to paragraph 7.304 with the term "alleged", that we replace the term "mitigated" in that footnote with the term "found", and that we qualify the term "replace" with the term "improperly" in the same footnote.

6.59. The European Union only comments on Argentina's requests for revisions concerning the footnote to paragraph 7.304. In this respect, the European Union notes that the Panel had already used the word "mitigated" elsewhere in the Report and that Argentina had not expressed any comment in this respect in its initial requests for review. Further, the European Union considers that the term "found", suggested by Argentina, does not accurately reflect the meaning expressed by the relevant sentence, and suggests that any change should use the terms "eliminated" or "addressed". The European Union also asks us to reject Argentina's request to qualify the term "distortion" with the term "alleged" on grounds that the relevant sentence describes the actions taken by the investigating authorities as opposed the parties', or the Panel's, assessment of whether the distortion was "alleged" or real. Finally, the European Union asks us to reject Argentina's request to qualify the term "replace" with the term "improperly" on grounds that the relevant sentence is simply describing facts and does not assess whether the actions of the investigating authority were "proper".

6.60. We made certain changes to the language of paragraph 7.304 and the corresponding footnote in light of Argentina's comments and the European Union's comments thereon. In particular, we have modified the first sentence of paragraph 7.304. In this respect, we note however that both the panel and the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* considered that, in the context of an investigation in which the analogue country methodology is applied, the investigating authority is not required under Article 2.4 to adjust for differences in a manner that would lead it to adjust back to the costs in the NME industry that it had found to be distorted, thereby undermining the use of the analogue country methodology. The footnote to paragraph 7.304 already highlighted the differences in the approaches adopted by the panel and Appellate Body; we modified our text to provide even greater clarity in this respect. We decline to qualify certain language in the footnote by adding "alleged" and "improperly" before "distortion" and "replace", as requested by Argentina, because the language at issue reflects certain factual aspects of the EU authorities' determination rather than findings of the Panel. However, we replaced the term "mitigated" by "addressed" to better reflect the EU authorities' determination. Finally, we modified the last sentence of paragraph 7.304 to better reflect our understanding of the essence of the Appellate Body's findings in *EC – Fasteners (China) (Article*

[22] Emphasis added.

21.5 – China) and of its relevance to the present dispute. As a result, we also amended the first sentence of paragraph 7.305.

Footnote 581 to paragraph 7.337

6.61. The European Union notes that in footnote 581 to paragraph 7.337, the reference to the panel report in *Thailand – H-Beams* relates to subparagraphs (i) and (ii) of Article 2.2.2 of the Anti-Dumping Agreement, whereas the present dispute involves subparagraph (iii) of Article 2.2.2. Argentina considers the European Union's observation inapposite because the paragraph of the panel report in *Thailand – H-Beams* points out the connection between Article 2.2.2(iii) and the preceding subparagraphs of Article 2.2.2.

6.62. Paragraph 7.112 of the panel report in *Thailand – H-Beams* discusses the "chapeau and overall structure" of Article 2.2.2 of the Anti-Dumping Agreement. We therefore decline to amend that reference. However, we have omitted an inaccurate reference to *EU – Footwear (China)* in the same footnote, identified by the European Union.

Paragraph 7.347

6.63. The European Union suggests that the Panel include the word "particularly" before the clause beginning "when reliable data concerning …" in paragraph 7.347. According to the European Union, this would be more consistent with footnote 579. Argentina objects on the ground that the modification suggested by the European Union is unnecessary.

6.64. In order to avoid any risk of misunderstanding, we substituted the word "might" for the word "may" in the sentence referred to by the European Union.

Paragraph 7.361

6.65. The European Union submits that paragraph 7.361 inaccurately attributes to the Appellate Body in *US – Zeroing (EC)* a quotation ("that is, a margin established consistently with Article 2"). In response, Argentina notes that the language identified by the European Union is not part of the quotation in paragraph 7.361.

6.66. We see no reason to modify paragraph 7.361. The text referred to by the European Union does not appear in quotation marks, nor does it misrepresent the quotation from *US – Zeroing (EC)* extracted in paragraph 7.361.

Paragraph 7.370

6.67. Argentina requests that the Panel modify paragraph 7.370 to reflect the fact that its claims under Articles 3.1 and 3.4 should be read jointly with the claims under Articles 3.1 and 3.5. The European Union disagrees with Argentina's request, arguing that footnote 618 already makes the same point.

6.68. We reject Argentina's request. Paragraph 7.370 and footnote 618 to the same paragraph already make clear the link between Argentina's claims under Articles 3.1 and 3.4, on the one hand, and its claims under Articles 3.1 and 3.5, on the other.

Paragraphs 7.416-7.422

6.69. Argentina submits that the Panel's finding that the EU authorities failed to base their evaluation of production capacity and capacity utilization on positive evidence and failed to conduct an objective examination of the impact of dumped imports on the domestic industry insofar as it relates to these two factors only provides a partial resolution of the matter at issue. Argentina considers that to ensure a complete resolution of the dispute, it is also necessary for the Panel to make a finding regarding the issue whether the EU authorities acted inconsistently with Article 3.4 in their definition of capacity and capacity utilization. The European Union does not comment on this request.

6.70. Argentina has not demonstrated that findings with respect to its allegation concerning the EU authorities' definition of capacity utilization are necessary to the resolution of the dispute between the parties in light of the Panel's conclusions in paragraphs 7.413 and 7.415. We therefore maintain our view that we need not make such findings.

Paragraph 7.429

6.71. The European Union suggests adding a reference to the panel reports in *China – Raw Materials* (second phase of the preliminary ruling, paragraphs 74 to 76) to this paragraph. Argentina objects to this suggestion. Argentina argues that it is too late at the interim review stage to advance new arguments or to refer to prior reports that were not brought to the Panel's attention earlier.

6.72. We do not consider it necessary to include a reference to the panel reports in *China – Raw Materials* and have therefore not made the addition suggested by the European Union.

Paragraph 7.462

6.73. Argentina requests that we clarify that its argument with regard to overcapacity discussed in paragraph 7.462 focuses on the violation of both Articles 3.1 and 3.5. The European Union does not provide comments on this request.

6.74. The relevant clarification has been inserted into the text.

Paragraphs 7.463 and 7.465

6.75. The European Union suggests that, in its description of the findings of the EU investigating authorities, the Panel add footnote references to the relevant documents containing these findings. Argentina does not comment on this request.

6.76. In the light of the European Union's request, we have inserted relevant footnote references where appropriate (footnotes 783-785 and 788-790).

Paragraph 7.471

6.77. The European Union suggests adding footnotes indicating the source of certain statements in paragraph 7.471. Argentina does not comment on this request.

6.78. The relevant footnotes have been inserted in the Final Report (footnotes 798, 800, and 802).

Paragraph 7.509

6.79. The European Union suggests adding footnotes indicating the source of certain statements in paragraph 7.509. Argentina does not comment on this request.

6.80. The Panel has made certain changes to paragraphs 7.503, 7.505, 7.508, and 7.509 to clarify its findings and, in doing so, has added footnotes to identify the source of the statements or arguments it refers to, where appropriate (footnotes 867, 872-873, and 875-878).

7 FINDINGS

7.1. This dispute concerns European Union measures imposing anti-dumping duties on biodiesel from Argentina, which Argentina challenges on an "as applied" basis, as well as Article 2(5), second subparagraph, of the Basic Regulation, which Argentina challenges on an "as such" basis. Argentina's claims proceed under various provisions of the Anti-Dumping Agreement; Articles VI:1, including subparagraph (b)(ii) thereof, and VI:2 of the GATT 1994; and Article XVI:4 of the World Trade Organization (WTO) Agreement. The European Union requests that the Panel reject each of the claims presented by Argentina, and in addition, requests the Panel to find that certain of Argentina's claims are not within the Panel's terms of reference.

7.2. We begin by examining the request for a preliminary ruling submitted by the European Union prior to the filing by Argentina of its first written submission. Thereafter, we consider Argentina's "as such" claims against Article 2(5), second subparagraph, of the Basic Regulation, before considering Argentina's "as applied" claims, which pertain to the EU authorities' Provisional Regulation and Definitive Regulation in the biodiesel investigation. However, before proceeding to do so, we briefly recall the relevant general principles regarding treaty interpretation, the standard of review and the burden of proof in WTO dispute settlement proceedings, as laid down by the Appellate Body.

7.1 General principles regarding treaty interpretation, the applicable standard of review and burden of proof

7.1.1 Treaty interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[23]

7.1.2 Standard of review

7.4. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> [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. (emphasis added)

7.5. Further to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; and
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.6. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination.[24]

7.7. The Appellate Body has also stated that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[25] At the same time, a panel must not simply

[23] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.
[24] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[25] Ibid. para. 187.

defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[26]

7.1.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[27] Therefore, as the complaining party, Argentina bears the burden of demonstrating that the EU measures it challenges are inconsistent with the provisions of the covered agreements that it invokes. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely, a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[28] It is generally for each party asserting a fact to provide proof thereof.[29]

7.2 Terms of reference – European Union's request for a preliminary ruling

7.2.1 Introduction

7.9. On 24 November 2014, the European Union submitted a request for a preliminary ruling in which it objected to the inclusion of certain claims and measures in Argentina's panel request. In its request, the European Union argued that Argentina's panel request failed to identify the specific measure(s) at issue, failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, and/or added claims that had not been included in Argentina's request for consultations.

7.10. Specifically, the European Union requested the Panel to find that:

a. the references to "implementing measures and related instruments or practices" in paragraph 1(A) and footnote 7 of Argentina's panel request, and the reference to "related measures and implementing measures" in paragraph 1(B) of Argentina's panel request, fail to "identify the specific measures at issue" as required by Article 6.2 of the DSU and, as a consequence, any claims with respect to these measures fall outside the scope of the Panel's terms of reference[30];

b. the use of the term "*inter alia*" in section 2(A) of Argentina's panel request, in the description of the provisions of the covered agreements allegedly violated by Article 2(5) of the Basic Regulation, fails to properly identify the legal basis of the complaint and to present the problem clearly and, as a consequence, the relevant claims are outside the Panel's terms of reference[31];

c. paragraph 2(B)(6) of Argentina's panel request, to the effect that the Provisional and Definitive Regulations are inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, fails to properly identify the legal basis of the complaint and to present the problem clearly and, as a consequence, falls outside the Panel's terms of reference[32];

d. the claim in respect of "related … practices" in paragraph 1(A) of Argentina's panel request (the paragraph that identifies Article 2(5) of the Basic Regulation as a measure at issue), refers to a measure that was not included in Argentina's consultations request,

[26] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Lamb*, paras. 106 and 107.
[27] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[28] Appellate Body Report, *EC – Hormones*, para. 104.
[29] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[30] European Union's request for a preliminary ruling, paras. 3-9.
[31] European Union's request for a preliminary ruling, paras. 11-13.
[32] European Union's request for a preliminary ruling, paras. 14-22.

thereby expanding the scope of the dispute and changing the essence of Argentina's complaint and, as a consequence, falls outside the Panel's terms of reference[33];

e. an unnumbered paragraph inserted between paragraphs 2(B)(3) and 2(B)(4) of Argentina's panel request appears to set forth a new "as applied" claim in respect of Article 2(5) of the Basic Regulation that was not included in Argentina's consultations request and expands the scope of the dispute, and which, as a consequence, falls outside the Panel's terms of reference[34];

f. the claim under Article 9.3 of the Anti-Dumping Agreement against Article 2(5) of the Basic Regulation in paragraph 2(A)(3) of Argentina's panel request is a new claim that was not included in Argentina's request for consultations, expands the scope of the dispute and changes the essence of the complaint, and, as a consequence, falls outside the Panel's terms of reference[35];

g. the claims under Article VI:1 of the GATT 1994 in paragraphs 2(A)(1) and 2(A)(2) of Argentina's panel request are new claims that were not included in Argentina's request for consultations, expand the original scope of the dispute and, as a consequence, fall outside the scope of the panel's terms of reference[36];

h. the claims in paragraph 2(A)(2) of Argentina's panel request that Article 2(5) of the Basic Regulation is inconsistent with the requirement in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement that "the costs used be associated with the production and sale of the product under consideration" are new claims that were not included in Argentina's request for consultations, expand the original scope of the dispute and, as a consequence, fall outside the scope of the Panel's terms of reference[37]; and

i. the claim under Article 2.1 of the Anti-Dumping Agreement in paragraph 2(B)(4) of Argentina's panel request concerning the amount for profits is a new claim that was not included in Argentina's request for consultations and, as a consequence, falls outside the scope of the Panel's terms of reference.[38]

7.11. Argentina responded to the European Union's request on 18 December 2014.[39] The European Union submitted comments on Argentina's response on 19 January 2015 as part of its first written submission[40] and both parties further commented on the matter as part of their subsequent submissions and statements before the Panel. In addition, China and Mexico submitted comments on the European Union's request as third parties.[41]

7.12. The European Union's request for a preliminary ruling pre-dated Argentina's filing of its first written submission. Argentina submitted that the European Union's objections concerning "implementing measures and related instruments or practices", "related measures and implementing measures", the terms "*inter alia*" and "related practices", and the "as such" claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-Dumping Agreement, were unnecessary because, at the time these objections were made, Argentina had not yet made any submissions indicating that it was challenging measures on those bases.[42] The European Union subsequently contended in its first written submission that:

> Argentina has abandoned: (1) any claim against "*related practices*", mentioned in Paragraph 1(A) and in Footnote 7 of Argentina's Panel Request; (2) any claim under an "*inter alia*" legal basis, mentioned in Paragraph 2(A) of Argentina's Panel

[33] European Union's request for a preliminary ruling, paras. 27-30.
[34] European Union's request for a preliminary ruling, paras. 31-35.
[35] European Union's request for a preliminary ruling, paras. 36-40.
[36] European Union's request for a preliminary ruling, paras. 41-44.
[37] European Union's request for a preliminary ruling, paras. 45-49.
[38] European Union's request for a preliminary ruling, paras. 50-54.
[39] Argentina's response to the European Union's request for a preliminary ruling.
[40] European Union's first written submission, paras. 11-44.
[41] Mexico's third-party submission on the European Union's request for a preliminary ruling; China's third-party submission, paras. 4-14.
[42] Argentina's response to the European Union's request for a preliminary ruling, paras. 33, 42, 72, 78, and 80.

> Request; (3) the claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-dumping Agreement, mentioned in Paragraph 2(A)3 of Argentina's Panel Request; (4) any distinct "*as applied*" claim against Article 2(5) of the Basic Regulation, mentioned in the not-numbered paragraph between paragraphs 2(B)3 and 2(B)4 of Argentina's Panel Request; (5) the claim against Article 2(5) of the Basic Regulation for the "second reason" mentioned in Paragraph 2(A)2 of Argentina's Panel Request, namely that the costs used are allegedly not "associated with the production and sale of the product under consideration"; and (6) the claim against the "profit determination" based on Article 2.1 of the Anti-Dumping Agreement, mentioned in Paragraph 2(B)4 of Argentina's Panel Request.[43] (emphasis original; fns omitted)

7.13. On the basis of that understanding, the European Union submitted that the Panel cannot examine or make any findings on those particular claims, and stated that it would "not address these claims further, because they are outside the scope of the present dispute".[44] Argentina noted these statements of the European Union, and stated that "these issues appear to be moot and, in Argentina's view, the Panel therefore does not need to examine them any further".[45] Therefore, we understand the parties to agree that there is no need for us to rule on these aspects of the European Union's request for a preliminary ruling. In light of Argentina's submissions and in the absence of claims being made or pursued in relation to these aspects of the European Union's request for a preliminary ruling, we consider them moot. Accordingly, we make no findings on these aspects of the European Union's request.

7.14. We also note that, in response to the European Union's objection concerning "implementing measures and related instruments or practices" and "related measures and implementing measures" in paragraph 1(A), paragraph 1(B) and footnote 7 of Argentina's panel request, Argentina indicated that a ruling by the Panel would have no "practical implications for the dispute at issue".[46] The European Union responded that this "confirms that Argentina has abandoned these claims" and that its arguments pertaining to the other allegedly abandoned claims applied.[47] In that context, and in view of our understanding that Argentina has not, in fact, pursued claims concerning "implementing measures and related instruments or practices", we consider these aspects of the European Union's request for a preliminary ruling to be moot, and will therefore make no findings on these aspects.

7.15. Below, we consider and resolve the remaining objections raised by the European Union in its request for a preliminary ruling.[48]

7.2.2 Objection concerning the claim of inconsistency with Article 9.3 of the Anti-Dumping Agreement in paragraph 2(B)(6) of Argentina's panel request

7.16. The European Union requests that we find paragraph 2(B)(6) of Argentina's panel request to be inconsistent with Article 6.2 of the DSU, and thus outside the scope of the Panel's terms of reference.[49]

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[43] European Union's first written submission, para. 12.

[44] European Union's first written submission, paras. 13 and 14.

[45] Argentina's opening statement at the first meeting of the Panel, paras. 29-31. Argentina stated that "[f]or most of the claims concerned by this allegation, the fact is not that Argentina has raised claims that it decided not to pursue, but that the European Union has raised procedural objections with regard to non-existent issues". (Argentina's second written submission, para. 6)

[46] Argentina's second written submission, para. 7.

[47] European Union's second written submission, para. 7 (referring to European Union's first written submission, para. 13).

[48] We note that, in its subsequent submissions to the Panel, the European Union raises a jurisdictional objection with respect to Argentina's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement as they pertain to the EU authorities' evaluation of return on investments. See below, para. 7.389.

[49] European Union's request for a preliminary ruling, paras. 15-22. We note that the European Union stated in its first written submission that Argentina has clarified that this claim is conditioned upon the success of Argentina's claims under Article 2 and, therefore, that Argentina's Article 9.3 claim "is of very limited value for the present dispute". The European Union nonetheless "invites the panel to consider whether the claim is properly within its terms of reference". (European Union's first written submission, paras. 41 and 42). We understand from this that the European Union persists with its jurisdictional objection with respect to this claim.

7.2.2.1 Main arguments of the parties

7.2.2.1.1 European Union

7.17. The European Union submits four arguments in support of its assertion that paragraph 2(B)(6) of Argentina's panel request is inconsistent with the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[50]

7.18. First, the European Union argues that panel requests must specify which specific subparagraph of a provision is alleged to be infringed where the provision contains different subparagraphs containing different sets of obligations.[51] Accordingly, the failure of Argentina to specify in paragraph 2(B)(6) which of the chapeau or three subparagraph of Article 9.3 of the Anti-Dumping Agreement is alleged to be infringed is inconsistent with Article 6.2 of the DSU.

7.19. Second, the European Union argues that the allegation in paragraph 2(B)(6) that it "imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established" does not articulate clearly the exact claim that Argentina advances.[52] For the European Union, this allegation could refer either to a challenge to the comparison between the anti-dumping duty and the margin of dumping (e.g. as a result of a numerical mistake in setting the anti-dumping duty), or to a challenge to the method of calculation of the margin of dumping itself.

7.20. Third, assuming *arguendo* that the claim in paragraph 2(B)(6) pertains to the method of calculation of the margin of dumping itself, the European Union argues that it is unclear which aspect of this calculation is challenged by Argentina's claim.[53] In particular, the European Union points out that the determination of the dumping margin by the EU authorities was based on four separate components or aspects (the determination of the normal value, the determination of the export price, the comparison between the two, and the analysis of certain requests by Argentine exporters), and that these are dealt with by the challenged measures in four different sections with four different titles. For the European Union, the failure to specify which component or aspect of the measures is challenged means that it cannot understand the scope of the challenge it faces.

7.21. Finally, assuming *arguendo* that the claim in paragraph 2(B)(6) pertains to the fourth section of the challenged measures entitled "Dumping Margins", the European Union submits that this section discusses two different and distinct issues pertaining to requests submitted by Argentine exporters.[54] The failure of Argentina to specify which of those two issues are under challenge in paragraph 2(B)(6) falls short of the applicable standard under Article 6.2.

7.2.2.1.2 Argentina

7.22. Argentina contends that there is no general requirement under Article 6.2 to refer to the specific paragraphs of a provision of the covered agreements that is alleged to be infringed.[55] Rather, according to Argentina, WTO jurisprudence suggests that the question of whether a general reference to a treaty provision is adequate to meet the "sufficiency" requirement of Article 6.2 calls for a case-by-case assessment, taking into account the extent to which such reference sheds light on the nature of the obligation at issue.[56]

7.23. In the particular circumstances of this case, Argentina points to an alignment between the language used in paragraph 2(B)(6) of its panel request and the chapeau of Article 9.3 of the Anti-Dumping Agreement.[57] In particular, the chapeau of Article 9.3 states that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2", and

[50] European Union's request for a preliminary ruling, paras. 15-22; first written submission, paras. 39-42.
[51] European Union's request for a preliminary ruling, para. 16.
[52] European Union's request for a preliminary ruling, para. 17.
[53] European Union's request for a preliminary ruling, para. 19.
[54] European Union's request for a preliminary ruling, paras. 20 and 21.
[55] Argentina's response to the European Union's request for a preliminary ruling, para. 47.
[56] Argentina's response to the European Union's request for a preliminary ruling, para. 48.
[57] Argentina's response to the European Union's request for a preliminary ruling, para. 49.

paragraph 2(B)(6) of Argentina's panel request states that there is a violation of Article 9.3 "because 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". In the light of this textual alignment, Argentina submits that it is clear that the claim set out in paragraph 2(B)(6) of its panel request is directed at the chapeau of Article 9.3 of the Anti-Dumping Agreement. In this regard, Argentina cites the Appellate Body Report in *Thailand – H-Beams*, in which an explicit reference to the specific language of Article 3 of the Anti-Dumping Agreement was found to be sufficient to meet the requirements of Article 6.2, without identifying the specific paragraphs of Article 3 alleged to have been infringed.[58] Moreover, Argentina argues that the conclusion that the claim is directed at the chapeau is further supported by the fact that the claim relates at the same time to Article VI:2 of the GATT 1994.

7.24. In Argentina's view, the nature of the obligation in the chapeau of Article 9.3 of the Anti-Dumping Agreement clarifies that the claim in paragraph 2(B)(6) of its panel request could not be construed as pertaining to the method of calculating dumping margins, contrary to the argument of the European Union.[59] This is because the chapeau of Article 9.3, and Article 9 generally, do not deal with the determination of dumping. Rather, they deal with the imposition and collection of anti-dumping duties.

7.25. In the light of its other claims concerning the determination of the dumping margin under Article 2 of the Anti-Dumping Agreement, Argentina submits that its claim under Article 9.3 of the Anti-Dumping Agreement logically refers to the levying of anti-dumping duties that exceed the margins of dumping that the European Union should have calculated without violating its obligations under Article 2.[60] In any case, Argentina claims that the European Union has failed to demonstrate that any ambiguity in its panel request prejudiced the European Union's ability to defend itself.[61]

7.2.2.2 Arguments of the third parties

7.26. **China** submits that there is no general and mandatory requirement to refer to a specific subparagraph of a WTO treaty provision, but rather, a panel should examine whether a general reference to a treaty provision meets the requirement under Article 6.2 on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue.[62] In China's view, the language of paragraph 2(B)(6) of Argentina's panel request indicates that the factual basis of the alleged inconsistency with Article 9.3 is that the anti-dumping duties were levied in excess of the margins of dumping, which connected the challenged measure with the chapeau of Article 9.3.

7.2.2.3 Evaluation by the Panel

7.27. Pursuant to Article 6.2 of the DSU, the request for the establishment of a panel must, *inter alia*, "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". A panel must determine whether a panel request is sufficiently clear on the basis of an objective examination of the panel request as a whole, as it existed at the time of filing, and on the basis of the language used therein[63], that is, "'on the face' of the panel request".[64] Parties'

[58] Argentina's response to the European Union's request for a preliminary ruling, para. 50 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para 4.24, in turn referring to Appellate Body Report, *Thailand – H-Beams*, para. 90).

[59] Argentina's response to the European Union's request for a preliminary ruling, para. 53.

[60] Argentina's response to the European Union's request for a preliminary ruling, para. 54. Argentina reiterated its position in para. 9 of its second written submission.

[61] Argentina's response to the European Union's request for a preliminary ruling, para. 57.

[62] China's third-party submission, para. 8.

[63] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 641 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108), and 642).

[64] Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

submissions and statements during the panel proceedings cannot "cure" defects in the panel request.[65]

7.28. As a minimum requirement, the panel request must list the provision(s) of the covered agreement(s) claimed to have been violated.[66] There may be situations, however, where such listing is not "sufficient to present the problem clearly", for instance, where the provisions contain multiple and/or distinct obligations.[67] On the other hand, there may be situations where a general reference to a treaty provision is sufficient under Article 6.2.[68] Thus, the determination of conformity with Article 6.2 must be undertaken on a case-by-case basis, taking account of the nature of the measure(s) at issue, and the manner in which it is (or they are) described in the panel request, as well as the nature and scope of the provision(s) of the covered agreements alleged to have been violated.[69]

7.29. Finally, in order to "present the problem clearly", a panel request must "plainly connect" the challenged measure(s) with the provision(s) claimed to have been infringed such that a respondent can "know what case it has to answer, and … begin preparing its defence".[70]

7.30. With this understanding of the relevant principles, we now address the objection raised by the European Union with respect to the claim under Article 9.3 of the Anti-Dumping Agreement set forth in paragraph 2(B)(6) of Argentina's panel request.

7.31. Paragraph 2(B)(6) of Argentina's panel request states that Argentina considers that the anti-dumping measures imposed by the European Union on imports of biodiesel, and the underlying investigation in that regard, are inconsistent with:

> Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because 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.

The question before us is whether this text suffices to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.32. The text of paragraph 2(B)(6) refers to Article 9.3 of the Anti-Dumping Agreement. That Article consists of a chapeau and three subparagraphs, each of which sets out different obligations. Taken in isolation, the reference to Article 9.3 in paragraph 2(B)(6) of Argentina's panel request may cause some confusion over which particular obligation contained therein is the object of the claim. However, paragraph 2(B)(6) contains an additional narrative referring to "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". This narrative is clear enough to align it with the text of the chapeau of Article 9.3, which states that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Thus, in our view, this additional narrative clarifies that the obligation in Article 9.3 at issue is that contained in the chapeau of the provision. Our understanding is further confirmed by the reference in paragraph 2(B)(6) of Argentina's panel request to Article VI:2 of the GATT 1994. That provision provides, in relevant part, that "a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". The similarity between that provision and the chapeau of Article 9.3 of the Anti-Dumping Agreement provide a further indication that the reference to Article 9.3 in paragraph 2(B)(6) of Argentina's panel request concerns the obligation contained in the chapeau.

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[65] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 787 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; and *US – Carbon Steel*, para. 127).

[66] Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, fn 21, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, fn 13, paras. 145 and 147; and *India – Patents (US)*, fn 21, paras. 89, 92, and 93); and *US – Carbon Steel*, para. 130.

[67] Appellate Body Report, *China – Raw Materials*, para. 220 (referring to Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598).

[68] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17; *US – Carbon Steel*, para. 130 (referring to Appellate Body Report, *Korea – Dairy*, para. 124).

[69] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17.

[70] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).

7.33. Turning to the structure of Argentina's panel request, we note that paragraph 2(B)(6) of that request is part of a series of claims concerning the anti-dumping measures imposed by the European Union on imports of biodiesel from Argentina. In particular, it is preceded by claims under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 pertaining to alleged failures in the calculation of the cost of production and in the construction of the normal value for the producers under investigation, as well as those pertaining to the fairness of the comparison between the export price and the normal value. It is in this context that Argentina subsequently claims in paragraph 2(B)(6) that "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." When read in this context, it is apparent that the claim in paragraph 2(B)(6) of Argentina's panel request is premised on a number of other claims pertaining to Article 2 of the Anti-Dumping Agreement. In our view, it is sufficiently clear from this context that Argentina makes a claim in paragraph 2(B)(6) of its panel request that the alleged inconsistencies with Article 2 in the calculation of the margin of dumping led, in turn, to the levying of an amount of anti-dumping duty that exceeds the level at which the margin of dumping would have been established if the disciplines of Article 2 had been properly observed.

7.34. For the foregoing reasons, we reject the European Union's request and conclude that the claim under Article 9.3 of the Anti-Dumping Agreement set forth in paragraph 2(B)(6) of Argentina's panel request falls within our terms of reference.

7.2.3 Objection concerning the claims of inconsistency with Article VI:1 of the GATT 1994 in paragraphs 2(A)(1) and 2(A)(2) of Argentina's panel request

7.35. The European Union submits that Argentina's claims under Article VI:1 of the GATT 1994 against Article 2(5) of the Basic Regulation in paragraphs 2(A)(1) and 2(A)(2) of Argentina's panel request fall outside the scope of the Panel's terms of reference as they are new claims which were not included in Argentina's request for consultations, and which expand the scope of the dispute.[71]

7.2.3.1 Main arguments of the parties

7.2.3.1.1 European Union

7.36. The European Union contends that Argentina's request for consultations did not contain any claims based on Article VI:1 of the GATT or any claims regarding Article 2(5) of the Basic Regulation based on the GATT 1994 more generally.[72] For the European Union, the claims under Article VI:1 set out in paragraphs 2(A)(1) and 2(A)(2) of Argentina's panel request expand the original scope of the dispute, and there are no facts that suggest that these new claims might reasonably be said to have evolved from the consultations.[73] In particular, the European Union submits that nothing prevented Argentina from presenting the same claims in the request for consultations, as is evidenced by the fact that the request for consultations contains other claims regarding the same provision. Further, the European Union asserts that the addition of these new claims is indicative of Argentina's view that this provision has a different scope to the provisions of the Anti-Dumping Agreement listed in its request for consultations, and thus, the "essence" of these respective provisions and claims is different.[74]

[71] European Union's request for a preliminary ruling, paras. 41-44. We note that the European Union stated in its first written submission that Argentina has not developed its Article VI:1 of the GATT 1994 claims against Article 2(5) of the Basic Regulation in the course of the proceedings, and that Argentina's claims in this regard are reliant on its other claims pertaining to Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. The European Union adds that this being the case, the claims are of very limited relevance for the present dispute. The European Union nonetheless invites the Panel to consider whether this claim is properly within its terms of reference. (European Union's first written submission, paras. 43 and 44). We understand from this that the European Union persists with its jurisdictional objection with respect to these claims.

[72] European Union's request for a preliminary ruling, para. 41.

[73] European Union's request for a preliminary ruling, para. 42.

[74] European Union's request for a preliminary ruling, para. 43.

7.2.3.1.2 Argentina

7.37. Argentina first notes that it has limited the claims set out in paragraphs 2(A)(1) and 2(A)(2) of its panel request to Article VI:1(b)(ii) of the GATT 1994.[75] In addition, Argentina submits that nothing prevents it from adding provisions that are identical in scope to an existing claim on which consultations were held.[76] Argentina considers that the claim does not expand the scope of the dispute, and, in its view, a comparison of the text and context of that provision, and the provisions of the Anti-Dumping Agreement cited in its request for consultations, demonstrates that those sets of provisions do not differ in essence or scope.[77] Argentina draws on criteria mentioned by the panel in *China – Broiler Products* to argue that there is a strong connection between the panel request and the request for consultations due to the obligations at issue (obligation to construct normal value on the basis of the cost of production of the producers, and cost in the country of origin) being the same, and the factual circumstances leading to the alleged violation (failure to allow, in the costs calculation, for the use of costs in the country of production, and failure to require that the costs be calculated on the basis of producers' records) being identical.[78] Argentina also submits that Article VI:1 of the GATT 1994 is cited in its request for consultations in respect of "as applied" claims that are similar to the "as such" claims at issue. On the basis of the foregoing, Argentina submits that "consultations were held" with the European Union on Article VI:1(b)(ii) of the GATT 1994 regarding Argentina's claims under paragraphs 2(A)(1) and 2(A)(2) of its panel request.[79]

7.2.3.2 Arguments of the third parties

7.38. **Mexico** submits that the Appellate Body has established that Articles 4 and 6 of the DSU do not require a precise and exact identity between the request for consultations and the panel request with respect to the "legal basis" of the complaint.[80] According to Mexico, the Panel should look at whether the allegedly "new claims" actually derive from claims previously identified by Argentina in the request for consultations, and should consider whether "some connection" exists between the respective claims.[81]

7.2.3.3 Evaluation by the Panel

7.39. The European Union's objection concerns the relationship between the claims set forth in Argentina's consultations request, on the one hand, and those set forth in its panel request, on the other.

7.40. Pursuant to Article 7.1 of the DSU, a panel's terms of reference are normally defined on the basis of the panel request made pursuant to Article 6.2 of the DSU. However, the request for consultations made under Article 4 of the DSU constitutes a prerequisite for the panel request.[82] Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[83] Moreover, "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them".[84] As a result, the request for consultations circumscribes the scope of the panel request and, therefore, the panel's terms of reference.[85]

7.41. However, Articles 4 and 6 do not "require a precise and exact identity" between the specific provisions of the covered agreements identified in the request for consultations, and those

[75] Argentina's response to the European Union's request for a preliminary ruling, para. 81.
[76] Argentina's response to the European Union's request for a preliminary ruling, para. 83.
[77] Argentina's response to the European Union's request for a preliminary ruling, para. 85.
[78] Argentina's response to the European Union's request for a preliminary ruling, para. 85 (referring to Panel Report, *China – Broiler Products*, para. 7.224).
[79] Argentina's response to the European Union's request for a preliminary ruling, para. 86.
[80] Mexico's submission on the European Union's request for a preliminary ruling, para. 9 (citing Appellate Body Report, *Brazil – Aircraft*, para. 131).
[81] Mexico's submission on the European Union's request for a preliminary ruling, para. 11 (citing Panel Report, *India – Agricultural products*, para. 3.48).
[82] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.
[83] Appellate Body Report, *Brazil – Aircraft*, para. 131.
[84] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[85] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 137.

identified in the panel request.[86] This is because a complaining party may come to know of additional information during consultations – for example, it may develop a better understanding of the operation of a challenged measure – that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent.[87] Thus, it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations.[88] In other words, the addition of provisions must not have the effect of changing the essence of the complaint.[89]

7.42. Paragraphs 2(A)(1) and (2) of Argentina's panel request provide, in relevant part:

> Argentina considers that Article 2(5) of the Basic Regulation is inconsistent as such with, *inter alia*, the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"):
>
> > 1. Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, because these provisions do not permit to adjust or establish the cost of production on the basis of data or information other than that in the country of origin.
> >
> > 2. Articles 2.2, 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 for two reasons: first, since these provisions require that the costs be calculated on the basis of the records kept by the producers under investigation when 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 and do not permit to adjust or replace the costs actually incurred by the producers under investigation by other costs simply because they are considered to be artificially low or distorted; secondly, since these provisions require that the costs used be associated with the production and sale of the product under consideration.

7.43. The corresponding paragraphs of Argentina's request for consultations appear to be paragraphs b(1) and (2), which set forth claims under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. These two paragraphs indicate that Argentina is seeking consultations with respect to:

> 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 in that it establishes that 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. This measure appears to be inconsistent *as such* with the following obligations of the European Union:
>
> > 1. Article 2.2 of the Anti-Dumping Agreement, which requires that the cost of production *in the country of origin* be used to determine the margin of dumping on the basis of a comparison between the export price and the production cost plus a reasonable amount for administrative, selling and general costs and for profits;

[86] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[87] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[88] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[89] Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 137; *US – Shrimp (Thailand) / US – Customs Bond Directive,* para. 293.

> 2. Article 2.2.1.1 of the Anti-Dumping Agreement, which requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation … . (emphasis original; fn omitted)

7.44. Neither Article VI:1 nor any other provision of the GATT 1994 is mentioned in these paragraphs of Argentina's request for consultations.[90]

7.45. As Article VI:1 of the GATT 1994 was added as a legal basis for the claims set out in paragraphs 2(A)(1) and 2(A)(2) of Argentina's panel request, we now consider whether the addition of this provision as a legal basis for those claims changes the essence of the complaint or whether the legal basis for these claims may reasonably be said to have evolved from the legal basis that formed the subject of consultations.

7.46. We first consider the texts of the provisions at issue. Article VI:1 of the GATT 1994 provides, in relevant part[91]:

> [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 …
>
> (ii) *the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit*. (emphasis added)

7.47. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement provide, in relevant part, that:

> 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, 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*.
>
> ...
>
> 2.2.1.1 *For the purpose of paragraph 2*, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation,

[90] However, paragraph b(3) of Argentina's consultations request alleges that Article 2(5) of the Basic Regulation violates:

> Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the Anti-Dumping Agreement, since the European Union did not take all of the necessary measures to ensure conformity of its laws, regulations and administrative procedures *with the provisions of the GATT 1994* and the Anti-Dumping Agreement. (emphasis added)

We also note that paragraphs (a) 1 and 2 of Argentina's request for consultations include "as applied" claims under Article VI:1 of the GATT 1994 with respect to the anti-dumping measures imposed by the European Union on biodiesel from Argentina and the underlying investigation. These paragraphs indicate that Argentina is seeking consultations with respect to these measures and allege that they are inconsistent with:

> 1. Article 2.1, 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and *Article VI:1 of the GATT 1994*, because the European Union did not calculate the costs on the basis of the records kept by the exporters or producers under investigation and because the European Union did not properly determine the costs of production;
>
> 2. Article 2.1 and 2.2 of the Anti-Dumping Agreement and *Article VI:1 of the GATT 1994*, because in constructing the normal value, the European Union did not use the production cost in the country of origin … . (emphasis added)

[91] Before the Panel, Argentina clarified that the claims in paragraphs 2(A)(1) and 2(A)(2) of its panel request pertain not to Article VI:1 in its entirety, but rather, are limited to Article VI:1(b)(ii) of the GATT 1994. (Argentina's response to the European Union's request for a preliminary ruling, para. 81). We must rule on the European Union's objection on the basis of the text of Argentina's panel request rather than on the basis of Argentina's representations before the Panel. Nonetheless, the narrative of paragraphs 2(A)(1) and (2) of its panel request makes it clear that Argentina's claims therein are limited to Article VI:1(b)(ii).

> 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*. (emphasis added; fn omitted)

7.48. Based on our understanding of the foregoing extracts, we consider that there is a close correlation between the content – in terms of the obligations imposed – of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, on the one hand, and Article VI:1(b)(ii) of the GATT 1994, on the other. In particular, these provisions concern, *inter alia*, whether a product is to be considered as being introduced into the commerce of an importing country at less than its normal value by reference to the cost of production in the country of origin in instances where domestic prices are unavailable or unsuitable.

7.49. We next consider the texts of the claims in Argentina's request for consultations, on the one hand, and the corresponding claims in Argentina's panel request, on the other. As noted above, paragraph 2(A)(1) of Argentina's panel request specifically claims that Article 2(5) of the Basic Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1 of the GATT 1994 on the basis that these provisions "do not permit to adjust or establish the cost of production on the basis of data or information other than that in the country of origin".[92]

7.50. This can be juxtaposed against Argentina's request for consultations. The consultations request alleges that whereas Article 2.2 of the Anti-Dumping Agreement "requires that the cost of production *in the country of origin* be used to determine the margin of dumping"[93], Article 2(5) of the Basic Regulation:

> [E]stablishes that 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.[94]

7.51. Paragraph 2(A)(2) of Argentina's panel request claims that Article 2(5) of the Basic Regulation is inconsistent with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and with Article VI:1 of the GATT 1994, on the basis that these provisions:

> [R]equire that the costs be calculated on the basis of the records kept by the producers under investigation when 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 and do not permit to adjust or replace the costs actually incurred by the producers under investigation by other costs simply because they are considered to be artificially low or distorted; … [and] that the costs used be associated with the production and sale of the product under consideration.[95]

7.52. This can be juxtaposed against the language of paragraph b(2) of Argentina's consultations request, which alleges, for the same reasons as under paragraph b(1), that Article 2(5) of the Basic Regulation is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement, which "requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation".

7.53. When these claims are compared, it is apparent to us that they are sufficiently similar in terms of the alleged circumstances leading to the alleged violation and that the "essence" of these claims is the same. In particular, the claims under paragraph 2(A)(1) of the panel request and b(1) of the consultations request both concern the fact that Article 2(5) is inconsistent with an alleged prohibition against determining the cost of production on a basis other than data or information in the country of origin. The claims under paragraph 2(A)(2) of the panel request and

[92] WT/DS473/5, para. 2(A)(1).
[93] WT/DS473/1, para. b(1). (emphasis original)
[94] WT/DS473/1, chapeau of para. b.
[95] WT/DS473/5, para. 2(A)(2).

under paragraph b(2) of the consultations request both take issue with the fact that Article 2(5) of the Basic Regulation allegedly makes it permissible to determine the cost of production on a basis other than the records kept by the producers, despite those records conforming to the specified requirements.

7.54. In view of the foregoing, we consider that there is a close and clear relationship between the claims set forth in the request for consultations, on the one hand, and those included in the panel request, on the other, in terms of the obligations at issue, the provisions cited, the measure being challenged, and the alleged violation resulting from this measure. Therefore, in our view, the claims in the panel request may reasonably be said to have evolved from those in the request for consultations such that the essence of the dispute has not been changed by the addition of Article VI:1 as a legal basis for the claims included in the panel request.[96]

7.55. For these reasons, we conclude that these claims under Article VI:1 of the GATT 1994 do fall within our terms of reference.

7.2.4 Objection concerning the claim of inconsistency with Article 2.2 of the Anti-Dumping Agreement in paragraph 2(A)(2) of Argentina's panel request

7.56. The European Union initially requested that the Panel find that the "as such" claims of inconsistency against Article 2(5) of the Basic Regulation with the requirement in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement that "the costs used be associated with the production and sale of the product under consideration" contained in paragraph 2(A)(2) of Argentina's panel request are new claims not included in Argentina's request for consultations and, as a result, fall outside the Panel's terms of reference.[97] Specifically, the European Union contended that these claims in Argentina's panel request introduce a new legal basis not found in Argentina's consultations request, namely, Article 2.2 of the Anti-Dumping Agreement, and further, that they introduce a new type of complaint, namely, the alleged use of costs not "associated with the production and sale of the product under consideration".[98] As mentioned above, in its first written submission, the European Union appeared to take the view that Argentina had abandoned the claim against Article 2(5) of the Basic Regulation for the "second reason" mentioned in paragraph 2(A)(2) of Argentina's panel request, namely, that the costs used are allegedly not "associated with the production and sale of the product under consideration".[99] As we discuss above, the parties appear to concur that this aspect of the European Union's request for a preliminary ruling is moot.[100] However, we also note that, in its discussion of one of the objections that were not moot, the European Union stated the following[101]:

> In these circumstances, the question of whether the claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT are within the Panel's terms of reference is of very limited value for the present dispute. For this reason, the European Union invites the Panel to consider whether this claim is properly within its terms of reference, but will not discuss the issue any further.[*]
>
> _____
>
> [*fn original][43] The same is true for Argentina's reference to Article 2.2 of the Anti-Dumping Agreement, mentioned in Paragraph 2(A)2 of its Panel Request and in paragraph 133 of its First Written Submission.

7.57. Thus, the European Union appears to call upon the Panel to consider whether Argentina's reference to Article 2.2 of the Anti-Dumping Agreement in paragraph 2(A)(2) of its panel request insofar as it relates to the first basis specified in paragraph 2(A)(2) – namely, the EU authorities'

[96] The fact that Argentina could already have included a claim against Article 2(5) of the Basic Regulation under Article VI:1 of the GATT 1994 in light of, notably, the inclusion of an "as applied" claim under this provision challenging the anti-dumping measures imposed by the European Union on biodiesel from Argentina does not, in our view, mean that the Article VI:1 claim against Article 2(5) of the Basic Regulation could not reasonably be said to have evolved from the corresponding claims included in Argentina's request for consultations.

[97] European Union's request for a preliminary ruling, paras. 45-49.

[98] European Union's request for a preliminary ruling, para. 46.

[99] See above, para. 7.12.

[100] See above, para. 7.13.

[101] European Union's first written submission, para. 44 and fn 43 thereto.

alleged failure to calculate the costs on the basis of the records kept by the producers/exporters under investigation – is within the Panel's terms of reference.[102] Accordingly, we now consider the European Union's objection in this respect.

7.2.4.1 Main arguments of the parties

7.2.4.2 European Union

7.58. With respect to its objection pertaining to Article 2.2 of the Anti-Dumping Agreement, the European Union argues that the allegedly new claims in paragraph 2(A)(2) of Argentina's panel request expand the scope of the dispute and change the essence of the complaint by introducing a new legal basis. In particular, the European Union argues that the corresponding portion of Argentina's request for consultations only included a claim based on Article 2.2.1.1 of the Anti-Dumping Agreement, rather than on Article 2.2.[103] The European Union submits that the addition of Article 2.2 could not "'reasonably be said to have evolved' from the consultations" given that Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of the Basic Regulation at the time of its consultations request, and was aware of all the facts that would have allowed it to articulate this claim in its consultations request, particularly as Argentina's consultations request already included "as applied" claims alleging a violation of Article 2.2.[104]

7.2.4.2.1 Argentina

7.59. Argentina disagrees with the European Union's contention that it added a provision in the panel request. Argentina argues that paragraph 2(A)(2) of its panel request should not be read by reference to paragraph b(2) of its request for consultations only. Rather, Argentina submits that the issue of the calculation of costs for the purpose of the construction of normal value is also addressed in paragraph b(1) of its request for consultations, which refers to Article 2.2 of the Anti-Dumping Agreement. On this basis, Argentina argues that consultations were held on Article 2.2 and with respect to the same substantive obligations at issue. Moreover, Argentina argues, there is a clear and logical connection between Article 2.2.1.1 and Article 2.2, the former being a specific provision governing the calculation of costs for the construction of normal value while the latter concerns, among other matters, the construction of normal value and its components, including the cost of production. Argentina submits that consultations on the calculation of costs for the construction of normal value pursuant to Article 2.2.1.1 logically also cover the construction of normal value pursuant to Article 2.2, when such costs are being included in the construction of normal value. Therefore, even assuming that Argentina had only referred to Article 2.2.1.1 in its consultations request, the inclusion of Article 2.2 in the panel request can "reasonably be said to have evolved" from the consultations.[105]

7.2.4.2.2 Arguments of the third parties

7.60. **China** submits that Article 2.2 of the Anti-Dumping Agreement was invoked to challenge Article 2(5) of the Basic Regulation in both the request for consultations and the panel request.[106] Thus, it appears to China that Argentina has not added a new legal basis in the panel request, but has merely clarified or reformulated the connection between the challenged measure and the legal basis. Further, China submits that Articles 4.4 and 6.2 of the DSU set different requirements for the request for consultations and the panel request; in particular, it is sufficient for a consultations request to include an *indication* of the legal basis for the complaint. Therefore, the terms "which requires" in the consultations request, in contrast with the terms "because" or "for two reasons"

[102] Moreover, we recall that the Appellate Body has stated that "the vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings … panels must deal with such issues – if necessary on their own motion – in order to satisfy themselves that they have authority to proceed". (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36)

[103] European Union's request for a preliminary ruling, para. 46.

[104] European Union's request for a preliminary ruling, paras. 45 and 46.

[105] Argentina's response to the European Union's request for a preliminary ruling, paras. 87-94.

[106] China's third-party submission, para. 12.

used in the panel request, suggest that Argentina's intention in the consultations request was not to "present the problem clearly" but just to indicate the legal basis of the claim.[107]

7.2.4.2.3 Evaluation by the Panel

7.61. As we have noted in the previous subsection, the claim set forth in paragraph 2(A)(2) of Argentina's panel request corresponds to the claim set forth in paragraph b(2) of Argentina's request for consultations. Hence, Argentina's panel request added a reference to Article 2.2 in a claim which already cited Article 2.2.1.1.

7.62. In light of the close relationship and – to some extent – even identity between the measure that is being challenged, the grounds for the alleged violation, and the obligations and provisions involved, we are of the view that the Article 2.2 claim can reasonably be said to have evolved from the Article 2.2.1.1 claim set forth in the request for consultations.[108] In particular, with respect to the obligations at issue, we note that Article 2.2.1.1 is a subparagraph of Article 2.2 and serves to further refine the obligation set forth under that provision as it provides how the "cost of production in the country of origin" is to be determined. Moreover, the corresponding paragraphs of the request for consultations and of the panel request make it clear that Argentina takes issue in both documents with the fact that Article 2(5) of the Basic Regulation allegedly permits not constructing the cost of production on the basis of producers' records. The language of Argentina's panel request clearly implies that the alleged violation of Article 2.2 is closely related to the alleged violation of Article 2.2.1.1.

7.63. Moreover, we note that Argentina's consultations request already included an *"as applied"* claim under Article 2.2 challenging the EU authorities' failure to calculate the costs *on the basis of the records kept by the producers/exporters* under investigation similar to the "as such" claim to which the European Union objects. Argentina's consultations request also included an "as such" claim under Article 2.2 based on the requirement to construct the normal value using the cost of production *in the country of origin*. The fact that Argentina's consultations request already included these claims under Article 2.2, does not, in our view, mean that the scope of the dispute was broadened by the addition in its panel request of an "as such" claim under Article 2.2 challenging the failure to calculate the costs *on the basis of the records kept by the producers/exporters* under investigation. In particular, in our view, the addition of a reference to Article 2.2 in a claim already listing Article 2.2.1.1 is indicative of a further refinement of the legal basis for the claim that was in the request for consultations. Thus, it does not follow that the addition of Article 2.2 in paragraph 2(A)(2) of Argentina's panel request could not reasonably have evolved from the corresponding claim in Argentina's request for consultations on the basis that this provision had already been cited in the request for consultations in another sense.

7.64. In light of the foregoing, we find that the claim of inconsistency with Article 2.2 of the Anti-Dumping Agreement set forth in paragraph 2(A)(2) of Argentina's panel request falls within our terms of reference.

7.65. Having considered the request of the European Union for a preliminary ruling on the terms of reference of the Panel, we now turn to address the "as such" and "as applied" claims of Argentina.

7.3 Argentina's claims concerning whether Article 2(5), second subparagraph, of the Basic Regulation is inconsistent "as such" with 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

7.3.1 Introduction

7.66. Argentina makes a number of claims pertaining to Article 2(5), second subparagraph, of the Basic Regulation, both "as such" and with respect to the application of this provision in the EU anti-dumping measures on biodiesel from Argentina.

[107] China's third-party submission, para. 13.
[108] We also refer, in this respect, to our considerations in section 7.2.3.3.

7.67. Argentina's claims raise complex questions pertaining to the interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 that have not been addressed previously by panels or the Appellate Body concerning the following issues:

a. whether, under Article 2.2.1.1 of the Anti-Dumping Agreement, an investigating authority may find that a producer/exporter's records do not "reasonably reflect the costs associated with the production and sale of the product under consideration" on the ground that the records reflect costs (notably for inputs) that the authority considers to be abnormally or artificially low due to an alleged distortion; and

b. whether an investigating authority may, under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, adjust or calculate the producer/exporter's costs of production by using information pertaining to prices prevailing on other markets than the market of the country of origin when it has been determined that a producer/exporter's records do not "reasonably reflect" the costs of production and sale.

7.68. In this section, we consider Argentina's claims that Article 2(5), second subparagraph, of the Basic Regulation is "as such" (i.e. independently of its application in specific instances), inconsistent with the covered agreements. We address Argentina's "as applied" claims in the following section of this Report.

7.69. With respect to its claims concerning Article 2(5), second subparagraph, of the Basic Regulation "as such", specifically, Argentina claims that:

a. by providing that the authorities shall reject or adjust the cost data of the producers/exporters as included in their records when those costs reflect prices which are "abnormally or artificially low" because they are affected by an alleged distortion, Article 2(5), second subparagraph, of the Basic Regulation is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement; and this violation in turn leads to a violation of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994;

b. by providing that the costs shall be adjusted or established in certain cases "on any other reasonable basis, including information from other representative markets", Article 2(5), second subparagraph, of the Basic Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994; and

c. as a consequence of these violations, 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.[109]

7.3.2 Relevant provisions of the covered agreements

7.70. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement provide as follows:

> 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, 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. (fn omitted)
>
> ...

[109] Argentina's first written submission, paras. 87, 133-134, 142, and 468-469; second written submission, para. 252.

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. 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.[*]

_____

[*fn original][6] 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.

7.71. Article VI:1 of the GATT 1994 reads, in relevant part:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party 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*) ... is less than ...

...

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

7.3.3 Factual background

7.72. Article 2 of the Basic Regulation provides, in relevant part:

Article 2

Determination of dumping

A. NORMAL VALUE

1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.

...

2. Sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5% or more of the sales

> volume of the product under consideration to the Community. However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.
>
> 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.

7.73. Argentina challenges only the second subparagraph of Article 2(5) above and not any other part or provision of the Basic Regulation.[110]

7.3.4 Main arguments of the parties

7.3.4.1 Argentina

7.74. Argentina argues that the second subparagraph of Article 2(5) contains a rule that:

> [W]hen the costs associated with the production and sale of the product concerned are not reasonably reflected in the records of the producer concerned, that is, according to the European Union, when the prices of the raw materials included in the records of the exporters are considered as being abnormally or artificially low because the market is regulated or because of some alleged distortion, then they must be adjusted or established on the basis of the costs of other producers in the same country, or on any other reasonable basis, including information from other representative markets.[111]

[110] We use the terminology used by the European Union, which has referred to this provision as the "second subparagraph of Article 2(5)". Before the Panel, Argentina initially referred to the second subparagraph of Article 2(5) of the Basic Regulation as the "second *paragraph*" of this provision, but later adopted the European Union's terminology. In addition, the European Union notes that the General Court of the European Union has referred to the same subparagraph as the "second sentence of the first subparagraph" of Article 2(5) of the Basic Regulation (the General Court refers to the first subparagraph of Article 2(5) as the "first sentence of the first subparagraph" of this provision).

[111] Argentina's first written submission, para. 2. See also Argentina's first written submission, para. 86.

7.75. Argentina adds that this rule is "reflected in the continued and consistent practice of the European Union"[112], but indicates that it is not challenging this alleged consistent practice as a separate measure at issue.

7.76. In support of its interpretation of the second subparagraph of Article 2(5), Argentina submits evidence pertaining to the text of this provision, its legislative history, its consistent application by the EU authorities, and judgments of the General Court of the European Union.

7.77. With respect to the text of the provision at issue, Argentina argues that Article 2(5), first subparagraph, only repeats the general rule under Article 2.2.1.1 that when the records reasonably reflect the costs associated with the production and sale of the product under consideration and are in accordance with generally accepted accounting principles (GAAP), those records must be used. However, the first subparagraph does not lay down the criteria that must lead to the determination that the records do not reasonably reflect the costs. Argentina submits that it is the second subparagraph of Article 2(5) that gives meaning and content to the situations in which the records are to be found not to reasonably reflect the costs of production and sale of the product under investigation. According to Argentina, it is the second subparagraph that leads to the determination that records do not reasonably reflect costs if the prices for inputs are artificially or abnormally low due to an alleged distortion. This is clarified by the fact that the second subparagraph requires the authorities to adjust or establish the costs on any other reasonable basis, including information from other representative markets, where information from the domestic market cannot be used. Thus, Argentina argues, the second subparagraph of Article 2(5) provides the legal basis for disregarding the records of the producers in those situations.[113] Argentina also argues that Article 2(5), second subparagraph, establishes a mandatory rule in this respect: where this condition is met, then the second part of the sentence automatically applies, i.e. the recorded costs must be adjusted or established on another basis, including potentially, "from other representative markets".[114]

7.78. With respect to the legislative history[115] of the second subparagraph of Article 2(5), Argentina submits that this subparagraph was introduced by Council Regulation 1972/2002 at the same time as the Russian Federation was granted full market economy status, with the purpose of allowing the EU authorities to continue to apply non-market economy techniques in investigations involving products from the Russian Federation. Argentina draws attention to Recital 4 of Council Regulation 1972/2002, which it submits sheds light on the meaning of Article 2(5), second subparagraph, by making it clear that it was added in order to provide a legal basis for the authorities to reject the cost data included in the records when those costs are found to be "artificially low" or "abnormally low" because they are affected by a "distortion" and to adjust or replace these costs by data which are not affected by such "distortion".[116] Argentina also refers to Article 2(3), second subparagraph, of Council Regulation 1972/2002, which was added to clarify what circumstances could be considered as constituting a "particular market situation". Argentina argues that, taken together, Recital 4 and the second subparagraph of Article 2(3) clarify that the opening phrase of the second subparagraph of Article 2(5), viz. "[i]f costs associated with the production and sale of the product … are not reasonably reflected in the records", refers to situations where prices are abnormally or artificially low or affected by a distortion.

7.79. With respect to the consistent practice of the EU authorities in applying the second subparagraph of Article 2(5), Argentina argues that the EU authorities have followed the practice that if the prices of certain raw materials are, in their view, "abnormally or artificially low" in comparison with the prices in other markets, that means that the costs associated with the production and sale of the product under investigation are not reasonably reflected in the producer's records, notwithstanding the fact that the records may have accurately reported the actual prices paid by the producers/exporters.

7.80. Argentina refers the Panel to four judgments of the General Court of Justice of the European Union in which the General Court considered issues pertaining to the application of

[112] Argentina's first written submission, para. 2.
[113] Argentina's second written submission, paras. 16-20.
[114] Argentina's first written submission, para. 55.
[115] Argentina refers to this evidence as the "historical perspective". (Argentina's first written submission, section 4.1.2)
[116] Argentina's second written submission, paras. 27-28 and 33.

Article 2(5).[117] Argentina argues that these judgments, and particularly the judgment of the Court in *Acron*, confirm that the second subparagraph to Article 2(5) covers situations where prices are regulated or distorted.[118]

7.81. Argentina claims that Article 2(5), second subparagraph, is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement (and, as a consequence, with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994) because it 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, whereas Article 2.2.1.1 requires that that determination be solely made by reference to the costs actually incurred by the producer and reflected in its records.[119] In addition, Argentina submits that even if the authorities had the discretion alleged by the European Union, the mere fact that Article 2(5), second subparagraph, provides for the possibility to find that the records do not reasonably reflect the costs on the ground that costs are artificially or abnormally low would render it inconsistent with Article 2.2.1.1.[120]

7.82. In addition, Argentina claims that Article 2(5), second subparagraph, is inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 as it provides that, where the costs of other producers or exporters in the same country are not available or cannot be used, the costs shall be adjusted or established on "any other reasonable basis, including information from other representative markets", i.e. it provides for the use of costs not in the country of origin in establishing a producer's costs of production.

7.83. By contrast, Argentina argues, Article 2.2 of the Anti-Dumping Agreement requires that, when the margin of dumping is established by comparison with a constructed normal value, the comparison shall be made with "the cost of production in the *country of origin*".[121] Argentina submits that the term "shall" denotes an obligation, and the term "country of origin" refers to the exporting country. Article V1:1(b)(ii) of the GATT 1994 similarly refers to "the cost of production of the product in the country of origin".[122] For Argentina, the "cost of production in the country of origin" refers to the "price to be paid for the act of producing" in the country of origin, which necessarily implies that the evidence or data used are those in the country of origin.[123] Assuming for the sake of argument that evidence outside the country of origin could be used, Argentina considers that adjustments would need to be made in order to ensure that it correctly reflects the situation in the country of origin[124], and it would need to be demonstrated how such evidence reflects the "cost of production" in the exporter's country of origin.[125] On this basis, Argentina rejects what it considers to be an artificial distinction drawn by the European Union between the "cost" and the "evidence", whereby evidence from outside the country of origin could be used to determine the cost of production in the country of origin.

7.84. In this respect, Argentina argues that in Article 2(5), second subparagraph, the "information from other representative markets" constitutes the evidence which is used to determine the cost of production. However, the mere fact that evidence is used "for the purposes" of determining the "cost of production in the country of origin" does not demonstrate that such evidence reflects the situation in the country of origin. Moreover, Argentina submits that the consistent practice of the EU authorities actually confirms the absence of a "connection" or "nexus" between the evidence

[117] Argentina's first written submission, paras. 80-85; response to Panel question Nos. 23 (para. 59), 26 (para. 81), and 35 (para. 99).
[118] Argentina's first written submission, para. 85.
[119] See below, paras. 7.186-7.191 for a more detailed summary of Argentina's arguments on the interpretation of Article 2.2.1.1.
[120] Argentina's opening statement at the first meeting of the Panel, para. 74; response to Panel question No. 24, para. 69; second written submission, paras. 147-149.
[121] Argentina's first written submission, para. 138. (emphasis original)
[122] Argentina's first written submission, para. 139.
[123] Argentina's second written submission, para. 154 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.481).
[124] Argentina's second written submission, para. 156; response to Panel question No. 20, paras. 55-58.
[125] Argentina's second written submission, para. 158.

used, namely the information from other representative markets, and the cost of production in the "country of origin".[126]

7.85. Argentina argues that, to establish that a measure is "as such" inconsistent with the covered agreements, it is not necessary to demonstrate that it leads to WTO-inconsistent results in each and every case. Rather, it is sufficient to demonstrate that the rule will necessarily lead to WTO-inconsistent results. Thus, Argentina considers that, whether Article 2(5), second subparagraph, grants discretion to the authorities or not is irrelevant; insofar as Article 2.2 prohibits the construction of normal value on a basis other than the cost of production in the country of origin, the fact that Article 2(5), second subparagraph, provides for the use of a basis other than the cost of production in the country of origin renders that measure inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[127]

7.86. In any event, Argentina argues, Article 2(5), second subparagraph, does not give the authorities "broad discretion" as is claimed by the European Union. Argentina submits that, under Article 2(5), second subparagraph, in every case where domestic information is not available or cannot be used, the authorities have to adjust or replace the costs on any other reasonable basis, including information from other representative markets.[128] Argentina argues that "any other reasonable basis" necessarily refers to information outside the country of origin[129], and that "other representative markets" necessarily is not "the cost of production in the country of origin". Argentina asserts that the consistent practice of the EU authorities confirms the absence of discretion since, in the cases referred to by Argentina, where the authorities have found that prices were "artificially low" or "abnormally low" because of a distortion, they have used information other than information from the country of origin.[130]

7.3.4.2 European Union

7.87. The European Union argues that, to succeed in its "as such" claims, Argentina must establish that Article 2(5) *requires* the EU authorities to act inconsistently with the relevant provisions of the covered agreements in all cases.[131] According to the European Union, neither the first nor the second subparagraph of Article 2(5) of the Basic Regulation mandates the EU authorities to act in any particular manner but, quite to the contrary, both provisions allow the EU authorities discretion.[132]

7.88. The European Union submits that the scope, meaning and content of the second subparagraph of Article 2(5) are clear "on its face", and that therefore, the consistency of this measure with the covered agreements must be assessed on the basis of the text of the legal instrument alone.[133] The European Union considers that Argentina attributes to the second subparagraph of Article 2(5) a meaning not found in its text.[134] The European Union argues that it is clear from the text of Article 2(5) that the determination whether a producer's records "reasonably reflect" the costs of production and sales is made under the first subparagraph of Article 2(5), and not under the second subparagraph of that provision.[135] The European Union asserts that the second subparagraph only describes what the authorities can do when one of the provisos of the first subparagraph is not met, and in such situations, gives them alternative options for establishing or adjusting the costs of production. The European Union also submits that the text of Article 2(5) does not include the terms – "abnormally low", "artificially distorted", "reflect market values", "regulated market" – used by Argentina in describing the alleged measure; that the second subparagraph does not define the notion of records that "reasonably

[126] Argentina's second written submission, paras. 156-158.
[127] Argentina's second written submission, paras. 161-166.
[128] Argentina's second written submission, para. 149.
[129] Argentina's response to Panel question No. 99, para. 66; comments on the European Union's response to Panel question No. 101, para. 33.
[130] Argentina's second written submission, paras. 161-166.
[131] European Union's first written submission, paras. 184-187 (quoting from, *inter alia,* Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483); second written submission, paras. 38 and 82.
[132] European Union's opening statement at the first meeting of the Panel, para. 61.
[133] European Union's first written submission, paras. 74 and 78 (quoting from Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168, referring in turn to Appellate Body Report, *US – Carbon Steel*, para. 157).
[134] European Union's first written submission, para. 71.
[135] European Union's first written submission, para. 78.

reflect costs"; and that it does not impose on the authorities the obligation to treat as "unreasonable" cost data that are "abnormally or artificially low" or "distorted".[136]

7.89. The European Union argues that even if the scope, meaning and content of the second subparagraph of Article 2(5) were not clear "on its face", *quod non*, none of the other evidence invoked by Argentina supports Argentina's reading of the measure at issue.

7.90. With respect to the legislative history, the European Union argues that the introduction of the second subparagraph in 2002 had no impact on the scope, meaning or content of the terms "reasonably reflects costs" in Article 2(5) since those terms already existed in that Article and the EU authorities had determined that records did not reasonably reflect costs based on similar grounds in many cases even prior to that date.[137] The European Union also argues that Recital 4 of Council Regulation 1972/2002 and the second subparagraph of Article 2(3) are not relevant to the interpretation of the second subparagraph of Article 2(5) as they pertain to only one of the two situations under the Basic Regulation where the authorities may construct the normal value, i.e. where there is a "particular market situation".[138]

7.91. With respect to the evidence submitted by Argentina on the "consistent practice" of the EU authorities applying the measure, the European Union argues that Argentina needs to establish that: (i) the practice forms an integral part of (i.e. is not distinct from) the measure itself and that it is necessarily applied in all instances; and (ii) that the practice is required by the measure and constitutes a binding requirement to apply the measure in the same way in all cases.[139] The European Union considers that Argentina fails to establish any of these requirements. Moreover, the European Union argues that the examples of alleged consistent practice of the EU authorities cited by Argentina do not support its interpretation because: (i) in the precedents cited by Argentina, the EU authorities invoke the first, rather than the second, subparagraph of Article 2(5) in the analysis of whether company records "reasonably reflect" costs; (ii) Argentina cites too few examples and its examples mostly pertain to the issue of dual pricing of gas in Russia; and (iii) Argentina excludes cases where the EU authorities found that company records did not reasonably reflect costs on grounds other than the artificially low value of inputs.[140]

7.92. The European Union argues that the judgments of the General Court of the European Union cited by Argentina do not support Argentina's assertions because: (i) they make clear that the determination of whether company records "reasonably reflect" costs is made pursuant to the first rather than the second subparagraph of Article 2(5); and (ii) they confirm that Article 2(5) entitles – but does not require – the EU authorities to find that the records do not "reasonably reflect costs" if the prices are "abnormally or artificially low".[141]

7.93. In sum, the European Union argues that Article 2(5), second subparagraph, is not inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement because it does not govern the determination whether producers' costs are reasonably reflected in their records or provide criteria for the authorities to make such a determination, let alone require them to reach a determination that the costs are not reasonably reflected in a producer's records in the situations identified by Argentina. Moreover, the European Union considers that Article 2.2.1.1 does not require an authority to determine whether a producer's records "reasonably reflect" the costs of production and sale solely with reference to the costs actually incurred by that producer, but allows it to examine whether the costs themselves are "reasonable".[142]

7.94. With respect to Argentina's claim under Article 2.2 of the Anti-Dumping Agreement, the European Union argues that Argentina misinterprets Article 2(5), second subparagraph, when it asserts that this provision establishes a mandatory rule. According to the European Union, this provision affords the EU authorities broad discretion in choosing between different options to establish or adjust the costs, imposes no limitation or direction as to what constitutes an "other

[136] European Union's first written submission, paras. 79-87.
[137] European Union's first written submission, paras. 89-92.
[138] European Union's first written submission, paras. 93-98.
[139] European Union's first written submission, paras. 118 (quoting from Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.460, 4.474, 4.476, 4.477, and 4.480), and 119-126.
[140] European Union's first written submission, paras. 100 and 102-105.
[141] European Union's first written submission, paras. 106-115.
[142] See below, paras. 7.194-7.201 for a more detailed summary of the European Union's arguments on the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

representative market", and does not prescribe that the latter should be a market outside the country of origin.[143] Thus, the European Union submits, the text of Article 2(5), the judgments of EU courts, and the EU authorities' determinations in prior investigations all show that Article 2(5), second subparagraph, does not require the authorities to use information from other countries in all cases, as it does not require them to engage in any particular conduct and, much less, in any conduct necessarily inconsistent with the covered agreements.[144]

7.95. In addition, the European Union argues that, although Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 require that an investigating authority determine the costs of production in the country of origin, the *evidence* that may be used in constructing these costs is not subject to this limitation.

7.96. In particular, in respect of Article 2.2 of the Anti-Dumping Agreement, the European Union submits that the determination of a firm's costs of production in a particular country will typically require evidence pertaining to that country, but it cannot be excluded that evidence relating to that determination might originate in other countries. For example, evidence of the cost of imports might be verified by means of invoices issued by exporters in other countries.[145] Thus, the European Union contends that there is a conceptual distinction between the "costs", on the one hand, and the "evidence" pertaining to the determination of those costs, on the other.[146] The European Union argues that support for the distinction between costs and the evidence pertaining to the determination of costs can be found in the context of Article 2.2. The European Union refers in particular to the second sentence of Article 2.2.1.1 in this regard. The European Union notes that whereas "costs" in Article 2.2 refers to "the country of origin", the requirement to consider "all available evidence" in Article 2.2.1.1 in the proper allocation of such costs is not restricted in that way[147], and that Article 6.12 of the Anti-Dumping Agreement expressly provides that various groups outside the country of origin can provide information relevant to the investigation regarding dumping.[148] The European Union argues that the conditional permission in Article 2.2.2 of the Anti-Dumping Agreement to calculate amounts for administrative, selling, and general costs using "any reasonable method" supports its understanding, because it 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.[149]

7.97. In respect of Article VI:1(b)(ii) of the GATT 1994, the European Union submits that, pursuant to Article 17.6(i) of the Anti-Dumping Agreement, a criterion of reasonableness applies to the evidence used by investigating authorities in establishing the exporter's costs in the country of origin.[150]

7.3.5 Arguments of the third parties[151]

7.98. **Australia** considers that the mandatory/discretionary distinction is relevant to the Panel's analysis of Argentina's "as such" claims in the present dispute. Australia refers to the Appellate Body Report in *US – 1916 Act*, which endorsed the approach developed by GATT panels that only legislation which mandates WTO-inconsistent conduct can be challenged "as such".[152] Australia submits that this approach was recently confirmed by the Appellate Body in *US – Carbon*

[143] European Union's first written submission, paras. 174-183; opening statement at the second meeting of the Panel, paras. 114-118; comments on Argentina's response to Panel question No. 99, paras. 87-91.
[144] European Union's first written submission, paras. 184-187.
[145] European Union's first written submission, para. 193.
[146] European Union's first written submission, paras. 193 and 194.
[147] European Union's first written submission, para. 194.
[148] European Union's response to Panel question No. 20, para. 28.
[149] European Union's first written submission, paras. 197 and 198; second written submission, paras. 136 and 137.
[150] European Union's first written submission, paras. 203 and 204.
[151] The third parties' arguments on the interpretation of Article 2.2.1.1 are summarized below, in the section addressing Argentina's "as applied" claims. In addition, we note that some third parties made observations on Article 2.2 of the Anti-Dumping Agreement insofar as it may serve as context to the interpretation and application of Article 2.2.1.1 of the Anti-Dumping Agreement. (China's third-party response to Panel question No. 13, paras. 28-31; Colombia's third-party submission, para. 20; Russian Federation's third-party statement, paras. 9-11; Turkey's third-party statement, paras. 10-12). Since those observations were not connected directly to the present claim, they are not reflected in this section.
[152] Australia's third-party response to Panel question No. 19 (referring to Appellate Body Report, *US – 1916 Act,* paras. 88-89).

Steel (India), in which the Appellate Body rejected "as such" claims on the basis that the challenged measure did not *require* inconsistent conduct but instead was of a "discretionary nature".[153] Australia further notes that Argentina does not challenge the European Union's practice of application of Article 2(5), but only the provision itself. In this regard, Australia considers that the Appellate Body's findings in *US – Carbon Steel (India)* suggest that the practice must not be distinct and separate from Article 2(5) and that it must *require* the European Union to engage in inconsistent conduct.[154]

7.99. Australia submits that the "country of origin" requirement in Article 2.2 does not preclude evidence from being obtained from outside the country concerned.[155] However, the authorities should explain why the evidence is useful for providing a basis for comparison to determine dumping margins.

7.100. **China** submits that, in view of the special link between the first and second subparagraphs of Article 2(5), these two paragraphs simultaneously require the authority to make the same determination as to whether the company records "reasonably reflect" costs. China considers that, read together with Recital 4 of Council Regulation 1972/2002, the second subparagraph of Article 2(3) and Recital 3 of the same Council Regulation, the second subparagraph of Article 2(5) appears to require the investigating authority to reject the records of the parties concerned on the ground that "prices are artificially low" or for reasons relating to the situation of the entire market caused by governmental policy interventions.[156] China argues that this reading is confirmed by the EU authorities' practice in applying Article 2(5), which shows that they apply the two subparagraphs simultaneously, and that in determining whether the records reasonably reflect the costs, they compare the producer's costs with hypothetical costs that would be borne by a producer in a theoretical market where the prices of relevant inputs were not affected by governmental policy interventions.[157]

7.101. China argues that in order for a rule or norm of general and prospective application to be found to be inconsistent, "as such", with the Anti-Dumping Agreement, it is not necessary that it "mandate" a WTO-inconsistent outcome in every case; rather the complainant must provide evidence demonstrating that, *in defined circumstances*, the application of the impugned rule will necessarily lead to a violation of that Member's WTO obligations. China argues that Article 2(5), second subparagraph, appears necessarily to require the EU authorities to reject records of a producer/exporter that accurately account for the costs incurred by that producer/exporter for the sole reason that the recorded costs are "artificially low" compared to the hypothetical costs that would be incurred in a market unaffected by governmental policy interventions. This being the case, China argues, the impugned provision is inconsistent with Article 2.2.1.1. China also considers that Article 2(5), second subparagraph, appears to require, in the same situations, the adjustment of the costs recorded in the producer/exporter's records on the basis of information outside the country of origin when the costs of other producers/exporters in the same country are also "artificially low" and other "reasonable" bases are not available. China submits that Article 2.2 of the Anti-Dumping Agreement requires that the cost of production that may be used to construct normal value must be the cost "in the country of origin".[158] For China, evidence in the form of prices from outside the country of origin will not itself reflect costs in the country of origin.[159] China considers that by explicitly authorizing the EU authorities to act in violation of Article 2.2 by using information outside the country of origin, Article 2(5), second subparagraph, is "as such" inconsistent with Article 2.2 of the Anti-Dumping Agreement.[160]

[153] Australia's third-party response to Panel question No. 19 (referring to Appellate Body Report, *US – Carbon Steel (India),* para. 4.483). Australia submits that the relevance of the mandatory/discretionary distinction is also supported by Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review,* para. 89 and *US – Section 211 Appropriations Act*, para. 259; and Panel Report, *US – Section 301 Trade Act*, para. 7.53.

[154] Australia's third-party response to Panel question No. 20.

[155] Australia's third-party response to Panel question No. 12.

[156] China's third-party submission, paras. 85-90.

[157] China's third-party submission, paras. 92-99.

[158] China's third-party submission, para. 121.

[159] China's third-party response to Panel question No. 12, para. 25.

[160] China's third-party submission, paras. 79-80 (quoting from Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172), and 100-108; third-party response to Panel question No. 19, para. 37.

7.102. **Colombia** argues that a complainant bringing an "as such" claim must demonstrate that the challenged law has general and prospective application.[161] Colombia refers to previous panel and Appellate Body reports that indicate that evidence in support of an "as such" claim is not limited to the text of the measure, but can include, as appropriate, decisions and jurisprudence of domestic courts on the meaning of such laws, doctrine issued by legal experts and examples of application of the challenged law.[162] Thus, Colombia argues, the Panel should take into consideration all the evidence submitted by the parties in examining Argentina's "as such" claims.[163]

7.103. **Indonesia** submits that previous Appellate Body reports suggest that evidence submitted by Argentina in support of its "as such" claim beyond the text of the measure, including the legislative background, administrative practice and domestic court rulings, must be reviewed by the Panel.[164] Indonesia further submits that Recital 4 of Council Regulation 1972/2002 and the application of Article 2(5) in previous anti-dumping investigations support the above understanding of the scope and content of the challenged provision.[165]

7.104. Indonesia considers that the second subparagraph of Article 2(5) of the Basic Regulation establishes a rule which mandates WTO-inconsistent conduct by the European Union and that it constitutes a WTO-inconsistent condition or requirement in the form of a "non-distortion" test not provided for in the Anti-Dumping Agreement or in any of the other WTO covered agreements.[166] Indonesia submits that this requirement has been "woven" into the requirement that the costs be "reasonably reflected" in the records of the investigated producer/exporter.[167] Indonesia also submits that in case the producer/exporter's costs are found to be distorted, the EU authorities are required to replace or adjust them with prices from outside the country of origin.[168]

7.105. With respect to Argentina's claims under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Indonesia submits that, once an investigating authority decides to construct the normal value under Article 2.2, it does not have the discretion to use third country prices or cost data.[169] By unequivocally referring to the cost of production in the "country of origin", Article 2.2 expressly limits the cost of production to be assessed on the basis of, and to be based on, costs that exist in the country where the investigated producer/exporter produces the product under consideration.[170] The text and context of Article 2.2 do not permit any exceptions to this rule. For Indonesia, once out-of-country evidence is used, the actual cost of the producer/exporter in the country of origin is disregarded and replaced by the out-of-country evidence or cost.[171]

7.106. The **Russian Federation** notes that amendments to Articles 2(3) and 2(5) of the Basic Regulation were introduced simultaneously with the granting of full market economy status to the Russian Federation in 2002. The Russian Federation considers that these amendments were introduced to allow the EU authorities to use data from markets other than the country of origin for constructing the normal value. In particular, the amendment to Article 2(5) gave the EU authorities the right to reject or adjust costs reflected in the producers/exporters' records and to establish such costs based on "information from other representative markets". The Russian Federation argues that this practice is similar to the EU authorities' treatment of non-market economies applied to the Russian Federation before it was granted market economy

[161] Colombia's third-party submission, paras. 8-10.
[162] Colombia's third-party submission, paras. 9-10 (referring to the Appellate Body Report, *US – Carbon Steel*, para. 157; and Panel Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 6.26; and *EC – IT Products*, para. 7.108).
[163] Colombia's third-party submission, para. 12; third-party statement, para. 4; third-party response to Panel question No. 20, para. 10.
[164] Indonesia's third-party submission, para. 8 (referring to Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.446 and 4.451).
[165] Indonesia's third-party submission paras. 9, 12, 14-15, and 23-32; third-party statement, para. 4; third-party response to Panel question No. 19, paras. 46-49.
[166] Indonesia's third-party submission, para. 16; third-party statement, para. 4.
[167] Indonesia's third-party submission, para. 16; third-party statement, para. 4.
[168] Indonesia's third-party submission, para. 17; third-party statement, para. 4.
[169] Indonesia's third-party submission, para. 50; third-party response to Panel question No. 12, paras. 33-36.
[170] Indonesia's third-party submission, para. 52.
[171] Indonesia's third-party submission, para. 51.

status.[172] The Russian Federation argues that the relevance of the mandatory/discretionary distinction is "highly questionable", because the distinction is not based on any provision of the covered agreements.[173]

7.107. **Saudi Arabia** submits that the ordinary meaning of Article 2.2 is unequivocal in that it only permits investigating authorities to construct the normal value on the basis of the "cost of production in the country of origin" and not on the basis of costs of production in a third country market or the world market.[174] For Saudi Arabia, this is reflective of the country-specific nature of an anti-dumping investigation, and is confirmed by the context afforded by Articles 2.2.1.1 and 2.2.2, which suggest that the constructed cost of production and the constructed amounts for administrative, selling and general costs and for profits must be based on data from the country under investigation and cannot be established by reference to out-of-country benchmarks such as international reference prices.[175]

7.108. The **United States** considers that to succeed in an "as such" claim, a complainant has to demonstrate that the measure at issue *requires* an investigating authority to act in a WTO-inconsistent manner, and that if the measure can be applied in a WTO-consistent manner, there is no basis for finding a violation.[176] The United States notes that in *US – Carbon Steel (India)* the Appellate Body found that the evidence submitted (which included, beyond the text of the measures, also judicial decisions, legislative history, and evidence of the application of the measure) did not "establish conclusively that the measure requires an investigating authority to consistently" act contrary to the WTO obligations.[177] Therefore, the Unites States submits, the Panel should consider whether Argentina has demonstrated that Article 2(5) of the Basic Regulation *requires* that the EU authorities act in a WTO-inconsistent manner.[178] The United States submits that if the text of the challenged law provides discretion to act in a WTO-inconsistent manner, the complainant must submit additional evidence in order to identify "elements requiring an investigating authority to engage" in WTO-inconsistent conduct.[179] In this regard, the United States notes the European Union's arguments that Article 2(5) expressly provides for discretion for the EU authorities to adjust costs and that it does not require the EU authorities to depart from the producers' cost data. The United States considers that the practice of the application of a challenged measure can be reviewed in considering an "as such" claim, but the practice must demonstrate that *the measure itself* mandates WTO-inconsistent action.[180] The United States takes the view that the additional evidence submitted by Argentina does not show that the EU authorities are mandated to act in a particular manner.[181]

7.109. The United States submits that Article 2.2 does not limit the evaluation of record evidence to evidence obtained in the country of origin, and further, that revising particular elements of the cost calculation based on record evidence from outside the country of origin would not undermine the constructed normal value as a proxy for home market value.[182] However, the United States notes that it is for the investigating authority to demonstrate, based on the record evidence, that such costs serve as an appropriate comparator or alternative source of data, and that such costs are only appropriate to the extent that they aid in determining the cost of production in the domestic market.[183]

[172] Russian Federation's third-party statement, paras. 4-7.
[173] Russian Federation's third-party response to Panel question No. 19, paras. 9 and 10 (referring to Appellate Body Reports, *US – Hot-Rolled Steel*, para. 200; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101).
[174] Saudi Arabia's third-party submission, para. 25.
[175] Saudi Arabia's third-party submission, para. 29.
[176] United States' third-party submission, para. 5; third-party response to Panel question No. 19, para. 34.
[177] United States' third-party submission, para. 7 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483).
[178] United States' third-party submission, para. 8.
[179] United States' third-party response to Panel question No. 19, para. 35 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483).
[180] United States' third-party response to Panel question No. 20, para. 37.
[181] United States' third-party submission, para. 6.
[182] United States' third-party response to Panel question No. 12, para. 25.
[183] United States' third-party response to Panel question No. 12, para. 26.

7.3.6 Evaluation by the Panel

7.3.6.1 Introduction

7.110. Argentina challenges "as such", that is, independently of its application in specific instances, Article 2(5), second subparagraph, of the Basic Regulation as being inconsistent with several provisions of the Anti-Dumping Agreement and the GATT 1994. Argentina's challenge is limited to this second subparagraph of Article 2(5) of the Basic Regulation and does not extend to the first subparagraph of the same provision.[184] In addition, while Argentina has referred to the EU authorities' consistent practice in applying the second subparagraph of Article 2(5), it has repeatedly made it clear that it only refers to this practice in support of its interpretation of the text of Article 2(5), second subparagraph, but does not challenge this alleged practice in and of itself.[185]

7.111. Argentina has used different formulations in describing the scope, meaning and content of the challenged measure during these proceedings. While we would have preferred greater consistency in this regard, we do not consider that these variations amount to a failure on its part to articulate properly, with the requisite evidence, the precise content of the measure challenged, as the European Union alleges.[186]

7.112. We understand the essence of Argentina's claims to be as follows:

a. 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", Article 2(5), second subparagraph, 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.[187] Argentina submits that this renders Article 2(5), second subparagraph, inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement, and as a consequence, with Articles 2.2 of the same Agreement and Article VI:1(b)(ii) of the GATT 1994.

b. When the aforesaid determination is made, Article 2(5), second subparagraph, further requires the EU authorities to adjust or establish the costs on the basis of other information, including costs other than those prevailing in the country of origin. Argentina submits that this renders Article 2(5), second subparagraph, inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.113. Argentina explains that it uses 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. In addition, Argentina points out that these terms, and the terms "distorted or affected by a distortion" and "do not reflect market values or prices", which it uses in describing the measure at issue, are not included in the text of Article 2(5), second subparagraph, of the Basic Regulation, but have been used in the other evidence it submits to the Panel to support its understanding of the scope, meaning and content of this provision.[188]

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[184] Argentina's first written submission, para. 34; opening statement at the first meeting of the Panel, paras. 47 and 69; and response to Panel question No. 23, para. 59.

[185] Argentina's response to Panel question No. 23(c), para. 61.

[186] European Union's opening statement at the first meeting of the Panel, paras. 53-60; second written submission, paras. 40-41 (referring to Appellate Body Report, *Argentina – Import Measures*, paras. 5.102-5.104).

[187] Argentina indicates that, under its interpretation of Article 2(5), second subparagraph, this provision imposes the following test: "the authorities must determine whether the costs reflect prices that are 'artificially low' or 'abnormally low' as a result of an alleged 'distortion'". (Argentina's response to Panel question No. 26(b), para. 83)

[188] Argentina explains that the terms "affected by a distortion" are found in Recital 4 of Council Regulation 1972/2002; that the terms "abnormally low" and "artificially low" have been used by the EU authorities in their "practice", and that the words "artificially low" are also used in Article 2(3) of the Basic Regulation to describe one type of circumstances in which a "particular market situation" may be deemed to exist; and that it uses the terms "reflect market values and prices" in its submissions by reference to the

7.114. The European Union takes the view that Argentina challenges two separate measures.[189] However, it is clear to us that Argentina challenges two related aspects of the same measure, namely Article 2(5), second subparagraph, of the Basic Regulation under two separate but related claims or groups of claims. For ease of reference, we hereafter refer to these claims as two separate "claims" advanced by Argentina.

7.115. Before we proceed with our analysis, we consider it useful to recapitulate the main points of disagreement between the parties with respect to the meaning and operation of the measure at issue as it relates to each of Argentina's two claims.

7.116. First, with respect to Argentina's first claim, which principally involves Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union disputes that Article 2(5), second subparagraph, is the provision governing the determination whether the costs of production are "reasonably reflected" in the producer's records. The European Union argues that the relevant provision for this determination is the first, and not the second, subparagraph of Article 2(5). Even with respect to such a determination under the first subparagraph of Article 2(5), the European Union contends that the EU authorities are not required to find that the costs are not "reasonably reflected" in the records in the situations identified by Argentina (i.e. where the records reflect prices that are artificially or abnormally low due to a distortion). According to the European Union, the authorities are merely afforded discretion based on their view of the facts and circumstances of each case.

7.117. With respect to Argentina's second claim, which involves Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the disagreement between the parties centres on "the discretion" afforded to the EU authorities to resort to information prevailing in "other representative markets", particularly in the situations identified by Argentina. According to Argentina, the reference to "information from other representative markets" in Article 2(5), second subparagraph, *mandates* the use of costs not prevailing in the country of origin. On the contrary, the European Union contends that the provision grants wide discretion to the EU authorities to resort to various options when they have determined under the first subparagraph of Article 2(5) that the costs are not reasonably reflected in the records.

7.118. Although it considers that Article 2(5), second subparagraph, of the Basic Regulation, contains a rule or requirement, Argentina argues, in the alternative, that even if the authorities had the discretion alleged by the European Union, this provision would nonetheless be inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. With respect to Article 2.2.1.1 of the Anti-Dumping Agreement, Argentina submits that even if Article 2(5), second subparagraph, only provided for the possibility – and did not require – that the authorities reject the records in situations where prices are artificially low or abnormally low, the mere possibility would render it inconsistent with Article 2.2.1.1. With respect to Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the fact that Article 2(5), second subparagraph, provides for the use of a basis other than the cost of production in the country of origin renders that measure inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[190] The European Union considers that Argentina needs to establish that the measure mandates WTO-inconsistent action for its claims to succeed.[191]

7.3.6.2 General principles relevant to a panel's examination of "as such" claims and of municipal legislation

7.119. We begin our analysis by recalling the relevant principles established under WTO jurisprudence on the examination of the scope, content and meaning of provisions of the municipal (i.e. domestic) legislation of a Member, under "as such" claims.

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criterion used by the EU authorities when Russian exporters were subject to the hybrid market economy treatment system before the Russian Federation was granted market economy status in 2002 and by reference to several cases in which the costs were described by the EU authorities as reflecting "regulated prices which are far below *market prices* in unregulated markets". (Argentina's response to Panel question No. 26, paras. 78-82) (emphasis original)

[189] European Union's first written submission, paras. 63-66.

[190] See, e.g. Argentina's opening statement at the first meeting of the Panel, para. 74; response to Panel question No. 24, para. 69; second written submission, paras. 147-149 and 162.

[191] See, e.g. European Union's first written submission, paras. 184-187; second written submission, paras. 38 and 82.

7.120. First, we note that the Appellate Body has emphasized that "as such" challenges to a Member's legislation are "serious challenges", particularly as Members are presumed to have enacted their laws in good faith.[192] We also note that, consistent with the generally applicable principles regarding the burden of proof applicable in WTO disputes, it is for the complainant to establish the WTO-inconsistency of provisions of domestic law.

7.121. In the recent *US – Carbon Steel (India)* dispute, the Appellate Body explained that:

> With regard to the construction of municipal law, the Appellate Body explained in *US – Hot-Rolled Steel* that, "[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".[*] As part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and content of the municipal law at issue in order to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the covered agreements. This obligation under Article 11 means that panels must conduct their own objective and independent assessment of the meaning of municipal law, instead of deferring to a party's characterization of such law.[*][193]
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> [*fn original][1115] Appellate Body Report, *US – Hot-Rolled Steel*, para. 200.
> [*fn original][1116] Appellate Body Report, *India – Patents (US)*, para. 66.

7.122. The Appellate Body has also emphasized that when a panel is called upon to interpret domestic legislation to decide on its WTO-consistency, the panel should undertake a "holistic assessment" of all relevant elements, including, for instance, the consistent application of the relevant domestic laws, pronouncements of domestic courts on the meaning of such laws, the opinion of legal experts, and the writings of recognized scholars.[194]

7.123. In the recent *US – Shrimp II (Viet Nam)* case, the Appellate Body explained that:

> In respect of the types of elements that are required to be considered in order to establish the content and meaning of municipal law, the Appellate Body has clarified that, in some cases, the text of the relevant legislation may suffice. In other cases, the complainant will also need to support its understanding of the content and meaning of the measure at issue with evidence beyond the text, such as evidence of consistent application of the measure, pronouncements of domestic courts, and the writings of recognized scholars.[*] Furthermore, the Appellate Body has held that, "in ascertaining the meaning of municipal law, 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."[*] An examination of such elements, including legal interpretations given by domestic courts or domestic administering authorities, may inform the question of whether a measure is consistent with a WTO Member's obligations under the covered agreements. In respect of the burden of proof, the Appellate Body has clarified that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[*][195]

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[192] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173:
> In our view, "as such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. … The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged "as such".

[193] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.445.

[194] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.472 and fn 1157 (referring to Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; and *US – Carbon Steel*, para. 157).

[195] Appellate Body Report, *US – Shrimp II (Viet Nam)*, para. 4.32.

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[*fn original][184] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Carbon Steel*, para. 157; *US – Carbon Steel (India)*, para. 4.446.
[*fn original][185] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.
[*fn original][186] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.446 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157, in turn referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335).

7.124. While the Appellate Body has stated that where the meaning of a provision is clear on the face of its text, the text of the relevant legislation may suffice to establish the content and meaning of municipal law, in recent disputes the Appellate Body has clarified that:

> [I]n order to conduct a "detailed examination" of the measure at issue, and to engage in an "objective assessment of the matter", it 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.[196] (emphasis added)

7.125. Our reading of these statements of the Appellate Body suggests to us that, depending on the probative value of the facts and the evidence before it, a panel may well be required to go beyond the text of the impugned measure regardless of how clear the text might be on its face and that a panel may be required to make a "holistic assessment" of all the relevant elements.[197] In the present dispute, we understand Argentina to take the position that confining the analysis to the text of Article 2(5), second subparagraph, itself will not suffice to arrive at a proper interpretation of this provision. Argentina's interpretation of Article 2(5), second subparagraph, of the Basic Regulation relies on its reading of the text of this provision, on the legislative history that led to its introduction, on an alleged consistent practice of the EU authorities in applying it, and on judgments of the General Court of the European Union.

7.126. With these principles in mind, and mindful 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.

7.3.6.3 Argentina's first "as such" claim under 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

7.127. 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.

7.3.6.3.1 Text of Article 2(5), second subparagraph, of the Basic Regulation

7.128. With respect to its first claim, Argentina's case is premised on its view that the EU authorities make the determination that the records do not "reasonably reflect" the costs pursuant to the opening phrase of the second subparagraph of Article 2(5) ("If costs …"). The European Union disagrees and argues that the determination whether a producer's records reasonably reflect the costs of production and sale of the product is made pursuant to the first subparagraph of Article 2(5) of the Basic Regulation. In addition, the European Union contends that neither the first nor the second subparagraph set forth the criteria for the EU authorities to make that determination.

[196] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.454.
[197] Moreover, the Appellate Body has indicated that it sees "no merit in the proposition … that a panel must limit itself, in considering a claim against legislation as such, *exclusively* to the wording of legislation itself." (Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112) (emphasis original)

7.129. Although Argentina initially contended that the determination is governed by the opening phrase of Article 2(5), second subparagraph, Argentina later clarified that its position is that while Article 2(5), first subparagraph, is – or may be – the provision generally authorising authorities to reject data when that data does not reasonably reflect the costs of production, the second subparagraph of the Article is the real provision that identifies the situations where costs are artificially or abnormally low as a result of a distortion as constituting the basis for the determination that records do not reasonably reflect the costs. In other words, according to Argentina, the second subparagraph is the provision requiring the EU authorities to determine that the records do not "reasonably reflect" the costs when the costs included in the records are "artificially" or "abnormally low" as a result of a distortion.[198]

7.130. The European Union has objected to this subsequent clarification of Argentina, alleging that it amounts to a "change [in] the factual basis" of Argentina's claims introduced for the first time in Argentina's responses to the Panel's questions after the second meeting.[199] We decline to reject this clarification of its arguments by Argentina, as the European Union would have us do. Contrary to what the European Union suggests, the Working Procedures adopted by the Panel do not impose a time limit on the submission of arguments to the Panel, but only on the *factual evidence* submitted to the Panel.[200] In our view, the clarification is more properly regarded as a clarification or refinement of Argentina's argumentation, rather than as the introduction of a new "factual basis". In any event, the European Union has had the opportunity to respond to Argentina's "clarification", and has done so, such that due process has been preserved.

7.131. We now consider whether the text of Article 2(5) of the Basic Regulation supports Argentina's reading of that provision.[201] In our view, it does not. Article 2(5) applies to the calculation of costs of production for purposes of: (i) applying the below-cost ("ordinary course of trade") test; or (ii) constructing the normal value on the basis of the costs of production. With respect to the latter, Article 2(3) provides for two separate grounds on which the investigating authority may be permitted to resort to a constructed normal value: (i) where there are no or insufficient sales in the ordinary course of trade; or (ii) where sales in the ordinary course of trade do not permit a proper comparison because of a particular market situation. Article 2(5) applies in both situations. The first subparagraph of Article 2(5) reproduces almost word for word the first sentence of Article 2.2.1.1. It sets out the source of the data which is to be preferred in the construction of a producer's costs of production, i.e. the producer's records, and subjects this preference to two conditions: that the records be consistent with the generally accepted accounting principles of the exporting Member, and that they reasonably reflect the costs of production.

7.132. The second subparagraph of Article 2(5) begins with a condition: "If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned", followed by "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." Thus, the text of the second subparagraph of Article 2(5) 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. This is clear from the use of the word "[i]f", which clearly refers to the second condition under the first subparagraph. Thus, the plain text of Article 2(5), second subparagraph, does not support Argentina's contention that it governs the issue as to when the EU authorities are to reach the conclusion that the producer's records do not reasonably reflect the costs of production and sale of the product under investigation. On the contrary, on the face of

[198] Argentina's response to Panel question Nos. 84, para. 10, and 88(b), para. 30. In its response to Panel question No. 84, Argentina uses the conditional form ("even if the first subparagraph were to be regarded as including the authorization for the authorities to conclude that the records do not reasonably reflect the costs, it is the second subparagraph which provides that such determination has to be made where costs are distorted") whereas in its response to Panel question No. 88(b), para. 30, Argentina affirmatively states that the first subparagraph "contains the general principle that the costs must be calculated on the basis of the records provided that it is shown that such records reasonably reflect the costs associated with the production and sale of the product under consideration".

[199] European Union's comments on Argentina's response to Panel question No. 84, para. 22.

[200] Panel's Working Procedures, Annex A-1, para. 8.

[201] Although Argentina challenges only the second subparagraph, in light of their close relationship, we consider it pertinent to consider the meaning and content of both subparagraphs.

the language used therein, this is an issue that is governed by the first subparagraph of Article 2(5) of the Basic Regulation. We therefore agree with the European Union that the relevant determination is made under the first subparagraph of Article 2(5) and that the second subparagraph of the Article 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 investigation.

7.133. Moreover, we note 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. Argentina argues that the options that are given to the investigating authorities under the second part of the second subparagraph constitute or inform the reasons why information from the domestic market cannot be used to determine the costs of production.[202] By this, we understand Argentina to argue that the phrase "*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 requires the EU authorities to find that the producer's records do not reasonably reflect costs where they differ from costs in other representative markets. Argentina's argument disregards the fact that the phrase quoted above refers not only to "information from other representative markets", but also to the costs of producers or exporters in the exporting country, and to "any other reasonable basis".

7.134. In sum, Argentina would have us read the second subparagraph in a manner that is contrary to its text. We agree with the European Union that the second subparagraph of Article 2(5) only lays down what the authorities can do – and allows them to exercise 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. We also find, as 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. None of these terms are found in the text of the Article to be used by the EU authorities as criteria for determining whether the records reasonably reflect the costs of production and sale of the product under consideration.

7.135. We are therefore of the view that the text of Article 2(5), second subparagraph, does not support Argentina's allegations with respect to the scope, meaning, and content of that provision. Having reached these preliminary conclusions on the basis of the text we now consider the other evidence submitted by Argentina. We start with the legislative history pertaining to the introduction of the second subparagraph of Article 2(5).

7.3.6.3.2 Legislative history pertaining to the inclusion of the second subparagraph of Article 2(5) in the Basic Regulation

7.136. Argentina relies on the legislative history that led to the introduction of the second subparagraph of Article 2(5) in support of its interpretation of this provision. Argentina refers in particular to: (i) Recital 4 of Council Regulation 1972/2002, which is the Regulation that added the second subparagraph to Article 2(5); (ii) the second subparagraph of Article 2(3), which was added at the same time as the second subparagraph of Article 2(5); and (iii) academic writings drawing a link between the introduction of the second subparagraph and the granting, by the European Union, of market economy status to the Russian Federation.

7.137. Argentina submits that the introduction of the second subparagraph in Article 2(5) by Council Regulation 1972/2002 gave a specific meaning and content to the condition 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", such that the EU authorities are required to conclude that the records do not reasonably reflect costs associated with the production and sale of the product under consideration where they find that the costs of the inputs reflect prices that are "abnormally or artificially low" in comparison to prices in other markets.[203]

[202] Argentina's second written submission, paras. 19-22 and 63.
[203] Argentina's opening statement at the first meeting of the Panel, paras. 53-58.

7.138. Recital 4 of Council Regulation 1972/2002, which explains the addition of the second subparagraph of Article 2(5) of the Basic Regulation, states as follows:

> 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.[204] (emphasis added)

7.139. In addition, Argentina refers to the second subparagraph of Article 2(3), which was also introduced by Council Regulation 1972/2002 and which provides that:

> A particular market situation for the product concerned within the meaning of the preceding sentence 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.[205]

7.140. Argentina submits that Recital 4, read together with the new Article 2(3), makes clear that, pursuant to Article 2(5), second subparagraph, when the costs are "artificially low" or "affected by a distortion", the costs must be adjusted or established on another basis. Argentina further submits that Recital 4 does more than merely identify the options available in case the records do not reasonably reflect the costs, as it also identifies the situations in which recourse to such options will be made, namely when costs are affected by a distortion.[206] Argentina submits that even though Recital 4 refers to situations in which normal value is constructed because of the existence of a "particular market situation", it is relevant for the purposes of interpreting Article 2(5), second subparagraph, as this provision applies not only in cases in which the authorities proceed to construct the normal value due to the existence of a "particular market situation", but also in cases in which the authorities construct normal value following a finding that there are no or insufficient sales in the ordinary course of trade.[207]

7.141. It is clear from Recital 4 that the second subparagraph was added to Article 2(5) to give some guidance as to what has to be done *if* "pursuant to Article 2(5)" – which clearly refers to what is now the first subparagraph[208] – "the records do not reasonably reflect the costs associated

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[204] Council Regulation 1972/2002, (Exhibit ARG-5), Recital 4 (quoted in Argentina's first written submission, para. 37).

[205] Recital 3 of Council Regulation 1972/2002, (Exhibit ARG-5), explains the rationale for the introduction of the new subparagraph to Article 2(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. Obviously, any clarification given in this context cannot be of an exhaustive nature in view of the wide variety of possible particular market situations not permitting a proper comparison.

[206] Argentina's response to Panel question No. 84, para. 10.

[207] Argentina's response to Panel question No. 29(a), paras. 93-94.

[208] We are not convinced by Argentina's argument that these terms refer to Article 2(5) "without any further precision", as opposed to only to its first subparagraph. (Argentina's response to Panel question No. 84, para. 9). At the time, Article 2(5) of the previous Regulation had only one sentence, namely, the current first subparagraph of Article 2(5). Thus, we see merit in the European Union's argument that:

> The text of Recital 4 shows that Article 2(5) had already been the legal basis for the authorities' determination of whether the records reasonably reflected costs, already before the introduction of the second subparagraph of Article 2(5). This is made clear by the fact that Recital 4 does *not* state that the purpose of the introduction of the second subparagraph was to

with the production and sale of the product under consideration", before proceeding to list what sources may be used in so doing, essentially repeating the language contained in the second subparagraph. This is consistent with our reading of the second subparagraph of Article 2(5) above, namely, that it applies only *after* the EU authorities have determined that the producer's records do not reasonably reflect the costs of production and sale of the investigated product, and that it governs how the EU authorities are to establish the cost of production in such a situation.

7.142. We consider next the second subparagraph of Article 2(3). This new subparagraph provides guidance as to the meaning of the terms "particular market situation" in the first subparagraph of the same Article. It provides that such a "particular market situation" may exist "when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements". Reading the second subparagraph of Article 2(3) in conjunction with Recital 4 suggests that, when they determine that a particular market situation exists on the basis of the existence, *inter alia*, of "artificially low" prices due to a distortion, the authorities should establish or adjust the costs of a producer on a basis that is not affected by that distortion. However, it is not at all apparent from the text of Article 2(3), even read in conjunction with that of Recital 4, firstly, that it applies to Article 2(5) and secondly, that these considerations govern the determination that the costs of production are not "reasonably reflected" in the producer's records.

7.143. Hence, neither Recital 4 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).[209, 210]

7.144. Argentina also argues that the modifications made to Articles 2(3) and 2(5) of the Basic Regulation by Council Regulation 1972/2002 sought to enable the EU authorities to continue using non-market economy techniques *vis-à-vis* the Russian Federation at the same time as the European Union granted the Russian Federation full market economy status. Argentina refers us to an article published in a law journal and to excerpts from a book. Argentina also comments on an article submitted to the Panel by the European Union.[211] The authors of these articles express a

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provide, for the first time, to the investigating authorities the power to determine whether the records reasonably reflect costs. Recital 4 treats this legal authority as a given on the basis of the pre-existing form of Article 2(5) and states that the addition of the second subparagraph to Article 2(5) simply gives guidance on the sources to be used in order to identify the relevant data, when the company records cannot be used. This confirms that the legal basis for the determination of whether the records reasonably reflect costs is the first subparagraph of Article 2(5), which is the only provision that existed prior to the addition of the second subparagraph and the adoption of Recital 4. (European Union's opening statement at the second meeting of the Panel, para. 28) (emphasis original)

[209] In addition, Argentina submits as evidence what appears to be the initial European Commission proposal for the amendments to the Basic Regulation that would become Council Regulation 1972/2002, and which contains an "Explanatory Memorandum" by the European Commission to explain the proposal. (European Commission, Proposal for a Council Regulation further amending Council Regulation (EC) No. 384/96 on the protection against dumped imports from countries not members of the European Communities, COM(2002)467 final, 31 December 2002, (Exhibit ARG-57), discussed in Argentina's response to Panel question No. 84, para. 11 and fn 13). The European Union objects to Argentina's submission of this exhibit. (European Union's comments on Argentina's response to Panel question No. 84, para. 16). We do not find it necessary to decide on the European Union's objection given that the Explanatory Memorandum merely states – in different terms – the same explanations as are provided in Council Regulation 1972/2002.

[210] In light of this conclusion, we do not find it necessary to consider in any more detail Argentina's argument that Recital 4 and/or the second subparagraph of Article 2(3) of the Basic Regulation are relevant to the interpretation of Article 2(5) as this provision applies not only in cases when the authorities proceed to construct the normal value on the basis of the existence of a "particular market situation", but also when the authorities determine to do so on the basis that there are no, or that are insufficient, sales of the investigated product in the ordinary course of trade on the domestic market.

[211] Argentina's first written submission, para. 43 (quoting from Edward Borovikov and Bogdan 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*, 2002, pp. 875 – 896, (Exhibit ARG-6), p. 888; and Olesia Engelbutzeder, *EU Anti-Dumping Measures Against Russian Exporters – In View of Russian Accession to the WTO and the EU Enlargement 2004*, pp. 159 – 160, (Exhibit ARG-7)); second written submission, paras. 29-30 (referring to Tietje et al., "Cost of

personal view that by virtue of Article 2(3), second subparagraph, the EU authorities might extend the non-market economy techniques to market economies as well. However, we consider it particularly relevant that the authors of these articles do not suggest that the 2002 amendments to the Basic Regulation require that the EU authorities conclude that the records do not "reasonably reflect" costs where prices are artificially low, but merely suggest that it enables them to do so. More importantly, they do not suggest that it is the second subparagraph of Article 2(5) that governs the determination whether costs are reasonably reflected in a producer's records.

7.3.6.3.3 Alleged consistent practice of the EU authorities

7.145. We now turn to Argentina's allegations concerning the alleged consistent "practice" of the EU authorities in applying Article 2(5), second subparagraph. We recall that Argentina does not challenge the alleged consistent practice in and of itself as a measure at issue but only relies on this alleged consistent practice as evidence in support of its interpretation of Article 2(5), second subparagraph. Therefore, we consider whether this alleged practice sheds light on the meaning of the impugned provision.

7.146. Argentina refers us to decisions of the EU authorities in a series of anti-dumping proceedings, *Potassium Chloride from Belarus, Russia or Ukraine*[212], *Seamless Pipes and Tubes of Iron or Steel from Croatia, Romania, Russia and Ukraine*[213], *Solutions of Urea and Ammonium Nitrate from inter alia Russia and Algeria*[214], *Ammonium Nitrate from Russia*[215], *Ammonium Nitrate from Ukraine*[216], *Urea from Russia*[217], *Urea from, inter alia, Croatia and Ukraine*[218], *Certain Welded Tubes and Pipes of Iron or Non-Alloy* Steel *from inter alia Russia*[219], and the investigation concerning imports of biodiesel from Argentina and Indonesia[220] which is the subject of Argentina's "as applied" claims in the present dispute.

7.147. Having reviewed the decisions of the EU authorities cited by Argentina, we find that they do evidence a certain pattern of the EU authorities concluding that the costs of production of the product under investigation were not reasonably reflected in the records of a producer/exporter in situations in which the prices of inputs (particularly energy) were lower than world prices, prices in third country markets, the cost of production of the input, or the price of the same input when exported from the country of origin (e.g. the Russian Federation). However, we also note that in almost all these cases, the input or energy prices were set and regulated by the government, which raises in our view doubts as to whether they can be regarded as establishing a "consistent practice" or as convincing evidence that Article 2(5), second subparagraph, mandates the authorities to disregard the producer's actual costs in every case in which the authorities find the input prices to be artificially low.[221, 222]

Production Adjustments in Anti-Dumping Proceedings", *Journal of World Trade*, 45, No. 5 (2011), pp. 1071-1102, (Exhibit EU-8)).

[212] Council Regulation 1891/2005, (Exhibit ARG-8); Council Regulation 1050/2006, (Exhibit ARG-9).

[213] Council Regulation 954/2006, (Exhibit ARG-10); Council Regulation 812/2008, (Exhibit ARG-11); Council Implementing Regulation 1269/2012, (Exhibit ARG-12).

[214] Council Regulation 1911/2006, (Exhibit ARG-13); Council Regulation 238/2008, (Exhibit ARG-14); Council Implementing Regulation 1251/2009, (Exhibit ARG-15).

[215] Council Regulation 236/2008, (Exhibit ARG-16); Council Regulation 661/2008, (Exhibit ARG-17).

[216] Council Regulation 237/2008, (Exhibit ARG-18).

[217] Council Regulation 907/2007, (Exhibit ARG-19).

[218] Council Regulation 240/2008, (Exhibit ARG-20).

[219] Council Regulation 1256/2008, (Exhibit ARG-21).

[220] Definitive Regulation, (Exhibit ARG-22), p. 2.

[221] In some of the cases cited by Argentina, the EU authorities reach the conclusion that the prices for the input did not reasonably reflect the cost of production for that *input* rather than the cost of production of the product under investigation. (Council Regulation 1891/2005, (Exhibit ARG-8), Recital 31; Council Regulation 1050/2006, (Exhibit ARG-9), Recital 54)

[222] We do not find it relevant to our consideration of Argentina's claims that the EU authorities may in some instances have found that company records did not reasonably reflect the costs on grounds other than those that are alleged by Argentina, i.e. the artificially low value of the raw materials or inputs. We recall that "[w]hat Argentina is claiming is that the second subparagraph of Article 2(5) requires the authorities to conclude that the records do not reasonably reflect the costs if they find that the costs of the inputs reflect prices that are 'abnormally low' or 'artificially low' because of an alleged distortion on the domestic market", and that Argentina is not claiming that these constitute the only reason that lead the EU authorities to reach such a conclusion. (Argentina's opening statement at the first meeting of the Panel, para. 61; see also *idem* at 73)

7.148. In any event, we do not consider it necessary to examine at any greater length whether the examples of application cited by Argentina can properly be characterised as reflecting, or be constitutive of, a consistent "practice" of the EU authorities. This is because 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.[223] In sum, the determinations submitted to our attention by Argentina do not undermine our preliminary conclusion, reached above 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).[224]

7.3.6.3.4 Judgments of the General Court of the European Union interpreting the measure at issue

7.149. In support of its interpretation of the second subparagraph to Article 2(5), Argentina submits evidence pertaining to four judgments of the General Court of the European Union that were issued on the same date by a bench composed of the same three judges, address similar claims, and largely share the same reasoning.[225]

7.150. Of significance for the purposes of our consideration of Argentina's claims, these judgments do *not* suggest that the determination whether the costs are reasonably reflected in the records of a producer is one which is governed by the second subparagraph of Article 2(5). On the contrary, it is obvious to us that the General Court considered in each case that this determination is one which is governed by Article 2(5), first subparagraph.[226] We note that Argentina directs our attention to a statement of the General Court in one of the judgments, which Argentina reads as supporting its view that the second subparagraph of Article 2(5) is the provision governing the determination of whether the records reasonably reflect the costs of production and sales in certain situations.[227] In our view, Argentina reads out of context a statement that the Court intended to be a mere restatement of its earlier findings, which as we have stated above, do not support Argentina's position.

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[223] Argentina's response to Panel question 35(a), para. 99.

[224] Moreover, although Argentina submits that there had been no cases in which the EU authorities concluded that the records do not reasonably reflect costs on the basis of Article 2(5) because the costs were found to be abnormally or artificially low as a result of an alleged distortion before the inclusion of the second subparagraph of Article 2(5) in 2002 (Argentina's response to Panel question No. 126, para. 113), the European Union refers to what it considers is an example of the EU authorities reaching a determination that the costs were not reasonably reflected in the producer's records by virtue of a distortion of the type alleged by Argentina prior to the inclusion of the second paragraph of Article 2(5) in the Basic Regulation. (European Union's first written submission, para. 91 (quoting *Aluminum Foil originating in China and Russia* investigation, Council Regulation 950/2001, (Exhibit EU-1), Recital 45)). We agree with the European Union that this example lends support to the view that Article 2(5), first subparagraph, is the provision pursuant to which this determination is made. While, as Argentina notes, in *Aluminum Foil originating in China and Russia*, the normal value was established on the basis of "facts available" pursuant to Article 18 of the Basic Regulation, the determination also indicates that the EU authorities sought to rely on the producer's data to the extent possible.

[225] Judgments of the General Court of the European Union of 7 February 2013 in Cases T-235/08 (*Acron I)*, (Exhibit ARG-23); T-118/10 (*Acron II*), (Exhibit ARG-52); T-459/08, (Exhibit ARG-53); T-84/07, (Exhibit ARG-54).

[226] See General Court of the European Union, *Acron I*, (Exhibit ARG-23), in particular paras. 39-41; General Court of the European Union, case T-118/10 (*Acron II*), (Exhibit ARG-52), in particular paras. 46-48; General Court of the European Union, case T-459/08, (Exhibit ARG-53), in particular paras. 60-62; General Court of the European Union, case T-84/07, (Exhibit ARG-54), in particular paras. 53-55.

[227] General Court of the European Union, *Acron II*, (Exhibit ARG-52), para. 72 (cited in Argentina's second written submission, paras. 41-42; and response to Panel question No. 98, paras. 60- 63):

> [T]he WTO rules do not define the expression 'a particular market situation', as defined in the second sentence of the Article 2(3) of the basic regulation and which may be used as a basis by the institutions for assessing whether the records reasonably reflect the costs, pursuant to the second sentence of the first subparagraph of Article 2(5) of the basic regulation, as noted in paragraphs 44 to 51 above.
>
> The decision in case T-84/07, (Exhibit ARG-54), contains an identical statement at para. 83.

7.151. Similarly, we are unconvinced by Argentina's suggestion that the judgments confirm, on the basis of Recital 4 of Council Regulation 1972/2002 that the second subparagraph of Article 2(5) was introduced to provide a legal basis to reject the cost data contained in the records where such costs reflect prices that are found to be "abnormally" or "artificially low" because of a distortion. On the contrary, in the judgments, the General Court reads Recital 4 of Council Regulation 1972/2002 as we do, i.e. as indicating that the second subparagraph of Article 2(5) was inserted to provide guidance as to "what has to be done" following a determination that the records do not reasonably reflect the costs pursuant to the first subparagraph.

7.152. In sum, 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).

7.3.6.3.5 Conclusion with respect to Argentina's first claim that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent 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

7.153. On the basis of the foregoing, and based on our "holistic assessment" of the evidence submitted by Argentina in support of its interpretation of the provision at issue, we conclude 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. In fact, the evidence indicates that Article 2(5), second subparagraph, applies to an entirely different issue, i.e. 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.

7.154. This aspect of Argentina's claims is associated with its claims of inconsistency under 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. As we conclude that Argentina has not established its case regarding the scope, meaning, and content of the challenged measure on which these claims are based, we find that Argentina has not established 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 and, as a consequence, Article 2.2 of the same Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.3.6.4 Argentina's second claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

7.155. With respect to Argentina's second claim, which involves Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the disagreement between the parties centres on the "discretion" afforded (or not) to the EU authorities to resort to information prevailing in "other representative markets" in establishing or adjusting the normal value where they have concluded that a producer's records do not reasonably reflect the costs of production of the investigated product, particularly in the situations identified by Argentina. Argentina's claims are premised on its reading of Article 2(5), second subparagraph, 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 which 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.[228] According to Argentina, the references to "any other reasonable basis" and to "information from other representative markets" in Article 2(5), second subparagraph, *mandate* the use of costs not prevailing in the country of origin.[229] On the contrary, the European Union contends that the

[228] See, *inter alia*, Argentina's first written submission, paras. 134-140.

[229] As noted above, however, Argentina also argues, in the alternative, that to the extent that Article 2.2 prohibits the construction of normal value on a basis other than the cost of production in the country of origin, the fact that Article 2(5), second subparagraph, provides for the use of a basis other than the cost of

provision grants wide discretion to the EU authorities to resort to various options in constructing the normal value when they have determined under the first subparagraph of Article 2(5) that the costs are not reasonably reflected in the records.

7.156. We proceed to analyse 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 with respect to this second claim.

7.3.6.4.1 Text of Article 2(5), second subparagraph, of the Basic Regulation

7.157. We note 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. On its face, the phrase of the second subparagraph at issue is formulated in permissive terms. The first – and it seems, preferred – option is for the EU authorities to use the costs of other producers or exporters in the country of origin. Where "such information is not available or cannot be used", they can resort to "any other reasonable basis", including "information from other representative markets". Hence, the text of Article 2(5), second subparagraph, suggests that the EU authorities would first seek to establish or adjust a producer's costs of production on the basis of information originating from producers in the same country. It only permits the authorities to adjust or establish the costs on the basis of information from other representative markets as one of several options that they can consider if such information is not available or cannot be used.

7.158. In support of its reading of the text of Article 2(5), second subparagraph, as requiring the EU authorities to use information outside the country of origin, Argentina argues that as the term "on any other reasonable basis" necessarily relates to information other than information from other domestic producers, it can refer only to information from outside the country of origin.

7.159. Certainly, as Argentina argues, the plain text of the second subparagraph makes it clear that the phrase "any other reasonable basis" refers to something other than "the costs of other producers or exporters in the same country". However, in our view, there may be "bases" or sources of information in the country of origin other than the costs of other producers or exporters of the investigated products. This is particularly so as Argentina's reading would render the phrase "including information from other representative markets" inutile. Hence, we are not convinced by Argentina's argument that the reference to "any other reasonable basis" necessarily is a reference to costs outside the country of origin.

7.160. In addition, we note that Argentina considers that Article 2(5) necessarily implies that the authorities will use not only "information", but will actually construct the normal value on the basis of "costs" in countries other than the country of origin when they decide to resort to "information" from "other representative markets". We note, however, that the text of the second subparagraph refers to "adjust[ing] or establish[ing]" the costs "on the basis" of "information". As Article 2(5), second subparagraph, refers to the *sources of information* (as opposed to the *costs* themselves) that may be used to establish an investigated producer or exporter's costs, it does not, in our view, *require* the EU authorities to construct the normal value so as to reflect costs prevailing in other countries. Hence, the text of Article 2(5), second subparagraph, does not, in our view, support Argentina's argument that this provision requires the EU authorities, where 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 prevailing in other countries than the country of origin.

7.161. On the basis of the foregoing, we are of the view that the text of Article 2(5), second subparagraph, does not support Argentina's allegations with respect to the scope, meaning, and content of that provision as regards Argentina's second claim. Rather, in our view, the text of Article 2(5), second subparagraph, suggests that it provides the EU authorities with a wide range of options concerning the information they may use in constructing the normal value where they

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production in the country of origin renders that measure inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. (See above, paras. 7.85 and 7.118)

have determined that producers/exporters' records do not reasonably reflect the costs of production.

7.162. Having reached these preliminary conclusions on the basis of the text, we now consider the other evidence submitted by Argentina.

7.3.6.4.2 Legislative history pertaining to the inclusion of the second subparagraph of Article 2(5) in the Basic Regulation

7.163. As we have stated above, in the context of addressing Argentina's first claim, our 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.[230]

7.3.6.4.3 Alleged consistent practice of the EU authorities

7.164. We now focus on the application of Article 2(5), second subparagraph, by the EU authorities as it pertains to Argentina's claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.165. As we have noted above, in our evaluation of Argentina's first claim under Article 2.2.1.1, Argentina has brought to our attention a number of instances in which the EU authorities, having determined (primarily in situations in which the prices for certain energy inputs were regulated by the government) that the producer's records did not reasonably reflect its costs, adjusted the costs on the basis of information from sources that they did not consider to be affected by the distortion.[231] The 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.[232] Indeed, 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.[233] As discussed below, in the Biodiesel case, the EU authorities adjusted the actual input costs on the basis of reference prices which, 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 systems maintained by Argentina and Indonesia.[234]

7.166. In our view, 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, any consistent practice emanating from these examples does not demonstrate that Article 2(5), second

[230] We do not find it necessary to form a view as to whether Recital 4 and the second subparagraph of Article 2(3) are relevant to interpreting Article 2(5), second subparagraph, in a situation where the authorities decide to construct the normal value on the basis that there are no, or insufficient, domestic sales in the ordinary course of trade; see above, fn 210.

[231] In some of the determinations, the EU authorities explain that one of the primary criteria for the choice of the basis on which to adjust or establish the input price is that "it reasonably reflects a price normally payable in undistorted markets". See, e.g. Council Regulation 238/2008, (Exhibit ARG-14), Recitals 28-29; Council Regulation 236/2008, (Exhibit ARG-16), Recitals 29 and 31.

[232] Council Implementing Regulation 1251/2009, (Exhibit ARG-15), paras. 20 et seq.

[233] Council Regulation 1891/2005, (Exhibit ARG-8), Recital 31; Council Regulation 1050/2006, (Exhibit ARG-9), Recital 54; Council Regulation 954/2006, (Exhibit ARG-10), Recitals 97 and 127; Council Regulation 812/2008, (Exhibit ARG-11), Recital 17; Council Implementing Regulation 1269/2012, (Exhibit ARG-12), Recital 21; Council Regulation 1911/2006, (Exhibit ARG-13), Recitals 28 and 58; Council Regulation 238/2008, (Exhibit ARG-14), Recital 22; Council Regulation 1251/2009, (Exhibit ARG-15), Recital 18; Council Regulation 236/2008, (Exhibit ARG-16), Recital 19; Council Regulation 661/2008, (Exhibit ARG-17), Recital 59; Council Regulation 237/2008, (Exhibit ARG-18), Recital 26; Council Regulation 907/2007, (Exhibit ARG-19), Recital 34; Council Regulation 240/2008, (Exhibit ARG-20), Recitals 26 and 46; Council Regulation 1256/2008, (Exhibit ARG-21), Recital 111.

[234] See below, paras. 7.179-7.184.

subparagraph, *requires* them to do so.[235] Merely the fact that the authorities opted to act in a certain manner in the past does not mean that the provision at issue requires them to do so in all cases; as we have already noted, Argentina relies on the EU authorities' practice in support of its interpretation of Article 2(5), second subparagraph, but does not challenge the WTO-consistency of the practice itself.[236]

7.3.6.4.4 Judgments of the General Court of the European Union interpreting the measure at issue

7.167. Argentina does not refer specifically to the judgments of the General Court of the European Union with respect to the issue of how the EU authorities are to establish a producer's costs in situations in which they conclude that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration. We note, however, that in the judgments cited by Argentina in support of its arguments on the scope, meaning and content of Article 2(5) relating to its first claim, the General Court cites Recital 4 of Council Regulation 1972/2002 as stating that "the data should be obtained from sources which are unaffected by such distortions".[237] Moreover, the General Court holds that the EU authorities are *entitled* to conclude that where an item in a producer's records could not be regarded as reasonable, it had to be adjusted by having recourse to other sources from markets which the authorities regarded as more representative, for instance by adjusting the costs to bring them into line with costs prevailing in other countries.

7.168. In sum, the judgments 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. This is consistent with our reading of the text of Article 2(5), second subparagraph, above.

7.3.6.4.5 Conclusion with respect to Argentina's second claim that Article 2(5), second subparagraph, is inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

7.169. With respect to the scope, meaning and content of Article 2(5), second subparagraph, as it pertains to Argentina's second claim, our review of the text of Article 2(5), second subparagraph, shows that this provision lays out a series of options for the EU authorities in establishing 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. On its face, the phrase at issue 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. It only permits the authorities to establish or adjust the costs reported in the producers' records on the basis of *information* from other representative markets; moreover, this option is subject to the costs of other producers or exporters in the same country not being available or not being suitable and is only one of "other reasonable bas[es]" which the EU authorities may resort to.

7.170. The other evidence submitted by Argentina does not convince us that the second subparagraph of Article 2(5) *requires* the EU authorities to construct a producer's costs of production on the basis of information pertaining to countries other than the country of origin.

7.171. 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. In this respect, we note that it is 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 normal value on the basis of the "cost of production" "in the country of origin". The parties however disagree as to whether

[235] Moreover, as already noted, the examples cited by Argentina mostly pertained (with the notable exception of the investigation on biodiesel from Argentina and Indonesia) to situations in which prices were regulated. For this reason, we are not convinced that they suffice to establish a "consistent practice".

[236] We find guidance in the Appellate Body Report in *US – Carbon Steel (India)*; see in particular para. 4.480 of the Report.

[237] General Court of the European Union, *Acron I*, (Exhibit ARG-23), paras. 41 et seq.

Article 2.2 and Article VI:1(b)(ii) permit the use of *information* not from the country of origin in the construction of the cost of production. Argentina takes the view that these Articles do not permit the use of information other than information from the country of origin and therefore that there would never be any instance in which the use of information from other representative markets can be consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.[238] We note, however, that 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.

7.172. By contrast, our consideration of the evidence submitted by Argentina leads us to conclude that the language of Article 2(5), second subparagraph, pertains to the *sources of information* (as opposed to the *costs* themselves), that may be used to establish an investigated producer/exporter's costs in constructing its normal value. As a result, even when information from "other representative markets" is used, Article 2(5), second subparagraph, does not, in our view, *require* the EU authorities to establish the costs of production so as to reflect *costs* prevailing in other countries.[239]

7.173. Argentina contends that for its claims to prevail, it would be "sufficient for Argentina to demonstrate that this rule will necessarily lead to violations of WTO rules in certain specified circumstances".[240] However, we have concluded that Argentina has not made such a demonstration.

7.174. In addition, we understand Argentina to take the position, in the alternative, that the fact that Article 2(5), second subparagraph, *provides* for the use of a basis other than the cost of production in the country of origin in the construction of the normal value renders Article 2(5), second subparagraph, inconsistent with the same provisions. However, 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 with Article VI:1(b)(ii) of the GATT 1994, as discussed above Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner. This being the case, we find 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.[241]

7.3.6.5 Whether Argentina has established that Article 2(5), second subparagraph, is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement

7.175. Argentina claims that, as a consequence of the inconsistency of Article 2(5), second subparagraph, of the Basic Regulation 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 also violates Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.[242] As these claims are purely consequential and as we have rejected Argentina's principal claims on which they depend, we also find 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.

[238] See, e.g. Argentina's opening statement at the second meeting of the Panel, para. 24.

[239] The European Union argues that the terms "other representative markets" could be markets in the country of origin. We do not find it necessary to resolve this question to decide Argentina's claims.

[240] Argentina's opening statement at the first meeting of the Panel, para. 84

[241] We find guidance in the Appellate Body Report in *US – Carbon Steel (India)*; see in particular para. 4.483 of the Report.

[242] Argentina's first written submission, paras. 142-146 and 469.

7.4 Argentina's claims concerning whether the EU anti-dumping measures on imports of biodiesel from Argentina are inconsistent with Articles 2.1, 2.2, 2.2.1.1, 2.2.2(iii), 2.4, 3.1, 3.4, 3.5, and 9.3 of the Anti-Dumping Agreement and Articles VI:1, VI:1(b)(ii) and VI:2 of the GATT 1994, "as applied"

7.4.1 Whether the EU anti-dumping measures on imports of biodiesel from Argentina are inconsistent with Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and with Articles VI:1 and VI:1(b)(ii) of the GATT 1994

7.4.1.1 Legal claims

7.176. Argentina claims that the anti-dumping measures applied by the European Union on imports of biodiesel from Argentina are inconsistent with a number of provisions of the Anti-Dumping Agreement and of the GATT 1994. Specifically, Argentina requests us to find that the European Union acted inconsistently with:

a. 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 failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers;

b. 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, namely, Argentina;

c. 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; and

d. Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 as a consequence of the above-mentioned violations under the Anti-Dumping Agreement and the GATT 1994.[243]

7.177. We begin by addressing the first of these claims, which hinges, in large part, on the proper interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.4.1.2 Relevant provisions of the covered agreements

7.178. The texts of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and of Article VI:1 of the GATT 1994 are reproduced above, paragraphs 7.70-7.71. Article 2.1 of the Anti-Dumping Agreement reads:

> 2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

7.4.1.3 Factual background

7.179. On 16 July 2012, the European Biodiesel Board (EBB) submitted a complaint to the EU authorities, requesting the initiation of an anti-dumping investigation concerning imports of biodiesel originating in Argentina and Indonesia.[244] The EU authorities subsequently initiated an anti-dumping investigation on imports of biodiesel from these countries on 29 August 2012.[245] On 28 May 2013, the European Union published a Provisional Regulation imposing provisional anti-dumping duties on imports of biodiesel from Argentina at margins of between 6.8% and 10.6% in the form of specific duties expressed as a fixed amount per tonne.[246] On 1 October 2013,

[243] Argentina's first written submission, para. 470(a)-(d); second written submission, para. 254(a)-(d).
[244] Consolidated version of the complaint, (Exhibit ARG-31). We will not address the aspects of the investigation pertaining to Indonesia, as these are not material to the claims at hand.
[245] Notice of initiation of the anti-dumping investigation, (Exhibit ARG-32).
[246] Provisional Regulation, (Exhibit ARG-30), Recital 179.

the European Union issued a Definitive Disclosure and proposal for definitive measures to interested parties.[247] Interested parties were allowed to submit comments on this Definitive Disclosure. On 26 November 2013, the Definitive Regulation was published in the Official Journal of the European Union. It confirmed the provisional findings of dumping and injury. It calculated dumping margins ranging from 41.9% to 49.2%. Given that the dumping margins exceeded the injury margins calculated by the EU authorities, which ranged from 22.0 to 25.7%, the European Union applied duties corresponding to the latter, in the form of specific duties on imports of biodiesel from Argentina.[248]

7.180. In the Provisional Regulation, the EU authorities found that, since the Argentine biodiesel market was heavily regulated, domestic sales were not made in the ordinary course of trade, which meant that the normal value would have to be constructed.[249] As part of constructing the normal value, the EU authorities calculated the costs of production of biodiesel on the basis of the costs recorded in the producers' records during the investigation period (IP). While the EBB had claimed that the "Differential Export Tax" (DET) system[250] in Argentina depressed the price of soybeans and soybean oil (the main raw material inputs used in the production of biodiesel) and, therefore, distorted the costs of biodiesel producers, the EU authorities indicated that they did not have enough information at that stage of the investigation to make a decision as to the most appropriate way to address that claim.[251] Hence, they stated, the question as to whether the costs of soybeans in the producers' records reasonably reflect the costs associated with the production of biodiesel would be examined further at the definitive stage, as well as in the parallel countervailing duty investigation.[252]

7.181. In the Definitive Disclosure, the EU authorities confirmed their finding that domestic sales were not made in the ordinary course of trade given that the Argentine market was heavily regulated, such that the normal value had to be constructed.[253] In addition, the EU authorities found that the DET depressed the domestic price of soybeans and soybean oil to an artificially-low level which, as a consequence, affected the costs of the biodiesel producers.[254] The EU authorities further considered that this cost distortion should be taken into account in establishing the normal value.[255] In particular, the EU authorities considered that the investigation demonstrated that the DET in Argentina distorted the costs of production of Argentine biodiesel producers because:

> [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) …
>
> ...
>
> On the other hand, domestic prices of soya beans and soya bean oil are determined on the relevant markets under the prevailing conditions. However, the domestic prices follow the trends of the international prices. The investigation 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.

[247] Definitive Disclosure, (Exhibit ARG-35).
[248] Definitive Regulation, (Exhibit ARG-22).
[249] Provisional Regulation, (Exhibit ARG-30), Recitals 44 and 45.
[250] See below, para. 7.181, for the EU authorities' description of the DET.
[251] Provisional Regulation, (Exhibit ARG-30), Recital 45.
[252] Provisional Regulation, (Exhibit ARG-30), Recital 45. The EU authorities conducted a parallel countervailing duty investigation on imports of biodiesel from Argentina and Indonesia. The investigation was initiated on 10 November 2012, following the submission of a complaint by the EBB on 27 September 2012. (Notice of initiation of the countervailing duty investigation, (Exhibit ARG-33)). The alleged subsidies at issue consisted of the provision of inputs (soybean or soybean oil in the case of Argentina and palm oil in the case of Indonesia) at below market prices by means of government policies implemented and enforced by a policy of export tax (export tax on the inputs at higher rates than on the finished product, biodiesel), and which obliged 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. (Notice of termination of the countervailing duty investigation, (Exhibit ARG-36))
[253] Definitive Disclosure, (Exhibit ARG-35), para. 24.
[254] Definitive Disclosure, (Exhibit ARG-35), para. 26.
[255] Definitive Disclosure, (Exhibit ARG-35), para. 26.

> The domestic reference prices of soya beans and soya bean oil are also published by the Argentine Ministry of Agriculture as the 'FAS theoretical price'. The producers of soya beans and soya bean oil therefore obtain the same net price no matter whether they sell for export or domestically.
>
> In conclusion, the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be 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 as interpreted by the General Court as explained above.[256] (fns omitted)

7.182. In light of the above, the EU authorities decided to disregard the price actually paid by Argentine producers for soybeans – which the EU authorities referred to as "the main raw material purchased and used in the production of biodiesel" – and to replace it with "the price at which those companies would have purchased the soya beans in the absence of such a distortion".[257] The EU authorities thus replaced the actual purchase price of soybeans during the IP, as reflected in the producers' records used in the calculation at the provisional stage, with the average reference price of soybeans published by the Argentine Ministry of Agriculture for export, FOB Argentina, minus fobbing costs, during the IP.[258] This resulted in the EU authorities replacing the costs incurred by the producers as reported in their records by a uniform price of 2,144.60 ARS (Argentine pesos) for soybeans for all producers in establishing their costs of production. This significantly increased the costs of production for each of the Argentine producers.[259] The EU authorities considered that this reference price reflected the level of international prices.[260]

7.183. In its comments on the Definitive Disclosure, the association of Argentine exporting producers (Cámara Argentina de Biocombustibles, CARBIO) argued, *inter alia*, that export taxes on soybeans or soybean oil are not a cost associated with the production of biodiesel in Argentina, and therefore cannot be included in the cost of production and sale of biodiesel.[261]

7.184. In the Definitive Regulation, the EU authorities confirmed their conclusion that domestic prices of soybeans were artificially lower than international prices due to the distortion created by the Argentine export tax system, and also confirmed their use of reference prices published by the Argentine Ministry of Agriculture to establish the cost at which companies would have purchased soybeans in the absence of the distortion.[262] In response to CARBIO's claim that export taxes on soybeans or soybean oil could not be included in the cost of production and sales of biodiesel, the EU authorities stated:

> In the present case it was established that the costs associated with the production of the product concerned are not reasonably reflected in the records of the companies concerned as they are artificially low due to the distortion caused by the Argentine DET system. This holds true regardless of whether or not DET systems in general may be as such contrary to the WTO Agreement … [W]hen making such a determination to derogate from [the general rule set forth in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement], the investigating authority must set forth its reasons for doing so. Consistent with this interpretation, in view of the distortion created by the DET system, which creates a particular market situation, the Commission replaced the costs recorded by the companies concerned for the purchase of the main raw material in Argentina with the price that would have been paid in the absence of the established distortion.[263]

[256] Definitive Disclosure, (Exhibit ARG-35), paras. 31-34.
[257] Definitive Disclosure, (Exhibit ARG-35), para. 35.
[258] Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI).
[259] Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI), pp. 2, 5, 8, 11, and 14; Argentina's first written submission, para. 182.
[260] Definitive Disclosure, (Exhibit ARG-35), para. 32.
[261] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), pp. 5 and 6 (discussed in Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI)).
[262] Definitive Regulation, (Exhibit ARG-22), Recitals 38-40.
[263] Definitive Regulation, (Exhibit ARG-22), Recital 42.

7.4.1.4 Whether the European Union acted inconsistently 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 by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers

7.4.1.4.1 Arguments of the parties

7.4.1.4.1.1 Argentina

7.185. Argentina submits that the European Union acted inconsistently with Article 2.2.1.1 and, as a consequence of this inconsistency, with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.[264] In particular, Argentina claims that the European Union erred by determining that the costs of the main raw material in the production of biodiesel, soybean oil and soybeans[265], were not reasonably reflected in the records kept by the Argentine producers under investigation because those costs were artificially lower than international prices due to the distortion created by the Argentine export tax system.[266]

7.186. Argentina submits that Article 2.2.1.1 of the Anti-Dumping Agreement requires an investigating authority to calculate a producer/exporter's costs of production on the basis of the records kept by the producer/exporter under investigation, provided that such records are in accordance with the 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.[267] According to Argentina, the second basis for disregarding the costs reflected in the records kept by the producer/exporter under Article 2.2.1.1 is needed because those records pre-exist and are not necessarily organized in a manner which coincides with what is requested in an anti-dumping investigation, which focuses on a specific product and a specific period of investigation.[268] For instance, this ground might be relied upon where the costs reflected in these records do not correlate to the specific time period or product under investigation, or in instances where the exporter forms part of a group of companies and sources certain inputs from a related company.[269] However, this ground only permits examination of whether the *records* – rather than the *costs* contained therein – are "reasonable".[270] Thus, the reliance on this condition by the EU authorities to remedy what they considered to be "artificially low" prices stemming from the Argentine export tax system was erroneous.[271] Argentina bases its understanding of Article 2.2.1.1

[264] Argentina's first written submission, paras. 171(1), 244, and 470(a). Argentina also argues, as a first line of argumentation, that Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement, and, therefore, the Panel should likewise find the application of Article 2(5) of the Basic Regulation in the anti-dumping measures at issue to be inconsistent with the same provision. (Argentina's first written submission, para. 196). We have found in the previous section of our report that Argentina has not established that Article 2(5), second subparagraph, of the Basic Regulation, is inconsistent "as such" with the provisions of the Anti-Dumping Agreement and of the GATT 1994 which it invokes. Accordingly, in the present section, we only address the second line of argumentation presented by Argentina in support of its "as applied" claim under Article 2.2.1.1, i.e. that Article 2(5) was applied in a manner inconsistent with Article 2.2.1.1 in the circumstances of the investigation at issue.

[265] We note that Argentina claims that the European Union erred in referring indistinctly in the Definitive Regulation to soybeans and soybean oil as "the main raw material", because soybeans are not a direct input in the production of biodiesel. In particular, Argentina contends that producers must "crush" soybeans to obtain soybean oil (in addition to soybean meal and pellets) before biodiesel can be obtained from the oil by way of transesterification. (Argentina's first written submission, paras. 211 and 212 (referring to Definitive Regulation, (Exhibit ARG-22), Recitals 30, 34, 38, and 39)). We adopt the same terminology as the Definitive Regulation without prejudice to the merits of Argentina's contention in that regard.

[266] Argentina's first written submission, paras. 204-207 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 38).

[267] Argentina's first written submission, paras 92 and 200. Argentina contends that the term "normally" in the first sentence of Article 2.2.1.1 does not render the rule contained therein optional, but rather, indicates that there are exceptions to the rule as expressed by the two conditions referred to in the same sentence (see ibid. paras. 93 and 201).

[268] Argentina's response to Panel question Nos. 90, para. 32 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393), and 7, paras. 17-23.

[269] Argentina's response to Panel question No. 7, paras. 18-23.

[270] Argentina's second written submission, para. 179.

[271] Argentina's first written submission, paras. 99 and 209-211.

in this regard on the ordinary meaning of that provision, in its context and in light of the object and purpose of the Anti-Dumping Agreement.[272]

7.187. In particular, Argentina contends that the ordinary meaning of the term "costs" concerns costs actually incurred by the producer/exporter, regardless of whether the amount actually incurred by the producer/exporter corresponds to prices that they could have hypothetically paid on other markets.[273] Further, Argentina notes that, if the producer/exporter were to include costs in its records that represent the costs that it could have hypothetically incurred instead of the costs that were actually incurred, those records would be inconsistent with the GAAP.[274] Thus, for Argentina, the term "costs" in Article 2.2.1.1 refers to costs actually incurred by the producer/exporter. On that basis, the term "associated" in the phrase "costs associated with the production and sale" cannot be construed in a broad sense to cover hypothetical costs that were not actually incurred by the producer/exporter. Rather, it refers to costs pertaining specifically to the production and sale of the product under investigation.[275]

7.188. Argentina further argues that, in the phrase "provided that such records … reasonably reflect the costs …", the term "records" is the subject, the term "costs" is the object, the term "reflect" is the verb, and the term "reasonably" is an adverb.[276] Thus, it follows from the structure of this phrase that the correct inquiry into whether the records reasonably reflect the cost of production involves an assessment of the reasonableness of the *records*, as opposed to the reasonableness of the costs themselves.[277] Thus, while governmental intervention might distort costs, such intervention is not relevant if those costs are reasonably reflected in the records.[278]

7.189. Turning to the context of the phrase "provided that such records … reasonably reflect the costs …" in the first sentence of Article 2.2.1.1, Argentina asserts that the second and third sentences in Article 2.2.1.1 are directly concerned with the manner in which costs are apportioned and registered in the records, rather than with the costs themselves.[279] For Argentina, this confirms that the first sentence of Article 2.2.1.1 is not concerned with the reasonableness of the costs, but rather, with whether the costs are reasonably reflected in the records. Argentina also argues that the presence of Article 2.2.2 in the Anti-Dumping Agreement suggests that the drafters of the Agreement would have explicitly provided for using data other than those of the producers in determining the cost of production if they had intended such a meaning.[280] This is because Article 2.2.2 provides an express basis for using data other than those of the producers' records for determining particular costs and profits, in contrast to Article 2.2.1.1.

7.190. Argentina also argues that the textual references to the domestic market of the "country of origin" in Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 suggest that costs reflected in the records kept by the producer/exporter should not be considered "unreasonable" on the basis that they do not reflect international prices.[281] Argentina further argues that the very concept of dumping, as articulated through multiple provisions of the Anti-Dumping Agreement, is clearly exporter-specific.[282] It concerns the costs actually incurred by an exporter, rather than abstract or hypothetical costs pertaining to other exporters in different contexts. This militates against an interpretation that would permit an investigating authority to disregard the actual costs incurred by an exporter on the basis that they were unreasonable or

[272] Argentina's first written submission, para. 207.

[273] Argentina's first written submission, paras. 101 and 216. In this connection, Argentina refers to a number of panel reports which, it claims, support the view that Article 2.2.1.1 pertains to actual costs incurred by the producer/exporter. See ibid. paras 128-131 (referring to Panel Reports, *US – Softwood Lumber V*, para. 7.321; *Egypt – Steel Rebar*, para. 7.393; and *EC – Salmon (Norway)*, para. 7.483). Argentina also notes the absence of any reference to terms such as "prices" or "international prices" in Article 2.2.1.1 that connote what the costs could be by reference to undistorted markets (see ibid. para. 217).

[274] Argentina's first written submission, para. 228.

[275] Argentina's second written submission, paras. 114-115 and 180; comments on the European Union's response to Panel question No. 90, para. 18.

[276] Argentina's first written submission, para. 225.

[277] Argentina's response to Panel question No. 4, para. 3; first written submission, para. 225.

[278] Argentina's response to Panel question No. 4, para. 3.

[279] Argentina's first written submission, para. 111; response to Panel question No. 11, para. 24.

[280] Argentina's first written submission, para. 113; second written submission, paras. 123-125.

[281] Argentina's first written submission, paras. 114, 117, and 232-235; second written submission, paras. 184 and 185.

[282] Argentina's second written submission, paras. 127-131 and 136; opening statement at the first meeting of the Panel, para. 79.

artificially low.[283] Thus, to permit the replacement of costs actually incurred by the producer/exporter in the domestic market with international prices would subvert the object and purpose of the Anti-Dumping Agreement, which is to regulate dumping based on a comparison between the normal value and the export price.[284] Further, addressing the existence of a "distortion" on the domestic market is totally unrelated to the issue of "dumping".[285]

7.191. In Argentina's view, the foregoing considerations make clear that Article 2.2.1.1 does not permit the costs in producers/exporters' records to be disregarded on the basis that those costs are artificially low due to distortions flowing from governmental intervention. Given that the interpretation of the term in light of its ordinary meaning and read in context is not ambiguous, the negotiating history of Article 2.2.1.1 would only be useful insofar as it confirms the meaning of that provision as set out above.[286] In this regard, Argentina argues, *inter alia*, that the negotiating history demonstrates that the costs of production relate to costs in the country of origin, that Article 2.2.1.1 concerns the allocation of costs in the records kept by the producer/exporter rather than the reasonableness of the costs themselves, and that the negotiating parties decided not to regulate "input dumping" in the Anti-Dumping Agreement.[287] Further, Argentina argues that the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 does not establish, contrary to the arguments of the European Union, that dumping is capable of stemming from governmental practices such as Argentina's export tax system.[288] Rather, the second *Ad* Note to Articles VI:2 and VI:3 is limited to the specific case of multiple currency practices.[289]

7.192. Finally, Argentina submits that the European Union's finding that the records do not reasonably reflect the cost of "the main raw material" is based on an improper establishment of the facts. In particular, the finding that domestic prices of soybeans and soybean oil in Argentina are "distorted" is factually incorrect since those prices are freely set.[290] Further, soybeans are not a direct input in the production of biodiesel. Instead, they are used to produce soybean oil, from which biodiesel can in turn be obtained through transesterification.[291] Argentina argues that given that soybeans are not a direct input in the production of biodiesel, it does not flow from the finding that the domestic price of soybeans is "distorted" that the price of the "main raw material" (i.e. soybean oil) is "distorted", or that the records of the Argentinean producers do not reasonably reflect the cost of soybean oil.[292]

7.193. As a result of failing to calculate the costs of production in accordance with Article 2.2.1.1 of the Anti-Dumping Agreement, Argentina claims that the European Union failed to properly construct the normal value, and therefore acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.[293]

7.4.1.4.1.2 European Union

7.194. The European Union requests the Panel to find that Argentina has failed to make a *prima facie* case that it acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement by disregarding the costs of soybeans and soybean oil in the records kept by the producers because they were "artificially low" as a consequence of Argentina's export tax system.[294] For the European Union, investigating authorities are only required to use the "costs" reflected in such records under Article 2.2.1.1 where they are "reasonable" for the production of the goods in question.[295] Thus, where such costs are not "reasonable", Article

[283] Argentina's first written submission, paras. 125-127 and 240.
[284] Argentina's opening statement at the first meeting of the Panel, paras. 77 and 78.
[285] Argentina's response to Panel question No. 91, para. 40.
[286] Argentina's response to Panel question No. 18, para. 38.
[287] Argentina's response to Panel question No. 18, paras. 37-47; second written submission, paras. 141-145.
[288] Argentina's comments on the European Union's response to Panel question No. 94, paras. 23-26.
[289] Argentina's opening statement at the second meeting of the Panel, paras. 38-40.
[290] Argentina's first written submission, paras. 209 and 210. In addition, Argentina argues that export taxes are legal under WTO law, and the particular export tax in question is not a form of government intervention in the domestic price of soybeans. (Argentina's response to Panel question No. 103, paras. 77-79)
[291] Argentina's first written submission, para. 211.
[292] Argentina's first written submission, para. 212.
[293] Argentina's first written submission, para. 244.
[294] European Union's second written submission, paras. 132 and 143.
[295] European Union's first written submission, paras. 130-133 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393).

2.2.1.1 does not preclude investigating authorities from determining that the producer's records do not reasonably reflect those costs, regardless of the fact that they may record the costs that were actually incurred by the producer under investigation.[296]

7.195. In respect of the ordinary meaning of Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union argues that the term "costs" does not necessarily refer only to the costs actually incurred by a producer, but rather, it connotes the prices "to be paid" by the producer for the production of the product under consideration.[297] In this connection, the European Union contends that the term "associated" in the phrase "costs associated with the production and sale" in Article 2.2.1.1 captures a broader range of relations between the "costs" and the "production" of the goods than the costs actually incurred by the producer/exporter.[298] For instance, it captures the costs that would "normally" be associated with the production and sale of the goods.[299] The European Union notes, in this regard, the absence of a textual link in the first sentence of Article 2.2.1.1 between the "costs associated …" and the specific "producer" under investigation. The European Union also contends that the term "reflect" suggests that there is no need for "a precise calculation or determination"; therefore, the use of that term in the first sentence of Article 2.2.1.1 does not support Argentina's thesis that the records should be considered as "reasonable" where they simply include the precise costs "actually incurred by the producer". The European Union refers to a number of panel and Appellate Body reports which it considers provide authority for its understanding of Article 2.2.1.1.[300]

7.196. In respect of the context of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union argues that the specific references to the "actual amounts" incurred by the producer/exporter in Article 2 of the Anti-Dumping Agreement, such as those in Articles 2.2.2(i) and 2.2.2(ii), suggest that the choice of the words "costs associated with the production and sale" in Article 2.2.1.1 aims to cover something different from the "actual amounts incurred" or "expenses actually incurred" by a specific producer.[301] Further, the inclusion of the condition in the first sentence of Article 2.2.1.1 for the records to be consistent with GAAP – which, the European Union submits, suffices to ensure that the records include the costs actually incurred by the producer under investigation – suggests that the subsequent condition pertaining to the records reasonably reflecting costs must mean something more than simply "the expenses actually incurred".[302] The European Union also argues that the second and third sentences of Article 2.2.1.1 suggest that adjustments may be made to the costs reported by a company in certain circumstances, and that authorities can take into consideration cost information that does not appear in such records.[303] This, in turn, suggests that Article 2.2.1.1 stands for the principle that authorities may disregard, or adjust, the information in the records of producers under investigation, provided certain conditions are met.[304]

7.197. The European Union submits that the chapeau of Article 2.2.2 also provides context for the interpretation of Article 2.2.1.1, insofar as it states that the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade. In particular, it can be inferred from this that, where sales are *not* in the ordinary course of trade, actual data may potentially be disregarded. Since it is not disputed in the present case that sales of biodiesel were not in the ordinary course of trade in Argentina, the

[296] European Union's response to Panel question No. 5, para. 10.

[297] European Union's first written submission, para. 136 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.481); second written submission, paras. 125-128.

[298] European Union's first written submission, para. 137 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393).

[299] European Union's first written submission, para. 139.

[300] European Union's first written submission, paras. 140-141, 166-169 (referring to Panel Reports, *EC – Salmon (Norway)*, para. 7.481; *Egypt – Steel Rebar*, para. 7.383; *US – Softwood Lumber V* paras. 7.327-7.329 and 7.347; and Appellate Body Report, *US – Softwood Lumber V*, para. 171); response to Panel question No. 10, para. 18; opening statement at the second meeting of the Panel, paras. 136-138 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393), and 151-152 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.483); comments on Argentina's response to Panel question No. 90, para. 49.

[301] European Union's first written submission, para. 147.

[302] European Union's first written submission, paras. 148 and 149; opening statement at the second meeting of the Panel, para. 142.

[303] European Union's first written submission, paras. 151-153 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.484).

[304] European Union's first written submission, para. 154.

context provided by Article 2.2.2 suggests that Article 2.2.1.1 should not be read to require the investigating authority to use the costs actually incurred by the producers.[305]

7.198. The European Union rejects Argentina's argument that various textual references to the "country of origin" support Argentina's interpretation of Article 2.2.1.1 that costs reflected in the records kept by the producer/exporter may not be considered "unreasonable" where they do not accord with international prices. First, the European Union argues that the reference to the country of origin in Article 2.2 does not mean that evidence from other countries cannot be used in determining the costs of production. The European Union argues in this respect that Article 2.2.1.1 directs an investigating authority to consider "all available evidence", which may include, for instance, invoices issued by exporters in other countries.[306] Second, the European Union argues that the leeway provided for in Article 2.2.2(iii) to use "any other reasonable method" implies that there is no absolute prohibition on the use of data on the cost of production from countries other than the country of origin where the conditions of production and sale are not in the "ordinary course of trade".[307]

7.199. In respect of the object and purpose of the Anti-Dumping Agreement, the European Union contends that it is directed at preventing damage to the industries of an importing country by the producers of an exporting country through the use of prices that are artificially low due to some abnormal condition. For the European Union, therefore, goods that are produced with costs that are not "normal" fall within the type of conditions that the Anti-Dumping Agreement is intended to address.[308] In this connection, the European Union contends that exogenous factors, such as the actions of the government of the exporting country, are capable of being the source of dumping. For instance, the Appellate Body has considered that there can be circumstances where dumping and subsidization arise from the "same situation"[309], and further, the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 states that "multiple currency practices" meant as "practices by governments" can "constitute a form of dumping".[310] Given its similarities to "multiple currency practices" (both involve a government-induced manipulation of the ordinary operation of the market, which substantially affects and distorts pricing), Argentina's export tax falls within the types of government measures that may lead to dumping.[311] More generally, this *Ad* Note demonstrates that the definition of dumping cannot be construed to exclude government practices, but rather, that whether a particular governmental price intervention results in dumping must be considered on a case-by-case basis.[312]

7.200. The European Union argues that the negotiating history of Article 2.2.1.1 contradicts Argentina's interpretation of this provision, given that the terms "the allocation of costs" included in a previous version of the provision were replaced with "costs shall be normally calculated", which suggests that this provision is not limited to cost allocation issues, and given that the requirement for "reasonableness" was severed from the GAAP, which suggests a broader scope for the "reasonableness" obligation in Article 2.2.1.1.[313]

7.201. Finally, the European Union submits that Argentina's contentions that the EU authorities improperly established the facts in determining that a distortion existed and that soybeans are a direct input in the production of biodiesel are unfounded.[314]

[305] European Union's first written submission, paras. 247 and 248; opening statement at the first meeting of the Panel, paras. 73-75.
[306] European Union's first written submission, paras. 193 and 194; second written submission, paras. 134 and 135.
[307] European Union's first written submission, para. 198; opening statement at the second meeting of the Panel, para. 159.
[308] European Union's first written submission, paras. 157 and 158.
[309] European Union's opening statement at the first meeting of the Panel, paras. 25-36 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568).
[310] European Union's second written submission, paras. 114-124.
[311] European Union's second written submission, paras. 119-124; response to Panel question No. 94, paras. 38-41.
[312] European Union's response to Panel question No. 94, paras. 39-41.
[313] European Union's second written submission, paras. 96-98.
[314] European Union's first written submission, paras. 222-232.

7.4.1.4.2 Arguments of the third parties

7.202. **Australia** submits that an investigating authority should be permitted to consider whether the costs reflected in the records of the producer/exporter are reasonable, and, where they are not, to adjust or replace them in an appropriate manner.[315] Thus, Article 2.2.1.1 permits investigating authorities to look beyond a producer/exporter's actual records and consider whether the costs reflected therein are reasonably related to the costs of producing and selling the product. For Australia, the reasonableness of costs of inputs or raw materials would be relevant to this analysis.[316]

7.203. In Australia's view, to disallow an authority from considering elements that were beyond the direct control of a producer/exporter would render inutile the provision in Article 2.2 of the Anti-Dumping Agreement for cost construction in circumstances of a particular market situation.[317] Further, to limit an investigating authority's scope of analysis to factors that are endogenous to the foreign producers/exporters implies limitations in Article 2.2 that do not exist, and, moreover, contradicts the ordinary meaning of the term "particular market situation".[318]

7.204. **China** submits that the authority to apply anti-dumping measures is limited to circumstances in which the pricing behaviour of an individual producer/exporter under investigation is found to result in price discrimination between the normal value and export price for a product and that price discrimination causes injury to the importing Member's domestic industry.[319] For China, this producer/exporter-specific focus is embodied in the definition of dumping in Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, and is also reflected throughout various provisions of the Anti-Dumping Agreement.[320] Accordingly, an investigating authority cannot reject the costs recorded in the producer/exporter's accounts on grounds exogenous to that producer/exporter, such as governmental interventions beyond its control.[321] While China does not consider that governmental interventions "are outside the remedial scope of the covered agreements", China argues that to ignore this foundational element of the Anti-Dumping Agreement would be to subvert the carefully negotiated balance of rights, disciplines and remedies provided for Members in the WTO Agreement as a whole.[322]

7.205. China thus submits that the European Union's understanding of Article 2.2.1.1 of the Anti-Dumping Agreement goes impermissibly far in suggesting that recorded costs may be benchmarked against hypothetical costs that might be borne by a producer in a theoretical market where the price of relevant inputs is not affected by governmental interventions.[323] For China, a cost in a hypothetical market, incurred by a hypothetical producer, does not pertain to the production of the product by the investigated producer.[324]

7.206. China acknowledges that, in certain cases, there could be evidence suggesting that the actual costs ascribed to a producer/exporter and reflected in its records may not properly reflect the costs associated with production and sale in the country of origin.[325] A comparison with the costs incurred by other producers/exporters of the product in the country of origin could be indicative in that regard.[326] Importantly, however, the context afforded by Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement demonstrates that recorded costs "can only be rejected as not 'reasonably reflect[ing]' costs of production if they fail to reasonably reflect the cost of production

[315] Australia's third-party submission, para. 12.
[316] Australia's third-party submission, para. 5 (referring to Panel Report, *China – Broiler Products*, para. 7.164).
[317] Australia's third-party response to Panel question No. 5.
[318] Australia's third-party response to Panel question No. 8.
[319] China's third-party submission, paras. 26 (referring to Appellate Body Reports, *US – Zeroing (Japan)*, para. 111; *US – Stainless Steel (Mexico)*, para. 86) and 58-62; third-party statement, para. 4.
[320] China's third-party statement, para. 4; third-party submission, paras. 47-50.
[321] China's third-party submission, para. 27.
[322] China's third-party submission, paras. 29 and 30; third-party statement, para. 5: "Otherwise, anti-dumping proceedings cease to be a remedy for the pricing behavior of producers or exporters, and instead become a tool for investigating authorities to penalize imports for cost advantages that foreign producers may enjoy."
[323] China's third-party submission, para. 36.
[324] China's third-party submission, paras. 37 and 42-45; third-party statement, paras. 9-13.
[325] China's third-party submission, para. 39.
[326] China's third-party submission, para. 51.

of the product in the *country of origin*".[327] Thus, for China, it is never appropriate to substitute out-of-country costs for costs in the country of origin.[328] China does not exclude the possibility that an investigating authority may encounter exceptional circumstances in which there is simply no evidence as to the relevant costs available from within the country of origin.[329] However, any evidence that does not directly pertain to costs of production in the country of origin would need to be dealt with in a manner that reflects the specific market conditions in the country of origin, including any differences in respect of relevant governmental interventions between the two markets, such as taxes and duties.[330]

7.207. **Colombia** submits that the phrase "reasonably reflect the costs" in Article 2.2.1.1 refers to "the actual cost of production a producer has to reflect in its records", in the light of the syntax of the phrase[331], as well as the fact that Article 2.2.1.1 is directed at situations where a Member that imposes an anti-dumping measure "is actually investigating the costs of production of producers of the exporting Member".[332] Colombia notes the absence of any terms in Article 2.2.1.1 suggesting that the "costs" have to be the ones "*normally* associated with the production and sale of goods"[333], as well as the context of the term "allocation", which refers to an amount of a resource assigned for a particular purpose, and the context provided by Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement, which establish that the benchmark for calculating the normal value is the cost of production in the country of origin.[334] Therefore, in Colombia's view, the European Union acted against Article 2.2.1.1 by using international prices of soybeans to calculate the costs of production.

7.208. Colombia submits that it may have been more appropriate for the European Union to have pursued a countervailing duty investigation.[335] For Colombia, the Anti-Dumping Agreement governs actions against exporters that injuriously sell at an abnormally low value, and distorted input prices due to an export tax do not fall within its scope.[336]

7.209. **Indonesia** concurs with Argentina's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.[337] In Indonesia's view, the European Union added an additional dimension to the test governing the reasonable reflection of costs by including an element on the non-distortion and reasonableness of input costs *per se*.[338] For Indonesia, this is not supported by the text or context of Article 2.2.1.1.[339] In this regard, Indonesia notes that a reasonability condition explicitly applies to the "administrative, selling and general costs" under Article 2.2 of the Anti-Dumping Agreement, whereas the two criteria in the first sentence of Article 2.2.1.1 are concerned with cost allocation issues unrelated to the reasonability of those costs.[340] Indonesia also argues that these two criteria call for an assessment of the records of the producer/exporter under investigation, which, in turn, limits an investigating authority from expanding its consideration to any other set of prices outside the costs contained in those records.[341]

7.210. Indonesia submits that the European Union's rejection of the argument that Article 2.2.1.1 refers to costs "actually incurred by the producer" is untenable because the first sentence of that provision clearly refers to the "records kept by the producer/exporter under investigation", and further, because it would be contrary to the requirement to calculate individual dumping margins.[342] Indonesia draws on certain historical materials to support its position. In particular,

[327] China's third-party submission, para. 52 (emphasis original); third-party statement, paras. 14-16.
[328] China's third-party response to Panel question No. 13, para. 28.
[329] China's third-party response to Panel question No. 13, para. 30.
[330] China's third-party response to Panel question Nos. 13, para. 31; 4, para. 12; and 12, paras. 25-27.
[331] Colombia's third-party statement, para. 7.
[332] Colombia's third-party submission, para. 18.
[333] Colombia's third-party submission, para. 18. (emphasis original)
[334] Colombia's third-party submission, para. 20.
[335] Colombia's third-party submission, para. 24; third-party response to Panel question Nos. 6, paras. 3-6, and 16, para. 7.
[336] Colombia's third-party submission, paras. 23 and 24.
[337] Indonesia's third-party submission, para. 33.
[338] Indonesia's third-party submission, paras. 35 and 36.
[339] Indonesia's third-party submission, para. 35.
[340] Indonesia's third-party submission, paras. 37 and 38 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.484).
[341] Indonesia's third-party submission, para. 39.
[342] Indonesia's third-party submission, para. 40; third-party statement, paras. 10-12 (referring to Panel Report, *Thailand – H-Beams*, para. 7.112); third-party response to Panel question No. 2, para. 12.

Indonesia suggests that the European Union's own view in the *Ad hoc* group on the implementation of the Anti-Dumping Code was that the actual costs of a producer had to be used.[343] Further, Indonesia suggests that the negotiating history on Article 2.2.1.1 demonstrates that the term "reasonably" is not intended to qualify the term "costs".[344]

7.211. In response to questions from the Panel, **Mexico** submits that it did not consider there to be fixed parameters in the text or context of Article 2.2.1.1 of the Anti-Dumping Agreement governing the manner in which an investigating authority is to determine whether the records reasonably reflect the costs associated with the production and sale of the product concerned.[345] Accordingly, Mexico considers that investigating authorities have a margin of discretion to make such a determination on a case-by-case basis.

7.212. **Norway** submits that both of the cumulative conditions in Article 2.2.1.1 seem to relate to the quality of the records as such, and the structure and ordinary meaning of Article 2.2.1.1 suggest that the second condition only concerns whether the records reflect the costs associated with the production and sale of the product under investigation in a reasonable manner.[346]

7.213. The **Russian Federation** considers that the practice of input cost adjustment is inconsistent both with the provisions of the WTO Agreement and the spirit of the WTO.[347] Concerning Article 2.2.1.1 of the Anti-Dumping Agreement, the Russian Federation submits that the records must depict the costs that have been incurred in association with the production and sale of the product under consideration.[348] The plain meaning of the term "costs" focuses on what is paid, rather than on the value or the reasonableness of what is paid, and the core issue under Article 2.2.1.1 is whether the costs are reasonably reflected in the records, as opposed to whether the costs themselves were reasonable in the light of extraneous economic considerations.[349] Indeed, an analysis of the structure of the first sentence of Article 2.2.1.1 reveals that the word "reasonably" immediately precedes the word "reflect", and therefore the inquiry under Article 2.2.1.1 is whether the records reflect the costs associated with the production and sale of the product under consideration "reasonably".[350]

7.214. Further, the Russian Federation contends that the European Union's understanding of the object and purpose of the Anti-Dumping Agreement, which is a holistic, integrative notion, is "manifestly wrong" because it was derived from a single provision of the treaty while ignoring the others, and because the term "normal" in the Anti-Dumping Agreement does not correspond to concepts of "artificially low" and "abnormal condition" as suggested by the European Union.[351] Further, the Russian Federation submits that WTO jurisprudence demonstrates that the concept of "dumping" in the Anti-Dumping Agreement does not deal with the price of the product's inputs.[352]

7.215. **Saudi Arabia** contends that the first sentence of Article 2.2.1.1 imposes a general and mandatory obligation to use, for the purpose of calculating costs of production, the costs in the country of origin as reflected in the records of each individual producer/exporter concerned.[353] For Saudi Arabia, the term "normally" in that sentence confirms that the general rule must be followed unless one of the two exceptional circumstances listed therein applies.[354] In Saudi Arabia's view, these two limited conditions concern the reliability and accuracy of the costs in relation to the product under consideration, and underline the exceptional nature of the circumstances that would allow an investigating authority to reject those costs.[355] For Saudi Arabia, the "reasonableness" referred to in the first sentence of Article 2.2.1.1 does not allow an investigating authority to question the general "reasonableness" of the costs recorded, such as by comparison with

[343] Indonesia's third-party submission, paras. 42 and 47.
[344] Indonesia's third-party statement, para. 7; third-party response to Panel question No. 11, paras. 24-32.
[345] Mexico's third-party response to Panel question No. 2.
[346] Norway's third-party statement, paras. 7 and 8.
[347] Russian Federation's third-party statement, para. 2.
[348] Russian Federation's third-party submission, para. 3.
[349] Russian Federation's third-party submission, para. 5.
[350] Russian Federation's third-party submission, para. 3.
[351] Russian Federation's third-party submission, paras. 17-22.
[352] Russian Federation's third-party submission, paras. 23-31.
[353] Saudi Arabia's third-party submission, para. 12.
[354] Saudi Arabia's third-party submission, para. 13.
[355] Saudi Arabia's third-party submission, paras. 14-16.

international reference prices. Rather, it merely concerns the association of the recorded costs with the product under consideration as compared with other products of the producer/exporter to which certain costs may also be associated.[356] Saudi Arabia also invokes the object and purpose of the Anti-Dumping Agreement in contending that it is not aimed at preventing Members from adopting WTO-consistent measures or undoing Members' comparative advantages by correcting reported costs of production in light of international reference prices.[357] In Saudi Arabia's view, there are other multilateral or unilateral instruments available to address measures alleged to distort the market environment and trade.[358]

7.216. **Turkey** submits that Article 2.2.1.1 of the Anti-Dumping Agreement requires that, for the purpose of establishing normal value, the investigating authority is normally obliged to use the records kept by the producer/exporter if the two conditions in the first sentence of that provision are met.[359] If those conditions are met, the term "normally" in Article 2.2.1.1 indicates that the investigating authority has discretion, and the investigating authority would be required to provide a reasoned and adequate explanation to deviate from the rule.[360] For Turkey, whether a "particular market situation" would justify disregarding the records of producers/exporters requires a case-by-case examination.[361] Turkey submits that the term "reasonably" in Article 2.2.1.1 not only defines the method for how the prices (paid or due to be paid) are recorded in the books of the producer/exporter, but also implies an examination that focuses on whether the recorded prices correspond to a price level that is determined by market forces free from any intervention.[362] For Turkey, therefore, the "reasonableness" assessment displays a two-sided structure. Based on the outcome of this assessment, the investigating authority has discretion to modify the elements of costs in line with in-country or out-of-country benchmarks, so long as the out-of-country data used is associated with the cost of production and sales of the product under consideration.[363]

7.217. The **United States** submits that, in situations where records are kept in accordance with GAAP and reasonably reflect the costs associated with the product under consideration, the investigating authority is normally obligated to use those records pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement.[364] The term "normally" in Article 2.2.1.1 indicates that the use of a producer/exporter's records is not necessary in every case, but if the investigating authority finds that the records meet the conditions and nonetheless departs from them, it is bound to provide an explanation.[365]

7.218. The United States contends that the ordinary meaning of the term "costs" in Article 2.2.1.1 does not necessarily imply costs "actually incurred by the producer".[366] The United States finds support for this understanding by comparing it to the express references to "the actual amounts incurred" elsewhere in Article 2.[367] The United States also notes that Article 2.2.1.1 references costs "associated with" the production and sale of the product under consideration. In that regard, the United States contends that the term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product than just those costs borne by the specific producer.[368]

7.219. The United States rejects Argentina's contention that Article 2.2.1.1 solely concerns cost allocation issues, but rather, contends that Article 2.2.1.1 leaves open what costs may be "unreasonable" such that the records do not reasonably reflect the costs associated with the

[356] Saudi Arabia's third-party submission, para. 17.
[357] Saudi Arabia's third-party submission, para. 20.
[358] Saudi Arabia's third-party submission, para. 21.
[359] Turkey's third-party submission, para. 7 (referring to Panel Reports, *EC – Salmon (Norway)*, para. 7.483, and *China – Broiler Products*, para. 7.164).
[360] Turkey's third-party submission, para. 7; third-party statement, para. 3.
[361] Turkey's third-party submission, paras. 10-12.
[362] Turkey's third-party response to Panel question No. 7, paras. 7 and 8.
[363] Turkey's third-party response to Panel question Nos. 4, para. 6, and 17, para. 8.
[364] United States' third-party submission, para. 11.
[365] United States' third-party submission, para. 12.
[366] United States' third-party submission, para. 14 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.481).
[367] United States' third-party submission, para. 15; third-party statement, para. 9.
[368] United States' third-party submission, paras. 26 and 27 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393).

production and sale of the product.[369] In that connection, the United States argues that the context provided by Article 2.2, such as the reference to a "low volume of the sales in the domestic market of the exporting country" or "a particular market situation", supports the understanding that market conditions, including some "peculiarity, structure, [or] distortion", may lead to records reflecting "unreasonable" costs.[370] In the United States' view, an investigating authority may, on a case-by-case basis, use a wide range of record evidence, potentially including international prices, to evaluate whether the producer/exporter's records reasonably reflect their costs.[371] However, international prices, if used, must be a proxy for the costs in the country of origin.[372]

7.4.1.4.3 Evaluation by the Panel

7.220. Argentina requests us to find 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 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.[373]

7.221. We note, at the outset, that the EU authorities disregarded the records kept by the Argentine producers insofar as they pertained to the costs for soybeans and soybean oil because:

> [T]he 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 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 as interpreted by the General Court as explained above.[374]

7.222. Beyond this statement from the Definitive Regulation, it has not been alleged that the costs pertaining to the main raw material in the records kept by producers do not represent the actual price paid by those producers, nor has it been alleged that the records themselves are improper, flawed, or otherwise inconsistent with the GAAP.

7.223. Argentina's principal allegation is that the European Union acted inconsistently with Article 2.2.1.1 (and, as a consequence, with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994) because the reasons given by the EU authorities for disregarding the records – i.e. because the prices for an input were artificially lower than international prices due to an alleged distortion – are not legally permissible under Article 2.2.1.1.[375]

7.224. Thus, we consider the question before us to be whether, on the basis of the reasoning set out in the Definitive Regulation, the European Union acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, and, consequently, with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.225. We begin our analysis by setting out our understanding of Article 2.2.1.1. Before doing so, however, we note that Article 2.2 of the Anti-Dumping Agreement prescribes that 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" in one of two situations, namely when there are no sales of the like product in the ordinary course of trade, or

[369] United States' third-party submission, paras. 20 and 22 (referring to Panel Reports, *China – Broiler Products*, para. 7.172; and *US – Softwood Lumber V*, para. 7.318).
[370] United States' third-party submission, para. 24; third-party response to Panel question No. 3, paras. 10 and 11.
[371] United States' third-party response to Panel question No. 1, para. 2.
[372] United States' third-party response to Panel question No. 12, para. 26.
[373] Argentina's first written submission, paras. 195, 244, and 470(a); second written submission, para. 254(a).
[374] Definitive Regulation, (Exhibit ARG-22), Recital 38.
[375] Argentina's first written submission, paras. 195, 244, and 470(a). Argentina also contests that its export tax system creates a distortion.

where there is a particular market situation or a low volume of sales in the domestic market, such that those sales do not permit a proper comparison.[376]

7.226. Article 2.2.1.1 provides, in relevant part:

> 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.

7.227. The opening phrase "[f]or the purpose of paragraph 2" makes clear that Article 2.2.1.1 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 in the circumstances mentioned above. The first sentence of Article 2.2.1.1 also establishes the records of the investigated producer as the preferred source of information for the establishment of the costs of production. The term "shall" in this first sentence of Article 2.2.1.1 indicates that it establishes a mandatory rule in this respect[377], whereas the term "normally" suggests that this rule may be derogated from under certain conditions.[378] In that regard, 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 producer/exporter under investigation.[379] In the case before us, the investigating authority explicitly relied on the second of these conditions, namely that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.[380] We have therefore to address the proper scope and meaning of only that condition, before turning to whether it was correctly invoked by the investigating authority in the present case.

7.228. We begin our interpretation with the ordinary meaning of the phrase "provided such records … reasonably reflect the costs associated with the production and sale of the product under consideration". First, we note that for both this condition and the GAAP-related condition in Article 2.2.1.1, the subject is the producer/exporter's "records". It is the "records" of the producer/exporter under investigation that must be in accordance with the generally accepted accounting principles and that must reasonably reflect the costs associated with production and sale of the product under consideration for the conditional obligation set forth under the first sentence to apply. Thus, the focus of the condition is on the specific producer/exporter under investigation, and what is contained in its records.[381]

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[376] 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. (fn omitted)

Article 2.2.1.1 is also applicable to determining whether, pursuant to Article 2.2.1, sales in the domestic market of the exporting country are at prices below per-unit costs and therefore not in the ordinary course of trade by reason of price.

[377] Appellate Body Report, *EC – Fasteners (China)*, paras. 316 and 317.

[378] Appellate Body Report, *US – Clove Cigarettes*, para. 273; Panel Report, *China – Broiler Products*, para. 7.161. See also Appellate Body Report, *EC – Fasteners (China)*, para. 317.

[379] See Panel Reports, *China – Broiler Products*, para. 7.164; and *US – Softwood Lumber V,* paras. 7.236 and 7.237.

[380] Definitive Regulation, (Exhibit ARG-22, Recital 38); European Union's response to Panel question No. 82, paras. 10-14. We note, in this regard, that it has not been argued in the proceedings before us that the investigating authority derogated from the rule set out in the first sentence of Article 2.2.1.1 on any other basis, and we therefore consider it unnecessary to express any views in that regard. For the same reason, we consider it unnecessary to the resolution of the present claim to express any views on the arguments presented by the parties and third parties as to whether, in general terms, Article 2.2.1.1 permits derogations on grounds other than those expressly listed in Article 2.2.1.1. (Argentina's first written submission, para. 98; Saudi Arabia's third-party submission, para. 13; United States' third-party submission, para. 12)

[381] This focus is consistent with the general rule in Article 6.10 of the Anti-Dumping Agreement that an individual dumping margin should be calculated for each particular producer/exporter under investigation.

7.229. We turn next to the verb in the phrase "provided such records … reasonably reflect the costs associated with the production and sale of the product under consideration". The verb is "reflect": the records must reflect the costs. The *Oxford English Dictionary* defines "reflect" as, *inter alia*, "to reproduce, esp. faithfully or accurately; to depict."[382] Therefore, we understand this verb to refer, in the context of the construction of the cost of production under Article 2.2.1.1, to records that capture, or depict, the costs associated with the production and sale of the product under investigation in a faithful or accurate manner.

7.230. We consider next the term "reasonably" in this phrase. It is clear to us that "reasonably" is an adverb that modifies the verb "reflect", and not, as the European Union seems to suggest, the term "costs". Generally speaking, an adverb modifies the meaning of a verb, adjective or another adverb in terms of ideas such as time, place, degree or manner. In the context of the provision of Article 2.2.1.1, where the verb is to "reflect" the costs associated with production and sale of the product under consideration, it seems to us that the modification introduced by the adverb is with respect to the degree or manner of reflection of such costs in the records of the producer or exporter. In other words, the question before us concerns the manner or degree by which the records depict or capture the costs associated with production and sale of the product so to satisfy the condition that they "reasonably reflect" such costs.

7.231. This brings us to the meaning of "reasonably" in the phrase "*reasonably reflect* the costs associated with the production and sale of the product". The adjective underlying the adverb "reasonably" is "reasonable". The word "reasonable" is given several definitions in dictionaries depending on the context in which it is used. In the context of Article 2.2.1.1, where the records must "reasonably reflect" the costs, together with the requirement that the same records must also be in accordance with generally accepted accounting principles, it seems to us that an appropriate ordinary meaning of the word "reasonable" is conveyed here by concepts such as "rational or sensible", "in accordance with reason", and "fair and acceptable in amount".[383] Since it is the "records" that must "reflect reasonably" the costs of production and sale of the product for the purpose of the *construction* of the "normal value", and in the light of our understanding that "reflect" connotes the faithful and accurate depiction of information, we understand the term "reasonably reflect" in Article 2.2.1.1 to mean that the records of a producer/exporter must depict all the costs it has incurred in a manner that is – within acceptable limits – accurate and reliable.

7.232. Turning to the immediate context of this phrase in Article 2.2.1.1, we note that it sits alongside the condition that records be "in accordance with the generally accepted accounting principles of the exporting country". It is undisputed between the parties that the GAAP *generally* encompass a requirement that all the costs that have actually been incurred in the production of the items be truly reported in a company's records.[384] This means that records containing costs that differ from the costs actually incurred by producers would likely not be in accordance with GAAP, and would thus form a basis for derogating from the general rule to use producers' records under Article 2.2.1.1. This suggests to us that the first sentence of Article 2.2.1.1 is concerned with the "reasonable reflect[ion]" of the costs that producers *actually* incur in the production of the product in question. In this regard, we disagree with the European Union that the inclusion of the condition in the first sentence of Article 2.2.1.1 for the records kept to be consistent with GAAP suggests that the subsequent condition pertaining to the records reasonably reflecting costs must mean something more than simply "the expenses actually incurred".[385] Rather, in our view the inclusion of the second condition reflects the fact that, while records might be consistent with GAAP, they may still not adequately report the actual costs incurred by the producer/exporter under investigation. Moreover, 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. As another example, the specific producer/exporter under investigation might be part of a vertically-integrated group of companies in which the actual cost of production of particular inputs is spread across different companies' records, or in which

[382] Oxford English Dictionary, http://www.oed.com/view/Entry/160912?rskey=Ly5uAc&result=3#eid, accessed 23 November 2015.
[383] Oxford English Dictionary, http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid, accessed 23 November 2015.
[384] Argentina's first written submission, para. 228; European Union's first written submission, paras. 148 and 149.
[385] European Union's first written submission, paras. 148 and 149.

transactions between such companies are not at arms-length or indicative of the actual costs involved in the production of the product under consideration.

7.233. We find further support for our understanding that the "costs associated with the production and sale of the product under consideration" refers to the actual costs incurred by the producer/exporter under investigation in other elements of the context of Article 2.2.1.1. First, the basic purpose of calculating the cost of production and constructing the normal value on the basis of that cost under Article 2.2 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 that price cannot be used.[386] To us, it clearly 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. Conversely, if the actual costs incurred by a producer are not properly taken into account, this would lead to an unreliable proxy for what the price of the like product in the ordinary course of trade in the domestic market of the exporting country would have been. Second, we note that, pursuant to Article 6.10 of the Anti-Dumping Agreement, investigating authorities are required as a general rule to determine an individual margin of dumping for each known producer/exporter concerned of the product under investigation. This, in turn, suggests to us that costs of production will vary from producer to producer and each producer's costs of production should be evaluated separately. In that context, it would seem anomalous to us if the "costs associated with the production and sale" did not refer to the *actual* costs incurred by individual producers, as reflected in their records.

7.234. Our view in this regard is also supported by footnote 6 to Article 2.2.1.1 of the Anti-Dumping Agreement, which provides:

> 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.

7.235. In particular, it is implicit in this footnote that costs are to be assessed on the basis of the specific circumstances of each producer/exporter and the costs that they incur, such as those pertaining to start-up operations. Thus, contrary to the arguments of the European Union, we do not understand the term "associated" in the phrase "costs associated with the production and sale" in Article 2.2.1.1 to be capable of denoting costs "normally" associated with the production and sale of the goods in general.[387] Such an approach could lead to a determination that the costs contained in the investigated producer/exporter's records do not "reasonably reflect" the costs of production because of the mere fact that they differ from costs incurred by other producers/exporters. The European Union's interpretation would, in our view, frustrate the purpose of Article 2.2.1.1 to enable investigating authorities 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 for each individual producer.[388]

7.236. We are also not persuaded by the European Union's reliance on Article 2.2.2 as context, namely, 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.[389] As we discuss elsewhere[390], 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), for approximating, as closely as possible, the profit margin and administrative, selling and general costs for the product under consideration. Hence, the reference to "actual costs" in the specific context of Article 2.2.2 does

[386] Panel Reports, *Thailand – H-Beams*, para. 7.112; and *US – Softwood Lumber V*, para. 7.278.

[387] European Union's first written submission, paras. 137-143 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393) and 258-263; response to Panel question No. 97, para. 51.

[388] We emphasize, however, that our observations in this regard pertain to the invocation of the particular condition in Article 2.2.1.1 of the Anti-Dumping Agreement relied upon by the European Union in the present claim. As we mention above in footnote 380, we consider it unnecessary to express any views on any potential derogations other than that specifically invoked and relied upon by the European Union.

[389] European Union's first written submission, paras. 247 and 248.

[390] See below, para. 7.335, and Panel Report, *Thailand – H-Beams*, para. 7.112.

not in our view support the European Union's reading of the first sentence of Article 2.2.1.1.[391] If anything, the context provided by Article 2.2.2 suggests to us that, as a general principle, the actual data of producers/exporters is to be preferred in constructing the normal value. This accords with our understanding of Article 2.2.1.1 set out above.

7.237. The European Union argues that the omission of the words "of the product" in Article 2.2 of the Anti-Dumping Agreement, in contrast to the corresponding provision in Article VI:1(b)(ii) of the GATT 1994, suggests an intention that in the calculation of the constructed price the focus does not need to be exclusively on the specific company under investigation and the production of its goods.[392] We disagree. In our view, the term "cost of production" in Article 2.2 could not be read as referring to anything other than the cost of production "of the product", particularly as Article 2.2 already refers to the "like product" twice. Thus the inference suggested by the European Union cannot validly be drawn.

7.238. We further note that the parties made a number of arguments pertaining to the object and purpose of the Anti-Dumping Agreement. We recall, in this regard, that Argentina argues that the object and purpose of the Anti-Dumping Agreement is to "counteract dumping, which occurs when the export price is less than the comparable price, in the ordinary course of trade, in the *domestic* market and not on any other markets".[393] The European Union responds that the object and purpose of the Anti-Dumping Agreement is directed at preventing damage incurred by the use of prices that are artificially low "due to some abnormal condition", and, therefore, goods produced with costs that are not "normal" fall within the type of conditions that the Anti-Dumping Agreement is intended to address.[394] The Anti-Dumping Agreement does not contain a preamble or an explicit indication of its object and purpose.[395] 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.[396] 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.

7.239. The European Union draws on the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 to argue that the notion of dumping is not limited to situations that arise out of producers/exporters' "voluntary" pricing behaviour, but rather, it also covers situations that are created by the action of governments.[397] The European Union also argues that the situation addressed in the *Ad* Note, i.e. multiple currency practices, involve a government-induced manipulation of the ordinary operation of the market, which substantially affects and distorts pricing, and that these are precisely the characteristics of Argentina's export tax on soybeans.[398]

7.240. We are not convinced by these arguments. The second *Ad* Note to Articles VI:2 and VI:3 is, on its own terms, limited to "multiple currency practices", and its very existence indicates that it should be treated as an exceptional and specialized provision. We therefore see no reason to extrapolate from this provision that the concept of "dumping" is generally intended to cover any

[391] Along broadly similar lines, Australia and the United States submit that the "particular market situation[s]" referred to in Article 2.2 encompass distortions that could render a producer/exporter's recorded costs unreasonable as to the cost of production and sale, and thereby justify departing from those recorded costs. However, in our view, Article 2.2 of the Anti-Dumping Agreement only states that a "particular market situation" may necessitate the construction of normal value. It does not address how that construction should be undertaken, which is instead set out in detail in the subparagraphs of Article 2.2. (Australia's third-party response to Panel question No. 5; United States' third-party response to Panel question No. 3, para. 11)

[392] European Union's first written submission, para. 196.

[393] Argentina's first written submission, para 240. (emphasis original)

[394] European Union's first written submission, paras. 157 and 158.

[395] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 118.

[396] Appellate Body Report, *US – Shrimp*, para. 114.

[397] The text of the second *Ad* Note provides that:

> Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

[398] European Union's second written submission, paras. 113-115.

distortion arising out of government action or circumstances such as those surrounding Argentina's export tax system and its impact on soybean prices as an input material for biodiesel.[399]

7.241. Finally, we note the explicit provisions allowing investigating authorities to disregard domestic prices and costs when determining the normal value that are provided for under the second *Ad* Note to Article VI:1 of the GATT 1994 (which is incorporated by reference into the Anti-Dumping Agreement through Article 2.7 thereof), and in the protocols of accession of certain Members. These provisions lend further support to our understanding of Article 2.2.1.1. At the very least, these provisions suggest to us that their drafters considered explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin.

7.242. On the basis of the foregoing considerations, we understand the ordinary meaning of the phrase "provided such records … reasonably reflect the costs associated with the production and sale of the product under consideration", in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in –within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer.[400] We emphasize, however, 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.[401]

7.243. We find support for our understanding of Article 2.2.1.1 in the reports of other panels and the Appellate Body considering claims under this provision. For instance, the panel in *US – Softwood Lumber V* was confronted with a claim that the investigating authority erred under Article 2.2.1.1 by using the records of certain producers to calculate their cost of production of softwood lumber.[402] In particular, the claim concerned whether those records "reasonably

[399] As we do not see the relevance of the second *Ad* Note to Article VI:2 and VI:3 on its face, we do not consider it necessary to address further the material submitted on its negotiating history.

[400] However, we do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean, as argued by Argentina, that the words "reasonably reflect" are limited only to the "allocation" of costs. The investigating authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated; and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs. But, in our view, the examination of the records that flows from the term "reasonably reflect" in 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.

[401] We note that the parties and third parties made a number of submissions concerning the negotiating history of relevant provisions of the Anti-Dumping Agreement and the GATT 1994 pertaining to the interpretation of Article 2.2.1.1. In this connection, we note that Article 32 of the Vienna Convention provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

Our analysis of the interpretation of Article 2.2.1.1 does not, in our view, leave its meaning ambiguous or obscure, nor lead to a result which is manifestly absurd. Thus, our analysis does not, in our view, call for a recourse to the negotiating history referred to by the parties and third parties. In any event, our review of that negotiating history suggests that it is not conclusive on the issues at hand.

[402] We recall that the claim under review in the present section is that the investigating authority erred by *not* using the costs reflected in the producers' records. The panel in *US – Softwood Lumber V* was confronted with a different claim, namely, whether the investigating authority erred *by using* the costs reflected in the producers' records. We note, in this regard, that the nature of the claim faced by the panel in *US – Softwood Lumber V* formed a key part of its evaluation of that claim. This was because, in that panel's view, Article 2.2.1.1 gives rise to a discretion – not a requirement – to decline to use the costs reflected in

reflect[ed]" the level of profit derived from selling woodchips – a by-product generated in the production of softwood lumber – which, in turn, offset the cost of production of softwood lumber. The panel approached this claim by assessing whether the "records do not reasonably reflect *the extent to which the existence of the by-product reduces the costs to the producer*".[403] By assessing the *extent* to which the profits derived from woodchip sales reduced the cost of production of softwood lumber, we understand the panel to have sought to ascertain the *actual* cost of production to the producer in question. In this regard, we note that the panel rejected an argument concerning one of the producers that, because that producer's sales were made through interdivisional transactions within the same company at a discounted rate, the profits reflected in its records should be replaced with a market benchmark price.[404] Instead, the panel found that the investigating authority did not err in using the *actual* profits derived from woodchip sales reflected in that producer's records to offset the cost of production of softwood lumber, notwithstanding that those transactions may have been at prices lower than market prices for woodchips.[405]

7.244. We note that, in respect of another producer, the panel in *US – Softwood Lumber V* took a different approach. For that particular producer, the investigating authority had rejected the profits reported in its records for sales of woodchips to affiliated parties, and instead replaced those profits with other values from that producer's transactions with unaffiliated parties.[406] The panel did not find error with the investigating authority's replacement of profits from affiliated transactions with those from unaffiliated transactions.[407] However, contrary to the arguments of the European Union, we do not understand this finding to represent an acceptance of disregarding recorded costs where they do not reflect market values.[408] Instead, we understand the panel to have been concerned with whether, in the case of this particular producer, the profits from sales to affiliated parties were "reliable", that is, whether they provided an accurate indication of the *actual* extent to which the sales of woodchips reduced the costs of production to the producer.[409] The panel took note, in this connection, of the concerns of the investigating authority about the probity of the evidence on affiliated sales, as well as the late submission by the relevant producer of

producers' records where the reflection of these is not reasonable. Thus, its observations on whether the investigating authority erred by using the costs reflected in the producers' records were on an *arguendo* basis, assuming that Article 2.2.1.1 imposes a positive obligation on an investigating authority. (Panel Report, *US – Softwood Lumber V*, paras. 7.236-7.237, 7.241, 7.310, 7.316, and 7.317; see also European Union's second written submission, para. 102)

[403] Panel Report, *US – Softwood Lumber V*, para. 7.312. (emphasis added)

[404] Panel Report, *US – Softwood Lumber V*, para. 7.321 and fn 447 thereto.

[405] Panel Report, *US – Softwood Lumber V*, paras. 7.322-7.324. In this regard, we disagree with the European Union that the investigating authority in that case "used market value as a benchmark for determining the reasonableness of prices paid by a company to purchase a by-product from an affiliated company" in order to "confirm whether the final valuation would be as close as possible to market value". (European Union's second written submission, para. 106). Rather, in our reading, the investigating authority in that case sought to ascertain whether the *reflection* of the recorded costs was reasonable. In other words, the investigating authority tested the recorded costs/prices against a market benchmark in order to determine whether those costs/prices were reliable and accurate because the transactions at issue were transactions between divisions of the same company, thus raising questions as to whether the value of the transactions in the producer's records accurately reflected the costs/prices to the producer. In any event, we note that the panel's ultimate finding on this aspect was that "an unbiased and objective investigating authority could have used the actual cost of the input as recorded in Tembec's books as a benchmark for valuing internal transfers of wood chips". (Panel Report, *US – Softwood Lumber V*, para. 7.324). The panel did not, in our view, reach a finding that "confirm[ed] that investigating authorities can use market prices as 'benchmarks' in order to confirm the 'reasonableness' of the recorded costs and values". (European Union's second written submission, para. 109). See also Argentina's opening statement at the first meeting of the Panel, para. 95.

[406] Panel Report, *US – Softwood Lumber V*, para. 7.327.

[407] Panel Report, *US – Softwood Lumber V*, para. 7.332.

[408] European Union's first written submission, paras. 167-169; second written submission, para. 105.

[409] Panel Report, *US – Softwood Lumber V*, para. 7.329. In this regard, we do not agree with the European Union that, by assuming that investigating authorities are not precluded from carrying out an arm's length test in order to ensure prices charged to affiliated parties are "reliable", the panel in *US – Softwood Lumber V* accepted that investigating authorities may reject the data in the companies' records where they do not reflect market prices, and that they may adjust costs on the basis of market prices. (European Union's first written submission, para 167). Rather, we understand the panel to have assumed that such a test is permissible in order to establish the veracity of the reflection of the recorded costs, and thus to establish whether those costs are "reliable", or able to be trusted and relied upon. Moreover, in *US – Softwood Lumber V*, the investigating authority had used the producer's *own* transactions in comparing costs and prices between unaffiliated and affiliated parties, as opposed to a market benchmark that was external to the producer.

otherwise pertinent data.[410] Based on the foregoing, our understanding of the panel's analysis in *US – Softwood Lumber V* accords with that of Argentina, insofar as it stands for the proposition that there is no requirement under Article 2.2.1.1 for costs in producers' records to reflect market values.[411]

7.245. We also find support for our understanding of Article 2.2.1.1 in the panel's findings in *Egypt – Steel Rebar*. The European Union argues that the panel in that case interpreted Article 2.2.1.1 to mean that "the costs reflected in the records must be 'reasonable' for the production of the good in question", and to "reflect the broader notion of 'associated', instead of the narrow notion of 'actually incurred'".[412] Our reading of the panel's findings, however, does not accord with this understanding. In particular, the panel in that case was faced with the question 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.[413] In undertaking this inquiry, the panel focused on evidence as to whether each company under investigation had demonstrated that the interest income at issue was sufficiently closely related to their costs of production of rebar.[414] Since none of these companies had provided sufficient factual evidence during the investigation that the interest income was related to their cost of production of rebar, the panel found that Turkey had not established a *prima facie* case that the investigating authority violated Article 2.2.1.1 in deciding not to factor this income as an offset in its calculation of the cost of production of rebar.[415] In our reading, this approach reveals that the panel understood that Article 2.2.1.1 calls for a factual assessment of each producer/exporter's actual costs of production, and whether the evidence on record demonstrates that those costs were offset by certain income.

7.246. The European Union argues that the panel's findings in *EC – Salmon (Norway)* "confirms that Article 2.2.1.1 creates an association with the costs that would normally be required for the *act of producing*" and that the "notion of 'reasonable costs' is not limited to the expenses that the specific company under investigation has incurred".[416] We do not share the European Union's view of the panel's analysis in that case. Rather, a close reading of that case suggests to us that the panel was concerned to ensure the accuracy of the calculation of the actual cost of production to the producers concerned. In particular, the panel faulted the investigating authority for calculating certain non-recurring costs on the basis of a three year average, despite three years being the average amount of time to farm a salmon, because those non-recurring costs did not relate exclusively to the farming-related activities for a given salmon generation.[417] Instead, the panel stated that "in order to comply with Article 2.2.1.1, the allocation methodology that is applied by an investigating authority to determine cost of production *must reflect the relationship that exists between the costs being allocated and the production activities to which they are 'associated'*".[418] This statement does not suggest to us that Article 2.2.1.1 is concerned with what might "normally" be the cost of production. Rather, it suggests to us that the panel was focused on the *actual* costs of production incurred by the producers in assessing alleged violations of Article 2.2.1.1. This is because the panel tested whether there existed, in actuality, a rational relationship between the costs allocated and the production activities, in order to yield an accurate outcome. Our understanding in this regard is strengthened by the panel's subsequent finding that the investigating authority erred in adding costs of purchasing salmon from domestic sources to a producer's cost of production, without taking account of the revenue received from the same domestic sources for slaughtering services by that producer in respect of the same purchased salmon.[419] Again, this reveals an approach focused on the *actual* costs of production incurred by producers in assessing alleged violations of Article 2.2.1.1, including any appropriate offset revenue, rather than the costs that might be "normally" incurred.

7.247. In sum, we consider that the proper interpretation of "provided such records … reasonably reflect the costs associated with the production and sale of the product under consideration" under

[410] Panel Report, *US – Softwood Lumber V*, paras. 7.331-7.333.
[411] Argentina's response to Panel question No. 19, para. 54.
[412] European Union's first written submission, paras. 133 and 138.
[413] Panel Report, *Egypt – Steel Rebar*, para. 7.422.
[414] Panel Report, *Egypt – Steel Rebar*, paras. 7.423-7.426.
[415] Panel Report, *Egypt – Steel Rebar*, para. 7.426.
[416] European Union's first written submission, paras. 141 and 163. (emphasis original)
[417] Panel Report, *EC – Salmon (Norway)*, paras. 7.506-7.507.
[418] Panel Report, *EC – Salmon (Norway)*, para. 7.514.
[419] Panel Report, *EC – Salmon (Norway)*, paras. 7.606 and 7.609.

Article 2.2.1.1 calls for an 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.

7.248. With the foregoing considerations in mind, we now turn to whether, in the case before us, the investigating authority derogated from using the costs reflected in the records kept by producers in a manner consistent with Article 2.2.1.1. The investigating authority determined not to use the costs of the main raw material, 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".[420] In our view, this does not constitute a legally 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.

7.249. Therefore, we find 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.[421]

7.250. Argentina also requests that we find that, as a consequence of failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union failed to properly construct the normal value and thus acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[422] Argentina's claims under these provisions are purely consequential to its claim under Article 2.2.1.1, and we do not consider findings under those provisions to be necessary for the effective resolution of this dispute.

7.4.1.5 Whether 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 failing to construct the normal value on the basis of the cost of production in the country of origin

7.4.1.5.1 Arguments of the parties

7.4.1.5.1.1 Argentina

7.251. Argentina requests that we 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 by failing to construct the normal value on the basis of the cost of production in the country of origin.[423]

7.252. In addition to its arguments concerning the interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994[424], Argentina submits that the

[420] Definitive Regulation, (Exhibit ARG-22), Recital 38.

[421] In the light of this finding, we do not consider it necessary to address the arguments set out in paragraphs 208-213 of Argentina's first written submission concerning the alleged improper establishment of certain facts. We note, however, that the Argentine government does not set the price of soybeans in Argentina.

We also note the argument of the European Union that Argentina's *prima facie* case rests on the Panel upholding Argentina's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement, and consequently, if the Panel "replac[es] Argentina's legal interpretation of Article 2.2.1.1 with a different legal interpretation that Argentina has not proffered", this "would be tantamount to the Panel's making the case for the complaining party". (European Union's second written submission, paras. 90-91, 118, 132, and 139). We disagree with the suggestion that panels are not entitled to develop their own legal reasoning in a context in which it is clear that the complaining party has made a claim on a matter before the panel. (Appellate Body Reports, *EC – Hormones*, para. 156; *US – Certain EC Products*, para. 123). In any event, our understanding of Article 2.2.1.1 of the Anti-Dumping Agreement bears close similarity to the interpretation advocated by Argentina.

[422] Argentina's first written submission, para. 244.

[423] Argentina's first written submission, paras. 254 and 470(b). Argentina also argues, as a first line of argumentation, that Article 2(5), second subparagraph, of the Basic Regulation being inconsistent "as such" with Articles 2.2 of the Anti-Dumping Agreement and VI:1(b)(ii) of the GATT 1994, its application in the anti-dumping measures at issue is necessarily inconsistent with the same provisions. (Argentina's first written submission, paras. 248-249). As we have rejected Argentina's "as such" claims under Articles 2.2 and VI:1, in the present section we only consider Argentina's second line of argumentation, i.e. that Article 2(5), second subparagraph, of the Basic Regulation was applied in a manner inconsistent with those provisions in the circumstances of the present investigation.

[424] See above, paras. 7.82, 7.86.

EU authorities used prices of soybeans that are not the prices of soybeans in Argentina, i.e. the country of origin. Rather, they used the reference FOB price of soybeans, net of fobbing costs, which "reflect the level of international prices".[425] For Argentina, the fact that this price is published by the Ministry of Agriculture in Argentina does not render it a "domestic price" because it is not a price at which soybeans are or can be acquired domestically, but rather, it provides an indication of the taxable base that will be used in the calculation of the export tax on a given day.[426] Therefore, Argentina submits, in constructing the normal value on the basis of the reference FOB price minus fobbing costs, the EU authorities calculated a cost of production that is not the cost of production in the country of origin.[427]

7.4.1.5.1.2 European Union

7.253. The European Union responds that Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 entitled it to use the impugned data in order to calculate the normal value of Argentine biodiesel.[428]

7.254. In addition to its arguments concerning the interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994[429], the European Union submits that the EU authorities were faced with the problem that certain costs had been distorted as a result of government action, and were required to find appropriate evidence in order to determine what the cost would have been in the absence of the distortion.[430] They sought this evidence in the FOB prices published daily by the Government of Argentina, which technically constitute prices "in the country of origin"[431], and they properly set forth their reasons for doing so.[432] Thus, the European Union submits, Argentina failed to make a *prima facie* case.[433]

7.4.1.5.2 Evaluation by the Panel

7.255. Argentina requests that we 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 by failing to construct the normal value on the basis of the cost of production in the country of origin.[434]

7.256. The text of both Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 refer to the "cost of production" in "the country of origin".[435] Thus, the question before us is whether the cost used by the EU authorities for soybeans can be understood to be a cost in "the country of origin", that is, in Argentina.

7.257. We recall, in this regard, that the EU authorities found the domestic prices of the main raw material used by biodiesel producers in Argentina to be "artificially lower" than international prices due to the distortion created by the Argentine export tax system.[436] On that basis, the EU authorities disregarded the price actually paid by Argentine producers for soybeans and replaced it with "the price at which those companies would have purchased the soya beans in the absence of such a distortion".[437] Accordingly, the EU authorities replaced the average actual purchase price of soybeans during the IP, as reflected in the producers' records, with the average reference price of soybeans published by the Argentine Ministry of Agriculture for export, FOB

[425] Argentina's first written submission, paras. 251-253; second written submission, para. 191 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 34).
[426] Argentina's second written submission, paras. 193 and 194.
[427] Argentina's second written submission, para. 195.
[428] European Union's first written submission, para. 257.
[429] See above, paras.7.94 - 7.97.
[430] European Union's first written submission, para. 205.
[431] European Union's opening statement at the first meeting of the Panel, paras. 80 and 81.
[432] European Union's first written submission, para. 206; response to Panel question No. 45, paras. 57-60.
[433] European Union's first written submission, para. 207.
[434] Argentina's first written submission, paras. 254 and 470(b).
[435] The parties agree that both provisions require the use of the "cost of production" in the country of origin. (European Union's first written submission, paras. 200 and 205-207; Argentina's first written submission, para. 117).
[436] Definitive Disclosure, (Exhibit ARG-35), para. 34.
[437] Definitive Disclosure, (Exhibit ARG-35), para. 35.

Argentina, minus fobbing costs, during the IP.[438] The EU authorities considered that this reference price reflected the level of international prices and that this would have been the price paid by the Argentine producers in the absence of the export tax system.[439]

7.258. In our view, it is plain from this that the cost used by the European Union is not a cost "in the country of origin". It was specifically selected to remove the perceived distortion in the domestic price of soybeans caused by the Argentine export tax system.[440] This is because the prices prevailing in Argentina were considered to be artificially lower than international prices. In other words, the EU authorities selected this cost precisely because it was *not* the cost of soybeans in Argentina.

7.259. The fact that this price was published by the Argentine Ministry of Agriculture, and therefore, was a price published "in" Argentina, is irrelevant. This price did not represent the *cost of soybeans in* Argentina for domestic purchasers of soybeans, including the Argentine producers/exporters of biodiesel.[441] The European Union itself stated that "the prices used were indeed reflecting the soya bean costs that the Argentine producers of biodiesel would have to bear in Argentina, *in the absence of the distortion*".[442] Thus, the European Union itself recognized that the prices used were not those actually prevailing in Argentina, but rather, were those that would have prevailed in the absence of the alleged distortion.

7.260. For the foregoing reasons, we 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 by using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value.

7.4.1.6 Whether 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

7.4.1.6.1 Main arguments of the parties

7.4.1.6.1.1 Argentina

7.261. Argentina submits that 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.[443]

7.262. In Argentina's view, the test under Article 2.2.1.1 of the Anti-Dumping Agreement focuses on the records kept by the producer/exporter, and therefore the "costs associated with the production and sale" are necessarily the costs of that specific producer/exporter.[444] This further flows from the fact that the test refers to the "costs associated with the production and sale of *the product under consideration*".[445] According to Argentina, instead of calculating the cost of production on the basis of the records of the exporting producers, the European Union decided to base the cost of soybeans on an average of the FOB reference price published by the Ministry of Agriculture of soybeans net of fobbing costs.[446] Since the producers under investigation did not pay the reference FOB price minus fobbing costs for soybeans but instead paid the actual amounts reflected in their records, Argentina submits that the price of soybeans used by the

[438] Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI), p. 1.
[439] Definitive Disclosure, (Exhibit ARG-35), para. 32.
[440] Definitive Regulation, (Exhibit ARG-22), Recitals 38-40.
[441] To recall, the price used by the EU authorities was the reference price used by the Argentine government for the calculation of the export tax on soybeans. See above, para. 7.184.
[442] European Union's response to Panel question No. 45, para. 60. (emphasis added)
[443] Argentina's first written submission, para. 470(c).
[444] Argentina's second written submission, para. 115.
[445] Argentina's second written submission, para. 115 (emphasis original); response to Panel question No. 91, para. 38.
[446] Argentina's first written submission, para. 260.

European Union to calculate the cost of production is not a price that is associated with the production and sale of the like product.[447]

7.4.1.6.1.2 European Union

7.263. The European Union submits that Argentina's claim is based on the assumption that the terms "associated with the production and sale" in Article 2.2.1.1 should be given the meaning "prices actually paid by the companies under investigation".[448] In the European Union's view, however, the term "associated" has a broader meaning than the words "actually incurred" or "actually paid".[449] The European Union submits, in this regard, that the panel report in *Egypt – Steel Rebar* used the term "*pertain* to the production".[450] In the European Union's view, the panel's use of the term "pertain", akin to the use of the term "associated", demonstrates that Article 2.2.1.1 does not require that the "costs" used for the calculation be the "expenses actually incurred" by the producer.[451]

7.264. The European Union submits that its understanding in this regard is reinforced by the fact that Article 2.2.1.1 mentions the costs associated "with the production", as opposed to the costs incurred by the "producer".[452] The European Union notes the *EC – Salmon (Norway)* panel's finding that the "costs of production" should be understood as the prices to be paid "for the act of producing".[453] For the European Union, the use of the terms "production" and "act of producing", instead of the term "producer", shows that Article 2.2.1.1 does not require the costs to have been actually paid by the specific producers that are subject to the investigation. The European Union also argues that the context afforded by Article 2.2.2 of the Anti-Dumping Agreement, which uses the phrase "shall be based on actual data pertaining to production and sales in the ordinary course of trade", can be contrasted with Article 2.2.1.1, which uses the phrase "reasonably reflect the costs associated with the production and sale".[454]

7.4.1.6.2 Arguments of the third parties

7.265. **China** submits that, self-evidently, the price of soybeans exported from Argentina is not a cost associated with the production and sale of biodiesel in Argentina, since exported soybeans are necessarily not available to producers of biodiesel in Argentina.[455] By including in its calculation of the cost of production of biodiesel a cost which was not associated with the cost of production and sale of biodiesel, China argues, the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.[456]

7.266. **Indonesia** submits that the European Union misinterprets the statement of the panel in *Egypt – Steel Rebar* in asserting that, by using the word "pertain", "the Panel was seeking a term that would reflect the broader notion of 'associated' instead of the narrow notion of actually incurred".[457] Indonesia submits that this is because, in the chapeau of Article 2.2.2, the present participle of the verb "pertain" is used to refer to the "actual data" of the producer/exporter under investigation.[458] Indonesia also considers that previous panel reports have adequately established that the phrase "costs associated with the production and sale of the product under consideration"

[447] Argentina's first written submission, para. 261; second written submission, paras. 185-189 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.483).
[448] European Union's first written submission, para. 259.
[449] European Union's first written submission, para. 260.
[450] European Union's first written submission, para. 260 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393). (emphasis added)
[451] European Union's first written submission, para. 260; opening statement at the first meeting of the Panel, para. 72.
[452] European Union's first written submission, para. 261.
[453] European Union's first written submission, para. 261 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.481).
[454] European Union's opening statement at the first meeting of the Panel, para. 73.
[455] China's third-party submission, para. 125.
[456] China's third-party submission, para. 127.
[457] Indonesia's third-party submission, para. 40(iii) (referring to European Union's first written submission, paras. 137 and 138, in turn referring to Panel Report, *Egypt – Steel Rebar*, para. 7.383).
[458] Indonesia's third-party submission, para. 40(iii); third-party statement, para. 11.

necessarily refers to the costs which are connected in some manner to the actual production and sales of the product under consideration by the investigated producer/exporter.[459]

7.267. The **United States** submits that it is revealing that, rather than modify "reasonably reflect costs" with the phrases "actually incurred" or "by the exporter or producer in question," Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration".[460] For the United States, the text of Article 2.2.1.1 is not directly tied to the producers or their books and records. Rather, the term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product.[461] The United States contends that the use of the term "associated with" also conveys a conception of costs more general than just those borne by the specific producer.

7.4.1.6.3 Evaluation by the Panel

7.268. Argentina requests that we find that 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.[462]

7.269. We recall, in this connection, that Argentina has also requested us to find 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 on the basis of the records kept by the producers.[463] In our understanding, the present claim also follows from the reliance of the European Union on the condition in Article 2.2.1.1 set out in the phrase "provided that such records … reasonably reflect the costs associated with the production and sale of the product under consideration". The EU authorities relied on this condition in their determination not to calculate costs on the basis of the records kept by the producers under investigation. We have already examined whether the EU authorities had a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the actual costs incurred in the production of biodiesel. We found that they did not and consequently, found that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.[464] Thus, in the light of that finding, we consider it unnecessary to reach a finding on the present claim for the effective resolution of this dispute.

7.4.1.7 Whether the European Union acted inconsistently with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994

7.4.1.7.1 Main arguments of the parties

7.4.1.7.1.1 Argentina

7.270. Argentina submits that, as a consequence of the European Union acting inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in calculating the cost of production and constructing the normal value, the dumping margin determinations made by the investigating authority are also inconsistent with Article 2.1 of the Anti-Dumping Agreement and with Article VI:1 of the GATT 1994.[465]

7.271. Argentina indicates that its claim is "not a stand-alone claim", but rather, is a consequential claim premised on other violations.[466] Argentina submits that, while Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement are definitional provisions that do not impose independent obligations and on which no stand-alone claim can be based, the character of such provisions as definitional does not mean that a Member cannot act inconsistently

[459] Indonesia's third-party submission, para. 40 (referring to Panel Reports, *Egypt – Steel Rebar*, paras. 7.393, 7.426; *EC – Salmon (Norway)*, para. 7.483).
[460] United States' third-party submission, para. 26. (emphasis original)
[461] United States' third-party submission, para. 26.
[462] Argentina's first written submission, para. 470(c).
[463] Argentina's first written submission, paras. 195, 244, and 470(a).
[464] See above, para. 7.249.
[465] Argentina's first written submission, paras. 264 and 470(d); second written submission, paras. 196 and 254(d).
[466] Argentina's response to Panel question No. 55, para. 134; opening statement at the first meeting of the Panel, para. 39.

with such definitions in and of themselves, and when applied to other provisions.[467] Argentina notes, in this respect, that the Appellate Body has not declined to find violations of these provisions in its past reports because such provisions cannot be violated, but rather, the Appellate Body deemed that additional findings under those provisions were not necessary to resolve the particular disputes concerned.[468]

7.272. Argentina further submits that Article 2.1 of the Anti-Dumping Agreement is not limited to cases in which there are no sales in the ordinary course of trade, but rather, it is concerned with defining dumping generally, as evidenced by the phrase "for the purpose of this Agreement".[469] In Argentina's view, a finding that the European Union acted inconsistently with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 will provide "more solid legal predictability", and would ensure that, when implementing the Panel's recommendations and rulings, the European Union adopts a measure which is not only consistent with Articles 2.2 and 2.2.1.1, but also with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.[470]

7.4.1.7.1.2 European Union

7.273. The European Union submits that, according to the jurisprudence of the Appellate Body, Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 do not impose any independent obligation on Members, and they cannot serve as a legal basis for a distinct claim in WTO dispute settlement proceedings.[471] Consequently, Argentina cannot base any claim on Article 2.1 of the Anti-Dumping Agreement. For the European Union, Argentina's assertion that its claims are "consequential" and dependent on other claims under different legal provisions essentially constitutes a request to the Panel to exercise judicial economy on these claims.[472] Since the provisions at issue are not aimed at protecting some specific and distinct legal right or interest, the European Union doubts whether raising claims under those provisions is compatible with the Members' obligations under Article 3.10 of the DSU.[473]

7.274. Further, the European Union submits that, in defining the concept of a "dumped product", the text of Article 2.1 expressly refers to a comparison between the export price and the comparable domestic price of the product "in the ordinary course of trade".[474] For the European Union, Article 2.1 does not cover situations, as in the present case, where there are no domestic sales "in the ordinary course of trade".

7.4.1.7.2 Evaluation by the Panel

7.275. We commence our analysis by noting that the Appellate Body has approached similar claims in the following manner[475]:

> Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the *Anti-Dumping Agreement* and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations. As we have found that the United States acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures in original investigations on the basis of T-T comparisons, we do

[467] Argentina's response to Panel question No. 55, paras. 133 and 135.
[468] Argentina's response to Panel question No. 55, para. 135 (referring to Appellate Body Reports, *US – Zeroing (Japan)*, para. 140; *US – Stainless Steel (Mexico)*, para. 140); opening statement at the first meeting of the Panel, para. 40 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 140).
[469] Argentina's opening statement at the first meeting of the Panel, para. 41.
[470] Argentina's response to Panel question No. 107, paras. 82-84.
[471] European Union's first written submission, paras. 48 and 53 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 140).
[472] European Union's second written submission, para. 14.
[473] European Union's second written submission, para. 14.
[474] European Union's first written submission, para. 49.
[475] Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

> not consider it necessary to make additional findings on Japan's claims under these provisions. Japan has not explained why such additional findings under Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 would be necessary to resolve this dispute. (fn omitted)

7.276. We see no reason to depart from this approach in the present case. In particular, Argentina has not explained how, the Panel having found the European Union to have acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, additional findings under Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 would contribute to the effective resolution of the present dispute. Argentina asserts that such findings would provide "more solid legal predictability", and ensure that, as part of its implementation, the European Union would adopt a measure which is not only consistent with Articles 2.2 and 2.2.1.1, but also with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.[476] However, Argentina does not ground these assertions on any further explanation or argumentation. In the absence of cogent reasons for departing from the approach of the Appellate Body in prior cases, we adopt the same approach.[477] We therefore conclude that is it unnecessary to make findings on Argentina's claims under Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 for the effective resolution of the present dispute.

7.4.2 Whether the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between the normal value and the export price

7.4.2.1 Legal claim

7.277. Argentina requests that we find that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and the normal value.[478] In particular, Argentina claims that the comparison between a constructed normal value that reflected an average of the reference price of soybeans published by the Argentine Ministry of Agriculture (minus fobbing costs), on the one hand, and an export price that reflected the actual domestic price of soybeans, on the other, was not a "fair comparison" under Article 2.4.[479]

7.4.2.2 Relevant provisions of the covered agreements

7.278. Article 2.4 of the Anti-Dumping Agreement provides, in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[*] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph.
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> _____
>
> [*fn original][7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[476] Argentina's response to Panel question No. 107, paras. 82-84.
[477] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.
[478] Argentina's first written submission, para. 470(f).
[479] Argentina's first written submission, para. 296.

7.4.2.3 Factual background

7.279. As noted above[480], the EU authorities considered that the normal value had to be constructed, and replaced the actual prices paid by the producers for the main raw material, soybeans, with prices that reflected the level of international prices. The reason for this replacement, according to the EU authorities, was that the domestic Argentine prices for soybeans were distorted by the Argentine export tax system.[481]

7.280. In its comments on the Definitive Disclosure, CARBIO argued that, by comparing the exporting producers' actual export prices to a normal value based on international prices of soybean and soybean oil, the EU authorities effectively compared a normal value that reflects the inclusion of the export taxes on soybeans and soybean oil with an export price that is net of such taxes. It contended that, given that soybean oil is the main component of the production costs, the inclusion of the export taxes in the normal value substantially impacted price comparability. CARBIO argued that the EU authorities' decision to construct the normal value on the basis of international prices of soybeans and soybean oil and to compare this value with an export price net of export taxes (that would otherwise have brought such export price also to the level of "international prices") could not be considered a "fair comparison".[482]

7.281. In response to CARBIO's argument that the EU authorities did not make a fair comparison, the EU authorities stated that:

> The 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. International prices of commodities are set based on supply and demand and there is no evidence that the DET system in Argentina affects the CBOT prices. Therefore, all claims and allegations that by using an international price the Commission did not make a fair comparison between normal value and export price are unfounded.[483]

7.4.2.4 Main arguments of the parties

7.4.2.4.1 Argentina

7.282. Argentina argues that the failure to construct the normal value on the basis of the cost of production reported in producers' records, which it claims is inconsistent with, *inter alia*, Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement, introduced a difference between the normal value and export price that affected price comparability. For Argentina, the difference stems from the EU authorities' reflection of the export tax on soybeans in the cost of soybeans for the purposes of calculating the cost of production when constructing the normal value, while omitting that same tax from the export price.[484] In Argentina's view, this approach ignores the fact that both exported biodiesel and domestically sold biodiesel are manufactured using domestic soybean oil and this has led to an "artificial imbalance" between the export price and the normal value.[485]

7.283. According to Argentina, the European Union should have made "due allowance" for this difference between the export price and the normal value, for instance by deducting the export tax on domestic soybeans from the constructed normal value.[486] Although Argentina acknowledges that the export tax on soybeans was not directly added to the cost of production, Argentina

[480] See above, paras. 7.182, 7.184.
[481] Definitive Disclosure, (Exhibit ARG-35), paras. 35-37.
[482] CARBIO's comments on the Definitive Disclosure (Exhibit ARG-39), p. 12.
[483] Definitive Regulation, (Exhibit ARG-22), Recital 42.
[484] Argentina's first written submission, para. 303.
[485] Argentina's second written submission, para. 202.
[486] Argentina's response to Panel question Nos. 56, para. 138, and 113, paras. 98-100. Argentina submits that this difference accounts for approximately 75% of the dumping margin found by the European Union at the definitive stage. (Argentina's first written submission, para. 300; opening statement at the first meeting of the Panel, para. 105; response to Panel question No. 56, para. 137)

submits that the methodology of the European Union yielded a result which, from a numerical viewpoint, was similar to simply adding the export tax.[487]

7.284. Argentina submits that its claim under Article 2.4 does not concern the manner in which the normal value was constructed. Rather, for Argentina, the WTO-inconsistent construction of the normal value introduced differences between the normal value and the export price that affected price comparability and for which due allowance should have been made pursuant to Article 2.4.[488] In this regard, Argentina refers to the panel report in *EU – Footwear (China)*, which stated that "the provisions of Article 2.4 are intended precisely to deal with problems that arise in the comparison as a result of, *inter alia*, how normal value was established".[489]

7.4.2.4.2 European Union

7.285. The European Union argues that Argentina has failed to substantiate its claim of inconsistency with Article 2.4 of the Anti-Dumping Agreement.

7.286. The European Union contends that, properly characterized, Argentina's claim under Article 2.4 pertains to the calculation of the normal value, as opposed to the comparison between the normal value and the export price.[490] The European Union draws on the panel reports in *Egypt – Steel Rebar* and *EC – Tube or Pipe Fittings* to argue that Article 2.4 does not deal with "the basis for and basic establishment of the export price and normal value (which are addressed in other provisions)", but rather, has to do "with the *nature of the comparison* of export price and normal value".[491] Thus, Argentina's claim that the EU authorities should have calculated the normal value in a different way falls outside the scope of Article 2.4, because Article 2.4 does not apply to the establishment of the normal value.[492]

7.287. The European Union submits that the EU authorities did not adjust the normal value by reference to the level of the export tax on soybeans.[493] Rather, the European Union contends that the EU authorities considered the export tax to have introduced a distortion into the market for soybeans and soybean oil, thus prompting them to measure the extent of that distortion and, accordingly, adjust the cost of production.[494] While the extent of the distortion corresponded, in practice, to the level of the export tax, the European Union submits that the extent of the distortion could have been less had the balance of market power between the soybean growers and the biodiesel producers been such that the growers could have obtained a higher price.[495] Thus, the European Union should not be understood to have adjusted the normal value by an amount corresponding to the level of export tax, but rather, to have made adjustments for a market distortion created by the export tax.

7.288. Further, the European Union argues that Argentina's reliance on the panel report in *EU – Footwear (China)* is misplaced because that case addressed a different situation and a different claim, and, conversely, that panel report actually supports the European Union's position by concluding that Article 2.4 does not "establish specific obligations with regard to the methodologies that investigating authorities may use in order to ensure a fair comparison".[496] For the European Union, this suggests that investigating authorities enjoy discretion under Article 2.4 on how adjustments are made and which methodology they chose to ensure a fair comparison.[497] The

[487] Argentina's first written submission, paras. 302-304 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.388).
[488] Argentina's first written submission, paras. 285 and 286; second written submission, para. 206; response to Panel question No. 56, paras. 136-138.
[489] Argentina's response to Panel question No. 56, para. 137; opening statement at the second meeting of the Panel, para. 7 (both quoting Panel Report, *EU – Footwear (China)*, para. 7.264).
[490] European Union's response to Panel question No. 57, para. 84.
[491] European Union's second written submission, para. 21 (quoting Panel Report, *Egypt – Steel Rebar*, para. 7.333 (emphasis added by the European Union)); see also ibid. para. 26 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140).
[492] European Union's second written submission, paras. 21-22 and 24.
[493] European Union's first written submission, para. 284.
[494] European Union's first written submission, para. 284.
[495] European Union's first written submission, para. 284.
[496] European Union's second written submission, paras. 31-35 (quoting Panel Report, *EU – Footwear (China)*, para. 7.281).
[497] European Union's second written submission, para. 36. The European Union also refers to the Panel Report in *EC – Tube or Pipe Fittings*, para. 7.178.

European Union argues that in the present case, Argentina has failed to show that the EU authorities have exercised their discretion in an arbitrary manner when comparing the normal value and the export price.

7.4.2.5 Arguments of the third parties

7.289. **China** submits that Article 2.4 of the Anti-Dumping Agreement applies generally to the calculation of the dumping margin, regardless of how the normal value and export price are determined.[498] In China's view, the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 by making adjustments to the costs of soybeans. However, even if the EU authorities were entitled to make such adjustments, China argues that those adjustments nonetheless resulted in a difference affecting price comparability under Article 2.4. This is because the adjustments led to a difference in the costs of inputs reflected respectively in the normal value and in the export price, and this difference affected price comparability.[499] In China's view, the European Union was obliged under Article 2.4 to make "due allowance" for this difference in order to ensure a fair comparison between the normal value and the export price.

7.290. **Indonesia** submits that there is an obvious difference between the constructed normal value and the export price affecting the comparability between the two.[500] Indonesia submits that the use of international prices for soybeans or the inclusion of an amount numerically equal to the export tax on soybeans only in the normal value is a difference that needed to be taken into account in the comparison to the export price, because it affected the "comparable price" that was constructed.[501]

7.291. The **United States** submits that the text of Article 2.4 of the Anti-Dumping Agreement presupposes that the appropriate normal value has already been identified.[502] The United States agrees in principle with both complainant and respondent that the use of a constructed normal value does not preclude the need for due allowances or adjustments where necessary.[503] In the context of the comparison required by Article 2.4, the United States submits that the Panel should consider, first, whether there is a relevant difference between the constructed value and the export price, and second, whether that difference has an effect on "price comparability".

7.4.2.6 Evaluation by the Panel

7.292. We begin our analysis by interpreting Article 2.4 of the Anti-Dumping Agreement based on its text and context, taking into account relevant reports of prior panels and the Appellate Body.

7.293. Beginning with the text of Article 2.4, we note that its opening sentence mandates that a "fair comparison" be made between the export price and the normal value when determining whether dumping exists.[504] The second sentence of Article 2.4 sets up certain parameters for this comparison, requiring it to be "at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time". These parameters, in our view, provide an indication of matters to be considered in ensuring that the comparison is "fair".

7.294. The third sentence of Article 2.4 elaborates on the means of ensuring, in practical terms, that the "comparison" between the normal value and the export price is "fair". It requires "[d]ue allowance" to be made "for differences which affect price comparability". In our understanding, the ordinary meaning of making an "allowance" connotes "mak[ing] [an] addition or deduction

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[498] China's third-party submission, para. 143 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.388).

[499] China's third-party submission, para. 145.

[500] Indonesia's third-party statement, para. 21.

[501] Indonesia's third-party statement, para. 21 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 157; Panel Report, *EU – Footwear (China)*, para. 7.264).

[502] United States' third-party submission, para. 33.

[503] United States' third-party submission, para. 34.

[504] We note that the parties and third parties do not dispute that Article 2.4 of the Anti-Dumping Agreement applies in cases involving normal values constructed under Article 2.2 of the Anti-Dumping Agreement. (Argentina's first written submission, para. 286; European Union's first written submission, para. 286; China's third-party submission, para 145; Indonesia's third-party statement, para. 21; Saudi Arabia's third-party submission, para. 31; United States' third-party submission, para. 34)

corresponding to; … tak[ing] into account mitigating or extenuating circumstances"[505], and "due" connotes what is "just, proper, regular, and reasonable".[506] That is, additions or deductions in appropriate amounts to the export price or normal value may be required to account for "differences" between the two if they affect price comparability, thereby ensuring the "fairness" of the comparison under Article 2.4. The Appellate Body, interpreting the text of Article 2.4, has indicated that this provision is specific in describing the circumstances in which such allowances are to be made, namely, as just noted, where there are "differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction".[507] This, in turn, calls for the identification of "differences" that affect the appropriateness of the respective "price[s]" for the purposes of comparison, which would compromise the "fair[ness]" of the comparison if an allowance were not made.

7.295. Article 2.4 lists examples of "differences" between the normal value and the export price which presumptively may affect price comparability: "conditions and terms of sale, taxation, levels of trade, quantities, [and] physical characteristics". The elements of listed differences are all features, or characteristics, of the transactions that are compared to determine whether there is dumping.[508] This list is non-exhaustive, and due allowance must also be made for "any other" difference which is demonstrated to affect price comparability. Thus, the reference in Article 2.4 to "price comparability" can be understood to refer to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the prices involved in the transaction.[509]

7.296. Viewed in this context, it is evident that Article 2.4 concerns the comparison between the normal value and the export price and is not directed at what the panel in *Egypt – Steel Rebar* described as "the basis for and basic establishment of the export price and normal value", which it considered to be "addressed in detail in other provisions".[510] Or, in the words of the *EU – Footwear (China)* panel: "[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price."[511] Thus, the subject-matter of Article 2.4, i.e. differences affecting the comparability of the normal value and the export price, can be contrasted with that of Articles 2.1, 2.2 – including its subparagraphs – and 2.3 which pertain to the methodology for determining the normal value and the export price.[512]

7.297. This is not to say that the manner in which the normal value or export price is determined is not pertinent to the question whether the authority is conducting a "fair comparison" within the meaning of Article 2.4. Indeed, as noted above[513], the parties and third parties all agree that Article 2.4 of the Anti-Dumping Agreement applies in cases involving normal values constructed under Article 2.2 of the Anti-Dumping Agreement. We agree with the *Egypt – Steel Rebar* panel's indication that "[a] constructed normal value is, in effect, a notional price, 'built up' by adding costs of production, administrative, selling and other costs, and a profit". Thus, it may be necessary to make "due allowance" in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4, even though the normal value is one arrived at by way of a construction under Article 2.2.[514] Thus, there may be cases where the

[505] Oxford English Dictionary, http://www.oed.com/view/Entry/5464?rskey=sBvRt6&result=1#eid, accessed 23 November 2015.

[506] Panel Report, *Mexico – Olive Oil,* para 7.67 (citing *Black's Law Dictionary*, 7th edn, abridged. (2000), p. 405).

[507] Appellate Body Report, *US – Zeroing (EC)*, para. 157.

[508] Appellate Body Report*, US – Zeroing (EC)*, para. 157; Panel Report, *US – Stainless Steel (Korea)*, para. 6.77.

[509] Appellate Body Report*, US – Zeroing (EC)*, para. 157; Panel Report, *US – Stainless Steel (Korea)*, para. 6.77. The Appellate Body has indicated that, conversely, the third sentence of Article 2.4 can also be read *a contrario*, such that allowances may not be made for differences that do not affect price comparability. (Appellate Body Report*, US – Zeroing (EC)*, para. 156)

[510] Panel Reports, *Egypt – Steel Rebar*, para. 7.333; *EU – Footwear (China)*, para 7.263.

[511] Panel Report, *EU – Footwear (China)*, para 7.263.

[512] We note, however, that the fourth and fifth sentences of Article 2.4, which are not at issue here and which apply in specific cases involving a constructed export price under Article 2.3, can be conceived as supplementing the construction of the export price pursuant to that provision. These two sentences incorporate disciplines to ensure that the constructed export prices are comparable to the normal value, notwithstanding that they have been constructed by the investigating authority on the bases specified in Article 2.3.

[513] See above fn 504.

[514] Panel Report, *Egypt – Steel Rebar*, para. 7.388.

methodology by which the normal value is calculated has a bearing on the kinds of allowances that may need to be made to ensure a "fair comparison" under Article 2.4. As one example, we note that, in *United States – Hot-Rolled Steel*, the Appellate Body found that the use of downstream sales prices in the calculation of the normal value under Article 2.1 could, in principle, necessitate the provision of appropriate allowances under Article 2.4 to account for any differences that affect price comparability.[515]

7.298. We turn now to Argentina's claim that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between the export price and the normal value in the underlying investigation.[516] Argentina's claim concerns what it describes as the "artificial imbalance" between a normal value that reflects an average of the reference FOB price of soybeans (minus fobbing costs), on the one hand, and an export price that reflects the actual domestic price of soybeans, on the other.[517] Thus, the question before us is whether *this* difference between the normal value and the export price is a "difference which affects price comparability" for which "due allowance" should have been made in order to ensure a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement.[518]

7.299. At the outset, we consider it useful to recall how this difference between the normal value and the export price arose. In particular, we recall that the EU authorities reached the conclusion that the export tax applicable to soybeans and soybean oil depressed the domestic prices of the main raw material input in biodiesel to an artificially low level.[519] This was found to distort the costs of production for biodiesel in Argentina.[520] Thus, the EU authorities considered that the costs of the main raw material were not reasonably reflected in the records kept by the Argentine producers under investigation.[521] They replaced those costs with costs reflecting the price which they considered would have been the price at which those producers would have purchased the soybeans in the absence of the distortion caused by the export tax.[522] The replacement used by the authorities was the average of the reference prices of soybeans published by the Argentine Ministry of Agriculture during the investigating period, which the Argentine government used to calculate the amount of the export tax on soybeans.[523] Thus, the level of distortion mitigated by the authorities more or less amounted to the level of the export tax, given that the difference between the reference price and actual prices roughly equalled the export tax.[524]

7.300. Thus, the "difference" that Argentina claims "affects price comparability" between the normal value and the export price, such that "due allowance" should have been made in order to ensure a "fair comparison" under Article 2.4, arose from the methodology used by the investigating authority to determine the normal value. In particular, it arose from the decision of the investigating authority – challenged by Argentina under claims that we have upheld above – to construct a normal value by, *inter alia*, using what it considered to be undistorted prices for the main raw material input.[525]

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[515] Appellate Body Report, *US – Hot-Rolled Steel,* para. 169.

[516] Argentina's first written submission, para. 296.

[517] Argentina's second written submission, para. 202.

[518] The European Union asserts that Argentina's claim falls outside the "scope" of Article 2.4 and must therefore be rejected as a preliminary matter. (European Union's second written submission, paras. 20-28). The European Union's argument in that regard is premised on its own interpretation of Article 2.4. We do not see how we can reject Argentina's claim, as a preliminary matter, on the basis of the European Union's interpretation of Article 2.4 without first reviewing both the merits of Argentina's claim and the European Union's preferred interpretation. We therefore decline to reject Argentina's claim, as a preliminary matter, on the basis that it is outside the "scope" of Article 2.4.

[519] Definitive Disclosure, (Exhibit ARG-35), paras. 26 and 31; Definitive Regulation, (Exhibit ARG-22), paras. 30 and 35.

[520] Definitive Disclosure, (Exhibit ARG-35), para. 31; Definitive Regulation, (Exhibit ARG-22), para. 35.

[521] Definitive Disclosure, (Exhibit ARG-35), para. 34; Definitive Regulation, (Exhibit ARG-22), paras. 38 and 39.

[522] Definitive Disclosure, (Exhibit ARG-35), para. 35; Definitive Regulation, (Exhibit ARG-22), para. 39.

[523] Definitive Disclosure, (Exhibit ARG-35), paras. 32 and 36; Definitive Regulation, (Exhibit ARG-22), paras. 36 and 40.

[524] European Union's first written submission, para. 284; Argentina's first written submission, paras. 302-304.

[525] We note, in this regard, that Argentina indicated that its claim "results from the failure to construct normal value on the basis of the cost of production reported in the accounts of the exporting producers". (Argentina's first written submission, para. 285)

7.301. In our view, this difference is not a "difference[] which affect[s] price comparability" within the meaning of Article 2.4 of the Anti-Dumping Agreement for which "[d]ue allowance" should have been made under that Article. It does not relate to a difference in the characteristics of the (actual or notional) domestic vs. export transactions being compared. In particular, we do not consider that this difference represents a tax – or some other identifiable characteristic – that was incorporated into the constructed normal value by the EU authorities. Rather, the alleged "difference" is one that arose exclusively from the methodology used to construct the normal value; it resulted from a methodological approach directed at remedying what the authority considered to be a distorted input cost, a matter that is primarily governed by Article 2.2 of the Anti-Dumping Agreement.

7.302. Certainly, the perceived distortion itself was caused by the export tax, and the undistorted price ultimately used by the EU authorities closely resembled the domestic price plus the export tax. But this does not transform the export tax on soybeans into an identifiable component of the constructed normal value itself. Unlike the examples in the illustrative list in Article 2.4, it is not a *characteristic* of the transactions being compared. It 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.

7.303. Our conclusion in this respect is consistent with the views of the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)*. In that dispute, China alleged that there existed a number of differences between the export price and the normal value, which had been determined on the basis of prices prevailing in an analogue "market economy" country, in application of the analogue country methodology. Specifically, China referred to certain differences in taxation, arguing that the producer in the analogue country imported most of its raw materials and therefore paid import duties and other indirect taxes on its purchases of these raw materials, whereas the Chinese producers sourced their raw materials on the domestic market and consequently did not have to pay import duties and other associated taxes on the raw materials. China also alleged a number of other differences between the Chinese producers and the surrogate country producer, in terms of access to raw materials, the use of self-generated electricity, and "efficiency and productivity".[526]

7.304. Like the panel, the Appellate Body considered that, in the context of an investigation in which the analogue country methodology is applied, the investigating authority is not required under Article 2.4 to adjust for differences in costs where this would lead it to adjust back to the costs in the NME industry that it had found to be distorted.[527] We read the findings of the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* 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". We note that unlike the factual scenario in *EC – Fasteners (Article 21.5 – China)*, the methodology at issue in the present dispute was challenged by Argentina, and found by us to be inconsistent

[526] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 7.196-7.223 and 7.237-7.251.

[527] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.207. See also ibid., paras. 5.214 and 5.231, and Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 7.218-219 and 7.245. However, the Appellate Body took issue with the panel's approach, which – in the Appellate Body's words – was to find, "in general terms and without more", that adjusting for differences in taxation or differences in costs would undermine the investigating authority's recourse to the analogue country methodology. The Appellate Body found that the panel had failed to review whether the authority had established that the differences were "related to the issue of the price of domestic raw materials that was found to be distorted or whether an adjustment was merited because price comparability was affected under Article 2.4". The Appellate Body considered in this respect that it is incumbent on an investigating authority to take "steps to achieve clarity as to the adjustment claimed" and then to determine whether and to what extent the adjustment is warranted because it reflects a difference affecting price comparability and – in a situation such as the one that arose in *EC – Fasteners (China) (Article 21.5 – China)*, "whether it would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison". (Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.216-5.218 and 5.231-5.236). We recall, in this regard, that in the present dispute, the EU authorities explicitly clarified in their determination that the level of distortion addressed by the authorities more or less amounted to the level of the export tax, given that the difference between the reference price and actual prices roughly equalled the export tax (see Definitive Disclosure, (Exhibit ARG-35), paras. 32-35; see also European Union's first written submission, para. 284; and Argentina's first written submission, paras. 302-304). There is in our view no question that the entirety of the alleged difference resulted from the EU authorities' decision to replace the price actually paid by the investigated Argentine producers for soybeans by the adjusted reference price.

with certain provisions of the Anti-Dumping Agreement. However, in our view, the aforementioned general proposition applies as well to instances in which the methodology may reveal itself to be WTO-inconsistent as in the case before us.

7.305. We find support for our reasoning in the Appellate Body's resolution of a claim that zeroing constitutes an impermissible allowance under Article 2.4 in *US – Zeroing (EC)*. The Appellate Body in that case found that the zeroing methodology used by the USDOC in the administrative reviews at issue – which it had already found to result in an inconsistency with Article 9.3 of the Anti-Dumping Agreement because it meant that the authority did not treat the product under consideration "as a whole" – could not be characterized as an allowance or adjustment "undertaken to adjust to a difference relating to a characteristic of the export transaction in comparison with a domestic transaction".[528] Similarly, in the present case, the action of the investigating authorities that is at the heart of Argentina's Article 2.4 claim – the use of reference prices in the construction of normal value, rather than the prices actually paid by the investigated producers – is not one which was undertaken with a view to adjusting for a difference relating to some characteristic of the domestic transactions in comparison with the export transactions.

7.306. For the foregoing reasons, we find that Argentina has not established that the European Union failed to make a "fair comparison" between the normal value and the export price, inconsistently with Article 2.4 of the Anti-Dumping Agreement.

7.4.3 Whether the European Union acted inconsistently with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement by failing to base the determination of the amount for profits on a "reasonable method"

7.4.3.1 Legal claim

7.307. Argentina claims that the anti-dumping measures at issue are inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because the European Union failed to base the amount for profits component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii).[529] In response, the European Union submits that the method on the basis of which the EU authorities determined the level of profits was reasonable and that the resulting margin was itself reasonable.[530]

7.308. Before addressing Argentina's claim of inconsistency, we set out the relevant facts concerning the establishment of the profit margin used in constructing the Argentine producers' normal value in the investigation. We will then examine whether Argentina has demonstrated that the European Union acted inconsistently with the provisions it cites.

7.4.3.2 Relevant provisions of the covered agreements

7.309. Article 2.2 of the Anti-Dumping Agreement provides, in relevant part:

> 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. (fn omitted)

7.310. Article 2.2.2(iii) of the Anti-Dumping Agreement provides, in relevant part:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales

[528] Appellate Body Report, *US – Zeroing (EC)*, para. 158.
[529] Argentina's first written submission, paras. 265 and 470(e); second written submission, para. 254(e).
[530] European Union's first written submission, para. 267.

> in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> ...
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.4.3.3 Factual background

7.311. In the complaint to initiate an investigation, for the construction of the normal value, the EBB used a profit margin which was not reported in the public version of the complaint but which was described as being comprised between 0 and 5%. The EBB claimed to base this figure on the Argentine regulations establishing the price formula of biodiesel, while noting that this level of profit "appear[ed] artificially low", and recalling that, in the 2009 anti-dumping and countervailing duty investigations on imports of biodiesel from the United States, the EU authorities had considered a profit margin of 15% to be a level reasonably achieved by the European Union biodiesel industry.[531]

7.312. In the Provisional Regulation, the EU authorities found that the Argentine market conditions for biodiesel were such that "domestic sales were not considered as being made in the ordinary course of trade and the normal value of the like product had to be provisionally constructed".[532] Considering the prevailing market conditions in Argentina, the EU authorities concluded that the amount for profits could not be based on the actual data of the Argentine producers and proceeded to determine the amount for profits "on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve, that is 15% based on turnover".[533]

7.313. In its Comments on the Provisional Disclosure, CARBIO argued that the 15% profit rate was "ridiculously high", and was not based on a reasonable parameter.[534] In addition, CARBIO argued that the rate was not in line with the profit rates used by the EU authorities in all similar proceedings in the past. CARBIO cited the examples of recent investigations on biodiesel from the United States, in which a profit rate of 6.27% (corresponding to the weighted average of the profit margins of investigated producers with representative domestic sales) was used, and on bioethanol from the United States, in which the weighted average profit rate of the company that accounted for the majority of domestic sales was even lower. CARBIO added that these two industries were also "young and innovative capital intensive" industries. CARBIO also argued that in recent investigations in the commodities sector, the EU authorities had used profit margins in the region of 5% in constructing normal value.[535]

7.314. In the Definitive Disclosure, the EU authorities noted these arguments by CARBIO, stating that some Argentine producers claimed that the 15% amount for profits used by the EU authorities in constructing normal value was unrealistically high and represented a radical change in its established practice in similar proceedings. The EU authorities rejected these arguments, explaining that they do not systematically use a 5% profit margin when constructing normal value, and that every situation is assessed on its own merits taking into account the specific

[531] Consolidated version of the complaint, (Exhibit ARG-31), para. 64.

[532] Provisional Regulation, (Exhibit ARG-30), Recital 45. As part of their finding that the Argentine market was heavily regulated by the State, the EU authorities noted that, during the IP, Argentina imposed a mandatory blending requirement of 7% and that the biodiesel needed to meet this blending requirement was apportioned via the attribution of quotas among a selected number of Argentine biodiesel producers. The EU authorities further noted that the biodiesel sold under this quota system was sold at a price that was fixed by the State under a complex formula which took into account the cost of production and ensured the achievement of a certain amount of profit, and which resulted in significant profitability for the Argentine producers. (*Idem*, para. 44)

[533] Provisional Regulation, (Exhibit ARG-30), Recitals 44 and 46.

[534] CARBIO's comments on the Provisional Disclosure, (Exhibit ARG-51), pp. 4-5.

[535] CARBIO's comments on the Provisional Disclosure, (Exhibit ARG-51), pp. 5-6.

circumstances of the case.[536] They noted, for example, that in the 2009 investigation on biodiesel from the United States, different profit levels were used, with a weighted average profit rate well above 15%.[537] In addition, the EU authorities indicated that they had looked at the short and medium-term borrowing rate in Argentina, around 14% according to World Bank data, and considered that it was reasonable to expect a higher profit margin to be obtained when doing business in the domestic biodiesel markets than the borrowing cost of capital.[538] They added that the 15% profit figure was "even lower than the profit realised during the IP by the producers of the product concerned, albeit that level results from distortions in costs brought about by the DET and domestic biodiesel prices regulated by the State".[539] For these reasons, the EU authorities maintained their determination that "15% profit is a reasonable amount that can be achieved by a relatively new, capital-intensive industry in Argentina".[540]

7.315. In its comments on the Definitive Disclosure, CARBIO raised a number of objections against the EU authorities' determination of the amount for profits. First, CARBIO argued that the EU authorities' reference to the prior investigation on biodiesel from the United States was ill-founded given that the market had matured dramatically since then and that high profits were no longer possible. CARBIO added that, on this very consideration, the EU authorities had reduced from 15% to 11% the target profit margin for the EU industry that it used in calculating the injury margin.[541] CARBIO requested that the EU authorities use a profit margin not exceeding the same figure of 11% when constructing the Argentine producers' normal value.[542] CARBIO also objected to the EU authorities' reference to borrowing rates in Argentina, which it argued departed from the EU authorities' usual practice in constructing the normal value. CARBIO further argued that the Argentine producers make investments in USD terms, not just because of inflation in Argentina but also because, in virtually all cases, they make the investments together with foreign-owned entities related to EU producers. CARBIO added that none of the accounts of the sampled companies would show short and medium financing costs in the region of 14%.[543] Finally, CARBIO argued that because of the regulated prices of biodiesel on the domestic market, profit margins on the – albeit limited – domestic sales were not "in the ordinary course of trade" and should therefore be disregarded.[544]

7.316. The Definitive Regulation, however, confirmed the 15% profit margin established in the Provisional Regulation and set out in the Definitive Disclosure on the following grounds:

> The Commission considered that a 15% profit margin was reasonable for the biodiesel industry in Argentina, since in that country during the IP it was still a young and capital intensive industry. The reference to the profit margin in the US case was made to rebut the claim that the Commission uses systematically a 5% profit margin when constructing normal value. The reference to the medium-term borrowing rate also was not meant to set a benchmark but to test the reasonableness of the margin used. The same applies to the profit actually earned by the sampled companies. On the other hand, since the purpose of constructing normal value is different from the calculation of the target profit for the Union industry in the absence of dumped imports, any comparison between the two is irrelevant.[545]

7.4.3.4 Main arguments of the parties

7.4.3.4.1 Argentina

7.317. Argentina submits that the amount for profits established by the EU authorities, namely 15% on turnover is not based on a reasonable method within the meaning of Article 2.2.2(iii) of

[536] Definitive Disclosure, (Exhibit ARG-35), paras. 37-38; Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI), pp. 2, 6, 8, 11, and 15.
[537] Definitive Disclosure, (Exhibit ARG-35), para. 38.
[538] Definitive Disclosure, (Exhibit ARG-35), para. 38.
[539] Definitive Disclosure, (Exhibit ARG-35), para. 38.
[540] Definitive Disclosure, (Exhibit ARG-35), paras. 37-38.
[541] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 13.
[542] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), pp. 13-14.
[543] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 14.
[544] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 14.
[545] Definitive Regulation, (Exhibit ARG-22), Recital 46.

the Anti-Dumping Agreement and, consequently, cannot be considered to be "reasonable" within the meaning of Article 2.2 of the Anti-Dumping Agreement.[546]

7.318. First, Argentina contends that the EU authorities failed to provide any explanation of how they determined a profit margin of 15%, but rather, merely stated that they "considered" that amount to be reasonable.[547] For Argentina, therefore, the 15% figure does not result from any "method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement, let alone a reasonable one. In Argentina's view, the reference to "any other reasonable method" in Article 2.2.2(iii) implies that the profit margin must be arrived at by way of a method.[548] The profit margin cannot just be "established" first and then tested for its reasonableness. Otherwise, Article 2.2.2(iii) would have used the term "any reasonable amount". Argentina finds support for its interpretation in the first two subparagraphs of Article 2.2.2, which lay down precise procedures that must be followed in order to arrive at a reasonable amount for profits. Argentina further considers that its interpretation is supported by the findings of the panels in *Thailand – H-Beams* and *EC – Bed Linen*, which it argues show that the ceiling under subparagraph (iii) operates after a methodology has been applied rather than an amount merely being "established".[549]

7.319. Second, Argentina contends that the EU authorities' reference to World Bank data concerning the short to medium-term borrowing rate cannot be a relevant justification for the 15% profit margin determination because "profit" indicates a "result", and a profit margin is a figure that is arrived at after financing costs and other liabilities are taken into account, at least in the case of a net profit.[550] Consequently, there is no reason to expect the level of profits to exceed the borrowing cost of capital. Further, since this data was only used to confirm the reasonableness of the profit margin, it does not indicate the method by which that margin was determined.[551]

7.320. Third, Argentina contends that the EU authorities' reference to the 15% profit margin determination for the European Union's biodiesel industry in a prior investigation concerning imports from the United States relates to "entirely different" market conditions[552], and further, it was unreasonable to consider the Argentine industry as "young and innovative" compared to the European Union's industry because, at the time of the investigation, Argentine production had peaked and the market had matured significantly.[553] In this connection, Argentina submits that the European Union's explanation concerning the profit margin used in the investigation on US biodiesel and its explanation concerning the relative levels of development of the Argentine and European Union biodiesel industries amounts to nothing more than a *post hoc* rationalization.[554] Argentina additionally submits that, while this might constitute a justification of the profit margin determined by the investigating authority, it does not reveal the method by which the margin was determined.[555] In contrast, Argentina submits that the 11% profit figure used by the investigating authority in the present investigation to calculate the injury elimination level would have been an acceptable figure in the present investigation because it reflects similar levels of development between the Argentine and European Union industries, and further, because this figure was determined in a reasoned manner on the basis of a carefully-described methodology.[556]

7.4.3.4.2 European Union

7.321. The European Union submits that the method on which the determination for the profit margin was based consisted of a number of elements: (i) the figure was appropriate on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve; (ii) each

[546] Argentina's first written submission, para. 275.
[547] Argentina's first written submission, para. 276.
[548] Argentina's response to Panel question No. 54, para. 129; response to Panel question No. 108, paras. 85-88.
[549] Argentina's response to Panel question No. 54, paras 130-132 (referring to Panel Reports, *Thailand – H-Beams*, paras. 7.122 – 7.128; *EC – Bed Linen*, paras. 6.98-6.99; and *EU – Footwear (China)*, para. 7.299).
[550] Argentina's first written submission, paras. 279 and 280.
[551] Argentina's second written submission, para. 197(c).
[552] Argentina's first written submission, para. 281.
[553] Argentina's first written submission, paras. 282 and 283; response to Panel question No. 109, paras. 92 and 93.
[554] Argentina's second written submission, para. 198; response to Panel question No. 109, para. 92.
[555] Argentina's second written submission, para. 197(a).
[556] Argentina's response to Panel question No. 109, paras. 91-95.

assessment is case-by-case and on its own merits; (iii) the figure was not out of line with that adopted in other investigations; (iv) the short and medium-term borrowing rate in Argentina was approximately 14%, and it was reasonable to expect biodiesel producing companies to obtain a profit margin exceeding that level; (v) Argentine biodiesel companies enjoyed a level of profit higher than 15% during the investigation period, albeit because they benefited from distorted costs; and (vi) a comparison with the target profit for the domestic industry in the absence of dumped imports is not relevant because the target profit rate for the domestic industry has a different purpose.[557]

7.322. The European Union submits that this represents a "method" for the calculation of the profits that is "reasonable". The EU authorities first established a profit figure on the basis of their experience with the relevant industry from other investigations and then tested the reasonableness of that profit figure against a number of benchmarks.[558] In this regard, the European Union asserts that, logically, if the amount determined by an investigating authority is "reasonable", then whatever "method" it had used in order to determine that amount should also be "reasonable".[559] On that basis, the European Union argues that the Panel should first examine whether the profit margin determined by the EU authorities was "reasonable" for purposes of the chapeau of Article 2.2 of the Anti-Dumping Agreement.

7.323. The European Union submits that the World Bank data on the short and medium-term borrowing rate in Argentina was only used in order to confirm the reasonableness of the 15% profit margin, rather than to determine that margin in the first instance. In that regard, the European Union submits that the fact that the EU authorities considered that investors decided to invest in the Argentine biodiesel industry with the knowledge that the cost of the invested capital would be around 14% was an additional element that supported the reasonableness of the 15% profit margin.[560] With regard to the EU authorities' finding that the Argentine producers actually achieved profit margins higher than 15% during the investigation, the European Union argues that although this level was evidently achieved because of the distortions in costs caused by the export tax regime and State regulation of domestic biodiesel prices, "that was the context in which the companies were operating and the EU investigating authority could not ignore it".[561]

7.324. The European Union also notes that its prior anti-dumping investigation of biodiesel from the United States showed that during its early stages, the profit levels achieved by the EU industry were around 18%.[562] That investigation concluded that a profit margin of 15% on turnover could be regarded as an appropriate level that its domestic industry could have expected to obtain. The European Union submits that its authorities followed a similar analysis in the present case and reached the conclusion that a 15% margin was reasonable for the Argentine industry at a period of time when it was at the same stage of development as its domestic industry in the prior investigation.[563] However, the European Union clarified that it does not suggest that the 15% profit margin was adopted in the present investigation simply because that was the level used for the European Union industry in the United States' investigation.[564] Rather, it was used to rebut Argentina's argument that the 15% profit margin for the European Union industry in the prior investigation had been reduced to an 11% profit margin in the present investigation due to its biodiesel market maturing.

7.325. With respect to the 11% profit figure used in calculating the injury margin, the European Union argues that its domestic biodiesel industry was found to have matured by the time

[557] European Union's first written submission, paras. 269-275; response to Panel question No. 51, para. 70.
[558] European Union's second written submission, para. 148.
[559] European Union's response to Panel question No. 108, para. 84.
[560] European Union's response to Panel question No. 52, para. 76.
[561] European Union's first written submission, para. 280. In its response to Panel question No. 51, the European Union refers to Appendix II to the Government of Argentina's questionnaire response in the countervailing duty investigation, (Exhibit EU-12), p. 36, which indicates that the Argentine biodiesel industry was achieving profit margins in excess of 25% at the time. (European Union's response to Panel question No. 51, para. 74)
[562] European Union's response to Panel question No. 51, para. 72.
[563] European Union's response to Panel question No. 51, paras. 72-73.
[564] European Union's response to Panel question No. 110, para. 89.

of the investigation on biodiesel from Argentina, and the different levels of development of the EU and Argentine biodiesel industries explain the difference in the two profit rates.[565]

7.326. Finally, the European Union submits that the anti-dumping duties were imposed on a "lesser duty rule" basis and that in the case of all Argentine exports the injury margin was well below the dumping margin. Accordingly, even if the profits had been set at the level proposed by Argentina, viz. 11%, the amount of the anti-dumping duty imposed would have been no different.[566]

7.4.3.5 Arguments of the third parties

7.327. **China** submits that it is questionable whether the European Union adopted a "method", let alone a reasonable one, which meets the test under Article 2.2.2(iii) of the Anti-Dumping Agreement to determine the amounts for profits.[567] In China's view, the EU authorities did not indicate the method that they used in order to determine the 15% profit margin, and, at most, they only provided a general rationale for the figure.[568]

7.328. **Indonesia** submits that the justification provided by the European Union does not meet the requirements of Article 2.2.2 and Article 2.2 because it does not qualify as a "methodology" and it overlooks the main purpose of the construction of the normal value, namely, to ensure that the constructed normal value approximates as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.[569]

7.4.3.6 Evaluation by the Panel

7.329. The question before us is whether the anti-dumping measures imposed by the European Union on imports of biodiesel from Argentina are inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because the European Union failed to determine the profit margin as a component of the constructed normal value on the basis of a "reasonable method" within the meaning of Article 2.2.2(iii).[570]

7.330. Article 2.2 provides that where the normal value is constructed, it shall include, *inter alia*, a "reasonable amount" for selling, general and administrative (SG&A) expenses and for profits. The chapeau and paragraphs (i) and (ii) of Article 2.2.2 outline specific methods available to the authorities to determine these amounts "[f]or the purpose of paragraph 2", i.e. Article 2.2. The chapeau requires the use of the SG&A expenses and profit margins from the producer/exporter's domestic sales of the like product in the ordinary course of trade. When the amounts cannot be determined on that basis, the authorities may resort to the various approaches, or "methods", set out under paragraphs (i)-(iii).[571] The panel in *EC – Bed Linen* summarized the three subparagraphs of Article 2.2.2 as they apply to the determination of the amount for profits as follows:

> Paragraphs (i)-(iii) provide three alternative methods for calculating the profit amount, which, in our view, are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule. Thus, Article 2.2.2(i) allows the calculation of the profit amount on the basis of data for the exporter concerned, corresponding to *a general category of products*, including the like product. In turn, Article 2.2.2(ii) permits the calculation of the profit rate on the basis of the weighted average profit rate for *other investigated exporters*, corresponding to the like product itself. Finally, Article 2.2.2(iii) allows the use of any other method, as long as the resulting rate is not higher than the weighted average

[565] European Union's response to Panel question No. 53, paras. 79 and 80.
[566] European Union's first written submission, para. 283.
[567] China's third-party submission, paras. 135 and 137.
[568] China's third-party submission, para. 136.
[569] Indonesia's third-party statement, para. 18.
[570] Argentina's first written submission, para. 470(e).
[571] Panel Report, *EC – Bed Linen*, para. 6.58.

> profit rate realised by *other investigated exporters* in respect of sales in the same *general category of products*.[572] (emphasis original; fn omitted)

7.331. As the panel in *EC – Bed Linen* noted, Article 2.2.2(iii) prescribes two conditions for determining the amount for profits, when that proviso is resorted to. First, the amount for profits must be determined on the basis of "any other reasonable method", and second, it must not exceed the ceiling defined under this subparagraph, i.e. "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". The report of the panel in *EU – Footwear (China)* suggests that each of the two conditions must be met in order for the amount for profit to be consistent with Article 2.2.2(iii).[573] In the present dispute, Argentina's claims are limited to the first condition concerning the use of a "reasonable method" in determining the amount for profits.

7.332. We note, however, that in addition to its claim under Article 2.2.2(iii), Argentina also makes a claim of inconsistency under Article 2.2. This provision requires the use of a "reasonable amount for administrative, selling and general costs and for profits" in constructing normal value. We understand Argentina to contend that a violation of the specific conditions of Article 2.2.2(iii) leads, *ipso facto*, to a violation of this requirement under Article 2.2 as well.[574]

7.333. We now set out our understanding of what constitutes "any other reasonable method" under Article 2.2.2(iii), before assessing whether reliance on such a method can be discerned from the explanations provided by the EU authorities in the investigation at issue.

7.334. We turn first to the ordinary meaning of the term "method" in the context of Article 2.2.2(iii). Dictionary definitions of the term include "[p]rocedure for attaining an object", "[a] mode of procedure; a (defined or systematic) way of doing a thing", and "[a] written systematically-ordered collection of rules, observations, etc. on a particular subject".[575] Based on these definitions, we understand the term "method" to refer, in general terms, to a process or procedure, as opposed to an outcome.

7.335. The context of the term in Article 2.2.2(iii) sheds further light on its scope. First, the term is qualified by the words "any other". The use of "any" suggests a particularly broad scope[576], and the use of "other" suggests that the other subparagraphs of Article 2.2.2 illustrate what may be captured by the term "method" under Article 2.2.2(iii). In that regard, we note that the chapeau and paragraphs preceding Article 2.2.2(iii) provide, in relevant part, that the amounts for administrative, selling and general costs and for profits may be "based on" or "determined on the basis of": (i) actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation; (ii) the actual amounts incurred and realized by the exporter or producer in question in respect of the same general category of products; or (iii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product.[577] It is significant, in our view, that these three alternatives refer to the kind of specific data on which the amount of profit can be determined, rather than a specific procedure or methodology for the calculation of the amount for profits. This suggests to us that the term "method" in subparagraph (iii) refers to a reasoned consideration of the evidence before the investigating authority for the determination of the amount for profits, rather than to a pre-established procedure or methodology.[578] In addition, these "other" methods indicate a

[572] Panel Report, *EC – Bed Linen*, para. 6.60.

[573] Panel Report, *EU – Footwear (China)*, paras. 6.52, 6.55, and 7.288 et seq.

[574] Argentina's first written submission, para. 284, and second written submission, para. 199. Moreover, we note that Argentina refers us to the reports of two panels that concluded that the "reasonable amount" language in Article 2.2 does not impose an additional reasonableness test on the amount for profit determined pursuant to Article 2.2.2. (Argentina's response to Panel question No. 54, paras. 129-132 (referring to Panel Reports, *EC – Bed Linen*, paras. 6.98-6.99 and *Thailand – H-Beams*, paras. 7.122-7.128))

[575] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1767.

[576] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China),* fn 197; *Canada – Autos* para. 79.

[577] See above, para. 7.310, for the text of Article 2.2.2(iii) of the Anti-Dumping Agreement.

[578] Argentina acknowledges that "neither of the two procedures set forth in (i) and (ii) represents a complex or elaborated method. They are rather simple" (adding, however, that "they go beyond the mere

preference for the actual data regarding 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). It flows from that context that the phrase "any other reasonable method" may be used in the absence of reliable data concerning the actual exporter or other exporters and the like product.[579] This, in turn, suggests that an investigating authority would usually have recourse to Article 2.2.2(iii) in circumstances where its options for basing the determination of an exporter's profit margin are constrained. This context, together with absence of any additional guidance in Article 2.2.2(iii) on what the "method" chosen should entail in terms of either the source or scope of the data or procedure, suggests to us a broad and non-prescriptive understanding of the term.

7.336. Second, as we have noted above, in addition to the requirement that it be determined on the basis of "any reasonable method", Article 2.2.2(iii) imposes a ceiling on the amount for profits determined[580], requiring that that the amount for profits "not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". The presence of this constraint, in the absence of any other guidance on the kind of "method" to be adopted, confirms our broad and non-prescriptive understanding of the term "method".

7.337. We now turn to assess what constitutes a "reasonable" method in the context of Article 2.2.2(iii). In the context of Article 2.2.2(iii), it is clear from the use of "any other" before "reasonable" that what is "reasonable" is connected to the preceding paragraphs and the chapeau and that the "methods" set in the preceding paragraphs and the chapeau are presumptively reasonable. As we have discussed, these indicate 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). In our view, this context suggests that the general function of Article 2.2.2 is to approximate what the profit margin (as well as administrative, selling and general costs) would have been for the like product in the ordinary course of trade in the domestic market of the exporting country.[581] Thus, in our view, the reasonableness of the method used under Article 2.2.2(iii) for determining the profit margin turns on whether it is rationally directed at approximating what that margin would have been if the product under consideration were sold in the ordinary course of trade in the domestic market of the exporting country.

7.338. Based on the foregoing considerations, we understand the term "any other reasonable method" in Article 2.2.2(iii) to involve an enquiry into whether the investigating authority's determination of the amount for profits is the result of a reasoned consideration of the evidence before it, rationally directed at approximating the profit margin to what would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country.

7.339. With this understanding in mind, we now examine whether the EU authorities' explanations for the 15% profit margin applied in the investigation at issue meet this requirement.

7.340. We recall that the EU authorities first identified a profit margin of 15% in the Provisional Regulation. This amount was reached "on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve".[582] We consider it relevant to this explanation that the application of the EBB to initiate the investigation had drawn attention to the finding reached by the EU authorities in a prior investigation that a profit margin of 15% represented a level

unsubstantiated assertion with respect to what profits are"). (Argentina's response to Panel question No. 108, para. 86)

[579] We note that the panel in *EC – Bed Linen* found that there is no hierarchy among the methods for determining the amount for profits in Articles 2.2.2(i)-(iii). (Panel Report, *EC – Bed Linen,* para. 6.59). The question of the interaction between these methods, or a potential hierarchy among them, has not been raised in this dispute and accordingly we express no views in that regard.

[580] We note that the ceiling does not apply to the determination of the amounts for administrative, selling and general costs.

[581] Panel Report, *Thailand – H-Beams*, para. 7.112.

[582] Provisional Regulation, (Exhibit ARG-30), Recitals 44 and 46.

reasonably achieved by the European Union biodiesel industry.[583] The figure of 15% in that investigation was "deemed reasonable for guaranteeing the productive investment on a long-term basis for this newly established [biodiesel] industry", and was reached in the light of profits of 18.3%, 18%, and 5.7% achieved by the EU domestic industry over the period of investigation.[584]

7.341. Thus, it appears that the EU authorities initially arrived at the figure of 15% based on their experience with the relevant industry in other investigations, taking into account the characteristics of the industry in question.[585] The profit margin selected and the rationale for that margin in the Provisional and Definitive Regulations are analogous to the profit margin and rationale in the prior investigation referred to by the domestic industry in its application. Moreover, the 15% profit margin calculated in the investigation concerning biodiesel from the United States is expressly relied upon by the EU authorities in the Provisional and Definitive Regulations at issue; the EU authorities used the same profit margin in calculating the injury elimination margin in the Provisional Regulation, before adjusting it to 11% in the Definitive Regulation in the light of market developments in the intervening period.[586]

7.342. Thus, from the relevant attendant circumstances, we understand that the EU authorities arrived at the 15% figure by taking into account the characteristics of a biodiesel industry that is "young", "innovative", and "capital intensive" and by drawing on their earlier experience in a recent, similar investigation.

7.343. We note that, subsequent to determining the profit margin of 15% in the Provisional Regulation, and in response to CARBIO's arguments opposing this profit rate, the EU authorities explained that they tested it.[587] They compared it to the short and medium-term borrowing rate in Argentina of around 14% because, in their view, it seemed reasonable to expect a higher profit margin to be obtained when doing business in the domestic biodiesel markets than the borrowing cost of capital. They also compared it to the profit realized during the period of investigation by the Argentine producers and found it to be lower than that profit, while recognizing that the higher profit level achieved in the Argentine domestic market resulted from certain distortions. Following these tests, the EU authorities confirmed the 15% profit margin.

7.344. At this juncture, we note that our understanding of the approach of the EU authorities is consistent with the explanation of the European Union, namely, that they first established a profit figure on the basis of their experience with the relevant industry from other investigations, and then tested the reasonableness of that profit figure on the basis of a number of benchmarks.[588] This being the case, we are of the view that the EU authorities' determination of the amount for profits proceeded from a reasoned consideration of the evidence before them. Further, we recall that such data was not selected arbitrarily in the present case, but rather, on the basis of what appear to be plausible similarities between the respective stages of development of the EU biodiesel industry at the time of the investigation on biodiesel from the United States and of the Argentine biodiesel industry during the IP in the investigation at issue here. We therefore disagree with Argentina that the approach of the EU authorities does not qualify, in the first instance, as a "method" within the meaning of Article 2.2.2(iii).

7.345. We turn now to the reasonableness of the method used by the EU authorities. CARBIO argued in response to the EU authorities' testing of the 15% profit margin that the short and medium-term borrowing rate had never previously been used to set a reasonable level of profit, and that the sampled biodiesel producers make investments in USD and do not have financing costs of 14%.[589] CARBIO also argued that testing against the actual profit margins of biodiesel

[583] Consolidated version of the complaint, (Exhibit ARG-31), para. 64; Provisional Regulation, anti-dumping investigation on biodiesel from the United States, (Exhibit EU-13), Recital 164.

[584] Provisional Regulation, anti-dumping investigation on biodiesel from the United States, (Exhibit EU-13), Recitals 95 and 164. Moreover, the EU authorities indicated that "[t]he imposition of anti-dumping measures would likely put the Community industry in the position to *maintain its profitability at levels considered necessary for this capital intensive industry*." (Provisional regulation in the AD investigation on biodiesel from the United States, (Exhibit EU-13), Recital 146) (emphasis added)

[585] European Union's second written submission, para. 148.

[586] Provisional Regulation, (Exhibit ARG-30), Recitals 174 and 175; Definitive Regulation, (Exhibit ARG-22), Recitals 204-210.

[587] Definitive Disclosure, (Exhibit ARG-35), para. 38.

[588] European Union's second written submission, para. 148.

[589] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 14.

producers was not appropriate, as these are based on sales that are not in the ordinary course of trade. CARBIO further submitted, in contrast to its earlier submission, that "the market has matured dramatically since the early days in this industry", and therefore, that "high profits are no longer possible" and that "the reference to the US proceeding is ill-founded".[590]

7.346. The EU authorities responded by stating that the profit margin of the domestic industry for the injury elimination level in the current proceeding is not a relevant benchmark for comparison because the purpose of constructing normal value is different from the purpose of calculating the target profit for the EU biodiesel industry in the absence of dumped imports.[591] The EU authorities also replied that their reference to the profit margin in the prior investigation had been made to rebut CARBIO's claim that they systematically use a 5% profit margin when constructing normal value.[592] Further, the EU authorities stated that the short and medium-term borrowing rates, and the actual profits of producers, were not meant to set a benchmark but to test the reasonableness of the margin used.[593]

7.347. In our view, these arguments and explanations inform whether the "method" used by the EU authorities was "reasonable", that is, rationally directed at approximating the profit margin for the like product to what would have been achieved were the like product sold in the ordinary course of trade in the domestic market of the exporting country.[594] We recall that investigating authorities might have recourse to Article 2.2.2(iii) when reliable data concerning the actual exporter or other exporters and their products is unavailable, making the more specific approaches in the chapeau and subparagraphs (i) and (ii) of Article 2.2.2 unusable. In that context, we consider that an unbiased and objective investigating authority could reasonably consider, as an initial step, that profit margins determined in prior investigations of other producers in the same industry at similar stages of development provide an indication of the profit margins of producers in a subsequent investigation. Further, since that figure was determined at a different point in time for different producers, it would be appropriate, in our view, that an unbiased and objective investigating authority would seek to test that figure against relevant benchmarks that might be available. In our understanding, four such benchmarks were considered by the EU authorities in this investigation and they seem to us to be plausible.

7.348. The EU authorities used the World Bank indicator for short and medium-term borrowing rates in Argentina, which was 14%, to test the reasonableness of the 15% profit margin they had determined. In addition, the EU authorities noted the rate of the actual profits of Argentine biodiesel producers, which was in excess of 25%.[595] CARBIO proposed a 5% benchmark since that figure is regularly used in similar commodity-related markets, as well as an 11% benchmark since that figure was used for the domestic industry. The EU authorities rejected the first of CARBIO's benchmarks on the basis that a 5% profit margin is not systematically used and instead there should be a case-by-case analysis, and it rejected the second because the figure used for the purpose of constructing normal value is different from the calculation of the target profit for the domestic industry in the absence of dumped imports. Moreover, while the EU authorities did not explicitly find that the EU and Argentine industries were at different stages of development during the IP, a comparison of their discussion of the profit rate applied to the Argentine producers (in which they refer to that industry as a young and innovative one) with their discussion of the profit rate applied to the EU industry in the context of determining the injury margin (which they found

[590] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 13. In our view, CARBIO's position in this regard seems to have evolved from its earlier contention that the profits of US producers in prior biodiesel investigations – which represented a "young and innovative capital intensive industry" – could be used as the profit margin for Argentine producers in the current investigation. (See CARBIO's comments on the Provisional Disclosure, (Exhibit ARG-51), p. 6). In particular, in its later submission, CARBIO seemed to reject the characterization as a "young and innovative capital intensive industry", and further, CARBIO also now seemed to reject the relevance of considering prior investigations. In contrast to its earlier submission, CARBIO now seemed to suggest that the profit margin of the domestic industry for the injury elimination level in the current proceeding represented a reasonable benchmark for comparison. (See CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 13)

[591] Definitive Regulation, (Exhibit ARG-22), Recital 46.

[592] Definitive Regulation, (Exhibit ARG-22), Recital 46.

[593] Definitive Regulation, (Exhibit ARG-22), Recital 46.

[594] Panel Report, *Thailand – H-Beams*, para. 7.112.

[595] See above, fn 561.

had "matured significantly" since the investigation on biodiesel from the United States[596]), makes it clear that the EU authorities considered this to be the case.

7.349. Thus, the selection and testing of the 15% profit margin resulted from a reasoned analysis that, in our view, was rationally directed at approximating what the Argentine producers' profit margin for the like product would have been if the like product had been sold in the ordinary course of trade in the domestic market of the exporting country.[597] Both the initial selection of a figure of 15% and its subsequent confirmation through testing against benchmarks were grounded on coherent reasoning in a context where data on the actual producers and their products was not useable. We do note some apparent internal inconsistencies in the EU authorities' explanations. In particular, in response to CARBIO's argument that the EU authorities' reference to the prior investigation into biodiesel from the United States was ill-founded, the EU authorities stated that the reference to the profit margin in that investigation was made to rebut the claim that the European Union systematically uses a 5% profit margin when constructing normal value. That could be read to suggest that the EU authorities did not rely on that investigation as part of its method for deriving the figure of 15%.[598] Regardless of this statement, we do not understand the EU authorities to have used the findings in its prior investigation *exclusively* to rebut CARBIO's argument concerning the 5% profit margin when constructing normal value. Rather, in our understanding, the EU authorities used those prior findings as part of its corpus of knowledge in identifying the initial figure of 15%, because that investigation involved an industry with similar characteristics and products to the case at hand.

7.350. We also note that the EU authorities rejected CARBIO's suggestion to use the 11% figure determined for the domestic industry as a benchmark in the present investigation on the grounds that the purpose of constructing the normal value is different from the calculation of the target profit for the European Union industry in the absence of dumped imports, in the context of determining the injury margin. There seems to be a degree of inconsistency between this reasoning, on the one hand, and the use by the EU authorities of the 15% profit margin determined on the basis of its earlier experience from the United States investigation, on the other. This is because the 15% margin used by the EU authorities in the present investigation *in constructing the Argentine producers' normal value* itself was, as we note above, based on the 15% target profit margin used by the EU authorities in their *calculation of the injury margin* in the prior investigation on biodiesel from the United States. That notwithstanding, we consider that an objective and unbiased investigating authority, in the present case, could have plausibly differentiated between the determination of the profit margin of Argentine producers for the purpose of constructing normal value on the one hand, and the determination of the profit margin of the European Union industry for the purpose of determining the level of injury, on the other. This is particularly the case given that the EU authorities found that the EU domestic industry had matured such that a reduction in its target profit in the absence of dumped imports was warranted, but considered the Argentine industry to be "young and innovative", or, in other words, at a different stage of development. On that basis, we consider that it was not unreasonable for the EU authorities to distinguish between the profit rates used in the construction of normal value and the profit rate used in the calculation of the target profit for the European Union industry in the absence of dumped imports.[599]

7.351. For the foregoing reasons, we find that Argentina has not established that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement in its determination of the amount for profits in constructing the Argentine producers' normal value. In light of our understanding that Argentina's claim under Article 2.2 is dependent on its claim under

[596] Definitive Regulation, (Exhibit ARG-22), Recital 205.

[597] Panel Report, *Thailand – H-Beams*, para. 7.112.

[598] In addition, while, in its response to Panel question No. 51, the European Union discussed the 15% profit margin used to calculate the injury elimination margin in the investigation on biodiesel from the United States, the European Union later clarified in response to a question from the Panel, that it "did not state [in its response to Panel question No. 51] that the '15% profit margin comes from the US investigation'", and that it "did not suggest that the 15% profit margin had been adopted in the Argentine investigation simply because that was the level used for the European Union industry in the United States' investigation". (European Union's response to Panel question No. 110, para. 89)

[599] We also find it significant that, in response to a question from the Panel, Argentina indicated that a profit rate of 11%, the rate used by the EU authorities in calculating the injury elimination margin, would have been an acceptable profit rate for the Argentine producers, based *inter alia* on the fact that the 11% rate had been determined in a reasoned manner. (Argentina's response to Panel question No. 109, paras. 91-95)

Article 2.2.2(iii), we also find that the European Union did not act inconsistently with Article 2.2 in its determination of the amount for profits.

7.4.4 Whether the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing and levying anti-dumping duties in excess of the margins of dumping

7.4.4.1 Legal claim

7.352. Argentina requests that we find 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 and levying 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.[600]

7.4.4.1.1 Relevant provisions of the covered agreements

7.353. The chapeau of Article 9.3 of the Anti-Dumping Agreement provides that:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.354. Article VI:2 of the GATT 1994 provides that:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

7.4.4.2 Main arguments of the parties

7.4.4.2.1 Argentina

7.355. Argentina argues that the European Union imposed and levied anti-dumping duties in excess of the margin of dumping that it should have calculated in conformity with Article 2 of the Anti-Dumping Agreement. Argentina submits that this results from the European Union acting inconsistently with Articles 2.2, 2.2.1.1, 2.2.2(iii) and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in the construction of the normal value and the comparison of the normal value to the export price.[601] Argentina submits that a dumping margin calculation in conformity with Article 2 would have established that imports of biodiesel originating in Argentina were not dumped, or would have resulted in margins well below the duties imposed by the European Union.[602]

7.4.4.2.2 European Union

7.356. The European Union submits that Article 9.3 of the Anti-Dumping Agreement addresses the *comparison* between the anti-dumping duties and the dumping margins, as opposed to addressing the *calculation* of the normal value.[603] Thus, in the European Union's view, the text of Article 9.3 requires a comparison between the anti-dumping duties actually imposed and the dumping margin actually calculated by the investigating authority. Article 9.3 does not call for a comparison with what should have been calculated under Article 2 of the Anti-Dumping Agreement. The European Union submits that this understanding is supported by the context of the Anti-Dumping Agreement insofar as it contains two separate sets of rules in Article 2 and Article 9, the former of which concerns the construction of normal values and the

[600] Argentina's first written submission, paras. 309 and 470(g); second written submission, para. 254(g). We recall that we have rejected the European Union's contention that this claim is not within our terms of reference. See above, para. 7.34.

[601] Argentina's first written submission, paras. 307-309; response to Panel question No. 114, para. 101.

[602] Argentina's second written submission, para. 209; response to Panel question No. 114, para. 101.

[603] European Union's first written submission, para. 57. We note that the arguments of the European Union in this regard also pertain to its request for a preliminary ruling concerning Article 9.3 of the Anti-Dumping Agreement.

calculation of dumping margins, and the latter of which regulates the imposition and collection of anti-dumping duties.[604] Since Article 9.3 is situated in the latter, it would run counter to the context of Article 9.3 for it to encompass alleged errors in the construction of normal value. In this connection, the European Union draws on the panel's findings in *EC – Salmon (Norway)* to demonstrate that a violation of Article 2 does not automatically lead to a violation of Article 9.3.[605]

7.4.4.3 Evaluation by the Panel

7.357. Argentina requests that we find 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 and levying 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.[606]

7.358. We first address Argentina's claim under Article 9.3 of the Anti-Dumping Agreement. As we understand it, the key point of contention between the parties with respect to this claim concerns the proper interpretation of the term "margin of dumping as established under Article 2" in Article 9.3 of the Anti-Dumping Agreement. Thus, we consider the question before us to be whether this term refers to the margin of dumping that was actually determined by the investigating authority *regardless* of any errors or inconsistencies with Article 2 of the Anti-Dumping Agreement, or whether it refers to the margin of dumping that an investigating authority would have established in the absence of any errors or inconsistencies with this Article.

7.359. We begin our analysis by setting out our interpretation of Article 9.3 of the Anti-Dumping Agreement. We note that Article 9 addresses the imposition and collection of duties. Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". It is therefore clear from the plain language of Article 9.3 that it concerns the margin of dumping "as established under Article 2". Relevant dictionary definitions of the preposition "under" include "subject to", "subject to the authority, control, direction, or guidance of", "in the form of", and "in the guise of".[607] "Under" may be used to introduce "the guise of" or "the manner how" a certain action is to be conducted.[608] When read in the context of the phrase "as established *under* Article 2", we understand "under" to refer to the disciplines set out in Article 2 of the Anti-Dumping Agreement, which contain detailed rules on the determination of dumping.[609] Thus, in our view, "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. It would run counter to the inclusion of the phrase "as established under Article 2" if the margin of dumping referred to in Article 9.3 of the Anti-Dumping Agreement could encompass a margin that is established in a manner that is *not* consistent with the disciplines of Article 2.

7.360. We also consider it clear from the plain language of Article 9.3 that it sets the maximum level at which anti-dumping duties may be levied, namely, at the level of "the margin of dumping as established under Article 2". In the light of this, we do not take the view that an error or inconsistency in calculating the margin of dumping under Article 2 necessarily leads to a violation of Article 9.3 insofar as the upper limit of the margin is concerned. For instance, as we note below, the anti-dumping duty could be imposed or levied at a rate that is lower than the dumping margin that ought to have been determined had the authorities acted in accordance with Article 2.

7.361. Our reading of Article 9.3 of the Anti-Dumping Agreement is supported by findings in prior disputes. For instance, in *US – Zeroing (EC)*, the Appellate Body noted that Article 9.3 refers to

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[604] European Union's first written submission, para. 60.

[605] European Union's first written submission, para. 61 (referring to Panel Report, *EC – Salmon (Norway)*, paras, 7.749 and 8.2).

[606] In respect of both Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the European Union stated 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 that the European Union has answered in the preceding paragraphs", and that "[s]ince Argentina has failed to establish the earlier claims these consequential claims must also fail." (European Union's first written submission, para. 288). We recall that we have upheld some of Argentina's claims under Article 2 of the Anti-Dumping Agreement.

[607] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3421; Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.75.

[608] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.75.

[609] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 80.

Article 2, and considered that "[i]t follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established 'for the product as a whole'", that is, a margin established consistently with Article 2.[610] Similarly, in *US – Zeroing (Japan)*, the Appellate Body found violations in respect of the determination of the margin of dumping under Article 2. In its consideration of claims under Article 9.3 of the Anti-Dumping Agreement, the Appellate Body did *not* refer to the margin of dumping actually determined by the investigating authority, which it had found to be inconsistent with Article 2. Rather, it stated that the calculation under Article 9.3 must be made "according to the margin of dumping established for that exporter or foreign producer *without zeroing*", that is, without the error it had found in the determination under Article 2.[611]

7.362. In sum, it is clear that the term "the margin of dumping as established under Article 2" means a margin established in a manner that is consistent with Article 2, as opposed to whatever erroneous margin was actually established by the investigating authority.

7.363. We note that the European Union relies on the panel report in *EC – Salmon (Norway)* to support its argument that a violation of Article 2 does not automatically lead to a violation of Article 9.3.[612] This accords with our understanding that Article 9.3 sets the maximum level at which anti-dumping duties may be levied. As the Appellate Body explained in *US – Stainless Steel (Mexico)*, "under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter."[613] 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.[614] This is because it is possible that an anti-dumping duty could be applied at a rate that is lower than the WTO-inconsistent dumping margin. This might be the case where the lesser duty rule is applied, in which case the anti-dumping duty actually applied may 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.

7.364. In the case at hand, we recall that we found above that the EU authorities 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 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. By 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.

7.365. Argentina contrasts the margins calculated in the Provisional Regulation, ranging from 6.8% to 10.6%[615], with the duties imposed by the EU authorities in the Definitive Regulation, which ranged from 22.0% to 25.7%[616], i.e. two to three times higher. We cannot infer the exact dumping margins that would have been established had the determinations been done in accordance with Article 2. Yet, in our view 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. The substantial difference between the margins calculated at the provisional stage and the duties imposed in the Definitive Regulation suggests that the anti-dumping duties imposed by the European Union in the Definitive Regulation

[610] Appellate Body Report, *US – Zeroing (EC)*, para. 127. (fn omitted)

[611] Appellate Body Report, *US – Zeroing (Japan)*, para. 156. (emphasis added)

[612] European Union's first written submission, para. 61 (referring to Panel Report, *EC – Salmon (Norway)*, paras, 7.749 and 8.2).

[613] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102. (emphasis original)

[614] For instance, in the Provisional Regulation, the lesser duty rule was not applied because the provisional injury margins were found to be higher than the provisional dumping margins, whereas the opposite finding resulted in the application of the lesser duty rule in the Definitive Regulation. (Provisional Regulation, (Exhibit ARG-30), Recital 179; Definitive Regulation, (Exhibit ARG-22), Recital 215)

[615] Provisional Regulation, (Exhibit ARG-30), Recitals 59 and 179.

[616] Definitive Regulation, (Exhibit ARG-22), Recital 215. In 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%.

exceeded what the dumping margins could have been had they been established in accordance with Article 2. On this basis, and in light of our finding referred to above, we consider 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.

7.366. We now turn to Argentina's claim under Article VI:2 of the GATT 1994. This Article provides that a WTO Member "may levy … an anti-dumping duty not greater in amount than the margin of dumping in respect of such product", adding that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with [Article VI:1]". The terms "in accordance with" in the latter phrase makes it clear, in our view, 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. The same considerations that guided our assessment of Argentina's Article 9.3 claim therefore apply *mutatis mutandis* to our assessment of its Article VI:2 claim. With respect to this claim, we therefore also conclude that Argentina has made a *prima facie* case that the European Union has not rebutted.

7.367. On the basis of the foregoing, we find 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.

7.4.5 Whether the EU authorities' evaluation of production capacity, capacity utilization and return on investments is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.4.5.1 Legal claim

7.368. Argentina claims that the anti-dumping measures on imports of biodiesel from Argentina are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Argentina takes issue, in particular, with the EU authorities' exclusion of so-called "idle capacity" in their calculation and evaluation of production capacity and of utilization of capacity in their injury analysis. Specifically, Argentina asserts that:

a. The EU authorities' definition of production capacity and of utilization of capacity was inconsistent with Article 3.4;

b. The EU authorities' evaluation of production capacity and of utilization of capacity was inconsistent with Articles 3.1 and 3.4 because it was not based on positive evidence;

c. The EU authorities' evaluation of production capacity and of utilization of capacity was inconsistent with Articles 3.1 and 3.4 because it did not proceed from an objective examination; and

d. The EU authorities acted inconsistently with Article 3.4 by failing to adequately evaluate production capacity and utilization of capacity.

7.369. In addition, Argentina claims that the EU authorities acted inconsistently with Article 3.4 by failing to evaluate return on investments and utilization of capacity in a consistent manner.[617]

7.370. Argentina argues that the exclusion of "idle capacity" led the EU authorities, in their findings, to understate production capacity and overstate utilization of capacity and that, moreover, their WTO-inconsistent evaluation of production capacity and utilization of capacity affected their non-attribution analysis under Article 3.5.[618]

[617] Argentina's first written submission, paras. 310, 353, and 470 (h); second written submission, para. 254 (h).

[618] Argentina asks that we read its Articles 3.1 and 3.4 claims together with its claims under Article 3.5 of the Anti-Dumping Agreement regarding overcapacity of the domestic industry as an alleged other factor causing injury to that industry. (Argentina's first written submission, para. 311; second written submission, para. 215; response to Panel question Nos. 61, paras. 146-149, and 122, para. 107 (referring to Appellate

7.371. The European Union considers that Argentina has not made *a prima facie* case and therefore asks the Panel to reject these claims.[619]

7.4.5.2 Relevant provisions of the covered agreements

7.372. Article 3.1 of the Anti-Dumping Agreement reads as follows:

> 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.

7.373. Article 3.4 of the Anti-Dumping Agreement provides that:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.4.5.3 Factual background

7.374. The EBB initially submitted certain data regarding production capacity and capacity utilization of the EU biodiesel industry in its complaint.[620] Subsequently, on 12 March 2013, prior to the issuance of the Provisional Regulation, the EBB revised some of the data – including the data on production and production capacity – that it had submitted in the complaint.[621]

7.375. In the Provisional Regulation, issued on 27 May 2013, the EU authorities found that during the period considered for purposes of the injury determination (2009 to the IP, i.e. 1 July 2011 to 30 June 2012), the production capacity and capacity utilization of the EU domestic industry were as reported in the following table [622]:

	2009	2010	2011	IP
Production capacity (tonnes)	20 359 000	21 304 000	21 517 000	22 227 500
Index 2009 = 100	100	105	106	109
Production volume (tonnes)	8 745 693	9 367 183	8 536 884	9 052 871
Index 2009 = 100	100	107	98	104
Capacity utilisation	43%	44%	40%	41%
Index 2009 = 100	100	102	92	95

Body Report, *China – GOES*, para. 128)). We address Argentina's claims under Article 3.5 in the next sub-section of this Report.

[619] European Union's first written submission, paras. 329 and 348; second written submission, para. 170.

[620] Consolidated version of the complaint, (Exhibit ARG-31), paras. 122-126 and Annex 49.

[621] EBB's submission of 12 March 2013, (Exhibit ARG-44).

[622] Provisional Regulation, (Exhibit ARG-30), table 4.

On the basis of this data, the EU authorities stated that the production capacity of the domestic industry had "remained relatively stable in particular between 2010 and the IP"[623] and that capacity utilization had "remained low throughout the period".[624] The Provisional Regulation indicates that the source of these figures was the data provided by the EU industry.

7.376. Following the Provisional Regulation, CARBIO disputed the finding that "capacity remained relatively stable".[625] Subsequently, on 17 September 2013, the EBB filed a submission requesting an adjustment of the data it had previously submitted.[626] The EBB stated that the estimate of the total production capacity of the EU industry that it had provided to the EU authorities (and which was also reported on its website) included "idle capacity" and, therefore, that it had to be adjusted to exclude such "idle capacity". The EBB explained that while the data it had previously submitted regarding EBB members already excluded the "idle capacity" of these EBB members, the figures for non-EBB members and for the total EU production capacity (i.e. EBB members and non-EBB members) still included "idle capacity".[627] Hence, to provide an accurate calculation of the EU industry's production capacity, the total EU production capacity and the capacity of non-EBB members had to be adjusted. The EBB explained that the previous estimated total EU industry production capacity should be adjusted by subtracting the "idle capacity" of both EBB members and of non-EBB members, and the previous estimated production capacity of non-EBB members should be adjusted by subtracting EBB members' production capacity from the revised total EU production capacity.[628]

7.377. In the Definitive Disclosure issued to interested parties on 1 October 2013, the EU authorities stated that, "after close scrutiny", they had accepted the revised data regarding production capacity submitted by the EBB.[629] As a result, the EU authorities modified their provisional findings regarding production capacity and capacity utilization.

7.378. CARBIO commented on this issue in its comments on the Definitive Disclosure, arguing that it was inappropriate to exclude "idle capacity", questioning the revised production capacity data and suggesting that the change appeared to have been made with the only purpose of diminishing the importance of the EU industry's overcapacity as a source of injury.[630]

7.379. In the Definitive Regulation, the EU authorities confirmed their decision to accept the revised production capacity data submitted by the EBB. The Definitive Regulation states the following with regard to production capacity and capacity utilization:

> Following provisional disclosure the Union industry noted that the capacity data that had been used in Table 4 of the provisional Regulation included capacity that had not been dismantled, but was not in such a state that it would have been available for use during the IP, or previous years, to manufacture biodiesel. They separately identified this capacity as 'idle capacity' which should not be counted as capacity available for use. The capacity utilisation figures in Table 4 were therefore understated. After close

[623] Provisional Regulation, (Exhibit ARG-30), Recital 103.
[624] Provisional Regulation, (Exhibit ARG-30), Recital 103.
[625] CARBIO's Powerpoint presentation of 8 July 2013, (Exhibit ARG-46), slides 19-21.
[626] EBB's submission of 17 September 2013, (Exhibit ARG-47). The Panel was only provided with the non-confidential version of this submission.
[627] The EBB also explained that it estimated the total EU biodiesel production capacity on the basis of the total production capacity of EBB members and then estimated the production capacity of non-EBB members by subtracting the production capacity of EBB members from the EU-wide production capacity. Given that the capacity of non-EBB members had been calculated as the total EU capacity (including "idle capacity") minus the capacity of EBB members (excluding "idle capacity"), the production capacity previously calculated for non-EBB members included not only these non-EBB members' own "idle capacity", but also the "idle capacity" of EBB members. (EBB's submission of 17 September 2013, (Exhibit ARG-47), pp. 2 and 3)
[628] The EBB submission included annexes providing the following information: (a) non-EBB members aggregate data on production, production capacity, sales and employment; (b) EBB members aggregate macro data, including the total production capacity of EBB members, their capacity utilization, the total production capacity of sampled companies, the total EU production capacity *excluding* "idle capacity" (i.e. excluding "idle capacity" for EBB members and non-EBB members) and the total EU production capacity *including* "idle capacity" (i.e. including "idle capacity" of both EBB members and non-EBB members); (c) former and current EBB members that stopped production in the period 2009-2012; (d) information regarding "idle capacity" of non-EBB members per country. (EBB's submission of 17 September 2013, (Exhibit ARG-47), pp. 12-19)
[629] Definitive Disclosure, (Exhibit ARG-35), para. 105.
[630] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 16 et seq.

scrutiny of this resubmitted data, it was accepted and Table 4 is restated below. The capacity utilisation rate, which had been from 43% to 41% in the provisional Regulation, was now 46% to 55%. The Union industry also corrected the production data for 2009 to produce the table below:

	2009	2010	2011	IP
Production capacity (tonnes)	18 856 000	18 583 000	16 017 000	16 329 500
Index 2009 = 100	100	99	85	87
Production volume (tonnes)	8 729 493	9 367 183	8 536 884	9 052 871
Index 2009 = 100	100	107	98	104
Capacity utilisation	46%	50%	53%	55%
Index 2009 = 100	100	109	115	120

Recital 103 of the provisional Regulation analysed the previous capacity utilisation data, noting that production increased while capacity remained stable. With the revised data production still increases, but useable capacity decreased during the same period. This shows that the Union industry was reducing available capacity in face of increased imports from Argentina and Indonesia and thereby reacting to market signals. This revised data is now more in line with the public statements of the Union industry and Union producers, stating that during the period under consideration production was stopped in several plants and that the capacity that had been installed was not immediately available for use, or only available for use with significant reinvestment.

Several interested parties questioned the revised capacity and capacity utilisation data. However, no alternatives were provided by any interested party. The revision is based on the revised capacity data provided by the complainant, covering the entire Union industry. The revised data was cross-referenced to publicly available data concerning in particular idle capacity as well as capacity of producers that ceased operations due to financial difficulties. As explained above in Section 6, 'Macroeconomic indicators', the revised data provide a more accurate dataset of capacity available to produce biodiesel during the period under consideration than the dataset originally provided and published in the provisional Regulation.[631]

7.4.5.4 Main arguments of the parties

7.4.5.4.1 Argentina

7.380. Argentina submits that the EU authorities' definition of capacity and capacity utilization is inconsistent with Article 3.4 as there is no concept of "idleness" or any legal basis in the text of Article 3.4 or the rest of the Anti-Dumping Agreement that allows excluding "idle capacity" or capacity not "available for use". Therefore, Argentina submits, in the framework of Article 3, the entirety of production capacity must be taken into account regardless of whether it is "available for use" or not.[632] Argentina adds that this interpretation is supported by the object of Article 3.4, which is to provide for an "evaluation [of] … all relevant economic factors and indices having a bearing on the state of the industry". Argentina notes in this respect that the entirety of an industry's production capacity generates costs, regardless of the assets' immediate availability for use. Therefore, the exclusion of "idle capacity" results in an inaccurate picture of the state of the domestic industry.[633] Argentina submits that excluding "idle capacity" from the assessment of capacity utilization would diminish the meaning of the terms "utilization of" in Article 3.4 as it blurs the distinction between full production capacity and the portion of this full production capacity that

[631] Definitive Regulation, (Exhibit ARG-22), Recitals 131-133.
[632] Argentina's first written submission, para. 354; second written submission, para. 216.
[633] Argentina's first written submission, para. 355.

is actually being used.[634] Finally, Argentina asserts that the definition of "idle capacity" provided in the Definitive Regulation is vague and does not support the EU authorities' decision that the circumstances of the present investigation warranted the exclusion of the "idle capacity".[635]

7.381. Argentina claims that the European Union acted inconsistently with Articles 3.1 and 3.4 because its evaluation of production capacity and capacity utilization was not based on positive evidence. Argentina builds its claim upon the following three principal lines of argument. First, Argentina argues that the evidence on which the EU authorities based their evaluation of capacity utilization is implausible. Argentina notes in this respect that the EU authorities' reduction of the production capacity figures in the Definitive Regulation amounted to 5,898,000 tonnes, or 26.53% of total production capacity, during the IP (i.e. 1 July 2011 to 30 June 2012). Argentina argues that the EBB could not have overlooked a "mistake" of this magnitude, given the frequency with which the EBB collected production capacity data and given the fact that the EBB's September 2013 submission shows that the entirety of "idle capacity" had previously been attributed to non-EBB producers, a minority sector of the EU industry.[636] Second, Argentina asserts that the revised capacity figures are contradicted by multiple reliable and publicly available sources reporting production capacity figures similar to those initially provided by the EBB in the complaint.[637] Furthermore, Argentina argues that while, in the Definitive Regulation, the EU authorities mentioned that they had cross-referenced the revised data to publicly available data, they failed to identify the public data used, to place this data on the public file of the investigation and to clarify the "cross-referencing" exercise which they allegedly undertook.[638] Third, Argentina argues that because the exclusion of "idle capacity" is not supported by the text of Article 3.4, evidence concerning such "idle capacity" is not evidence that is relevant or pertinent with respect to the issue of capacity.[639]

7.382. Argentina submits that the European Union did not conduct an objective examination of production capacity and capacity utilization, as required by Article 3.1, as the EU authorities failed to act in an even-handed manner and favoured the interests of the EU domestic industry in weighing and balancing the evidence before them. Argentina argues in this respect that the unusual exclusion, on the basis of unreliable data, of "idle capacity" of a huge magnitude favoured the interests of the domestic industry by understating capacity, overstating capacity utilization and consequently denying the significance of overcapacity as a source of injury.[640] Argentina adds that this occurred in a context in which CARBIO argued that overcapacity, and not dumped imports, caused injury to the EU industry.[641] In addition, Argentina argues that the facts that the EU authorities favoured evidence produced by one party even though that evidence is contradicted by public sources, that the EU authorities did not disclose the publicly available data with which they cross-referenced the EBB's submission of 17 September 2013, and that the adjustment was made after the on-site verifications had been completed constitute a failure to conduct an objective examination.[642] Argentina adds that all sampled producers were EBB members, and therefore their production capacity figures excluded "idle capacity" from the beginning; therefore the EU authorities' verification of these producers' data does not establish the accuracy of the revised data.[643]

7.383. Argentina claims that, contrary to Article 3.4, the EU authorities failed to adequately evaluate production capacity and capacity utilization. Argentina first submits in this respect that the obligation to evaluate all relevant economic factors under Article 3.4 is to be read in conjunction with the obligations imposed under Article 3.1, such that the authorities' failure to

[634] Argentina's second written submission, para. 216; response to Panel question No. 59, para. 145.
[635] Argentina's second written submission, para. 218.
[636] Argentina's first written submission, paras. 363-364; opening statement at the first meeting of the Panel, para. 113; second written submission, para. 219-220.
[637] Argentina's first written submission, para. 370. The sources are EBB press releases, the EBB's website, the US Department of Agriculture's Global Agricultural Information Network, and data quoted by a Bloomberg New Energy Finance analyst in The Telegraph.
[638] Argentina's first written submission, paras. 371-372.
[639] Argentina's first written submission, para. 373; second written submission, para. 222 (referring to Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.213).
[640] Argentina's first written submission, paras. 376-377 and 380.
[641] Argentina's first written submission, para. 376.
[642] Argentina's first written submission, para. 378; opening statement at the first meeting of the Panel, para. 117.
[643] Argentina's second written submission, para. 224.

base their evaluation of production capacity and capacity utilization on an objective examination of positive evidence also constitutes a violation of Article 3.4.[644] Second, Argentina submits that the finding in the Provisional Regulation, confirmed in the Definitive Regulation, that "production capacity remained relatively stable" is factually incorrect in view of the fact that production capacity increased by 1,868,500 tonnes, or 9%, during the reference period.[645]

7.384. Finally, Argentina argues that the EU authorities acted inconsistently with Article 3.4 because they failed to evaluate return on investments and capacity utilization in a consistent manner. Argentina submits that "idle capacity" was excluded from the capacity utilization figures considered by the EU authorities but was included in the return on investment figures given that the EU authorities' evaluation of the latter proceeded on the basis of all assets employed in the production of biodiesel.[646] Argentina submits that while the European Union asserts that "idle capacity" was not included in the calculation of return on investments because there were no sampled companies with "idle capacity", there was at least one sampled company, namely Diester, with "idle capacity" that would have been excluded from the production capacity figure but was included in the return on investments figures used by the EU authorities.[647] Argentina rejects the European Union's contention that its claim concerning return on investments does not properly fall within the Panel's terms of reference.

7.4.5.4.2 European Union

7.385. Concerning Argentina's challenge of the EU authorities' definition of production capacity, the European Union argues that there is no definition of production capacity in the Anti-Dumping Agreement. It submits that the exclusion of "idle capacity" accords with the most relevant dictionary definitions of the term "capacity", such as the one in *the Shorter Oxford English Dictionary*, which defines it as "the maximum amount or number that can be contained, produced, etc."[648], given that "idle" plants make no contribution to the "maximum amount or number that can be … produced".[649] According to the European Union, this conclusion is supported by the context of the term, as a plant that is not available for production cannot be utilized.[650] The European Union argues that Article 3.4 requires a substantive assessment of the state of the domestic industry (i.e. a substantive evaluation rather than a formalistic one based on rigid definitions and a checklist of positive and negative factors) and that capacity utilization is only one of the factors listed in Article 3.4.[651] The implications for the injury determination are the same regardless of the inclusion or exclusion of "idle capacity" as both low capacity utilization and closing or "mothballing" of plants are indicative of injury.[652] However, the European Union submits that capacity utilization provides a measure of the level of efficiency at which an industry is operating, and that to include industrial plants that have been mothballed in the same category as plants that are kept in operational condition would give a false impression about the state of the domestic industry.[653]

7.386. The European Union rejects Argentina's allegations that the revised figures are implausible and therefore do not constitute positive evidence. The European Union submits that the change consisted in reclassifying part of the non-producing plants as "idle" because "[they were] not in a state that it would have been available for use during the IP" and that "having given the EBB's information 'close scrutiny', the EU authorities were prepared to accept it as accurate".[654] The European Union argues that the issue of whether and at what precise point a plant becomes "idle" is one of technical interest; what is significant in the context of Article 3.4 is the conclusion, as

[644] Argentina's first written submission, paras. 382-383 (quoting from Panel Report, *Korea – Certain Paper*, para. 7.272).
[645] Argentina's first written submission, paras. 384-385 (quoting from Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314).
[646] Argentina's first written submission, para. 390.
[647] Argentina's opening statement at the first meeting of the Panel, para. 120; response to Panel question No. 63(b), para. 156.
[648] *Shorter Oxford English Dictionary*, 6th edn, (version 3.0.2.1), (Exhibit EU-9).
[649] European Union's first written submission, para. 300.
[650] European Union's first written submission, para. 301.
[651] European Union's response to Panel question No. 59, para. 87; second written submission, para. 151.
[652] European Union's first written submission, para. 308.
[653] European Union's second written submission, para. 154.
[654] European Union's first written submission, para. 305.

stated in recital 132 of the Definitive Regulation, that "during the period under consideration production was stopped in several plants and that the capacity that had been installed was not immediately available for use, or only available for use with significant reinvestment". The European Union submits that the evidence was secured from the best source, namely the domestic industry[655], and the EU authorities have made no attempt to conceal the analytical process in which they were engaged, and the effect of the new data received from the EBB.[656] The European Union argues that the production capacity data contained in the publicly available material cited by Argentina were in fact based on the data that the EBB provides to the public, which include "idle capacity". The European Union further submits, with respect to Argentina's criticism that the EU authorities have not made available the publicly available material relating to "idle capacity", that there is no such obligation in the legal provisions invoked by Argentina, i.e. Articles 3.1 and 3.4.[657] In any event, the European Union considers that it has submitted to the Panel several examples of the types of publicly available material relied upon by the EU authorities.[658]

7.387. The European Union argues that Argentina confuses the "objective examination" aspect of its claim by embarking on a discussion of the causes of injury, a matter governed by Article 3.5, rather than the existence or extent of that injury, which is the subject of Article 3.4.[659] In addition, the European Union argues that even though the EBB's revised submission was filed after *in situ* verifications, the EU authorities gave it "close scrutiny".[660] The European Union explains that the authorities analysed the data concerning capacity in two ways: first, by desk analysis and cross-referencing against publicly available sources (published press releases, news from biodiesel producers and the EBB that plants had been closed or mothballed); and second, by selecting a sample of EU producers and subjecting their data to detailed examination and verification.[661]

7.388. With regard to Argentina's assertion that the EU authorities failed to properly evaluate data in respect of production capacity and capacity utilization, the European Union notes that this aspect of Argentina's claim is in part merely consequential to its claims concerning objective examination and positive evidence. The European Union responds to the other aspect of that claim, concerning the EU authorities' statement that production capacity was "relatively stable" even though it had increased by 9%, that the "relatively stable" finding pertained to the period from 2010 to the IP, in which capacity increased by 4.3%, not by 9%.[662]

7.389. The European Union argues that the inconsistency alleged by Argentina concerning the EU authorities' findings with regard to return on investments falls outside the Panel's terms of reference given that Argentina did not mention return on investments in either its panel request or its request for consultations.[663] On the merits, the European Union initially submitted that the EU authorities' assessment of production capacity was based on data for the industry as a whole, whereas their examination of return on investments was based on data from the sampled EU producers. The European Union indicated that had any of the sampled producers had "idle capacity", that capacity would have been ignored in calculating return on investments. However, none of these sampled producers had "idle capacity"; therefore the exclusion of "idle capacity" had no impact on the EU authorities' assessment of return on investments.[664] In its second written submission, the European Union acknowledged that one of the sampled producers in fact had "idle capacity", which was reported by that company and verified.[665] However, the European Union argued, excluding "idle capacity" from the consideration of capacity utilization, on the one hand,

[655] European Union's second written submission, para. 155.
[656] European Union's first written submission, para. 308.
[657] European Union's first written submission, para. 310. However, the European Union recognizes that such an obligation is contained in Article 6 of the Anti-Dumping Agreement.
[658] European Union's first written submission, para. 310 and fn 254 (referring to Media reports on plant closures in the European Union, (Exhibit EU-10)).
[659] European Union's first written submission, para. 313.
[660] European Union's first written submission, para. 315.
[661] European Union's first written submission, para. 295; response to Panel question No. 62, para. 91.
[662] European Union's first written submission, para. 317.
[663] European Union's first written submission, para. 318; second written submission, para. 165.
[664] European Union's first written submission, para. 318.
[665] European Union's second written submission, para. 157.

but including it in the evaluation of return on investments, on the other, is entirely logical given that this capacity, although not in use, was nevertheless an asset of the company.[666]

7.4.5.5 Arguments of the third parties

7.390. **China** considers that certain facts and arguments submitted by Argentina raise issues as to whether the European Union based its injury determination on positive evidence and conducted an objective examination, as required by Article 3.1 of the Anti-Dumping Agreement.[667] China agrees with Argentina that Article 3.4 contains no reference to a concept such as "availability for use" or "idleness" and thus the entirety of the production capacity should be considered during the injury investigation.[668] China considers that the term "idle" does not mean that such capacity ceased to exist, and that the exclusion of such capacity is not an "objective examination" of utilization of capacity.[669]

7.391. **Colombia** invites the Panel to take into account the architecture of Article 3 and the key importance of "positive evidence" and "objective examination" in the legal obligation under Article 3.4.[670] Colombia submits that the Panel should consider the last sentence of Article 3.4, which provides that "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."[671] This provision suggests that the Panel should refrain from limiting its analysis of the Article 3.4 claim to the evaluation of production capacity and utilization of capacity. Rather, all injury factors must be taken into account when evaluating the state of the domestic industry.[672]

7.392. **Indonesia** argues that the full installed capacity of the domestic industry should be considered for evaluation of the injury factor "utilization of capacity".[673] Indonesia refers to the definition of the term "capacity" provided in *the Shorter Oxford English Dictionary* – "ability to receive, contain, hold, produce or carry".[674] Indonesia believes that this was the meaning intended by the drafters of the Anti-Dumping Agreement, as a contrary interpretation would make an assessment of capacity utilization non-objective and discriminatory, because investigating authorities could adopt different interpretations of the term "idle capacity" in different contexts.[675]

7.393. **Saudi Arabia** notes the importance of the injury analysis in preventing abuse of the anti-dumping instrument and recalls that the injury determination shall be based on positive evidence. Saudi Arabia submits that the injury analysis is not a "tick-the-box exercise"; rather it requires a critical analysis of the facts on the record and an unbiased and proper evaluation of facts.[676]

7.4.5.6 Evaluation by the Panel

7.394. Argentina's challenge with respect to the EU authorities' analysis of the impact of dumped imports on the domestic industry raises two principal issues. The first is the EU authorities' exclusion of "idle capacity" in their determination and evaluation of production capacity and capacity utilization. Argentina argues that excluding "idle capacity" is not permissible under Article 3.4, that "idleness" of capacity is an irrelevant fact in the evaluation of production capacity and capacity utilization, and that reliance on an irrelevant fact violates the "positive evidence" requirement under Article 3.1. The second issue pertains to the data that was used by the EU authorities in their evaluation of production capacity and capacity utilization. This issue primarily arises under Article 3.1 of the Anti-Dumping Agreement – Argentina alleges the EU authorities acted inconsistently with the "positive evidence" and "objective examination" requirements under Article 3.1 in accepting the revised data submitted by the EBB. Argentina also submits that a violation of these requirements in Article 3.1 gives rise to a violation of Article 3.4.

[666] European Union's second written submission, para. 158.
[667] China's third-party submission, para. 150.
[668] China's third-party submission, para. 151.
[669] China's third-party response to Panel question No. 21.
[670] Colombia's third-party submission, paras. 27-29.
[671] Colombia's third-party submission, para. 39.
[672] Colombia's third-party submission, paras. 38-49.
[673] Indonesia's third-party response to Panel question No. 21, para. 61.
[674] Indonesia's third-party response to Panel question No. 21, para. 53.
[675] Indonesia's third-party response to Panel question No. 21, para 61.
[676] Saudi Arabia's third-party statement, para. 17.

7.395. We do not find it necessary, in the circumstances of the present dispute, to definitively resolve the first issue, i.e. whether the EU authorities acted inconsistently with Articles 3.1 and 3.4 by excluding "idle capacity" in their determination and evaluation of production capacity and capacity utilization. This is because, as we explain below, we find that the EU authorities acted inconsistently with Articles 3.1 and 3.4 in accepting the revised data submitted by the EBB without assuring themselves of the accuracy and reliability of this revised data. Before turning to that conclusion, we recall the obligations imposed by Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.396. Article 3.4 requires an investigating authority to evaluate "all relevant economic factors and indices having a bearing on the state of the industry". Article 3.4 sets forth a non-exhaustive list of such economic factors and indices which must be evaluated in order to examine the impact of the dumped imports on the domestic industry.[677] One of these is utilization of capacity. Consideration of capacity utilization as an economic factor or index having a bearing on the state of the industry necessarily involves, as a preliminary step, determining the production capacity of the domestic industry in order to be able to determine the level or percentage of such capacity that is being utilized.[678] In the investigation at issue, the EU authorities addressed both production capacity and capacity utilization in their analysis of the impact of the dumped imports on the domestic industry.[679]

7.397. Article 3.1 of the Anti-Dumping Agreement is "an overarching provision that sets forth a Member's fundamental, substantive obligation"[680] that its injury determination be based on an "objective examination" of "positive evidence" concerning the impact of dumped imports on the domestic industry.

7.398. The obligation to base findings on *positive evidence* pertains to "the quality of the evidence that authorities may rely upon in making a determination".[681] Thus, it is concerned with "the facts underpinning and justifying the injury determination".[682] Prior panels and the Appellate Body have observed that the term "positive" suggests that "the evidence must be of an affirmative, objective and verifiable character, and that it must be credible".[683] Further, "positive evidence" refers to "evidence that is relevant and pertinent with respect to the issue to be decided, and that has the characteristics of being inherently reliable and creditworthy".[684] Appellate Body findings in prior disputes suggest that the obligation to conduct an *objective examination* deals with the procedural aspects of the proceeding, i.e. the investigative process itself.[685] It requires that the effects of dumped imports be investigated in an unbiased manner, without favouring the interests of any interested party in the investigation.[686] Our analysis of Argentina's claim proceeds on the basis of this understanding of the relevant obligations under Article 3.1 invoked by Argentina.

7.399. We first consider Argentina's argument that the EU authorities based their evaluation of production capacity and capacity utilization on evidence that was unreliable. We recall that in the Definitive Regulation, the EU authorities revised the production capacity figures that they had set out in the Provisional Regulation, on the basis of revised data submitted by the EBB in

[677] Appellate Body Report, *Thailand – H-Beams*, paras. 121-128.

[678] "Capacity utilization" is defined in the Oxford Dictionary of Economics as the "[a]ctual output as a percentage of capacity." (*Oxford Dictionary of Economics,* 3rd edn, J. Black, N. Hashimzade and G. Myles (Oxford University Press 2009), p. 50)

[679] Although Article 3.4 does not require evaluation of production capacity *per se*, it allows it, given that it includes a *non-exhaustive* list of relevant factors or indices. Production capacity and capacity utilization were two of the "macroeconomic indicators" which the EU authorities evaluated on the basis of data provided relating to all EU producers. (Provisional Regulation, (Exhibit ARG-30), Recitals 100-101; and Definitive Regulation, (Exhibit ARG-22), para. 130)

[680] Appellate Body Report, *Thailand – H-Beams*, para. 106.

[681] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[682] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[683] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[684] Panel Reports, *Mexico – Steel Pipes and Tubes,* para. 7.213; and *Mexico – Anti-Dumping Measures on Rice,* para. 7.55, upheld by the Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice,* paras. 164-165.

[685] Appellate Body Report, *US – Hot-Rolled Steel,* para. 193.

[686] Appellate Body Report, *US – Hot-Rolled Steel,* para. 193.

September 2013, which excluded "idle capacity" from overall production capacity. They also revised the capacity utilization figures accordingly.[687]

7.400. In our view, the circumstances surrounding what was a substantial revision of the data underlying the EU authorities' evaluation of production capacity and capacity utilization were such that an unbiased and objective authority should have exercised particular care in ascertaining the accuracy and reliability of the revised data.

7.401. First, the change in the total production capacity figures that resulted from the EBB's revision of the data was of such a magnitude that it was likely to fundamentally affect the EU authorities' evaluation of this factor and, as consequence, their evaluation of capacity utilization. The EBB's revised data resulted in a reduction in total EU production capacity of up to 5,898,000 tonnes, or 26.53% of the figure reported in the Provisional Regulation.[688] It also led to very different trends in the evolution of production capacity. The figures relied upon by the EU authorities in the Provisional Regulation showed production capacity *increasing* from 20,359,000 tonnes to 22,227,500 tonnes between 2009 and the IP, while in the Definitive Regulation, production capacity *decreases* from 18,856,000 to 16,329,500 tonnes. The data revision also led to very different trends in capacity utilization; according to the revised data, capacity utilization showed an upward trend, increasing from 46% to 55% over the period considered, in stark contrast to the downward trend from 43% to 41% over the same period in the Provisional Regulation.[689] Moreover, the change in the data also led to different conclusions in the Definitive Regulation concerning the impact of the dumped imports on the domestic industry. The Definitive Regulation states that: "[w]ith the revised data production still increases, but useable capacity decreased during the same period. This shows that the Union industry was reducing available capacity in face of increased imports from Argentina and Indonesia and thereby reacting to market signals."[690] Such significant changes as a result of accepting the revised data warrant careful consideration of the accuracy and reliability of the revised data, especially where, as in this case, the changes benefit the position of the submitter of the revised data.

7.402. Second, the reliability of the EBB data appears to have been an issue from the outset of the investigation. According to the European Union, the EU authorities entertained doubts concerning the reliability of the data initially provided by the EBB, which they relied upon in the Provisional Regulation.[691] In addition, it appears that the EBB corrected its production capacity and

[687] Definitive Regulation, (Exhibit ARG-22), Recital 131.

[688] The EU authorities revised the production capacity for each of the years considered in their injury determination: for 2009, production capacity was revised from 20,359,000 to 18,856,000 tonnes (a decrease of 1,503,000 or 7.38%); for 2010, it was revised from 21,304,000 to 18,583,000 tonnes (a decrease of 2,721,000 or 12.77%); for 2011, it was revised from 21,517,000 to 16,017,000 tonnes (a decrease of 5,500,000 or 25.56%); for the IP, from 22,227,500 to 16,329,500 tonnes (a decrease of 5,898,000 or 26.53%).

[689] Definitive Regulation, (Exhibit ARG-22), Recital 131.

[690] Definitive Regulation, (Exhibit ARG-22), Recital 132.

[691] In particular, during the second meeting of the Panel with the parties, in answer to a question from the Panel, the representative of the European Union stated that from the beginning the officials of the EU authorities had considerable doubts about the production capacity figures that they had received from the EBB and that throughout the investigation, they pursued the EBB with the view to identify the "actual capacity". In its second written submission, the European Union argues that "[t]he true situation regarding [idle] capacity was discovered by the investigating authority only after the adoption of the Provisional Regulation." (European Union's second written submission, para. 157). See also the European Union's response to Panel question No. 119(c), para. 111: "… it was only due to the persistent efforts of the Commission that the EBB provided figures for capacity that could be relied upon", and response to Panel question No. 115, para. 96:

> In the Biodiesel investigation the Commission sought to identify a reliable and meaningful figure for the production capacity of the industry. As a first step in this direction the Provisional Regulation reproduced data that had been supplied by the EBB. Following the adoption of the Provisional Regulation, the Commission focussed particular attention on the reliability of the capacity figures. In the course of this examination it became apparent, in particular, that the figures in the Provisional Regulation included 'idle' plant, i.e. plant that was not available for use. The Commission set about identifying a figure that excluded any such capacity. The result of this effort is the figures which are given in the Definitive Regulation. These figures were closely examined by the Commission.

The Definitive Regulation does not explicitly address the question of who, of the EU authorities or the EBB, initiated the revision of the production capacity figures, although it contains language that suggests the the EBB took the initiative to revise its data. It states, notably, that:

capacity utilization data at least twice during the investigation process, in March 2013, after the initiation of the investigation and before the issuance of the Provisional Regulation, and again in September 2013, when the EBB presented the revised data that is at the centre of the present claim.

7.403. Third, the September 2013 data was prepared specifically for the purposes of the investigation, and differed from the production capacity data made available to the public by the EBB, notably on its website. We do not mean that the fact that the EBB presented different production data to different audiences for different purposes, in and of itself, says anything about the reliability of any of the data so presented. However, in our view, the difference between the data publicly reported by the EBB, which included "idle capacity", and the data submitted by the EBB in its September 2013 submission, which excluded "idle capacity", and the fact that the latter was specifically prepared for the purposes of the investigation made it all the more necessary for the EU authorities to satisfy themselves of the accuracy and reliability of the revised data.

7.404. Fourth, the revision of the data took place in a context in which the issue of capacity and, in particular, of overcapacity, was one of particular importance. From the outset of the investigation, Argentine interested parties repeatedly argued that the overcapacity of the domestic industry was an important cause of injury. Again, this context supports the conclusion that careful consideration of the accuracy of the revised data was warranted.

7.405. In these circumstances, we would expect an investigating authority to exercise particular care and circumspection in assuring itself of the reliability of the production capacity data that it ultimately relies upon. However, nothing on the record allows us to conclude that the EU authorities did so in this case.

7.406. We recall in this respect that the Definitive Regulation states that the EU authorities accepted the revised data "after close scrutiny".[692] However, the only elaboration on this "close scrutiny" is the statement that they cross-referenced this data against "publicly available data concerning in particular idle capacity as well as capacity of producers that ceased operations due to financial difficulties".[693] The Definitive Regulation also mentions that:

> [The] revised data is now more in line with the public statements of the Union industry and Union producers, stating that during the period under consideration production was stopped in several plants and that the capacity that had been installed was not immediately available for use, or only available for use with significant reinvestment.[694]

7.407. These statements do not persuade us that the EU authorities were sufficiently careful in assessing the accuracy and reliability of the data.

7.408. Before the Panel, the European Union asserted that the EU authorities had cross-checked the revised data against public sources. However, the European Union was unable to satisfactorily explain how this exercise was conducted. The European Union submitted to the Panel, as Exhibit EU-10, "examples of the kinds of sources that were used"[695] during the investigation to cross-check the data.[696] The European Union admitted that this Exhibit does not contain the actual public sources used by the EU authorities in cross-referencing the revised data, and that the data that was actually used to verify the EBB's submission was not placed on the record of the investigation.[697] In our analysis, we are obliged to limit ourselves to evidence that was on the record of the investigating authority at the time of investigation. As Exhibit EU-10 was prepared

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Following provisional disclosure the Union industry noted that the capacity data that had been used in Table 4 of the provisional Regulation included capacity that had not been dismantled, but was not in such a state that it would have been available for use during the IP, or previous years, to manufacture biodiesel. They separately identified this capacity as 'idle capacity' which should not be counted as capacity available for use. (Definitive Regulation, (Exhibit ARG-22), Recital 131)

[692] Definitive Regulation, (Exhibit ARG-22), Recital 131.
[693] Definitive Regulation, (Exhibit ARG-22), Recital 133.
[694] Definitive Regulation, (Exhibit ARG-22), Recital 132.
[695] European Union's response to Panel question No. 118 (c), para. 106.
[696] See Media reports on plant closures in the European Union, (Exhibit EU-10).
[697] European Union's response to Panel question No. 118 (c), para. 106.

for the purposes of this dispute and did not form part of the record of the EU authorities in the anti-dumping investigation at hand, even assuming we found it to be persuasive, which we do not[698], it would not be pertinent to our analysis.[699]

7.409. The European Union further asserted before the Panel that the capacity data was "checked" through "desk analysis", which we understand to mean that it was reviewed so as to spot problems in terms of clarity, consistency and completeness, etc.[700] That said, even when asked directly, the European Union could not clarify whether only the initial data was "checked" through desk analysis or whether the revised data also was.[701] Similarly, although the European Union's explanations on this matter are not particularly clear, we understand that the EU authorities verified the production capacity of sampled producers, who were all EBB members, prior to the submission by the EBB of the revised data. As noted above, the EBB indicated that the initial data, as it pertained to EBB members, already excluded "idle capacity", whereas the revised data concerned non-EBB members that were not part of the sample.[702] As the revised data was submitted after the on-site verifications of sampled EU producers conducted by the EU authorities, it is clear to us from the European Union's explanations that the EU authorities did not actually verify the revised data, at least as it pertained to non-EBB members, through these on-site verifications.

7.410. Finally, the European Union's answers to precise questions regarding the verification or checks on the revised data do not allow us to conclude that the EU authorities performed any other type of verification.[703] We add that the revised data was submitted less than 10 working days before the Definitive Disclosure containing revised findings based on the revised data was issued. The brevity of this period also raises question whether the EU authorities would have been able to assure themselves of the accuracy and reliability of the revised data.

7.411. In light of the foregoing, the explanations provided by the European Union do not satisfy us that the EU authorities undertook sufficient steps to satisfy themselves that the revised figures were accurate. While it may be that the EU authorities exercised the necessary degree of circumspection in considering the revised data and assuring themselves of its accuracy, nothing on the record or in the explanations provided by the European Union allows us to satisfy ourselves that this was the case. Having considered the record before us and the explanations by the European Union, it is not clear that the EU authorities satisfied themselves of the accuracy of the information provided in the EBB submission of September 2013, consistent with the requirement under Article 3.1 to base their determination on positive evidence[704] We stress that we make no conclusion as to the accuracy in fact of the revised data; we merely find that the European Union has not persuaded us that the EU authorities exercised sufficient care in assessing the accuracy and reliability of the revised data in the circumstances of this investigation.

7.412. Moreover, in the context of an investigation in which the issue of capacity and overcapacity was fiercely contested between the domestic industry and the Argentine producers/exporters, the

[698] Media reports on plant closures in the European Union, (Exhibit EU-10), contains only a few news excerpts pertaining, *inter alia*, to the closing of certain plants. While this may have allowed the European Union to satisfy itself of the veracity of some of the plant closures reported in the EBB's revised submission, the type of information referred to in this exhibit would in our view have been insufficient to allow the EU authorities to verify the accuracy of the revised figures provided by the EBB in its September 2013 submission.

[699] Pursuant to Article 17.5 (ii) of the Anti-Dumping Agreement, a panel shall examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". See also Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 161: "a Member may not seek to defend its agency's decision on the basis of evidence not contained in the record of the investigation".

[700] European Union's response to Panel question No. 118, para. 104.

[701] European Union's response to Panel question Nos. 62, para. 91, and 118, paras. 104-108.

[702] The revised data also affected the total EU production capacity, which was comprised of EBB and non-EBB members' capacity. See above, paras. 7.374 - 7.379.

[703] See, e.g. European Union's response to Panel question No. 118, paras. 104-108.

[704] In its first written submission, the European Union submits that "[i]t is not the practice of the European Union in drafting measures such as the Provisional and Definitive Regulations to enter into the level of detail about its methodology that Argentina seems to expect", concerning how the revised data was verified or scrutinized. (European Union's first written submission, para. 296). We note that we have not limited ourselves to the explanation provided in the Regulations, but have given the European Union the opportunity to refer to other evidence on the record, whether or not that evidence or information was made public or communicated to interested parties.

EU authorities' acceptance of revised data presented by one of these parties without sufficiently assuring itself of the accuracy of this data does not, in our view, constitute the "objective examination" required by Article 3.1.

7.413. Based on the above considerations, we conclude that Argentina has made *a prima facie* case, which the European Union has failed to rebut, that the EU authorities failed to base their evaluation of production capacity and capacity utilization on positive evidence, and failed to conduct an objective examination of the impact of dumped imports on the domestic industry insofar as it relates to these two factors, thereby acting inconsistently with Article 3.1.

7.414. Argentina further asks us to find that the EU authorities' failure to act consistently with the "positive evidence" and "objective examination" obligations under Article 3.1 renders its evaluation inconsistent not only with these provisions, but also with Article 3.4 of the Anti-Dumping Agreement.

7.415. We recall that Article 3.4 requires that an investigating authority's examination of the impact of the dumped imports on the domestic industry include "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry", including *inter alia*, utilization of capacity. We also recall that the fundamental obligations imposed under Article 3.1 "inform[] the more detailed obligations in succeeding paragraphs" of Article 3[705], including Article 3.4. It is difficult to imagine that an unbiased and objective investigating authority could conduct its evaluation of any injury factor or index consistently with Article 3.4 where that evaluation is not based on "positive evidence" within the meaning of Article 3.1, and does not result from an "objective examination", also within the meaning of Article 3.1. In the circumstances of the present dispute, we consider that Argentina has made a *prima facie* case that the EU authorities acted inconsistently with Article 3.4, which the European Union has not rebutted, and therefore also uphold Argentina's Article 3.4 claim.

7.416. We now turn to Argentina's allegation that the EU authorities acted inconsistently with Article 3.4 in their definition of the term "capacity utilization". According to Argentina, the term "capacity" in that Article means the full production capacity of the domestic industry and no part of it can be excluded. On the contrary, the European Union is of the view that the term "capacity" as used in Article 3.4 permits the exclusion of production capacity which is not available for use during the IP.

7.417. Prior panels – in particular the panels in the recent *EU – Footwear (China)* and *EC – Fasteners (China)* disputes – have stressed that Article 3.4 does not provide any guidance or methodology for the evaluation of individual factors and indices listed in Article 3.4.[706] In other words, investigating authorities enjoy a certain degree of latitude in the evaluation of the Article 3.4 injury factors and indices. Nonetheless, in our view, the terms used in listing the various relevant factors under Article 3.4 delineate what the authorities must examine, and what data they may rely upon in their examination of the relevant factors.

7.418. In this dispute, the parties have debated whether "capacity", as a concept, or as used in the phrase "utilization of capacity" in Article 3.4, requires inclusion or not of certain type(s) of capacity which is not used or not available for use, e.g. "idle capacity". Hence, the question before us is whether some part of the installed capacity, which is not available for use, may be excluded from the calculation of a firm's total production capacity.

7.419. The ordinary meaning of the term "capacity" (in the sense of production capacity) refers to the maximum output that a firm is capable of producing; in other words, it refers to its total installed production capacity.[707] As it refers to the notion of being capable to produce, this ordinary

[705] Appellate Body Report, *Thailand – H-Beams*, para. 106.

[706] Panel Reports, *EU – Footwear (China)*, paras. 7.445, 7.448, and 7.456; *EC – Fasteners (China)*, para. 7.401.

[707] The *Shorter Oxford English Dictionary* defines "capacity" as, *inter alia*, the "[a]bility to receive, contain, hold, produce, or carry", and "[t]he maximum amount or number that can be contained, produced, etc." (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 338). The *Oxford English Dictionary* defines the same term, as it is used in industry as "the ability to produce; equivalent to 'full capacity'." (OxfordDictionaries.com, Oxford University Press, accessed 28 October 2015, http://www.oed.com/view/Entry/27368?redirectedFrom=capacity#eid). The *Oxford Dictionary of Economics* provides an even more pertinent definition of "capacity". It defines this term as "[t]he

meaning does not conclusively resolve the question whether some installed capacity which is in practical terms not available for productive use may be excluded from the calculation of a firm's production capacity. It seems to accommodate defining production capacity as only that part of installed capacity which can actually be mobilized for production within the reasonably short term. Turning to the context of the term "capacity" as it is used in the phrase "utilization of capacity" in Article 3.4, the requirement to evaluate this factor or index to determine whether the domestic industry has been injured makes it implicit that what is called for is an evaluation of the domestic industry's ability (or inability) to make use of its installed capacity during the period considered. This evaluation calls for a determination as to the extent to which the assets were being put to use and the extent to which the assets could not be put to use *as a result of the impact of dumped imports on the domestic industry* during the period considered for purposes of the injury determination. Insofar as productive assets are genuinely not available for use, as noted above, an investigating authority could, in our view, properly consider that they do not form part of the domestic industry's production capacity. However, capacity utilization as a factor or index bearing on the state of the domestic industry would be less than meaningful or would be undermined if production capacity that is not being used as a result of the impact of dumped imports is excluded from the determination of rates of capacity utilization.[708]

7.420. In this investigation, the record before us strongly suggests that the EU authorities relied on the re-classification of production capacity between "useable" capacity and capacity that is not available for use done by the EBB without themselves assessing the EBB's reclassification[709], and without adequately assessing whether the data actually corresponded to the explanation or definition of "idle capacity" that they themselves provided in the Regulations[710] and, more importantly, without assuring themselves that the production capacity that was excluded could properly be excluded from the domestic industry's production capacity. In addition, the Regulations refer to "idle capacity" as capacity which would require significant reinvestment in order to be put to use again but there is no explanation as to why reinvestment was required.

7.421. It is not clear whether "idle capacity", as that term was used by the EBB and the EU authorities, corresponds to plants that entirely stopped producing on a permanent basis or plants that were temporarily shut down but could be put back into use once the necessity arose, or both of them, or any other types of plants. Of particular concern is the reference by the EU authorities in the Definitive Regulation to capacity which was "not immediately available for use".[711] In principle, one would expect that the fact that certain capacity is momentarily unavailable is not sufficient to exclude it from the production capacity of a producer or of the overall industry. Where an investigating authority decides to exclude such production capacity from its evaluation, we would expect a plausible explanation of its reasons for doing so. In this context, we note that the capacity that was excluded in the Definitive Regulation amounts to as much as 5,898,000 tonnes according to the data set out in the Regulations.

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maximum output of goods and services a firm or an economy is capable of producing". (*Oxford Dictionary of Economics,* 3rd edn, J. Black, N. Hashimzade and G. Myles (Oxford University Press 2009), p. 50).

[708] Argentina submits that the negotiating history of the Anti-Dumping Agreement supports its interpretation. In our view, the ordinary meaning of the term "capacity" in Article 3.4 read in its context, does not entirely preclude determining the amount of capacity with reference to capacity available for use in the reasonably short term and there is therefore no need to have recourse to the preparatory work of the treaty as a supplementary means of interpretation pursuant to Article 32 of the Vienna Convention. In any event, the negotiating history on this matter is inconclusive.

[709] We recall that we have found above that Argentina has made *a prima facie* case that the EU authorities failed to properly satisfy themselves of the accuracy of the relevant figures provided by the EBB.

[710] We recall that the Definitive Disclosure and the Definitive Regulation define the excluded capacity (or "idle capacity") as "capacity that had not been dismantled, but was not in such a state that it would have been available for use during the IP, or previous years, to manufacture biodiesel" (Definitive Disclosure, (Exhibit ARG-35), Recital 105; Definitive Regulation, (Exhibit ARG-22), Recital 131) and – implicitly – as "capacity that had been installed [but] was not immediately available for use, or only available for use with significant reinvestment" (Definitive Regulation, (Exhibit ARG-22), Recital 132) and contrasted such "idle capacity" with "capacity available for use" or "useable capacity" (Definitive Regulation, (Exhibit ARG-22), Recitals 131 and 132). (See also European Union's response to Panel question No. 116, para. 99)

[711] The Definitive Regulation implies that the EU authorities excluded "capacity that had been installed [but] was not immediately available for use, or only available for use with significant reinvestment". (Definitive Regulation, (Exhibit ARG-22), Recital 132, cited in European Union's response to Panel question No. 116, para. 99)

7.422. In our view, these concerns raise doubts as to the consistency with Article 3.4 of the treatment of the total production capacity of the EU industry. It also raises questions as to the objectivity of the EU authorities' evaluation of production capacity and capacity utilization as factors bearing on the state of the domestic industry in their injury analysis under Article 3.4. However, given our findings above that the European Union acted inconsistently with Articles 3.1 and 3.4, we do not see the need to reach a definitive view on this matter.

7.423. Lastly, we turn to Argentina's contention that the EU authorities acted inconsistently with Article 3.4 due to their "inconsistent" evaluation of capacity utilization and of return on investments.[712] To recall, Argentina argues that "idle capacity" was excluded from the production capacity and capacity utilization figures, but was included in the "return on investments" figures.[713] Before addressing the merits of Argentina's claim in this respect, we address the European Union's objection that it is outside the Panel's term of reference.

7.424. The European Union argues that the inconsistency alleged by Argentina falls outside the panel's terms of reference because neither Argentina's panel request nor its request for consultations mentions return on investments.[714] The European Union submits in this respect that each of the factors listed under Article 3.4 of the Anti-Dumping Agreement is the object of a separate obligation. Consequently, the European Union argues, pursuant to Article 6.2 of the DSU, Argentina's panel request should have referred to each factor for which it challenges the EU authorities' evaluation and its failure to mention this factor deprives Argentina of the possibility of challenging the EU authorities' evaluation of it. In addition, the European Union argues that Argentina's panel request does not satisfy the Article 6.2 requirement to present the problem clearly with respect to return on investments as it does not even mention this injury factor.[715]

7.425. Argentina responds that it does not challenge the EU authorities' evaluation of return on investments in isolation, but rather that it challenges the inconsistent evaluation of capacity utilization and return on investments.[716] Argentina disagrees with the proposition that each of the injury factor listed in Article 3.4 amounts to a specific and independent obligation, and considers that its panel request mentioned the relevant obligation, which is to evaluate all relevant economic factors and indices having a bearing on the state of the industry. Argentina adds that the alleged inconsistency arises from a change of figures on production capacity and capacity utilization, thus the evaluation of capacity utilization is a basis for this claim and it was included in the panel request.[717] In addition, Argentina argues that the express use of "*inter alia*" in the paragraph of its panel request setting out its Articles 3.1 and 3.4 claims means that the claim is not necessarily limited to the injury factor "utilization of capacity".[718]

7.426. We recall that Article 6.2 of the DSU provides that a panel request "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". According to the Appellate Body, Article 6.2 requires claims, but not arguments, to be set forth in the panel request.[719]

7.427. Argentina's panel request alleges that the anti-dumping measures imposed by the European Union on imports of biodiesel are inconsistent with:

[712] Argentina's response to Panel question No. 63, para. 151.

[713] Return on investments was one of the "microeconomic" factors that the EU authorities considered on the basis of data provided by the sampled producers. The EU authorities indicated that their assessment of return on investments was made on the basis of the sampled domestic producers' "pre-tax result as a percentage of the average opening and closing net book value of the assets employed in the production of biodiesel." (Provisional Regulation, (Exhibit ARG-30), Recital 116, confirmed in Definitive Regulation, (Exhibit ARG-22), Recitals 140-141)

[714] European Union's first written submission, para. 318; second written submission, para. 165.

[715] European Union's second written submission, paras. 166-168 (quoting from Appellate Body Report, *China – Raw Materials*, para. 231).

[716] Argentina's response to Panel question No. 63, para. 151.

[717] Argentina argues that it is making allegations concerning return on investments not as an independent factor, but as part of its claim regarding capacity utilization.

[718] Argentina's opening statement at the first meeting of the Panel, para. 119; response to Panel question 63, paras. 150-153.

[719] Appellate Body Report, *EC – Bananas III*, para. 143.

> Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the European Union's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product, *inter alia*, in relation to capacity and capacity utilization of the domestic industry.[720]

7.428. In it submissions to the Panel, Argentina requests that the Panel find that:

> [T]he anti-dumping measures imposed by the European Union on imports of biodiesel originating in Argentina are inconsistent with the following provisions of the Anti-Dumping Agreement and the GATT 1994:
>
> ...
>
> Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the European Union's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the European Union industry ... .[721]

7.429. Although Argentina responds to the European Union's objection that it does not challenge the evaluation of return on investments "in isolation", i.e. *per se*, this assertion is contradicted by the requests for findings that it presents to the Panel, in which it seeks a finding that the EU authorities' evaluation of this specific factor was inconsistent with Articles 3.1 and 3.4. Argentina's claim in this regard falls outside the Panel's terms of reference as Argentina's panel request does not mention "return on investments", while it expressly mentions "capacity and capacity utilization". Argentina had all the information in its possession to include a claim concerning this factor/index in its panel request. Thus, had Argentina wanted to also challenge the EU authorities' evaluation with respect to the factor return on investments in the same manner as it did with respect to production capacity and capacity utilization, there is no plausible reason why it could not have also mentioned this factor/index in its panel request – and, before then, in its consultations request – alongside the other two factors. To us, the use of the catch-all phrase "*inter alia*" does not cure this omission, particularly as, by explicitly listing capacity and capacity utilization as specific factors with respect to which the EU authorities' evaluation infringed Articles 3.1 and 3.4, Argentina's panel request implicitly limited the issues or problems it could raise in respect of the EU authorities' determination under Article 3.4. In light of the formulation of Argentina's claims under Articles 3.1 and 3.4 in its panel request, and considering the requirements of Article 6.2 of the DSU, the absence of any reference to the factor "return on investments" in Argentina's panel request could only lead to the conclusion that the EU authorities' evaluation of this factor falls outside the terms of reference of the Panel.

7.430. As noted above, Argentina argues that it is not challenging the EU authorities' evaluation of "return on investments" *per se*, but rather that it only refers to their evaluation of this factor as an argument in support of its claims concerning the EU authorities' evaluation of capacity utilization. Even if we agreed, and on this basis considered that Argentina's challenge concerning this factor falls within the Panel's terms of reference as a part of the production capacity and capacity utilization claims, we would still not need to make a finding with respect to the EU authorities' evaluation of this factor in order to resolve this dispute. This is because we have already found that the EU authorities acted inconsistently with Articles 3.1 and 3.4 in their evaluation of production capacity and capacity utilization.[722]

7.431. In sum, for the reasons explained above, we find that Argentina has made a *prima facie* case that the EU authorities did not base their evaluation of production capacity and "utilization of capacity" on an "objective examination" of "positive evidence". This being the case we find that the European Union acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in

[720] WT/DS473/5, p. 4, para. 7.

[721] Argentina's requests for findings in first written submission, para. 470(h); second written submission, para. 254(h).

[722] See above, paras. 7.413 and 7.415.

its examination of the impact of the dumped imports on the domestic industry, insofar as it relates to these two factors.[723]

7.4.6 Whether the EU authorities' non-attribution findings are inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.4.6.1 Introduction

7.432. Argentina claims that the European Union acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the EU authorities failed to appropriately assess the injury caused by "other factors" at the same time and to separate and distinguish that injury from the injury caused by the dumped imports.[724] Argentina challenges the EU authorities' consideration of the following "other factors", which were brought to their attention by CARBIO, the association of Argentine biodiesel producers: (i) the overcapacity of the EU domestic industry; (ii) the EU domestic industry's imports of the product under consideration; (iii) the EU domestic industry's lack of vertical integration and of access to raw materials; and (iv) the alleged double-counting regimes of certain EU member States.[725]

7.433. In the determinations at issue, the EU authorities concluded that significantly increased volumes of dumped imports from Argentina and Indonesia undercut the prices of the EU industry and caused material injury to it.[726] They further concluded that whereas it was possible that other factors had affected the performance of the EU industry to a certain extent, the effect of those factors, considered individually or collectively, was not such as to break the causal link between the dumped imports and the material injury suffered by the EU industry.[727] Specifically, with respect to the other factors addressed by Argentina's claims, the EU authorities found that the domestic industry's overcapacity was a factor of injury, but not such a decisive one as to break the causal link between the dumped imports and the deterioration of the situation of the domestic industry.[728] With regard to the imports by the EU industry, the EU authorities rejected allegations that the domestic industry had a long-term strategy of importing the investigated product and concluded that the causal link was not broken by these imports.[729] Finally, the EU authorities rejected arguments that other factors such as the double-counting regimes put in place by certain EU member States, the domestic industry's lack of access to raw materials at reasonable prices, and absence of vertical integration, were causing injury to the domestic industry.[730]

7.434. We examine Argentina's claims as they pertain to each of these "other factors" in turn, after reviewing the relevant obligations under the two provisions invoked by Argentina.

7.4.6.2 Relevant provisions of the covered agreements

7.435. The text of Article 3.1 of the Anti-Dumping Agreement has been reproduced above in paragraph 7.372.

7.436. Article 3.5 of the Anti-Dumping Agreement reads as follows:

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[723] We do not understand Argentina to be seeking a finding with respect to the overall conclusion of material injury reached by the EU authorities (see, in particular, Argentina's response to Panel question No. 61, para. 148). Given that Argentina's claims are confined to the EU authorities' evaluation of production capacity and utilization of capacity, our findings of inconsistency are limited to the EU authorities' evaluation of these two factors.

[724] We note that while Argentina submits claims of violation under both Articles 3.1 and 3.5, with the exception of its allegations with respect to the issue of overcapacity, most of the arguments submitted by Argentina relate to the requirements under Article 3.5.

[725] Argentina's first written submission, paras. 420, 436, 453, 467, and 470(i); second written submission, para. 254(i).

[726] Provisional Regulation, (Exhibit ARG-30), Recital 128; confirmed in Definitive Regulation, (Exhibit ARG-22), Recital 147.

[727] Definitive Regulation, (Exhibit ARG-22), Recital 189.

[728] Definitive Regulation, (Exhibit ARG-22), Recital 164.

[729] Provisional Regulation, (Exhibit ARG-30), Recital 136; Definitive Regulation, (Exhibit ARG-22), Recitals 151-160.

[730] Provisional Regulation, (Exhibit ARG-30), Recitals 141-146; Definitive Regulation, (Exhibit ARG-22), Recitals 172-179.

> 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. (emphasis added)

7.4.6.3 General considerations relevant to Argentina's Articles 3.1 and 3.5 claims

7.437. We have already discussed in the previous section of this Report[731] the fundamental requirement imposed on investigating authorities by Article 3.1 of the Anti-Dumping Agreement that they should base their determination of injury on an "objective examination" of "positive evidence".

7.438. Article 3.5 of the Anti-Dumping Agreement requires the demonstration of a causal link between the dumped imports and the material injury as a prerequisite to the imposition of anti-dumping measures. It also requires the authorities to examine any other known factors that may be simultaneously causing injury to the domestic industry and to ensure that the injuries caused by those other factors are not attributed to the dumped imports. The Appellate Body in *EC – Tube or Pipe Fittings* set out three elements for determining when such a "non-attribution" analysis is required. The Appellate Body indicated that the factor at issue must: (i) be "known" to the investigating authority; (ii) be a factor "other than dumped imports"; and (iii) be injuring the domestic industry at the same time as the dumped imports.[732] The Appellate Body has taken the view that if an "other factor" is causing injury to the domestic industry simultaneously with the dumped imports, the investigating authority "must appropriately assess the injurious effects of those other factors" and "such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports."[733]

7.439. Article 3.5 does not contain any guidance or specify any methodology as to how an investigating authority may satisfy the obligation not to attribute to the dumped imports the injurious effect of the other known factor. Prior panels have taken the view that it is appropriate "to undertake a careful and in depth scrutiny" of the determinations made by the investigating authorities in order to evaluate whether the investigating authority's explanations and conclusions regarding the other factor are "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and explanations given."[734]

7.440. We are guided by these principles in our review of the EU authorities' consideration of each of the other factors cited by Argentina, to which we now turn.

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[731] See above, paras. 7.397, 7.398.

[732] Appellate Body Report, *EC – Tube or Pipe Fittings,* para. 175.

[733] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223; reiterated in Appellate Body Reports, *EC – Tube or Pipe Fittings,* para. 188; *China – GOES*, para. 151; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283.

[734] See, e.g. Panel Reports, *EU – Footwear (China)*, para. 7.483; and *EC – Salmon (Norway)*, para. 7.655. Moreover, we recall that, as noted in section 7.1.2 above, pursuant to the standard of review applicable in disputes involving anti-dumping measures, set forth under Article 17.6 (i) of the Anti-Dumping Agreement, the panel must not conduct a *de novo* review of the evidence before an investigating authority, but must instead "determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective".

7.4.6.4 Overcapacity of the EU domestic industry

7.4.6.4.1 Introduction and factual background

7.441. Argentina argues that excessive overcapacity was the main factor that was injuring the EU domestic industry, rather than dumped imports from Argentina and Indonesia, and that by attributing the injury suffered by the domestic industry to the dumped imports rather than to overcapacity, the EU authorities failed to appropriately separate and distinguish the injurious effects of this factor from those of the dumped imports.[735]

7.442. During the course of the investigation, CARBIO identified overcapacity as a major factor causing injury to the EU industry, stressing the fact that despite the low capacity utilization rate during the period considered (less than 50%), the EU producers had continuously expanded their production capacity on over-optimistic assumptions.[736]

7.443. In the Provisional Regulation, the EU authorities rejected this argument on the basis that there was no temporal correlation between the domestic industry's capacity utilization, which remained low and stable during the period considered, and its profitability, which declined during the same period:

> It is the case that during the period considered capacity utilisation across the Union remained low, at a low point of 40% during the IP. Therefore some companies have not been using the capacity they have installed.
>
> However capacity utilisation was already low at the start of the period considered and has remained low throughout the whole period, and was also stable in the sampled companies.
>
> The sampled companies were profitable at the start of the period considered and loss making at the end, with stable capacity utilisation. It is reasonable to deduce that the whole industry has also become less profitable while its capacity utilisation has remained stable. This cannot therefore be considered a major cause of injury, as there appears to be no causal link. This argument is therefore provisionally rejected.[737]

7.444. CARBIO disagreed with these preliminary findings and argued that even the total elimination of imports would not have had a noticeable effect on capacity utilization. CARBIO pointed out that even in the total absence of imports, capacity utilization would have been only 53% during the IP.[738] CARBIO argued that such a low capacity utilization rate was problematic and, in the light of all the fixed costs that such a young industry must bear, would not allow the EU industry to be profitable.[739]

7.445. In the Definitive Regulation, the EU authorities recalled their finding in the Provisional Regulation that the domestic industry's low capacity utilization rate, which was a stable feature, was not responsible for the injury caused to it, given that the situation of the sampled companies had deteriorated during the period considered while their capacity utilization did not decrease to the same extent.[740] The EU authorities noted the arguments that, even in the absence of dumped imports, capacity utilization would have been low, and that the domestic industry had increased production capacity during the period chosen for injury analysis. The EU authorities considered that no evidence had been provided to show that the domestic industry's low capacity utilization was causing injury to such an extent as to break the causal link between the dumped imports and the deterioration in the situation of the domestic industry.[741] They added that fixed costs represented only a small proportion (roughly 5%) of total production costs, which showed that the

[735] Argentina's first written submission, paras. 398-420; second written submission, paras. 227-235.
[736] See, e.g. CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), pp. 26-28; CARBIO's Powerpoint presentation of 14 December 2012, (Exhibit ARG-43), slides 17-18.
[737] Provisional Regulation, (Exhibit ARG-30), Recitals 138-140.
[738] CARBIO's Powerpoint presentation of 8 July 2013, (Exhibit ARG-46), slide 20; CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), p. 16.
[739] CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), p. 16.
[740] Definitive Regulation, (Exhibit ARG-22), Recitals 161-162 and 171.
[741] Definitive Regulation, (Exhibit ARG-22), Recitals 163 and 164.

low capacity utilization was "only one factor of injury, but not a decisive one."[742] They also considered that one of the reasons for the low capacity utilization rate was the fact that the domestic industry, "due to the particular market situation", imported the finished product itself.[743] They stated, in addition, that according to the revised data on capacity and capacity utilization, the domestic industry had decreased its capacity during the period considered, and capacity utilization had increased from 46% to 55%, which "show[ed] that the capacity utilisation of the Union industry would be significantly higher in the absence of dumped imports than the 53% [figure mentioned by interested parties]".[744] The EU authorities also rejected the argument that the domestic industry's overcapacity was so high that even in the absence of imports it would not be adequately profitable, reasoning that the fact that the domestic industry was profitable in 2009 with a low capacity utilization suggested that in the absence of dumped imports, profitability would have been even higher.[745]

7.446. They also rejected as unsupported by evidence the argument that any company increasing production capacity during the period under consideration was making an irresponsible business decision. In this regard, they noted the fact that some companies were able to increase capacity in the face of increasing imports of dumped biodiesel from Argentina and Indonesia, which to the EU authorities showed that there was demand in the market for their particular products.[746] The EU authorities further noted that, according to the revised data before them, "companies were during the period taking capacity out of possible use, and closer to the end of the IP were starting a process of closing plants that are no longer viable". Increases in capacity on a company-by-company level were mainly due to the expansion of "second generation" biodiesel plants. Therefore, the EU authorities reasoned, the domestic industry had been, and was, in the process of rationalising capacity to meet the demands of the EU market.[747]

7.447. Finally, the EU authorities rejected as unsupported by evidence the arguments contesting their finding that fixed costs represented only about 5% of the domestic industry's total costs. They added that verification had shown a fixed-cost to total-cost of production ratio between 3% and 10% during the IP for sampled producers and that in any case, fixed costs did not bear any relation to the capacity utilization rates.[748]

7.448. On the basis of these considerations, the EU authorities confirmed their provisional findings on the issue.[749]

7.4.6.4.2 Main arguments of the parties

7.4.6.4.2.1 Argentina

7.449. In support of its claims, Argentina first refers to its claims under Articles 3.1 and 3.4[750], and argues that the EU authorities acted inconsistently with Articles 3.1 and 3.5 by relying in their examination of overcapacity on the revised figures on production capacity and capacity utilization.[751] Argentina submits that the correct figures would have shown a much higher production capacity and a much lower capacity utilization rate than the ones relied upon by the EU authorities in the Definitive Determination.[752] In addition, Argentina argues that the correct figures would show different trends in capacity utilization: whereas the EU authorities found an increase in capacity utilization, the correct figures would have shown an increase in unused capacity of 1,561,322 tonnes from 2009 to the IP, and a decrease in capacity utilization during the same period.[753]

[742] Definitive Regulation, (Exhibit ARG-22), Recital 164.
[743] Definitive Regulation, (Exhibit ARG-22), Recital 164.
[744] Definitive Regulation, (Exhibit ARG-22), Recital 165.
[745] Definitive Regulation, (Exhibit ARG-22), Recitals 165 and 167.
[746] Definitive Regulation, (Exhibit ARG-22), Recital 169.
[747] Definitive Regulation, (Exhibit ARG-22), Recital 170.
[748] Definitive Regulation, (Exhibit ARG-22), Recital 166.
[749] Definitive Regulation, (Exhibit ARG-22), Recital 171.
[750] See above section 7.4.5.
[751] Argentina's first written submission, paras. 400-401 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 165).
[752] Argentina's first written submission, para. 400.
[753] Argentina's opening statement at the first meeting of the Panel, para. 124.

7.450. Second, Argentina takes issue with the EU authorities' reliance on the fact that capacity utilization was stable during the period considered. In this regard, Argentina submits that the EU authorities confused overcapacity as a factor causing injury and capacity utilization as an injury indicator[754], and that their assessment of overcapacity as an "other factor" improperly focused on the capacity utilization rate. Argentina argues that the authorities should instead have focused on the important increase in overcapacity in absolute terms, i.e. the fact that, according to Argentina, the EU industry's unused production capacity increased by 1,561,322 tonnes from 2009 to the IP.[755] Argentina argues that this was the focus of CARBIO's arguments during the investigation.[756]

7.451. Third, Argentina submits that the increase in unused capacity correlates with the decrease in profitability of the EU industry, which in its view shows that overcapacity was responsible for the deterioration of the situation of the industry.[757] Argentina notes that, according to the figures initially provided by CARBIO, overcapacity increased from 11,613,307 to 13,174, 629 tonnes from 2009 to the end of IP, while profitability decreased from 3.5% to -2.5% during the same period.[758] Argentina also argues that the profit of 3.5% of the domestic industry in 2009 was low, considering the fact that in the investigation on biodiesel from the United States, the EU authorities used a profit margin of 15% in determining the injury elimination margin during the period from April 2007 to March 2008.[759]

7.452. In addition, Argentina notes that imports from Argentina and Indonesia increased by 1,247,389 tonnes between 2009 and the IP. Argentina argues that if imports had not increased, the EU industry would still have had significant overcapacity, of 11,927,240 tonnes, and that even the total elimination of imports from Argentina and Indonesia would have hardly improved the EU industry's capacity utilization rates. Argentina notes that the EU industry experienced a similar level of overcapacity in 2010, when it was no longer profitable with a loss of -0.3%.[760]

7.453. Fourth, Argentina takes issue with the EU authorities' finding concerning fixed costs, pointing in particular to the EU authorities' statement that "fixed costs do not bear any relation to capacity utilisation rates". Argentina argues that the fact that fixed costs remain constant at different capacity utilization rates is precisely the reason why low capacity utilization rates result in fixed costs being disproportionally high on a per-unit basis.[761] Argentina argues that an increase in capacity utilization to a reasonable rate (at least 70%), would have led to a decrease in the ratio of fixed costs to total costs.[762] Argentina also disputes the EU authorities' statement that fixed cost represented only a "small proportion" of total production costs in light of their finding that fixed costs amounted to 3-10% of the sampled companies' total costs during the IP.[763] In addition, Argentina argues that the authorities' finding with regard to overcapacity of the EU industry is at odds with their recognition of the capital-intensive nature of the biodiesel industry. Argentina

[754] Argentina's first written submission, paras. 403-406; second written submission, para. 229.
[755] Argentina's first written submission, para. 405 (referring to the provisional findings on production capacity and production in table 4 of the Provisional Regulation, (Exhibit ARG-30)); second written submission, para. 232.
[756] Argentina's first written submission, paras. 404-406 (referring to CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), section 5.1 (pp. 26 et seq.); CARBIO's Powerpoint presentation of 14 December 2012, (Exhibit ARG-43), slides 17 and 18; CARBIO's Powerpoint presentation of 8 July 2013, (Exhibit ARG-46), slides 19 to 21).
[757] Argentina's second written submission, paras. 229-231.
[758] Argentina's second written submission, paras. 229-231, and table 1 thereto.
[759] Argentina's second written submission, para. 232 (referring to the findings of the EU authorities in the Definitive Regulation, anti-dumping investigation on biodiesel from the United States, (Exhibit EU-14), Recitals 181 and 182). Argentina also notes the profit margin of 18% achieved by the domestic industry in 2005 and 2006, when the capacity utilization levels amounted to around 90%. (Argentina's second written submission, para. 233 (referring to European Union's response to Panel question No. 65, referring in turn to the Provisional Regulation in the anti-dumping investigation on imports of biodiesel originating in the United States, (Exhibit EU-13), paras. 87 and 95, tables 4 and 7))
[760] Argentina's second written submission, para. 234 (referring to Definitive Regulation, (Exhibit ARG-22), table 2).
[761] Argentina's first written submission, para. 409.
[762] Argentina's first written submission, para. 411.
[763] Argentina's first written submission, para. 410.

submits that overcapacity was "a controlling cause of injury", considering the relevance of fixed costs to the capital-intensive biodiesel industry.[764]

7.454. Fifth, Argentina points to other findings of the EU authorities pertaining to the issue of overcapacity which, in its view, are based on incorrect or irrelevant considerations. In particular, Argentina notes the EU authorities' statement that one of the reasons for the low capacity utilization rate was the importation of the product by the EU industry itself. Argentina argues that this consideration does not mean that overcapacity was not a significant source of injury.[765] Argentina also takes issue with the EU authorities' statement that "the fact that some companies were able to increase their capacity in the face of increasing imports of dumped biodiesel … shows the demand on the market for their particular products".[766] Argentina submits that an increase in capacity does not mean that there is sufficient demand to utilize installed production capacity.[767]

7.4.6.4.2.2 European Union

7.455. The European Union argues that the EU authorities made a reasoned assessment of the effects of overcapacity and properly concluded that whatever the effects of overcapacity, the evidence established that the dumped imports had caused injury to the domestic industry.[768]

7.456. The European Union argues that Argentina cannot shortcut the requirements of Article 3.5 by simply relying, in its Article 3.5 claim, on the allegations of incorrect assessment of capacity utilization it made in the context of its Article 3.4 claim. The European Union submits that Argentina's approach fails to recognize the different natures of Articles 3.4 and 3.5.[769]

7.457. Responding to the argument of Argentina that the EU authorities focused on low capacity utilization, rather than on overcapacity, the European Union argues that in the case at hand, the production capacity of the EU industry had expanded more than there was a demand in the EU and export markets, and in this context these two terms, "low capacity utilization" and "overcapacity", are interchangeable.[770] In addition, the European Union questions the figure on the increased unused capacity (1,561,322 tonnes from 2009 to the IP) cited by Argentina and submits that Argentina failed to provide a formula or principle as to how a particular level of overcapacity correlates with the consequent level of harm to the industry.[771] The European Union considers that the argument of Argentina that even a total elimination of imports would have hardly improved the EU domestic industry's capacity utilization rates is of no significance; such a hypothesis, if it were to have any significance, would have to consider all the consequences of the removal from the EU market of dumped imports that were markedly undercutting the prices of EU producers.[772]

7.458. With regard to Argentina's argument concerning fixed costs, the European Union refers to the EU authorities' finding that sampled companies were profitable at the beginning of the IP but loss-making at the end of the IP, while capacity utilization remained low during the IP. The European Union argues that this means that there was no correlation between the two.[773] Similarly, the European Union argues that the capital intensive nature of the biodiesel industry is a constant feature, whereas injury to the domestic industry developed over the course of the period considered.[774] Referring to the EU authorities' findings in the Definitive Regulation, the European Union notes that the capacity utilization rate actually improved, which indicates that

[764] Argentina's first written submission, paras. 413-414 (referring to Provisional Regulation, (Exhibit ARG-30), Recitals 46, 65, 106, and 160; and Definitive Regulation, (Exhibit ARG-22), Recitals 44, 46, 84, and 138); opening statement at the first meeting of the Panel, para. 126.
[765] Argentina's first written submission, para. 417.
[766] Argentina's first written submission, para. 418 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 169).
[767] Argentina's first written submission, para. 418.
[768] European Union's first written submission, para. 328.
[769] European Union's first written submission, para. 321.
[770] European Union's first written submission, para. 322.
[771] European Union's first written submission, para. 323.
[772] European Union's second written submission, para. 159.
[773] European Union's first written submission, para. 324.
[774] European Union's first written submission, para. 325.

capacity utilization was not responsible for the deterioration in the situation of the domestic industry.[775]

7.459. Regarding the EU industry's imports of biodiesel, the European Union submits that the dumped imports forced the EU industry to shift in part from producing biodiesel to importing it, thus aggravating its existing problem of overcapacity, which was in turn both an indicator of injury and a cause of harm reflected in other indicators, such as profits.[776]

7.460. Finally, the European Union argues that EU authorities' statement that "the fact that some companies were able to increase their capacity in the face of increasing imports of dumped biodiesel … shows the demand on the market for their particular products"[777] refers to "some companies" and to a demand for "their particular products", and not to the EU domestic industry as a whole.[778]

7.4.6.4.3 Arguments of the third parties

7.461. **Colombia** notes the argument of Argentina that even in case of total elimination of imports, the capacity utilization of the EU industry would only have reached around 50%. Colombia submits that it is necessary to question what prompted the EU industry to expand its production capacity, despite the presence of the allegedly dumped imports during the IP.[779] It argues that the decision to increase production capacity is not logical or responsible when an industry had already experienced difficulties and faced competition from dumped imports.[780] Colombia further notes that the European Union itself recognized that one of the reasons for the low capacity utilization rate was the imports of the product under consideration made by the EU industry. Colombia argues that the EU authorities failed to meet their obligation of separating and distinguishing causes of injury and suggests that the Panel should apply an "order of magnitude test" with regard to the effect of the low capacity utilization rate, on the one hand, and the injury caused by the dumped imports, on the other hand.[781]

7.4.6.4.4 Evaluation by the Panel

7.462. We first consider Argentina's argument that the EU authorities' findings on overcapacity are inconsistent with Articles 3.1 and 3.5 because they are premised on an improper determination of the amount of capacity and of the capacity utilization rate.[782] We recall our finding in the previous section of this Report that the EU authorities acted inconsistently with Articles 3.1 and 3.4 in their evaluation of the domestic industry's production capacity and capacity utilization, because they failed to base this evaluation on an "objective examination" of "positive evidence". Argentina's present argument raises the question whether these findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement mean that we should also find that the EU authorities' non-attribution analysis with regard to overcapacity was inconsistent with Articles 3.1 and 3.5 for the same reasons. In resolving this question, we consider whether the non-attribution analysis of the EU authorities was tainted by, i.e. based on or affected by, the downward revision of the figures of the domestic industry's production capacity.

7.463. In this regard, we note that in both the Provisional and the Definitive Regulation, i.e. irrespective of which set of figures they considered, the EU authorities found that the level of capacity utilization was low and stable during the period considered, whereas the profitability of the sampled producers had deteriorated during the same period.[783] The EU authorities considered that low capacity utilization was a constant or permanent feature of the EU biodiesel industry

[775] European Union's first written submission, paras. 322-323 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 131 and table thereto); second written submission, para. 161.
[776] European Union's first written submission, para. 326.
[777] Definitive Regulation, (Exhibit ARG-22), Recital 169.
[778] European Union's first written submission, para. 327.
[779] Colombia's third-party submission, para. 60.
[780] Colombia's third-party submission, para. 61.
[781] Colombia's third-party submission, paras. 64-68 (referring to Panel Report, *Egypt – Steel Rebar*, paras. 7.119-7.121).
[782] See the summary of the EU authorities' findings on production capacity and capacity utilization rates, above, paras. 7.375, 7.379.
[783] Provisional Regulation, (Exhibit ARG-30), Recitals 138-140; Definitive Regulation, (Exhibit ARG-22), Recitals 161-162.

during the period considered, and therefore, that it could not explain the deteriorating state of the domestic industry, and that it was the dumped imports with their price undercutting that caused the state of the domestic industry to deteriorate. It is clear from the EU authorities' findings that their conclusions 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. This, in fact, was the basis of the EU authorities' conclusion, which did not rely on the levels of capacity utilization or any changes in those levels. Again, the conclusion of the EU authorities on the issue of overcapacity is unchanged from the Provisional to the Definitive Regulation. In the Provisional Regulation – which according to Argentina, was based on "correct" capacity and capacity utilization data – the EU authorities found that overcapacity was not a major cause of injury.[784] The Definitive Regulation merely confirmed these findings, after addressing comments of interested parties on the findings in the Provisional Regulation and the Definitive Disclosure.[785] This leads us to conclude that the revision of the production capacity and capacity utilization figures in the Definitive Determination did not taint the EU authority's 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.[786]

7.464. Argentina refers to a statement of the EU authorities in the Definitive Regulation in which they mention the revised figures:

> 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.[787]

7.465. However, the statement cited by Argentina was, in our view, a subsidiary point made by the EU authorities in response to a specific argument that even in the absence of any imports from Argentina and Indonesia, capacity utilization would have been low at 53% during the IP.[788] The EU authorities rejected this argument on the ground that 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, before adding that fixed costs represented only a small proportion of the total production costs.[789] This, in their view, showed that low capacity utilization was a factor of injury, but not a decisive one. It is only after making these points that the EU authorities posited 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.[790] Read in context, 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.

7.466. 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. Consequently, the fact that their evaluation of capacity and capacity utilization was, as we have found, inconsistent with Articles 3.1 and 3.4, does not, in and of itself, render their non-attribution analysis with respect to overcapacity inconsistent with Articles 3.1 and 3.5. In other words, notwithstanding our findings above that the EU authorities acted inconsistently with Article 3.1 and Article 3.4 in their evaluation of production capacity and capacity utilization, Argentina has not established that the authorities' consideration of the issue of overcapacity is, as a result, inconsistent with Articles 3.1 and 3.5.

7.467. This brings us to the next argument of Argentina, i.e. that in their non-attribution analysis, the EU authorities improperly focused on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered. Argentina posits a difference between the capacity utilization rate (an injury indicator under Article 3.4 representing the percentage of

[784] Provisional Regulation, (Exhibit ARG-30), Recital 140.
[785] Definitive Regulation, (Exhibit ARG-22), Recital 171.
[786] The panel in *China – GOES* took a similar approach (Panel Report, *China – GOES,* paras. 7.541, 7.542, and 7.621). See also Appellate Body Report, *China – GOES*, paras. 219-221.
[787] Definitive Regulation, (Exhibit ARG-22), Recital 165.
[788] Definitive Regulation, (Exhibit ARG-22), Recital 163.
[789] Definitive Regulation, (Exhibit ARG-22), Recital 164.
[790] Definitive Regulation, (Exhibit ARG-22), Recital 165.

available production capacity being utilized) and overcapacity (the industry's unused capacity in absolute terms as an "other" source of injury). Referring to the figures in the Provisional Regulation, Argentina argues that while capacity utilization did not vary significantly, ranging between 43% and 41% between 2009 and the IP according to the initial figures provided by the EBB, overcapacity increased dramatically from 11,613,307 to 13,174,629 tonnes, i.e. by 1,561,322 tonnes, during the same period.[791] Argentina argues that, for this reason, the statement of the EU authorities that "production capacity remained relatively stable" is factually incorrect.[792] Argentina submits that the increase in unused capacity correlates with the decrease in profitability from 3.5% to –2.5 % during the same period, and concludes that overcapacity led to the declining profitability and the injury suffered by the domestic industry.

7.468. In our view, 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. We fail to see how 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 matter. More fundamentally, we see no basis in Article 3 of the Anti-Dumping Agreement – and Argentina has identified none – 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. In our view, 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. In fact, an authority may well consider that the former is a more pertinent and informative basis on which to assess the issue of overcapacity. We therefore reject Argentina's argument that in their non-attribution analysis, the EU authorities improperly focused on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered.[793]

7.469. Argentina also takes issue with the EU authorities' conclusion that the sampled companies were profitable at the start of the IP, arguing that a profit rate of 3.5% is extremely low in comparison to the profit rates realised by the EU domestic industry in earlier periods, in particular in view of the 15% profit rate used by the EU authorities in calculating the injury elimination margin in the anti-dumping investigation on biodiesel from the United States.[794] Argentina also refers to the European Union's indication, in response to a question from the Panel, that in 2005-2006 the EU biodiesel industry had a profitability rate of 18%, while its capacity utilization rate was 88–93%.[795] The fact that the EU industry may have achieved higher levels of profitability at a time when its capacity utilization rates were higher does not, in our view, undermine the EU authorities' conclusion that, during the period considered, dumped imports caused a deterioration in the situation of the domestic industry and that overcapacity was not such a cause of injury as to break this causal link. In our view, whether an industry is in good or poor condition at the outset of the period examined is not determinative of whether dumped imports caused material injury. We add, in this respect, that the concept of injury under Article 3 of the Anti-Dumping Agreement is not limited to the situation in which a healthy industry is injured by dumped imports.[796] Rather, the notion of "injury", in our view, calls for an inquiry into whether the situation of the industry *deteriorated* during the period considered. Our view is supported by the fact that Article 3.5 itself envisages the possibility of more than one factor causing injury. We note in this regard that the EU authorities found that while capacity utilization was stable (although low), profits decreased. Merely because the EU domestic industry might have been "less injured" if

[791] Argentina's first written submission, para. 405 (referring to the provisional findings on production capacity and production, which do not exclude "idle capacity" (Provisional Regulation, (Exhibit ARG-30), table 4)); second written submission, paras. 229-232.

[792] Argentina's first written submission, paras. 384 and 405 (referring to Provisional Regulation, (Exhibit ARG-30), Recital 103, confirmed in Definitive Regulation, (Exhibit ARG-22), Recital 139).

[793] Argentina's first written submission, para. 406.

[794] Argentina's second written submission, para. 232 (referring to Definitive Regulation, anti-dumping investigation on biodiesel from the United States, (Exhibit EU-14), Recitals 181 and 182).

[795] Argentina's second written submission, para. 233 (referring to European Union's response to Panel question No. 65, para. 95, referring in turn to Provisional Regulation, anti-dumping investigation on biodiesel from the United States, (Exhibit EU-13)).

[796] In this respect, we note that in response to a question from the Panel, the European Union noted that the profit rate of 3.5% achieved by the EU sampled producers in 2009 could not be deemed as the profit that would have been achieved in the absence of dumped imports, because in the period between 2005 and 2009 the EU biodiesel producers faced the dumped imports from the United States and their profitability had considerably decreased. (European Union's response to Panel question No. 75, para. 107)

the rate of capacity utilization were higher does not undermine the EU authorities' finding that, with a constant state of capacity utilization, the decline in profits can be attributed to dumped imports. The same considerations lead us to reject Argentina's argument that even in the absence of any imports from Argentina and Indonesia, the EU industry would still be operating at a significant level of overcapacity.

7.470. We now turn to Argentina's argument concerning the EU authorities' finding that fixed costs represent only a small proportion of the total production costs. Argentina argues that the biodiesel industry is a capital-intensive industry that normally has high fixed costs, that the decrease in capacity utilization leads to cost increases on a per-unit basis and that it is important for a capital-intensive industry to have a high level of capacity utilization in order to stay profitable. However, the EU authorities verified that the sampled companies had ratios of fixed costs to total costs of production between 3% and 10% during the IP.[797] While Argentina's assertions may be valid in the abstract, they are belied by the facts on the record in this case. Given that Argentina has produced no evidence that brings into question these facts, we consider that the conclusion reached by the EU authorities on this issue is one which an unbiased and objective authority could have reached.

7.471. Finally, we turn to the other statements challenged by Argentina. First, Argentina takes issue with the statement that one of the reasons for the low capacity utilization rate was the importation of the product by the EU industry itself.[798] Argentina argues that this explanation does not support the conclusion that overcapacity was not a significant source of injury. However, in our view, this particular statement does not suggest that the EU authorities considered that overcapacity was not a cause of injury. Rather, it points to the fact that overcapacity was caused, at least in part, by competition from the dumped imports.[799] Likewise, in our view, Argentina misreads the EU authorities' statement that "the fact that some companies were able to increase their capacity in the face of increasing imports of dumped biodiesel … shows the demand on the market for their particular products".[800] Argentina submits that an increase in capacity does not mean that there is sufficient demand to utilize installed production capacity.[801] As the European Union points out, this statement pertained to *some companies* and the demand for their particular products and not, as Argentina suggests, to the entirety of the EU industry.[802]

7.472. Based on the above considerations, we reject Argentina's arguments with respect to the EU authorities' non-attribution analysis as it concerns the issue of overcapacity. Instead, we consider that the EU authorities' conclusion with respect to this "other factor" is one that an unbiased and objective investigating authority could have reached in light of the facts before it. Consequently, we reject Argentina's allegations that the European Union acted 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.

7.4.6.5 Imports by the EU domestic industry

7.4.6.5.1 Introduction and factual background

7.473. During the investigation, CARBIO argued that the imports from Argentina were a result of a long-term commercial strategy of the EU producers to benefit from the considerable natural advantages of soybean production in Argentina.[803] CARBIO argued, in particular, that the volume of imports by the EU industry was significant and that the imported biodiesel was produced in facilities directly related to EU producers.[804] In the Provisional Regulation, the EU authorities

[797] Definitive Regulation, (Exhibit ARG-22), Recitals 164 and 166.
[798] Argentina's first written submission, para. 417 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 164).
[799] We note that the EU authorities found that the domestic industry made these imports in self-defence in order to remain in business. Moreover, we note that we reject, below, Argentina's allegations concerning the issue of the EU industry's own imports.
[800] Definitive Regulation, (Exhibit ARG-22), Recital 169.
[801] Argentina's first written submission, para. 418.
[802] European Union's first written submission, para. 327.
[803] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), section 5.2, para. 81; CARBIO's Powerpoint presentation of 14 December 2012, (Exhibit ARG-43), slides 9-11.
[804] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), section 5.2, para.79; CARBIO's Powerpoint presentation of 14 December 2012, (Exhibit ARG-43), slides 9 to 16.

rejected CARBIO's arguments and accepted the EU industry's arguments that imports were made, temporarily and in self-defence, in order to benefit from dumped prices and to stay in business.[805] The EU authorities concluded that the EU industry's imports did not break the causal link between the dumped imports and the injury, and explained that even if the EU domestic industry had not imported these volumes of biodiesel, trading companies would have imported them anyway and would have undercut the EU domestic industry's prices to sell the product on the EU market.[806] The Provisional Regulation addresses this issue as follows:

> It is clear from data provided by the Union industry that they have imported quantities of biodiesel from Argentina and Indonesia during the period considered, up to 60% of all imports in the IP from these countries. However they have stated these imports have been made in self-defence. Being able to benefit from the dumped prices of these imports, in the short term, has assisted Union producers in being able to stay in business for the medium term.
>
> The imports of biodiesel at dumped prices by the Union industry increased substantially in 2011 and the IP, which was when the effect of the differential export tax on biodiesel and its raw materials could be most felt, as it was at that time that imports of the raw materials (soybean oil and palm oil) became uneconomic as compared to imports of the finished product. The differential export tax system in both countries puts a higher tax on the export of raw materials than the tax on the finished product … .
>
> For example during some months of the IP the import price of soybean oil from Argentina was higher than the import price of SME, making purchase of soybean oil economically disadvantageous. In this position purchase of SME was the only economically justifiable option.[807]

7.474. CARBIO objected to these findings in the Provisional Regulation.[808] In the Definitive Disclosure the EU authorities found that no evidence of the "long term strategy" alleged was provided and concluded that, in any case, if such a strategy existed, it would be "nonsensical and illogical [for the EU industry] to then launch a complaint against such imports".[809] In addition, the EU authorities stated that the EU industry's imports were the result of the Differential Export Tax (DET) systems, which made imports of the finished product (biodiesel) more competitive than imports of raw materials (soybean or palm oil).[810]

7.475. CARBIO objected to these findings, relying, in particular, on what it asserted was the EU authorities' standard practice in similar situations. CARBIO argued that the massive volume of imports made by the EU industry (60% of total imports) represented far more in percentage terms than what the EU authorities usually regard as imports made in "self-defence''.[811] Consequently, CARBIO argued, it would have expected the EU authorities to provide a substantiated and detailed explanation as to why, in this particular case, they had departed from their consistent practice.[812] Furthermore, CARBIO argued that the EU authorities had ignored certain of the arguments it had presented, in particular its arguments concerning the extent to which the increase in the market share of the imports from the countries concerned resulting from the imports made by the EU industry had compensated for the decrease in the EU industry's own market share.[813]

7.476. In the Definitive Regulation the EU authorities rejected these arguments and confirmed their provisional findings.[814] They reiterated that no evidence of a "long-term strategy" had been provided and that such a "long-term strategy" had been denied by the EU industry, adding that "[c]learly if the strategy of the Union industry was to supplement their biodiesel production by

[805] Provisional Regulation, (Exhibit ARG-30), Recital 133.
[806] Provisional Regulation, (Exhibit ARG-30), Recital 136.
[807] Provisional Regulation, (Exhibit ARG-30), Recitals 133-135; confirmed in Definitive Regulation, (Exhibit ARG-22), Recital 160.
[808] CARBIO's Powerpoint presentation of 8 July 2013, (Exhibit ARG-46), slide 22.
[809] Definitive Disclosure, (Exhibit ARG-35), Recital 127.
[810] Definitive Disclosure, (Exhibit ARG-35), Recital 128.
[811] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 19.
[812] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 19.
[813] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 19.
[814] Definitive Regulation, (Exhibit ARG-22), Recitals 151-160.

producing in Argentina and importing the finished product, it would be nonsensical and illogical to then launch a complaint against such imports."[815] They also reiterated their conclusions with respect to the effects of the differential export tax:

> The Union industry has also shown that in previous years the importation of soya bean oil — and palm oil — for processing into biodiesel was economically viable. No evidence of the contrary was provided by the interested party. Only with the distortive effect of the differential export tax which makes the export of biodiesel cheaper than the raw materials does import of the finished product become economically sensible.[816]

7.4.6.5.2 Main arguments of the parties

7.4.6.5.2.1 Argentina

7.477. Argentina submits that the EU authorities failed to properly assess the injury caused by the EU industry's imports of the product concerned and to separate and distinguish those injurious effects from that of the allegedly dumped imports.

7.478. Argentina argues that, based on the available evidence, the EU authorities could not reasonably have arrived at the conclusion that the imports of the EU industry were merely made in self-defence and that they did not break the causal link between the dumped imports and the injury suffered by the industry.[817] In particular, Argentina argues, first, that the EU authorities themselves recognised that the imports by the EU industry had led to a decrease in the level of capacity utilization, and thus were a cause of injury.[818] Second, Argentina submits that the significant volume of imports by the EU industry and the fact that the imported biodiesel was produced in facilities that were related to the EU producers and set up with investments made by them as from 2007, constitute ample evidence of a long-term commercial strategy pursued by the EU industry.[819] Third, Argentina argues that the EU authorities' "allegations" that the DET system forced the EU industry to import biodiesel and that traders would have imported biodiesel if the EU industry had not, are irrelevant to the causation analysis.[820] Argentina asserts that the EU authorities failed to provide any evidence that traders would have imported the same significant amount of biodiesel from Argentina.[821] Finally, Argentina contends that the argument that the importation of biodiesel was a way to maintain a customer base is contradicted by the fact that imports made by the EU producers were counted in the market share of the allegedly dumped imports, rather than in the market share of the domestic industry.[822]

7.4.6.5.2.2 European Union

7.479. The European Union asserts that the EU authorities rejected the allegation of a long-term commercial strategy because, in their view, such a strategy could not be reconciled with the EU industry's plan to have anti-dumping duties imposed on biodiesel from Argentina and Indonesia.[823] The European Union argues that evidence provided by Argentine interested parties during the investigation did not support the existence of a "long term commercial strategy" of importing the product under consideration.[824] With regard to the impact of the EU industry's imports on its capacity utilization rate, the European Union argues that the dumped prices compelled the EU

[815] Definitive Regulation, (Exhibit ARG-22), Recital 154. See also *idem*, Recital 155: "Also, it would seem illogical for the concerned Union producers to support the complaint and, in some cases, to have increased its capacity in the Union while at the same time have a strategy to fulfil production needs by imports."

[816] Definitive Regulation, (Exhibit ARG-22), Recital 157.

[817] Argentina's first written submission, paras. 429-434; second written submission, paras. 236-242.

[818] Argentina's first written submission, paras. 432-433 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 164).

[819] Argentina's first written submission, para. 434; second written submission, paras. 238-239; opening statement at the first meeting of the Panel, paras. 129-132.

[820] Argentina's first written submission, para. 435; opening statement at the first meeting of the Panel, paras. 129-132.

[821] Argentina's second written submission, para. 240.

[822] Argentina's second written submission, para. 241; comments on the European Union's response to Panel question No. 123, para. 68.

[823] European Union's first written submission, para. 333.

[824] European Union's first written submission, paras. 330-331.

industry to import biodiesel, thereby causing injury in the form of low capacity utilization. The European Union submits that this was not injury caused by an "other factor" but merely injury caused by dumped imports through an indirect chain of causation.[825] Finally, the European Union notes that the EU authorities found that by importing biodiesel itself, the EU industry improved its financial situation and that independent traders would have secured the same deals if the EU industry had not made the imports.[826] The European Union submits that biodiesel imported from Argentina was cheaper than the soybean oil used to produce biodiesel and that imports of the finished product – biodiesel – were a temporary effort on the part of the EU producers to maintain their customer base, while seeking protection against the unfair imports.[827]

7.4.6.5.3 Arguments of the third parties

7.480. **Colombia** argues that the EU authorities failed to meet their obligation of separating and distinguishing causes of injury and suggests that the Panel should apply an "order of magnitude test" with regard to, on the one hand, the imports by the EU industry, and on the other, the injury caused by the dumped imports.[828]

7.4.6.5.4 Evaluation by the Panel

7.481. We recall that the EU authorities rejected allegations about the existence of a long-term strategy of importing biodiesel by the domestic industry and found that the industry's own imports of Argentine and Indonesian biodiesel did not break the causal link between the dumped imports and the injury to the industry.[829]

7.482. Argentina argues that based on the evidence before them, the EU authorities could not have arrived at the conclusion that imports of Argentine biodiesel by the EU industry were not a result of a long-term commercial strategy of the EU producers to benefit from the natural advantages of soybean production in Argentina.

7.483. We recall that the EU authorities concluded that no evidence of the alleged "long term strategy" had been provided to them. They added that it would have been "nonsensical and illogical" for the domestic industry to launch or support an investigation against such imports or to have increased its capacity in the European Union while at the same time pursuing a strategy of supplementing its production with imports.

7.484. We read these statements in the light of the EU authorities' findings, in the section of the Definitive Regulation regarding the definition of the domestic industry, in which the EU authorities rejected comments of interested parties regarding the relationship between the EU producers and Argentine and Indonesian producers:

> [T]hose companies were found to be openly competing with each other for the same customers on the Union market, thereby showing that their relationship did not have any impact on the business practices of either the Argentinian exporting producer or the Union producer.[830]

7.485. More importantly, the EU authorities found that the EU industry's imports were the result of the DET system, which made imports of the finished product, biodiesel, more competitive than imports of the raw materials needed for biodiesel production and thus caused the EU producers to temporarily import the finished product from Argentina in order to stay in business. We consider

[825] European Union's first written submission, para. 332.
[826] European Union's first written submission, para. 334; opening statement at the second meeting of the Panel, para. 221.
[827] European Union's response to Panel question No. 70, para. 100; opening statement at the second meeting of the Panel, para. 221.
[828] Colombia's third-party submission, paras. 65-68 (referring to Panel Report, *Egypt – Steel Rebar*, paras. 7.119-7.121).
[829] Provisional Regulation, (Exhibit ARG-30), Recital 136; Definitive Regulation, (Exhibit ARG-22), Recital 160.
[830] Definitive Regulation, (Exhibit ARG-22), Recital 109 (referred to in European Union's second written submission, para. 164).

that the EU authorities provided a plausible explanation for the actions of the EU industry to support their conclusion that the imports were made temporarily and in self-defence.[831]

7.486. Argentina also takes issue with the EU authorities' explanation that even if the EU industry had not imported these volumes of biodiesel, trading companies would have imported them anyway and would have undercut the EU industry's prices to sell the product on the EU market.[832] Argentina submits that the conclusion that traders would import the same volume of biodiesel, amounting to 60% of the total imports, is not supported by any evidence.[833] The EU authorities stated in the Provisional Regulation, and confirmed in the Definitive Regulation that:

> In any case had the Union industry not imported these volumes of biodiesel, trading companies in the Union would have imported them, undercut the Union industry and sold them on the Union market, as they already import from these countries for sale to the diesel refiners in competition with the Union industry.[834]

In our view, this reflects a reasonable inference from the fact that the imported volumes of biodiesel were absorbed by the EU market, indicating demand that needed to be met.

7.487. Argentina argues that the European Union's position that the importation of biodiesel was a way to maintain a customer base is contradicted by the fact that imports made by the EU producers were counted as part of the market share of the allegedly dumped imports, rather than as part of the market share of the domestic industry.[835] During the investigation, CARBIO argued that the decrease in the EU domestic industry's own market share was compensated by the increase in the domestic industry's sales of its imports of biodiesel from Argentina and Indonesia.[836] The EU authorities rejected this argument in the Definitive Regulation, explaining that the domestic industry's market share has to reflect the sales of the EU industry of goods they produced themselves and not their trading activities.[837]

7.488. We have no issue with this conclusion. Nothing in the Anti-Dumping Agreement supports the proposition that imports by the domestic producers must be included in the domestic industry's market share.[838]

7.489. Finally, we note that the parties disagree whether, in the EU authorities' finding that the "Union industry" imported almost 60% of all imports from Argentina and Indonesia during the IP, the term "Union industry" was a reference to all EU biodiesel producers, or whether it excluded the three producers who had been excluded from the definition of the EU industry because of their large volume of imports.[839] In light of our conclusions above, we do not consider it necessary to

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[831] Definitive Regulation, (Exhibit ARG-22), Recitals 154-155 and 157.

[832] Provisional Regulation, (Exhibit ARG-30), Recital 136; Definitive Regulation, (Exhibit ARG-22), Recital 160.

[833] Argentina's second written submission, para. 240.

[834] Provisional Regulation, (Exhibit ARG-30), Recital 136, confirmed in Definitive Regulation, (Exhibit ARG-22), Recital 160.

[835] Argentina's second written submission, para. 241 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 156); comments on the European Union's response to Panel question No. 123, paras. 68-70. The decrease in the market share of the domestic industry was one of the elements relied upon by the EU authorities in their causation analysis. (Provisional Regulation, (Exhibit ARG-30), Recital 125; confirmed in Definitive Regulation, (Exhibit ARG-22), Recital 147)

[836] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 19.

[837] Definitive Regulation, (Exhibit ARG-22), Recital 156.

[838] We agree with the findings of the panel in *Korea – Certain Paper* that:

> [W]e are unaware of any provision in the Agreement which could support the proposition that dumped imports made by the domestic industry have to be excluded from the scope of dumped imports for purposes of the IA's injury determination. Imports from sources subject to an anti-dumping investigation may properly be treated as dumped imports irrespective of the identity of the importers making these imports. (*Korea – Certain Paper*, Panel Report, para. 7.287)

[839] In their determinations, the EU authorities defined the term "Union industry", as including 254 EU producers of biodiesel and excluding five companies: three who were excluded due to their reliance on imports from Argentina and Indonesia and two who had not produced biodiesel during the IP. This would suggest that the EU authorities found that 60% of all imports were made by all the EU producers that were found to be part of the domestic industry, i.e. excluding those producers who imported the most of the product under consideration. However, in response to a question from the Panel, the European Union clarified that the 60% figure referred to all EU producers, including the three companies excluded from the definition of the EU

reach a definitive view on the issue of the precise percentage of the imports from Argentina and Indonesia that were made by the EU industry in order to resolve Argentina's claims.

7.490. On the basis of the foregoing, we find that the EU authorities' conclusion that the EU industry's imports of the product concerned did not break the causal link between the dumped imports and the material injury to the domestic industry is one which an unbiased and objective investigating authority could have reached in light of the facts before it. We therefore reject Argentina's allegation that the European Union acted inconsistently with Articles 3.1 and 3.5 in finding that the EU industry's imports of Argentine and Indonesian biodiesel did not break the causal link between the dumped imports and the injury to the EU industry.

7.4.6.6 Double-counting regimes of certain EU member States

7.4.6.6.1 Introduction and factual background

7.491. Argentina submits that the EU authorities failed to appropriately assess the injurious effects of the "double-counting regimes" in place in certain EU member States and to distinguish and separate the injurious effects of such regimes from those of the allegedly dumped imports.

7.492. So-called "double-counting" refers to the fact that certain EU member States availed themselves of the possibility, under the EU Renewable Energy Directive, to allow minimum blending requirements (established pursuant to the same Directive) to be halved when the biodiesel used in blending is second generation biodiesel made from certain types of raw materials, particularly waste oils or used animal fats, rather than from virgin vegetable oil such as soybean, palm, or rapeseed oil. Thus, in these member States, second generation biodiesel meeting certain criteria "counts double" for purposes of satisfying the minimum incorporation requirements.[840]

7.493. In the investigation, CARBIO argued, *inter alia*, that the double-counting regimes of certain EU member States caused a decrease in the sales of first generation biodiesel during the IP, thereby injuring the EU domestic industry.[841] CARBIO submitted specific evidence concerning the French double-counting regime. In particular, it cited a public statement by Diester, a French biodiesel producer, in which this producer stated that it had experienced a significant decrease in its sales as a result of double-counting and that double-counting had diminished the French market by around 600,000 tonnes.[842] CARBIO also referred the EU authorities to a report of the French *Cour des Comptes*, which found that the introduction on the French market of 350,000 tonnes of double-counted biodiesel in 2011 caused Diester's sales to decrease by 700,000 tonnes – representing a third of its French production – and causing it to close down a non-depreciated production line.[843] CARBIO argued that in the light of this information, which showed that the double-counting policy in France alone caused 350,000 tonnes of biodiesel (representing 3.14% of total EU consumption) to disappear from the market altogether, the effect of double-counting on the domestic industry could not be considered limited or temporary.[844]

7.494. The EU authorities rejected CARBIO's allegations concerning the impact of EU member States' double-counting regimes on the domestic industry. In the Provisional Regulation, the EU authorities noted that their sample of domestic producers included both companies producing first generation biodiesel and companies producing double-counted biodiesel, that the latter's prices had also been affected by the low price of the dumped imports and that their financial situation was not significantly different to that of sampled companies making biodiesel from virgin vegetable oils.[845] The EU authorities also rejected an argument that the domestic industry was

industry, such that the if imports from these three producers were excluded, the EU industry imported 35%, not 60%, of all subject imports during the IP.

[840] Provisional Regulation, (Exhibit ARG-30), Recital 144.

[841] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 27. CARBIO also argued that lack of clarity and uniformity in the national legislations of EU member States and the lack of traceability of double-counting biodiesels had resulted in fraudulent practices. Argentina has not emphasized these arguments in its submissions to the Panel. (CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), para. 95)

[842] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), paras. 96 and 97.

[843] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), pp. 106 and 107 to Annex 16.

[844] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), paras. 93-98; CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), p. 27.

[845] Provisional Regulation, (Exhibit ARG-30), Recital 145.

suffering injury by not investing more in second-generation biofuel production; the EU authorities indicated that there was not enough waste oil available in the European Union to significantly increase the amount of processing.[846]

7.495. In the Definitive Regulation, the EU authorities rejected CARBIO's arguments concerning Diester and the French double-counting regime as follows:

> The negative impact on this one producer was however limited, temporary and only relevant for a part of the investigation period, as the double counting scheme was adopted in the Member State in which the company is located only in September 2011. Given that the financial performance of the sampled companies declined after September 2011, and this company was included in the sample, double counting cannot be considered a source of injury.[847]

They then confirmed the conclusions they had reached in the Provisional Regulation, stating:

> As the Union industry is composed of both companies producing biodiesel from waste oils and benefiting from double-counting in some Member States, and also of companies producing biodiesel from virgin oils, the movement in demand remains within the Union industry. Due to a finite supply of used oils which are needed for manufacturing double counting biodiesel, a large increase in production of double-counting biodiesel is difficult. Therefore, there is still a strong demand for first generation biodiesel. No significant imports of biodiesel eligible for double-counting was found during the investigation period, thereby confirming that double-counting is shifting the demand within the Union industry and not generating demand for imports. The Commission received no data from the interested party to show that double counting biodiesel had caused the price of virgin oil biodiesel to fall during the period under consideration. In fact data shows that double counting biodiesel has a small price premium over virgin biodiesel, the price of which is linked to mineral diesel.
>
> The decline in performance of the Union industry, which is composed of both types of producers, cannot be attributed to the double-counting regime in force in some Member States. In particular, the fact that companies in the sample producing double-counted biodiesel are also showing a decline in performance, as mentioned in recital 145 to the provisional Regulation, shows that injury caused by dumped imports is being suffered across the industry.[848]

7.496. Finally, the EU authorities addressed the argument made by several interested parties after the Definitive Disclosure that the amounts of double-counted biodiesel were underestimated. The authorities indicated that the amounts of double-counted biodiesel available on the EU market were limited in relation to the total sales of biodiesel during the IP, and repeated, in this context, that double-counted biodiesel was produced in the European Union "and therefore demand remain[ed] within the Union industry".[849]

7.4.6.6.2 Main arguments of the parties

7.4.6.6.2.1 Argentina

7.497. Argentina submits that the EU authorities failed to adequately assess the injurious effects of the double-counting regimes, which not only shifted demand from first-to second-generation

[846] Provisional Regulation, (Exhibit ARG-30), Recital 146.
[847] Definitive Regulation, (Exhibit ARG-22), Recital 175. In its first written submission, the European Union submitted that the statement in the Definitive Regulation that "the double counting scheme was *adopted* in the Member State in which the company is located only in September 2011" (emphasis added) was a clerical error and that "adopted" should be replaced by "repealed", (European Union's first written submission, para. 337). In response to a question from the Panel, the European Union further clarified that the double-counting regime in France was introduced in April 2010 without fixing a ceiling to the incorporation rate, and was amended in 2011 to fix a ceiling of 0.35%. (European Union's response to Panel question No. 113, para. 103)
[848] Definitive Regulation, (Exhibit ARG-22), Recitals 176-177.
[849] Definitive Regulation, (Exhibit ARG-22), Recital 178.

biodiesel, but actually reduced overall EU demand, citing evidence that the French regime alone caused an EU-wide drop in consumption of 3.14% in 2011.[850] Argentina also notes that in one of its submissions to the EU authorities, the EBB admitted that the French double-counting regime "may have caused, to a certain extent in 2011, injury to first-generation biodiesel producers, such as Diester".[851]

7.498. Argentina disagrees with the European Union's assertion that the negative performance of companies producing double-counted biodiesel showed that the double-counting regimes were not a source of injury.[852] Argentina submits that this conclusion is based on the mistaken assumption that the double-counting regimes could only have been found to be a cause of injury if the performance of producers of second-generation biodiesel were positive. Argentina submits that the negative effect of the double-counting regimes is evidenced by the reduced demand for biodiesel.[853]

7.499. Argentina also disputes the relevance of the EU authorities' conclusion that the French regime was in effect only during a part of the IP, given that the evidence shows that it had an impact during the IP.[854] Argentina argues that since the effects of the double-counting regime in France materialized during the IP, these effects should have been distinguished and separated as required by Article 3.5, regardless of the fact that it had been repealed.[855]

7.500. Finally, Argentina argues that the EU authorities examined the injurious effect of the double-counting regime in France, but failed to examine the impact of the double-counting regimes of other EU member States.[856]

7.4.6.6.2.2 European Union

7.501. The European Union argues that Argentine interested parties submitted evidence regarding the alleged detrimental effect of double-counting regimes only with respect to France and only with regard to one producer (Diester).[857] The European Union submits that since the information about implementation of the double-counting regimes at the national level was difficult to obtain, the EU authorities based their analysis of the effect of double-counting regimes on the data of the sampled EU producers (eight producers from seven member States).[858] Following this analysis, apart from a minor effect on one producer (Diester), the EU authorities did not identify any significant consequences of the regimes and found that the performance of both double-counting and non-double-counting biodiesel producers was in decline, and therefore the deterioration of their situation resulted from a different source of injury, i.e. the dumped imports.[859] The EU authorities also relied on the fact that the sampled producers' performances declined only after the scheme was ended.[860]

7.502. The European Union submits that the French scheme ended three months into the IP in September 2011 and that the evidence presented by Argentina itself indicated that the 2011 decline in production resulting from the double-counting regime would be more than cancelled during the following year.[861] In response to a question from the Panel, the European Union clarifies that the double-counting regime in France was introduced in April 2010 without fixing a ceiling to the incorporation rate, and was amended in 2011 to establish a ceiling of 0.35%. The European

[850] Argentina's first written submission, paras. 449-450.
[851] Argentina first written submission, para. 440 (referring to EBB's submission of 17 September 2013, (Exhibit ARG-47), p. 5).
[852] Argentina's second written submission, para. 245.
[853] Argentina's second written submission, para. 245.
[854] Argentina's first written submission, para. 452.
[855] Argentina's second written submission, para. 244.
[856] Argentina's first written submission, para. 448; second written submission, para. 246.
[857] European Union's first written submission, paras. 338-339.
[858] European Union's opening statement at the second meeting of the Panel, para. 222; response to Panel question No. 124, para. 121.
[859] European Union's response to Panel question No. 71, para. 101 (referring to Definitive Regulation, (Exhibit ARG-22), Recitals 176-178).
[860] European Union's first written submission, paras. 337-339.
[861] European Union's first written submission, para. 338.

Union argues that the injury this regime caused to first generation producers was limited and only relevant for a short period of the IP.[862]

7.4.6.6.3 Evaluation by the Panel

7.503. The EU authorities' analysis of "double-counting" as an alleged "other factor" consists of a general discussion of the effects of double-counting, in the context of rebutting interested parties' arguments that double-counting regimes injured the domestic industry. As part of this analysis, the EU authorities also consider specific evidence placed before them by CARBIO concerning the French double-counting regime and its effect on Diester. In both respects, the EU authorities reject the argument that double-counting is a cause of injury to the EU industry.

7.504. We understand the EU authorities' reasoning with respect to the evidence relevant to the French regime and Diester to be that the effect of the French double-counting regime had been limited in time given that in September 2011 France imposed a ceiling on the proportion of double-counted biodiesel.[863] The evidence before the EU authorities showed that the French regime had been put in place in April 2010, and the IP ran from 1 July 2011 to 30 June 2012, meaning that the French double-counting regime was in place without a ceiling for only approximately 3 months of the IP. Moreover, the same documents, which CARBIO cites, that reported the impact on Diester of the French double-counting regime in 2011 made the point that the negative impact of the double-counting regime would have essentially disappeared by 2012.[864] In our view, an unbiased and objective investigating authority could have concluded from the evidence before the EU authorities that the negative impact of the French double-counting regime resulting from the introduction of 700,000 tonnes of double-counted biodiesel on the French market was limited in scope and in time. This is particularly the case as this negative impact resulted from a specific situation having regard to the fact that France had initially not imposed a ceiling on the use of double-counted biodiesel. The fact that the impact on Diester corresponded – according to CARBIO – to 3% of the EU biodiesel market in 2011[865], or the fact that Diester may have had to close a production line, does not mean that it was unreasonable for the EU authorities to treat the impact of the French regime as limited in time and scope.[866]

7.505. We also note the EU authorities' explanation that the situation of sampled companies, including Diester, deteriorated after the introduction of the ceiling in the French regime.[867] In our view, these explanations reasonably support the EU authorities' conclusion that double-counting was not a cause of injury to the domestic industry.

7.506. Argentina also argues that the EU authorities failed to examine the impact of the double-counting regimes of EU member States other than France.[868] Argentina submits in this respect that CARBIO drew the attention of the EU authorities to the fact that double-counting regimes had been implemented in several EU member States, including France, Germany, Denmark and the

[862] European Union's response to Panel question No. 73, para. 103.

[863] Although the Definitive Regulation states that the French "double-counting" regime was adopted in September 2011, the European Union indicated that this was a clerical mistake and the paragraph should be read as stating that the French double-counting was repealed in September 2011, given that a ceiling was then imposed on the use of double-counted biodiesel. (See above, fn 847). We accept the European Union's explanation, particularly as it is the only one that makes the EU statement comprehensible, since the point that the EU authorities sought to make was that the performance of the companies declined only after the scheme had ceased to exist, thereby indicating that it was not responsible for that decline.

[864] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), pp. 104 and 113.

[865] While Argentina argues that the ceiling of 0.35% placed on double-counted biodiesel in France in September 2011 did not prevent European Union-wide consumption from being reduced by 3.14% as explained by the French *Cour des Comptes* (Argentina's first written submission, para. 452), in our view Argentina's argument is inapposite. We understand that 350,000 tonnes of double-counted biodiesel were sold on the French market during the year 2011, so we fail to see how it can be stated that the imposition of a ceiling by France in September 2011 did not prevent something which happened prior to the imposition of that ceiling.

[866] Moreover, we read the EU authorities' statement that the impact of double-counting on Diester was "limited" in the light of the statement of the EU authorities, in response to another aspect of the argument of interested parties on the issue of double-counting, that "the amounts of double-counted biodiesel available on the Union market were limited in relation to the total sales of biodiesel during the period under investigation". (Definitive Regulation, (Exhibit ARG-22), Recital 178)

[867] Definitive Regulation, (Exhibit ARG-22), Recital 175.

[868] Argentina's first written submission, para. 448; second written submission, para. 246.

Netherlands.[869] Argentina refers in particular to a submission made by CARBIO to the EU authorities, in which CARBIO addressed the double-counting regimes in other EU member States as follows:

> Several Member States of the EU have implemented [the Renewable Energy Directive] at the national level. For instance, in France, the eligible raw materials are waste vegetable oils, animal fats or oils and cellulose matter. Germany, for instance, does not include animal fats or oils in its double-counting provisions due to traceability concerns. Denmark, on the other hand, includes animal fats but not waste vegetable oils in its double-counting provisions. Under Dutch legislation, the raw materials that qualify are waste oils, residues and lignocellulosic materials.[870]

7.507. Article 3.5 only requires investigating authorities to consider – and distinguish – the injury caused by "other factors" that are "known" to the investigating authority. As concerns the effects that double-counting regimes could have on demand, CARBIO only submitted specific evidence with respect to the effects of the French regime, which we have discussed above.[871] CARBIO's submission with respect to other double-counting regimes only describes certain aspects of those regimes; CARBIO did not submit to the EU authorities specific evidence concerning the effects of those other double-counting regimes. In the absence of specific evidence that the double-counting regimes of other member States were such as to injure the EU domestic industry, we do not consider that the EU authorities were required, under the terms of Article 3.5, to examine at greater length the impact of those regimes on the domestic industry. This is particularly the case as the EU authorities did not find that the one double-counting regime which they considered in more detail – that established by France – had injured the domestic industry during the IP.

7.508. Concerning the EU authorities' general discussion of the effects of double-counting regimes, Argentina takes issue with what it regards as the EU authorities' "misplaced insistence" on the fact that double-counting only "shifts demand" within the European Union[872], citing in particular the findings in the report of the French *Cour des Comptes* that double-counting in France alone reduced European Union-wide consumption of biodiesel, whether first generation or not, by more than 3% in 2011.

7.509. It cannot be contested that double-counting regimes reduce overall demand for biodiesel in the European Union; as Argentina explains, the very concept of double-counting means that one tonne of "double-counted" biodiesel replaces two tonne of vegetable oil biodiesel, which in principle reduces overall demand of biodiesel of any type by one tonne. Read in isolation, the EU authorities' reference to demand shifting within the European Union[873] could be read as suggesting that the EU authorities misunderstood this argument made by CARBIO. However, we read this statement as making the point that although double-counting may affect one segment of the EU domestic industry, it benefits another segment of the EU industry (and not foreign producers) by creating demand for "double-counted" second generation biodiesel of EU origin; in this context, the EU authorities noted that there had been no significant imports of double-counted biodiesel.[874] In addition, we read the EU authorities' reference to the amounts of double-counted biodiesel being limited as an indication that double-counting only affected a fraction of the EU demand for biodiesel[875], and their reference to the limited supply of raw materials for the

[869] Argentina's response to Panel question No.72, para. 173 (referring to CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), paras. 93-98).

[870] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), para. 94.

[871] In its submission, CARBIO further cited a press release from the EBB regarding the negative effects of double-counting regimes. However, the press release at issue focused on problems generated by what the EBB saw as the lack of guidance concerning the implementation of the double-counting mechanism across EU member States and issues with compliance or verification, adding that "[i]f not consistently implemented in member States' legislations, the double-counting mechanism will inevitably lead to important disruptions of the EU biofuels market". (CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), para. 95). Hence, this press release concerns a secondary type of issues possibly arising out of the double-counting regimes (i.e. the potential for varying implementation across the European Union and risks of circumvention), and differs from the issues that are at the heart of Argentina's claims, pertaining to the effects of double-counting on demand for first generation biodiesel and on overall EU demand for biodiesel.

[872] Argentina's first written submission, para. 449 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 176).

[873] Definitive Regulation, (Exhibit ARG-22), Recital 176.

[874] Definitive Regulation, (Exhibit ARG-22), Recital 176. See also ibid., Recital 178.

[875] Definitive Regulation, (Exhibit ARG-22), Recital 178.

production of double-counted biodiesel as an indication that double-counted biodiesel would not significantly replace biodiesel made from virgin oils.[876]

7.510. Argentina also takes issue with the EU authorities' statement that both producers of non-double-counted biodiesel and producers of double-counted biodiesel saw their situation deteriorate. Argentina reads this statement as being premised on the unfounded assumption that double-counting could only have harmed the domestic industry if producers of double-counted biodiesel had done well, whereas in Argentina's view, double-counting harms the domestic industry by virtue of reducing overall demand for biodiesel, whether first generation or "double-counted".[877] However, in our view, the EU authorities' discussion of this issue[878] indicates that they considered that, if double-counting had been an important cause of injury, producers of "double-counted" biodiesel would have been expected to fare better than producers of first generation biodiesel. Argentina has not convinced us that this inference is unreasonable and that an unbiased and objective investigating authority could not have inferred from the fact that producers of double-counted biodiesel were also injured, that both types of producers were injured by dumped imports. Moreover, we note that the EU authorities examined the impact of double-counted biodiesel on the price of first generation biodiesel, and found that double-counted biodiesel sells for a small premium over biodiesel made from virgin oil.[879]

7.511. In light of the foregoing, and despite that the EU authorities' treatment of this "other factor" of injury could have been better explained, we do not consider that the EU authorities' conclusions could not have been reached by an unbiased and objective investigating authority in the light of the evidence and arguments before it. Consequently, we reject Argentina's allegations that the European Union acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in the EU authorities' evaluation of "double-counting" as an "other factor" allegedly causing injury to the domestic industry.

7.4.6.7 Alleged lack of vertical integration of and access to raw materials of the EU industry

7.4.6.7.1 Introduction and factual background

7.512. During the investigation, CARBIO argued that the lack of vertical integration of the EU industry and its lack of access to raw materials placed it at a disadvantage compared to the Argentine producers and constituted "other factors" causing injury to the EU biodiesel industry.[880] In particular, CARBIO argued that production of biodiesel in Argentina was more efficient than in the European Union because the Argentine industry was vertically integrated, with the growing of soybeans, crushing plants, and biodiesel production units all located in proximity to one another and close to port facilities.[881] By contrast, CARBIO argued, the EU industry was not integrated with crushing facilities and relied primarily on imported vegetable oil produced outside of the European Union or far from its biodiesel production units.[882] CARBIO further argued, regarding the raw material used in the production of biodiesel, that the EU industry mainly used rapeseed oil, whereas the Argentine industry used soybean oil, which on average was 10% cheaper.[883]

7.513. In the Provisional Determination, the EU authorities rejected these arguments on the ground that some of the sampled EU producers were located at ports with seamless access to imported raw materials brought in by ship, others had their biodiesel producing plants on the same site as their vegetable oil producing plants, and many – in the south of Europe – were located at port sites deliberately to access raw materials imported from Argentina and Indonesia or were on the same site as their customers (fossil oil refineries).[884] The EU authorities also considered that

[876] Definitive Regulation, (Exhibit ARG-22), Recital 176.
[877] Argentina's second written submission, para. 245.
[878] Provisional Regulation, (Exhibit ARG-30), Recital 145; Definitive Regulation, (Exhibit ARG-22), Recital 177.
[879] By contrast, the EU authorities found that dumped imports undercut the prices of the domestic industry. (Provisional Regulation, para. 126)
[880] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), para. 84.
[881] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), para. 85; CARBIO's Powerpoint presentation of 14 December 2012, (Exhibit ARG-43), slides 19-20.
[882] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), paras. 85-88.
[883] CARBIO's written submission of 5 November 2012, (Exhibit ARG-37), para. 91.
[884] Provisional Regulation, (Exhibit ARG-30), Recital 142.

the effect of the DET systems of Argentina and Indonesia had been to make the raw materials more expensive than the finished product, which injured the EU industry by making it economically impossible for it to manufacture biodiesel from soybean oil and palm oil in the European Union.[885]

7.514. CARBIO contested these provisional findings, arguing that the EU producers were *either* located close to ports or close to raw materials. By contrast, Argentine producers were located close to *both* ports and raw materials.[886] In addition, CARBIO argued that in the Provisional Regulation, the EU authorities had recognized a direct causal link between the domestic industry's difficulties in obtaining imported feedstock at viable prices and the injury it suffered.[887] CARBIO referred to the EU authorities' findings that:

> [D]ue to a poor rapeseed harvest in 2011 the cost of production rose to an extent that it could not be covered by an increase in sales price. It was uneconomical for the Union industry to import alternative raw materials from Argentina and Indonesia due to the tax regimes in place in those countries and therefore was forced to resort to importing the finished biodiesel in order to keep down its costs and therefore reducing overall losses.
>
> ...
>
> The Union producers … could not pass on the further increase in cost from 2011 to the IP, due to an increase in the feedstock price, which represents close to 80% of the full cost of production of biodiesel. These cost increases could not be fully passed on to customers on the Union market, causing the losses in the IP.[888]

7.515. CARBIO requested that the EU authorities isolate these factors – the poor rapeseed harvest of 2011, the domestic industry's lack of feedstock and increased feedstock prices – in its injury analysis.[889] In addition, CARBIO argued that rapeseed is more expensive than soybeans and that the poor harvest of 2011 exacerbated the problem.[890]

7.516. In the Definitive Disclosure, the EU authorities indicated that they would confirm their provisional findings based on the fact that no new evidence had been submitted on this issue.[891] In its comments on the Definitive Disclosure, CARBIO contested this statement and referred to its comments on the Provisional Disclosure of 1 July 2013 and to statements it made at the hearing held in July 2013.[892]

7.517. In the Definitive Regulation, "in the absence of any new comments", the EU authorities confirmed their findings in the Provisional Regulation.[893]

7.4.6.7.2 Main arguments of the parties

7.4.6.7.2.1 Argentina

7.518. Argentina argues that EU biodiesel producers are at a competitive disadvantage compared to Argentine producers (including the Argentine producers to which they are related) because of their lack of vertical integration and of access to raw materials.[894] As part of this argument, Argentina submits, first, that EU producers are at a disadvantage because they must import soybeans, which contain only 20% oil, as opposed to soybean oil, which results in increases in the

[885] Provisional Regulation, (Exhibit ARG-30), Recital 142.
[886] CARBIO's Powerpoint presentation of 8 July 2013, (Exhibit ARG-46), slide 17.
[887] CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), pp. 14 and 15.
[888] Provisional Regulation, (Exhibit ARG-30), Recitals 111 and 120 (quoted in CARBIO's comments on the Provisional Disclosure, (Exhibit ARG-51), p. 12).
[889] CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), p. 12.
[890] CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), p. 14.
[891] Definitive Disclosure, (Exhibit ARG-35), para. 138.
[892] CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), pp. 12 and 13; CARBIO's Powerpoint presentation of 8 July 2013, (Exhibit ARG-46), slides 15 and 16.
[893] Definitive Regulation, (Exhibit ARG-22), para. 172 (confirming Provisional Regulation, (Exhibit ARG-30), Recitals 141 and 142).
[894] Argentina's first written submission, para. 461.

volume of cargo that must be transported and imported.[895] Second, feedstock production in the European Union is not enough to cover the demand of the biodiesel industry and EU producers therefore have to rely on imported feedstock.[896] Third, vertically integrated companies benefit from cost efficiencies due to on-site production of vegetable oil; in this respect, Argentina argues that the EU producers' location close to ports does not cure the relative disadvantage caused by the fact that they are not vertically integrated, as an additional phase, viz. transport of the raw materials, is added to their production chain.[897] Argentina further argues that, as acknowledged by the EU authorities, two factors related to the issue of access to raw materials – the poor rapeseed harvest in the European Union in 2011 and rapeseeds being on average 10% more expensive than soybeans – injured the domestic industry. However, the EU authorities have failed to examine these factors to ensure that the resulting injury was not attributed to dumped imports.[898]

7.519. Finally, Argentina takes issue with the EU authorities' statement in the Definitive Regulation that no new comments were submitted on the issue following the provisional determination, contending that CARBIO extensively commented on this issue during the investigation. [899]

7.4.6.7.2.2 European Union

7.520. The European Union submits, first, that most of the factors pertaining to the alleged lack of vertical integration and access to raw materials are constant and existed also at the time when the EU industry was profitable, and they cannot be held responsible for the deterioration in the condition of the EU industry during the IP.[900] Second, the European Union contests Argentina's assumption that vertical integration is necessarily a more efficient way of operating in the biodiesel industry, particularly when processors and growers in different countries are located close to ports.[901] Third, the European Union counters Argentina's argument that the EU industry is disadvantaged by having to import soybeans, which contain only 20% oil, noting that oilseeds also have value as animal feed, which is in itself a sufficient reason to import them.[902] Finally, regarding the poor rapeseed harvest in 2011, the European Union submits that normally in such a situation, biodiesel producers would switch to alternative sources of supply, but because of the differential export tax systems in Argentina and Indonesia, they had to purchase the finished product from these countries.[903] Regarding the fact that rapeseeds are on average 10% more expensive than soybeans, the European Union responds that this is a constant factor and could not have explained the deterioration in the situation of the domestic industry.[904]

7.4.6.7.3 Arguments of the third parties

7.521. **Colombia** notes that the arguments submitted by Argentina with regard to the EU industry's lack of vertical integration and of access to raw materials raise the issue of the possible absence of a causal link between the dumped imports and the injured suffered by the EU industry.[905]

7.4.6.7.4 Evaluation by the Panel

7.522. Argentina primarily takes issue with the EU authorities' conclusion that the structure of the EU industry was not a cause of injury. The two factors, namely lack of vertical integration and lack of access to raw materials, identified by Argentina, essentially are inherent features of the EU domestic industry that, according to Argentina, render it less competitive than the Argentine producers. In our view, however, this line of argument is premised on a misreading of Article 3 of the Anti-Dumping Agreement and its various paragraphs, including Article 3.5. The concept of

[895] Argentina's first written submission, para. 464(a).
[896] Argentina's first written submission, para. 464(b).
[897] Argentina's first written submission, para. 464(c); second written submission, para. 249.
[898] Argentina's first written submission, para. 466.
[899] Argentina first written submission, paras. 463 and 465 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 172).
[900] European Union's first written submission, para. 342.
[901] European Union's first written submission, para. 343.
[902] European Union's first written submission, para. 343.
[903] European Union's first written submission, para. 345.
[904] European Union's first written submission, para. 346.
[905] Colombia's third-party submission, paras. 69-72.

injury envisaged by Article 3 relates to negative *developments* in the state of the domestic industry.[906] Article 3 is not intended to address differences in the structure of the domestic industry as compared to that of the exporting Member. Rather, it is clear from the text of Article 3.5 and from its indicative list of such "other factors" – which all pertain to *developments* in the situation of the domestic industry – that the authority is not required to conduct a non-attribution analysis with respect to features that are inherent to the domestic industry and have remained unchanged during the period considered by the investigating authority for purposes of its injury analysis.

7.523. Argentina argues, citing to the Appellate Body Report in *US – Wheat Gluten*, that the relevant issue is not when a factor occurred, took place, or varied, but when its effects were felt[907], and that although the lack of vertical integration or access to raw materials were constant features of the EU industry, they existed during the period of investigation and their effects were felt during that period.[908] We agree with the European Union that the Appellate Body Report in *US – Wheat Gluten* does not address the issue of whether a feature or characteristic of a domestic industry which is inherent to that domestic industry and does not vary over the course of the period considered may properly be regarded as an "other factor". Rather, that Report concerns the timing of the injury caused by an "other factor".[909] Argentina has not argued that the effect of the lack of raw materials or vertical integration changed during the period considered so as to cause injury to the domestic industry. Therefore, the Appellate Body Report in *US – Wheat Gluten,* where the factual circumstances were different, is inapposite to the present case, and Argentina has not convinced us that the EU authorities were required by Article 3.5 to conduct a non-attribution analysis with respect to the inherent features or characteristics of the EU biodiesel industry *vis-à-vis* the Argentine industry. For the same reason, i.e. because this alleged fact does not, in our view, constitute an "other factor" within the meaning of Article 3.5, we do not consider Argentina's argument that the EU authorities failed to address the fact that rapeseed is on average 10% more expensive than soybeans as an "other" factor causing injury to the EU industry.

7.524. Nonetheless, we will consider the EU authorities' determination with respect to the alleged lack of vertical integration and of access to raw materials of the EU domestic industry. We have carefully reviewed the EU authorities' discussion of this issue and the explanations for rejecting the arguments that the EU industry's alleged lack of access to raw materials and lack of vertical integration were "other factors" injuring that industry. We are not convinced that the conclusions reached by the EU authorities concerning these two alleged other factors are unreasonable. In particular, we read the Provisional Regulation as tacitly making the point that whereas the Argentine industry may have benefited from certain advantages (e.g. location close to the source of raw materials), the EU industry may itself have benefited from certain other advantages (e.g. location close to ports or to the final customer). We consider the EU authorities' explanation on this issue reasonable. In any event, we consider the EU authorities' conclusion that these factors were not the cause of the deterioration in the condition of the domestic industry in the IP was reasonable in the light of the evidence before them.

7.525. Argentina also raises concerns regarding the EU authorities' treatment of the poor rapeseed harvest of 2011 and the increase in feedstock prices during the IP. Argentina argues that the EU authorities failed to address the effects of this poor harvest and the increase in feedstock prices in its consideration of this injury factor even though in the Provisional Regulation, the EU authorities themselves suggested that the poor rapeseed harvest of 2011 had injured the EU industry, and Argentine interested parties subsequently asked the EU authorities to isolate the effects of the poor rapeseed harvest and the increase in feedstock prices. Argentina refers to the following language in the Provisional Regulation as an acknowledgment by the EU authorities of the impact of the 2011 rapeseed harvest:

> Although over the period considered the Union industry was able to increase its sales price, due to a poor rapeseed harvest in 2011 the cost of production rose to an extent that it could not be covered by an increase in sales price. It was uneconomical for the

[906] This is particularly clear from the text of Article 3.4, which requires consideration of the evolution of the state of the domestic industry and calls upon the authority to consider, *inter alia*, "declines" in various factors or indices.

[907] Argentina's response to Panel question No. 69, para. 169 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 87 and 88).

[908] Argentina's second written submission, para. 250.

[909] European Union's second written submission, para. 169.

> Union industry to import alternative raw materials from Argentina and Indonesia due to the tax regimes in place in those countries and therefore was forced to resort to importing the finished biodiesel in order to keep down its costs and therefore reducing overall losses.[910]

7.526. The EU authorities addressed the effect of the poor rapeseed harvest in both the Provisional Regulation and the Definitive Regulation, in the context of their evaluation of the impact of dumped imports on domestic industry. In our view, the statement quoted above reflects the EU authorities' conclusion that but for the export tax regime, the poor rapeseed harvest would not have had the adverse effects it did. Thus, it seems to us to be more in line with a notion of indirect causation in injury by imports rather than an "other" factor causing injury. While it would have been helpful if the EU authorities had provided a more thorough discussion of the effects of the poor 2011 rapeseed harvest, in our view, the EU authorities' conclusion, that the negative impact of the poor harvest were compounded by the effect of the differential export tax regimes, satisfies the requirements of Article 3.5.

7.527. On the basis of the foregoing, we reject Argentina's allegations that the European Union acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in their evaluation of the alleged lack of vertical integration and of access to raw materials as "other factors" causing injury to the domestic industry.

7.4.6.7.5 Overall conclusion with respect to Argentina's claims concerning the EU authorities' non-attribution findings

7.528. We recall that we have considered and rejected the arguments raised by Argentina with respect to the EU authorities' non-attribution analysis as it concerns each of the four "other factors" at issue, finding in each case that the EU authorities' conclusions with respect to the specific "other factor" were conclusions which an unbiased and objective investigating authority could have reached in the light of the facts before it.

7.529. Consequently, we find that Argentina has not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we conclude as follows:

a. With respect to the objections raised by the European Union in its request for a preliminary ruling:

   i. The claim under Article 9.3 of the Anti-Dumping Agreement set forth in paragraph 2(B)(6) of Argentina's panel request falls within our terms of reference;

   ii. The claims under Article VI:1 of the GATT 1994 set out in paragraphs 2(A)(1) and 2(A)(2) of Argentina's panel request fall within our terms of reference;

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[910] Provisional Regulation, (Exhibit ARG-30), Recital 111. In addition, CARBIO had made a similar point with respect to the following paragraph of the Provisional Regulation:

> The Union producers were able to pass on most of the increase in cost of production from 2010 to 2011 (+33 percentage points) but only by lowering profitability to the break-even point. However they could not pass on the further increase in cost from 2011 to the IP, due to an increase in the feedstock price, which represents close to 80% of the full cost of production of biodiesel. These cost increases could not be fully passed on to customers on the Union market, causing the losses in the IP. (Provisional Regulation, (Exhibit ARG-30), Recital 120, confirmed in Definitive Regulation, (Exhibit ARG-22), Recital 143)

(See CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), pp. 12-14). The issue of poor rapeseed harvest and increase in feedstock prices during the IP was raised by Argentine interested parties in the context of their argument that the lack of vertical integration and access of raw materials were other factors causing injury to the domestic industry. In particular, CARBIO noted that that poor rapeseed harvest of 2011 is a part of the wider problem of the EU biodiesel industry, namely their access to the raw materials. (CARBIO's comments on the provisional disclosure, (Exhibit ARG-51), p. 12)

iii. The claim under Article 2.2 of the Anti-Dumping Agreement set forth in paragraph 2(A)(2) of Argentina's panel request falls within our terms of reference; and

iv. We do not rule on the other objections in the European Union's request for a preliminary ruling.

b. With respect to Argentina's "as such" claims:

i. Argentina has not established that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent 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;

ii. Argentina has not established that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994; and

iii. Argentina has not established that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement 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.

c. With respect to Argentina's claims concerning the anti-dumping measures 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; we do 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;

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;

iii. We do not reach a finding as to 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;

iv. We do not reach findings as to 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;

v. Argentina has 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";

vi. Argentina has 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;

vii. 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;

viii. 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 it relates to production capacity and capacity utilization.

ix. Argentina's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the EU authorities' evaluation of return on investments fall outside our terms of reference; and

x. Argentina has not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue have been found to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Argentina under these agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994. Argentina requests that we use our discretion under the second sentence of the same article to suggest ways in which the European Union should bring its measures into conformity with the Anti-dumping Agreement and the GATT 1994. Argentina considers that the measures at issue in this dispute should be withdrawn. We decline to exercise our discretion under the second sentence of Article 19.1 of the DSU in the manner requested by Argentina.

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WORLD TRADE ORGANIZATION

WT/DS473/R/Add.1

29 March 2016

(16-1745)

Original: English

EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS473/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Revised on 27 January 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel on 25 November 2014.

4. The Panel shall meet in closed session. The parties, and Members who have notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all the members of its own delegation and shall ensure that each member of its own delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event, no later than in its first written submission to the Panel. If Argentina requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Argentina shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal and answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comments, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of it into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibit upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Argentina could be numbered ARG-1, ARG-2, etc. If the last exhibit in connection with the first submission was numbered ARG-5, the first exhibit of the next submission thus would be numbered ARG-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including in writing prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Argentina to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Argentina presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Argentina. If the European Union chooses not to avail itself of that right, the Panel shall invite Argentina to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that

interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than in responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each executive summary submitted by each party of opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages each. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXX@wto.org, XXXX@wto.org and XXXX@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted 25 November 2014

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS473.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as BCI by the Commission of the European Union in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. As required by Article 18.2 of the DSU, a party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these working procedures to protect BCI. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in this dispute. All third party access to BCI shall be subject to the terms of these working procedures.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party under the terms specified in these procedures, or an outside advisor to a party or third party for the purposes of this dispute.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

7. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

8. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF ARGENTINA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF ARGENTINA

I. INTRODUCTION

1. Argentina has initiated this dispute with regard to two different measures: first, Article 2(5) of Council Regulation (EC) No 1225/2009 (hereinafter, the Basic Regulation), that Argentina challenges as being inconsistent "as such" with several provisions of the Anti-Dumping Agreement (hereinafter, ADA), and the General Agreement on Tariffs and Trade 1994 (hereinafter, GATT 1994), and second, the anti-dumping measures imposed by the European Union (hereinafter, EU) on imports of biodiesel originating in Argentina[1], that Argentina submits that are inconsistent with several obligations under the ADA and the GATT 1994.

II. "AS SUCH" CLAIMS IN RELATION TO 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

A. Background, scope and content of Article 2(5) of the Basic Regulation

2. The original version of Article 2(5) of the Basic Regulation as adopted in 1994 to implement the ADA did not contain the provision currently set out in its second paragraph, which Argentina challenges in the present dispute. This paragraph has been added by Council Regulation (EC) No 1972/2002 of 5 November 2002. The historical overview of this provision shows that the second paragraph of Article 2(5) has actually been introduced to keep the possibility in the calculation of normal value to disregard the "costs" of the producers when the authorities consider that these costs are "*abnormally or artificially low*", because they do not reflect "*market values*" or are "*distorted*".

3. According to Council Regulation (EC) 1972/2002 and the consistent practice of the EU authorities Article 2(5), second paragraph, of the Basic Regulation refers to situations where the prices of an input are "abnormally or artificially low" because they are set in a "regulated market" or because of the existence of some alleged "distortion" on the domestic market. This interpretation has been confirmed by the General Court of the EU. Article 2(5), second paragraph, requires, in such a situation, that these costs "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." Such a rule is inconsistent with various provisions of the ADA and of the GATT 1994.

B. Article 2(5) of the Basic Regulation violates Article 2.2.1.1 of the ADA and, as a result, Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994

4. Article 2.2.1.1 of the ADA, correctly interpreted in accordance with the principles of treaty interpretation does not allow investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be "abnormally or artificially low", because they do not reflect market values or because they are allegedly distorted.

- **The ordinary meaning of Article 2.2.1.1 of the ADA**

5. Article 2.2.1.1 establishes an obligation on the investigating authorities to calculate the costs "on the basis of records kept by the exporter" when constructing normal value, provided that two

[1] 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, OJ 2013 L 141 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, OJ 2013 L 315. (Definitive Regulation).

conditions are fulfilled: (i) such records are in accordance with the generally accepted accounting principles (GAAP) of the exporting country and (ii) such records reasonably reflect the costs associated with the production and sale of the product under consideration.

6. There are only two exceptions to the above obligation to calculate costs on the basis of the records kept by the exporters. It is only where the records are inconsistent with GAAP or that they do not reasonably reflect the costs associated with the production and sale of the product under consideration that the authorities have the right not to use the data in the records. Whenever the records are consistent with GAAP of the exporting country and they reasonably reflect the costs associated with the production and sale of the product, the investigating authorities *must* calculate the costs on the basis of the records kept by the exporter or producer.

7. The second condition included in Article 2.2.1.1, first sentence, does not authorize the authorities to reject or adjust the data in the records because the prices are "*abnormally or artificially low*", because they do not reflect "*market values*" or are "*distorted*". This interpretation flows from the ordinary meaning of the words of Article 2.2.1.1, first sentence and from the structure of that sentence. In providing that the records must reasonably reflect "the costs" associated with the production and sale of the product under consideration, Article 2.2.1.1 of the ADA expressly refers to the charges or expenses which have actually been incurred by the producer concerned for the production and sale of the product under consideration, regardless of whether such costs are lower than international prices or of whether they are, in the authorities' view, market-based.

8. Moreover, the word "reasonably" in Article 2.2.1.1 is attached to the verb "reflect" and not to the word "costs". This sentence does not provide that the records must reflect "reasonable costs" or "costs which are reasonable in light of prices on other markets". This analysis excludes an interpretation that refers to whether the costs included in the records are in line with international prices or prices on other markets. In other words, the sentence does not provide that the records must reflect costs which are reasonable, but that they must reflect "costs associated with the production and sale of the product under consideration" and in a reasonable way.

- **The context of Article 2.2.1.1, first sentence, of the ADA**

9. The second and third sentences of Article 2.2.1.1 provide relevant context in construing the obligation set out in the first sentence. The second sentence provides what the authorities have to do if they use an alternative cost allocation methodology. This confirms that the second condition in the first sentence refers to a cost allocation issue.

10. Article 2.2.2 of the ADA deals with "the amounts for administrative, selling and general costs and for profits" which are also central elements for constructing normal value. It flows from this rule that if the drafters of the ADA had intended to authorize the authorities to use, for the purposes of the calculation of the cost of production, data other than those of the producers, they would have explicitly provided so. Furthermore, the different ways set out in Article 2.2.2 to determine SG&A and profit all relate to data in the country of origin. This supports the view that a "reasonability" test under Article 2.2.1.1, first sentence, by reference to data outside the country of origin is not relevant and contrary to the principles found in the context of the dumping determination.

11. Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 expressly refer to "the cost of production *in the country of origin*". Since Article 2.2.1.1 of the ADA seeks to provide further details "for the purposes of paragraph 2", it is clear that the interpretation of Article 2.2.1.1 must be consistent with Article 2.2, to which Article 2.2.1.1 directly refers. The express indication in Article 2.2 of the ADA (and Article VI:1 of the GATT 1994) that the cost of production is the one "in the country of origin" does not allow to conclude that the "costs" referred to in Article 2.2.1.1 could be found to be "unreasonable" in view of benchmarks outside of the country of origin, such as prices in other markets. Since the construction of the normal value must be based on the "cost of production in the country of origin", it does not make any sense to reject costs on the ground that they would not reflect international prices or prices in other markets.

12. An interpretation of the first sentence of Article 2.2.1.1 whereby the cost data could be rejected because they are lower than prices in other markets is inconsistent with the requirement

under Article 2.2 of the ADA that the constructed normal value be based on the "cost of production in the country of origin".

- **The object and purpose of the ADA**

13. By providing that the records are not reasonable if the cost data reflect prices which are lower than the prices on other markets, Article 2(5), second paragraph, undermines the fundamental logic of "dumping" which is based on a comparison between the export price of the product concerned and the price of the like product on *the domestic market*, as defined in Article VI:1 of the GATT 1994 and 2.1 of the ADA.

- **Case law**

14. The interpretation according to which the first sentence of Article 2.2.1.1 of the ADA does not allow investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration when the prices of these inputs in their domestic market are found to be "abnormally or artificially low", because they do not reflect market values or because they allegedly are distorted is confirmed by the Panel Reports in *US – Softwood Lumber V*[2], *EC – Salmon*[3], and *Egypt – Steel Rebar*.[4]

C. Article 2(5) of the Basic Regulation is inconsistent with Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994

15. Article 2(5) of the Basic Regulation violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 since those provisions expressly require that the margin of dumping must be determined by comparison with the cost of production in the country of origin.

16. Article 2.2 expressly provides that when the margin of dumping is established by comparison with a constructed normal value, the comparison shall be made with "the cost of production in the country of origin". Article VI:1(b)(ii) of the GATT 1994 similarly refers to "the cost of production of the product in the country of origin." Since Article 2(5), second paragraph, of the Basic Regulation provides that the costs 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", it is inconsistent with Article 2.2 and Article VI:1(b)(ii) of the GATT 1994 which require to use the cost of production "in the country of origin".

D. The EU violates Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA

17. Since Article 2(5), second paragraph, of the Basic Regulation violates Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1 of the GATT 1994, it follows that the EU has not ensured the conformity of its laws, regulations and administrative procedures with the provisions of the ADA and of the GATT 1994 and, therefore, has also violated Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA.

III. CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL ORIGINATING IN ARGENTINA

A. The EU acted inconsistently with Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 in failing to calculate the cost of production on the basis of the records kept by the producers under investigation

18. Argentina submits that the EU acted inconsistently with the obligation laid down in the first sentence of Article 2.2.1.1 of the ADA since it calculated the exporting producers' cost of soybean on the basis of an average of the FOB reference price and not on the basis of cost of soybean

[2] Panel Report, *US – Softwood Lumber V*, para. 7.321.
[3] Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[4] Panel Report, *Egypt – Steel Rebar*, para. 7.393.

included in the accounting records of those producers.[5] If this Panel finds that Article 2(5) of the Basic Regulation is *as such* inconsistent with Article 2.2.1.1 of the ADA, it follows that its application in the anti-dumping investigation concerning imports of biodiesel originating in Argentina necessarily produced a result that is also inconsistent with Article 2.2.1.1 of the ADA. In any case, Argentina submits that the violation of these provisions is supported by five arguments.

19. First, Argentina submits that the finding that the records of the Argentinean producers did not reasonably reflect the costs of "the main raw material" is based on an improper establishment of the facts. This finding ignores the fact that prices in Argentina are freely set and based on offer and demand, as recognized by the EU itself in both the Definitive Regulation and in the parallel anti-subsidy investigation.

20. Second, in finding that the costs of the main raw material were not reasonably reflected in the records of the exporting producers, the EU ignored the ordinary meaning of the terms of the first sentence of Article 2.2.1.1 of the ADA. By referring to the term "costs", Article 2.2.1.1 refers to the expenses actually incurred by the producer. Therefore, the fact that the cost of soybean incurred and reported by the exporters was lower than the international price did not allow the EU to conclude that the records of the exporters do not reasonably reflect the *costs* of soybean associated with the production and sale of biodiesel.

21. Third, the interpretation of the first sentence of Article 2.2.1.1 of the ADA at the basis of the EU's refusal to base the cost of soybean on the records of the exporting producers cannot be reconciled with the structure of that provision. In this sentence, "records" is the subject, "costs" the object, "reflect" the verb and "reasonably" the adverb which qualifies the term "reflect". The misplaced reading of "international prices" into the second condition of Article 2.2.1.1 of the ADA leads to the result that for "records" to reflect "costs" according to the interpretation of the EU, such records should have reflected costs that a producer actually never incurred, namely, in this case, the FOB reference price of soybean.

22. Fourth, the refusal of the EU to base the cost of soybean on the records of the producers under investigation is based on a reading of Article 2.2.1.1 of the ADA that is not supported by the context of this provision. The second and third sentences of Article 2.2.1.1, dealing with cost allocation issue, show that the "reasonably reflect" condition in the first sentence of Article 2.2.1.1 refers to the actual costs incurred by the producers instead of international prices. Furthermore, Articles 2.2 of the ADA and VI:1(b)(ii) of the GATT 1994 expressly refer to the cost of production *in the country of origin*. Given that Article 2.2.1.1 of the ADA is aimed at further specifying that clause, Article 2.2.1.1 must be read in a manner that is consistent therewith. Therefore, it does not make any sense to reject costs on the grounds that they would not reflect "international prices", since it implies a comparison with prices outside of the country of origin. Argentina also reiterates the reference to Article 2.2.2 of the ADA in this respect.

23. Fifth, Argentina submits that, in finding that the records of exporting producers "do not reasonably reflect costs" because they do not reflect international prices despite the fact that they reflect the costs actually paid by the exporting producer, and in replacing the costs reflected in those records by international prices, the EU undermines the object and purpose of the ADA which is to counteract dumping that occurs when the export price is less than the comparable price, in the *domestic* market and not on any other markets. The EU subverted the fundamental purpose of the ADA and used the Agreement to address differences in price between the export price of the product concerned and international prices, instead of comparable prices on the domestic market.

B. The EU acted inconsistently with Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994 in failing to construct normal value of biodiesel on the basis of the cost of production in Argentina

24. In replacing the cost of soybean reported in the records of the exporting producers by an average of the FOB reference price, the EU failed to construct normal value on the basis of the cost of production in the country of origin. Consequently, the EU acted inconsistently with Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994.

[5] It is worth recalling that the Definitive Regulation confuses soybean and soybean oil as the direct input in the production of biodiesel. It thus deliberately blurs the distinction between the product concerned (biodiesel), the main input used in its production in Argentina (soybean oil), and indirect inputs used for the production of the direct inputs (soybean).

C. The EU acted inconsistently with Article 2.2.1.1 of the ADA by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production

25. By using the average of the reference FOB price minus fobbing costs during the investigation period (IP), the EU included in its calculation of the cost of production of biodiesel a cost which is not associated with the cost of production and sale of biodiesel within the meaning of Article 2.2.1.1 of the ADA. Since the producers under investigation did not pay the reference FOB price minus fobbing costs for soybeans but, instead an amount representing the *actual* cost of soybean included in their records, Argentina submits that, the price of soybean used by the EU to calculate the cost of production is not a price that is associated with the production and sale of the like product. Therefore, the EU acted inconsistently with Article 2.2.1.1 of the ADA.

26. As a result of the inconsistencies mentioned in (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994.

D. The EU acted inconsistently with Articles 2.2 and 2.2.2(iii) of the ADA because the amounts for profits established by the EU were not determined on the basis of a reasonable method

27. When determining the reasonable amount for profits, the EU did not calculate the reasonable amount for profits on the basis of the chapeau of Article 2.2.2 of the ADA or on subparagraphs (i) or (ii) of that provision, choosing instead to base it on "any other reasonable method" pursuant to Article 2.2.2(iii) of the ADA. Argentina submits that the amount for profits established by the EU of 15% is not based on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA and cannot be considered to be "reasonable" within the meaning of Article 2.2 *in fine* of the ADA.

28. In both the Provisional and Definitive Regulations, the EU failed to provide any explanation of how it determined a profit margin of 15%. The 15% figure does not result from any "method" within the meaning of Article 2.2.2(iii) of the ADA, let alone a reasonable one. Argentina fails to see how a World Bank figure concerning the short to medium term lending rate can be understood to be a relevant justification of the 15% profit margin determination. Moreover, Argentina explained that it was unreasonable to consider that the Argentinean biodiesel industry is "young and innovative", at a time when production had peaked and the market had matured significantly.

E. The EU acted inconsistently with Article 2.4 of the ADA in failing to make due allowance for differences affecting price comparability, including differences in taxation, and in precluding a fair comparison between export price and normal value

29. Argentina submits that the EU acted inconsistently with Article 2.4 of the ADA in failing to make a fair comparison between normal value and export prices within the meaning of that provision, as a fair comparison would have required that due allowance be made for differences affecting price comparability. This inconsistency arose as a result of a comparison of, on the one hand, a constructed normal value that included an average of the reference FOB price of soybeans (minus fobbing costs) with, on the other hand, an export price that incorporated the domestic price of soybeans.

30. In the Definitive Regulation, the EU deducted the expenses incurred for exporting the soybean from the reference FOB price. Therefore, the difference between the price of soybean included in the constructed normal value and the domestic price of soybean reflected in the export price is approximately equal to the export tax on soybean. The EU itself acknowledged that its methodology yielded a result which, from a numerical point of view, was similar to simply adding the export tax to the cost of the raw material.

F. The EU acted inconsistently with Article 9.3 of the ADA and Article VI: 2 of the GATT 1994 in imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA

31. In order to have the dumping margin determination made in conformity with Article 2 of the ADA, the EU should have based the cost of production on the records of the producers under investigation and it should have ensured that the profit margin determination was based on a reasonable method pursuant to Article 2.2.2(iii) of the ADA. Therefore, the EU has imposed and levied anti-dumping duties in excess of the margin of dumping that it should have calculated in conformity with Article 2 of the ADA. As a result, it acted inconsistently with Article 9.3 of the ADA and VI:2 of the GATT 1994.

G. The EU acted inconsistently with Articles 3.1, 3.4 and 3.5 of the ADA in its evaluation of the production capacity, the utilization of capacity and the return on investment of the EU industry

32. Argentina submits that the utilization of capacity was overstated and that a proper evaluation would have revealed that capacity utilization was in fact significantly lower than the figures reflected in the Definitive Regulation. Argentina claims that the EU failed to ensure that injury arising out of the overcapacity of the domestic industry was not attributed to the dumped imports. This is the result of, among others, the EU's failure to properly evaluate the utilization of capacity of its domestic industry.

33. Throughout the investigation, overcapacity was identified as a factor having an impact on the state of the industry by the investigated companies as well as by the Government of Argentina. In the course of the injury analysis conducted by the EU, the European Biodiesel Board (hereinafter, EBB) submitted information that showed that capacity of the domestic industry grew throughout the investigation period. In a submission dated 17 September 2013, the EBB suddenly asserted that the figures concerning production capacity of the EU industry needed to be adjusted to exclude the "idle" capacity. On 1 October 2013, the EU issued the Definitive Disclosure where it accepted the resubmitted data and altered the findings on capacity and capacity utilization that it had made in the Provisional Regulation. However, the Definitive Disclosure did not contain further information on the methodology used by the EU to assess this information or further elaboration of what was meant by "close scrutiny of this resubmitted data".

34. Argentina claims that the EU acted inconsistently with Articles 3.1 and 3.4 of the ADA *first*, because the EU's definition of "utilization of capacity" is inconsistent with Article 3.4 of the ADA, *second*, because its analysis of the production capacity and the utilization of capacity of the EU industry was not based on positive evidence; *third,* because the injury determination did not involve an objective examination; *fourth,* because the evaluation of the production capacity and of the utilization of capacity is not adequate and that the EU therefore acted inconsistently with Article 3.4 of the ADA and *fifth,* because the indicators "utilization of capacity" and "return on investment" were not evaluated in a consistent manner.

- **The EU's definition of utilization of capacity is inconsistent with Article 3.4 of the ADA**

35. Argentina notes that the terms "utilization of capacity" in Article 3.4 of the ADA contain no reference to a concept such as "availability for use" or "idleness". Consequently, in the framework of Article 3 of the ADA, the entirety of production capacity must be taken into account regardless of whether it is allegedly "available for use" or not. It is undeniable that all of an industry's production capacity, whether it is available for immediate use or not, generates costs. Failure to take production capacity that is not ready for use or that is "idle" yields an inaccurate picture of the state of the domestic industry. In adopting a definition whereby the evaluation of "utilization of capacity" excludes so-called "idle" capacity, the EU acted inconsistently with Article 3.4 of the ADA.

- **The EU acted inconsistently with Article 3.1 and 3.4 of the ADA in failing to base its analysis of the production capacity and the utilization of capacity on positive evidence**

36. At a late stage in the proceedings, the EBB submitted a document requesting the exclusion of supposedly idle capacity, a change in production capacity figures by EBB that amounted to 26.53% of total production capacity in the EU or 5,898,000 tons during the IP.[6] This amounts to almost three times the combined amounts of imports originating in Argentina and Indonesia during the IP. Argentina submits that the evidence on which the evaluation of the utilization of capacity is based is implausible first because the alleged "mistake" in EBB's submissions would have been impossible to overlook, and second, because if the "mistake" had existed, major inconsistencies in the data submitted by EBB concerning production capacity of non-EBB Members would have been evident, especially in view of the fact that the entirety of the alleged "idle capacity" of the EU industry was allocated to non-EBB Members, which are a minority sector of the EU industry.

37. In stark contrast to the multiplicity of publicly available sources confirming the accuracy of the data in the Complaint and the Provisional Regulation, the data provided by EBB in its submission of 17 September 2013 appear to consist of mere assertions by EBB. The EU stated in the Definitive Regulation that it cross-referenced EBB's submission to "publicly available data concerning in particular idle capacity as well as capacity of producers that ceased operations due to financial difficulties" but it does not state what these publicly available data are. The reliance on undisclosed yet supposedly public sources further calls into question the reliability and creditworthiness of the evidence on which evaluation of the capacity of the Union industry was based.

38. Argentina notes that (1) this "publicly available data" was not placed on the public file of the investigation, (2) it is contradicted by all other publicly available sources that do appear on the public file of the investigation and (3) the EU did not clarify what the "cross-referencing" exercise entailed. As a result, Argentina submits that the data on which the evaluation of production capacity and capacity utilization is based, is not reliable.

39. Moreover, Article 3.4 of the ADA does not allow for an exclusion of production capacity that is "idle" from the evaluation of the utilization of capacity. As a result, the "idleness" of production capacity is a fact that is neither relevant nor pertinent to the question of what constitutes production capacity within the meaning of Article 3.4 of the ADA; it is production capacity regardless of whether it is "idle" or "available for use." As a result, to the extent that the assessment of production capacity and utilization of capacity is based on evidence concerning the fact that part of the capacity is allegedly "not available for use", it is based on evidence that is irrelevant and impertinent.

40. Therefore, the EU failed to base its injury determination on positive evidence and acted inconsistently with Articles 3.1 and 3.4 of the ADA.

- **The EU acted inconsistently with Articles 3.1 and 3.4 of the ADA in failing to conduct an objective examination of the production capacity and the utilization of capacity of its domestic industry**

41. The unusual exclusion of production capacity that was "idle" had the effect of understating the production capacity of the EU biodiesel industry by 5,898,000 tons during the IP or 26.53% of total capacity. This understatement, in turn, overstates the utilization of capacity and thus negates the significance of the overcapacity of the EU industry as a cause of injury that is different from that of the allegedly dumped imports. Argentina submits that in weighing and balancing the evidence before it, the EU did not act in an even-handed manner. Indeed, the exclusion of production capacity that was "not available for use" was based on evidence that is not credible and which at the same time favoured the interests of EBB in the investigation. As a result, the examination was not "objective" within the meaning of Article 3.1 of the ADA. The EU has therefore acted inconsistently with Articles 3.1 and 3.4 of the ADA.

[6] The magnitude of the figures involved speaks for itself. While EBB was perfectly able to detect, examine and isolate the economic effect supposedly caused by imports less than 1,500,000 tons in a market almost ten times bigger, it was unable to detect that the total EU production capacity had been overstated by almost six million tons.

- **The EU acted inconsistently with Article 3.4 of the ADA in failing to adequately evaluate the production capacity and utilization of capacity of the domestic industry of the EU**

42. When stating that production capacity remained "relatively stable" the EU failed to properly evaluate production capacity at the provisional stage as it failed to properly analyze this factor by "placing it in context in terms of the particular evolution of the data".[7] Argentina submits that the EU equally failed to adequately evaluate the production capacity and utilization capacity of the EU industry at the definitive stage. Consequently, the EU acted inconsistently with Article 3.4 of the ADA.

- **The EU acted inconsistently with Article 3.4 of the ADA in failing to evaluate utilization of capacity and return on investment in a consistent manner**

43. To the extent that the EU eliminated so-called "idle capacity" from the production capacity of the EU industry, while basing the evaluation of the return on investment on the basis of all assets employed in the production of biodiesel, it would appear that both factors were based on data which lack consistency. Indeed, while the "return on investment" appears not to exclude "idle" assets, the EU's evaluation of the utilization of capacity did. Thus, Argentina submits that the EU failed to evaluate the return on investments and the utilization of capacity in a consistent manner. Consequently, the EU acted inconsistently with Article 3.4 of the ADA.

H. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the overcapacity of the EU industry was not attributed to the allegedly dumped imports

- **Figures concerning production capacity and utilization of capacity are incorrect**

44. The EU made a determination concerning production capacity and utilization of capacity based on a definition of utilization of capacity which is inconsistent with Article 3.4 of the ADA, which was not based on positive evidence, which did not involve an objective examination and which was not based on an adequate evaluation. The correct figures would have shown a much higher production capacity of the EU industry and, consequently, a much lower utilization of capacity.

- **Errors in the assessment of the overcapacity in the Provisional Regulation**

45. The EU appeared to assume, incorrectly, that the arguments of the interested parties concerned only the low capacity utilization, instead of referring to overcapacity. The EU industry had expanded production capacity by 38% during the period 2008-2011, i.e. far beyond what the market could absorb and despite the already extremely low rates of utilization of capacity in 2008. Even a superficial consideration of these arguments on overcapacity would have shown that based on the figures of the Provisional Regulation, unused capacity increased from 11,613,000 tons in 2009 to 13,174,629 tons during the IP, an increase of 1,561,322 tons.

- **The findings relating to fixed costs are incorrect**

46. Argentina refers to the statement that fixed costs do not bear any relation to capacity utilization rates, which is one of the reasons why the EU rejected the allegation that there was a causal relationship between the overcapacity of the EU industry and the injury it suffered. This statement appears to be based on a misunderstanding. Indeed, the fact that fixed costs remain constant at different capacity utilization rates is precisely the reason why the low capacity utilization rates result in fixed costs being disproportionately high on a per unit basis.

47. In addition to the fact that, contrary to the statements of the EU, the weight of the fixed costs in the total cost of production is impacted by the rate of capacity utilization, Argentina disputes the notion that fixed costs were low and that, therefore, the low rates of capacity utilization were not a "decisive" factor of injury, as stated in Recitals 164 and 166 of the Definitive Regulation.

[7] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

- **The findings that low capacity utilization rates are not a decisive factor cannot be reconciled with the EU's statements that the biodiesel industry is capital intensive**

48. The EU mentions repeatedly that the biodiesel industry is capital intensive. Capital-intensive industries require large financial commitments to produce the first unit of any good and thus require high capacity utilization to achieve economies of scale and achieve a return on investment. Argentina submits that the finding that the very significant overcapacity of the EU industry was not a decisive factor of injury cannot be reconciled with the statements throughout the Provisional and Definitive Regulations that the biodiesel industry is capital-intensive.

I. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the alleged injury caused by the EU industry's long term commercial strategy of importing the product under consideration was not attributed to the allegedly dumped imports

49. The EU failed to properly assess the injury arising from the EU industry's strategy of importing the product under consideration, thereby failing to separate and distinguish the injurious effects of this commercial strategy from those of the allegedly dumped imports.

50. The EU itself recognized that imports made by the EU industry were one of the reasons for the low capacity utilization rate. Therefore, the commercial strategy pursued by the EU industry, which consisted of sourcing the product under consideration in Argentina through related entities, was a cause of injury. The statement that the imports were temporarily made in self-defense is contradicted by their sheer volume: over 60% of total imports by the EU's own recognition.

J. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the double-counting regimes was not attributed to the allegedly dumped imports

51. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA as a result of the failure to recognize that the double-counting regimes injured the EU industry at the same time as the allegedly dumped imports and/or of the failure to appropriately assess the injurious effects of those regimes. In failing to examine the effects of the double-counting regimes in force in other EU Member States besides France, the EU failed to appreciate the full extent of the injurious effects of those regimes. The EU misplacedly insisted that double-counting only shifts demand, although it also reduces demand. Finally, Argentina disputes the relevance of the contention that the double-counting regime was in force only during a part of the IP in France.

K. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the lack of vertical integration and the access to raw material of the EU industry was not attributed to the allegedly dumped imports

52. Argentina contends that the EU failed to comply with the non-attribution obligation in relation to the lack of vertical integration and the lack of access to raw materials of the EU industry. The EU did not undertake any steps to separate and distinguish the injurious effects arising out of these factors from the injurious effects of the allegedly dumped imports. Therefore, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

IV. CONCLUSION

53. Argentina respectfully requests that this Panel find that:

> I.- Article 2(5) of the Basic Regulation is inconsistent *as such*, with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data of the exporters as included in its records when those costs reflect prices which are "abnormally or artificially low", because the costs do not reflect market prices or because they are allegedly affected by a distortion; (B) Article 2.2 of the ADA 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", even though neither provision allows for an establishment of the costs on this basis. As a result, the EU acted inconsistently with Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA, and

II.- The anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 because the EU failed to calculate the cost of production on the basis of the records kept by the producers under investigation; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because the EU failed to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin; (C) Article 2.2.1.1 of the ADA because the EU included costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (D) As a result of the inconsistencies mentioned in points (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994; (E) Articles 2.2 and 2.2.2(iii) of the ADA because the EU failed to base the profit margin as a component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA; (F) Article 2.4 of the ADA because the EU failed to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and normal value; (G) Article 9.3 of the ADA and VI:2 of the GATT 1994 because the EU 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 ADA; (H) Articles 3.1 and 3.4 of the ADA because the EU's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the EU industry; (I) Articles 3.1 and 3.5 of the ADA since the EU failed to conduct an objective examination, based on positive evidence, of known factors other than the allegedly dumped imports in its non-attribution analysis; hence, the EU failed to ensure that the injury suffered by the domestic industry of the EU resulting from other factors was not attributed to the allegedly dumped imports. Argentina considers that the measures at issue should be withdrawn.

54. Argentina respectfully requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-dumping Agreement and the GATT 1994.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF ARGENTINA

A. INTRODUCTION

1. Argentina has demonstrated, and the European Union (hereinafter the "EU") has failed to rebut, that, under Article 2(5) second subparagraph of the Basic Regulation, as reflected in the consistent practice of the EU authorities and the judgments of the General Court of the EU, when the prices of inputs are found to be "abnormally low" or "artificially low" in comparison to prices in other markets, as a result of an alleged "distortion", it is concluded that the costs are not reasonably reflected in the records of the producer concerned and are thus adjusted or replaced by data on any other reasonable basis, including information from other representative markets. This measure is clearly inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement (hereinafter the "ADA").

2. Argentina has also demonstrated that several aspects of the anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the provisions of the ADA, including the dumping margin determinations and the injury and causality determinations.

B. ARGENTINA'S CLAIMS AGAINST ARTICLE 2(5), SECOND SUBPARAGRAPH, OF THE BASIC REGULATION

The measure at issue

3. Under its "as such" claims, Argentina is challenging one measure, namely Article 2(5), second subparagraph, of the Basic Regulation and not "two separate measures"[1] as the EU is claiming.

4. Regarding the **scope of the measure**, the EU errs when claiming that "the second subparagraph of Article 2(5) of the Basic Regulation [only] describes what the authorities can do after it has been determined that the records do not "reasonably reflect" costs, pursuant to the first subparagraph of Article 2(5) of the Basic Regulation".

5. This is, first of all, contrary to the text of Article 2(5), second subparagraph. Indeed, Article 2(5), second subparagraph, does not only provide to the authorities the legal basis to use information from other representative markets when information on the domestic market is not available or cannot be used but, at the very same time, it also provides the legal basis for disregarding the records of the producers in those situations.

6. The background, the consistent practice of the EU authorities and the judgements of the General Court of the EU, confirm that Article 2(5), second subparagraph, provides the legal basis for rejecting the records of the producers/exporters where prices are "artificially low" or "abnormally low" as a result of an alleged "distortion".

7. Regarding the background, it must be noted that the first subparagraph of Article 2(5) was introduced through Council Regulation No 3283/94 of 22 December 1994 which sought to implement the EU's international obligations arising from the ADA adopted during the Uruguay Round. In particular, by means of Article 2(5) of that regulation, it intended to implement the particular obligations laid down by Article 2.2.1.1 of the ADA. The second subparagraph of Article 2(5) was introduced by Regulation No 1972/2002 at the same time that Russia was granted full Market Economy Status, to provide a legal basis for the authorities to reject the cost data included in the records of the investigated party in case those costs reflect a price which is "abnormally low" or "artificially low", in comparison to prices in other markets, because of a "distortion" and to adjust or replace such costs by data which are not affected by such "distortion", as clearly stated in Recital 4 of Regulation No 1972/2002.

[1] EU's first written submission, para. 63.

8. The scope of Article 2(5), second subparagraph, as described by Argentina has been expressly confirmed by the General Court in the judgments referred to by Argentina.

In particular, in the second *Acron* case (Case T-118/10), the General Court expressly noted that the assessment "*whether the records reasonably reflect the costs*" is made pursuant to the second subparagraph of Article 2(5):[2]

> The institutions were therefore 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.[3]

9. Finally, the consistent practice of the EU authorities which has developed after the introduction into the Basic Regulation of Article 2(5), second subparagraph, confirms the foregoing. The *Aluminium Foil case* to which the EU refers is irrelevant since the determination was based in that case on Article 18 of the Basic Regulation.

10. It is clear from the foregoing that Argentina does not confuse the scope of the second subparagraph of Article 2(5) with the scope of the first subparagraph of Article 2(5), as asserted by the EU.[4] Instead, it is the defendant that artificially creates a non-existent two-steps approach between Article 2(5) first and second subparagraphs, on the basis of the allegation that the second subparagraph only describes "what the authorities are authorized to do in order to calculate the costs, when the company records cannot be used".[5] The EU's position should not prevail. That position is based on a simplistic reading of Article 2(5), first and second subparagraphs, taken in isolation, and without consideration of their context. As demonstrated above, the text of Article 2(5), second subparagraph, together with its background makes evident that it is pursuant to that particular provision that the authorities determine that records do not reasonably reflect the costs where the prices are "abnormally low" or "artificially low", in comparison to prices in other markets, because of an alleged "distortion". This has been expressly confirmed by the General Court, and is supported by the consistent practice of the EU authorities which has developed after the introduction into the Basic Regulation of Article 2(5), second subparagraph.

11. As to the **precise meaning and content of the measure challenged**, Argentina notes that the "measure on its face" is only "the starting point" for an "as such" analysis.[6] As the Appellate Body underlined, if "the meaning or content of the measure is not evident on its face, further examination is required"[7], as Argentina claims, so it is needed that the Panel "undertake a holistic assessment of all relevant elements (…)"[8] "(…) submitted by a party that the alleged inconsistency with the covered agreements arises from a particular manner in which a measure is applied".[9]

12. After reading the plain text of Article 2(5), second subparagraph, of the Basic Regulation, it is clear that this provision imposes an obligation on the authorities. Indeed, where information of the costs of other producers or exporters in the same country "is not available or cannot be used", then the costs must be adjusted or established on "any other reasonable basis, including information from other representative markets". The second part of that provision also directs the

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[2] Judgment of the General Court in *Acron OAO v Council of the EU*, Case T-118/10, para. 72 (Exhibit ARG-52).

[3] Judgment of the General Court in *Acron OAO and Dorogobuzh v Council of the EU*, para. 46 (Exhibit ARG-23).

[4] EU's opening statement at the first substantive meeting, para. 45.

[5] EU's opening statement at the first substantive meeting, para. 50.

[6] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[7] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168. See also Appellate Body Report, *US – Carbon Steel (India),* para. 4.446 referring to Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

[8] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.451 referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

[9] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.454.

authorities to reject the exporters' records for the same reason that they have to use information from other representative markets.

13. Furthermore, Recital 4 of Regulation No 1972/2002 explains the meaning and content of Article 2(5), second subparagraph. Recital 4 explicitly acknowledges that, in situations where, because of a particular market situation, sales do not permit a proper comparison, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration. The use of the words "in particular" demonstrates that the finding that the records do not reasonably reflect the costs is not limited to situations in which a particular market situation has been found to exist. The next sentence in Recital 4 establishes that this is to be the case whenever the costs are "affected by a distortion". The EU itself has noted that Article 2(5), second subparagraph, is used by the authorities in cases where, like in the case at hand, normal value is constructed because of lack of sales in the ordinary course of trade. It cannot just argue thereafter that Recital 4, which precisely seeks to explain the meaning and content of Article 2(5), second subparagraph, is not relevant for the interpretation of that provision.

14. The fact that Recital 4 is relevant for the interpretation of Article 2(5), second subparagraph in all circumstances is further supported by the fact that the General Court referred to Recital 4 even with regard to situations in which the normal value was constructed pursuant to a finding that there was no or insufficient sales in the ordinary course of trade.[10]

15. In conclusion, Regulation No 1972/2002, and in particular its Recital 4, are highly relevant for the understanding of the content and meaning of Article 2(5), second subparagraph. They demonstrate that Article 2(5), second subparagraph, provides the legal basis for (a) rejecting the cost data included in the records when they are affected by a "distortion", in particular, when they reflect prices that are "artificially low" and (b) for adjusting or establishing the costs in such a case on the basis of data from sources which are not affected by such distortions.

16. Argentina has also referred to the consistent practice of the EU authorities pursuant to Article 2(5), second subparagraph, of the Basic Regulation as a relevant element for the understanding of the meaning and content of Article 2(5), second subparagraph.[11] In all the cases referred to by Argentina, the EU authorities have described the prices of the input concerned as being "significantly lower" or "much lower" in comparison with prices in other markets, such as prices in the EU. The prices have been described as being "abnormally low" and/or "artificially low" prices. What is relevant is the consistency in the determinations made by the EU authorities, that is, where the prices of the inputs have been found to be "artificially low" or "abnormally low" because of an alleged distortion, the authorities have consistently concluded that the records did not reasonably reflect the costs associated with the production and sale of the product under consideration.

17. Finally, the judgements of the General Court are relevant for the understanding of the meaning and content of Article 2(5), second subparagraph, since the General Court has confirmed on the basis of Recital 4 of Council Regulation No 1972/2002 that the key element in the determination that the data were not "reasonable" is the existence of a "distortion".

18. In conclusion, when assessed in conjunction, these elements establish altogether that where the prices of the inputs are found to be "artificially low" or "abnormally low" in comparison to prices on other markets as a result of a "distortion", the records do not reasonably reflect the costs associated with the production and sale of the product under consideration and the costs included in the records are adjusted or replaced by information from other representative markets.

The Mandatory / Discretionary distinction

19. Argentina first notes that there is no provision in the ADA or any other Agreements which establishes a mandatory/discretionary standard that the Panel would have to apply. In other words, the Panel is required to examine whether the measure is consistent with the relevant WTO obligations, not whether the measure is discretionary or mandatory. Thus, the mandatory/discretionary distinction is not a test that panels are required to apply. At best, it could

[10] Judgment of the General Court in *Acron OAO and Dorogobuzh v Council of the EU*, Case T-235/08, para. 30 (Exhibit ARG-23).

[11] See Argentina's first written submission, section 4.2.2.

in certain cases be an "analytical tool", which, as established by the Appellate Body, should not be applied "mechanistically", and the significance of which would vary from case to case.[12]

20. Argentina submits that the starting point of the analysis in an "as such" claim is the provision with which the measure is claimed not to be consistent. Therefore, if the relevant WTO provision prohibits a certain conduct, the mere fact that the measure being challenged provides for such a conduct should lead to the conclusion that there is a violation. Thus, even if Article 2(5), second subparagraph, only provided for the possibility - and did not require – that the authorities reject the records in such situations, the mere possibility would render it inconsistent with Article 2.2.1.1 of the ADA. The same reasoning applies to Argentina's claim under Article 2.2 of the ADA.

21. Second, and in any case, Argentina submits that Article 2(5), second subparagraph, is not discretionary as alleged by the EU. The text of Article 2(5), second subparagraph, Regulation No 1972/2002, the consistent practice of the EU authorities as well as the judgments of the General Court show that the authorities do not have discretion with respect to situations in which the prices are found to be "abnormally low" or "artificially low" because of an alleged "distortion". In such cases, the authorities necessarily conclude that the records do not reasonably reflect the costs and replace or adjust the costs on the basis of information from other representative markets.

Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2.1.1 of the ADA and, as a result, Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994

22. Regarding the **interpretation of Article 2.2.1.1 of the ADA**, Argentina notes in relation to the text of that provision, that the structure of the first sentence of Article 2.2.1.1 clearly excludes any reasonableness test of the cost elements themselves.[13] This is supported by the fact that the sentence uses the adverb "reasonably" which relates to the verb "reflect" and not the adjective "reasonable" that would be used to describe the "costs". Thus, the test is not to determine whether the cost elements are "reasonable" in relation to any type of outside benchmarks, but whether the records of the producer/exporter investigated provide reasonable information of the costs that are associated with the production and sale of the product under consideration for that producer/exporter in the framework of that investigation.

The definition of the term "costs" as "charges or expenses" refers to a concrete amount by opposition to a hypothetical value, such as an international price, while the term "associated" does not in any away imply "a broad range of relations between the "costs" and the "production""[14] such that it could "capture the costs that would normally be associated with the production and sale of the goods".[15] The word "associated" simply means that the costs must "pertain"[16] to the production and sale of the product under consideration.

23. Regarding the context, Argentina notes that the second and third sentences of Article 2.2.1.1 confirm that the test under the first sentence is not about the reasonableness of the costs in relation to outside benchmarks but about the relationship between the costs and the production and sale of the product under investigation for each producer/exporter examined in the anti-dumping investigation at issue. Article 2.2 which refers to the "cost of production in the country of origin" means that Article 2.2.1.1 cannot imply a test whereby it is examined whether the "costs" are reasonable in light of benchmarks outside of the country of origin. As to Article 2.2.2 of the ADA, this provision which deals exclusively with the determination of the "amounts for administrative, selling and general costs and for profits" confirms that if the drafters had intended to authorize the authorities to use data other than those of the producers/exporters for the calculation of the "cost of production", they would have explicitly provided for that possibility in Article 2.2.1.1.

24. Finally, Argentina submits that "dumping" is about the "pricing behaviour" of the exporters/producers concerned and that this applies to both the "export price" and the "normal value" as the Appellate Body itself noted is *US – Zeroing (Japan)*. The European Union's view that

[12] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.
[13] Argentina's first written submission, para. 107.
[14] EU's first written submission, para. 137.
[15] EU's first written submission, para. 139.
[16] Panel Report, *Egypt – Steel Rebar*, para. 7.393.

the normal value is "the value that the products should have in normal circumstances" is inconsistent with the proposition that the normal value relates to the pricing behaviour of the exporter/producer investigated. Indeed, the dumping found in such circumstances would not result from the pricing behaviour of the exporter/producer concerned but from the difference between the export price of the exporter/producer concerned and a hypothetical value, namely the one that products *should have in normal circumstances*. This view departs from the definition of "dumping" which is said to relate to the pricing behaviour of the specific exporter/producer investigated.

25. Regarding the object and purpose, Argentina notes that, by claiming that the authorities should be authorized to address costs of inputs which are not "normal", the EU appears to seek to address so-called "input dumping" which has been described as "situation where materials or components that are used in manufacturing an exported product are purchased internationally or domestically at dumped or below cost prices, whether or not the product itself is exported at dumped prices".[17]

26. This issue was discussed by the Ad-Hoc Group on the Implementation of the Anti-Dumping Code of the Committee on Anti-Dumping Practices just before the Uruguay Round. There was, however, no consensus on this issue. Furthermore, the Draft Recommendation prepared by the Ad-Hoc Group confirms that no provision in the GATT or in the Anti-Dumping code authorized the use of anti-dumping duties to address "input dumping". As Argentina explained in its response to Panel's question No. 18, the negotiating history of Article 2.2.1.1 shows that there was no intention amongst the Parties to introduce "the requirements that the costs reflected in the records should be reasonable", as claimed by the defendant.[18] Furthermore, the issue of "input dumping" was raised during the Uruguay Round negotiations but was not addressed in the ADA.

27. In conclusion, the analysis of the text and context of Article 2.2.1.1 as well as of the object and purpose unambiguously demonstrates that this provision does not permit investigating authorities to reject data included in the exporter/producer's records because such data reflect "abnormally low" or "artificially low" prices because of a "distortion".

28. As to the **claims**, Argentina first submits that to the extent that the Panel confirms that Article 2.2.1.1 prohibits the rejection of data in the 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 that rejection falls within the category of what is prohibited by Article 2.2.1.1. Second, and in any case, Argentina submits that pursuant to Article 2(5), second subparagraph, the authorities are required to conclude that the records do not reasonably reflect costs when prices are found to be "abnormally low" or "artificially low" because of an alleged distortion, thereby violating Article 2.2.1.1 of the ADA.

Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994

29. Regarding the **interpretation** of Article 2.2 of the ADA, Argentina notes that the text of the provision is clear and necessarily requires that the data/evidence used must be data/evidence in the country of origin. Furthermore, even if evidence outside the country or origin could be used, it would have to be demonstrated that the cost of production which is based on such data/evidence constitutes the "cost of production in the country of origin".

30. As to the **claims**, Argentina submits that Article 2(5), second subparagraph, violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because it provides that, where the costs of other producers or exporters in the same country are not available or cannot be used, the costs shall be adjusted or established on any other reasonable basis, including information from other representative markets while Article 2.2 prohibits the construction of normal value on a basis other than "the cost of production in the country of origin". Furthermore, Argentina notes that the authorities do not have the "broad discretion" as claimed by the EU. The text of Article 2(5), second subparagraph, as confirmed by the practice, shows that where information from the

[17] Draft Recommendation concerning treatment of the practice known as input dumping, ADP/W/83/Rev.2.

[18] EU's opening statement at the first meeting of the Panel, para. 40.

domestic market is not available or cannot be used, the costs must be adjusted or replaced on any other reasonable basis including information from other representative markets.

C. CLAIMS AGAINST THE ANTI-DUMPING MEASURES ON IMPORTS OF BIODIESEL ORIGINATING IN ARGENTINA

As a preliminary matter, Argentina noted several factual inconsistencies in the EU's defense.

Claims pursuant to Articles 2.2 and 2.2.1.1 of the ADA and Article VI:1(b)(ii) of the GATT 1994 and consequential claim pursuant to Article 2.1 of the ADA and Article VI:1 of the GATT 1994

31. In the biodiesel investigation, the EU first rejected the cost of soybean that was reported by the producers under investigation and that was used to determine the cost of soybean oil, on the basis that they were found to be artificially lower that the international prices due to the distortion created by the Argentine export tax system. After the rejection of the reported costs of soybean, the EU went on to replace those costs with the reference FOB prices of soybean.

32. Argentina has claimed that the EU authorities were not entitled to examine whether the costs of soybeans "would pertain to the production and sale of biodiesel in normal circumstances, i.e. in the absence of the distortion caused by Argentina's export tax on the raw materials".[19] Therefore, by rejecting the cost data of soybeans as included in the records of the producers because they were "artificially lower than the international prices due to the distortion created by the Argentine export tax system"[20], the EU violated Article 2.2.1.1 of the ADA.

33. It is important to emphasise that the EU authorities not only wrongfully tested whether the costs reflected costs of soybeans that would normally be associated with the production and sale of biodiesel in normal circumstances, but they also wrongfully carried out this test in comparison with "international prices". As Argentina has underlined previously, comparison with benchmarks outside the country of origin is clearly incompatible with the express requirement in Article 2.2 that refers to the "cost of production *in the country of origin*".

34. The EU has explained that the international price of soybean - which has been used as benchmark - is the price that *would have* pertained to the production and sale of biodiesel in the absence of the export tax on soybean.[21] It has also stated that the difference between the international price and the domestic price of soybean (which is the price that was reported by the producers under investigation) is the export tax and other expenses incurred for exporting it.[22]

35. Argentina submits that implicit in these statements is the consideration that, in fact, the international price of soybean did not pertain to the production and sale of the biodiesel under investigation *in that investigation* and *in that case.* Therefore, according to the EU's own findings in the biodiesel investigation, the international price of soybean that was used as benchmark to determine that the costs of soybeans were not reasonably reflected in the records[23] is *not* associated with the production and sale of biodiesel within the meaning of the second proviso of the first sentence of Article 2.2.1.1 of the ADA.

36. Given that the international price of soybean is not a cost of the Argentinean producers that is associated with the production and sale of biodiesel in that investigation, the EU was not allowed, under the second proviso of the first sentence of Article 2.2.1.1, to test the records of the Argentinean producers against those costs.

37. Therefore, in rejecting the cost of soybean reported by the exporting producers when constructing normal value on grounds that those costs "were found to be artificially lower than the international prices", the EU acted inconsistently with Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994.

[19] EU's first written submission, para. 236.
[20] Definitive Regulation, Recital 38 (Exhibit ARG-22).
[21] See, for instance, EU's first written submission para. 236.
[22] Definitive Regulation, Recital 37 (Exhibit ARG-22).
[23] Definitive Regulation, Recital 38 (Exhibit ARG-22).

38. With regard to Article 2.2, Argentina submits that the ADA provides that the costs of production must be "the cost of production in the country of origin". According to this, Argentina has demonstrated that the EU violated this obligation since in calculating the cost of production of the Argentinean exporters/producers, it did not use domestic prices of soybeans, but the reference FOB prices of soybeans, net of fobbing costs.[24]

39. The reference FOB price of soybean minus fobbing costs, on the basis of which the EU calculated the cost of production, is not a "price to be paid for the act of producing" (i.e. cost of production) in Argentina (the country of origin), as it comprises the export tax on soybeans and because the domestic price of soybean is equivalent to the reference price *minus* fobbing costs and *minus* export taxes. The reference FOB price is, at best, a proxy of the export price of soybean but not a cost at which soybean is acquired domestically. It thus acted inconsistently with Article 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994.

40. Finally, for the reasons expressed in its opening statement[25] and in its response to Panel question No. 55, Argentina maintains its claims under Article 2.1 of the ADA and Article VI:1 of the GATT 1994.

The EU acted inconsistently with Articles 2.2 and 2.2.2(iii) of the ADA because the amounts for profits established by the EU were not determined on the basis of a reasonable method

41. Argentina asserts that, contrary to what the EU pretends, the mere fact of establishing an amount and then testing its reasonableness is insufficient to comply with the terms of Article 2.2.2(iii) of the ADA. In order to fulfil the requirements of that provision, the selected amount needs to be arrived at following a reasonable method. Given that the EU did not establish the amount for profits pursuant to any method, let alone a reasonable one, it has violated Articles 2.2.2(iii) and 2.2 of the ADA.

The EU acted inconsistently with Article 2.4 of the ADA in failing to make due allowance for differences affecting price comparability, including differences in taxation, and in precluding a fair comparison between export price and normal value

42. Argentina has shown that the manner in which the EU constructed normal value whereby it disregarded the domestic price of soybean as a basis to calculate the "oil share" (i.e. the value of the bean corresponding to the oil) and substituting it with the "FOB reference price" of soybean as a basis from which to calculate the "oil share" is inconsistent with Articles 2.2 and 2.2.1.1 of the ADA. This WTO-inconsistent manner of substituting the cost of soybean resulted in a normal value applied to the exporting producers that reflected the international price of soybean oil, as if the exporting producers were located outside of the territory of Argentina.

43. In subsequently calculating the dumping margin, the EU compared this "non-domestic" or "international" normal value of biodiesel with an export price that was fully "domestic", i.e. without the substitution or the adjustment of the cost of soybean out of which the "oil share" was calculated. By proceeding in that way, the EU acted as if it were calculating dumping margins of the finished product based on differences between the domestic price and the export price not of the product under consideration, but of its primary input. Therefore, the EU generated an artificial imbalance between the export price and the normal value.

44. As a consequence, Argentina has claimed that a difference exists between normal value and export price[26] and that this difference affects price comparability.[27] It consequently claims that the comparison between normal value and export price, absent an adjustment to account for this difference, is not a fair comparison and consequently it is inconsistent with Article 2.4 of the ADA.

The EU acted inconsistently with Article 9.3 of the ADA and Article VI:2 of the GATT 1994 in imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA

[24] Argentina's first written submission, paras. 245-254.
[25] Argentina's opening statement at the first meeting of the Panel, paras. 18-22.
[26] Argentina's first written submission, paras. 298-299.
[27] Argentina's first written submission, para. 300; Argentina's opening statement at the first meeting of the Panel, para. 85.

45. Argentina's claim is that the EU has imposed and levied anti-dumping duties in excess of the margin of dumping that it should have calculated in conformity with Article 2 of the ADA and that, consequently, it acted inconsistently with Article 9.3 of the ADA and Article VI:2 of the GATT 1994.[28]

46. The defense of the EU appears to suggest that the terms "margin of dumping" have a meaning under Article 9.3 that is different from the meaning assigned to those terms under Article 2 and that, therefore, the level of the duties imposed or levied on the dumped imports may be tested against a margin of dumping which is not the margin of dumping established in conformity with Article 2 of the ADA. In line with the EU's contention, under Article 9.3, the "margins of dumping" against which the duties are to be tested would be those that are found by the investigating authority, regardless of their consistency with Article 2. This line of thought runs counter to Article 2.1 of the ADA, which defines dumping "for the purpose of this agreement" and thus shows that the meaning is uniform throughout the agreement.[29] It is also inconsistent with the text of Article 9.3, which explicitly states "as established under Article 2" and not "as determined by the investigating authority".

The EU acted inconsistently with Articles 3.1 and 3.4 of the ADA in its evaluation of the production capacity, the utilization of capacity and the return on investment of the EU industry

47. Argentina first submits that **the EU's definition of capacity and capacity utilization is inconsistent with Article 3.4**. Article 3.4 contains no basis for excluding capacity that is "idle" or "not available for use" from the assessment of capacity utilization.[30] Moreover, the EU not only has not pointed to any textual or contextual basis that would support the exclusion of part of the production capacity from the analysis of the utilization of capacity, but has not offered any explanation of what this exactly means. Therefore, the EU acted inconsistently with Article 3.4 of the ADA in excluding part of the production capacity, namely the "idle" capacity, from the assessment of the utilization of capacity.

48. Second, Argentina submits that **the EU's assessment of production capacity and capacity utilization is not based on positive evidence**. Argentina notes that the domestic industry intended to exclude "idle" capacity from its production capacity from the beginning of the investigation, as indicated by the statement that idle capacity had *already* been excluded from the capacity figures of EBB members.[31] Against this background, the fact that the production capacity figures for non-EBB members included both their idle capacity and that of EBB members appears to have been a mistake.[32] The data, on which the evaluation of capacity utilization is based, appear not to be reliable because they are contradicted by a multiplicity of available public sources, including EBB itself.[33] In view of the foregoing, it must be concluded that the EU's evaluation of production capacity and capacity utilization was not based on positive evidence and was therefore inconsistent with Articles 3.1 and 3.4 of the ADA**.**

49. Third, **the EU did not conduct an objective examination of the domestic industry's production capacity and utilization of capacity**. The EU attempts to contradict Argentina's claims by stating that it selected a sample of EU companies and subjected their data to detailed examination and verification.[34] However, all the sampled producers were EBB members, whose production capacity figures excluded "idle capacity" from the beginning. Therefore, the verification of those *EBB* companies does not guarantee the accuracy of the figures relating to *non-EBB* members and to the industry as a whole, which concerns the figures that were adjusted.

[28] Argentina's first written submission, para. 309.
[29] See also, Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96.
[30] Argentina's first written submission, paras. 354-356.
[31] Submission by EBB of 17 September 2013, section 1.1 (Exhibit ARG-47).
[32] The fact that this is a mistake is also apparent from EBB's letter of 17 November 2013 which cautions that "… any calculation of non-EBB member production capacity would (…) still include idle capacity from EBB and non-EBB member and would lead to a false calculation". See Submission by EBB of 17 September 2013, section 1.3, Exhibit ARG-47.
[33] See Argentina's first written submission, para. 370.
[34] EU's response to Panel question No. 62, para. 91.

50. Fourth, **the EU did not consistently evaluate the utilization of capacity and return on investment**. In its answer to Panel question No. 63(b) and in its opening statement[35], Argentina has addressed the EU's argument that there were no sampled companies with so-called "idle" capacity.[36] As explained by Argentina, at least one of the sampled companies, Diester, appeared to have what would fall within the EU's vague definition of "idle" capacity, that is, capacity that was installed but which was not available for use. Therefore, Argentina maintains its claim that the EU acted inconsistently with Article 3.4 of the ADA in failing to evaluate the return on investments and the utilization of capacity in a consistent manner.

The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by certain factors was not attributed to the allegedly dumped imports

51. Regarding **overcapacity**, Argentina has demonstrated that the EU failed to make an appropriate assessment of the injury caused to the EU industry by its overcapacity. The EU's defense is entirely unconvincing for a number of reasons.

52. First of all, the EU confuses utilization of capacity as an injury indicator (under Article 3.4 of the ADA) and the overcapacity of its domestic industry as a cause of injury (under Article 3.5 of the ADA). Second, the confusion prevented the EU from ascertaining the impact of this cause of injury on capacity utilization as an injury indicator, thus understating the controlling importance of overcapacity as a source of injury. Third, there is a correlation between the increase in overcapacity and the decrease in profitability which, together with the decline in market share are the main injury indicators on which the EU has relied to come to the conclusion that the domestic industry was materially injured.[37] Therefore, contrary to the EU's assertions, the overcapacity *is* the cause of the declining profit and consequently, of the injury suffered by the domestic industry. Fourth, the profit of 3.5% of the domestic industry in 2009 to which the EU refers was, in fact, extremely low by the EU's own standards, namely a 15% injury elimination level set by the EU for the period April 2007 to March 2008.[38] This level which is well below the injury elimination level set by the EU itself disproves the EU's contention that the industry could be healthy with high overcapacity. In any case, Argentina recalls that between 2009 and the IP overcapacity did not remain constant but instead increased by 1,561,322MT. Fifth, even if no increase in imports would have taken place at all during the IP, the overcapacity would still be enormous.

53. To summarize, the continued overcapacity and its significant increase between 2009 and the IP was the main factor injuring the domestic industry and not the imports originating in Argentina and Indonesia. The above shows that the EU's decision to attribute controlling importance to the allegedly dumped imports as a source of injury instead of to the overcapacity of the domestic industry amounts to a failure to appropriately separate and distinguish the injurious effects of the overcapacity from those of the allegedly dumped imports. Therefore, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

54. Turning to the **long-term commercial strategy of the EU industry**, Argentina noted that the EU's arguments are unconvincing for various reasons. First, the EU's statement that the domestic industry was *compelled* to buy biodiesel from Argentina is not believable given that the imports from Argentina and Indonesia were not a marginal phenomenon in comparison to total imports. This argument also overlooks the fact that biodiesel production facilities in Argentina are either directly affiliated to the domestic industry or related through common ownership.

55. Second, the EU has not provided evidence that had the domestic industry not made those imports, traders would have made those imports. Finally, the argument about the maintenance of a customer base is unconvincing and contradicted by the fact that the EU itself added the imports made by the Union industry to the market share of the allegedly dumped imports, instead of adding it to the market share of the domestic industry.[39]

56. In view of the above, Argentina submits that the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to separate and distinguish the injurious effects of the domestic

[35] Argentina's opening statement at the first meeting of the Panel, paras. 100 and 101.
[36] EU's first written submission, para. 318.
[37] Provisional Regulation, Recital 118 (Exhibit ARG-30) and Definitive Regulation, Recitals 142 and 143 (Exhibit ARG-22).
[38] See Exhibit EU-14, recitals 181 and 182.
[39] Definitive Regulation, Recital 156 (Exhibit ARG-22).

industry's own commercial strategy, in qualifying it as "self-defense" and in incorrectly attributing its effects to the allegedly dumped imports.

57. With regard to **double-counting**, Argentina has claimed that the EU failed to appropriately assess the injurious effects of the double-counting regimes and that it failed to separate and distinguish its effects from those of the allegedly dumped imports. In responding to this claim, the EU has stated that, double-counting shifts demand within the Union industry and does not generate demand for imports and that Union producers of double-counting biodiesel experienced negative performance, suggesting that the decline of non-double counting producers cannot be attributed to the performance of the double-counting producers.[40]

58. Argentina disagrees with these arguments for the following reasons. First of all, the fact that the financial situation of the producers declined only after double-counting had been repealed in France is irrelevant, as the effects of double-counting materialized during the IP. Consequently, the injurious effects of that scheme should have, but were not distinguished and separated from the injury caused by the allegedly dumped imports as mandated by Article 3.5 of the ADA. Second, Argentina notes that the EU failed to examine double-counting regimes other than the French regime[41], despite the fact that their existence was brought to the attention of the investigating authority.

59. In view of the above, Argentina submits that the EU violated Articles 3.1 and 3.5 of the ADA in failing to examine double-counting and to distinguish and separate the injurious effects of double-counting from those of the allegedly dumped imports.

60. Finally, Argentina has claimed that the EU's industry is at a disadvantage because of a **lack of vertical integration and lack of access to raw materials**. The disadvantage results from the introduction of additional phase of transport into the production chain, which does not exist when the raw materials are processed on site. The significance of this disadvantage cannot be understated, especially in view of the fact that transport of the raw material is not only an additional phase, but occupies a much larger volume of cargo space.

61. In consequence, in failing to separate and distinguish the effects of the lack of vertical integration and the lack of access to raw materials from the injury caused by the allegedly dumped imports, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

62. For the reasons set out in this submission and in previous submissions, Argentina respectfully requests that this Panel find that:

I.- Article 2(5) of the Basic Regulation is inconsistent as such, with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data of the exporters as included in its records when those costs reflect prices which are "abnormally or artificially low", because the costs do not reflect market prices or because they are allegedly affected by a distortion; (B) Article 2.2 of the ADA 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", even though neither provision allows for an establishment of the costs on this basis. As a result, the EU acted inconsistently with Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA, and

II.- The anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 because the EU failed to calculate the cost of production on the basis of the records kept by the producers under investigation; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because the EU failed to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin; (C) Article 2.2.1.1 of the ADA because the EU included costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (D) As a result of the inconsistencies mentioned in points (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994; (E) Articles 2.2

[40] EU's first written submission, para. 339 and EU's response to Panel question No. 79.
[41] EU's response to Panel question No. 73.

and 2.2.2(iii) of the ADA because the EU failed to base the profit margin as a component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA; (F) Article 2.4 of the ADA because the EU failed to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and normal value; (G) Article 9.3 of the ADA and VI:2 of the GATT 1994 because the EU 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 ADA; (H) Articles 3.1 and 3.4 of the ADA because the EU's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the EU industry; (I) Articles 3.1 and 3.5 of the ADA since the EU failed to conduct an objective examination, based on positive evidence, of known factors other than the allegedly dumped imports in its non-attribution analysis; hence, the EU failed to ensure that the injury suffered by the domestic industry of the EU resulting from other factors was not attributed to the allegedly dumped imports. Argentina considers that the measures at issue should be withdrawn.

63. Argentina respectfully requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-dumping Agreement and the GATT 1994.

ANNEX B-3

EXECUTIVE SUMMARY OF THE STATEMENT OF ARGENTINA
AT THE FIRST MEETING OF THE PANEL

1. Opening Remarks

1. Argentina asserts that we are not here because export taxes are the source of unfair advantages for producers in countries where exports are taxed, as the narrative of the EU suggests. We are here because of structural problems and lack of competitiveness in the EU industry of biodiesel. These structural problems are unfortunate in light of the huge subsidies granted to the biodiesel industry in Europe.

2. Argentina believes that the investigating authorities in the EU have a mandate to challenge export taxes at any cost. And it is what they did, even knowing that Argentina and Indonesia would bring a case before the WTO. However, export taxes are not only legal (there are no disciplines for export taxes under WTO law) but also legitimate instruments broadly used by developing countries and mainly for fiscal purposes.

2. Introduction

3. Despite being based on an intensely litigated agreement – the Anti-Dumping Agreement - this dispute is still unique on at least two counts: a) The first aspect is the fact that while dumping reflects the conduct of individual companies that export at prices below those in their own domestic market, in the case at hand, the European Union has targeted a series of practices that are very different from such price discrimination and are completely beyond the control of the exporting producers b) the second distinctive feature of this case which is derived from the first one, is the overt attempt by the European Union to expand the scope of application of the Anti-Dumping Agreement. According to the European Union, dumping would no longer be confined to the well-known practice of pricing the same product differently for different markets. Instead, it would also encompass differences in costs at which producers in different countries obtain inputs. Hence, as of the moment there is a difference in the price at which a producer can have access to a given input, and provided that such difference is reflected in the price of the final product, then, according to the European Union, that product is being dumped.

4. According to the above said, Argentina first challenges "as such" Article 2(5), second subparagraph, of the Basic Regulation, which provides that where the costs of the inputs in the records reflect prices that are found to be artificially or abnormally low in comparison with the prices on other markets, the costs have to be adjusted or established on another basis, including on the basis of information from other representative markets. This measure is manifestly inconsistent with the provisions of the Anti-Dumping Agreement and, in particular, with its Article 2 which precisely lays down the rules that must be followed for the determination of the normal value. This measure is of significant concern to Argentina given that the investigating authority endows itself with a margin of discretion that goes well beyond what is allowed under the Anti-Dumping Agreement. The European Union is, in fact, trying to create a new category of "dumping" which does not exist under the Anti-Dumping Agreement.

5. Argentina also challenges the anti-dumping measures imposed by the European Union on imports of biodiesel from, Argentina. These measures are based on manifestly flawed determinations of dumping since the European Union erroneously rejected the Argentinean producers' cost data for soybean and replaced them by the average of the FOB reference price, thereby finding dumping or artificially inflating the margins of dumping of the Argentinean producers. Furthermore, these measures are also based on manifestly flawed determinations relating to both injury and causality.

3. Request for a Preliminary Ruling and Preliminary Issues raised by the European Union

6. In Argentina's view, to the extent that the European Union cannot demonstrate that resolving these Article 6.2 claims would make any practical differences, these issues appear to be moot and, in Argentina's view, the Panel therefore does not need to examine them any further.[1]

7. The same comment applies to the European Union's claim about Argentina's alleged failure to identify the "specific measures at issue" in which it argued that the references to the terms "implementing measures and related instruments or practices" and to "related measures and implementing measures" in Argentina's Panel Request were too vague.[2] Argentina noted that these words were not on their face inconsistent with the requirement to identify the specific measures at issue and that, in any case, this objection appeared to be premature and unnecessary.

8. The European Union first asserts that the Panel must reject Argentina's claims pursuant to Article 2.1 of the Anti-Dumping Agreement and VI:1 of the GATT 1994 because they are definitional provisions that do not impose independent obligations[3] and is not applicable to situations where there are no sales in the ordinary course of trade.[4] However, Argentina remembers that in subparagraph 470 of its first written submission has explained that the European Union's violations of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 result from the numerous violations of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

9. The European Union erroneously argues that Argentina claims that a violation of Article 2.2 automatically constitutes a failure to comply with Article 9.3.[5] This is not correct. Argentina is not taking issue with the calculation of the normal value under its Article 9.3 claim. What Argentina has submitted is that the European Union has imposed definitive anti-dumping duties which exceed the margins of dumping as established under Article 2 of the Anti-Dumping Agreement.

4. Claims against Article 2(5), second subparagraph, of the Basic Regulation

10. Argentina is not challenging "two separate "measures""[6], as claimed by the European Union, but only one measure, namely Article 2(5), second subparagraph.

4.1 Claim under Article 2.2.1.1 of the Anti-Dumping Agreement

11. Argentina claims first that Article 2(5), second subparagraph, violates Article 2.2.1.1. In this sense, Argentina asserts that the introduction of the second subparagraph in Article 2(5) by Regulation No 1972/2002 gave a specific meaning and content to the condition 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". Under and pursuant to the new second subparagraph of Article 2(5), the authorities have to conclude that the records do not reasonably reflect costs associated with the production and sale of the product under consideration where they find that the costs of the inputs reflect prices that are "abnormally or artificially low" in comparison to prices on other markets.

12. Thus, it clearly flows from Regulation No 1972/2002 that, with the introduction of the second subparagraph of Article 2(5), a condition has been imposed on the authorities which must examine whether the costs of the inputs are not "abnormally or artificially low" in comparison to prices on other markets. This is actually supported by the wording of the second part of Article 2(5), second subparagraph, which refers to the adjustment or establishment of costs on any other reasonable basis including from other representative markets. The requirement to use information from other representative markets is rendered necessary precisely because the data on the domestic market are to be considered non-usable when they are found to be "artificially or abnormally low" in comparison with prices on other markets.

[1] Panel Report, *US – Countervailing and Antidumping Measures from China*, paras. 3.9 – 3.10.
[2] European Union's request for a preliminary ruling, paras. 8 – 9.
[3] European Union's first written submission, paras. 48 and 53.
[4] European Union's first written submission, para. 49.
[5] European Union first written submission, para. 56.
[6] European Union's first written submission, para. 63.

13. This is further supported by the consistent practice of the authorities, because it has been found that there is an automatic link between, on the one hand, prices that are found to be "abnormally or artificially low" in comparison to prices on other markets and, on the other hand, the finding that the costs are not reasonably reflected in the records. There is no discretion, and the practice confirms that.

14. Contrary to what European Union affirms, Argentina is not required to demonstrate that the "abnormally or artificially low" prices of the inputs is the only reason justifying the conclusion that the company records do not reasonably reflect the costs. Argentina is only required to demonstrate that the measure at issue necessarily requires the authorities to conclude that the records do not reasonably reflect the costs when the costs reflect prices that are found to be abnormally or artificially low.

15. The European Union claims that under the second condition of Article 2.2.1.1, the authorities can examine whether the records reflect costs that would normally be associated with the production and sale of the goods in normal circumstances.[7]

16. To defend its position, the European Union is thus obliged to distort the ordinary meaning of the terms of Article 2.2.1.1, adding words that are not there, such as "would normally be" and "in normal circumstances". As emphasized in Argentina's first written submission, such an interpretation is not only contrary to the ordinary meaning of the words, but also to the structure of the sentence and the context of this provision.

17. There is nothing in Article 2.2.1.1 or other provisions of the Anti-Dumping Agreement suggesting that the cost data of producers can be disregarded because they are lower than what they would be in other markets. Argentina underlined earlier, rejecting the costs of a producer on the ground that there are not "normal" in comparison to the prices in another country is fundamentally contrary to the concept of "dumping" in the Anti-Dumping Agreement.

4.2 Claim under Article 2.2 of the Anti-Dumping Agreement

18. Argentina asserts that the wording of Article 2(5) second subparagraph is clearly WTO inconsistent: it "mandates" the authorities to adjust or establish the costs "where such information is not available or cannot be used", "on any other reasonable basis, including information from other representative markets".

19. Furthermore, the European Union errs when it argues that it would be necessary to demonstrate that this provision requires "the investigating authority to use such information "in all cases"."[8] However, as the Appellate Body noted in an earlier case, in order to succeed with an "as such" claim,[9] Argentina is not required to demonstrate that in each and every case where Article 2(5) second subparagraph will be used, it will end in a result which is inconsistent with WTO rules. It is sufficient for Argentina to demonstrate that this rule will necessarily lead to violations of WTO rules in certain specified circumstances.

20. The European Union's interpretation that "[t]he 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 the country of origin, where the conditions of production and sale are not in the ordinary course of trade"[10] is untenable.

[7] European Union's first written submission, paras. 133, 139 and 144.
[8] European Union's first written submission, para. 186.
[9] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 172.
[10] European Union's first written submission, para. 198.

5. Claims regarding the Anti-Dumping Measures on imports of biodiesel originating in Argentina

5.1 Claims under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

5.1.1 The European Union misinterprets Article 2.2.1.1 of the Anti-Dumping Agreement

21. Argentina does not dispute that the costs against which the records must be tested are those that are "associated with the production and sale of the product under consideration". However, as Argentina has emphasized, the fact that the test refers to the "costs associated with the production and sale of the product under consideration" means that the determination must establish whether the costs in question effectively "pertain to the production and sale of the product in question", irrespective of whether the costs are lower than international prices or prices in other markets. In stating that it is entitled to consider "which costs would pertain to the production and sale of biodiesel in normal circumstances", the European Union is adding words which are not there, namely "would" and "in normal circumstances", and is thereby modifying the scope and meaning of this provision.

22. In the biodiesel anti-dumping investigation, the European Union did not examine whether the costs of soybeans in the producers' records reasonably related to the cost of producing and selling biodiesel in Argentina. Rather, it examined those costs against a hypothetical benchmark price and concluded that "the domestic prices of the main raw material used by the biodiesel producers in Argentina were […] artificially lower than the international prices due to the distortion created by the Argentine export tax system".[11]

23. Furthermore, the panel report in *EC – Salmon* confirmed that "the test for determining whether a cost can be used in the calculation of "cost of production" is whether it is "associated with the production and sale" of the like product", the costs being those of the "investigated party." The fact that the Panel in *EC – Salmon* defines the expression "cost of production" as "the price to be paid for the act of producing" does not in any way mean that the word "costs" could be understood as hypothetical prices.

5.1.2 The European Union acted inconsistently with Article 2.2.1.1 in using costs that are not associated with the production and sale of biodiesel for the construction of normal value

24. Argentina has shown that for the exporting producers, the FOB reference price is not a price that is associated with the production and sale of biodiesel. In fact, the reference FOB price is a statistical tool which is calculated by averaging FOB prices of the previous day.

5.1.3 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 failing to construct normal value on the basis of the cost of production in the country of origin

25. In calculating the cost of production, the European Union did not use the domestic price of soybeans, but the reference FOB price of soybeans, net of fobbing costs. By using the reference FOB price of soybeans, the European Union failed to construct normal value on the basis of the cost of production in the country of origin, thereby, acting inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

5.2 Claim under Article 2.4 of the Anti-Dumping Agreement: failure to make a fair comparison

26. Argentina argues that the difference between normal value and export price results from the use of the reference FOB price of soybean, which includes the export tax on soybeans in the construction of the normal value while the export price does not include any export tax at all. Consequently, it affects price comparability and also has a huge impact on the dumping margins.

[11] Definitive Regulation, recital (38), Exhibit ARG-22.

5.3 Claims under Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement in relation to production capacity and utilization of capacity

5.3.1 The European Union's definition of production capacity and utilization of capacity is inconsistent with Article 3.4 of the Anti-Dumping Agreement

27. At the outset, and as also noted by China[12], since Article 3.4 of the Anti-Dumping Agreement contains no reference to availability for use or idleness when providing that the injury assessment includes an evaluation of the utilization of capacity, the European Union's failure to include idle capacity in its evaluation of the utilization of capacity is therefore inconsistent with Article 3.4 of the Anti-Dumping Agreement. Argentina specifically notes that Article 3.4 of the Anti-Dumping Agreement mandates that all relevant economic factors and indices having a bearing on the state of the industry must be evaluated in the context of an injury assessment. The exclusion of capacity, which is a relevant economic factor, from the calculation of the utilization of capacity is thus inconsistent with this provision.[13]

5.3.2 The evaluation of production capacity and utilization of capacity is not based on positive evidence

28. Argentina maintains that the analysis of production capacity and utilization of capacity is not based on positive evidence, contrary to the requirements of Article 3.1 of the Anti-Dumping Agreement, for two reasons: a) the attribution of the "idle" capacity of EBB members and non-EBB members to the capacity of non-EBB Members is implausible due to the magnitude of the mistake, which amounts to almost six million tons and b) the new evidence submitted by the European Union in Exhibit EU-10 does not appear to directly relate to production capacity. Indeed, it only points to the fact that plants have stopped producing or have commenced insolvency proceedings. It does not demonstrate, however, that production capacity has ceased to exist.

5.3.3 The European Union's evaluation of production capacity and utilization of capacity does not involve an objective assessment

29. Contrary to the general obligation assumed under WTO, the European Union favoured evidence produced by one party but which is contradicted by publicly available and reliable information over the evidence on the record until that point.

5.3.4 The inconsistent evaluation of utilization of capacity and return on investment

30. Argentina objects to the inconsistent evaluation of both factors, since the so-called "idle" capacity was excluded from the evaluation of capacity utilization while it was included in the calculation of return on investment.[14]

5.3.5 Causation: overcapacity was a source of injury

31. Argentina maintains that the improper evaluation of the production capacity of the European Union industry under Article 3.4 of the Anti-Dumping Agreement prevented it from properly assessing overcapacity as a source of injury pursuant to Article 3.5. Indeed, an objective evaluation of production capacity and capacity utilization based on positive evidence would not have allowed the European Union to find that capacity utilization was increasing.

32. Furthermore, it is illogical to assert that because the utilization rate was consistently low, it could not be the cause of the decline in profitability or of the poor performance of the European Union industry, considering, especially in this case the gross level of the overcapacity.

33. To sum up, overcapacity was a factor known to the authorities, different from the dumped imports and also a source of injury, the effects of which the European Union was obliged to distinguish and separate from those caused by the allegedly dumped imports.

[12] China's third party submission, para. 151.
[13] Argentina's first written submission, para. 355.
[14] Argentina's first written submission, paras. 387-391.

5.3.6 Causation: long-term commercial strategy of importing biodiesel originating in Argentina as a source of injury

34. The facts show that rather than being forced to import biodiesel originating in Argentina, imports by the EU producers appear to have been a deliberate commercial strategy on their side. First of all, there is ample evidence on the record showing close relations, or even affiliation, to the same corporate groups of European and Argentinean producers, and secondly, the facts on the record show that 60% of total imports from Indonesia and Argentina during the IP were made by the EU industry itself.[15]

35. In conclusion, Argentina submits that the European Union was under the obligation to ensure that the injury resulting from the industry's long term commercial policy was not attributed to the domestic industry. Its failure to do so is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

[15] Provisional Regulation, recitals 132 to 136, Exhibit ARG-30 and Definitive Regulation, recital 151, Exhibit ARG-22.

ANNEX B-4

EXECUTIVE SUMMARY OF THE STATEMENT OF ARGENTINA
AT THE SECOND MEETING OF THE PANEL

1. Preliminary Issues

1. Regarding **Argentina's claim under Article 2.4**, Argentina has demonstrated that a difference exists between normal value and export price[1],that this difference affects price comparability[2] and therefore that, absent an adjustment to account for this difference, the comparison is not fair. In this regard, the *EC – Tube or Pipe Fittings* an the *EU – Footwear (China)* cases referred to by the European Union[3] are not relevant and must be rejected. Therefore, the European Union errs when arguing that Argentina's claim is outside the scope of Article 2.4.

2. Argentina's Claims against Article 2(5), second subparagraph, of the Basic Regulation

2.1 The scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation

2. Argentina argues that the European Union makes an effort to purport an over-simplistic reading of Article 2(5), second subparagraph, in complete isolation from its context when stating that it only "describes what the authorities are authorized to do in order to calculate the costs, when the company records cannot be used".[4] The fact that the determination that the records do not reasonably reflect the costs when they reflect prices that are "abnormally or artificially low" in comparison to prices on other markets because of an alleged distortion is made pursuant to Article 2(5), second subparagraph, of the Basic Regulation, does not only flow from the text of the provision and its background.[5] It has been also expressly confirmed by the practice and the General Court in the second *Acron case*.[6]

3. With regard to the **meaning and content** of Article 2(5), second subparagraph, the European Union had argued that the text of Article 2(5), second subparagraph, did not include the terms used by Argentina to describe the content and meaning of that measure.[7] Argentina has emphasized that, pursuant to Article 11 of the DSU the Panel should undertake a holistic assessment of all relevant elements, not only the text of the law, but also the consistent practice and the judgments of the General Court.

4. The European Union has also raised a new argument, namely that Argentina did not "establish the "scope, meaning and content" of the second subparagraph of Article 2(5) *in general*".[8] According *Argentina – Import Measures* in which the Appellate Body found that "in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, ***to the extent that such content is the object of the claims raised***"[9] this argument must be rejected.

5. On the other hand, the *US – Carbon Steel (India)* case[10] does not support the European Union's position. Indeed, the statement quoted by the European Union that "it is not clear why a number of instances of the application of the measure should in this case *conclusively establish the meaning of the measure at issue in general*, which in this case is confined to [the

[1] Argentina's first written submission, paras. 298-299; Argentina's second written submission, para. 103.
[2] Argentina's first written submission, para. 300, Argentina's opening statement at the first meeting of the Panel, para. 85 and Argentina's second written submission, para. 203.
[3] European Union's second written submission, paras. 25-27.
[4] European Union's opening statement, para. 50.
[5] Argentina's second written submission, paras. 16-33.
[6] Argentina's second written submission, paras. 34-41, 42.
[7] European Union's first written submission, paras. 85-86.
[8] European Union's second written submission, para. 50.
[9] Appellate Body Report, *Argentina – Import Measures*, para. 5.104.
[10] European Union's second written submission, paras. 51-52.

defending party's legislation]"[11], must be read in its context, since this statement[12] does not have the meaning that the European Union *pretends to read in it*.

2.2 Argentina has made a prima facie case on its claims against Article 2(5), second subparagraph, of the Basic Regulation

6. Argentina would like to emphasize that, in order to succeed with its "as such" claims, it is not necessary to demonstrate that the challenged measures requires the authorities to apply it in a manner inconsistent with the covered agreements "*in all cases*" as claimed by the European Union.[13]

7. Argentina has explained why, in its view, the discretionary/mandatory distinction is not relevant for the purposes of its claims and noted that, in any case, the measure at issue does not afford to the authorities the alleged "broad discretion" claimed by the European Union.

8. Firstly, and regarding as the discretionary/mandatory as an irrelevant distinction Argentina has noted that, if the relevant WTO provision prohibits a certain conduct, the fact that the measure being challenged provides for the possibility to adopt such a conduct, should lead to the conclusion that there is a violation of the said WTO provision.[14] Since Article 2.2.1.1 does not permit determinations that the records do not reasonably reflect costs in case of "artificially low" or "abnormally low" prices in comparison to prices on other markets because of an alleged distortion, and Article 2.2 does not permit the use of information other than information in the country of origin, Article 2(5), second subparagraph, must be found to be inconsistent with this specific provision as Argentina has argued.

9. Secondly, in order to make a *prima facie* case, Argentina has demonstrated that the assertion that Article 2(5), second subparagraph, affords broad discretion to the authorities is simply not true. It flows from the various elements presented by Argentina that the authorities do not have the discretion alleged by the European Union. The use of the term "shall" indicates the clear mandatory nature of the rule, and flies on the face of the assertion that second subparagraph of Article 2(5) of the Basic Regulation is framed in "permissive terms".[15] Moreover, the absence of discretion is supported by the consistent practice referred to by Argentina contrary to that of *US – Carbon Steel (India)*[16], and confirmed by the General Court.

10. In relation to Argentina's claims under Article 2.2, the cases referred to by the European Union showing that the EU authorities sometimes make adjustments based on domestic sources are totally irrelevant as well since Argentina is not taking issue with that type of adjustment.

3. Argentina's claims under Article 2.2.1.1 of the Anti-Dumping Agreement

3.1 Legal Interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

11. Argentina in the first place address an important preliminary issue, that is, the European Union claims that what the Panel has to do is to examine Argentina's interpretation and determine whether "this is indeed the proper interpretation of Article 2.2.1.1".[17] This is, however, an erroneous description of the Panel's task. The Panel has to determine whether Argentina has established that Article 2(5), second subparagraph, is inconsistent with Article 2.2.1.1. It is on the basis of all evidence and legal argumentation that the Panel has to determine whether Argentina has indeed demonstrated that Article 2(5), second subparagraph, is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

[11] European Union's second written submission, para. 51.
[12] See the Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480, first sentence.
[13] European Union's second written submission, para. 38.
[14] Argentina's opening statement at the first meeting of the Panel, para. 74; Argentina's second written submission, paras. 95 – 96.
[15] European Union's second written submission, para. 83.
[16] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480 in which the Appellate Body noted that "the United States placed a number of cases on the Panel records where the "worst possible inference" was not applied in instances of non-cooperation".
[17] European Union's second written submission, para. 90.

12. Argentina notes that, regarding the interpretation of Article 2.2.1.1, the European Union, in its second written submission, has focused on certain specific aspects such as the negotiating history, the findings of the panel in *US – Softwood Lumber V*, among others, which do not appear to be central to the interpretative exercise which must focus on the ordinary meaning of the terms, their context and the object and purpose of the Agreement.

13. First, the findings in *US – Softwood Lumber V*. The European Union attempts, by selectively quoting the Panel Report in that case, to create parallelisms between the situations in that case and the measure we are discussing in the present case. The situations at issue in *US – Softwood Lumber V* were, however, different from what we are discussing in this case.

14. Second, the reference to Note 2 Ad Article VI paragraphs 2 and 3 concerning the "multiple currency practices." The European Union´s reference to this Note has simply nothing to do with what we are discussing here. Therefore, this argument should be rejected. The definition of "dumping" in Article VI is contained in paragraph 1. The Ad Note, however, specifically refers to paragraphs 2 and 3. In fact, this Ad Note does not seek to change or have any influence on the definition of "dumping" which is included in Article VI:1, but only to authorize the levy of anti-dumping duties in the very specific circumstances identified therein. Lastly, Argentina's interpretation is confirmed by the negotiating history. The negotiating history makes clear that the drafters agreed that "only price dumping" as defined in Article VI would be allowed to justify the defensive duties which were an exception to GATT rules. For all the aforesaid, the attempt of the European Union to draw parallelisms between "multiple currency practices" and the characteristics of Argentina's export tax on soya beans[18] is manifestly inappropriate and unsupported by the proper interpretation of that provision.

15. Third, the definition of "cost" as provided by the Panel in *EC – Salmon (Norway)*, Argentina does not see much difference between a price that is "paid" and a price that is "incurred", since the word "cost" refers to a concrete amount and not to a hypothetical value.

3.2 Argentina's claim under Article 2.2.1.1 concerning anti-dumping measures on imports of biodiesel from Argentina

16. In its second written submission, the European Union fails to rebut the claims raised by Argentina. Instead, the European Union has focused on some factual issues which are manifestly incorrect.

17. First, the European Union argues that the export tax on soybeans "constitutes a mechanism for distorting the price of soya beans".[19] This is not so. Argentina has already explained.[20] Second, the European Union continues to wrongly argue that the FOB reference price is the "price to be paid" by the Argentinean producers for domestic purchases of soybeans in Argentina.[21] As emphasized several times, the FOB reference price is not a price that is payable on domestic transactions. Rather, it is a taxable basis for levying the corresponding export tax.

4. Claims under Article 2.2 of the Anti-Dumping Agreement

18. On the basis of the definition provided by the Panel in *EC – Salmon (Norway)*, the "cost of production" means "the price to be paid for the act of producing". Therefore, the "cost of production in the country of origin" refers to the price to be paid for the act of producing biodiesel in the country of origin, that is, in Argentina.

19. The EU authorities have used - and this is not disputed - an average of the FOB reference prices minus fobbing costs as the cost for soybeans when constructing normal value. The European Union in fact acknowledges that it is not the price at which soybean is purchased domestically, since it keeps on stating that the FOB reference prices reflect "the cost of soya beans that Argentine producers of biodiesel would have to incur, in the absence of the export tax".[22]

[18] European Union's second written submission, para. 124.
[19] European Union's second written submission, para. 127.
[20] Argentina's first written submission, Section 5.2.4, paras. 209 and 210.
[21] European Union's second written submission, para. 126.
[22] European Union's second written submission, para. 142.

20. By not using the "cost of production in the country of origin" the European Union violated Article 2.2 of the Anti-Dumping Agreement.

5. Background and Economic Context of the Antidumping Investigation Concerning Imports of Biodiesel.

21. The background to this dispute shows that the first full year of production of biodiesel in the European Union is 2005. By the end of 2007 EU's total consumption had slightly more than doubled. Interestingly the capacity utilization figures determined by the Commission for the sampled EU producers was 84%. There were imports from some countries but not from Argentina which, at that time, had no biodiesel industry.

22. Between 2007 and 2009, Community consumption literally exploded according to the Commission's own figures[23], but not as overwhelmingly as production capacity, which sky-rocketed in the same period and thereby creating huge overcapacity.[24]

23. The European Union has argued that this did not prevent the EU industry from still being profitable in 2009, suggesting that excess capacity is not a cause of injury such as to break the causal link. Interestingly enough however, the figures of profitability in the investigation concerning imports from the United States, show that in 2005 when overcapacity was not excessive yet, the profitability rate of the sampled producers was at 18.3% while by 2009, coinciding with an overcapacity of the Union industry of more than 11 million tons, profitability had dropped further by more than a third, to only 3.5%.

6. Claims under Article 3 of the Anti-Dumping Agreement

24. The European Union acted inconsistently with Articles 3.1 and 3.4 because its definition of capacity and capacity utilization is inconsistent with Article 3.4 and its assessment of these factors is neither based on positive evidence nor include an objective examination. Additionally to these inconsistencies, the EU also failed to properly evaluate the effects of the enormous overcapacity on the EU industry, thereby violating Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

25. Article 3.4 does not contain any rule allowing the exclusion of capacity that would be "idle" or "not immediately available for use". Argentina prefers to draw the Panel's attention to the fact that in the proceeding on photovoltaic modules from China as well as in the US biodiesel case the so-called "idle capacity" was not excluded from production capacity.[25]

26. In relation to this point Argentina explained in previous submissions that the European Union could simply not exclude part of the capacity from the assessment of the production capacity and utilization of capacity on the grounds that it was "idle" without violating Article 3.4 of the Anti-dumping Agreement.

27. The European Union's assessment of production capacity and the utilization of capacity is not based on positive evidence and does involve an objective examination as Argentina has shown. With respect to the "desk analysis and checking against publicly available sources", the European Union has not yet been able to produce the alleged "publicly available data" that would support these new figures and that they are contradicted by all publicly available data on record that appeared in the public file of the investigation. With respect to the verification of the data Argentina would like to highlight that, although the European Union did select a sample of Union producers and carried out a detailed examination of their data including on-the-spot verifications, this was done before the imposition of provisional duties. In any event, that early examination and verification actually confirmed the accuracy of the production capacity figures that were reported in the Provisional Regulation.

28. Finally, Argentina has demonstrated that the conclusions reached by the Commission as to why the effects of overcapacity did not break the causal link between dumped imports and injury, are not conclusions which could be reached by an unbiased and objective decision maker taking

[23] Provisional Regulation, Table 1 (Exhibit ARG-30).

[24] Provisional Regulation, Tables 1 and 4 (Exhibit ARG-30).

[25] Council Regulation 193/2009, recitals 125 – 128 (Exhibit EU-13) and Council Regulation 599/2009, recitals 148 – 152 (Exhibit EU-14).

into account the facts that were before the investigating authority, and in light of the explanations given[26] as explained in detail in Argentina's previous submissions.

29. The European Union thus failed to appropriately assess overcapacity and its effects on the situation of the domestic industry, leading to an erroneous conclusion about the causality between alleged dumped imports and the injury suffered by the EU industry.

30. Regarding the long-term commercial strategy of the European Union industry, the figures are undisputed and are self-explanatory. As a matter of fact, if the three producers whose imports reached 63%, 85% and 71% of their own production had not been excluded from the definition of the "Union industry", the proportion of imports made by the European Union producers would have exceeded the overall 60% ratio determined for the Union industry.

31. The sole justification given by the European Union to the massive imports from the countries concerned was that if the domestic industry had not imported biodiesel from Argentina, "that role would have been filled by independent traders". However, the European Union fails to offer a logical explanation as to why there was no increase in imports by such independent traders during the IP. Surely if the European Union producers found an advantage in importing from Argentina – so much so that they actually managed to increase their market share in the Union if their own production is added to their imports, then one would also have expected independent traders to equally find it attractive to import into the European Union. The European Union does not offer a logical explanation that would explain in which way the European Union producers were hoping to prevent independent traders from importing to the EU by doing it themselves.

[26] Panel Report, *EU – Footwear (China)*, para 7.484.

ANNEX B-5

EXECUTIVE SUMMARY OF THE RESPONSE OF ARGENTINA TO THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

1. Introduction

1. The request for a preliminary ruling filed by the European Union is based on arguments that are formalistic in nature, that are based on a selective reading of fragments of Argentina's panel and consultations requests out of context, or on arguments that are obscure or inaccurate. Therefore, preliminary objections by the European Union should all be rejected by the Panel. Argentina considers that (i) it has identified the specific measures at issue in its panel request, (ii) that it has presented the problem clearly in its panel request and (iii) that its panel request does not expand the scope of the dispute. Argentina will address each issue in turn.

2. Argentina has identified the specific measures at issue

2. The European Union takes issue with an alleged lack of clarity in the identification of the "specific measures at issue." In particular, the European Union takes issue with the references to "implementing measures and related instruments or practices" and to "related measures and implementing measures" in Section 1 of Argentina's panel request.[1]

2.1 The European Union's objection is unclear and inaccurate

3. The objection raised by the European Union falls short of accuracy and clarity.

4. Indeed, first, in relation to paragraph 1(A) of Argentina's panel request, the European Union notes that this paragraph refers to "any subsequent amendments, replacements, implementing measures and related instruments or practices". At paragraph 8 of its request for preliminary ruling, the European Union argues that the reference to "*implementing measures and related instrument or practices*" is too vague. However, in paragraph 9, the European Union argues that "Argentina's claims against "implementing measures and other related measures" in paragraph 1(A) and footnote 7 of its Panel Request fall outside the Panel's terms of reference; that reference to "other related measures" is unclear since the panel request refers to "implementing measures and related instruments or practices".

5. Second, in relation to paragraph 1(B), the European Union states that "[f]ootnote 3 mentions Commission Regulation 490/2013, while footnote 2 mentions Council Implementing Regulation 1194/2013."[2] However, this is manifestly incorrect. In fact, footnote 3 refers to both Commission Regulation (EU) No 490/2013 and Council Implementing Regulation (EU) No 1194/2013, while footnote 5 refers to Council Regulation (EU) No 490/2013 and footnote 6 refers to Council Implementing Regulation (EU) No 1194/2013.

2.2 The European Union's objection should be rejected entirely

6. The European Union contends that, by referring to "implementing measures and related instrument or practices" and "related measures and implementing measures" when describing the measures at issue, Argentina's panel request fails to comply with the provisions of Article 6.2, because it fails to "identify the specific measures at issue."[3] The requirements under Article 6.2 of the DSU to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly are central to the establishment of the jurisdiction of the Panel.[4]

7. As emphasized by the Appellate Body "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[5] The panel must therefore "scrutinize carefully the panel

[1] European Union's request for preliminary ruling, section 2, paras. 3-9.
[2] European Union's request for preliminary ruling, para. 6.
[3] European Union's request for preliminary ruling, para. 7.
[4] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.
[5] Appellate Body Report, *US – Carbon Steel*, para. 127.

request, read as a whole, and on the basis of the language used, in order to determine whether it is "sufficiently precise" to comply with Article 6.2 of the DSU."[6]

8. The European Union's suggestion that there is something vague in the references to "implementing measures and related instruments or practices" and to "related measures and implementing measures" lacks merits.

9. First of all, Argentina notes that these types of references are not uncommon in panel requests. As the Panel noted in *Australia – Tobacco Plain Packaging (Indonesia)*, the rulings in previous disputes in which this type of references has been challenged "suggest to us that a reference to unnamed measures such as those discussed above is not per se inconsistent with the specificity requirement in Article 6.2."[7] Argentina notes that the European Union fails to substantiate why, in the present case, the references concerned would be inconsistent with the specificity requirement in Article 6.2 of the DSU.

10. Argentina notes that "the obligation to identify the specific measure at issue does not oblige the complainant to set forth the "precise content" of the measure in its panel request."[8] As the Appellate Body emphasized, "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 needs be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[9]

11. Section 1, point A) of Argentina's panel request, refers to "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 as well as any subsequent amendments, replacements, implementing measures and related instruments or practices." Reading the sentence in its entirety, it is clear that the words "implementing measures and related instruments or practices" which are being challenged by the European Union necessarily refer to "Article 2(5) of Council Regulation (EC) No 1225/2009." Therefore, only measures relating to, that is having a sufficiently close nexus to, Article 2(5) of Council Regulation (EC) No 1225/2009 could fall within the scope of the "implementing measures and related instruments or practices." Therefore, this is not a "vague" reference as the European Union claims.

12. This is further supported by the narrative description of the substantive content and operation of the measures at issue in Section 2, point A), the heading and first two paragraphs which provide the following description:

> **Article 2(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries of the European Community (the "Basic Regulation)[7]**
>
> *Article 2(5) of the Basic Regulation inter alia provides that 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.*
>
> *Pursuant to this provision, when the European Union considers that the costs of manufacturing the product under consideration actually incurred by the producer under investigation are artificially low or are otherwise distorted, it does not calculate the costs on the basis of the records of the producer under investigation although those records are in accordance with the generally accepted accounting principles of the exporting countries and reasonably reflect the costs associated with the production and sale of the product under consideration but adjusts those costs or*

[6] Appellate Body Report, *EC – Fasteners*, para.562, referring to Appellate Body Reports, *US - Carbon Steel*, para.127; *US – Oil Country Tubular Goods Sunset Reviews*, paras.164 and 169, *US – Continued Zeroing*, para. 161 and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

[7] Preliminary Ruling of the Panel in *Australia – Tobacco Plain Packaging (Indonesia)*, para. 5.14.

[8] Panel Report, *China – Raw Materials*, Annex F-1, para. 8.

[9] Appellate Body Report, *US – Continued Zeroing*, para. 169.

establishes them on the basis of other data, including data pertaining to markets other than those of the exporting country.

[7] As well as any subsequent amendments, replacements, implementing measures and related instruments or practices

13. Thus, the above constitutes the description of the substantive content and operation of the challenged measures. It makes clear that the measures being challenged relate to Article 2(5) of the Basic Regulation. Thus, the only way to read "implementing measures and related instruments or practices" is in close connection to Article 2(5) of the Basic Regulation.

14. As to the reference to "related measures and implementing measures" in Section 1, point B), these terms are placed at the end of point B) which identifies the primary measures being challenged as "the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, inter alia, Argentina, as well as the underlying investigation.". Point B) then precisely identifies the anti-dumping measures, both in footnote 3 as well as in the next paragraphs of point B as covering (i) the provisional anti-dumping duties on imports of biodiesel originating in, inter alia, Argentina, pursuant 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 and (ii) the definitive measures imposed pursuant to 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. The last paragraph then concludes that the measures at issue include the anti-dumping measures identified above "as well as any subsequent amendments, replacements, related measures and implementing measures." It is clear that only measures relating to the anti-dumping measures imposed by the European Union on imports of biodiesel originating in Argentina could fall within the scope of the terms "related measures and implementing measures.

15. Argentina notes that the situation in the present case is similar to the one addressed by panels in recent cases, namely *India – Agricultural Products and Australia – Tobacco Plain Packaging (Indonesia)*. In that case, the Panel rejected the objection that "the panel request is not sufficiently precise to meet the requirements of Article 6.2 simply by virtue of the inclusion of the terms "related measures, or implementing measures."[10] In particular, the Panel emphasized that the "primary measures" were not broadly defined, but rather limited in view of their context.[11]

16. The references which the European Union takes issues with were necessary to protect the interests of Argentina as complaining party in order to avoid that a closely connected measure adopted after the establishment of the panel could be claimed not to be within the panel's terms of reference merely because not mentioned in the panel request. The Appellate Body has recognized that this constitutes a legitimate objective and serves the due process objective of preventing the complaining party from having to "adjust its pleading throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target"."[12] Hence, the aim of such references is to address the potential situation arising if the European Union were to adopt measures that are closely connected to, or change the legal nature of the existing measures during the course of the Panel proceedings. This situation arose in *EC – Chicken Cuts (Brazil)* in which, since the complainants' panel requests were not worded sufficiently broadly, they could not be interpreted as containing the new measures.[13]

17. In *EC – IT Products*, the Panel also noted that:

While we do not consider that the mere incantation of the phrase "any amendments or extensions and any related or implementing measures" in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as

[10] Preliminary Ruling of the Panel in *India – Agricultural Products*, para. 3.51.
[11] Preliminary Ruling of the Panel in *India – Agricultural Products*, para. 3.48.
[12] Appellate Body Report, *Chile – Price Band System*, para. 144.
[13] Panel Report, *EC – Chicken Cuts (Brazil)*, paras. 7.28-7.29.

> *the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review.*[14]

18. In conclusion, Argentina requests the Panel to reject the European Union's objection that "Argentina's claims against "implementing measures and other related measures" in Paragraph 1(A) and footnote 7 of its Panel Request, as well as Argentina's claims against "related measures and implementing measures" in Paragraph 1(B) of its Panel Request, fall outside the Panel's terms of reference".[15] First of all, the European Union failed to substantiate its objection. Second, this claim is premature and unnecessary. Third, when interpreted in their context, the words challenged by the European Union cannot be found to be vague and therefore are not "on their face" inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.

3. Argentina's panel request provides a brief summary of the legal bases of the complaint sufficient to present the problem clearly

19. The European Union argues that Argentina's panel request fails to meet the requirement to "present the problem clearly" in two aspects: by failing to identify the "legal basis" of the complaint and by failing to "plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed."[16]

20. Argentina notes that the requirement to "present the problem clearly" is not a standalone requirement. Article 6.2 of the DSU contains two requirements: (i) the obligation to identify the specific measure(s) at issue and (ii) the obligation to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3.1 The "inter alia" legal basis

21. The European Union first takes issues with the use of the word "inter alia" in sub-section 2(A). It argues that because of the words "inter alia", "[n]either the European Union, nor the Panel has any idea of what claims or legal bases Argentina will finally present in this case: the words "*inter alia*" make the list of claims in Argentina's panel request completely open-ended."[17]

22. Sub-section 2(a) of Argentina's panel request provides that:

> *A) 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 (the "Basic Regulation")*
>
> [...]
>
> *Argentina considers that Article 2(5) of the Basic Regulation is inconsistent as such with, inter alia, the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"):*
>
> *[...]*

23. In the first place, Argentina notes that the scope of the European Union's objection is unclear. Indeed, the European Union claims that "[t]his is inconsistent with Article 6.2 of the DSU and places the relevant claims outside the Panel's terms of reference."[18] It is, however, unclear which "relevant claims" would, according to the European Union, be placed outside the Panel's terms of reference.

[14] Panel Report, *EC – IT Products*, para. 7.140.
[15] European Union's request for preliminary ruling, para. 9.
[16] European Union's request for preliminary ruling, para. 10.
[17] European Union's request for preliminary ruling, para. 12.
[18] European Union's request for preliminary ruling, para. 13.

24. To the extent that the European Union were to argue that all the claims made by Argentina in Section 2, point A) would fall outside the Panel's terms of reference, this objection does not make any sense.

25. In fact, the European Union is focusing on the words "inter alia" in the introductory paragraph in isolation, without examining the context in which these words are used and in particular the list of legal claims included thereafter. As is clear from the panel request, the introductory paragraph in which the words "inter alia" are included is nothing else but the introductory clause to a detailed description of the specific legal bases of the different "as such" claims, as indicated by the colon that is written right after the parenthesis and before the list of items 1 to 4.

26. Furthermore, the claims made by Argentina and which are listed under points 1 to 4 of Section 2, point A) of Argentina's panel request, all precisely identify the provisions of the covered agreements that Argentina claims are being violated. For each claim, Argentina provides an explanation of the content of the claim so that the European Union knows the case it has to answer.

3.2 Paragraph 2 (B) of Argentina's Panel Request

27. The European Union also takes issue with the following paragraph in Sub-section 2, B) of Argentina's panel request:

> *Argentina considers that the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, inter alia, Argentina and the underlying investigation are inconsistent with the following provisions of the Anti-Dumping Agreement and of the GATT 1994:*
>
> *6. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because 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.*

28. The European Union claims that "[t]his paragraph fails to meet the requirements of Article 6.2 of the DSU"[19] for four reasons which must all be rejected.

29. First, the European Union claims that "Argentina's Panel Request fails to mention the specific sub-paragraph of Article 9.3, with which the challenged measures are supposed to be inconsistent."[20] There is, however, no such kind of general requirement "to refer to the specific sub-paragraph of the WTO treaty provision that is supposed to be infringed by the challenged measure".[21] The Appellate Body Report to which the European Union refers, found that:

> *There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint*[22]

30. Argentina's panel request indicates that the measures at issue are inconsistent with Article 9.3 and Article VI:2 of the GATT 1994 "because 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." While Article 9.3 indeed includes a chapeau and three sub-paragraphs, it is clear from the description of the claim (just quoted) that Argentina is taking issue with the chapeau. This interpretation is in accordance with the Report of the Appellate Body in *Thailand – H-Beams* which held that "a general reference to Article 3 of the Anti-Dumping Agreement without identifying the relevant paragraphs, was sufficient to fulfill the

[19] European Union's request for preliminary ruling, para. 15.
[20] European Union's request for preliminary ruling, para. 16.
[21] European Union's request for preliminary ruling, para. 16.
[22] Appellate Body Report, *Korea – Dairy*, para. 124.

requirements of Article 6.2 of the DSU, considering that the panel request "referred explicitly to the specific language of Article 3."[23]

31. Second, the European Union argues that "Argentina fails to articulate the exact claims it advances."[24] According to the European Union, it is not clear whether Argentina actually challenges (a) the comparison between the anti-dumping duty and the margin of dumping or (b) the method of calculation of the margin of dumping itself.[25]

32. However, there is no ambiguity about the claim of Argentina. In fact, as is clear from the structure of the panel request, Argentina first takes issue with the dumping margin determination under points 1, 2, 3, 4 and 5 of its panel request which all refer to specific obligations under Article 2 of the Anti-Dumping Agreement. Under point 6 of the panel request, as a next logical step, Argentina then claims that the European Union violated Article 9.3 by imposing and levying anti-dumping duties in excess of the margin of dumping to be established pursuant to Article 2 of the Anti-Dumping Agreement.

33. Argentina further notes that its first written submission confirms the meaning of the words used in the panel request.[26] Indeed, it is clear from paragraphs 307 to 309 of Argentina's first written submission that Argentina's claim under Article 9.3 focuses on the imposition and levying of anti-dumping duties in excess of the dumping margin, had the dumping margin been determined in conformity with Article 2 of the Anti-Dumping Agreement contrary to what the European Union did in this case as demonstrated in its previous claims

34. The third and fourth reasons submitted by the European Union are inapposite since they are based on the hypothetical assumption that "Argentina actually challenges the method of determining the dumping margin."[27] As Argentina has explained above, it is clear from both the wording of the panel request and the legal provision being challenged, namely Article 9.3, that Argentina's claim focuses on the fact that the duties have been imposed and levied "in excess" of the margin of dumping established in accordance with Article 2 of the Anti-Dumping Agreement.

4. The European Union's allegations concerning the expansion of the scope of the dispute

4.1 Arguments of the European Union

35. In section 4 of its request for a preliminary ruling, European Union alleges that Argentina has expanded the scope of the dispute in its panel request either as a result of the inclusion of new measures or as the result of the inclusion of new legal bases. The European Union notes that consultations circumscribe panel requests and, that, as a result, a panel request cannot include claims that were not included in the consultations request where these new claims expand the scope of the dispute or have the effect of changing the essence of the complaint.[28]

4.2 The applicable legal standard

36. Although Article 6.2 requires the complainant to indicate in its panel request "whether consultations were held", it does not require the measures and claims identified in the panel request as basis for the complaint to be *identical* to those identified in the consultations request.[29]

37. In *Brazil – Aircraft*, the Appellate Body emphasized that Articles 4 and 6 of the DSU do not "require a precise and exact identity between the specific measures that were the subject of

[23] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.24 referring to Appellate Body Report, *Thailand – H-Beams*, para. 90.
[24] European Union's request for preliminary ruling, para. 17.
[25] European Union's request for preliminary ruling, para. 17.
[26] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9 referring to Appellate Body Report, *US – Carbon Steel*, para. 127.
[27] European Union's request for preliminary ruling, para. 19.
[28] European Union's request for a preliminary ruling, para. 23, referring to Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice* and *US – Upland Cotton*.
[29] Preliminary Ruling of the Panel in *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 3.35.

consultations and the specific measures identified in the request for the establishment of a panel"[30]

38. In relation to the "legal basis" of the complaint in particular, the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "[i]t does not follow from the use of the same term [in Articles 4.4 and 6.2] […] that the claims made at the time of the panel request must be identical to those indicated in the request for consultations."[31]

39. It is important to underline that it is the panel request, not the consultations request, which determines the panel's terms of reference pursuant to Article 7 of the DSU. Moreover, as panels and the Appellate Body have consistently emphasized in past cases, the relevant provisions of the DSU do not require a "precise and exact" identity between the measures and claims identified in the request for consultations and those identified in the panel request.

40. Argentina will show why, taking into account the above legal standard, all the claims made in the panel request fall within this Panel's terms of reference and neither expand the scope of the dispute nor change the essence of the complaint.

4.3 The European Union's objection against the alleged inclusion of a new measure in the panel request

41. The European Union claims that Argentina's panel request challenges for the first time "*related practices*", in addition to Article 2(5) of Council Regulation 1225/2009 since the terms "related practices" were not included in Argentina's consultations request, thus expanding the scope of the dispute and changes the essence of Argentina's complaint.[32]

42. Argentina submits that this objection of the European Union was unnecessary and is clearly moot. Argentina is not challenging the European Union's practice as a distinct measure. In other words, Argentina is not challenging ""*related practices*", in addition to Article 2(5) of Council Regulation 1225/2009."[33] The measure being challenged is Article 2(5) of the Basic Regulation. Argentina refers to the practice of the European Union only to illustrate the content and scope of Article 2(5) of the Basic Regulation in view of its consistent application.[34] Accordingly, Argentina is not challenging a "new measure" since it is not asking that this Panel rule on "related practices", as shown in paragraph 468 of its first written submission.

4.4 The European Union's objections against the alleged inclusion of new legal bases in the panel request

4.4.1 The allegedly new and unclear "as applied" claim against Article 2(5) of the Basic Regulation

43. The European Union argues that Argentina brings a new and unclear claim against Article 2(5) of the Basic Regulation in a "not-numbered" paragraph. The European Union appears to refer to the unnumbered paragraph between paragraphs 3 and 4 of section B of the panel request.

44. This paragraph is not a "new claim" that Argentina is bringing, as this claim is not different from the claims raised under points 1, 2 and 3. This paragraph merely emphasizes that the European Union's violations of the provisions cited in points 1, 2 and 3 occurred as a result of the application of Article 2(5) of the Basic Regulation in the imposition of the measures on imports of biodiesel of Argentina. Argentina notes in this respect that the European Union itself points out that Commission Regulation and the Council Implementing Regulation imposing the provisional and definitive duties are based on Article 2(5) of the Basic Regulation.[35]

[30] Appellate Body Report, *Brazil – Aircraft*, para. 132.
[31] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 136.
[32] European Union's request for a preliminary ruling, paras.27 and 29.
[33] European Union's request for preliminary ruling, para. 27.
[34] Argentina's first written submission, section 4.2.2.
[35] European Union's request for a preliminary ruling, para. 38.

4.4.2 The allegedly new claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-Dumping Agreement

45. The European Union argues that Argentina's claim under Article 9.3 of the Anti-Dumping Agreement in section 2(A)(3) of the panel request falls outside of the Panel's terms of reference. It bases its argument on the fact that the request for consultations did not make any reference to Article 9.3 under section (b) and on the fact that section (b) of the consultations request did not refer to an alleged excess of the anti-dumping duty compared to the margin of dumping. The European Union thus considers that Argentina's claim under paragraph 2(A)(3) cannot be said to reasonably have evolved from the consultations.[36] Again, this objection lacks merit.

46. Argentina strongly disagrees with the European Union's contention that Argentina's as such claim under paragraph 2(A)(3) cannot reasonably be said to have evolved reasonably from the consultations request. First, as the European Union itself points out in paragraph 38 of its request for a preliminary ruling, Argentina raised a claim based on Article 9.3 in its as applied claims concerning the provisional and definitive anti-dumping measures.[37] Therefore, the imposition of anti-dumping duties in excess of the margin of dumping as a result of the application of Article 2(5) of the Basic Regulation has been the object of consultations.

47. In any case, as shown by its first written submission, Argentina is not bringing an as such claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-Dumping Agreement.[38] Indeed, Argentina considers that findings of inconsistency 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 Marrakesh Agreement Establishing the WTO with respect to Article 2(5) of the Basic Regulation would be sufficient to secure an effective resolution of this dispute.

4.4.3 The allegedly new claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994

48. The European Union argues that the claims based on Article VI:1 of the GATT 1994 in sections 2(A)1 and 2(A)2 of the panel request fall outside of the terms of reference of the Panel because this provision was not mentioned in the request for consultations. At the outset, Argentina notes that the claims it bring in this section are based Article VI:1(b)(ii) only.[39] Accordingly, Argentina limits its arguments to this specific provision. The objection raised by the European Union does not stand.

49. The European Union states that it cannot be argued that "adding new claims under Article VI:1 of the GATT does not change the "essence" of the complaint."[40] It bases this on the allegation that if Article VI:1 of the GATT 1994 is identical to the provisions of the Anti-Dumping Agreement that have already been cited, the addition of Article VI:1 would be redundant and the Panel would exercise judicial economy.[41]

50. This argument does not stand to reason. Nothing prevents Argentina from adding provisions that are identical in scope to an existing claim on which consultations were held.

51. Moreover, if the European Union intends to argue that Article VI:1(b)(ii) of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement are different in scope and that the "essence" of both provisions is different, then this is directly contradicted by the text and context of both provisions. The European Union has failed to point out what the difference in scope between both provisions is.

52. Article VI:1 of the GATT 1994 had been cited in the context of sections a.1 and a.2 of the consultations request in as *applied* claims that are similar to the as *such* claims at issue. Moreover, as already pointed out by Argentina, the content of Article VI:1(b)(ii) of the GATT 1994 is identical to Article 2.2 of the Anti-Dumping Agreement, which was cited in Argentina's consultations request in the section concerning the *as such claims*.

[36] European Union's request for a preliminary ruling, paras. 36-40.
[37] See section (a)(6) of the Request for consultations by Argentina, WT/DS/473/1.
[38] Argentina's first written submission, para. 468.
[39] Argentina's first written submission, paras. 133, 141 and 468.
[40] European Union's request for preliminary ruling, para. 43.
[41] European Union's request for a preliminary ruling, para. 43.

53. Argentina submits Article VI:1 of the GATT 1994 had been cited in the context of sections a.1 and a.2 of the consultations request in *as applied* claims that are similar to the *as such* claims at issue. Moreover, as already pointed out, the content of Article VI:1(b)(ii) of the GATT 1994 is identical to Article 2.2 of the Anti-Dumping Agreement, which was cited in Argentina's consultations request in the section concerning the *as such* claims. Argentina therefore respectfully requests that the Panel reject the European Union's purely formalistic objection and confirm that Argentina's claims under Article VI;1 of the GATT 1994 in relation to Section 2(A) are within the Panel's terms of reference.

4.4.4 The allegedly new claims against Article 2(5) of the Basic Regulation based on Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement

54. The European Union argues that the paragraph of the consultations request corresponding to section 2(A)(2) of the panel request only includes a claim based on Article 2.2.1.1 of the Anti-Dumping Agreement. It also argues that the corresponding claim in the consultations request refers only to the obligation that costs be calculated on the basis of the records kept by the exporters. The European Union thus argues that section 2(A)(2) of the panel request expands the scope of the dispute because they introduce a new legal basis (i.e., Article 2.2 of the Anti-Dumping Agreement) and because they introduce "a new type of complaint", that is, the use of costs not associated with the production and sale of the product under consideration.[42]

55. Argentina submits that the European Union carries out an unduly narrow reading when it reads section 2(A)2 of the panel request with reference to section b.2 of the consultations request only. The issue of the calculation of costs for the purpose of the construction of normal value is also addressed in section b.1 of Argentina's request for consultations, which refers to Article 2.2 of the Anti-Dumping Agreement. The assertion that Argentina added a provision in the panel request is therefore incorrect.

56. Moreover, there is a clear and logical connection between Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement. Indeed, Article 2.2.1.1 is a specific provision governing the calculation of costs for the construction of normal value. Article 2.2 concerns, among other matters, the construction of normal value and its components, including the cost of production. Argentina submits that consultations on the calculation of costs for the construction of normal value pursuant to Article 2.2.1.1 logically also cover the construction of normal value pursuant to Article 2.2, when such costs are being included in the construction of normal value.

57. Argentina also opposes the European Union's claim that it would have introduced in its panel request a "new type of complaint" when it refers to the use of costs not associated with the production and sale of the product under consideration. First of all, Argentina submits that this reference does not constitute a claim but an argument which is not required to be included in a panel request. Indeed, the Appellate Body emphasized that "Article 6.2 requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly."[43]

58. Furthermore, even if it is part of the claim, the European Union's claim is premised on an incorrect reading of Argentina's request for consultations. Indeed, the request for consultations refers in relevant part to Article 2.2.1.1 of the Anti-Dumping Agreement "which requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation." The request for consultations does not limit in any way Argentina's claim to certain aspects or parts of Article 2.2.1.1, first sentence. By referring to Article 2.2.1.1 "which requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation", Argentina refers to the first sentence of Article 2.2.1.1. Therefore, the reference in the panel request to the use of costs not associated with the production and sale of the product under consideration cannot be said to be a "new claim".

59. In view of the above, the European Union's objections under section 4.2.4 of its request for a preliminary ruling must fail.

[42] European Union's request for a preliminary ruling, paras 45 and 46.
[43] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

4.4.5 The allegedly new claim against the anti-dumping measures imposed by the European Union based on Article 2.1 of the Anti-Dumping Agreement

60. Finally, Argentina turns to the European Union's objection against the inclusion of Article 2.1 of the Anti-Dumping Agreement in section 2(B)4 of the panel request.

61. Argentina notes that it is a well-established principle of law that the burden of proof rests upon the party asserting the affirmative of a particular claim or defense. However, Argentina fails to see any substantiation by the European Union of why the addition of Article 2.1 of the Anti-Dumping Agreement results in an expansion of the scope of this dispute or why it cannot reasonably be said that the inclusion of this provision evolved from the consultations. In this respect, Argentina refers to paragraphs 51 to 53 of the European Union's request for a preliminary ruling, which contains only mere assertions but no substantiation. Consequently, the European Union's objection fails.

62. In any case, Argentina notes that it is not basing its claim concerning the profit determination on Article 2.1 of the Anti-Dumping Agreement.[44] As already highlighted in section 4.4.2 above, it would therefore appear not to be necessary for the panel to rule on this issue.

5. Conclusion

63. In light of the above, Argentina submits that the European Union's request for preliminary ruling should be rejected entirely.

64. First, the objection made by the European Union about the references to "implementing measures and related instruments or practices" and "related measures and implementing measures" should be rejected: first, because the European Union failed to substantiate its objection; second, since this claim is premature and unnecessary; and third, since these references comply with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.

65. Second, Argentina provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly in relation to the "as such" claims in section 2(A), as well as in relation to Argentina's claim under Article 9.3 of the Anti-Dumping Agreement in section 2(B)6.

66. Third, Argentina did not expand the scope of the dispute. Indeed, the "related practices" do not constitute a "new measure" that cannot be said to have "evolved" from the consultations and which, in any case, are not challenged by Argentina as a distinct measure. Furthermore, all the claims listed in the panel request were either included in the consultations request or can reasonably be said to have evolved from the claims listed in consultations request.

67. Accordingly, Argentina requests the Panel to find that the request for establishment of a Panel submitted by Argentina fully complies with the requirements of Article 6.2 of the DSU and that, consequently, all the measures and claims concerned fall within the Panel's terms of reference.

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[44] Argentina's first written submission, para. 470.

ANNEX C

ARGUMENTS OF THE EUROPEAN UNION

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INTRODUCTION

1. The EU demonstrates that both Argentina's claims with respect to the Basic Regulation and its claims with respect to the Provisional and the Definitive Regulations should be rejected as no inconsistency with the Anti-Dumping Agreement has been proved.

2. TERMS OF REFERENCE

2.1. CLAIMS ABANDONED BY ARGENTINA

2. Argentina has abandoned the following claims mentioned in its Panel Request: (1) any claim against "*related practices*"; (2) any claim under an "*inter alia*" legal basis; (3) the claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-dumping Agreement; (4) any distinct "*as applied*" claim against Article 2(5) of the Basic Regulation; (5) the claim against Article 2(5) of the Basic Regulation because the costs used are allegedly not "associated with the production and sale of the product under consideration"; and (6) the claim against the "profit determination" based on Article 2.1. The EU understands that, as Argentina has abandoned and does not pursue these claims, it cannot establish a *prima facie* case on them and that the Panel cannot make any findings on these claims.

2.2. OTHER ARGENTINE CLAIMS CHALLENGED BY THE EU

2.2.1. Argentina's failure to identify the "specific measure at issue"

3. First, Argentina appears to have abandoned the claim. Second, Argentina's assertions must be rejected. The EU's Request for a Preliminary Ruling was timely and in full compliance with the Panel's Working Procedures. "Objections to jurisdiction" of a Panel "*must be raised as early as possible*". On the substance of its Request, the EU has noted the Appellate Body's consistent case law, according to which references to "implementing measures and other related measures" do not identify the specific measures at issue. Accepting that all "measures" that "implement", or are "related" to Article 2(5) of the Basic Regulation fall within the Panel's Terms of Reference would have the perverse effect of bringing within the jurisdiction of this Panel all provisional and definitive Regulations of the EU based on Article 2(5).

4. The inclusion of the terms "implementing measures" and "related measures or instruments" in Argentina's Panel Request (a) creates an open-ended list of challenged "measures", (b) confuses the limits between the jurisdiction of this Panel and the jurisdiction of other panels, and (c) is not necessary in order to protect any legitimate interest of the complaining party; such legitimate interests are protected by other terms in the Panel Request, which are not challenged by the EU. Therefore, the challenged terms fail to meet the requirements of Article 6.2 of the DSU and fall outside the Panel's terms of reference.

2.2.2. Argentina's other claims

2.2.2.1 The claim against the Provisional and the Definitive Regulations based on Article 9.3 of the Anti-Dumping Agreement

5. The EU has argued that Argentina's Panel Request fails to articulate clearly the exact claim that it advances, because it is not clear whether Argentina's challenge is directed against (a) the comparison between the anti-dumping duty and the dumping margin, or (b) against the method of calculation of the dumping margin itself. The question of whether the claim under Article 9.3 is within the Panel's terms of reference is of limited value for the present dispute.

2.2.2.2 The claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994

6. Argentina's Panel Request includes claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994, which were not included in Argentina's Request for Consultations. However, Argentina's first written submission does not develop these claims. The question of whether the claims against Article 2(5) based on Article VI:1 of the GATT 1994 are within the Panel's terms of reference is of very limited value for the present dispute.

3. PRELIMINARY ISSUES

3.1. THE CLAIM UNDER ARTICLE 2.1 OF THE ANTI-DUMPING AGREEMENT

7. Given that Article 2.1 does not impose any independent obligation on WTO Members, it cannot serve as a legal basis for a distinct claim in WTO dispute settlement proceedings. Furthermore, Article 2.1 does not cover the situations where there are no domestic sales "in the ordinary course of trade". Therefore, the facts of this case fall outside the scope of Article 2.1 of the Anti-Dumping Agreement.

3.2. THE CLAIMS UNDER ARTICLE VI:1 OF THE GATT 1994

8. Since Article VI:1 of the GATT 1994 does not impose any independent obligation on WTO Members, it cannot serve as a legal basis for a distinct claim in WTO dispute settlement proceedings. Therefore, Argentina cannot base any claim on Article VI:1 of the GATT 1994.

3.3. THE CLAIM UNDER ARTICLE 9:3 OF THE ANTI-DUMPING AGREEMENT

9. Article 9.3 of the Anti-Dumping Agreement addresses the *comparison* between (a) the anti-dumping duties and (b) the dumping margins. It does not address the *calculation* of *normal value*. As a result, the complaining party must show something more than a simple erroneous calculation of normal value. The EU's interpretation is supported by the relevant case law. For example, in *EC – Salmon*, the Panel found that, in determining the dumping margin, the defending Member had acted inconsistently with a number of obligations imposed by Article 2 of the Anti-dumping Agreement. However, the Panel rejected the complaining Member's claims under Article 9.3 of the Anti-Dumping Agreement. Argentina's claim under Article 9.3 is conditioned upon the success of Argentina's claims under Article 2 of the Anti-Dumping Agreement. In these circumstances, Argentina's claims fall outside the scope of Article 9.3 of the Anti-Dumping Agreement and must be rejected.

4. ARGENTINA'S "AS SUCH" CLAIMS AGAINST THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

4.1. THE "AS SUCH" CLAIM UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

4.1.1. The reasons for rejecting Argentina's claim

4.1.1.1 Argentina is challenging "as such" a "measure" which does not exist

4.1.1.1.1 The scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation are clear on its face

10. Article 2(5) gives the anti-dumping authorities certain alternative options for establishing or adjusting the "costs associated with the production and sale of the product under investigation" when one of the provisos defined in the first subparagraph of Article 2(5) applies. The second subparagraph of Article 2(5) of the Basic Regulation describes what the authorities can do after it has been determined that the records do not "reasonably reflect" costs, pursuant to the first subparagraph of Article 2(5) of the Basic Regulation.

11. Given that the scope, meaning and content of the second subparagraph of Article 2(5) are clear "on its face", the consistency of the measure with the covered agreements must be assessed on the basis of the text of the legal instrument "alone".

4.1.1.1.2 Argentina distorts the scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation

12. The "measure" invented by Argentina simply does not exist. This conclusion is supported by a number of considerations. First, the conditions that must be met in order to determine whether the company records "reasonably reflect" costs are outside the scope of the second subparagraph of Article 2(5) of the Basic Regulation. Second, the terms "reflect market values", "regulated market", "abnormally low", or "artificially distorted", which Argentina uses to describe the "measure" that it challenges, do not even exist in the text of the second subparagraph of Article 2(5).

4.1.1.1.3 The "various elements examined" by Argentina do not give to the second subparagraph of Article 2(5) the scope, meaning and content asserted by Argentina

13. The first "element" identified by Argentina is the "historical perspective" of the second subparagraph of Article 2(5) of the Basic Regulation. However, the introduction of the second subparagraph of Article 2(5) in 2002 had no impact on the scope, the meaning or the content of the terms "reasonably reflect costs" in Article 2(5), which already existed in the first subparagraph of Article 2(5). The second "element" identified by Argentina is the "EU's practice". Nevertheless, the examples presented by Argentina in its first written submission do not suffice to establish a purported "practice" of the EU in the application of the second subparagraph of Article 2(5). The third element presented by Argentina consists of four judgments of the General Court of the EU. However, these judgments do not support Argentina's assertions since none of these judgments provides that the determination of whether company records "reasonably reflect costs" is made pursuant to the second subparagraph of Article 2(5).

4.1.1.2 Argentina has failed to establish that the purported "measure" that it challenges is "as such" inconsistent with the covered agreements

14. Argentina has asserted that it presents this "practice" only to illustrate the scope and content of the purported "measure" that it challenges. However, in order to achieve this result, Argentina would need to establish (a) that the "practice" is not "distinct from the measure itself", but, on the contrary, forms an "integral part of the measure itself" and is "necessarily applied in all instances"; and (b) that this "practice" is "required" by the measure, which must be "mandatory" and constitute a "binding requirement" to apply the measure in the same way in all cases. In the present case, Argentina has failed to establish any of these two requirements for either the first, or the second subparagraph of Article 2(5).

15. With regard to the first requirement, the plain text of the first subparagraph of Article 2(5) confirms that the provision affords broad discretion to the authorities to determine whether the records of a particular company "reasonably reflect costs", on the basis of their analysis of the facts in each individual case. With regard to the second, the evidence confirms the discretionary nature of Article 2(5). The use of the word "*entitled*" by the General Court confirms that, as a matter of municipal EU law, Article 2(5) is discretionary: it allows the authorities to take certain actions, but does not require them to do so in all cases.

4.1.1.3 Argentina advances an erroneous legal interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

4.1.1.3.1 The text of Article 2.2.1.1 of the Anti-Dumping Agreement

16. First, Argentina's thesis is based on the assertion that the costs reflected in the company records do not need to be "reasonable". Argentina is wrong. It is counterintuitive to assert that Article 2.2.1.1 of the Anti-Dumping Agreement mandates the investigating authorities to base their calculations on costs that are "unreasonable". In any event, the Panel Report in *Egypt – Steel Rebar* actually contradicts Argentina's thesis. The fact that the Panel required the relevant item to be *"reasonably related to the cost* of producing and selling rebar" shows that the word "reasonably" is also attached to the word "costs" in Article 2.2.1.1.

17. Second, Argentina seeks to dissociate the term "costs" in Article 2.2.1.1 from the word "prices". However, the Panel Report in *EC – Salmon* interpreted "costs of production" as "the *price*

to be paid for the act of producing". This shows that the "cost of production" is linked to the prices *to be paid* for the act of producing. If the panel considered that the required costs are the expenses that have actually already been incurred by the producer, it would have used the past tense of the verb "be" in its Report. By using the terms "to be paid", this panel finding confirms that the "reasonable costs" required by Article 2.2.1.1 are not necessarily only the expenses that have already been incurred by the producer.

18. Third, Argentina interprets the term "associated" in Article 2.2.1.1 as "actually incurred". It is submitted that the word "associated" has a broader meaning which captures a broader range of relations between the "costs" and the "production". Fourth, these terms "associated with the *production and sale*" are broad enough to capture the costs that *would normally be* associated with the production and sale of the goods. Fifth, Article 2.2.1.1 refers to the "costs associated with the production". It is uncontroversial that the cost of production depends on the cost of the raw material and other inputs used for the production and, hence to the prices of the raw material normally used for the production. Sixth, the use of the word "reflect" reinforces the conclusion that reasonableness in Article 2.2.1.1 is not limited only to the "expenses that have actually been incurred by the producer".

4.1.1.3.2 The context of Article 2.2.1.1 of the Anti-Dumping Agreement

19. Argentina's main thesis finds no support in the analysis of the context of the provision. First, where the Anti-Dumping Agreement wishes to refer to the expenses actually incurred by the producer, it expressly states so. Second, if Article 2.2.1.1 intended to have the records include only the "expenses actually incurred", then Article 2.2.1.1 would have included only the condition that records should be kept in accordance with the GAAP.

20. Third, Argentina is wrong when it asserts that the first sentence of Article 2.2.1.1 "refers to a cost allocation issue" and that "the second sentence provides what authorities have to do if they use an alternative cost allocation methodology". The first sentence of Article 2.2.1.1 uses the word "calculated" and not the word "allocation". Moreover, the first sentence of Article 2.2.1.1 refers to the records of the company as "data sources", while the second sentence refers to information that is *not* found in the records of the company, but that has been provided by the investigated companies in the course of the investigation. Finally, the second sentence of Article 2.2.1.1 allows the authorities to take into consideration "all available evidence on the proper allocation of costs, including that which is made available by respondents in the context of an anti-dumping investigation". This implies that the second sentence allows authorities to take into consideration cost information which is not found in the companies' records, but which has been provided later.

4.1.1.3.3 The object and purpose of the anti-dumping rules

21. Article VI:1 of the GATT 1994 shows that the object and purpose of the WTO anti-dumping rules is to prevent the industries of the exporting country from damaging the industries of the importing country through the use of prices that are artificially low, because of some abnormal condition (hence the reference to "normal" value). A cost of the raw materials used to produce the dumped goods which is not "normal" and which causes the "normal value" of the goods not to be "normal", falls squarely within the type of conditions that the WTO anti-dumping rules aim to address.

4.1.1.3.4 The case law of the WTO dispute settlement system

22. The Panel Report in *Egypt – Steel Rebar* confirms that the word "reasonably" is also linked to the word "costs" and, therefore, Argentina is wrong when it asserts that the costs reflected in the records do not need to be "reasonable". Likewise, the Panel Report in *EC – Salmon* establishes that "costs of production" means "prices to be paid for the act of producing" and not "expenses that have already been incurred by the producer". Most importantly, the Reports of the Appellate Body and the Panel in *US – Softwood Lumber V* clearly establish that Argentina's thesis is wrong. The Panel found that Article 2.2.1.1 does not impose on the investigating authorities any particular methodology in their assessing whether the records reasonably reflect costs. On appeal, the Appellate Body did not take issue with this interpretation of Article 2.2.1.1.

4.2. THE "AS SUCH" CLAIM UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

4.2.1. The second subparagraph of Article 2(5) of the Basic Regulation is not "as such" inconsistent with the covered agreements

4.2.1.1 The meaning and content of the provision

23. This broad discretion of Article 2.2 is established, *inter alia*, by the provision which allows investigating authorities to use "any other reasonable basis" in order to establish or adjust costs. At the same time, this provision does not "mandate" the authorities to use information from other representative markets. It only allows them to do so, if this is "reasonable".

24. Such discretion is also to be found in the second paragraph of Article 2(5). This is confirmed by the authorities' practice in cases such as *White phosphorus originating in Kazakhstan* or *Okoumé* plywood originating in China, which prove that the second subparagraph of Article 2(5) does not oblige the EU to seek production cost information outside the country of origin in all cases. This discretion is also confirmed by the judgments of the courts of the EU, where the use of the words "*may*" and "*entitled*" shows that the second subparagraph of Article 2(5) allows the investigating authorities a broad discretion in the choice of "reasonable sources of information".

4.2.1.2 The second subparagraph of Article 2(5) is not "as such" inconsistent with the covered agreements

25. A fundamental characteristic of an "as such" challenge against a "measure" is that the complaining party must establish that the measure is "necessarily inconsistent" with the covered agreements. Irrespective of whether using "information from other representative markets" is consistent with Article 2.2 of the Anti-Dumping Agreement, the second subparagraph of Article 2(5) does not "*require*" the investigating authority to use such information "*in all cases*".

4.2.2. Argentina suggests an erroneous interpretation of Article 2.2 of the Anti-Dumping Agreement

26. Neither Article 2.2.1.1 nor any other part of the Anti-Dumping Agreement provides a rule that explicitly deals with how costs should be determined when this proviso applies. Article 2(5) of the Basic Regulation properly deals with this issue in a manner which is fully consistent with the requirements of Article 2.2 of the Anti-Dumping Agreement.

27. First, the notion of "cost of production in the country of origin" is a legal one, but establishing the cost of production in a particular case involves determinations of fact. Such determinations are made with the aid of evidence. It cannot be excluded that evidence relating to that determination might originate in other countries. 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, where the conditions of production and sale are not in the "ordinary course of trade".

5. ARGENTINA'S CLAIMS REGARDING THE ANTI-DUMPING MEASURES ON BIODIESEL

5.1. ARGENTINA'S CLAIM IN RELATION TO THE USE OF THE RECORDS OF THE INVESTIGATED COMPANIES

5.1.1. The application of a measure that is found to be "as such" inconsistent with the covered agreements.

28. Argentina asserts that a finding that a provision is "as such" inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement would necessarily lead to a finding that the application of that provision in a particular situation is also inconsistent with Article 2.2.1.1. Given that the second subparagraph of Article 2(5) of the Basic Regulation is not "as such" inconsistent with Article 2.2.1.1, the issue raised by Argentina is moot in the present case.

5.1.2. The alleged "improper establishment of facts"

29. In regard to trade, the notion of "distortion" implies an interference with the normal operation of the market. The distortion identified in the Definitive Regulation is that caused by the existence of an export tax on soya beans and oil. This tax had the consequence that the prices of these products in the domestic market were lowered, and that effect in its turn had consequences for those companies that used these products.

30. The fact that, within the limits set by the state, market forces continue to operate, does not diminish or cancel the distortive effect on trade of an export tax. Likewise, the fact that domestic prices follow the trends in international prices is irrelevant in so far as the distortion accounts for the difference between those prices.

31. As far as Argentina's assertions in relation to the "main raw material" for biodiesel are concerned, the EU notes that it based its calculation of the biodiesel's cost of production and normal value on the cost of soya bean already at the provisional stage and that the Argentine companies under investigation had not expressed any concern or other comment, following disclosure.

5.1.3. The interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

5.1.3.1 The text of Article 2.2.1.1 of the Anti-Dumping Agreement

32. Argentina repeats its main thesis that Article 2.2.1.1 allegedly refers to the "expenses actually incurred by the producer". First, Article 2.2.1.1 does not include the words "expenses actually incurred by the producer". Second, Article 2.2.1.1 uses the terms "costs associated with the production and sale of the product". The word "associated" has a broader meaning than the words "actually incurred" and captures a broader range of relations between the "costs" and the "production".

33. Third, Argentina is wrong when it asserts that there is no relation between the word "costs" and the notion of "prices", for purposes of Article 2.2.1.1. The Panel in *EC – Salmon* has confirmed that the ordinary meaning of the terms "cost of production" may be considered to be the "prices to be paid for the act of producing".

34. Fourth, the Panel Report in *EC – Salmon* confirms that the "cost of production" is linked to the prices *to be paid* for the act of producing. By using the terms "to be paid", this Panel finding confirms that the costs captured by Article 2.2.1.1 are not the expenses that have actually been incurred by the producer. Fifth, Article 2.2.1.1 uses the terms "costs associated to the production", which the Panel in *EC – Salmon* has interpreted as the prices to be paid *for the act of producing*. The provision does not include the terms "incurred by the producer". Sixth, in *US – Softwood Lumber V,* both the Panel and Appellate Body accepted that an investigating authority is entitled to find that the company records do not "reasonably reflect costs", where they do not reflect prices charged at "arms-length" transactions.

5.1.3.2 The context of Article 2.2.1.1

35. Argentina asserts that Article 2.2.1.1 does not require the costs to be "reasonable", but that it requires, instead, that "unreasonable" costs be "reasonably" reflected in the company records. The EU has already shown that the Panel Report in *Egypt – Steel Rebar*, to which we refer, contradicts Argentina's assertion.

36. Article 2.2.1.1 does not impose any obligations on companies in relation to their accounting methods. It simply allows investigating authorities not to base their cost calculation on the companies' records, where either of the two conditions is not met. Argentina repeats the assertion that Article 2.2.1.1 deals with a "cost allocation issue". The EU has already exposed the fallacy of Argentina's assertion in the relevant section of this submission on the "as such" claim, to which we refer.

37. Argentina also seeks to use as "context" the provisions of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994. The EU has already dealt with Argentina's

interpretation of Article 2.2 of the Anti-Dumping Agreement and the issue of "country of origin" in the relevant section of this submission on the "as such" claim under Article 2.2 of the Anti-Dumping Agreement and we refer to that section.

38. Article 2.2.2 conditions the use of the "actual data pertaining to production" costs on the existence of *ordinary course of trade*. This supports the EU's thesis that it was not obliged to use the "actual data pertaining to production and sales" of biodiesel as recorded in the investigated companies' accounts, because the production and sale of biodiesel were not in the ordinary course of trade. Moreover, where the amounts cannot be determined "on this basis", then Article 2.2.2(iii) allows the investigating authorities to use "*any other reasonable method*". It is noted that Article 2.2.2(iii) does *not* impose any requirement that, in these circumstances, the data on the cost of production must be those prevailing in the country of origin.

5.1.3.3 The object and purpose of the Anti-Dumping Agreement

39. Argentina asserts that the EU's interpretation "subverts the fundamental purpose of the Anti-Dumping Agreement and uses the Agreement to address differences in price between the export price of the product concerned and international prices, instead of comparable prices on the domestic market". Argentina's assertion is wrong for a number of reasons.

40. First, the Definitive Regulation's dumping determination is not based on the difference between the export price of *biodiesel* and the international price of *biodiesel* but on the comparison between the export price of the Argentine biodiesel and the normal value of the Argentine biodiesel. Second, the Definitive Regulation found that Argentine biodiesel was dumped into the EU and, as a result of that dumping, the EU's industry suffered material injury. This is precisely the object and purpose of the WTO anti-dumping rules, as expressed in Article VI:1 of the GATT 1994.

5.2. ARGENTINA'S CLAIM IN RELATION TO "COUNTRY OF ORIGIN"

41. On the basis of the observations previously mentioned, the EU considers that Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 entitles the EU's investigating authorities to use the data that they used in order to calculate the normal value of Argentine biodiesel.

5.3. ARGENTINA'S CLAIM IN RELATION TO THE USE OF COSTS ALLEGEDLY "NOT ASSOCIATED WITH THE PRODUCTION AND SALE" OF BIODIESEL

42. The EU has already shown above that the term "associated" has a broader meaning than the words "actually incurred", or "actually paid" and that the Panel Report in *Egypt – Steel Rebar* uses the term "*pertain* to the production". Moreover, Article 2.2.1.1 mentions the costs associated *with the production*, as opposed to the expenses incurred by the *producer*. As the Panel in *EC – Salmon* has confirmed, the "costs of production" should be understood as the prices to be paid "for the *act of producing*".

5.4. ARTICLES 2.2 AND 2.2.2(III) OF THE ANTI-DUMPING AGREEMENT AND AMOUNTS FOR PROFITS

43. In setting the 15% margin of profit that the EU applied in constructing the normal value of biodiesel for Argentinian exporters, the EU was applying Article 2(3), first subparagraph, of the Basic Regulation, which follows the rule in Article 2.2 of the Anti-Dumping Agreement by specifying that a constructed normal value "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".

44. The EU submits that the method on the basis of which it determined the level of profits was reasonable and that the resulting margin was itself reasonable for the reasons stated below. Firstly, the figure is appropriate "on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve". Secondly, each situation must be assessed on its own merits taking into account the specific circumstances of the case. Thirdly, the figure was not out of line with that adopted in other investigations, for example that concerning biodiesel originating in the United States. Fourthly, the short and medium term borrowing rate in Argentina was around 14%, and it was reasonable to expect biodiesel producing companies to obtain a profit margin that

exceeded this level. Fifthly, biodiesel companies enjoyed a level of profit higher than 15% during the investigation period, albeit that they benefited from distorted costs. Sixthly, comparison with the target profit for the domestic industry in the absence of dumped imports is not relevant because it has a different purpose than the construction of the normal value.

5.5. Article 2.4 of the Anti-Dumping Agreement and Allowances for Price Comparability

45. The EU does not argue that a constructed price can never be the subject of adjustment in order to secure a fair comparison. Furthermore, the whole of Argentina's case with regard to Article 2.4 amounts to no more than an assertion that the method adopted by the EU for constructing the normal value could not, without adjustment, result in a fair comparison. There is no attempt to set the claim in a context, or to find guidance in the factors listed in Article 2.4 as appropriate for consideration as justifying allowances for differences. Such neglect is not surprising since none of them lends any support to the argument that Argentina presents.

5.5.1. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 vis-à-vis the level of anti-dumping duties imposed

46. 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 claims that the EU has answered in the preceding paragraphs. Since Argentina has failed to establish the earlier claims these consequential claims must also fail.

5.6. Articles 3.1, 3.4, 3.5 of the Anti-Dumping Agreement vis-à-vis production capacity, utilization of capacity and return on investment

5.6.1. Legal arguments and claims

47. Argentina claims that the EU's treatment of "idle" plant in the context of capacity does not accord with the meaning of that word in the phrase "utilization of capacity" in Article 3.4 of the Anti-Dumping Agreement.

48. There is no definition of "capacity" in the Agreement. In its Definitive Regulation the EU excluded "idle" plant, that is to say plant that "was not in such a state that it would have been available for use during the IP". Such plant would make no contribution to the "maximum amount or number that can be … produced", and its exclusion therefore accords with the ordinary meaning of the term "capacity".

49. The EU submits costs of relevant undertaking are taken into account when considering other factors in the list in Article 3.4, notably the factor of "actual and potential decline in … profits". "Utilization of capacity" is a factor distinct from costs and should be treated as such.

50. Whether the "idle" plants are included in the production capacity, or are excluded, the implications regarding injury are the same. In the first case the low capacity utilization is an indication of injury, in the second the closing or mothballing of plants is an indication of injury.

51. Argentina accuses the EU of not making available the "publicly available material" relating to idle capacity. There is no such obligation in any of the provisions of the Agreement invoked by Argentina in its Panel Request, and it is therefore outside of the Panel's terms of reference.

52. Argentina alleges that the presentation of data in the Definitive Regulation obstructed the arguments that the exporters wished to make about the causes of the EU's injury. However, all the data, concerning both "idle" and non-idle capacity were available to the exporters, and they were in no way inhibited from presenting arguments to the effect that the idle plants were a cause of injury. The factors listed in Article 3.4 are not exclusive.

53. Argentina also raises the issue of proper "evaluation" in regard to the issue of return on investment which it alleges was based on a different dataset to that used for production capacity. The EU has already shown that this issue is outside the terms of reference of the Panel.

54. Argentina argues that an assessment of "utilization of capacity" for the purposes of Article 3.4 that is based on a definition of capacity that is inconsistent with that provision, and was

not based on positive evidence, etc., in some way disqualifies that assessment from contributing to a finding of causation vis-à-vis the utilization of capacity. However, Argentina cannot shortcut the requirements of Article 3.5, which addresses the issue of causation, by invoking similar concepts in Article 3.4.

55. Argentina also alleges that the EU gave inadequate consideration to the issues of low capacity utilization and overcapacity. The data shows that the EU industry installed more capacity than there was demand in the EU, and possibly more capacity than EU demand plus export demand. However, the data available for the Definitive Regulation showed that capacity utilization, although low, was actually increasing and consequently could not have been a cause of injury in the sense of Article 3.5.

56. Argentina also alleges that the capital intensive nature of the biodiesel industry aggravates its sensitivity to overcapacity as the cause of injury. However, this capital intensive nature is a constant feature of the industry, whereas the injury to the EU industry has not been constant but has developed over the period of investigation.

5.7. Articles 3.1 and 3.5 of the Anti-Dumping Agreement vis-à-vis long-term commercial strategy

57. Argentina argues that the mere fact that imports by the EU industry from Argentina and Indonesia aggravated the low capacity utilization rate invalidates the conclusion that these imports did not break the causal link between the dumped imports and the injury to the EU industry. The fact that the chain of causation was indirect does not mean that it did not exist. Consequently, this was not an injury caused by an "other factor" which, under Article 3.5, need to be separated and distinguished.

5.8. Articles 3.1 and 3.5 of the Anti-Dumping Agreement vis-à-vis double counting

58. The evidence in question (Exhibit ARG-37, p. 35) concerned only one country, France, and came from only one producer, Diester. The evidence presented by Argentina itself indicates that the fall in production attributed to the French scheme in year 2011 was expected to be more than cancelled in 2012. The Definitive Regulation notes the financial performance of the sampled EU producers, which included Diester, declined only after the ending of the scheme.

59. Argentina presents no evidence of detrimental consequences of double counting in other EU Member States, and, as it explains in the Definitive Regulation, the EU could find none.

5.9. Articles 3.1 and 3.5 of the Anti-Dumping Agreement Vis-à-vis Vertical Integration, etc.

60. Almost all of the features identified by Argentina are constant in their nature and effects and therefore do not qualify as "causes" of injury within the meaning of Article 3.5. They cannot therefore be responsible for the deterioration in the condition of the industry which the EU has determined constitutes "injury" within the meaning of Article 3.4.

61. Even if consideration is given to these factors Argentina never explains why vertical integration is a more efficient way of operating in this industry. Nor is it clear whether the advantage is claimed because of common ownership (which in any case does not extend to growers of beans) or geographic proximity.

6. CONCLUSION

62. Argentina has failed to make a *prima facie* case on any of its claims. The EU has shown that all of the claims pursued and developed in Argentina's first written submission are unfounded and based on erroneous interpretations of the covered agreements. The EU respectfully requests the Panel to reject all of Argentina's claims.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INTRODUCTION

1. The European Union's second written submission focuses on the issues raised by Argentina in its Opening Statement and in its Replies to the Panel's Questions during the first substantive meeting with the Panel.

2. TERMS OF REFERENCE

2. During the First Hearing, Argentina confirmed that it has abandoned the claims challenged by the EU as being outside the Panel's terms of reference. Argentina has also abandoned the claims against "implementing measures and related instruments" and "related measures and implementing measures". This confirms the consequences described in paragraph 13 of the European Union's first written submission.

3. PRELIMINARY ISSUES

3.1. THE CLAIMS UNDER ARTICLE 2.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1 OF THE GATT

3. Argentina accepts in essence that Article 2.1 of the Anti-Dumping Agreement (ADA) and Article VI:1 of the GATT cannot serve as a legal basis for "distinct" claims in WTO dispute settlement proceedings. Both parties agree on this point. However, Argentina asserts that its claims under these two provisions are "consequential" and dependant on its claims under Articles 2.2 and 2.2.1.1 of the ADA.

4. First, the EU considers that the reasoning of the Panel in *EU – Footwear* supports the rejection of Argentina's corresponding claims in the present case. In that case the Panel argued that "under China's approach all dumping related claims could be brought under Article 2.1 alone, supported by the assertion that the obligations asserted are 'created' elsewhere". Importantly, the Panel also rejected China's claims under Article VI:1 of the GATT, stating that its analysis on the claims under Article 2.1 of the ADA also applied.

5. Second, Argentina's assertion that its claims under these two Articles are "consequential" and dependant on other claims under different legal provisions essentially constitutes a request to the Panel to exercise judicial economy on these claims. Since Argentina recognizes that these claims do not aim at protecting some specific and distinct legal right or interest, the EU doubts whether raising them is compatible with the Members' obligations under Article 3.10 of the DSU.

6. Third, there is nothing in Argentina's Panel Request that would indicate that Argentina was making some claims as "distinct" and others as "consequential". Indeed, the references to Article 2.1 of the ADA and Article VI:1 of the GATT seem to be on an equal footing with the references to other Articles in Argentina's Panel Request.

7. The conclusion is that Argentina's new assertions on the "consequential" nature of its claims under Article 2.1 of the ADA and Article VI:1 of the GATT must be rejected for lack of proper legal basis.

8. Moreover, in the present case both parties agree that there were no sales of biodiesel in Argentina in the ordinary course of trade. However, in its response Argentina fails to discuss the importance of the terms "in the ordinary course of trade" in Article 2.1 and the terms "when there are no sales of the like product in the ordinary course of trade" in the first line of the chapeau of Article 2.2. As a result, Argentina's statement fails to rebut the EU's objection that the facts of this case fall outside the scope of Article 2.1.

9. The conclusion is that Argentina's claims under Article 2.1 of the ADA and Article VI:1 of the GATT are manifestly unfounded in law and must be summarily rejected by the Panel.

3.2. THE CLAIMS UNDER ARTICLE 2.4 AND ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

3.2.1. Argentina's claims fall outside the scope of these provisions

10. The EU argues that Article 2.4 does not apply to the investigating authority's establishment of normal value and supports its interpretation with the Panel Report in *Egypt – Steel Rebar*. In that case, the Panel found that Article 2.4 "refers to the comparison of export price and normal value; i.e., the calculation of the dumping margin" and has to do "not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the *nature of the comparison* of export price and normal value".

11. In the case at hand, Argentina considers that investigating authorities have failed to calculate properly the product's normal value, resulting in a comparison between the normal value and the export price that was not "fair" (hence the alleged violation of Article 2.4) and a calculation of the "wrong" dumping margin. According to Argentina, the "wrong" dumping duty calculated was higher than the "correct" dumping margin (hence the alleged violation of Article 9.3).

12. Therefore, Argentina is challenging the *calculation* of the normal value itself (which falls within the scope of Article 2.2) and not the "*nature of the comparison*" between normal value and export price, which is the subject matter of Article 2.4, or the comparison of the anti-dumping duties with the dumping margin, which is the subject matter of Article 9.3. Argentina's claims consequently fall outside the scope of these articles.

13. The EU draws further support for this view from the Panel Report in *EC – Tube or pipe fittings*. In that case, Brazil argued that the EU had used some "wrong" data when constructing normal value and, consequently, had calculated the "wrong" normal value in breach of Articles 2.2 and 2.2.2 of the ADA. Brazil also argued that the EU had "breached the requirement to make a fair comparison between normal value and export price", in violation of Article 2.4. Given the similarity of these claims with the present case, the EU respectfully submits that the Panel should reject Argentina's claims under Article 2.4.

14. In the specific circumstances of the present case, the rejection of Argentina's claims under Article 2.4 necessarily leads to the rejection of Argentina's claims under Article 9.3 because Argentina's case lies solely on the alleged "incorrect" calculation of the dumping margin.

3.2.2. Argentina has failed to make a prima facie case

15. First, Argentina should have shown that the definitive anti-dumping duties are higher than the definitive dumping margins. Instead of that, Argentina compares the *definitive* anti-dumping duties with the *provisional* dumping margins.

16. Second, in a Reply to a Panel's Question, Argentina reproduces an excerpt from the Panel Report in *EU – Footwear (China)* which is not relevant for the present case, because it addressed a very different situation and a very different claim. Indeed, China had only argued that Article 2.4 imposed obligations on the investigating authority when it was constructing normal value whereas Argentina asserts that its Article 2.4 claim does not relate to the construction of normal value.

17. Moreover, Argentina refers to that excerpt out of context. The sentence in the Panel Report immediately following Argentina's excerpt states that "these allowances can only be made *after* the normal value and the export price have been established".

18. Third, the Panel Report in *EU-Footwear (China)* actually supports the EU's position in the present case. That Panel Report confirms that Article 2.4 allows investigating authorities the discretion to make any "due allowances" that they consider necessary and to follow any "methodology" that they consider appropriate.

19. These Panel findings are in line with the Panel Report in *EC – Tube or Pipe Fittings* which noted "the absence of any precise textual guidance in the Agreement concerning how adjustments

are to be calculated", as well as the "absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison".

20. In the present case, Argentina has failed to show that the EU's investigating authorities have exercised their discretion in an arbitrary manner when comparing the normal value with the export price and establishing the dumping margin. This is an additional reason for which Argentina's claims under Article 2.4 must be rejected.

4. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS "AS SUCH" CLAIMS

4.1. INTRODUCTION

21. The EU has argued that, in order to make a prima facie case on its "as such" claim under Article 2.2.1.1 and Article 2.2 of the ADA, Argentina had to establish *inter alia* (a) the "precise content" of the measure that it challenges; and (b) that the challenged "measure" constitutes a binding requirement that requires the investigating authorities to apply it in all cases in a manner which is inconsistent with the covered agreements.

4.2. THE REQUIREMENT TO ESTABLISH THE "PRECISE CONTENT" OF THE WRITTEN "RULE OR NORM"

22. In its recent Report in *Argentina-Import Measures*, the Appellate Body found that when bringing an "as such" challenge against a "rule or norm", the complaining party must clearly establish, *inter alia*, the "precise content of the challenged measure, to the extent that such content is the object of the claims raised".

23. In the present case, Argentina has confirmed that it challenges "as such" a written piece of legislation, namely the second sub-paragraph of Article 2(5) of the Basic Regulation. However, Argentina has failed to establish the "precise content" of that written piece of legislation.

24. First, the EU showed that Argentina has confused the scope of the first sub-paragraph of Article 2(5) with the scope of the second sub-paragraph of Article 2(5) of the Basic Regulation. This is confirmed by the evidence that Argentina itself has put on the record of the case such as the judgment of the General Court in *Acron*. The judgments of the EU's courts clearly show that the second subparagraph of Article 2(5) does *not* have the "precise content" asserted by Argentina.

25. Moreover, the EU's authorities were already making the same determinations with respect to company records on the basis of the first subparagraph of Article 2(5) at a time when the second subparagraph of Article 2(5) did not even exist. A good example of this is the Regulation concerning *Aluminium foil originating in China and Russia* which included the legal test found in the first sentence of Article 2.2.1.1 of the ADA and the first subparagraph of Article 2(5) of the Basic Regulation. Additionally, this regulation also included the term "reliable", used by the Panel in *US – Softwood Lumber V* to describe the meaning of the terms "reasonably reflect costs" in Article 2.2.1.1 of the ADA.

26. Second, Argentina itself has acknowledged that the "measure" it challenges is not found in the text of the second subparagraph of Article 2(5). Instead, it challenges the EU's application of Article 2(5) of the Basic Regulation only in certain specific circumstances, namely where "the prices of the inputs have been found to be artificially low or abnormally low because of an alleged distortion". Therefore, Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation.

27. In *US – Carbon Steel (India)*, India presented similar claims. However, the Appellate Body rejected India's claims and found that "it is not clear why a number of instances of the application of the measure should in this case conclusively *establish the meaning of the measure at issue in general*, which in this case is confined to [the defending party's legislation]". In the present case Argentina has also failed to establish the meaning of the second subparagraph of Article 2(5) *in general*. Consequently, this prevents Argentina from making a *prima facie* case on any of its "as such" claims, including under both Article 2.2.1.1 and 2.2 of the ADA.

28. Third, Argentina has offered a number of different and inconsistent descriptions of the "content" of the measure that it is challenging both under Article 2.2.1.1 and under Article 2.2 of the ADA. For example, in paragraph 25 of its Opening Statement, Argentina asserts that the second subparagraph of Article 2(5) offers the authorities *discretion* and does not oblige them to act in any specific way. In contrast, in paragraphs 54, 68, 70 and 72 of this statement, Argentina asserts that "there is *no discretion*" and that the provision is mandatory.

29. The consequence is that Argentina fails to establish the "precise content" of the second subparagraph of Article 2(5). In these circumstances, it is impossible for the Panel to understand precisely what is the "matter" before it.

30. When the Panel prompted Argentina to show the source of these varying descriptions in the text of the second subparagraph of Article 2(5), Argentina failed to do so. Indeed, its reliance on Recital 4 of Regulation 1972/2002 is misplaced. This Recital cannot be used as a source of interpretation of *all* the situations covered by Article 2(5) of the Basic Regulation because it refers to "particular market situation" and makes no reference to situations where there are "no sales in the ordinary course of trade", which is the situation of the present case. Also, the first sentence of Recital 4 clearly shows that the determinations of whether the records "reasonably reflect costs" were already being made under the first subparagraph of Article 2(5), which already existed at the time of the introduction of Recital 4.

31. Lastly, the European Union has provided examples of investigations to demonstrate that the second subparagraph of Article 2(5) does not oblige the investigating authorities to seek the cost-information outside the country of origin in all cases. In its response, Argentina argues that these examples are not relevant, because they do not "concern a situation in which the prices were found to be abnormally low or artificially low because of a distortion". This response confirms that Argentina does not challenge "as such" the second subparagraph of Article 2(5), but the purported application of that provision in certain specific examples.

32. The conclusion is that Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation (or in the words of the Appellate Body the "meaning" of the second subparagraph of Article 2(5) "*in general*") for purposes of its "as such" claims under either Article 2.2.1.1, or Article 2.2 of the ADA.

4.3. THE REQUIREMENT TO ESTABLISH THAT THE CHALLENGED MEASURE MANDATES CONDUCT THAT IS NECESSARILY INCONSISTENT WITH THE COVERED AGREEMENTS

33. In *US – Carbon Steel (India)*, India had put forward two alternative claims. First, that the covered agreement did not allow the defending party's investigating authorities to take certain actions. Second, that although the measure at issue provided that a specific administrative action may be taken (i.e. "an inference may be drawn"), it more accurately meant that in all cases the defending party's investigating authorities *necessarily* took that action. In support of its claims, India relied on the practice developed by the defending party's authorities but did not challenge "as such" that practice.

34. In relation to India's first claim, the Appellate Body rejected it, noting that the measure was framed in "permissive terms". In relation to India's second claim, the Appellate Body found that the challenged measure was "a discretionary measure rather than a binding requirement" to act in a certain way. The Appellate Body also found that the "practice" identified by India was not required by the measure, but was rather developed pursuant to the discretion afforded by the measure. This meant that the "practice appeared to be distinct and separate from the measure at issue" and was not necessarily applied in all instances.

35. In the present case, Argentina originally claimed that the second subparagraph of Article 2(5) "establishes a rule which is mandatory". However, according to its Opening Statement Argentina appears to have changed its claim. It now advances a new theory, pursuant to which "even if" the second subparagraph of Article 2(5) is discretionary and not mandatory, "the fact that the measure provides for the possibility" to act in a certain way "will necessarily be inconsistent with Article 2.2.1.1" of the ADA. Argentina has not provided further explanation about this new theory. Dealing with a similar situation in the case *EC – Fasteners*, the Appellate Body found that belated modifications of the nature of the complaining party's claims give rise to due process issues.

36. In any event, this modification confirms that Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation and, in contrast, offers two contradictory theories of that "content". The EU respectfully submits that the Panel should reject the "as such" claims of Argentina in the present case, just like the Appellate Body rejected India's "as such" claims in *US – Carbon Steel (India)*.

37. Argentina's first theory is that "the use of the verb 'shall' in Article 2(5), second subparagraph is evidence of the mandatory nature of the measure". Like India *US – Carbon Steel (India)*, Argentina relies on the EU's purported "practice" but does not make a claim that the "practice" itself constitutes a WTO-inconsistent measure.

38. The Panel should apply the Appellate Body's legal test in *US – Carbon Steel (India)*, namely to assess whether the second subparagraph of Article 2(5) of the Basic Regulation is "a discretionary measure", or "a binding requirement" to act in the same way in all cases.

39. Moreover, the Panel should also take into consideration the General Court judgments put on the record by Argentina and showing that, just like in *US – Carbon Steel (India)*, the exercise of the investing authorities' discretion is subject to "rules and disciplines separate from" the second subparagraph of Article 2(5), namely the general principles of the EU administrative law.

40. The Panel should conclude that Argentina has failed to show that the second subparagraph of Article 2(5) "mandates" the investigating authorities to act inconsistently with Article 2.2.1.1, or Article 2.2 of the ADA. Consequently, Argentina's "as such" claims must be rejected.

41. Argentina's new second theory is that the "mere fact that Article 2(5), second subparagraph, provides for the possibility [to find that records do not reasonably reflect costs because they are artificially low or abnormally low] would necessarily render the measure inconsistent with Article 2.2.1.1. The same reasoning applies to Argentina's claim under Article 2.2".

42. If the Panel decides that it has the authority to assess this new belated theory, then the Panel should apply the legal test of *US – Carbon Steel (India)*, namely to "assess whether, pursuant to the authorisation contained in the text of the measure, the investigating authority is *required* to act inconsistently" with the covered agreements.

43. In addition, the Panel should also take into consideration the fact that there have been examples where the authorities have used domestic sources from the country of origin (like in the case of *Okoume Plywood Originating in China*), or the accounts of the parent company (like in the case of *White Phosphorus Originating in Kazakhstan*) in order to establish the "reasonable" costs. This evidence shows that the authorities' use of some "other reasonable basis" depends on the particular circumstances of each case. This means that the second subparagraph of Article 2(5) does not *require* the investigating authority to act inconsistently with the covered agreements.

44. The Panel shall conclude that Argentina's "as such" claims must be rejected.

5. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1

5.1. ARGENTINA'S MAIN THESIS

45. Argentina's claim is premised on the theory that the terms "reasonably reflect the costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 of the ADA mean that the records should include the expenses actually incurred by the company under investigation. Argentina's theory is that the costs do not need to be "reasonable" themselves, but that the records need to reflect "reasonably" the expenses actually incurred.

46. Argentina has confirmed its claims and the fact that the first sentence of Article 2.2.1.1 relates exclusively to a cost allocation issue, in its Replies to the Panel's Questions. Argentina also provided a list of the types of situations that, in its view, would allow an investigating authority to disregard the recorded costs; all of them relate to the allocation of costs that have actually been incurred.

47. It is important to note that contrary to the view of certain Third Parties, Argentina's claim does not entertain the possibility of disregarding the recorded costs in situations where there have been intra-group transactions on a non-arms' length basis.

48. Therefore, Argentina has confirmed that its claim is premised on a specific legal interpretation of Article 2.2.1.1: (a) that the proviso on "reasonably reflect the costs" relates exclusively to the records and not the costs, i.e., that the costs themselves do not need to be reasonable; (b) that the records meet the condition of the proviso where they report the costs that have actually been incurred by the investigated company; (c) that the proviso of Article 2.2.1.1 relates exclusively to issues of proper allocation of the costs that have actually been incurred by the investigated company; and (d) that investigating authorities can *never* disregard or adjust the costs that have actually been incurred by the investigated company for other reasons, even where these costs are distorted.

49. This means that, in order to make a *prima facie* case on its "as such" claim, Argentina must establish that this is indeed the proper interpretation of Article 2.2.1.1. This also means that the Panel is not required to assess whether the second subparagraph of Article 2(5) of the Basic Regulation is consistent with some other interpretation of Article 2.2.1.1 of the ADA.

5.2. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

50. First, the EU notes that the "legislative history" leading to the adoption of Article 2.2.1.1 actually contradicts: (a) Argentina's assertion that the proviso relates only to cost allocation issues; and (b) Argentina's excessively restrictive interpretation of the terms "reasonably reflect the costs". Therefore, Argentina fails to substantiate its interpretation of Article 2.2.1.1.

51. Second, Argentina's discussion of the Panel Report in *US – Softwood Lumber V* is not convincing because Argentina focuses on a statement of the Panel which it reads out of context. A more detailed analysis of the Panel's findings shows that they actually contradict Argentina's claims in the present case. Indeed, the Panel's finding was that Article 2.2.1.1 does not *mandate*, or *require* investigating authorities to reject the recorded costs. In contrast, the Panel did *not* find that Article 2.2.1.1 does not *allow* investigating authorities to disregard the recorded costs, where they consider that they are not "reasonable" because they do not reflect market values. Therefore, the statement of the Panel, to which Argentina refers, has limited scope: the Panel finds that the investigating authorities are not *obliged* to treat the recorded costs in a certain way; but the Panel does *not* find that the authorities are not *allowed* to disregard the recorded costs as "unreasonable", where these costs do not reflect market values.

52. Quite to the contrary, the analysis of the entire reasoning of the Panel confirms that Article 2.2.1.1 *allows* authorities to disregard the recorded costs, where they do not reflect market values. The Panel expressly acknowledged that the recorded costs would be "reasonable" for purposes of Article 2.2.1.1, only if it could be shown that they corresponded to market prices.

53. In the case of Tembec, the investigating authority followed a methodology which used the "market values" as "benchmark" and compared the values recorded in the books with market values in order to determine whether the recorded values were "reasonable" for purposes of Article 2.2.1.1. The Panel's treatment of this methodology it important for the present case because it confirms that the notion of "reasonably" in the first sentence of Article 2.2.1.1 is not limited only to the records, but also covers the recorded costs and values. It also confirms that investigating authorities can use market prices as "benchmarks" in order to confirm the "reasonableness" of the recorded costs and values. The same conclusions are drawn from the Panel's assessment of the West Fraser investigation which accepted that "an arm's length test" may be carried out in order to determine whether these costs are "reliable", and that the recorded costs may be adjusted accordingly. The Panel's approach was confirmed by the Appellate Body on appeal.

54. The conclusion is that the Panel Report in *US – Softwood Lumber V* directly contradicts the main thesis of Argentina's challenge and leads to the rejection of Argentina's claims under Article 2.2.1.1 of the ADA.

55. Third, Argentina's argumentation is based on the theory that a dumping determination cannot rest on "external factors unrelated to the exporter or producer". However, Article VI of the GATT does not limit the notion of dumping only to situations that arise out of the exporters' "voluntary" pricing behaviour. Quite to the contrary, the notion of dumping also covers situations that are created by the action of governments and are, in that sense, "exogenous" or "external" to the "intention" of the exporters.

56. This interpretation is supported by considering the Note 2 *Ad* Article 6 paragraphs 2 and 3 (i.e. "Multiple currency practices can in certain circumstances constitute a subsidy to exports […] or *can constitute a form of dumping* […] which may be met by action under paragraph 2 [of the Article VI of the GATT]. By "multiple currency practices" is meant practices by governments or sanctioned by governments"), with due regard to the negotiating history of the Note and the context in which it appears. Its purpose is filling out the definitions contained in those provisions.

57. This has two important implications. Firstly, the text of the GATT expressly provides that government action can lead to a situation of dumping and that importing countries may impose anti-dumping duties. The consequence is that Argentina's legal interpretation of Article 2.2.1.1 fails. Given that this erroneous legal interpretation of Article 2.2.1.1 is the basis for both (a) the "as such" claim against the second subparagraph of Article 2(5) of the Basic Regulation; and (b) the claim against the specific anti-dumping measure on biodiesel, Argentina cannot make a *prima facie* case on either of these claims.

58. Secondly, the fact that the GATT expressly refers to multiple currency practices as a type of government measure that may lead to a situation of dumping provides some insights on the nature and market effects that such measures should have in order to fall within the scope of the dumping provisions in Article VI and the ADA.

59. Multiple currency practices involve a government induced manipulation of the ordinary operation of the market, which substantially affects and distorts pricing. These are precisely the characteristics of Argentina's export tax on soya beans. Argentina has expressly acknowledged that (a) the export tax on soya beans is a measure of the Government of Argentina and (b) that the effect of the export tax on soya beans is to reduce the domestic price of soya beans in Argentina in comparison to the level that this domestic price would have in the absence of the export tax. Consequently, Argentina's export tax falls squarely within the types of government measures that may lead to dumping and that "may be met by action" under Article VI:2 of the GATT.

60. Fourth, Argentina makes certain inconclusive statements in relation to the Panel Report in *EC – Salmon*. Firstly, Argentina fails to address the Panel's choice of words, contradicting its theory that Article 2.2.1.1 restricts the notion of "reasonably reflect costs" only to those that have actually already been incurred by the investigated company.

61. Secondly, Argentina asserts that the price used by the EU's investigating authorities "is clearly not the price to be paid by the Argentinean producers for domestic purchases of soybeans in Argentina". This contradicts Argentina's previous acknowledgements regarding the "price to be paid" by the Argentinian producers for domestic purchases of soya beans, in the absence of the government measure that distorts the price of soya beans.

62. It is noted that the information provided by Argentina in its Replies to the Panel's Questions confirms that the export tax on soya beans indeed constitutes a mechanism for distorting the price of soya beans. Argentina has also confirmed that the reason for which it determines this "reference FOB price" is to "monitor possible pricing *divergences* in the local market. The effect of that mechanism is to ensure that the resulting domestic price for soya beans is below the domestic price that would have prevailed in the absence of the export tax.

63. Therefore, the way Argentina implements the export tax on soya beans constitutes, is in essence, a mechanism of intervention on the domestic price of soya beans.

64. Fifth, Argentina makes some statements in relation to the terms "associated with the costs" in Article 2.2.1.1 of the ADA, which are not convincing. Indeed, Argentina qualifies the "reference FOB price" as a "hypothetical benchmark price" and asserts that the FOB reference price is "not a 'real' price in the sense that it is an average that is used for the calculation of the export tax.

Argentina thus contradicts its previous acknowledgement that in the absence of the export tax, the domestic price of soya beans would have been the "reference FOB price" less the transaction and fobbing costs.

65. In the present case, the investigating authorities took as a basis the FOB reference price (which the Government of Argentina itself had determined) and followed exactly the methodology that Argentina itself acknowledges would lead to the calculation of the domestic soya bean prices in the absence of the export tax.

66. The conclusion is that Argentina's interpretation of Article 2.2.1.1 of the ADA is erroneous. Consequently, Argentina fails to make a *prima facie* case on the claims that it bases on Article 2.2.1.1.

6. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

67. First, Argentina's main assertion is that the distinction between costs and evidence pertaining to the determination of costs suggested by the EU is "artificial" and has no basis in the text or the context of Article 2.2. However, the ADA itself makes such a distinction, when it contains a specific Article entitled "Evidence"(i.e., Article 6). Therefore, Argentina's assertion is unfounded.

68. Second, Argentina advances various arguments on the interpretation of Article 2.2.2(iii) of the ADA. Its main argument is that "the use of data other than that of the country of origin must explicitly be provided for" and that Article 2.2.2 of the ADA supposedly "does not provide for a similar exception or authorisation for the determination of the cost of production". Argentina also asserts that "Article 2.2.2 lays down the criteria for determining the reasonable amounts of SG&A and for profits only and not for the cost of production". As well as "the fact that Article 2.2.2(iii) refers to any other reasonable method for the determination of SG&A and profits can certainly not be applied to the determination of the cost of production".

69. Argentina's arguments are not convincing because the chapeau of Article 2.2.2 and Article 2.2.1.1 use the same terms to refer to the same production and sales costs. There is no reason for which the "any other reasonable method" of Article 2.2.2(iii) would relate only to the production and sales costs of the chapeau of Article 2.2.2, but not the same production and sales costs mentioned in Article 2.2.1.1.

70. Third, despites questions from the Panel, Argentina has failed to explain how an investigating authority could determine costs in a situation where there are no usable data from the country of origin.

71. Consequently, Argentina has failed to substantiate its interpretation of Article 2.2 and has failed to make a *prima facie* case on the claims that it bases on this provision.

7. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS CLAIMS UNDER ARTICLE 2.2.1.1 AND ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AGAINST THE ANTI-DUMPING MEASURE ON BIODIESEL

72. Argentina has failed to show that the prices used by the EU's investigating authorities were from "outside the country of origin". Argentina has simply asserted that "the EU did not use the domestic price of soybeans" and that "the EU failed to construct normal value on the basis of the cost of production in the country of origin".

73. The EU considers that, the prices used by the investigating authorities were from the country of origin and reflected the cost of soya beans that Argentine producers of biodiesel would have to incur, in the absence of the export tax.

74. Consequently, Argentina fails to make a *prima facie* case on its claims against the anti-dumping measure on biodiesel under Article 2.2 of the ADA, irrespective of whether that provision allows the use of evidence from outside the country of origin, or not.

8. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS CLAIMS IN RELATION TO PROFITS

75. In its Replies to the Panel's Questions, Argentina appears to draw a distinction between the "reasonable method" of Article 2.2.2(iii) and the figure of profits to be established. Argentina notes that Article 2.2.2(iii) does not "use the terms 'any reasonable amount'" and, on that basis, Argentina appears to assert that the profit figure does not need to be "reasonable", but that the methodology must be "reasonable". This assertion that is clearly wrong. The chapeau of Article 2.2 refers to a "reasonable amount for administrative, selling and general expenses and for profits".

76. In any event, the methodology followed by the investigating authorities in the present case closely resembles the methodology followed by the US authorities and approved by the Panel in *US – Softwood Lumber V*, albeit in order to calculate a different cost item. This is clearly a "method" for the calculation of the profits that is "reasonable".

77. In these circumstances, the EU submits that the Panel should reject Argentina's claim, just as the Panel rejected Canada's "*post hoc* rationalisation" objections in *US – Softwood Lumber V*.

9. ARTICLE 3 CLAIMS

78. Argentina persists in accusing the EU of having adopted the wrong definition of capacity. In the provisional and definitive Regulations the EU described the state of the various EU biodiesel producing facilities, and gave a clear explanation of the criterion it applied in assessing utilisation of capacity. While rejecting the EU's explanation Argentina has quietly abandoned its own criterion of capacity based on the notion of what a plant was "designed to produce". Instead, it proposes a new criterion of "potential" for production. Its suggestion that the negotiating history contributes to the interpretation of the text lacks all conviction, and trails off into platitude.

79. Argentina's only interest in the data on "capacity utilisation" is to proceed to the further step of identifying it as an "other factor" cause of injury. During the investigation the exporters suggested that the injury was caused through over-expansion. However, the evidence obtained by the EU and Argentina itself acknowledges that what it calls the "enormous overcapacity" is "continuous" and "existed in 2009", i.e. throughout the period considered. To the contrary, the EU believes that capacity utilisation is an indicator of the level of efficiency at which an industry is operating.

80. Argentina again accuses the EU of failing to make an objective assessment in its evaluation of production capacity and utilisation of capacity. The best answer that the EU can give is to ask the Panel to examine the careful justification for its conclusions that was provided by the EU, in particular in the Definitive Regulation at Recitals 130 to 133, and 161 to 171. These passages speak for themselves.

81. On the issue of causation, Argentina's argument hypothesises the "total elimination of imports originating in Argentina and Indonesia" as compared to the EU volume of production. The EU does not see what would be learnt from such an exercise. Indeed, the aim of the causation analysis, in situations where there are said to be "other factors", is to separate and distinguish the various causes.

82. Argentina suggests that these imports and the anti-dumping proceedings are being choreographed by multinational companies for ends of their own. It means that corporate groups "might have decided that their interests were better served by activating trade defence mechanisms in the European Union". Firms producing in the EU are, regardless of ownership, in principle entitled to the remedies provided by the anti-dumping legislation if the conditions set out there are satisfied. The idea that a firm might see an advantage in having its own goods subjected to anti-dumping duties seems somewhat far-fetched. Furthermore, the EU (consistent with Article 4.1(i) of the ADA) has already excluded three producers from the definition of the EU industry because the high level of their imports from Argentina.

83. The EU maintains that Argentina's claim that the EU, when examining injury in accordance with Article 3.4 of the ADA, failed to properly consider the factor 'return on investment' is outside the Panel's terms of reference because it was not mentioned in the Panel Request. The EU supports its contention referring to the Appellate Body Report *China – Raw Materials* in which the

claimants "failed to present the legal basis for their complaints with sufficient clarity to comply with Article 6.2 of the DSU".

84. The importance of examining each of the factors listed in Article 3.4 of the ADA has been stressed by the Appellate Body in *Thailand-H-Beams*. There are fifteen of these factors. Clearly it would not be sufficient for the panel request to merely state that they had not been properly examined without indicating which factors in particular the failure lay.

85. Argentina's reference to the Appellate Body's report in the *Wheat Gluten* case on the issue of "continuing" conditions has no bearing on the point that the EU has made. Rather it addresses the timing of injury caused by various factors. The EU makes provision for such issues of timing to be taken into account by tracking developments in the condition of the domestic industry, and the potential causes of injury, over a "period considered" of three and a half years, ending in the dumping "investigation period" of one year. It is just this approach that enables the EU to respect the obligation to separate and distinguish the various factors that may be causing injury. In particular, it permits the EU to distinguish those factors that are changing from those that are constant.

10. CONCLUSION

86. Argentina has failed to make a *prima facie* case on any of its claims. The European Union respectfully requests the Panel to reject all of Argentina's claims.

ANNEX C-3

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN UNION AT THE FIRST MEETING OF THE PANEL

1. INTRODUCTION

1. The opening statement of the EU will focus on some of the issues raised by certain Third Parties in their submissions.

2. THIRD-PARTY SUBMISSIONS REVEAL BROADER CONSENSUS ON CERTAIN ISSUES

2. A number of Third Parties, in particular the United States, Australia and Turkey, have expressed views that are very close to the legal interpretations and arguments put forward by the EU in its First Written Submission. This is also partially the case for Third Parties that have generally supported Argentina's claims like China. The conclusion that the EU draws from the submissions of the Third Parties is that there is broad consensus that, in principle and in certain circumstances, Article 2.2.1.1 allows investigating authorities to disregard company records, where the costs recorded are not reasonable. There is also broad consensus that, in principle and in certain circumstances, Article 2.2 allows the authorities to use evidence from outside the country of origin in order to calculate the cost of production in the country of origin.

3. However, there seems to be a disagreement on which are the "certain conditions" that must be met, for these principles to apply. On that regard, the EU stresses that Article 2(5) of the Basic Regulation does not allow "unfettered discretion" to its authorities, which are required to act reasonably and are subject to judicial control. In any case, the EU argues that the present panel is not required to come up with any exhaustive lists of conditions.

4. More importantly, the panel only needs to determine whether Argentina has made a prima facie case on its claims. To do so, the Panel only needs to decide whether Argentina has met its burden of showing (a) that the specific provisions of Article 2(5) of the Basic Regulation, which it challenges "as such", fall within the category of what is not permissible under Article 2.2.1.1 and (b) that it is never permissible to use evidence from outside the country of origin in order to calculate the costs of production. Since Article 2(5) of the Basic Regulation does not define the terms "reasonably reflects costs" nor define the conditions that would allow the investigating authorities to seek outside the country of origin the evidences for the costs, the EU does not see how it is possible for Argentina to succeed in its "as such" claims.

3. BROADER LEGAL POINTS RAISED BY SOME THIRD PARTIES

5. The EU considers that some broader legal interpretations advanced by certain third parties, which Argentina has not put forward, are outside the Panel's terms of reference, or fall outside the scope of the present dispute. In any case, these interpretations are also legally erroneous, as further explained.

4. EXPORT TAXES OR DUTIES

6. Regarding the impact of export taxes and export duties on anti-dumping investigations, some Third Parties have expressed the view that anti-dumping rules cannot be used to address the distortive effects of export duties, asserting that Article XI:1 of the GATT allows the imposition of export duties. This view is legally incorrect because there is nothing in the GATT that would prevent an investigating authority from taking into consideration the distortive effects of export duties and export taxes when constructing the normal value of the product under consideration.

7. More precisely, Article XI:1 does not allow anything, but only contains a prohibition. The definition of quantitative restrictions does not include export duties and export taxes. But, this does not mean that Article XI:1 authorises WTO Members to introduce export duties or export taxes.

8. The fact that export duties and export taxes fall outside the scope of Article XI:1 of the GATT does not mean that the effects of such export taxes and export duties fall outside the scope of Article VI of the GATT. Using a similar reasoning to that of Appellate Body in the case *Argentina – Import Measures,* the EU notes that Article XI:1 does not contain any "express language identifying its relationship" with Article VI of the GATT. Moreover, there is no language in Article XI:1 or Article VI of the GATT stating that the anti-dumping authorities of WTO Members cannot take into account the distortive effects of export duties or export taxes in anti-dumping investigations. Lastly, there is no specific obligation or language in Article XI:1 that could be said to conflict with the provisions of Article VI of the GATT. The use of the forceful term "condemn" in Article VI provides further support for the conclusion that export duties and export taxes and their distortive effects do not fall outside the scope of Article VI of the GATT and of anti-dumping investigations.

9. The Panel's rejection of Argentina's claims in the present dispute will not have the effect of indirectly declaring all export taxes or export duties as WTO-inconsistent because the investigation will still be subject to the strict procedural requirements of the Anti-Dumping Agreement and not necessarily always lead to a finding of dumping.

10. The distortive effects of export taxes and export duties are well known and well documented. They are the result of government intervention and of the protection afforded to the exporting country's downstream industry.

5. THE NOTION OF DUMPING

11. It has been argued by certain third parties that the anti-dumping rules are "only concerned with examining the private pricing behaviour of producers". As a consequence of this purported "nature" of dumping, "the investigation authority cannot reject the costs recorded in the producer/exporter's accounts on grounds exogenous to that producer/exporter", such as the "full range of governmental policy interventions that are entirely outside the control of the producer/exporter themselves". The EU believes that the panel should reject these erroneous assertions for a number of reasons.

12. There is no textual basis in Article VI of the GATT or in the Anti-Dumping Agreement for such a "subjective element" in the anti-dumping rules that would consider dumping as an intentional "price discrimination". To the contrary, both Article VI:1 of the GATT and Article 2 of the Anti-Dumping Agreement define dumping in objective terms: introduction of products "into the commerce of another country at less than the normal value of the products".

13. Dumping is not defined by reference to the domestic prices in the exporting country but by reference to the "normal value" of the products. Article VI:1 of the GATT lists certain types of evidence that could be used as proxy to identify the "normal value". This article confirms that dumping is not related to exporters' purported "intention" but only to the value that the products should have in normal circumstances. Also, the calculation of dumping would be deprived of practical effects if "exogenous" costs elements beyond the exporters own control would be excluded. Anti-dumping rules would thus be rendered ineffective.

14. Article VI:5 of the GATT acknowledges that there can be situations which could be subject of both a countervailing duty and an anti-dumping duty. Therefore, the text of this article acknowledges that government actions may be at the source of dumping and material injury. To further support this conclusion, the EU relies on the Appellate Body report in the case *United States – Anti-dumping and Countervailing duties (China)* in which it was established that "exogenous factors", such as the actions of the government of the exporting country, may very well be the source of dumping.

15. The reliance of certain Third Parties on the Appellate Body Reports in the zeroing cases is misguided. Indeed, in this case the Appellate Body was not dealing with the construction of the normal value, but only whether the investigating authority should look at individual transactions separately, or whether it should look at the "aggregation of all export transactions". The Appellate Body discussed the export price part of the comparison and not the normal value.

6. THE SITUATION UNDER THE ANTI-DUMPING CODE IN THE 1980S

16. Another Third Party referred to the situation that prevailed under the anti-dumping Code and especially views and documents from 1982 and 1984. The EU considers that the passages cited by Indonesia do not support its interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement since the Code was very different from the current version of the Anti-Dumping Agreement and did not include any provision like Article 2.1.1.1.

17. In the alternative, should those statements still have some relevance today, they would contradict Indonesia's and Argentina's interpretation of Article 2.2.1.1. Indeed, in its Article 1(4) the anti-dumping Code did not provide that the costs should normally be calculated on the basis of the records kept by the investigated companies, or that these records should reasonably reflect the costs associated with the production and sale of the relevant goods. To remedy this omission, WTO members have included the first sentence of Article 2.2.1.1 in the Anti-Dumping Agreement: costs reflected in companies' records must be reasonable.

18. In any event, paragraph 5 of the draft recommendation on the implementation of the anti-dumping Code, to which Indonesia refers, expressly limits the scope of the recommendation to situations where the inputs are purchased "in the ordinary course of trade". However, Article 2.2.1.1 of the Anti-Dumping Agreement applies to situations where there are no sales in the ordinary course of trade such as in the present dispute.

7. ARGENTINA HAS FAILED TO MAKE A PRIMA FACIE CASE ON ITS "AS SUCH" CHALLENGE UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

19. The EU considers Argentina's "as such" challenge against the second subparagraph of Article 2(5) of the EU's Basic Regulation is a more relevant point for the Panel's analysis. In the light of certain comments made by Third Parties in their submissions, the EU will submit the following: first, Argentina's failure to establish, as a matter of fact, the content and scope of the second subparagraph of Article 2(5); second, Argentina's failure to articulate properly, let alone establish, the "precise content" of the "norm or rule" that it purports to challenge "as such" and third, Argentina's failure to establish that the "norm or rule" that it purports to challenge "as such" is the type of measure that can be the subject of an "as such" challenge.

8. THE SCOPE OF THE SECOND SUBPARAGRAPH OF ARTICLE 2(5)

20. It is by now clear to all participants in these proceedings that Argentina's challenge against the *second* subparagraph of Article 2(5) of the Basic Regulation under Article 2.2.1.1 of the Anti-Dumping Agreement is factually wrong. In its First Written Submission, Argentina has simply confused the scope of the second subparagraph of Article 2(5) with the scope of the first subparagraph of Article 2(5). Any other theory advanced by China and Indonesia is factually untenable. This is made clear by the text of the two subparagraphs of the Article 2(5) of the Basic Regulation. It is also made clear by the fact that the EU had already made determinations similar to the ones challenged by Argentina in the present case, on the basis solely of the first subparagraph of Article 2(5), before the second subparagraph of Article 2(5) was even introduced. Indonesia even acknowledges this latter fact in footnote 27 of its Third Party Submission.

21. While the first subparagraph of Article 2(5) is repeating "verbatim the conditions on the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement", the second subparagraph does not relate to Article 2.2.1.1, but simply fills a gap, describing what actions authorities are authorised to take in order to calculate the costs when the company records cannot be used. In the Anti-Dumping Agreement, the closest provision to this second paragraph is subparagraph (iii) of Article 2.2.2, which refers to "any reasonable method" and to "any reasonable basis". This article was the inspiration for the drafting of the second subparagraph of Article 2(5). Therefore, the EU concludes that Argentina has simply directed its "as such" challenge under Article 2.2.1.1 of the Anti-Dumping Agreement against the wrong provision of the Basic Regulation.

9. ARGENTINA HAS FAILED TO ESTABLISH THE "PRECISE CONTENT" OF THE "NORM OR RULE" THAT IT CHALLENGES

22. The Appellate Body has confirmed that, in order to substantiate an "as such" claim, the complaining party must first establish, *inter alia*, the "precise content" of the "rule or norm" that it challenges. In the present case, Argentina has failed to articulate properly, let alone establish, the "precise content" of the norm that it challenges "as such" under Article 2.2.1.1 of the Anti-Dumping Agreement.

23. If Argentina is challenging "as such" Article 2(5) of the Basic Regulation "and more specifically its second paragraph", this challenge must fail. Indeed, there is broader consensus that this subparagraph allows EU authorities to act in a certain manner but does not oblige them, or mandate them to do so. If Argentina does not challenge this provision, its position is inconsistent. It challenges the "condition" that "refers in particular to situations where the prices are 'artificially low' or 'affected by a distortion'", the purported "continuous and established practice" of the EU, and Article 2(5) second paragraph of the Basic Regulation" which purportedly "refers to situations where the prices of an input are 'abnormally or artificially low' because they are set in a 'regulated market' or because of the existence of some alleged 'distortion' on the domestic market".

24. Since Argentina has already acknowledged that it does not challenge "as such" any "practice" and consequently that any such challenge against a "practice" would be outside the Panel's terms of reference, it could assumed that Argentina challenges a written "norm or rule", i.e the second subparagraph of Article 2(5). Nonetheless, Argentina still does not offer consistency even in the description of the content of that "norm or rule" it is "as such" challenging. The EU understands that Argentina considers that the challenged "measure" is to be found beyond the actual text of Article 2(5) of the Basic Regulation. However, the EU submits that Argentina has failed to articulate properly and to establish with the requisite evidence the "precise content" of its claims.

10. ARTICLE 2(5) OF THE BASIC REGULATION ALLOWS THE INVESTIGATING AUTHORITIES DISCRETION

25. The EU believes that it by now clear that Art 2(5) does not mandates the investigating authorities to act in a particular manner and allows the authorities' discretion. In light of the recent Appellate Body Report in *US – Carbon Steel (India)*, the discretionary nature of Article 2(5) of the Basic Regulation is fatal to Argentina's "as such" claims against Article 2(5).

26. The EU finds problematic assertions like one made by China, which considers that in order to challenge "as such" a "rule or norm", it is "not necessary to show that it 'mandates' a WTO-inconsistent outcome in every case". First, China does not offer any textual basis. Second, China's reference to the paragraph 172 of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews* contradicts its position. Indeed, this paragraph does not refer to the "particular circumstances" asserted by China. Also China fails to explain how its assertion can be compatible with the nature of an "as such" claim, which according to the Appellate Body is directed against "laws and regulations". To the contrary, China's assertion transforms in essence every "as applied" claim to an "as such" claim, by renaming the application of the law in a specific case to an application in "particular", or "defined", or "at least certain" circumstances. Therefore, China's assertions must be rejected.

11. THE MEANING OF THE TERM "ASSOCIATED" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

27. The EU in its First Written Submission noted that the ordinary meaning of the term "associated" is broader than the meaning of the words "actually incurred". It also noted that the Panel Report in *Egypt-Steel Rebar* supports its understanding of the ordinary meaning of the term "associated", because it uses the term "pertain", instead of the words "actually incurred".

28. Indonesia disagreed with EU interpretation and noted that the chapeau of Article 2.2.2 of the Anti-Dumping Agreement also uses the term "pertain" to "refer to the actual data" of the company under investigation. The EU believes that its interpretation is the preferable one for several reasons.

29. The ordinary meaning of the term "pertain" is "be appropriate" or "related". These terms are broader than the words "actually incurred". Therefore that ordinary meaning does not limit Article 2.2.1.1 to only those costs that have "actually been incurred" by the specific company under investigation.

30. The EU's interpretation is confirmed by the context in which these terms are used. Indeed, Article 2.2.1.1, which is the subject of the present analysis, does not use the words "actual data" contained in the chapeau of Article 2.2.2 and referred by Indonesia, but the word "reasonably".

31. The chapeau of Article 2.2.2 of the Anti-Dumping Agreement uses the term "pertaining to" in the context of the "ordinary course of trade". In contrast, the words "ordinary course of trade" are not found in Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, the term "pertaining to" in the chapeau of Article 2.2.2 is used in order to convey a different meaning form the term "associated" in Article 2.2.1.1 of the Anti-Dumping Agreement.

32. The EU notes that the chapeau of Article 2.2.2, in combination with subparagraph (iii) of Article 2.2.2, provides that, in the absence of "ordinary course of trade", the investigating authority may use "any other reasonable method".

12. ISSUES RELATING TO ARGENTINA'S "AS APPLIED" CLAIMS

33. The EU disagrees with the argument made by China that it has used "an average of the FOB reference prices" without making any "adjustment to this evidence". The EU's position was acknowledged by Argentina.

34. The EU also disagrees with certain Third Parties taking the view that the prices used by the investigating authority were not from the "country of origin" for a number of reasons: the investigation revealed that the prices used were actually fixed by the government of Argentina, the prices were applied in Argentina, paid in Argentina and ensured that Argentinian producers of soya bean and soya bean oil received the same net price irrespective of the destination of their goods. This is not a case of application of the proviso on "information from other representative markets", but a case of application of the proviso on "any other reasonable basis", authorised by Article 2(5).

35. Consequently, Argentina's "as applied" claim against the Definitive Regulation, based on Article 2.2 of the Anti-Dumping Agreement, must fail. And this, irrespective of whether Article 2.2 allows investigating authorities to seek evidence from outside the country of origin in order to calculate the costs of production in the country of origin.

ANNEX C-4

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN UNION AT THE SECOND MEETING OF THE PANEL

1. INTRODUCTION

1. The European Union's Opening Statement will address the points raised by Argentina in its Second Written Submission.

2. TERMS OF REFERENCE / PANEL'S FINDINGS

2. In relation to Argentina's "as such" claim, the only measure before the Panel is the second subparagraph of Article 2(5) of the Basic Regulation, as well as any subsequent amendments or replacements to that specific subparagraph. In relation to Argentina's "as applied" claims, the only measures before the Panel are the Provisional Regulation and the Definitive Regulation, as well as any subsequent amendments or replacements to these specific Regulations.

3. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS "AS SUCH" CLAIMS

3.1. ARGENTINA HAS FAILED TO ESTABLISH THE PRECISE CONTENT OF THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

3.1.1. Argentina misrepresents the scope of the second subparagraph of Article 2(5) of the Basic Regulation

3.1.1.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation

3. In paragraph 26 of its Second Written Submission, Argentina acknowledges that the first subparagraph of Article 2(5) "implements the particular obligations laid down by Article 2.2.1.1 of the Anti-Dumping Agreement" and "closely mirrors the wording of Article 2.2.1.1". Paradoxically, Argentina continues to insist that it is the second subparagraph of Article 2(5) that provides the legal basis for the decision not to rely on the records of the investigated companies.

4. In paragraphs 12 and 18 of its Second Written Submission, Argentina draws a distinction between what it calls the "first part of Article 2(5) second subparagraph [and] the second part of that provision". Argentina also asserts that the options given to the investigating authorities under "the second part of Article 2(5) second subparagraph" "imply" that they also constitute the "reasons why information of the domestic market cannot be used". However, there is nothing in the text of either the first or the second subparagraph of Article 2(5) that could support Argentina's assertion.

3.1.1.2 The lack of similarity with the *EC-Fasteners* case

5. In paragraph 15 of its Second Written Submission, Argentina compares the present dispute with the situation faced by the Panel in *EC – Fasteners*. In that case, the Appellate Body found that in the absence of a specific provision, Article 9(5) of the Basic Regulation also concerned the calculation of dumping margins.

6. In the present situation, the first subparagraph of Article 2(5) addresses precisely the question of the conditions that must be met in order to base the cost calculation on the company records.

3.1.1.3 Recital 4 of Regulation 1972/2002

7. Argentina has repeatedly referred to Recital 4 of Regulation 1972/2002, with which the second subparagraph was added to Article 2(5). However, the text of that Recital does not support Argentina's arguments.

8. First, the text of Recital 4 shows that Article 2(5) had already been the legal basis for the authorities' determination of whether the records reasonably reflected costs, before the introduction of the second subparagraph of Article 2(5). Second, in paragraph 69 of its Second Written Submission, Argentina confuses the *sales* of the like product [governed by Article 2(3)] with the "records that do not reasonably reflect the costs" associated with the production and sale of the relevant product. Third, in paragraph 70 of its Second Written Submission, Argentina asserts that Recital 4 "emphasises that the records *must* be found not to reasonably reflect the costs". However, Recital 4 expressly refers to guidance as to what has to be done after it has already been determined that the records do not reasonably reflect the costs. Fourth, Recital 4 does not have any impact on the interpretation of "reasonably reflect costs".

3.1.1.4 The alleged "background" of the second subparagraph of Article 2(5) of the Basic Regulation

9. Argentina continues to insist that the "purpose" of the introduction of the second subparagraph of Article 2(5) "was to provide a legal basis for the authorities to achieve effects similar to those applied under NME treatment to Russia, although it was being granted full MES".

10. In support of its assertions, Argentina refers to several comments of scholars listed in paragraph 43 of its First Written Submission. However, at the time of the publications, all the scholars referred to were actively involved in defending Russian companies in anti-dumping investigations relating to the application of Article 2(5) of the Basic Regulation. In these circumstances, it is doubtful whether their statements can be used as a source of interpretation of Article 2(5).

3.1.1.5 The judgments of the General Court

11. Argentina has submitted as Exhibits certain judgments of the General Court which actually contradict its description of the scope of the second subparagraph of Article 2(5).

12. The General Court's judgments in Cases T-235/08 and T-118/10 confirm three points. First, that the first subparagraph of Article 2(5) is the legal basis that authorises the investigating authorities to determine whether the records "reasonably reflect costs". Second, that the second subparagraph of Article 2(5) only provides the alternative sources of data that the investigating authorities may use when it has already been determined that the company records cannot be used, pursuant to the first subparagraph of Article 2(5). Third, that the first and the second subparagraphs of Article 2(5) *authorise* the investigating authorities to take certain actions, but do *not mandate* them to do so.

3.1.1.6 Examples of application of the first subparagraph of Article 2(5) of the Basic Regulation by the European Union's investigating authorities before 2002

13. Argentina insists that the EU's investigating authorities had never determined that company records do not "reasonably reflect costs" before 2002.

14. First, the EU's investigating authorities routinely used the provision which today is the first subparagraph of Article 2(5) in order to determine whether the company records "reasonably reflect" the relevant costs between 1995 and 2002, at a period when the second subparagraph of Article 2(5) did not exist. Example are the 2000 investigation on *Urea and Ammonium Nitrate originating in Algeria et al*., the 2001 investigation on certain *Iron or steel ropes and cables originating in the Czech Republic, Russia, Thailand, et al., the* 1996 investigation on *Polyester textured filament yarn originating in Indonesia and Thailand*, and the 2000 investigation on *Tube or pipe fittings originating in Brazil, the Czech Republic, et al*.

15. Second, Argentina errs when it asserts that the investigations involving an application of Article 18 of the Basic Regulation are not relevant for purposes of Article 2(5). Even where they apply Article 18, the EU's investigating authorities still use the information supplied by the companies to the extent possible. Examples are the 2000 investigation on *Synthetic staple fibres of polyester originating in Australia, Indonesia and Thailand* and the investigation on *Aluminium foil originating in China and Russia*.

3.1.2. Other shortcomings of Argentina's "as such" claims

16. To sum up, Argentina purports to challenge "as such" the second subparagraph of Article 2(5) of the Basic Regulation under Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement. Argentina's challenge under Article 2.2.1.1 of the Anti-Dumping Agreement must be rejected for the simple reason that the scope of the second subparagraph of Article 2(5) has nothing to do with the content of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

3.1.2.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation is clear

17. In its Second Written Submission, Argentina refers to the Appellate Body Report in *US – Corrosion Resistant Steel* and acknowledges that when a measure is challenged "as such" the starting point for the analysis "must be the measure on its face". Argentina also refers to the Appellate Body Report in *US – Hot Rolled Steel* and acknowledges that "further examination is required", only if the "meaning or content of the measure is *not* evident on its face".

18. The EU has explained the reasons for which the scope, meaning and content of the second subparagraph of Article 2(5) are clear and evident on the basis of the provision's text. Argentina has actually acknowledged this fact in paragraph 50 of its Second Written Submission when it took issue with the EU's "exclusively focusing on the terms of Article 2(5), second subparagraph".

3.1.2.2 Argentina's description of the second subparagraph of Article 2(5) of the Basic Regulation

19. The text of Argentina's Second Written Submission in essence confirms the EU's objection: there is still no concise and uniform description of the meaning and content of the second subparagraph of Article 2(5), despite the clarity of the provision's text.

20. Argentina has also failed to identify the "precise content" of the second subparagraph of Article 2(5). Therefore, Argentina cannot make a *prima facie* case on an "as such" claim against the second subparagraph of Article 2(5) either under Article 2.2.1.1, or under Article 2.2 of the ADA.

3.2. ARGENTINA HAS FAILED TO SHOW THAT THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION IS "AS SUCH" INCONSISTENT WITH THE COVERED AGREEMENTS

3.2.1. Argentina ignores the Appellate Body Report in *US – Carbon Steel (India)*

21. In its Second Written Submission, Argentina asserts that "there is no provision" in the covered agreements which "establishes a mandatory/discretionary standard that the Panel would have to apply". However, Argentina omits to mention that the Appellate Body has used the "discretionary" nature of particular measures as a ground for rejecting "as such" claims against them. The most recent example is the Appellate Body's Report in *US – Carbon Steel (India)*.

22. In its Second Written Submission, Argentina states that providing for the possibility of "the use of a basis other than the cost of production in the country of origin renders the measure inconsistent with Article 2.2 of the ADA". However, Argentina is not consistent in its description of the content of the second subparagraph of Article 2(5) and has failed to establish that this provision mandates any particular conduct which is necessarily inconsistent with the covered agreements.

3.2.2. Argentina's refusal of the discretion afforded to the investigating authorities by the second subparagraph of Article 2(5) of the Basic Regulation

3.2.2.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation

23. The text of the second subparagraph of Article 2(5) says nothing about the determination of whether the company records can be used or not. Therefore, Argentina cannot assert that the text of the second subparagraph of Article 2(5) "mandates" any conduct in relation to the determination of whether company records reasonably reflect costs.

24. Argentina's arguments are based on the use of the word "shall" in the text of the second subparagraph of Article 2(5). However, the word "shall" in the text of the second subparagraph of Article 2(5) addresses the obligation of the investigating authorities to proceed with the construction of the normal value so that they can complete the anti-dumping investigation. It does not relate to any single method that the investigating authorities may use in order to establish or adjust the costs.

3.2.2.2 The alleged "practice" of the European Union's investigating authorities

25. In paragraphs 102 to 104 of its Second Written Submission, Argentina states that "in all cases which involved a situation of 'abnormally low' or 'artificially low' prices caused by an alleged 'distortion', information on the domestic market could not be used and the authorities used information from other representative markets".

26. As already noted, the investigations of the EU's authorities do not support Argentina's arguments on the purported "absence of discretion" afforded by the second subparagraph of Article 2(5).

3.2.2.3 The judgments of the General Court

27. In paragraph 105 of its Second Written Submission, Argentina states that the "use of the word 'entitled'" in the judgments of the General Court "does not confirm that Article 2(5) is discretionary". However, the ordinary meaning of the word "entitle" is "to grant someone a right". The use of the word "entitled" means that the General Court considers that the second subparagraph of Article 2(5) grants to the investigating authorities the right to act in a certain way, without obliging them.

28. Moreover, Argentina omits to mention that the relevant paragraph of the General Court's judgment, to which it refers, reads as follows: "The institutions were therefore fully **entitled** to conclude that …". This makes clear that the General Court was actually examining whether the investigating authorities had gone beyond the discretion that both the first and the second subparagraphs of Article 2(5) affords them.

3.3. CONCLUSION

29. To sum up, Argentina has failed to make a *prima facie* case on its "as such" claims against the second subparagraph of Article 2(5) under Article 2.2.1.1 and Article 2.2 of the ADA.

4. ARGENTINA ADVANCES AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ADA

4.1. THE TEXT OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

30. Argentina reiterates that this provision requires the "records to reasonably reflect" the relevant costs and that there is no "reasonableness test of the cost elements themselves". In support of its assertions, Argentina inaccurately refers to paragraph 7.393 of the Panel Report in *Egypt – Steel Rebar*. The real text contradicts Argentina's understanding and confirms the EU's interpretation.

31. In paragraph 113 of its Second Written Submission, Argentina asserts "the term 'costs' as 'charges or expenses' refers to a concrete amount by opposition to a hypothetical value". However, the use of these "hypothetical" amounts is allowed by Article 2.2 of the ADA in constructing the normal value.

32. In paragraphs 115 to 117 Argentina states that the relevant costs "are necessarily the costs of the specific exporter/producer" who is involved in the anti-dumping investigation. However, the ADA allows the investigating authority to use costs from outside the specific company.

33. In paragraph 116 Argentina misrepresents the Panel's Report in *Egypt – Steel Rebar*. In reality, the Panel's findings are the opposite of what is asserted by Argentina, showing that the determination of whether company records "reasonably reflect costs" depends on the facts of each case.

34. In paragraph 117, Argentina misquotes paragraph 7.483 of the Panel Report in *EC – Salmon*. The Panel does not "note" that the costs "necessarily refer to the costs actually incurred" but referred to costs associated with the production and sale "of the *like* product".

4.2. The Context of Article 2.2.1.1 of the Anti-Dumping Agreement

35. In paragraph 119 of its Second Written Submission, Argentina asserts that the second and third sentences of Article 2.2.1.1 "illustrate the types of issues that may arise under the second condition of Article 2.2.1.1, first sentence". However Argentina fails to take into consideration the important textual differences between these sentences.

36. In paragraphs 122 to 126, Argentina asserts that "the costs associated with the production and sale' do not need to be reasonable. This argument fails on the basis of the texts of the chapeau of Article 2.2, Article 2.2.1.1 and Article 2.2.2(iii).

37. In paragraphs 127 to 133, Argentina seeks to build certain arguments on the purported definition of dumping. However, in paragraph 127 Argentina omits to mention that the condition for the application of Article 2.1 is the existence of domestic sales in the ordinary course of trade. Also, in paragraphs 128 to 134, Argentina refers to the zeroing cases without mentioning that they did not involve the construction of normal value.

4.3. The Object and Purpose of the Anti-Dumping Agreement

38. Argentina discusses two points: (a) the ad hoc group on the implementation of the anti-dumping code of the Tokyo Round; and (b) the negotiating history of the Anti-Dumping Agreement in the Uruguay Round. However, none of them supports Argentina's position.

39. In relation to the first point, the documents discussed by Argentina in paragraphs 142 to 144 of its Second Written Submission are irrelevant for the present dispute. In relation to the second point, the negotiating history of Article 2.2.1.1 actually supports the European Union's interpretation.

5. Argentina advances an erroneous interpretation of Article 2.2 of the ADA

40. Argentina's Second Written Submission does not provide any convincing factual evidence or legal arguments to support its excessively restrictive interpretation of the chapeau of Article 2.2 of the Anti-Dumping Agreement. For example, in paragraph 152, Argentina's argument is circular. In paragraphs 153 and 156 Argentina contradicts itself with respect to paragraph 154.

6. Factual Elements Relating to the Biodiesel Investigation

41. There are no "factual inconsistencies" in the EU's submissions and statements in the present dispute.

42. Indeed, in paragraph 169 of its Second Written Submission, Argentina actually confirms that prices were "published by the government of Argentina". In paragraph 174, Argentina makes reference to the use of the term "particular market situation" in the Definitive Regulation. However, this notion is not relevant in the present dispute. In this paragraph, Argentina also makes reference to the "DET system" and the "export tax on soybean and soybean oil" whereas there is no real difference between the two terms. In paragraph 172, Argentina asserts that there is a contradiction regarding the levels of imports between the figures in the Regulations and those presented in the Reply to the Panel's Question 78. However, there is non since Recital 133 of the Provisional Regulation refers to imports by EU's "producers" rather than to the "industry".

7. Paragraphs 175 to 196 of Argentina's Second Written Submission

43. In paragraphs 185 to 187, Argentina is relying on the wrong legal authority since the relevant findings of the Panel in *Egypt – Steel Rebar*, do not relate to the issue of "benchmarking". In paragraphs 188 and 189, Argentina contradicts its Reply to Question 43. In paragraphs 191 and 193 although the FOB reference prices "reflected" international prices, Argentine-determined FOB reference prices cannot themselves be "international prices". Finally, in paragraph 192 Argentina's

theory is incorrect because the third sentence of Article 2.2.1.1 expressly provides that costs can be adjusted in certain circumstances.

8. ARGENTINA'S OTHER CLAIMS

8.1. THE ISSUE OF PROFITS

44. Argentina has failed to make a *prima facie* case on its claims against the amount of profits established by the investigating authorities. For example, in paragraph 145 Argentina appears to assert that it is the methodology that needs to be "reasonable" and not the profit figure that needs to be "reasonable'. However Article 2.2 of the ADA expressly refers to a "reasonable amount for […] profits".

8.2. THE CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

45. First, if Argentina refers to the concept of "differences affecting price comparability", in the sense of Article 2.4 of the ADA, the EU confirms that it denies that such differences exist in the present case.

46. Second, Argentina has admitted during the First Hearing that it does not claim that the investigating authorities should have added the value of the export tax to the export price of biodiesel.

47. Third, Argentina reverses the order of the analysis by stating that the investigating authorities could have acted consistently with Article 2.4, while acting inconsistently with Article 2.2 of the ADA.

8.3. THE CLAIM UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

48. In paragraph 209, Argentina statement confirms that it is in reality challenging the construction of normal value. Such a challenge may fall within the scope of Article 2, but falls outside the scope of Article 9.3 of the Anti-Dumping Agreement.

49. In paragraph 213, Argentina states that the EU's interpretation could lead to a situation, which is not the type of situations that Article 9.3 covers.

50. Finally, in paragraph 213, Argentina refers to paragraph 132 of the Appellate Body Report in *US – Zeroing (EC)*. However these findings have no relation to the construction of normal value, or to a claim under Article 9.3 of the Anti-Dumping Agreement which is based on an allegedly erroneous construction of normal value, similar to the claims put forward by Argentina in the present case.

9. ARTICLE 3 CLAIMS

51. In paragraph 216, Argentina continues to treat the issue of "utilisation of capacity" as a stand-alone issue, divorced from its context.

52. Recital 131 of the Definitive Regulation sets out the findings of the investigation. Since Argentina accepted the investigating authorities' provisional judgment on the matter, Argentina should also accept the authorities' final judgment.

53. Argentina refers to the case of Diester. The verification of Diester took place before the Provisional Regulation had been adopted and when the issue of "idle" plants had not emerged as a serious factor.

54. As regards causation and the role of overcapacity, the investigating authorities had made clear that the production figures presented in the Provisional Regulation could no longer be relied upon.

55. Argentina argues that the EU was in effect a trader in biodiesel. This contradicts Argentina's previous allegation that the industry vastly overextended its production capacity.

56. Argentina wrongly accuses the investigating authorities of failing to examine double-counting regimes other than the French regime.

57. The investigating authorities' findings did not dispute that other factors had contributed to the situation of the EU industry. However, having analysed and distinguished those factors, they found that they did not undermine the conclusion that the dumped imports were a cause of the material injury that had been identified.

ANNEX C-5

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

1. INTRODUCTION

1. Article 6.2 of the *Dispute Settlement Understanding* (DSU) requires that a request for the establishment of a panel (Panel Request) must, *inter alia*, (a) identify the specific measures at issue; (b) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly; and (c) indicate whether consultations were held. Argentina's Panel Request in the present case fails to meet these requirements. For this reason, the European Union requests the Panel to issue a preliminary ruling, confirming that the claims identified in the present submission are outside the Panel's terms of reference.

2. The Panel's Working Procedures provide, in paragraph 7, that a party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The Working Procedures also provide that, if the European Union requests such a ruling, Argentina shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel. Therefore, the European Union's request for a preliminary ruling is submitted timely and properly, in accordance with the Panel's Working Procedures.

2. ARGENTINA'S FAILURE TO IDENTIFY THE "SPECIFIC MEASURES AT ISSUE"

3. The need for precision in panel requests flows from the two essential purposes of the terms of reference: (a) to define the scope of the dispute and (b) to serve the due process objective of notifying the parties and third parties of the nature of the complainants' case.[1] To meet this need of precision, a Panel Request must specify the measures challenged with sufficient particularity, so as to indicate the nature of the measure and the gist of what is at issue.[2]

4. Argentina's Panel Request contains a section entitled "1. The Measures at issue." This section purports to "enumerate" the "measures" which Argentina is challenging. The section contains two paragraphs.

5. Paragraph 1(A) of Argentina's Panel Request starts by mentioning Article 2(5) of Council Regulation (EC) 1225/2009 and continues by referring to "any subsequent amendments, replacements, *implementing measures and related instruments or practices*." This phrase also appears in footnote 7 of Argentina's Panel Request, which compliments Argentina's definition of what Argentina calls the "Basic Regulation."

6. Paragraph 1(B) of Argentina's Panel Request lists certain "anti-dumping measures imposed by the European Union." Footnote 3 mentions Commission Regulation 490/2013, while footnote 2 mentions Council Implementing Regulation 1194/2013. Paragraph 1(B) concludes by asserting that the "measures at issue" also include "any subsequent amendments, replacements, *related measures and implementing measures*."

7. These elements in Argentina's Panel Request fail to comply with the provisions of Article 6.2 of the DSU, because they fail to "identify the specific measures at issue."

8. In particular, the references to "*implementing measures and related instruments or practices*" and to "*related measures and implementing measures*" are too vague and do not allow the identification of the specific instruments that the references aim to cover. The Appellate Body has already found that references to "*implementing measures and other related measures*" do not

[1] For example, Appellate Body Report, *EC-Chicken Cuts*, para. 155, where there are further references to other Appellate Body Reports.

[2] Appellate Body Report, *US-Continued Zeroing*, para. 169.

"identify the specific measures at issue, as required in Article 6.2 of the DSU and, therefore, fall outside the panels' terms of references.[3]

9. Consequently, Argentina's claims against "implementing measures and other related measures" in Paragraph 1(A) and footnote 7 of its Panel Request, as well as Argentina's claims against "related measures and implementing measures" in Paragraph 1(B) of its Panel Request, fall outside the Panel's terms of reference.

3. ARGENTINA'S FAILURE TO "PRESENT THE PROBLEM CLEARLY"

10. The requirement to "present the problem clearly" aims at enabling the Panel, the defending party and third parties to know *which* obligations are allegedly violated, as well as *how* the challenged measures are allegedly inconsistent with these obligations. The general requirement to "present the problem clearly" has two aspects. First, the panel request must identify the "legal basis" of the complaint. In order to meet the requisite standard of clarity, the panel request may be required to specify particular sub-paragraphs of a treaty provision.[4] Second, the panel request must "plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed."[5] Argentina's Panel Request fails to meet both these requirements.

3.1. *THE "INTER ALIA" LEGAL BASIS*

11. Argentina's Panel Request has a Section "2", entitled "Legal Basis for Claims." Sub-section 2(A) includes a paragraph that reads: "Argentina considers that [name of measure] is inconsistent as such with, *inter alia*, the following provisions of the [names of covered agreements]."

12. The use of the words "*inter alia*" indicates that the list of provisions of the covered agreements expressly listed in Sub-section 2(A) of Argentina's Panel Request is not exhaustive. Argentina retains for itself the possibility to add more, unspecified provisions of the covered agreements, as "legal bases" for its claims *after* the circulation of the Panel Request. Neither the European Union, nor the Panel has any idea of what claims or legal bases Argentina will finally present in this case: the words "*inter alia*" make the list of claims in Argentina's Panel Request completely open-ended.

13. Consequently, Argentina's Panel Request fails to identify properly the legal basis of the complaint and fails to "present the problem clearly." This is inconsistent with Article 6.2 of the DSU and places the relevant claims outside the Panel's terms of reference.

3.2. *PARAGRAPH 2(B)6 OF ARGENTINA'S PANEL REQUEST*

14. Sub-section 2(B) of the Panel Request purports to present Argentina's views on the "anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia,* Argentina." The introduction of Sub-section 2(B) includes a footnote 8, which refers the reader to footnote 3. Footnote 3 refers to Commission Regulation 490/2013 and to Council Implementing Regulation 1194/2013.

15. Paragraph 2(B)6 of Argentina's Panel Request states that these two legal instruments are inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT, because "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." This paragraph fails to meet the requirements of Article 6.2 of the DSU, for a number of reasons.

16. First, Paragraph 2(B)6 alleges that the challenged measures are inconsistent with "Article 9.3 of the Anti-Dumping Agreement." However, Article 9.3 of the Anti-Dumping Agreement is composed of a *chapeau* and three sub-paragraphs. Each of these deals with a different set of conditions. Argentina's Panel Request fails to mention the specific sub-paragraph of Article 9.3, with which the challenged measures are supposed to be inconsistent. This runs against Article 6.2 of the DSU, which requires Panel Requests to refer to the specific sub-paragraph of the WTO treaty

[3] Appellate Body Report, *EC-Selected Customs Matters*, para. 152, footnote 369. See also, Panel Report, *China-Raw Materials*, Annex F-1, para. 17.

[4] For example, Appellate Body Report, *Korea-Dairy*, para. 124.

[5] For example, Appellate Body Report, *China-Raw Materials*, para. 220.

provision that is supposed to be infringed by the challenged measure, where there are such sub-paragraphs containing different sets of obligations.[6]

17. Second, Argentina fails to articulate clearly the exact claim it advances. Paragraph 2(B)6 alleges that the European Union "imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established." From this wording it is not clear whether Argentina actually challenges (a) the comparison between the anti-dumping duty and the margin of dumping (e.g., that there was some numerical mistake in the text of the Regulation resulting in the mentioned amount of the duty being higher than the mentioned amount of the dumping margin); or (b) the method of calculation of the margin of dumping itself. In other words, it is not clear whether Argentina's challenge should be understood as being directed against the "*in excess*", or against the "*should have been established*."

18. In that context, it is noted that the calculation of the anti-dumping duty is discussed in paragraphs 214 to 219 and in Article 1 of the Council Implementing Regulation. In contrast, the calculation of the margin of dumping is discussed in paragraphs 59 to 65 of the Council Implementing Regulation. Paragraph 2(B)6 of Argentina's Panel Request fails to explain plainly which of these two different sections of the Council Implementing Regulation it challenges. The result is that the European Union does not understand the scope of the challenge against which it must defend itself and the Panel does not understand the scope of the challenge facing it.

19. Third, even if we assume *arguendo* that Argentina actually challenges the method of determining the dumping margin, then again Paragraph 2(B)6 fails to comply with the requirements of Article 6.2 of the DSU. The determination of the dumping margin was based on (a) the calculation of the "normal value"; (b) the calculation of the "export price"; (c) the comparison between them; and (d) the analysis of certain requests presented by Argentinean exporters. Both the Commission Regulation and the Council Implementing Regulation discuss each of these issues separately, in four different sections with four different titles.[7] Paragraph 2(B)6 fails to explain plainly which of these issues (and which of the corresponding sections of the Regulations) it challenges. Again, the European Union and the Panel cannot understand the scope of the challenge facing them.

20. Fourth, even if we further assume *arguendo* that Argentina actually challenges only the fourth relevant section of the Regulations, i.e., the one entitled "Dumping Margins", then again Paragraph 2(B)6 fails to comply with the requirements of Article 6.2 of the DSU.

21. The relevant section 2.4 of the Council Implementing Regulation discusses two different and distinct issues. First, in paragraphs 59 to 60, the Regulation discusses a request advanced by "all cooperating Argentine exporting producers" in relation to the imposition of a "single duty for all cooperating exporting producers." Second, in paragraphs 61 to 64, the Regulation discusses a completely different request submitted by another three companies. These companies requested to "be included in the list of cooperating exporting producers." Their request was rejected because, either they were not exporting themselves to the European Union, or because they were not producing biodiesel during the investigation period. Paragraph 2(B)6 of the Panel Request does not provide the faintest indication of which of these two issues Argentina is actually challenging. Again, the European Union and the Panel cannot understand the scope of the challenge facing them.

22. Consequently, Paragraph 2(B)6 of Argentina's Panel Request falls outside the Panel's terms of reference.

4. ARGENTINA'S PANEL REQUEST EXPANDS THE SCOPE OF THE DISPUTE

23. Consultations requests constitute a prerequisite for panel requests and, as a result, they "circumscribe the scope of panel requests."[8] The Appellate Body has held that a panel request cannot include claims (either in relation to "challenged measures", or in relation to "legal bases"), which were not included in the corresponding consultations request, where these "new" claims

[6] Appellate Body Report, *Korea-Dairy*, para. 124.

[7] The Commission Regulation in paras. 40 to 46; paras. 47 to 49; paras. 50 to 55 and paras. 56 to 59 respectively. The Council Implementing Regulation in paras. 35 to 48; paras. 49 to 54; paras. 55 to 58; and paras. 59 to 65, respectively.

[8] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, para. 137. See also Panel Report, *China-Broiler Products*, para. 7.219.

"expand the scope of the dispute",[9] or have the effect of "changing the essence of the complaint."[10]

24. In the present case, Argentina's Panel Request includes a great number of such new claims, which expand the scope of the dispute and change the essence of the complaint set out in Argentina's request for consultations (Consultations Request).

25. These new claims include the following: (1) a new claim against a new "measure", which Argentina calls "*practices"* related to Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 1(A)**); (2) an unclear "as applied" claim against Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 2(B)3**); (3) a new claim under Article 9.3 of the Anti-dumping Agreement against Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 2(A)3**); (4) a new claim under GATT Article VI:1 against Article 2(5) of Council Regulation 1225/2009, alleging use of information other than that in the country of origin (**Panel Request Paragraph 2(A)1**); (5) a new claim under GATT Article VI:1 against Article 2(5) of Council Regulation 1225/2009, alleging not using the records kept by the producers and, further alleging, using costs not associated with the production and sale of the product under consideration (**Panel Request Paragraph 2(A)2**); (6) new claims under Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement against Article 2(5) of Council Regulation 1225/2009, alleging using costs not associated with the production and sale of the product under consideration (**Panel Request Paragraph 2(A)2**); (7) a new claim under Article 2.1 of the Anti-dumping Agreement against the Commission Regulation and the Council Implementing Regulation, alleging "unreasonable" determination of the amounts of profits (**Panel Request Paragraph 2(B)4**).

26. The sheer number and breadth of these new claims suffices to illustrate that Argentina's Panel Request seeks to expand the scope of the dispute. The individual analysis of each of these new claims further establishes that Argentina's Panel Request changes the "essence" of the complaint.

4.1. NEW "MEASURES" PRESENTED BY ARGENTINA FOR THE FIRST TIME IN THE PANEL REQUEST

27. Paragraph 1(A) of Argentina's Panel Request challenges for the first time "*related practices"*, in addition to Article 2(5) of Council Regulation 1225/2009. In contrast, Argentina's Consultations Request did not include any such reference. Argentina's Consultations Request, in its Paragraph b., refers solely to Article 2(5) of Council Regulation 1225/2009, i.e., a specific, written legal provision. The claim against "*related practices*" is a new claim, which expands the scope of the dispute and changes the essence of Argentina's complaint.

28. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009. Therefore, Argentina's decision to add the new claim against "*related practices*" in its Panel Request cannot be said to have "evolved" from the consultations.

29. It is also noted that the Consultations Request expressly stated that Argentina challenges Article 2(5) of Council Regulation 1225/2009 "*as such*." The reference to an "*as such*" claim further shows that Argentina was challenging a specific, written legal provision and not the application of that legal provision. Argentina's attempt to add a claim on the application of Article 2(5) of Council Regulation 1225/2009 changes the essence of the original complaint.

30. Consequently, the claim against "related practices" in Paragraph 1(A) of Argentina's Panel Request expands the scope of the dispute and changes the essence of the complaint and, therefore, falls outside the Panel's terms of reference.[11]

[9] Appellate Body Report, *US-Upland Cotton*, para. 293.

[10] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, paras. 137 and 138.

[11] As mentioned above, this new claim is also too vague and imprecise and fails to identify properly the specific measure at issue. Therefore, this new claim fails to comply with the requirements of Article 6.2 of the DSU for a number of different reasons.

4.2. NEW "LEGAL BASES" RAISED BY ARGENTINA FOR THE FIRST TIME IN THE PANEL REQUEST

4.2.1. The new and unclear "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009

31. Between Paragraph 2(B)3 and Paragraph 2(B)4 of the Panel Request, Argentina has inserted a new, not-numbered paragraph which seems to introduces an "*as applied*" challenge against Article 2(5) of Council Regulation 1225/2009. The role of this not-numbered paragraph is ambiguous. The Consultations Request expressly stated in Paragraph b. that Argentina was challenging Article 2(5) of Council Regulation 1225/2009 only "*as such*", without any reference to an "*as applied*" claim. The Panel Request repeats the reference to the "*as such*" claim in the last sub-paragraph of the *chapeau* of Paragraph 2(A).

32. On its face, it is not clear whether this not-numbered paragraph is intended to introduce an "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009. In any event, if we assume *arguendo* that Argentina is introducing an "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009, then such claim is new and expands the scope of the original dispute, as presented in Argentina's Consultations Request. In addition, it seems to be misplaced in section B, which rather deals with the provisional and the definitive regulations.

33. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009.

34. Therefore, all the elements that would have allowed Argentina to include the "*as applied*" challenge against Article 2(5) of Council Regulation 1225/2009 were at the disposal of Argentina already at the time it submitted its Consultations Request. However, Argentina did not advance these claims in its Consultations Request. Allowing Argentina to ignore the consequences of its own decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

35. Consequently, this claim of Argentina falls outside the Panel's terms of reference.

4.2.2. The new claim against Article 2(5) of Council Regulation 1225/2009 based on Article 9.3 of the Anti-dumping Agreement

36. Paragraph 2(A)3 of Argentina's Panel Request introduces a new claim against Article 2(5) of Council Regulation 1225/2009, based on Article 9.3 of the Anti-dumping Agreement. Argentina claims for the first time that Article 2(5) of Council Regulation 1225/2009 is "*as such*" inconsistent with Article 9.3 of the Anti-dumping Agreement, because, allegedly, the "amount of the anti-dumping duty to be imposed exceeds the margin of dumping."

37. This claim did not exist in Argentina's Consultations Request. Paragraph b. of the Consultations Request (which dealt with Article 2(5) of Council Regulation 1225/2009) did not make any reference to Article 9.3 of the Anti-dumping Agreement. Moreover, Paragraph b. of the Consultation Request did not make any reference to an alleged "excess" of the anti-dumping duty, if compared with the margin of dumping. Therefore, there is no doubt that the claim in Paragraph 2(A)3 of the Panel Request is a new claim, which expands the scope of the dispute and changes the essence of Argentina's original complaint.

38. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. Argentina was also aware of all the facts that would have allowed Argentina to allege that the anti-dumping duty was in excess of the dumping margin. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims under

Article 9.3 of the Anti-dumping Agreement against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009.[12]

39. Therefore, all the elements that would have allowed Argentina to challenge Article 2(5) of Council Regulation 1225/2009 under Article 9.3 of the Anti-dumping Agreement were at the disposal of Argentina already at the time it submitted its Consultations Request. However, Argentina did not advance these claims in its Consultations Request. Allowing Argentina to ignore the consequences of its own decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

40. Consequently, Argentina's new claim against Article 2(5) of Council Regulation 1225/2009, alleging an inconsistency with Article 9.3 of the Anti-dumping Agreement, as well as that the anti-dumping duty allegedly "exceeds" the dumping margin, falls outside the Panel's terms of reference.

4.2.3. New claims against Article 2(5) of Council Regulation 1225/2009 based on Article VI:1 of the GATT 1994

41. Paragraph 2(A)1 and Paragraph 2(A)2 of Argentina's Panel Request include new claims against Article 2(5) of Council Regulation 1225/2009 that are based on Article VI:1 of the GATT 1994. Argentina's Consultations Request did not include any claim based on Article VI:1 of the GATT. It also did not include any claims against Article 2(5) of Council Regulation 1225/2009 based on the GATT 1994.[13] Therefore, these claims are new and they expand the original scope of the dispute.

42. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Already at the time of its Consultations Request, Argentina was fully aware that Article 2(5) of Council Regulation 1225/2009 is part of the European Union's anti-dumping legislation. Therefore, there was nothing preventing Argentina from challenging Article 2(5) of Council Regulation 1225/2009 under Article VI:1 of the GATT, which is part of the GATT Article dealing with anti-dumping. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request already included claims against Article 2(5) of Council Regulation 1225/2009 that were based on the Anti-dumping Agreement.

43. Moreover, Argentina cannot argue that adding new claims under Article VI:1 of the GATT does not change the "essence" of the complaint, alleging that the original complaint was already based on the Anti-dumping Agreement and further alleging that its scope is the same with the scope of Article VI of the GATT. If Article VI:1 of the GATT and the provisions of the Anti-dumping Agreement included in Argentina's Consultations Request had identical scope, then the addition of a claim based on GATT Article VI:1 in the Panel Request would have been redundant and the Panel would simply exercise judicial economy on it. The fact that Argentina chose to add the new GATT Article VI:1 claim in its Panel Request shows that Argentina considers that the two sets of provisions have different scope and that the "essence" of GATT Article VI:1 is different from the "essence" of the provisions of the Anti-dumping Agreement included in the Consultations Request. Therefore, by adding the GATT Article VI:1 claim in its Panel Request, Argentina confirms that it changes the "essence" of its original complaint.

44. Consequently, Argentina's new claims under Article VI:1 of the GATT fall outside the Panel's terms of reference.

4.2.4. New claims against Article 2(5) of Council Regulation 1225/2009 based on Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement

45. In Paragraph 2(A)2 of its Panel Request, Argentina alleges the violation of Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement "for two reasons." As "second reason", Argentina asserts that Article 2.2 and 2.2.1.1 of the Anti-dumping Agreement "require that the costs used be associated with the production and sale of the product under consideration."

[12] See Paragraph a.6 of Argentina's Consultations Request.

[13] The Consultations Request included claims against Article 2(5) of Council Regulation 1225/2009 only based on the Anti-dumping Agreement and the Marrakesh Agreement; see Paragraph b. of Argentina's Consultations Request.

46. These are new claims against Article 2(5) of Council Regulation 1225/2009, which were not included in Argentina's Consultations Request; the corresponding paragraph in Argentina's Consultations Request appears to be Paragraph b.2, which (a) includes only a claim based on Article 2.2.1.1 of the Anti-dumping Agreement and (b) refers to the calculation of costs "on the basis of records kept by the exporter." The new claims in Argentina's Panel Request expand the scope of the dispute and change the essence of the complaint because (a) they introduce a new legal basis (i.e., Article 2.2 of the Anti-dumping Agreement); and (b) they introduce a new type of complaint (i.e., the alleged use of costs not "associated with the production and sale of the product under consideration").

47. There are no facts that could support a finding that these new claims might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. Argentina was also aware of all the facts that would have allowed Argentina to articulate this claim in its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation alleging a violation of Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement and referring to the alleged inclusion of "costs not associated with the production and sale of the product under consideration."[14]

48. Therefore, Argentina could have made this claim against Article 2(5) of Council Regulation 1225/2009 in its Consultations Request, but did not do so. Allowing Argentina to ignore the consequences of its decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

49. Consequently, Argentina's new claims against Article 2(5) of Council Regulation 1225/2009, based on Article 2.2 and Article 2.2.1.1 of the Antidumping Agreement and alleging the use of costs not associated with the production and sale of the product under consideration, are outside the Panel's terms of reference.

4.2.5. The new claim against the Commission Regulation and the Council Implementing Regulation based on Article 2.1 of the Anti-dumping Agreement

50. In paragraph 2(B)4 of its Panel Request, Argentina alleges that the European Union acted inconsistently with "Articles 2.1, 2.2 and 2.2.2(iii) of the Anti-dumping Agreement", because it failed to determine the "amounts of profit" on the "basis of a reasonable method." The corresponding paragraph in Argentina's Consultations Request is Paragraph a.5, where Argentina alleges that the European Union failed to determine the "amounts of profit" in "accordance with the rules established under" Articles 2.2 and 2.2.2 of the Anti-dumping Agreement.

51. These two paragraphs provide a good example of the difference between (a) "refining the contours" of a claim and (b) expanding the scope of the dispute. The Panel Request relies on Article 2.2.2(iii) of the Anti-dumping Agreement, while the Consultations Request referred to Article 2.2.2 in general. This development can probably "reasonably be said" to have "evolved from the consultations." The same can be said for the description of the claim: the Panel Request alleges a determination not "on the basis of a reasonable method", while the Consultations Request mentioned more generally a determination not "in accordance with the rules established under" Articles 2.2 and 2.2.2. The text of the Panel Request is a more precise version of the more general text used in the Consultations Request.

52. In contrast, Argentina's addition of a new claim under Article 2.1 of the Anti-dumping Agreement cannot "reasonably be said" to have "evolved from the consultations." Argentina was in possession of all the elements that would have allowed it to advance a claim under Article 2.1 of the Anti-dumping Agreement already at the time of the Consultations Request. The potential "refining of the contours" of Argentina's claims, brought about by the consultations, was the clarification of the precise sub-paragraph of Article 2.2.2 that would serve as legal basis for its claim. Argentina went farther than that in its Panel Request: it added a new legal basis for its claim.

[14] Argentina's Consultations Request, Paragraph a.3.

53. At the time of the Consultations Request, Argentina decided not to challenge the European Union's determination of profits under Article 2.1 of the Anti-dumping Agreement, although it could have done so. Article 6.2 of the DSU requires that Argentina be now held to the consequences of that decision.

54. Consequently, Argentina's new claim under Article 2.1 of the Anti-dumping Agreement in paragraph 2(B)4 of its Panel Request is outside the Panel's terms of reference.

5. CONCLUSION

55. The European Union requests the Panel to issue a preliminary ruling confirming that the claims of Argentina's Panel Request that are discussed in the present submission are outside the Panel's terms of reference.

56. The European Union also requests that this preliminary ruling be issued before the date on which the European Union's first written submission is due. This will allow the European Union to identify the precise claims to which it will need to defend itself in its first written submission.

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ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF AUSTRALIA

I. THE MEANING OF THE LANGUAGE "RECORDS [THAT] REASONABLY REFLECT THE COSTS ASSOCIATED WITH THE PRODUCTION AND SALE OF THE PRODUCT UNDER CONSIDERATION" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

1. A material issue in this matter is the interpretation of the language "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 of the *Anti-Dumping Agreement*. This language derives from the first sentence of Article 2.2.1.1, which reads:

> 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. Two questions are of critical importance to this analysis: what it means for records to reasonably reflect the costs associated with production and sale of the product under consideration; and, whether records that accurately detail the actual expenses of the exporter or producer automatically constitute records that must be used in the calculation of costs (provided they also accord with generally accepted accounting principles (GAAP) – in this submission Australia assumes that the GAAP proviso is met). Relevantly, the Panel in *China – Broiler Products (US)*[1] noted that:

> … although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with [generally accepted accounting principles - GAAP] or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration.

3. Argentina argues that records that detail the actual expenses of the exporter or producer would reasonably reflect the costs associated with production and sale of the product under consideration, and so must be used in the production cost calculation under Article 2.2.1.1. In Australia's view, this may not always be the case. Rather, Article 2.2.1.1 permits investigating authorities to look beyond the records to consider whether the costs reflected therein are reasonably related to the cost of producing and selling the product. The reasonableness of costs of inputs or raw materials would be relevant to this analysis.

4. In this respect, Australia recalls the Panel's approach to analysing the calculation of cost of production in *Egypt – Rebar (Turkey)*[2], where the Panel considered that it must:

> … reach a conclusion as to whether…there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation.

5. This supports a reading of Article 2.2.1.1 whereby any element that "reasonably" relates to the cost associated with production and sale should be taken into account, including in relation to inputs or raw materials, and might lead to the adjustment or replacement of certain costs. Indeed, this appears to be the situation in *US – Softwood Lumber*, where the Panel did not take issue with

[1] Report of the Panel, *China – Broiler Products (US)*, para. 7.164.
[2] Report of the Panel, *Egypt – Rebar (Turkey)*, para. 7.393.

respect to testing for arm's length prices.[3] In such cases, where the investigating authority has established that the records do not reasonably reflect the costs, there is no obligation under Article 2.2.1.1 to calculate costs using the records.[4]

6. This interpretation is consistent with the ordinary meaning of Article 2.2.1.1 and is the only sensible reading when considered in context, which is Article 2 on the determination of dumping. First, Article 2.1 of the *Anti-Dumping Agreement* sets down the usual basis for the determination of dumping: namely, the proper comparison between the normal value of the imported product in the ordinary course of trade in the country of origin or export, and the export price of the product in the country of import. Such a comparison must be a fair comparison by virtue of Article 2.4 of the *Anti-Dumping Agreement*.

7. Second, Article 2.2 of the *Anti-Dumping Agreement* provides for situations where there are no sales in the ordinary course of trade, or where such sales do not permit a proper comparison because of the low volume of sales or a particular market situation. Pursuant to Article 2.2, the authorities in these circumstances are required to disregard these sales and use a comparable price of the like product when exported to an appropriate third country, or to construct normal value.

8. Given that the application of an anti-dumping methodology should be assessed on a case by case basis, and the situations in which cost construction is required are determined by Article 2.2, Article 2.2 is central to this analysis.

9. As such, in situations where costs are being constructed under Articles 2.2 and 2.2.1.1, a holistic analysis of costs is warranted in order to arrive at a proper cost calculation that provides a point of comparison that is closest to a "normal" value.[5] All costs that would be reasonably related to the production of the goods, or at least those that are significant enough to affect the overall production costs, are relevant to such an analysis.

10. To suggest that the meaning of the first sentence of Article 2.2.1.1 prevents or limits investigating authorities from examining whether records reasonably reflect costs, having established that there are no sales in the ordinary course of trade or that such sales do not permit a proper comparison, would render this provision inutile. It would be circuitous in preventing authorities to address not being able to make a proper comparison in determining the margin of dumping.

II. THE OBJECT AND PURPOSE OF THE ANTI-DUMPING AGREEMENT

11. In Australia's view, such a reading of Article 2.2.1.1 is not contrary to the object and purpose of the *Anti-Dumping Agreement*, to the extent that one can be established.

12. The Panel in *US – Zeroing (EC)* observed with respect to the *Anti-Dumping Agreement* that "specific objectives are difficult to discern with any facility or compelling force due to the lack of anything that could properly be described as constituting a clear statement of the objectives of the *AD Agreement*".[6]

13. Nevertheless, to the extent that guidance can be drawn from Article VI.1 of the GATT 1994, Australia notes that the practice condemned therein hinges on the introduction of a product into the commerce of an importing country at "less than its normal value" – that is, at less than the comparable price, "in the ordinary course of trade". While Article VI:1 establishes the point of comparison within the ordinary course of trade, this does not preclude other points of comparison when normal value must be constructed because there are no sales within the ordinary course of trade. In Australia's view, an interpretation of Article 2.2.1.1 that allowed an investigating authority to consider, in a holistic way, the reasonableness of costs, and to adjust them if appropriate, would not run counter to Article VI.1 of the *Anti-Dumping Agreement*.

[3] Report of the Panel, *US – Softwood Lumber V*, para. 7.332.
[4] Report of the Panel, *US – Softwood Lumber V*, para. 7.236.
[5] *Anti-Dumping Agreement*, Article 2.1.
[6] Report of the Panel, *US – Zeroing (EC)*, footnote 292.

III. THE MANDATORY/DISCRETIONARY DISTINCTION IN "AS SUCH" CLAIMS

14. In Australia's view, a Panel should be guided by the mandatory/discretionary distinction in assessing whether a Member's legal instrument is inconsistent with its WTO obligations "as such".

15. The Appellate Body in *US – 1916 Act* found that the mandatory/discretionary distinction was a threshold consideration in determining whether legislation could be challenged 'as such', endorsing the approach of GATT panels that only legislation which *mandated* inconsistent action could be challenged 'as such'.[7] This approach appears to have been recently followed by the Appellate Body in *US – Carbon Steel (India)*, where it found that a US regulation was not inconsistent 'as such' with Article 12.7 of the *Agreement on Subsidies and Countervailing Measures* because the regulation did not *require* inconsistent conduct but was of a 'discretionary nature'.[8] While other rulings have left open the question of whether a discretionary measure could be challenged 'as such'[9], in *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body maintained that the mandatory/discretionary nature of a measure remained relevant to an assessment of whether a measure was 'as such' inconsistent with a Member's obligations, even if it did not have to be considered as a 'preliminary jurisdictional matter'.[10] As the Appellate Body held in *US – Section 211*, 'where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations'.[11]

[7] Appellate Body Report, *US – 1916 Act*, paras. 88-89.

[8] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483.

[9] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 89, 93; Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, footnote 334 to para. 159; Appellate Body Report, *US – Zeroing (EC)*, paras. 211, 214; Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54.

[10] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. See also Panel Report, *US – Section 301 Trade Act*, para. 7.53, where the panel stated that 'The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited'.

[11] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259.

ANNEX D-2

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF CHINA

I. Introduction

1. The People's Republic of China ("China") intervenes in this case because of its systemic interest in the correct interpretation of GATT 1994 and the Anti-Dumping Agreement ("ADA"). Through its written submission, oral statement and responses to the Panel's questions, China has discussed the request of the European Union ("EU") for a preliminary ruling ("PRR"), presented its views on the interpretation of Articles 2.2.1.1 and 2.2 of the ADA, made observations on the meaning of Article 2(5) of the EU Basic Regulation and its consistency with Articles 2.2.1.1 and 2.2, and made observations on certain claims with respect to elements of the EU determination in the Biodiesel investigation, including the EU approach to cost adjustments, profit determination, price comparability, and injury and causation issues.

II. The Request for a Preliminary Ruling

2. First, as to the EU's objections in Section 2 of the PRR, China considers that the references to "implementing measures and related instrument or practices" and "related measures and implementing measures" in the Panel Request are not *per se* inconsistent with the specificity requirement in Article 6.2. The Panel must consider the Panel Request as a whole, and, in particular, to examine whether the measures that are implemented or related were precisely identified in that Request. Second, as to the EU's objections in Section 3.2 of the PRR, China submits that there is no mandatory requirement to refer to a specific sub-paragraph of a treaty provision. A panel should examine whether a general reference to a treaty provision meets Article 6.2 on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue. China also recalls that a "brief summary" of the legal basis should be distinguished from arguments in support of a particular claim, which are not required to be included in a panel request. Third, as to the EU's objection in Section 4.2.4 of the PRR, China notes that both provisions concerned have been invoked to challenge Article 2(5) of the Basic Regulation in both the request for consultations and the Panel Request. It thus appears that Argentina has not added new legal basis in the Panel Request, but just clarified the connection between the challenged measure and the legal basis. Finally, China considers that PRR is not the only way to address preliminary issues. Parties may present views on many of these issues in their submissions and/or statements and expect panels to make findings in final reports. Unnecessary or premature requests should not be encouraged.

III. Interpretation of Articles 2.2.1.1 and 2.2 of the ADA

A. "Dumping" Reflects Pricing Behaviours of Individual Producers/Exporters

3. To properly interpret Articles 2.2.1.1 and 2.2, it is appropriate to begin with the foundational concept of "dumping". Dumping is the result of the "pricing behaviour of individual exporters or foreign producers". Thus, anti-dumping measures can be applied only to remedy injury caused by the pricing behaviour of an individual producer/exporter, which results in price discrimination between the producer's home market and the export market.

4. In line with this foundational concept of dumping, an authority cannot reject the costs recorded in the individual producer/exporter's records on grounds exogenous to that producer/exporter. Exogenous factors, such as the regulatory environment in which a producer operates, or the way in which duties or taxes affect market conditions for goods or services upstream to production of the product under consideration are, by definition, entirely outside the control of a producer/exporter. The market outcomes of government policy measures have nothing to do with the commercial conduct of the producer/exporter. They cannot therefore be the grounds to reject the accurately recorded costs. Otherwise, anti-dumping proceedings cease to be a remedy for the pricing behaviour of producers or exporters, and instead become a tool for authorities to penalize imports for cost advantages that foreign producers may enjoy.

B. Article 2.2.1.1 Does Not Permit Rejection of Recorded Costs on the Ground that They Are "Artificially Lower" than Hypothetical Costs

5. Article 2.2.1.1 does not permit authorities to reject recorded costs on the ground that they are lower than they would be if sourced in a market that, unlike the country of origin, remains unaffected by governmental policy interventions that affect costs.

6. First, a "reasonably reflect" assessment must be focused on the costs associated with production and sale of the product under consideration by the specific producer/exporter, and not the costs of a hypothetical producer or exporter.

7. This is made clear by the privileged status given to "records kept by the exporter or producer under investigation" under Article 2.2.1.1. It is also reflected in the explicit reference to the costs "associated with" the production and sale of "the product under consideration". To be "associated with" the production of the product under consideration, the costs must be connected with the product that is produced by the producer under investigation and exported to the importing Member. A cost taken from a hypothetical market does not in any way pertain to the production of the product by the investigated producer, and thus is not "associated with" the production of the product under consideration.

8. Furthermore, the circumstances identified in the second and third sentences of Article 2.2.1.1, in which a producer's records might not be a reasonable reflection of the costs, confirm that the determination of reasonableness does not extend to factors exogenous to the producer/exporter. Specifically, the issues of "proper allocation" of costs, "amortization", "depreciation" and "capital expenditure" all concern cost accounting choices made by the specific producer/exporter and any related companies with which it shares costs.

9. Article 2.2.2 provides further context. It also reflects the producer/exporter-specific focus when prescribing the basis for determination of administrative, selling and general (or "AS&G") costs, which are other cost components to be used in constructing normal value.

10. Second, if a benchmark is used to assess whether records reasonably reflect costs, such a benchmark must relate to costs in the country of origin and not costs in some hypothetical market where the market and regulatory conditions of the country of origin do not exist. Since Article 2.2.1.1 begins with the phrase "[f]or the purpose of paragraph 2", the scope of the costs considered under both Articles 2.2.1.1 and 2.2 is the same, i.e. "costs of production in the country of origin". In addition, Article 2.2.2, another provision within "paragraph 2" of Article 2, also requires that AS&G costs be determined on the basis of costs in the country of origin. In short, whether records reasonably reflect costs must be assessed within the boundaries of the country of origin. It is impermissible, as a matter of law, to benchmark a producer or exporter's recorded costs against an international market price or prices from other countries.

11. Third, the object and purpose of the ADA is to discipline the rules governing anti-dumping investigations and measures, for which the foundation stone is the existence of dumping by exporters or producers. A determination of the existence of dumping requires analysis of the pricing behaviours of the individual producers/exporters. Government measures affecting the costs of a producer or exporter may be relevant for the application of other covered agreements if they are specific subsidies, or if they take the form of impermissible export restrictions. However, since dumping is a producer/exporter-specific concept, it is not consistent with the object and purpose of the ADA to seek to remove the impact of governmental policy interventions that are entirely exogenous to the producer/exporter under consideration.

C. Article 2.2 Does Not Allow Use of Non-Country of Origin Costs

12. Article 2.2 is clear and explicit in requiring that the "cost of production" used to construct normal value must be the cost "in the country of origin". The language of Article 2.2 is less flexible than the language of Article 14(d) of the SCM Agreement. Thus, while the use of out of country benchmarks may sometimes be permissible under the SCM Agreement, a producer's costs under the ADA are, quite simply, the "costs of production in the country of origin".

13. The EU does not take issue with the requirement that "costs" under Article 2.2 reflect the "cost of production in the country of origin", but argues that the evidence required to establish

such costs may originate in other countries. First, the issue regarding the appropriate source of evidence only arises when the costs recorded by a specific producer or exporter need to be adjusted. Since authorities are not permitted to disregard recorded costs on the ground that they are "artificially low" because of governmental policy intervention, there is no need to refer to any sources of evidence other than the producer's records themselves in these circumstances. Second, in cases where cost records of a specific producer/exporter need to be adjusted because of issues pertaining to that producer or exporter, an authority shall consider evidence from *within* the country of origin, which might include evidence regarding costs from other producers/exporters of the investigated product, or from a related sector or industry. Third, only in very exceptional cases where there is a complete lack of evidence available in the country of origin, might an authority consider evidence of costs from third countries. In such a scenario, an authority could not simply deem out-of-country evidence to reflect the cost of production in the country of origin. Rather, such evidence could only be used as a starting point upon which to determine costs of production in the country of origin. In other words, if third country evidence is used, the specific market conditions in the country of origin must be factored in and the final costs of production must reflect the costs in the country of origin. Relevant market conditions that should be considered by an investigating authority include how policy or regulatory factors, including taxes and duties, impact on the price and availability of inputs and other factors of production.

IV. "As Such" Claims in Relation to Article 2(5) of the Basic Regulation

14. At the outset, China recalls that in order for a rule or norm of general and prospective application to be found to be, as such, WTO-inconsistent, it is not necessary to show that a rule or norm "mandates" a WTO-inconsistent outcome in *every* case. Rather, the complainant must provide evidence demonstrating that the application of the challenged rule will necessarily be inconsistent with that Member's WTO obligations *in defined circumstances*. China also recalls that the Appellate Body has provided guidance on how to examine the meaning of municipal law, requiring panels to undertake a holistic assessment of all relevant elements. China concurs with Argentina that the meaning of Article 2(5), second sub-paragraph, should be examined in a way taking into account elements other than the text, including: (i) its context and "logic", (ii) its consistent application by the EU authority, and (iii) the judgment of EU courts on its meaning.

15. As an immediate context, the first sub-paragraph of Article 2(5) includes the same "reasonably reflect" clause. There exists a special logical link between the two sub-paragraphs, i.e. the first sub-paragraph requires the authority to use the records of the parties concerned as the basis to calculate costs if this condition, together with another condition, is fulfilled, while the second sub-paragraph requires the authority not to use the records if the same condition is not met. Thus, the EU's argument that the conditions that must be met in order to determine whether the company records "reasonably reflect" costs are *outside of the scope* of the second subparagraph fails by disregarding this special link.

16. The context that should be taken into account also covers Recitals 3 and 4 of Council Regulation (EC) No 2972/2002, and Article 2(3), second sub-paragraph, of the Basic Regulation. Recital 4 clarifies that the circumstances in which records do not reasonably reflect costs cover the situations where "because of a particular market situation sales of the like product do not permit a proper comparison". According to Article 2(3), second sub-paragraph, a particular market situation may be deemed to exist when "prices are artificially low". Recital 3 of the Council Regulation (EC) No 2972/2002 further clarifies that particular market situations cover "market impediments", which may result in domestic prices being out of line with world-market prices or prices in other representative markets. Reading these provisions together, Article 2(5), second sub-paragraph, appears to require the investigating authority to reject the records of the parties concerned on the ground that "prices are artificially low" or for reasons relating to the situation of the *entire* market caused by governmental policy interventions, instead of a situation relating to or caused by conducts of a *specific* producer/exporter.

17. The above reading is confirmed by the application of Article 2(5). The practice of the EU authority indicates that it will disregard the costs correctly recorded by the specific producer/exporter under investigation if it determines that such costs are "artificially" lower than the "hypothetical" costs that would be borne in a theoretical market where the prices of relevant inputs were not affected by governmental policy interventions. In the investigation concerning imports of biodiesel from, *inter alia*, Argentina, the EU authority disregarded the actual cost of soya beans as recorded by the companies concerned on the ground that such cost (domestic

prices of soya beans) was "artificially lower" than a "hypothetical" cost (international prices). It is clearly indicated by the authority that this determination is not unique, but falls well "[with]in the meaning of Article 2(5)". In *Seamless Pipes and Tubes of Iron or Steel from Croatia, Romania, Russia and Ukraine*, the EU determined that the correctly accounted gas prices "could not reasonably reflect the costs associated with the production and distribution of gas" because that price "was much lower than the average export prices from Russia to both Western and Eastern parts of Europe". The authority also indicated that it reached this determination "as provided for in Article 2(5) of the basic Regulation", which implies that the above practice appears to be an automatic application of Article 2(5).

18. In summary, Article 2(5), second sub-paragraph, appears necessarily to require the EU authority to reject records of a producer/exporter under investigation that accurately account for the costs incurred by that producer/exporter, for the sole reason that the recorded costs are "artificially low" compared to the hypothetical costs that would be incurred in a market unaffected by governmental policy interventions; and appears to require, in the above situations, that the costs be "adjusted or established" on the basis of information from "other representative markets", when the costs of other producers/exporters in the same country are also "artificially low" compared to the hypothetical costs and other "reasonable" bases are not available.

19. Therefore, Article 2(5), second sub-paragraph appears to be, as such, inconsistent with Article 2.2.1.1 of the ADA, under which an authority is not entitled to reject the producer's recorded costs simply because the costs incurred by the producer are lower than hypothetical costs unaffected by circumstances such as governmental policy interventions. It also appears to be, as such, inconsistent with Article 2.2 of the ADA, which requires that the costs of production used to construct normal value must be those "in the country of origin".

V. Claims with Respect to the Anti-Dumping Measures on Argentine Biodiesel

A. Claims with Respect to the Adjustment of Costs

20. As to Argentina's claims in relation to the EU's rejection of the producers/exporters' records, China notes that the Definitive Determination clearly stated that the *sole* reason for the EU authority to conclude that the costs of soya beans were not reasonably reflected in the records and to disregard the actual costs as recorded was that the domestic prices of soya beans used by biodiesel producers in Argentina were found to be artificially lower than international prices due to the "distortion" created by the Argentine export tax system. The EU thus violates Article 2.2.1.1 because under this provision an authority is not permitted to depart from accurately accounted costs, for the sole reason that such costs are "artificially low" compared to the hypothetical costs unaffected by governmental policy interventions.

21. As to Argentina's second claim with respect to the adjustment of costs, China notes that the EU, having disregarded the recorded costs of soya beans, replaced this element of cost of production with an average FOB reference price. By definition, a FOB export price is not a price that is available to domestic Argentine producers, but a price available to buyers in the export market. It is not reflective of the cost of soya beans "in the country of origin", but reflects market conditions in markets outside of Argentina. Thus, even if the EU authority had no other evidence regarding such costs in Argentina, and, instead, were justified in referencing evidence relating to market conditions in export markets, it would have been necessary to adjust this "raw" evidence to ensure that it elucidated, in a sufficiently probative way, the "costs of production in the country of origin". By simply replacing the recorded cost of soya beans with an average FOB reference price, without taking account of the significantly different conditions affecting the price for exported soya beans, the EU acted inconsistently with Article 2.2.

22. Argentina also claims that the EU acted inconsistently with Article 2.2.1.1 by including, in its calculation of the cost of production of biodiesel, a cost not associated with the cost of production and sale of biodiesel. As explained by the panel in *EC – Salmon (Norway)*, Article 2.2.1.1 requires costs of production used for purposes of constructing normal value to be the "costs associated with production and sale of the product under consideration". Self-evidently, the price of soya beans exported from Argentina is *not* a cost associated with production and sale of biodiesel in Argentina, because exported soya beans are necessarily *not* available to producers of biodiesel in Argentina and the Argentine producers did not pay that price minus fobbing costs for soybeans. By including

a cost that was not associated with the cost of production and sale of biodiesel, the EU acted inconsistently with Article 2.2.1.1.

B. Claims with Respect to the Determination of Profits

23. China anticipates that the Panel, as required under Article 17.6(i) of the ADA, will examine whether the EU authority's establishment and evaluation of the relevant facts was unbiased and objective. In addition, it appears that the authority failed to indicate the method it used to determine the profit margin. At most, it just gave a general rationale, which does not describe a "method". Finally, amounts of profit determined on the basis of a method under Article 2.2.2(iii) are subject to further a reasonability test. An authority that adopts such a method is required to explain why it considers the method adopted to be reasonable.

C. Claims with Respect to Fair Comparison

24. China recalls that an authority bears a general obligation to ensure fair comparison and *no* differences that "affect price comparability" are precluded from being the object of an allowance. These requirements apply generally to the calculation of a dumping margin, and specifically, the construction of normal value does not preclude consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared.

25. There appears to be no disagreement between the parties with respect to the fact that the normal value and the export price that are used by the EU incorporated different prices of soya beans, i.e. the former includes an average of the reference FOB prices (minus fobbing costs) while the latter incorporates domestic prices. The different prices of soya beans, or the difference in the cost of inputs, fall within the scope of "other differences" affecting price comparability. Therefore, even assuming that the EU was entitled to disregard the domestic costs of soya beans and use international prices for the construction of normal value, it should have made due allowance for the above difference in order to ensure a fair comparison.

D. Claims in Relation to Injury and Causation

26. First, China wishes to draw the Panel's attention to some of the arguments and facts submitted by Argentina, particularly paragraphs 368, 376, 377, 378 and 390 of its first written submission. This material raises a question as to whether the EU based its determination on "affirmative, objective, verifiable, and credible" evidence, and whether the EU conducted the relevant examination in an unbiased manner, as required under Article 3.1 of the ADA.

27. Second, China notes that the terms "utilization of capacity" in Article 3.4 of the ADA contain no reference to a concept such as "availability for use" or "idleness". There is no legal basis to overlook such capacity in the injury determination.

28. Third, the key question for examining Argentina's Article 3.5 claims is whether the factors "other than dumped imports" identified by Argentina were injuring the EU industry at the same time as the dumped imports. To the extent that Argentina successfully establishes the facts of its case, the EU authority failed to undertake a proper non-attribution analysis.

ANNEX D-3

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF COLOMBIA

I. INTRODUCTION

1. Members of the Panel and distinguished delegates, Colombia has a systemic interest in the application of several provisions of the WTO's Covered Agreements discussed by the parties to this dispute, and while not taking a final position on the specific merits of this case, Colombia will provide its views on some of the legal claims advanced by them.

1. "As such" Claim's legal standard

2. According to Argentina's first written submission, there is a continued and consistent practice by the European Union, when applying Article 2(5) second paragraph of the EU Basic Regulation. In this respect, when the prices of raw materials included in the records of the producers, are considered to be "abnormally or artificially low", due to a regulated, or distorted, market, the European Communities have been adjusting these prices in accordance with the costs of other producers in the same country, or any other reasonable basis, including information from other representative markets. This continued practice, in Argentina's view, constitutes an "as such" violation to certain articles of the Antidumping Agreement.

3. Whenever a Member presents an "as such" claim, it must establish, through arguments and supporting evidence, at least that [1] the alleged measure - rule or norm- is attributable to the responding Member; [2] its precise content; and indeed, [3] that it does have a general and prospective application".[1] The AB further states that the "evidence [presented] may include proof of the systematic application of the challenged measure. According to the AB in *US – Carbon Steel*, "Such evidence, will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinion of legal experts and the writings of recognized scholars".[2] Furthermore, when a complaining party substantiates an "as such" challenge against laws, regulations, or other instruments of a Member that have general and prospective application, a complainant may submit evidence of the application of such legislation.[3]

4. Even though Colombia will not take a final position on the issue, it is of the opinion that in the present case, the Panel has to take into account all evidence submitted by the Parties, in order to determine if Article 2(5) is "as such" contrary to Article 2.2.1.1 of the ADA. Hence, Colombia respectfully suggests the Panel to review this matter, bearing in mind the considerations above mentioned.

2. Construction of the term "reasonably reflects the costs" in Article 2(5)'s second paragraph

5. For the EU, the costs presented by the Argentinian producers of biodiesel, do not "reasonably" reflect the cost of production, given that soybeans have an export tax in Argentina, which makes the internal price lower than the international price. In the EU's view, since the records presented by the producers do not reflect what the cost would "normally be" they do not reasonably reflect the cost of production. Hence, the EU proceeds to calculate the biodiesel's "normal costs of production" by using the soybeans' international prices. On the other hand, Argentina argues that Article 2.2.1.1 of the ADA's scope does not allow an investigating authority to reject the records on the basis of input price distortions.

6. Argentina, in its first written submission, interprets the terms "costs" "reasonably" and "reflect", to determine that the combined phrase "reasonably reflects the costs" refers to the charges or expenses that have actually been incurred in by the producer. The term "reasonably"

[1] Appellate Body Report, *US — Zeroing (EC)*, para. 198.
[2] Appellate Body Report on *US – Carbon Steel*, para. 157 (emphasis added); see also Panel Report on *Mexico – Rice*, para. 6.26.
[3] Panel Report *EC — IT Products*, para. 7.108.

acts as an adverb to the verb reflect. Thus, since the word "reasonably", which means "at a reasonable rate; to a reasonable extent", operates on the verb reflect and not on the noun "costs". Therefore, it is reasonable to construe such provision, interpreting that it refers to "the way the costs are reflected in the records", rather than to "the costs reflected in the records", as the EU submits.

7. Taking into account the submissions of both parties, it is Colombia's opinion that the interpretation based on the ordinary meaning of the term "reasonably reflects the costs" should be more similar to the one presented by Argentina, inasmuch as the ordinary meaning of this term refers to the actual cost of production a producer should reflect in its records, given the syntax of the phrase. Additionally, Article 2.2.1.1 refers to a situation in which the Member that imposes an antidumping measure is actually investigating the costs of production of producers of the exporting Member. Even if the text of Article 2.2.1.1 does not explicitly provide that the costs are actually the same that those charges incurred by the producer, from the ordinary meaning of the terms, it is not possible to draw that the "costs" have to be the ones "normally associated with the production and sale of goods".[4]

8. Furthermore, it is relevant to consider that one of the purposes of the Antidumping Agreement is to provide a multilaterally agreed framework of rules governing actions against injurious dumping practices.[5] In Colombia's opinion, the issue that raised the investigating authority's concern i.e. products whose inputs have regulated markets, where the price of the input is affected by a government's measure, does not seem to fall under the scope of the Antidumping Agreement. Under this premise, the antidumping measures imposed by the EU to biodiesel from Argentina might be contrary to the object and purpose of the ADA. In any case, the Panel should address this matter carefully when ruling on this issue.

9. Colombia recognizes that the object and purpose of the WTO is to liberalize trade and to eliminate distortions that provide unfair advantages to some goods over others. It also acknowledges the EU's power to conduct investigations on products that are imported under unfair conditions that favour them, causing damages to the national industry. However, Colombia is also aware that the WTO provides Members with different tools, under different Agreements, designed to address different barriers to trade; thus Members should apply these tools accordingly. Consequently, in Colombia's opinion, the Panel should take into account the availability of these other tools, when determining if the EU acted consistently when applying an antidumping measure.

3. Is the interpretation of the scope of Article 3.4 of the ADA, presented by the Parties, consistent with WTO law?

10. Article 3.4 of the ADA plays an important role in setting out how an investigating authority must determine injury, listing the relevant economic factors that must be evaluated in the determination of injury.[6] However, it is important to highlight that Article 3.4 explicitly establishes that "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance".

11. Colombia considers that the standard set above, must guide the analysis of the Panel to assess the impact of the dumped imported products in the domestic industry, regarding: i) whether the exclusion of "idle" plants contributes to a satisfactory evaluation of the state of the industry, and; ii) whether the October 1st 2013 Definitive Disclosure's resubmitted data obeys to the obligation, set forth in article 3.4 of the ADA, to carry out an "objective examination" on the basis of "positive evidence".

12. Thus, Colombia considers that the Panel must take into account all relevant factors at issue when evaluating the state of the industry in light of the last sentence of Article 3.4, rather than relying its analysis solely on the breach of Article 3.4, in accordance to the "production capacity and utilization capacity" factors.

[4] EU's First Written Submission. Para 139.
[5] Panel Report, *US — Zeroing (EC)*, footnote 292.
[6] Van den Bossche, Zdouc, The Law and Policy of the World Trade Organization, Cambridge University Press, (2013), pag. 705.

13. Colombia submits that the terms "objective examination" and "positive evidence" included in Article 3.1 of the ADA serve as relevant context in the interpretation of the last sentence of Article 3.4, due to the fact that "objective examination" puts an obligation on Investigating Authorities to conduct an objective analysis, without favouring the interests of any interested party, but always based on "positive evidence".

14. In light of the above mentioned arguments, the sentence "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance", when interpreted in accordance with its ordinary meaning, in its context and in light of the object and purpose of the ADA, does not allow the authorities to: i) base their decisions taking into account "one or several of these factors as decisive guidance" and; ii) to base their decision on unclear economic factors or to favour the interests of any interested party.

4. The Non Attribution Test obligations under Article 3.5 of Antidumping Agreement

15. Colombia notes that if, as stated by Argentina, "… even in the total absence of imports, the utilization of the EU's productive capacity would only have reached around 50% and the EU did not rebut or contradict that information …", it is necessary to question what motivated the EU's industry to increase its capacity of production, despite the allegedly dumped imports during the investigation period. In that sense, Colombia considers that the Panel's analysis should take into account the possibility that the EU misread the biodiesel sector or had high expectations about future changes in the prices conditions, which in the end never materialized.

16. The decision to expand the capacity of production, despite the real level of production that a market may absorb, results in an inadequate decision and generates undesirable consequences, such as reductions in the utilization of that capacity. When facing these particular conditions, damage to the national industry becomes an expected result. This damage cannot be attributable to imports.

5. CONCLUSION

17. Colombia considers that this case raises important questions on the application of certain provisions of the ADA Agreement and the GATT of 1994. While not taking a final position on all aspects of the merits of the case, Colombia requests the Panel to carefully review the scope of the claims in light of the remarks made in this hearing.

18. Mr. Chairman, distinguished members of Panel, and representatives of the Parties and Third Parties, with these comments Colombia hopes to contribute to the legal discussion of this case and would like to thank this opportunity to express its views on the present dispute. Thank you for your kind attention and we remain at your disposal to answer any questions.

ANNEX D-4

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF INDONESIA

1. "AS SUCH" CLAIM CONCERNING ARTICLE 2(5) OF THE EUROPEAN UNION'S BASIC ANTI-DUMPING REGULATION

1.1 Scope and content of Article 2(5) of the Basic Anti-Dumping Regulation

1. The construction of the contested measure in the present dispute has been supported by Argentina with evidence beyond its text. In line with the approach prescribed by the Appellate Body[1], the legislative background, administrative practice and domestic court rulings put forward by Argentina should be reviewed by the Panel.

2. As regards the scope and content of the measure at issue, Indonesia sees the second subparagraph of Article 2(5) as introducing a WTO-inconsistent condition or requirement - not provided for in the Anti-Dumping Agreement or any WTO-covered Agreements - which has to be met in order for the GAAP-consistent records of an exporter or producer which reflect the recorded costs associated with the production and sales of the product under consideration in the country of origin, to be used to calculate the cost of production. Failing the satisfaction of this condition, the European Union determines that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, and adjusts the costs of production of the investigated exporter or producer in a WTO-inconsistent manner.

3. The contested provision obliges the European Union investigating authority to use input costs unaffected by "distortions" for establishing the cost of production, which is a requirement not provided for in the WTO-covered Agreements. In this pursuit, it requires the investigating authority to undertake the 'distortion test' and replace/adjust, in a WTO-inconsistent manner, the actual-recorded input costs of exporters or producers in case those costs are found to be distorted on the basis of out-of-country of origin prices of the inputs. These additional requirements have been woven into the reasonable reflection of costs criterion. The above scope and content is evident from the clear explanation in recital 4 of Council Regulation (EC) No. 1972/2002, as well as a string of anti-dumping cases in which the contested provision was applied. In fact this practice has been applied consistently where the European Union was presented with allegations by the complainants or was aware of a causal factor that could lead to a distortion of input costs in the investigated country.

4. Contrary to the European Union's claim of the discretionary nature of the provision[2], the use of costs not affected by distortions is a norm set by the second subparagraph of Article 2(5) of the Basic Anti-Dumping Regulation and is necessarily WTO-inconsistent. Indeed, this is supported by the European Union's vehement justification of the WTO-consistency of the assessment of reasonableness of costs *per se* and of the use of reasonable costs in constructing the normal value[3], as well as the adjustment/rejection of raw material costs that are "*not "normal"*".[4]

1.2 Violation of Article 2.2.1.1 of the Anti-Dumping Agreement

5. If an investigating authority decides to construct the normal value, Article 2.2.1.1 comes into play.

6. First, previous Panel reports[5] have established that the first sentence of Article 2.2.1.1 sets out a rule and imposes a positive obligation on investigating authorities to calculate costs of

[1] Appellate Body Report, *US – Carbon Steel* (*India*), paras. 4.446, 4.451, 4.454; Appellate Body Report, *US – Carbon Steel*, para. 157; Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 168.

[2] European Union, first Written Submission, paras. 113-114, 119-124.

[3] European Union, first Written Submission, paras. 131-133.

[4] European Union, first Written Submission, para. 157.

[5] Panel Report, *China – Broiler Products*, paras. 7.160, 7.161; Panel Report, *EC – Salmon (Norway)*, para. 7.483; Panel Report, *US – Softwood Lumber V*, paras. 7.237, 7.310, 7.316.

production on the basis of the records kept by the exporter or producer under investigation[6], *provided* that two cumulative conditions are met, namely that the records of the investigated exporter or producer are consistent with the GAAP of the exporting country, and they reasonably reflect the costs associated with the production and sale of the product under consideration. Therefore, the second subparagraph of Article 2(5) of the European Union's Basic Anti-Dumping Regulation is WTO-inconsistent in so far as it imposes an additional condition to use undistorted input costs.

7. Second, a literal reading of the first sentence of Article 2.2.1.1 indicates that both the conditions apply to the *records*. The negotiating history of the provision supports such interpretation. Moreover, the drafters while modifying the various pre-Uruguay round texts of the Anti-Dumping Agreement starting from the Carlisle I text, did not insert the word "costs" after the conjunction "and" in the first sentence of Article 2.2.1.1 or indicate in any other manner that the reasonable reflection criterion is related to the costs. Therefore, the interpretation of the European Union that the word "reasonably" is attached to the word "costs" is untenable and is based on reading words into the text of the provision that do not exist.[7]

8. Third, the two conditions enumerated in the first sentence of Article 2.2.1.1 are aimed at assessing the reliability of the records *tout court* and as indicated by the structure of Article 2.2.1.1 were not meant to be mutually exclusive. The GAAP-consistency criterion is concerned with the reliability of the records of the investigated exporter/producer (or group) from an overall accounting perspective and costs are a part of the whole set of financial accounting data. If a company does not satisfy this condition, the investigating authority is not obliged to use the records of the investigated exporter or producer and it would not even test whether the records reasonably reflect costs associated with the production of the product under consideration. The next condition that records reasonably reflect the costs associated with the production and sale of the product under consideration is not linked to the issue of reasonability of costs but to the fact that from the perspective of product-specific costs involving allocations, the cost of production of the product under consideration should be reasonably reflected in the records. This is indicated by the specific reference to the words "product under consideration" in the context of the reasonable reflection of costs criterion. In fact such an interpretation is also supported by the second and third sentences of Article 2.2.1.1 which function within the ambit of the requirement set forth by the first sentence that records reasonably reflect the costs associated with the production of the product under consideration. Indeed, from a practical perspective, allocations would be necessary or relevant only in the context of product-specific cost accounting, since otherwise, the full/unallocated/aggregated company-wide costs would anyway exist in the GAAP-consistent records pertaining to the whole company.

9. Fourth, Article 2.2.1.1 and Article 2.2 do not require an assessment of the reasonableness of the costs of inputs recorded in the accounting records of the investigated exporter or producer *per se*, nor do these articles mandate that costs of inputs should be "reasonable" in comparison to any benchmark. This is attested by the fact that a reasonability condition is only specified with regard to SG&A costs and profits in Article 2.2 of the Anti-Dumping Agreement. Moreover, the concept of individual dumping margins as a means to address the individual pricing behaviour of exporters or producers[8] would lose meaning if the reasonability of each exporter or producer's cost of production were to be assessed on the basis of a standard cost of production or a standard cost for inputs as done by the European Union in the *Biodiesel* investigation.

10. Fifth, the text of Article 2.2.1.1 read in light of footnote 6 and the last sentence of Article 2.2.1 sets a parameter that the reasonable reflection of costs is to be assessed on the basis of the actual costs incurred by an exporter or producer in the investigation period. The enquiry under the first sentence of Article 2.2.1.1 does not allow the inclusion of costs that have not been incurred (in the investigation period) by the investigated exporter or producer, and that cannot be linked in any manner to the actual act of production by the exporter or producer concerned since such costs would never be recorded in the exporter or producer's records at the company-wide level or product-specific level. Moreover, it would be illogical to talk of allocation of costs that have not been incurred but should have been incurred. Indeed, the reference to start-up costs in

[6] Panel Report, *US – Softwood Lumber V*, para. 7.236.

[7] European Union, First Written Submission, para. 133. The United States also seems to hold a similar view as the European Union. United States, First Written Submission, paras. 18, 21.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 111.

footnote 6 and the recovery of costs in the last sentence of Article 2.2.1[9] leaves no room for doubt that the costs concerned by these provisions are those that would have already been incurred by the exporter or producer/group.

11. Last, investigating authorities need to assess individually in every case to the extent individual exporters or producers are investigated, as to whether or not their records reasonably reflect the costs associated with the production of the product under consideration by them. However, the parameters that are to be applied as regards the assessment of the reasonable reflection of the costs in the records cannot be determined by authorities on a case-by-case basis. This is because the clear parameters as identified above have been set out in the covered agreements in an unambiguous manner. Moreover, if investigating authorities were permitted to determine the parameters on a case-by-case basis, it would induce legal uncertainty as regards the application of Article 2.2.1.1 and could easily result in the same situation being treated differently by different WTO Members or different situations being treated in the same manner which is contrary to the fundamental principle of non-discrimination that is a pillar of the WTO Agreements.

1.3 Violation of Article 2.2 of the Anti-Dumping Agreement

12. In US – Softwood Lumber V, the Panel considered that Article 2.2 "concerns the establishment of 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 that price cannot be used".[10] Thus, the purpose of the constructed normal value is to create a "comparable price" for the like product if it were sold on the domestic market of the country of origin in the ordinary course of trade to comply with the definition of dumping within the meaning of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. The definition of dumping will lose meaning if the normal value is constructed using out-of-country of origin input costs as it will not yield a "comparable price" and a finding of dumping will in most cases be a foregone conclusion, particularly where low cost countries are targeted.

13. If an investigating authority decides to construct the normal value on the basis of the cost of production *in the country of origin* plus SG&A costs and profits, it does not have the discretion to use third country prices or cost data for any purpose including for the sort of 'non-distortion test' as done by the European Union or the calculation of the costs of production if it deems that these are not reasonable/undistorted. The text and context of Article 2.2 do not permit any exceptions to this rule. Thus, an investigating authority cannot directly or indirectly - by means of using evidence as suggested by the European Union - adopt international prices or third country prices to adjust the costs of an exporter or producer if it considers that the records of that investigated party do not reflect "reasonable" costs associated with the production of the product under consideration.

14. Moreover, if the European Union's interpretation and practice were to be upheld, legally it implies that in each case that an investigating authority would resort to out-of-country of origin input costs, it would be working on the basis of an assumption that an exporter or producer would have different input costs if there were sales of the like product in the ordinary course of trade in the domestic market. Such assumption cannot be justified on the basis of any provision in the WTO-covered agreements and flies in the face of the requirement for an investigating authority to base its determination on a proper establishment of facts. In fact the European Union itself admits that it aimed at determining a cost of production in the country of origin in the *Biodiesel* case in the absence of distortion and thus calculated a figure which was a "*hypothetical one*".[11]

[9] The final sentence of Article 2.2.1 states that sales below costs in the country of export may be considered as not being in the ordinary course of trade and may be disregarded in determining the normal value provided that they are made within an extended period of time, in substantial quantities and are at "*prices which do not provide for the recovery of all costs within a reasonable period of time*". The reference to "*recovery of all costs*" can only be intended when such costs have been incurred in the first place.

[10] Panel Report, *US – Softwood Lumber V*, para. 7.278.

[11] European Union, First Written Submission, para. 205.

2. CLAIM UNDER ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT – DEFINITION OF "UTILIZATION OF CAPACITY"

15. In the Shorter Oxford English Dictionary, the meaning of the term "capacity" is "*ability to receive, contain, hold, produce or carry*".[12] This is the generic definition that should be considered. According to this definition, the reference is to the ability to produce *tout court* regardless of the fact that the ability to produce is immediate or is useable subject to some investments/upgrading/overhauling etc. In any event, as long as the production capacity remains installed, it cannot be excluded that it can be put back into production.

16. Additionally, the term used in Article 3.4 of the Anti-Dumping Agreement is "utilization of capacity" and not utilization of 'productive' capacity or 'useable' capacity or 'operative' capacity. Therefore, the clear reference is to all capacity, including capacity that may not be used or be useable at a particular point in time. If the drafters had intended that only the utilization of 'productive' or 'useable' or on-line 'operative' capacity be assessed, implying in other words the exclusion of "idle capacity", this would have been specified in Article 3.4 through the use of any of the terms noted above.

17. Indonesia also notes that there is no definition of "idle capacity" in the Anti-Dumping Agreement. Thus, if the Panel were to agree with the European Union's theory, and consider that "idle capacity" be excluded from the definition of the term "utilization of capacity", there would be extreme ambiguity in the interpretation of this indicator. Per the Shorter Oxford English Dictionary, the meaning of the word "idle" is "*inactive, unoccupied, not moving or in operation*".[13] Thus the term "idle capacity" can be interpreted very widely.

18. To summarize, the full installed capacity of the domestic industry should be considered for the assessment of "utilization of capacity" and this was also supposedly the intention of the drafters of the Anti-Dumping Agreement. A contrary interpretation would make the assessment of this injury indicator un-objective and discriminatory as authorities or complainants could apply different definitions of "idle capacity" in different contexts.

[12] Shorter Oxford English Dictionary, Sixth Edition, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 341.

[13] Shorter Oxford English Dictionary, Sixth Edition, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 3487.

ANNEX D-5

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF MEXICO[1]

MEXICO'S THIRD-PARTY SUBMISSION ON THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

I. INTRODUCTION

1. Mexico thanks the Panel for this opportunity to submit comments regarding the preliminary objections and the parties to the dispute for giving access to their respective submissions.

2. The foregoing is very important for third-party Members, as it enables them to gain a better understanding of the dispute and, where appropriate, to submit comments prompted by systemic interest.

II. RELATED MEASURES AND IMPLEMENTING MEASURES

3. In its request for a preliminary ruling dated 24 November 2014, the European Union observes that the references made by Argentina in its request for the establishment of a panel to "implementing measures and related instruments or practices" and "related measures and implementing measures" should be considered as falling outside the Panel's terms of reference, since, in the opinion of the European Union, these terms do not comply with the provisions of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in that they fail to specifically identify the measures at issue.[2]

4. Mexico does not share the European Union's view. The phrase that includes related and implementing measures is a common phrase that complainants usually include in panel requests – precisely to avoid respondents from subsequently issuing a measure related to or deriving from the original measure at issue that is also non-compliant and goes beyond the panel's terms of reference. In previous disputes, complainants have incorporated this type of phrase and the panels have considered within their terms of reference future measures issued in relation to those being challenged.[3]

5. In this case, as regards "related measures and implementing measures", Argentina explains that the terms "related measures and implementing measures" are at the end of Section 1, point (B), which identifies the primary measures being challenged. It is therefore clear that only the measures related to the imposition of anti-dumping measures ("*medidas compensatorias*") by the European Union with respect to imports of biodiesel originating in Argentina could fall within the scope of the terms "related measures and implementing measures".[4]

6. Argentina further points out that the purpose of including such terms is to prevent the potential situation of the European Union issuing new measures related to those challenged by Argentina that would fall outside the Panel's terms of reference because they have not been expressly and individually identified by the complaining party. Consequently, the terms used by Argentina are necessary to protect its interests as complaining party, in order to avoid that a measure that is adopted after the establishment of the panel and is closely connected to the measure at issue may be excluded from the panel's terms of reference.[5]

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[1] Mexico indicated that its two submissions to the Panel (third-party submission on the European Union's request for a preliminary ruling and response to Panel question No. 2) should serve as the executive summary of its third-party arguments.

[2] Request for a preliminary ruling by the European Union, paras. 8-9.

[3] Appellate Body Report, *China - Raw Materials*, paras. 245 and 246. See also the Panel's ruling in *India - Agricultural Products* (DS430), which specifically analyses the question of whether the "related measures" and the "implementing measures" mentioned in the panel request are included within the Panel's terms of reference, preliminary ruling by the Panel, *India - Agricultural Products* (DS430) (document WT/DS430/5), paras. 3.40 and 3.51.

[4] Response of Argentina to the request for a preliminary ruling by the European Union, para. 21.

[5] Response of Argentina to the request for a preliminary ruling by the European Union, para. 29.

7. Mexico considers that the Panel should recognize these measures as falling within its terms of reference.

III. CLAIMS THAT EXPAND THE SCOPE OF THE DISPUTE

8. The European Union observes that Argentina's request for the establishment of a panel expands the scope of the dispute as presented in Argentina's request for consultations. According to the European Union, the panel request includes a great number of new claims, which changes the essence of the complaint raised in the consultations. The European Union requests that the following claims be considered as falling outside the Panel's terms of reference:[6]

a. The inclusion of "*related practices*" in the claim relating to Article 2(5) of Council Regulation (EC) No. 1225/2009, in paragraph 1(A) of the panel request. The European Union adds that the request for consultations expressly stated that what was being challenged was the above provision "*as such*", which means that what is being referred to is a specific, written legal provision and not the application of that provision.[7]

b. It is not clear whether the insertion of a paragraph between paragraphs 2(B)3 and 2(B)4 of the panel request is intended to introduce an "*as applied*" claim against Article 2(5) of Council Regulation (EC) No. 1225/2009.[8]

c. Argentina claims for the first time that Article 2(5) of Council Regulation (EC) No. 1225/2009 is "*as such*" inconsistent with Article 9.3 of the Anti-Dumping Agreement, because, allegedly, the amount of the anti-dumping duty ("*cuota compensatoria*") to be imposed exceeds the margin of dumping.[9]

d. Paragraphs 2(A)1 and 2(A)2 of the panel request include new claims against Article 2(5) of Council Regulation (EC) No. 1225/2009 that are based on Article VI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Argentina's request for consultations did not include any claim based on Article VI:1.[10]

e. A new claim is introduced in relation to the scope of Article 2(5) of Council Regulation (EC) No. 1225/2009, based on Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and referring to the inclusion as "costs not associated with the production and sale of the product under consideration".[11]

f. Argentina's claim regarding the European Union's determination of profits under Article 2.1 of the Anti-Dumping Agreement.[12]

9. Mexico recalls that the Appellate Body has noted that Articles 4 and 6 of the DSU do not require a "precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel, provided that the 'essence' of the challenged measures had not changed".[13] In *US - Upland Cotton*, the Appellate Body made clear that it did not intend to impose too rigid a standard for the "precise and exact identity" between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the request for the establishment of a panel, which according to Article 7 of the DSU is that which governs the panel's terms of reference.[14]

[6] Request for a preliminary ruling by the European Union, paras. 23-26.
[7] Request for a preliminary ruling by the European Union, paras. 27-30.
[8] Request for a preliminary ruling by the European Union, paras. 31-35.
[9] Request for a preliminary ruling by the European Union, paras. 36-40.
[10] Request for a preliminary ruling by the European Union, paras. 41-44.
[11] Request for a preliminary ruling by the European Union, paras. 45-49.
[12] Request for a preliminary ruling by the European Union, paras. 50-54.
[13] Appellate Body Report, *Brazil - Aircraft*, para. 131. In this case, the Appellate Body considered that the measures at issue (export subsidies for regional aircraft) were the subject of consultations and were referred to the DSB for consideration. The regulatory instruments that came into effect in 1997 and 1998 (following the consultations held on 18 June 1996) did not change the essence of the export subsidies at issue. The Appellate Body accordingly concluded that the export subsidies for regional aircraft, including the instruments that came into effect after consultations were held between Canada and Brazil, were properly before the Panel (Appellate Body Report, *Brazil - Aircraft*, paras. 132 and 133).
[14] Appellate Body Report, *US - Upland Cotton*, para. 293.

10. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body established that the same standard concerning the degree of identity that must exist between the request for consultations and the panel request applies with respect to the "legal basis" of the complaint. A complaining party may learn of additional information during consultations that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. It is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the addition of provisions (in the panel request) does not have the effect of changing the essence of the complaint.[15]

11. Argentina's conclusion in each particular case is that each of the assumptions contested by the European Union concerns claims that evolved out of those raised in the request for consultations but that "some connection" exists between the two.[16] Hence, the Panel should look at whether the allegedly "new claims" noted by the European Union actually derive from claims previously identified by Argentina in the request for consultations. In any event, the Panel should consider an analysis such as that referred to by the Panel in *India - Agricultural Products* in order to determine whether "some connection" exists:

> [W]e recall the words of the Appellate Body in *US - Carbon Steel* that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[17]

[15] Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice,* para. 138. The Appellate Body stated the following:

> "In our view, the same logic applies with respect to the legal basis of the complaint. A complaining party may learn of additional information during consultations - for example, a better understanding of the operation of a challenged measure - that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations - namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the 'legal basis' in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint."

[16] Response of Argentina to the request for a preliminary ruling by the European Union, para. 66.

[17] Preliminary ruling by the Panel, *India - Agricultural Products* (DS430) (document WT/DS430/5), para. 3.48.

MEXICO'S THIRD-PARTY RESPONSE TO PANEL QUESTION NO. 2

CLAIMS UNDER ARTICLE 2.2.1.1 AND 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994

Interpretation of the provisions of the covered agreements invoked by Argentina

(...)

2. (to all third parties) What are the parameters or criteria under Article 2.2.1.1 or any other provision of the covered agreements governing the manner in which an investigating authority shall determine whether the records reasonably reflect the costs associated with the production and sale of the product concerned? Or are the investigating authorities free to make this determination on case-by-case basis?

Mexico's response:

Mexico sees nothing in Article 2.2.1.1 of the Anti-Dumping Agreement that would enable it to conclude that there are any fixed parameters for making such a determination. Nor does it see any contextual elements that would enable it to conclude that such parameters exist. Consequently, Mexico considers that the investigating authorities have a measure of discretion to reach this determination on a case-by-case basis.

ANNEX D-6

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF NORWAY

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. We will not comment upon all the issues raised by the Parties. Rather, we will confine ourselves to offer some views on the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

2. As we know, the first sentence provides that:

> *[f]or the purposes 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.*

3. The parties disagree, amongst others, on whether Article 2.2.1.1 allows the "investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be 'abnormally or artificially low'".[1]

4. A legal analysis of a WTO provision starts, of course, with an inquiry into the ordinary meaning of the terms. Article 2.2.1.1 uses the word "shall", which indicates that it establishes an obligation of some sort. In this case, the word "shall" is qualified by the terms "normally" and "provided that". We understand "normally" in this context to point to the existence of conditions, rather than to "alter the characterization of [the] obligation as constituting a 'rule'".[2]

5. The obligation on the investigating authorities according to Article 2.2.1.1, is subject to two cumulative conditions:

i) that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

ii) that such records reasonably reflect the costs associated with the production and sale of the product under consideration.

6. If these two conditions are fulfilled, the investigating authorities "shall normally" calculate the costs on the basis of records kept by the exporter or producer under investigation.

7. In light of the ordinary meaning of the terms in Article 2.2.1.1, Norway notes that both conditions seem to relate to the quality of the records as such. It is the records that must be in accordance with the GAAP, and the records that must "reasonably reflect the costs associated with the production and sale of the product under consideration". The European Union, however, argues that the second condition should be interpreted to mean that the costs themselves need to be reasonable. The European Union submits, amongst others, that "it would be counterintuitive to assert that Article 2.2.1.1 […] mandates the investigating authorities to base their calculations on costs that are 'unreasonable'".[3]

8. In our view, by asserting this, the European Union is reading into Article 2.2.1.1 words that are simply not there. The structure of the first sentence of Article 2.2.1.1 does not suggest an interpretation that the records must reflect costs that are reasonable – or not "abnormally or artificially low". Rather, the structure and the ordinary meaning of the terms suggest that the second condition only concerns whether the records in a reasonable way reflects the costs associated with the production and sale of the product under consideration.

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[1] Argentina' First Written Submission, paras. 87 and 88. See also Argentina's First Written Submission para. 195. European Union's First Written Submission, for instance, paras. 154 and 254.

[2] See Appellate Body Report, *United States – Clove Cigarettes,* para. 273.

[3] European Union's First Written Submission, para. 131.

9. Accordingly, Norway is of the opinion that Article 2.2.1.1 does not allow investigation authorities to disregard the records in situations where the authorities find that the costs reflected in the records are "abnormally or artificially low", as long as the two explicitly mentioned conditions are met.

10. This concludes Norway's statement. I thank you for your attention.

ANNEX D-7

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF THE RUSSIAN FEDERATION

Introduction

1. The Russian Federation intervened in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, in particular the Anti-Dumping Agreement. The Russian Federation would like to provide its views on: a) the input cost adjustment practice used by the European Union in its anti-dumping investigations; b) the legal interpretation of the words "reasonably reflect" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement; c) Article 2.2 of the Anti-Dumping Agreement that requires construction of normal value on the basis of costs in the country of origin of the product under consideration; and d) the concept of "dumping" in the context of the Anti-Dumping Agreement.

A. The Input Cost Adjustment Practice Used by the European Union in Its Anti-Dumping Investigations

2. The Russian Federation strongly condemns the practice of input cost adjustment and considers it to be inconsistent with both the provisions of the WTO agreements and the spirit of the WTO in general.

3. This practice, based on Articles 2(3) and 2(5) of the Basic Regulation[1], is very similar to the treatment of non-market economies that the European Union applied in its antidumping procedures to imports from the Russian Federation when it had non-market economy status. As Argentina concludes in section 4.1 of its First written submission, the amendments introduced to the Basic Regulation in 2002 allow the investigating authorities of the European Union to continue using non-market economy techniques with respect to countries that have been granted full market economy status and even to countries that have always been recognized as market economies and have been WTO members. Thus, the European Union has widely expanded the application of the cost adjustment practice, and uses it for protectionist purposes. The present case clearly demonstrates this.

4. It is worth noting that the General Court of the European Union has found that the non-market economy techniques which, as it was mentioned, create the same consequences for the exporters as the practice of input cost adjustment violate Article 2 of the Anti-Dumping Agreement.[2]

B. The Legal Interpretation of the Words "Reasonably Reflect" in Article 2.2.1.1 of the Anti-Dumping Agreement

5. Based on the ordinary meaning of the words "reflect" and "reasonably", the Russian Federation is of the position that the proper reading of the phrase "reasonably reflect" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement is that records reasonably depict expenses incurred by the producer for the production and sale of the product under consideration.

6. In Article 2.2.1.1, the word "reasonably" is attached to the verb "reflect" and not to the word "costs". As Argentina correctly concluded, "this sentence does not provide that the records must reflect 'reasonable costs' or 'costs which are reasonable in light of prices on other markets'.

[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), OJ L 343, 22.12.2009, p. 51 and corrigendum to Council Regulation (EC) No 1225/2009, OJ L 7, 12.1.2010, p. 22 as amended by Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 (OJ L 237, 3.9.2012, p. 1), Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012 (OJ L 344, 14.12.2012, p. 1) and Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 (OJ L 18, 21.1.2014, p. 1).

[2] Case *T-512/09, Rusal Armenal ZAO* v *Council of the European Union,* Judgment of the General Court of the European Union of 5 November 2013.

Rather, the issue is only whether the records reflect the costs associated with the production and sale of the product under consideration in a reasonable manner".[3]

7. Moreover, the plain meaning of the term "cost" focuses on what is actually paid, rather than on the value or *reasonableness* of what is paid. Taking into account that Article 2.2.1.1 of the Anti-Dumping Agreement refers to GAAP, the term "cost" is used in an accounting sense. The focus of the inquiry is on whether the costs are *reasonably reflected in the records*, and *not* whether the costs *per se* were reasonable having regard to some extraneous economic considerations.

8. Article 2.2.1.1 of the Anti-Dumping Agreement does not provide that investigating authorities can reject or adjust the costs reasonably reflected in exporter's records on the basis that prices for the product under consideration or its inputs are lower in comparison with international prices or prices in other markets. If negotiators had agreed on the inclusion of such an option, they would have explicitly described it in the text of this provision. However, the drafters have neither mentioned it, nor set any criteria, or defined the circumstances in which costs associated with the production and sale of the product concerned accurately reflected in the records of the producer may be considered as not being "reasonable".

9. The interpretation advocated by the European Union when the prices of certain raw materials are considered to be "abnormally or artificially low" in comparison with prices in third countries or international prices not only erodes the comparative advantage of a Member, but is discriminatory towards countries which enjoy comparative advantages in different areas. The European Union's approach undermines the concept of comparative advantage, which is recognized to be the basis for international trade. Countries should not be discriminated against for having a comparative advantage, whether it is the cost of raw materials or labor etc.

10. It should be stressed that the Anti-Dumping Agreement does not envisage the use of "international prices" in anti-dumping investigations. Prices for inputs are determined in national markets depending on local market conditions and may vary considerably. With this in view, the question arises as to in which market prices for inputs are supposed to be chosen as benchmarks (to be considered "at the world level") for comparison with the costs actually incurred by the producer/exporter under investigation in order to conclude that they are "reasonable" or not. Even prices of commodities that are set at exchanges (for example, the London Metal Exchange) cannot be viewed as international prices in the context of anti-dumping investigations. The use of abstract "international prices" as a basis for determination of normal value or export price contradicts both the letter and the spirit of the Anti-Dumping Agreement.

11. Thus, the European Union's interpretation of the term "reasonably reflect" is neither supported by the text of Article 2.2.1.1 of the Anti-Dumping Agreement, nor does it reflect the intention of the drafters.

C. Article 2.2 of the Anti-Dumping Agreement Requires Construction of Normal Value on the Basis of Costs in the Country of Origin of the Product under Consideration

12. The Russian Federation considers that Article 2.2 of the Anti-Dumping Agreement, including Article 2.2.1.1, expressly and unambiguously requires that the margin of dumping must be determined by comparison with the cost of production *in the country of origin*. By providing the possibility to determine the cost of production to construct normal value on "information from other representative markets", Article 2(5) of the Basic Regulation is in sharp contrast with the requirement of Article 2.2.1.1 of the Anti-Dumping Agreement.

13. Article 2.2 of the Anti-Dumping Agreement contains a chapeau and several paragraphs. The chapeau provides a general rule, and paragraphs describe more specific rules related to the construction of normal value. The connection between the chapeau and other paragraphs is explicit, in particular through the numbering and the opening phrases "[f]or the purpose of paragraph 2" that appear in Articles 2.2.1.1 and 2.2.2. This fundamental structure and logic of Article 2.2 as a whole indicates that interpretation of its paragraphs should remain within the parameters of the chapeau and therefore the source of information for calculation of normal value is the domestic market of the exporting country.

[3] Argentina's First Written Submission, para. 104.

14. The support for this interpretation is found, in particular, in Article 2.2.2 of the Anti-Dumping Agreement that describes several ways to determine "the amounts for administrative, selling and general costs and for profits", all of which relate to data *in the country of origin*.

D. The Concept of "dumping" in the Context of the Anti-Dumping Agreement

15. The Panel should interpret provisions of the Anti-Dumping Agreement in their context, including the definition of "dumping" reflected in Article 2.1 of the Anti-Dumping Agreement.[4]

16. The Appellate Body has confirmed in several cases that the opening phrase of this Article – "For the purpose of this Agreement" – means that this definition of 'dumping' applies to the entire Anti-Dumping Agreement, and is central to the interpretation of other provisions of the Agreement.[5] They "relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country".[6]

17. It follows from the interpretation of the Appellate body that: (1) the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement must be applied in a coherent fashion, and cannot be of variable content or application;[7] (2) the term "dumping" relates to a *product*, meaning the product under consideration as a whole. Moreover, it is the exporter's pricing behaviour that may result in dumping. Thus, the concept of "dumping" in the context of the Anti-Dumping Agreement does not deal with the price of the product's inputs.

18. Finally, the Russian Federation supports Argentina's understanding that Article 2.2.1.1 refers to the "costs" which are "associated with the production and sale of the product under consideration". Argentina states, *inter alia,* that "it shows that this condition deals with the costs relating to 'the *product* under consideration' and *not with the costs of the inputs*".[8]

19. As Argentina, the Russian Federation is deeply concerned that the European Union's erroneous interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, reflected in the measure at issue, results in broadening the circumstances under which WTO Members may apply anti-dumping duties and thus undermines the concept of "dumping" provided for in Article 2.1 of the Anti-Dumping Agreement.

Conclusion

20. In sum, the legal analysis of Article 2.2 of the Anti-Dumping Agreement as a whole reveals that Article 2.2, including Article 2.2.1.1, does not permit the use of the data of a third country for the purpose of calculation of constructed normal value. The European Union's interpretation of the term "reasonably reflect" is neither supported by the text of Article 2.2.1.1 of the Anti-Dumping Agreement, nor does it reflect the intention of the drafters. The European Union's interpretation broadens the circumstances under which the WTO Members may apply anti-dumping duties and thus undermines the concept of "dumping" provided in Article 2.1 of the Anti-Dumping Agreement. In its legal interpretation of Article 2.2.1.1, the Panel should examine the text of this provision in the context of Articles 2.2, 2.2.2 and 2.1 of the Anti-Dumping Agreement.

[4] Argentina's First Written Submission, paras. 125-126.

[5] Appellate Body Reports, *US – Softwood Lumber V*, para. 93; *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 126; *US – Zeroing (Japan)*, para. 109; *US – Zeroing (Japan)*, para. 140.

[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 109 (emphasis original).

[7] Appellate Body Report, *US – Continued Zeroing*, para. 280.

[8] Argentina's First Written Submission, para. 103 (emphasis added).

ANNEX D-8

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS
OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia focuses its comments on a number of important systemic issues that are central to the dispute relating to (A) the requirement to base the determination of costs on the records of the investigated foreign exporter or producers, (B) the requirement to base the normal value on the costs in the country of origin rather than on an out-of-country benchmark, (C) the WTO consistency of export duties as a legitimate policy instrument and (D) the need for a proper injury and causation analysis.

II. ANALYSIS

2. Saudi Arabia considers that the anti-dumping instrument requires Members to examine private pricing behaviour of foreign producers in a given set of circumstances. It does not concern the comparison of a foreign producer or exporter's export price against an undefined international reference price or "normal" value that does not reflect the prices or conditions in the producer or exporter's country of origin. There is no textual basis in the Anti-Dumping Agreement for an investigating authority to question the reasonableness of input costs simply because these may be lower in the country of origin than in a third country or world market.

A. Recorded Cost Data Reasonably Associated With The Production And Sale Of The Product Concerned Cannot Be Rejected Based On An Allegation That They Are "Artificially Low" or "Distorted"

3. Article 2.1 of the Anti-Dumping Agreement reflects the fundamental principle that a dumping determination must be made on the basis of the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Domestic prices can only be disregarded when there are no sales of the like product in the ordinary course of trade or when the sales do not permit a proper comparison because of the particular market situation or the low volume of sales in the domestic market of the exporting country. Article 2.2 dictates the alternative bases for determining the normal value in such situations and offers only two options: either the comparable price of the like product when exported to an appropriate third country, provided that this price is representative or "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[1] In terms of "the cost of production in the country of origin", Article 2.2.1.1 of the Anti-Dumping Agreement imposes an obligation to calculate the costs on the basis of the records kept by the exporter or producer under investigation. The only conditions for using such records are that the records are kept "in accordance with the generally accepted accounting principles of the exporting country" and that the records "reasonably reflect the costs associated with the production and sale of the product under consideration". If that is the case, the records of the producer under investigation must be used.[2]

4. Article 2.2.1.1, first sentence, thus reflects the producer-specific and country-specific nature of the anti-dumping instrument which is only concerned with examining the private pricing behaviour of producers based on their recorded costs actually incurred in association with the production and sale of the product under consideration. The second part of the first sentence of Article 2.2.1.1 provides the exceptional circumstances under which the general rule does not apply. First, if the records are not kept in accordance with the generally accepted accounting principles of the exporting country, there is no requirement to use them. This is another reflection of the country-specific nature of the anti-dumping instrument. Second, if the records in question do not "reasonably reflect" the costs "associated with the production and sale of the product under consideration," the recorded costs do not have to be used either. This condition goes to the relationship between the recorded costs and the production and sale of the product under consideration, and not of a different or larger group of products.

[1] See Article 2.2 of the Anti-Dumping Agreement.
[2] See Article 2.2.1.1 of the Anti-Dumping Agreement.

5. The analysis may consider which costs are sufficiently associated with the production and sale of the product under consideration. So, the "reasonableness" test in Article 2.2.1.1 does not allow an investigating authority to question the general "reasonableness" of the costs recorded, such as by comparing them to costs of producers in other countries or to an international reference price. It merely concerns the association of the recorded costs with the product under consideration as compared with other products of the exporter to which certain costs may also be associated.

6. Saudi Arabia is of the view that the text of Article 2.2.1.1, when read in its ordinary meaning and in the context of Articles 2.1 and 2.2 of the Anti-Dumping Agreement, confirms that an investigating authority is not allowed to adjust, let alone reject, the cost data of foreign producers and exporters merely because it considers those costs to be "artificially low" when compared to an international benchmark or otherwise "distorted". In *EC – Salmon (Norway),* the panel noted that "the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product".[3] Similarly, in *US – Softwood Lumber V*, the panel noted that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the market value of those [costs]," and that to accept the "argument that Article 2.2.1.1 requires an investigating authority to ensure that the [cost] reasonably reflects the market value 'would require us to read into the text words which are simply not there'".[4] This interpretation is also supported by the object and purpose of the Anti-Dumping Agreement which, among others, is to introduce disciplines on WTO Members when conducting anti-dumping investigations. It allows Members to protect their producers from material injury caused by the private pricing behaviour of foreign producers. 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. Other multilateral or unilateral instruments are available to address measures that are alleged to distort the market environment and trade.

7. In sum, the exporter or producer's recorded costs are to be used when constructing the normal value as long as the records are kept in accordance with the generally accepted accounting principles of the exporting country and as long as the records reflect costs that are reasonably associated with the production and sale of the product concerned. There is no legal basis in the Anti-Dumping Agreement that would allow an investigating authority to question the reasonableness of the level of the recorded costs or to examine these costs in the light of an international reference price.

B. An Investigating Authority Is Not Permitted To Construct Normal Value On The Basis Of A Cost That Is Not The Cost In The Country Of Origin

8. Article 2.2 of the Anti-Dumping Agreement imposes an obligation to calculate the normal value on the basis of the costs of production in the country of origin. Saudi Arabia considers that the text of this provision when read in its context is clear and does not allow the imposition of an artificial cost of production that reflects an international reference price. This provision reflects the country-specific nature of an anti-dumping investigation that is limited to examining whether the export price is lower than the normal value of the product concerned of the in the country of origin from the exporter under investigation. The immediate context of Article 2.2 of the Anti-Dumping Agreement confirms this reading that requires "normal value" to be constructed based on in-country data. First, Article 2.2.1.1 requires the use of the recorded costs of the foreign exporter for constructing normal value. Second, Article 2.2.2 concerning construction of administrative, selling and general costs and profits provides that such amounts shall be linked to the country of origin. Therefore, both elements of the constructed normal value need to be based on information from the country under investigation and cannot be established by way of reference to out-of-country benchmarks such as international reference prices. Given that the producer's cost of production will be the same whether it exports or sells domestically, the level of the costs compared to other markets is simply irrelevant for purposes of the price discrimination question in a dumping investigation.

[3] Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[4] Panel Report *US – Softwood Lumber V*, para. 7.321 and footnote 446.

9. Finally, the obligation to consider and accept cost data of exporting producers is also relevant for the comparison of the normal value and the export price under Article 2.4, which sets out the general obligation that any comparison has to be "fair" thus connoting "impartiality, even-handedness, or lack of bias".[5] Article 2.4 thus requires that "due allowances" shall be made "for differences which affect price comparability". This means that "allowances should not be made for differences that do not affect price comparability".[6] Accordingly, no adjustments should be made when there are no differences in terms of costs of production of the goods whether destined for domestic or export sale. In addition, allowances for factors affecting price comparability should reflect costs actually incurred by exporting producers. Adjustments that do not reflect actual costs but are rather imposed to adjust the actual costs in the light of some abstract and theoretical "normal cost" benchmark are not appropriate under Article 2.4 and would skew the comparison and violate the important obligation of making a "fair comparison".

10. In sum, the text of Article 2.2 of the Anti-Dumping Agreement, when read in its context and in the light of the object and purpose of the Anti-Dumping Agreement, is unequivocal and requires that the costs used for constructing normal value are those of the country of origin. An investigating authority is not to impose international reference prices of what they consider the costs ought to be in the country of origin and cannot "adjust" costs to reflect such an international reference price.

C. Export Duties Are Permitted Under GATT Article XI And Cannot Be Contravened By Anti-Dumping Measures

11. Saudi Arabia recalls that it is clear from the text of the WTO Agreements, Article XI:1 of the GATT 1994, and from the relevant WTO jurisprudence that Members are permitted to maintain export duties. In *China – Raw Materials,* there was consensus among the panel, the Appellate Body and the disputing parties that WTO Members have the right under the GATT 1994 to impose export duties.[7] In the past, proposals were made to ban or strictly discipline the use of export duties. However, these proposals did not receive the support of the Membership. In the context of accession negotiations, the question of limiting the use of export duties is also frequently raised, and sometimes clear commitments have been made. Absent such commitments, however, export duties remain a permitted policy instrument, just like import duties. Import tariffs, export taxes, and other tariff and non-tariff related regulatory measure together constitute the market environment in which the producer operates. In an anti-dumping investigation, they are to be taken as a given. There is no basis for effectively seeking to prevent Members from employing a WTO consistent instrument like export duties through the imposition of dumping duties. The only "adjustments" that can be made under Article 2.4 relate to the differences affecting price comparability. Export duties do not affect this comparison. The anti-dumping instrument shall not be used to prevent Governments from adopting WTO-consistent measures (such as export taxes) or to undo Members' comparative advantages, simply because it is more difficult or impossible to do so under other instruments like the Agreement on Subsidies and Countervailing Measures. The anti-dumping instrument permits Members to protect domestic industries from the injurious effects of discriminatory pricing practices of foreign exporters and not from differences in market environments.

D. The Requirement To Conduct An Objective Examination Based On Positive Evidence Of Injury And Causation

12. Saudi Arabia wishes to underline the importance of a proper injury analysis in preventing abuse of the anti-dumping instrument. If there is no positive evidence of material injury resulting from the dumped imports and if the authority has failed to separate and distinguish the injury caused by other factors so as to make sure that it did not attribute such injury to the dumped imports, there is no basis for the imposition of anti-dumping measures. The injury analysis in an anti-dumping investigation is not a "tick-the-box exercise" where the authorities merely look at the injury factors in Article 3 and make a simple non-attribution analysis. The investigating authorities must engage in a critical and searching analysis of the facts on the record and conduct an

[5]Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada),* para. 138 (quoting the relevant dictionary meaning of "fair" as "just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards", and "offering an equal chance of success". (*Shorter Oxford English Dictionary*, 5th Ed., W. R. Trumble and A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 915)).

[6] Appellate Body Report, *US – Zeroing (EC)*, para. 156.

[7] Appellate Body Reports, *China – Raw Materials,* para. 293.

unbiased and proper evaluation of the facts. It must make sure to address and analyze "all relevant economic factors" and to engage with interested parties on the other factors that are affecting the domestic industry at the same time. If the injury is caused by other factors, there is no basis for imposing anti-dumping duties. It would not be permitted by the text of the Agreement and it would not make sense to impose a trade restriction on foreign producers to address a problem not caused by these producers. Consumers would pay the price for an unlawful and ineffective measure. The causation analysis is thus a particularly important part of the investigating authority's injury determination.

III. CONCLUSION

13. First, Saudi Arabia considers that a cost determination has to be made on the basis of the producer's cost data as reflected in the records of the exporting producer, if such records are kept in accordance with generally accepted accounting principles in the exporting country and have not been demonstrated to be a manifestly inaccurate reflection of the costs borne by the producer in question with respect to the production and sale of the product under consideration. The proviso in Article 2.2.1.1 of the Anti-Dumping Agreement that recorded cost data "reasonably reflect costs" does not permit the rejection of the producer's recorded costs simply because the investigation authority considers those costs to be "artificially low". Second, Article 2.2 of the Anti-Dumping Agreement imposes a clear obligation to base the normal value on the costs in the country of origin rather than on an out-of-country benchmark such as an international reference price. This is in line with the country-specific and producer-specific nature of the anti-dumping investigation. Third, export duties are a legitimate policy instrument that is expressly permitted by Article XI:1 of the GATT 1994. This must be taken into consideration when examining the disciplines imposed on Members under the Anti-Dumping Agreement. Fourth, if there is no positive evidence of material injury resulting from the dumped imports and if the authority has failed to separate and distinguish the injury caused by other factors so as to make sure that it did not attribute such injury to the dumped imports, there is no basis for the imposition of anti-dumping measures.

ANNEX D-9

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF TURKEY

I. RECORDS KEPT BY PRODUCER/EXPORTERS UNDER ARTICLE 2.2.1.1 OF THE ADA

1. Article 2 is considered to be as one of the cornerstone articles of the ADA which sets comprehensive and detailed rules concerning the components of dumping and how the dumping margin should be calculated.

2. As dumping is determined through a fair comparison between the normal value and export price, the source and calculation methodology of these two sets of data is at the heart of an ADA-consistent determination of the dumping margin.

3. At this point, Article 2.2.1.1 of the ADA elevates itself to critical level which designates the source of the primary element of the normal value, namely the costs of production and sales of the product under consideration.

4. The Article reads as:

> 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. *(emphasis added)*

5. As discussed in the rulings of *EC – Salmon*[1] and *China – Broiler*[2], Article 2.2.1.1 necessitates that, for the purpose of establishing normal value, the investigating authority is normally obliged to use the records kept by the producer or exporter if these records are in accordance with the generally accepted accounting principles, and reasonably reflect the costs associated with the production and sale of the product under consideration (POC). Turkey understands that the drafters of the article presume that the records found in the books of the company should "normally" mirror costs associated with the production and sales of POC. The word "normally", in this context, indicates that the investigating authority has less room to maneuver if the conditions, indicated in the second half of the sentence, are met. The article displays a comprehensible mechanics and necessitates the investigating authority to provide reasoned and adequate explanation to deviate from the "rule" and opt into work with the "derogation"[3] if it decides to do so.

6. Confirmed by the latest rulings in the WTO case law, the investigating authority has the discretion not to take legal path stipulated in the first part of the sentence and use alternative sources if the records are either inconsistent with the generally accepted accounting principles (GAAP) of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration. As pointed out in the case law the conditions of GAAP-consistency and reasonableness do not overlap in every case and that GAAP-consistency *per se* does not necessarily lead to the conclusion that the records reasonably reflect costs of production and sales.[4] To our understanding even if the records of the producers or exporters are in line with the GAAP, the investigating authority may still examine whether the records of the exporter or producer reasonably reflect the costs associated with the production and sale POC.

7. The point to be clarified in Article 2.2.1.1 is the definition of the word "*reasonably*". The ordinary meaning of "*reasonably*" encompasses, *inter alia,* "*sufficiently*", "*legitimately*", "*justly*", "*suitably*" and "*fairly*".[5] In Turkey's view "*reasonableness*" is established if there is no implausible

[1] Panel Report *EC – Salmon*, para. 7.483.
[2] Panel Report *China – Broiler*, para. 7.164.
[3] Panel Report *China – Broiler*, paras. 7.161-164.
[4] Panel Report *China – Broiler*, para. 7.166.
[5] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 9 January 2015, <http://www.oed.com/view/Entry/159074>

discrepancy between records and costs associated with the production and sales of the POC and as long as these costs and records reflect sufficiently reliable price levels. Under this legal interpretation, Turkey underlines that every case involving the "*reasonableness*" test should be handled on its own merits through the assessment of the peculiarities of the exporting country's market.

8. In regard to the discussion concerning the contextual margin of the phrase "... [c]osts associated with the production and sale of product under consideration", Turkey would like to note that, Turkey does not share the approach that an expense can only be considered as a "cost", if this expense is incurred by the producer/exporter.[6] Depending on the cost recording methodology and characteristics of the production and sale of the POC, certain expenses may become subject to realization at the end of the financial year. For coherency in their records, companies often set benchmark figures reflecting actual realizations of last financial year. Any figure that is above or below of this benchmark is recorded accordingly. Turkey understands that, disregarding expenses that are not incurred may lead to an asymmetry in a comprehensive evaluation of the costs.

9. In connection with these discussions, Turkey would also like to briefly comment on the second sentence of Article 2.2.1.1. In Turkey's view, this provision does not necessarily compel the investigating authority to use cost allocation method of the producer/exporters. The sentence reads as:

> [A]uthorities 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 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. *(emphasis added)*

10. The word "*including*" indicates that the cost allocation methodology of producer or exporter is one of the available evidences that the investigating authority may resort. There is no indication that the investigating authority has to start its evaluation by considering the cost allocation system of producer or exporter. From a different point of view, the drafters of the article formulated a step by step approach stipulating that the cost allocation methods of producer or exporter can be used if such allocations have been historically utilized by the producer or exporter particularly concerning amortization, depreciation, capital expenditures and development costs. Therefore, the rule does not require the investigating authority to use the cost allocation methodology of the producer or exporter unless the mentioned conditions are met.

[6] Argentina's first written submission, para. 102.

ANNEX D-10

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF THE UNITED STATES

I. ARGENTINA'S CLAIMS REGARDING THE INTERPRETATION OF ARTICLE 2 OF THE AD AGREEMENT

A. "As Such" Inconsistency Requires Examination of Whether the Measure Necessarily Requires WTO-Inconsistent Action or Precludes WTO-Consistent Action

1. The United States agrees that a complainant may allege that another Member's legislation or regulation is inconsistent with a covered agreement "as such" or "independently from the application of that legislation in specific instances". To prove an "as such" claim, the complainant must demonstrate that the identified measure requires the responding party to act in a WTO-inconsistent manner or precludes that party from acting in a WTO consistent manner. In this context, the EU emphasizes the express *discretion* of the investigating authorities under Article 2(5) of the Basic Regulation to adjust costs. In particular, the European Union observes that: (i) text of paragraph one of Article 2(5) *does not require* that investigating authorities depart from exporter or producer cost data, and (ii) the "rest of the evidence" (*e.g.*, judgments of the General Court of the European Union and determinations in other investigations) does not demonstrate that the investigating authorities are *mandated* to act in a particular manner.

2. The United States considers the Appellate Body's recent analysis in *US – Carbon Steel (India)* informative. The Appellate Body report in *US – Carbon Steel (India)* reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements requiring an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement. The Appellate Body ultimately concluded that these materials did not "establish conclusively that the measure requires an investigating authority to consistently" act contrary to the relevant WTO obligation.

B. The Panel's Analysis of Article 2.2.1.1 of the AD Agreement Should Be Informed by the Text and Context of the AD Agreement

3. Both Argentina's "as such" and "as applied" claims are dependent on the interpretation and meaning of Article 2.2.1.1 of the AD Agreement. As explained below, the United States considers that Article 2.2.1.1 requires an investigating authority to "normally" rely on producers' or exporters' books and records, but, as permitted by the text of the provision, the authority may look beyond these records in limited circumstances.

1. Investigating Authorities Shall Normally Calculate Costs on the Basis of Records Kept by Producers or Exporters

4. As a preliminary matter, the United States considers that Article 2.2.1.1 requires an investigating authority to normally calculate costs on the basis of records kept by an exporter's or producer's books, provided that (i) the books and records are in accordance with the GAAP of the exporting country, and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. This view was adopted by panel in *China – Broiler Products*. Thus, in situations where books and records are kept in accordance with GAAP 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 pursuant to Article 2.2.1.1.

5. The qualification to the obligation in Article 2.2.1.1 is reinforced by the use of the term "normally," which is defined as "in the usual way" or "as a rule". Thus, the term "normally" in conjunction with the two conditions ("provided that") in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances. To that end, as the *China – Broiler Products* panel report noted, if the investigating authority finds that the books and records do not meet the stated conditions, the authority is "bound to explain why it departed from the norm and declined to use a respondent's books and records".

2. Article 2.2.1.1: "Costs"

6. With respect to the interpretation of the second condition, "reasonably reflect the costs associated with the production and sale of the product under consideration," the parties attribute a number of differing meanings to these terms. Argentina fails to explain how the use of "costs" over an analogous term, like "prices," implies that "costs" must then refer exclusively to the "charges or expenses that have been actually incurred by producer". Moreover, the panel in *EC – Salmon (Norway)* did not find any meaningful distinction between "costs" and "prices" when it defined "cost of production" as the "price to be paid for the act of producing". In the context of Article 2, the United States considers the difference between "cost" and "price" to be a matter of perspective, and not one of substance.

7. Argentina's argument that "costs" relates only to expenses "actually" incurred by producers is undermined by adjacent text in Article 2. The drafters of the AD Agreement chose to utilize an express limitation – to amounts actually incurred by the producer – elsewhere in Article 2. For instance, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Further, Articles 2.2.2(i) and 2.2.2(ii) both pertain to the determination of "general costs". According to Argentina, the term "costs" is inherently specific to expenses "actually incurred by the producer". Argentina's interpretation would therefore render superfluous the "actually incurred and realized" by the "exporter or producer" language utilized in Articles 2.2.2(i) and 2.2.2(ii).

8. For these reasons, the United States does not consider the use of the term "costs" in the context of Article 2.2.1.1 to be indicative of a limitation with respect to the "actual amount incurred" as reflected by the producer's own books and records.

3. Article 2.2.1.1: "Reasonably" in Relation to "Costs"

9. In Argentina's view, Article 2.2.1.1 requires the use of an exporter's or producer's records whenever that exporter or producer transposes, within reason, its actual expenses to its records. Argentina's argument is contrary to the ordinary meaning of Article 2.2.1.1. The plain language provides that the "costs" used for the calculating normal value shall "normally" be based on the exporter's or producer's records, but that the costs need not be used if they do not reasonably reflect the costs associated with the production and sale of the product under consideration. The panel report in *Egypt – Rebar* supports this interpretation.

10. Argentina's argument also would seem to render redundant the first and second conditions in Article 2.2.1.1. Specifically, the first condition of Article 2.2.1.1 permits costs to be rejected based on books and records not in accordance with GAAP. However, under Argentina's interpretation, the second condition would establish yet another requirement that producer records faithfully reflect the costs incurred by producers. Although GAAP may serve as an indicia that costs are reasonable, because accounting principles typically ensure costs are properly sourced and recorded, this may not in all instances be sufficient. Further, the United States does not understand Article 2.2.1.1 to solely refer to "cost allocation" issues. The first sentence of Article 2.2.1.1 refers to costs "calculated", rather than "allocated". That "allocated" is explicitly mentioned elsewhere in the text, but not in the first sentence of 2.2.1.1, contradicts Argentina's argument.

11. When read together with other terms in Article 2.2.1.1 – and in particular "reflect the costs associated with" – the term "reasonably" can be understood to establish a substantive reasonableness standard for the costs reflected in the producer's or exporter's records. The United States notes that the language of Article 2.2.1.1 leaves open what costs may be "unreasonable" such that the records do not reasonably reflect the costs associated with the production and sale of the product. The panel reports in *China – Broiler Products* and *US – Softwood Lumber V* do not provide further guidance on this issue. Further, in *US – Softwood Lumber V* the panel found that Article 2.2.1.1 did not *obligate* the investigating authority to reject unreasonable costs, or to use producer cost data, as reflected in their books and records, if demonstrated to be unreasonable. In fact, the panel noted that "Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records 'reasonably reflect the costs associated with the production and sale of the product under consideration'".

12. As demonstrated by *US - Softwood Lumber V*, it is clear that, on an individual-respondent basis, adjustments are permitted to account for "unreasonable" costs, the recordation of which nonetheless complies with GAAP. For instance, inputs purchased from a related or affiliated supplier that do not reasonably reflect a respondent's costs may require an adjustment to the cost as recorded in the exporter or producer's books and records. This adjustment – to ensure that the data reasonably reflect the costs associated with production or sale of the product – is typically based on record evidence including sales to the first non-affiliated party, costs incurred by other exporters or producers, or other evidence of the appropriate costs.

13. The United States further notes that the context provided by the language of Article 2.2 supports the understanding that market conditions may lead to records reflecting "unreasonable" costs. Article 2.2 provides that where there exists a "low volume of the sales in the domestic market of the exporting country" or a "particular market situation," sales in the domestic market do not permit a proper comparison. The text of Article 2.2 therefore contemplates circumstances where some peculiarity, structure, distortion, or other occurrence of the domestic market makes a direct comparison to home market prices impossible.

14. The United States understands Article 2.2.1.1 to permit investigating authorities to consider whether a particular cost is unreasonable, and whether it may be adjusted, so long as the investigating authority sufficiently explains its determination.

4. Article 2.2.1.1: "Associated with the Production and Sale of the Product Under Consideration"

15. Finally, it is revealing that, rather than modify "reasonably reflects costs" with the phrases "actually incurred" or "by the exporter or producer in question," Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration". The term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product. Further, the use of the term "associated with" conveys a conception of costs more general than just those borne by the specific respondent.

16. Prior panel reports support this view. For instance in *Egypt – Rebar*, the panel described the analysis of "costs associated with the production and sale of the product under consideration" as "hing[ing] on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question *in that case*". The second condition of the first sentence of Article 2.2.1.1 is not simply a reformulation of the requirement that records be GAAP compliant. Specifically, the United States understands that Article 2.2.1.1 does not require the use of a particular respondent's records where the costs documented in those records are determined to be "unreasonable" or otherwise unrelated to the production of the product under review. While the United States takes no position on the facts underlying this dispute, it does consider there to be a range of reasons related to individual respondents, as well as larger market conditions, which may render particular costs to be unreasonable. Pursuant to Article 2 of the AD Agreement, with adequate supporting record evidence and explanation regarding its departure from the exporter or producer's records, an investigating authority may address that cost when determining a reasonable normal value.

C. Article 2.4 of the AD Agreement Addresses Issues of Price Comparability and Not the Proper Determination of Normal Value

17. Argentina argues that the EU did not establish the existence of a margin of dumping for the respondents on the basis of a fair comparison between the export price and the normal value. Argentina's claim under Article 2.4 is intended to address the "clear difference between normal value and export price". The United States considers the issue of the calculation of a proper normal value a matter for claims under Article 2.2.1.1, while issues related to the comparison between normal value and export prices should be considered under Article 2.4.

18. It is clear that Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. However, the text of Article 2.4 presupposes that the appropriate normal value has been identified. The United States in this context agrees in principle with both complainant and respondent, that the use of constructed normal value does not preclude the need for due allowances or adjustments where necessary. However, the United States submits that the

Panel should consider: first, whether there is a relevant difference between the constructed value and the export value, and second, whether such a difference has an effect on "price comparability".

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. DISCUSSION OF EXAMINATION OF ARTICLE 2.2.1.1 OF THE AD AGREEMENT

A. Interpretive Approach to the "Reasonably Reflects the Costs" Analysis

19. The United States would like to highlight its concerns with the interpretive approach to Article 2.2.1.1's "reasonably reflect" clause suggested by Argentina and some of the third parties. Nothing in the text of Article 2.2.1.1 limits the various possible rationales or reasons why, in exceptional circumstances and when warranted by record evidence, an investigating authority may find that the costs set out in a producer's or exporter's records do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the United States understands that the proper way to apply the "reasonably reflect" clause – and indeed the only way consistent with the text of the provision – is to examine, on a case-by-case basis, the rationale provided by an administering authority when it makes a determination that the costs set out in the records of the producer or exporter do not reasonably reflect the costs associated with production and sale.

20. In contrast, Argentina and some of the third parties to this dispute are advocating the position that Article 2.2.1.1 must be interpreted to include various proposed *a priori* limitations. That is, regardless of any record evidence that may demonstrate that a producer's records do not reflect costs associated with production and sale, and prior to any finding by an investigating authority, Argentina suggests Article 2.2.1.1 imposes certain limitations on the investigating authority's analysis. In the following paragraphs, the United States will examine some of these proposed *a priori* limitations, and explain how they cannot be supported under the rules of interpretation applicable to the WTO Agreement.

21. First, Argentina argues that the text of Article 2.2.1.1 restricts the investigating authority's "reasonably reflect" analysis to the books of the exporter or producer directly involved in the anti-dumping investigation. That is, the analysis is limited to expenses that have been "actually incurred by the producer". This argument, however, has no basis in the text of Article 2.2.1.1. The language "associated with" in the "reasonably reflects" clause similarly implies a less rigid connection between the relevant costs and the parties to the investigation than suggested by Argentina and several third parties.

22. Further, the AD Agreement also refutes the proposed interpretation that a "reasonably reflect" determination must be based only on information related to the specific producer or exporter responding to the anti-dumping investigation. For instance, the GAAP of each WTO Member is a factual matter, to be determined based on information that is necessarily exogenous to a producer's or exporter's records.

23. In addition to the context provided by Article 2.2.1.1, other text in Article 2 is contrary to Argentina's proposed interpretation. Given the express directions as to "actual data" in Article 2.2.2 and its proximity to Article 2.2.1.1, it is difficult to conclude that the drafters intended to include the *a priori* limitation in Article 2.2.1.1 that Argentina suggests. The United States also notes that although, in this particular dispute, the exporting Member is arguing against the use of the "reasonably reflect" clause, this may not be the case in every dispute. As was the case in *US – Softwood Lumber V*, there may well be circumstances in which an exporter or producer would argue against the use of its own books and records and in favour of an alternative source of cost information.

24. For all these reasons, a proposal to limit the information examined in a "reasonably reflect" determination cannot be supported. Neither the text of Article 2.2.1.1, nor context provided by other provisions of the AD Agreement, require an investigating authority to ignore any type of potentially relevant evidence.

25. Second and more broadly, it has been suggested that "dumping" relates exclusively to the behaviour of the exporter or producer, and it is *a priori* inappropriate to consider information not

directly related to the exporter's or producer's conduct. However, Article 2.2 of the AD Agreement refers to the existence of a "particular market situation" where sales in the domestic market do not permit a proper comparison. That a factor external to a specific exporter or producer – the particular market situation – governs normal value directly refutes the proposition that, as a number of third parties contends, dumping relates exclusively to the behaviour of the exporter or producer. Additionally, recorded costs related to inputs purchased from related corporate enterprises are regularly viewed as potentially unreasonable.

B. Relation to other WTO Agreements

26. It has been suggested in this dispute that because the issue of recorded costs that do not "reasonably reflect" the cost of producing the product under investigation might also be addressable under other covered agreements (such as the Agreement on Subsidies and Countervailing Measures), the AD Agreement therefore does not permit departure from such recorded costs when calculating normal value. However, the fact that one covered agreement could, in theory, address a given practice does not mean that the other covered agreements cannot do so as well. Indeed, the WTO Agreement contains many instances of overlapping obligations. To the extent this argument is intended as a reference to the "double-counting" issue addressed in *US – Anti-Dumping and Countervailing Duties (China)*, the reference in fact undercuts the argument for an *a priori* limitation with respect to finding recorded costs to be unreasonable.

C. Relevance of "Input Dumping" Discussions

27. Finally, the United States does not agree that certain pre-Uruguay Round discussions of "input dumping" – a term never used in the AD Agreement – is in any way relevant to the factors that may be examined in making a "reasonably reflect" determination under Article 2.2.1.1. "Input dumping" pertains to the narrow issue of whether materials or components used in manufacturing an exported product are purchased at dumped or below cost prices. Conversely, this dispute centers on the broader issue of whether investigating authorities must *a priori* limit the factors examined in deciding whether recorded costs reasonably reflect the associated cost of production and sale of the product.

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WORLD TRADE ORGANIZATION

WT/DS473/R/Add.1

29 March 2016

(16-1745)

Original: English

EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS473/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Revised on 27 January 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel on 25 November 2014.

4. The Panel shall meet in closed session. The parties, and Members who have notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all the members of its own delegation and shall ensure that each member of its own delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event, no later than in its first written submission to the Panel. If Argentina requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Argentina shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal and answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comments, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of it into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibit upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Argentina could be numbered ARG-1, ARG-2, etc. If the last exhibit in connection with the first submission was numbered ARG-5, the first exhibit of the next submission thus would be numbered ARG-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including in writing prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Argentina to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Argentina presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Argentina. If the European Union chooses not to avail itself of that right, the Panel shall invite Argentina to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that

interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than in responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each executive summary submitted by each party of opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages each. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXX@wto.org, XXXX@wto.org and XXXX@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted 25 November 2014

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS473.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as BCI by the Commission of the European Union in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. As required by Article 18.2 of the DSU, a party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these working procedures to protect BCI. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in this dispute. All third party access to BCI shall be subject to the terms of these working procedures.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party under the terms specified in these procedures, or an outside advisor to a party or third party for the purposes of this dispute.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

7. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

8. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF ARGENTINA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF ARGENTINA

I. INTRODUCTION

1. Argentina has initiated this dispute with regard to two different measures: first, Article 2(5) of Council Regulation (EC) No 1225/2009 (hereinafter, the Basic Regulation), that Argentina challenges as being inconsistent "as such" with several provisions of the Anti-Dumping Agreement (hereinafter, ADA), and the General Agreement on Tariffs and Trade 1994 (hereinafter, GATT 1994), and second, the anti-dumping measures imposed by the European Union (hereinafter, EU) on imports of biodiesel originating in Argentina[1], that Argentina submits that are inconsistent with several obligations under the ADA and the GATT 1994.

II. "AS SUCH" CLAIMS IN RELATION TO 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

A. Background, scope and content of Article 2(5) of the Basic Regulation

2. The original version of Article 2(5) of the Basic Regulation as adopted in 1994 to implement the ADA did not contain the provision currently set out in its second paragraph, which Argentina challenges in the present dispute. This paragraph has been added by Council Regulation (EC) No 1972/2002 of 5 November 2002. The historical overview of this provision shows that the second paragraph of Article 2(5) has actually been introduced to keep the possibility in the calculation of normal value to disregard the "costs" of the producers when the authorities consider that these costs are "*abnormally or artificially low*", because they do not reflect "*market values*" or are "*distorted*".

3. According to Council Regulation (EC) 1972/2002 and the consistent practice of the EU authorities Article 2(5), second paragraph, of the Basic Regulation refers to situations where the prices of an input are "abnormally or artificially low" because they are set in a "regulated market" or because of the existence of some alleged "distortion" on the domestic market. This interpretation has been confirmed by the General Court of the EU. Article 2(5), second paragraph, requires, in such a situation, that these costs "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." Such a rule is inconsistent with various provisions of the ADA and of the GATT 1994.

B. Article 2(5) of the Basic Regulation violates Article 2.2.1.1 of the ADA and, as a result, Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994

4. Article 2.2.1.1 of the ADA, correctly interpreted in accordance with the principles of treaty interpretation does not allow investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be "abnormally or artificially low", because they do not reflect market values or because they are allegedly distorted.

- **The ordinary meaning of Article 2.2.1.1 of the ADA**

5. Article 2.2.1.1 establishes an obligation on the investigating authorities to calculate the costs "on the basis of records kept by the exporter" when constructing normal value, provided that two

[1] 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, OJ 2013 L 141 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, OJ 2013 L 315. (Definitive Regulation).

conditions are fulfilled: (i) such records are in accordance with the generally accepted accounting principles (GAAP) of the exporting country and (ii) such records reasonably reflect the costs associated with the production and sale of the product under consideration.

6. There are only two exceptions to the above obligation to calculate costs on the basis of the records kept by the exporters. It is only where the records are inconsistent with GAAP or that they do not reasonably reflect the costs associated with the production and sale of the product under consideration that the authorities have the right not to use the data in the records. Whenever the records are consistent with GAAP of the exporting country and they reasonably reflect the costs associated with the production and sale of the product, the investigating authorities *must* calculate the costs on the basis of the records kept by the exporter or producer.

7. The second condition included in Article 2.2.1.1, first sentence, does not authorize the authorities to reject or adjust the data in the records because the prices are "*abnormally or artificially low*", because they do not reflect "*market values*" or are "*distorted*". This interpretation flows from the ordinary meaning of the words of Article 2.2.1.1, first sentence and from the structure of that sentence. In providing that the records must reasonably reflect "the costs" associated with the production and sale of the product under consideration, Article 2.2.1.1 of the ADA expressly refers to the charges or expenses which have actually been incurred by the producer concerned for the production and sale of the product under consideration, regardless of whether such costs are lower than international prices or of whether they are, in the authorities' view, market-based.

8. Moreover, the word "reasonably" in Article 2.2.1.1 is attached to the verb "reflect" and not to the word "costs". This sentence does not provide that the records must reflect "reasonable costs" or "costs which are reasonable in light of prices on other markets". This analysis excludes an interpretation that refers to whether the costs included in the records are in line with international prices or prices on other markets. In other words, the sentence does not provide that the records must reflect costs which are reasonable, but that they must reflect "costs associated with the production and sale of the product under consideration" and in a reasonable way.

- **The context of Article 2.2.1.1, first sentence, of the ADA**

9. The second and third sentences of Article 2.2.1.1 provide relevant context in construing the obligation set out in the first sentence. The second sentence provides what the authorities have to do if they use an alternative cost allocation methodology. This confirms that the second condition in the first sentence refers to a cost allocation issue.

10. Article 2.2.2 of the ADA deals with "the amounts for administrative, selling and general costs and for profits" which are also central elements for constructing normal value. It flows from this rule that if the drafters of the ADA had intended to authorize the authorities to use, for the purposes of the calculation of the cost of production, data other than those of the producers, they would have explicitly provided so. Furthermore, the different ways set out in Article 2.2.2 to determine SG&A and profit all relate to data in the country of origin. This supports the view that a "reasonability" test under Article 2.2.1.1, first sentence, by reference to data outside the country of origin is not relevant and contrary to the principles found in the context of the dumping determination.

11. Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 expressly refer to "the cost of production *in the country of origin*". Since Article 2.2.1.1 of the ADA seeks to provide further details "for the purposes of paragraph 2", it is clear that the interpretation of Article 2.2.1.1 must be consistent with Article 2.2, to which Article 2.2.1.1 directly refers. The express indication in Article 2.2 of the ADA (and Article VI:1 of the GATT 1994) that the cost of production is the one "in the country of origin" does not allow to conclude that the "costs" referred to in Article 2.2.1.1 could be found to be "unreasonable" in view of benchmarks outside of the country of origin, such as prices in other markets. Since the construction of the normal value must be based on the "cost of production in the country of origin", it does not make any sense to reject costs on the ground that they would not reflect international prices or prices in other markets.

12. An interpretation of the first sentence of Article 2.2.1.1 whereby the cost data could be rejected because they are lower than prices in other markets is inconsistent with the requirement

under Article 2.2 of the ADA that the constructed normal value be based on the "cost of production in the country of origin".

- **The object and purpose of the ADA**

13. By providing that the records are not reasonable if the cost data reflect prices which are lower than the prices on other markets, Article 2(5), second paragraph, undermines the fundamental logic of "dumping" which is based on a comparison between the export price of the product concerned and the price of the like product on *the domestic market*, as defined in Article VI:1 of the GATT 1994 and 2.1 of the ADA.

- **Case law**

14. The interpretation according to which the first sentence of Article 2.2.1.1 of the ADA does not allow investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration when the prices of these inputs in their domestic market are found to be "abnormally or artificially low", because they do not reflect market values or because they allegedly are distorted is confirmed by the Panel Reports in *US – Softwood Lumber V*[2], *EC – Salmon*[3], and *Egypt – Steel Rebar*.[4]

C. Article 2(5) of the Basic Regulation is inconsistent with Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994

15. Article 2(5) of the Basic Regulation violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 since those provisions expressly require that the margin of dumping must be determined by comparison with the cost of production in the country of origin.

16. Article 2.2 expressly provides that when the margin of dumping is established by comparison with a constructed normal value, the comparison shall be made with "the cost of production in the country of origin". Article VI:1(b)(ii) of the GATT 1994 similarly refers to "the cost of production of the product in the country of origin." Since Article 2(5), second paragraph, of the Basic Regulation provides that the costs 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", it is inconsistent with Article 2.2 and Article VI:1(b)(ii) of the GATT 1994 which require to use the cost of production "in the country of origin".

D. The EU violates Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA

17. Since Article 2(5), second paragraph, of the Basic Regulation violates Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1 of the GATT 1994, it follows that the EU has not ensured the conformity of its laws, regulations and administrative procedures with the provisions of the ADA and of the GATT 1994 and, therefore, has also violated Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA.

III. CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL ORIGINATING IN ARGENTINA

A. The EU acted inconsistently with Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 in failing to calculate the cost of production on the basis of the records kept by the producers under investigation

18. Argentina submits that the EU acted inconsistently with the obligation laid down in the first sentence of Article 2.2.1.1 of the ADA since it calculated the exporting producers' cost of soybean on the basis of an average of the FOB reference price and not on the basis of cost of soybean

[2] Panel Report, *US – Softwood Lumber V*, para. 7.321.
[3] Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[4] Panel Report, *Egypt – Steel Rebar*, para. 7.393.

included in the accounting records of those producers.[5] If this Panel finds that Article 2(5) of the Basic Regulation is *as such* inconsistent with Article 2.2.1.1 of the ADA, it follows that its application in the anti-dumping investigation concerning imports of biodiesel originating in Argentina necessarily produced a result that is also inconsistent with Article 2.2.1.1 of the ADA. In any case, Argentina submits that the violation of these provisions is supported by five arguments.

19. First, Argentina submits that the finding that the records of the Argentinean producers did not reasonably reflect the costs of "the main raw material" is based on an improper establishment of the facts. This finding ignores the fact that prices in Argentina are freely set and based on offer and demand, as recognized by the EU itself in both the Definitive Regulation and in the parallel anti-subsidy investigation.

20. Second, in finding that the costs of the main raw material were not reasonably reflected in the records of the exporting producers, the EU ignored the ordinary meaning of the terms of the first sentence of Article 2.2.1.1 of the ADA. By referring to the term "costs", Article 2.2.1.1 refers to the expenses actually incurred by the producer. Therefore, the fact that the cost of soybean incurred and reported by the exporters was lower than the international price did not allow the EU to conclude that the records of the exporters do not reasonably reflect the *costs* of soybean associated with the production and sale of biodiesel.

21. Third, the interpretation of the first sentence of Article 2.2.1.1 of the ADA at the basis of the EU's refusal to base the cost of soybean on the records of the exporting producers cannot be reconciled with the structure of that provision. In this sentence, "records" is the subject, "costs" the object, "reflect" the verb and "reasonably" the adverb which qualifies the term "reflect". The misplaced reading of "international prices" into the second condition of Article 2.2.1.1 of the ADA leads to the result that for "records" to reflect "costs" according to the interpretation of the EU, such records should have reflected costs that a producer actually never incurred, namely, in this case, the FOB reference price of soybean.

22. Fourth, the refusal of the EU to base the cost of soybean on the records of the producers under investigation is based on a reading of Article 2.2.1.1 of the ADA that is not supported by the context of this provision. The second and third sentences of Article 2.2.1.1, dealing with cost allocation issue, show that the "reasonably reflect" condition in the first sentence of Article 2.2.1.1 refers to the actual costs incurred by the producers instead of international prices. Furthermore, Articles 2.2 of the ADA and VI:1(b)(ii) of the GATT 1994 expressly refer to the cost of production *in the country of origin*. Given that Article 2.2.1.1 of the ADA is aimed at further specifying that clause, Article 2.2.1.1 must be read in a manner that is consistent therewith. Therefore, it does not make any sense to reject costs on the grounds that they would not reflect "international prices", since it implies a comparison with prices outside of the country of origin. Argentina also reiterates the reference to Article 2.2.2 of the ADA in this respect.

23. Fifth, Argentina submits that, in finding that the records of exporting producers "do not reasonably reflect costs" because they do not reflect international prices despite the fact that they reflect the costs actually paid by the exporting producer, and in replacing the costs reflected in those records by international prices, the EU undermines the object and purpose of the ADA which is to counteract dumping that occurs when the export price is less than the comparable price, in the *domestic* market and not on any other markets. The EU subverted the fundamental purpose of the ADA and used the Agreement to address differences in price between the export price of the product concerned and international prices, instead of comparable prices on the domestic market.

B. The EU acted inconsistently with Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994 in failing to construct normal value of biodiesel on the basis of the cost of production in Argentina

24. In replacing the cost of soybean reported in the records of the exporting producers by an average of the FOB reference price, the EU failed to construct normal value on the basis of the cost of production in the country of origin. Consequently, the EU acted inconsistently with Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994.

[5] It is worth recalling that the Definitive Regulation confuses soybean and soybean oil as the direct input in the production of biodiesel. It thus deliberately blurs the distinction between the product concerned (biodiesel), the main input used in its production in Argentina (soybean oil), and indirect inputs used for the production of the direct inputs (soybean).

C. The EU acted inconsistently with Article 2.2.1.1 of the ADA by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production

25. By using the average of the reference FOB price minus fobbing costs during the investigation period (IP), the EU included in its calculation of the cost of production of biodiesel a cost which is not associated with the cost of production and sale of biodiesel within the meaning of Article 2.2.1.1 of the ADA. Since the producers under investigation did not pay the reference FOB price minus fobbing costs for soybeans but, instead an amount representing the *actual* cost of soybean included in their records, Argentina submits that, the price of soybean used by the EU to calculate the cost of production is not a price that is associated with the production and sale of the like product. Therefore, the EU acted inconsistently with Article 2.2.1.1 of the ADA.

26. As a result of the inconsistencies mentioned in (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994.

D. The EU acted inconsistently with Articles 2.2 and 2.2.2(iii) of the ADA because the amounts for profits established by the EU were not determined on the basis of a reasonable method

27. When determining the reasonable amount for profits, the EU did not calculate the reasonable amount for profits on the basis of the chapeau of Article 2.2.2 of the ADA or on subparagraphs (i) or (ii) of that provision, choosing instead to base it on "any other reasonable method" pursuant to Article 2.2.2(iii) of the ADA. Argentina submits that the amount for profits established by the EU of 15% is not based on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA and cannot be considered to be "reasonable" within the meaning of Article 2.2 *in fine* of the ADA.

28. In both the Provisional and Definitive Regulations, the EU failed to provide any explanation of how it determined a profit margin of 15%. The 15% figure does not result from any "method" within the meaning of Article 2.2.2(iii) of the ADA, let alone a reasonable one. Argentina fails to see how a World Bank figure concerning the short to medium term lending rate can be understood to be a relevant justification of the 15% profit margin determination. Moreover, Argentina explained that it was unreasonable to consider that the Argentinean biodiesel industry is "young and innovative", at a time when production had peaked and the market had matured significantly.

E. The EU acted inconsistently with Article 2.4 of the ADA in failing to make due allowance for differences affecting price comparability, including differences in taxation, and in precluding a fair comparison between export price and normal value

29. Argentina submits that the EU acted inconsistently with Article 2.4 of the ADA in failing to make a fair comparison between normal value and export prices within the meaning of that provision, as a fair comparison would have required that due allowance be made for differences affecting price comparability. This inconsistency arose as a result of a comparison of, on the one hand, a constructed normal value that included an average of the reference FOB price of soybeans (minus fobbing costs) with, on the other hand, an export price that incorporated the domestic price of soybeans.

30. In the Definitive Regulation, the EU deducted the expenses incurred for exporting the soybean from the reference FOB price. Therefore, the difference between the price of soybean included in the constructed normal value and the domestic price of soybean reflected in the export price is approximately equal to the export tax on soybean. The EU itself acknowledged that its methodology yielded a result which, from a numerical point of view, was similar to simply adding the export tax to the cost of the raw material.

F. The EU acted inconsistently with Article 9.3 of the ADA and Article VI: 2 of the GATT 1994 in imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA

31. In order to have the dumping margin determination made in conformity with Article 2 of the ADA, the EU should have based the cost of production on the records of the producers under investigation and it should have ensured that the profit margin determination was based on a reasonable method pursuant to Article 2.2.2(iii) of the ADA. Therefore, the EU has imposed and levied anti-dumping duties in excess of the margin of dumping that it should have calculated in conformity with Article 2 of the ADA. As a result, it acted inconsistently with Article 9.3 of the ADA and VI:2 of the GATT 1994.

G. The EU acted inconsistently with Articles 3.1, 3.4 and 3.5 of the ADA in its evaluation of the production capacity, the utilization of capacity and the return on investment of the EU industry

32. Argentina submits that the utilization of capacity was overstated and that a proper evaluation would have revealed that capacity utilization was in fact significantly lower than the figures reflected in the Definitive Regulation. Argentina claims that the EU failed to ensure that injury arising out of the overcapacity of the domestic industry was not attributed to the dumped imports. This is the result of, among others, the EU's failure to properly evaluate the utilization of capacity of its domestic industry.

33. Throughout the investigation, overcapacity was identified as a factor having an impact on the state of the industry by the investigated companies as well as by the Government of Argentina. In the course of the injury analysis conducted by the EU, the European Biodiesel Board (hereinafter, EBB) submitted information that showed that capacity of the domestic industry grew throughout the investigation period. In a submission dated 17 September 2013, the EBB suddenly asserted that the figures concerning production capacity of the EU industry needed to be adjusted to exclude the "idle" capacity. On 1 October 2013, the EU issued the Definitive Disclosure where it accepted the resubmitted data and altered the findings on capacity and capacity utilization that it had made in the Provisional Regulation. However, the Definitive Disclosure did not contain further information on the methodology used by the EU to assess this information or further elaboration of what was meant by "close scrutiny of this resubmitted data".

34. Argentina claims that the EU acted inconsistently with Articles 3.1 and 3.4 of the ADA *first*, because the EU's definition of "utilization of capacity" is inconsistent with Article 3.4 of the ADA, *second*, because its analysis of the production capacity and the utilization of capacity of the EU industry was not based on positive evidence; *third,* because the injury determination did not involve an objective examination; *fourth,* because the evaluation of the production capacity and of the utilization of capacity is not adequate and that the EU therefore acted inconsistently with Article 3.4 of the ADA and *fifth,* because the indicators "utilization of capacity" and "return on investment" were not evaluated in a consistent manner.

- **The EU's definition of utilization of capacity is inconsistent with Article 3.4 of the ADA**

35. Argentina notes that the terms "utilization of capacity" in Article 3.4 of the ADA contain no reference to a concept such as "availability for use" or "idleness". Consequently, in the framework of Article 3 of the ADA, the entirety of production capacity must be taken into account regardless of whether it is allegedly "available for use" or not. It is undeniable that all of an industry's production capacity, whether it is available for immediate use or not, generates costs. Failure to take production capacity that is not ready for use or that is "idle" yields an inaccurate picture of the state of the domestic industry. In adopting a definition whereby the evaluation of "utilization of capacity" excludes so-called "idle" capacity, the EU acted inconsistently with Article 3.4 of the ADA.

- **The EU acted inconsistently with Article 3.1 and 3.4 of the ADA in failing to base its analysis of the production capacity and the utilization of capacity on positive evidence**

36. At a late stage in the proceedings, the EBB submitted a document requesting the exclusion of supposedly idle capacity, a change in production capacity figures by EBB that amounted to 26.53% of total production capacity in the EU or 5,898,000 tons during the IP.[6] This amounts to almost three times the combined amounts of imports originating in Argentina and Indonesia during the IP. Argentina submits that the evidence on which the evaluation of the utilization of capacity is based is implausible first because the alleged "mistake" in EBB's submissions would have been impossible to overlook, and second, because if the "mistake" had existed, major inconsistencies in the data submitted by EBB concerning production capacity of non-EBB Members would have been evident, especially in view of the fact that the entirety of the alleged "idle capacity" of the EU industry was allocated to non-EBB Members, which are a minority sector of the EU industry.

37. In stark contrast to the multiplicity of publicly available sources confirming the accuracy of the data in the Complaint and the Provisional Regulation, the data provided by EBB in its submission of 17 September 2013 appear to consist of mere assertions by EBB. The EU stated in the Definitive Regulation that it cross-referenced EBB's submission to "publicly available data concerning in particular idle capacity as well as capacity of producers that ceased operations due to financial difficulties" but it does not state what these publicly available data are. The reliance on undisclosed yet supposedly public sources further calls into question the reliability and creditworthiness of the evidence on which evaluation of the capacity of the Union industry was based.

38. Argentina notes that (1) this "publicly available data" was not placed on the public file of the investigation, (2) it is contradicted by all other publicly available sources that do appear on the public file of the investigation and (3) the EU did not clarify what the "cross-referencing" exercise entailed. As a result, Argentina submits that the data on which the evaluation of production capacity and capacity utilization is based, is not reliable.

39. Moreover, Article 3.4 of the ADA does not allow for an exclusion of production capacity that is "idle" from the evaluation of the utilization of capacity. As a result, the "idleness" of production capacity is a fact that is neither relevant nor pertinent to the question of what constitutes production capacity within the meaning of Article 3.4 of the ADA; it is production capacity regardless of whether it is "idle" or "available for use." As a result, to the extent that the assessment of production capacity and utilization of capacity is based on evidence concerning the fact that part of the capacity is allegedly "not available for use", it is based on evidence that is irrelevant and impertinent.

40. Therefore, the EU failed to base its injury determination on positive evidence and acted inconsistently with Articles 3.1 and 3.4 of the ADA.

- **The EU acted inconsistently with Articles 3.1 and 3.4 of the ADA in failing to conduct an objective examination of the production capacity and the utilization of capacity of its domestic industry**

41. The unusual exclusion of production capacity that was "idle" had the effect of understating the production capacity of the EU biodiesel industry by 5,898,000 tons during the IP or 26.53% of total capacity. This understatement, in turn, overstates the utilization of capacity and thus negates the significance of the overcapacity of the EU industry as a cause of injury that is different from that of the allegedly dumped imports. Argentina submits that in weighing and balancing the evidence before it, the EU did not act in an even-handed manner. Indeed, the exclusion of production capacity that was "not available for use" was based on evidence that is not credible and which at the same time favoured the interests of EBB in the investigation. As a result, the examination was not "objective" within the meaning of Article 3.1 of the ADA. The EU has therefore acted inconsistently with Articles 3.1 and 3.4 of the ADA.

[6] The magnitude of the figures involved speaks for itself. While EBB was perfectly able to detect, examine and isolate the economic effect supposedly caused by imports less than 1,500,000 tons in a market almost ten times bigger, it was unable to detect that the total EU production capacity had been overstated by almost six million tons.

- **The EU acted inconsistently with Article 3.4 of the ADA in failing to adequately evaluate the production capacity and utilization of capacity of the domestic industry of the EU**

42. When stating that production capacity remained "relatively stable" the EU failed to properly evaluate production capacity at the provisional stage as it failed to properly analyze this factor by "placing it in context in terms of the particular evolution of the data".[7] Argentina submits that the EU equally failed to adequately evaluate the production capacity and utilization capacity of the EU industry at the definitive stage. Consequently, the EU acted inconsistently with Article 3.4 of the ADA.

- **The EU acted inconsistently with Article 3.4 of the ADA in failing to evaluate utilization of capacity and return on investment in a consistent manner**

43. To the extent that the EU eliminated so-called "idle capacity" from the production capacity of the EU industry, while basing the evaluation of the return on investment on the basis of all assets employed in the production of biodiesel, it would appear that both factors were based on data which lack consistency. Indeed, while the "return on investment" appears not to exclude "idle" assets, the EU's evaluation of the utilization of capacity did. Thus, Argentina submits that the EU failed to evaluate the return on investments and the utilization of capacity in a consistent manner. Consequently, the EU acted inconsistently with Article 3.4 of the ADA.

H. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the overcapacity of the EU industry was not attributed to the allegedly dumped imports

- **Figures concerning production capacity and utilization of capacity are incorrect**

44. The EU made a determination concerning production capacity and utilization of capacity based on a definition of utilization of capacity which is inconsistent with Article 3.4 of the ADA, which was not based on positive evidence, which did not involve an objective examination and which was not based on an adequate evaluation. The correct figures would have shown a much higher production capacity of the EU industry and, consequently, a much lower utilization of capacity.

- **Errors in the assessment of the overcapacity in the Provisional Regulation**

45. The EU appeared to assume, incorrectly, that the arguments of the interested parties concerned only the low capacity utilization, instead of referring to overcapacity. The EU industry had expanded production capacity by 38% during the period 2008-2011, i.e. far beyond what the market could absorb and despite the already extremely low rates of utilization of capacity in 2008. Even a superficial consideration of these arguments on overcapacity would have shown that based on the figures of the Provisional Regulation, unused capacity increased from 11,613,000 tons in 2009 to 13,174,629 tons during the IP, an increase of 1,561,322 tons.

- **The findings relating to fixed costs are incorrect**

46. Argentina refers to the statement that fixed costs do not bear any relation to capacity utilization rates, which is one of the reasons why the EU rejected the allegation that there was a causal relationship between the overcapacity of the EU industry and the injury it suffered. This statement appears to be based on a misunderstanding. Indeed, the fact that fixed costs remain constant at different capacity utilization rates is precisely the reason why the low capacity utilization rates result in fixed costs being disproportionately high on a per unit basis.

47. In addition to the fact that, contrary to the statements of the EU, the weight of the fixed costs in the total cost of production is impacted by the rate of capacity utilization, Argentina disputes the notion that fixed costs were low and that, therefore, the low rates of capacity utilization were not a "decisive" factor of injury, as stated in Recitals 164 and 166 of the Definitive Regulation.

[7] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

- **The findings that low capacity utilization rates are not a decisive factor cannot be reconciled with the EU's statements that the biodiesel industry is capital intensive**

48. The EU mentions repeatedly that the biodiesel industry is capital intensive. Capital-intensive industries require large financial commitments to produce the first unit of any good and thus require high capacity utilization to achieve economies of scale and achieve a return on investment. Argentina submits that the finding that the very significant overcapacity of the EU industry was not a decisive factor of injury cannot be reconciled with the statements throughout the Provisional and Definitive Regulations that the biodiesel industry is capital-intensive.

I. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the alleged injury caused by the EU industry's long term commercial strategy of importing the product under consideration was not attributed to the allegedly dumped imports

49. The EU failed to properly assess the injury arising from the EU industry's strategy of importing the product under consideration, thereby failing to separate and distinguish the injurious effects of this commercial strategy from those of the allegedly dumped imports.

50. The EU itself recognized that imports made by the EU industry were one of the reasons for the low capacity utilization rate. Therefore, the commercial strategy pursued by the EU industry, which consisted of sourcing the product under consideration in Argentina through related entities, was a cause of injury. The statement that the imports were temporarily made in self-defense is contradicted by their sheer volume: over 60% of total imports by the EU's own recognition.

J. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the double-counting regimes was not attributed to the allegedly dumped imports

51. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA as a result of the failure to recognize that the double-counting regimes injured the EU industry at the same time as the allegedly dumped imports and/or of the failure to appropriately assess the injurious effects of those regimes. In failing to examine the effects of the double-counting regimes in force in other EU Member States besides France, the EU failed to appreciate the full extent of the injurious effects of those regimes. The EU misplacedly insisted that double-counting only shifts demand, although it also reduces demand. Finally, Argentina disputes the relevance of the contention that the double-counting regime was in force only during a part of the IP in France.

K. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the lack of vertical integration and the access to raw material of the EU industry was not attributed to the allegedly dumped imports

52. Argentina contends that the EU failed to comply with the non-attribution obligation in relation to the lack of vertical integration and the lack of access to raw materials of the EU industry. The EU did not undertake any steps to separate and distinguish the injurious effects arising out of these factors from the injurious effects of the allegedly dumped imports. Therefore, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

IV. CONCLUSION

53. Argentina respectfully requests that this Panel find that:

> I.- Article 2(5) of the Basic Regulation is inconsistent *as such*, with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data of the exporters as included in its records when those costs reflect prices which are "abnormally or artificially low", because the costs do not reflect market prices or because they are allegedly affected by a distortion; (B) Article 2.2 of the ADA 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", even though neither provision allows for an establishment of the costs on this basis. As a result, the EU acted inconsistently with Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA, and

II.- The anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 because the EU failed to calculate the cost of production on the basis of the records kept by the producers under investigation; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because the EU failed to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin; (C) Article 2.2.1.1 of the ADA because the EU included costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (D) As a result of the inconsistencies mentioned in points (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994; (E) Articles 2.2 and 2.2.2(iii) of the ADA because the EU failed to base the profit margin as a component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA; (F) Article 2.4 of the ADA because the EU failed to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and normal value; (G) Article 9.3 of the ADA and VI:2 of the GATT 1994 because the EU 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 ADA; (H) Articles 3.1 and 3.4 of the ADA because the EU's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the EU industry; (I) Articles 3.1 and 3.5 of the ADA since the EU failed to conduct an objective examination, based on positive evidence, of known factors other than the allegedly dumped imports in its non-attribution analysis; hence, the EU failed to ensure that the injury suffered by the domestic industry of the EU resulting from other factors was not attributed to the allegedly dumped imports. Argentina considers that the measures at issue should be withdrawn.

54. Argentina respectfully requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-dumping Agreement and the GATT 1994.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF ARGENTINA

A. INTRODUCTION

1. Argentina has demonstrated, and the European Union (hereinafter the "EU") has failed to rebut, that, under Article 2(5) second subparagraph of the Basic Regulation, as reflected in the consistent practice of the EU authorities and the judgments of the General Court of the EU, when the prices of inputs are found to be "abnormally low" or "artificially low" in comparison to prices in other markets, as a result of an alleged "distortion", it is concluded that the costs are not reasonably reflected in the records of the producer concerned and are thus adjusted or replaced by data on any other reasonable basis, including information from other representative markets. This measure is clearly inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement (hereinafter the "ADA").

2. Argentina has also demonstrated that several aspects of the anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the provisions of the ADA, including the dumping margin determinations and the injury and causality determinations.

B. ARGENTINA'S CLAIMS AGAINST ARTICLE 2(5), SECOND SUBPARAGRAPH, OF THE BASIC REGULATION

The measure at issue

3. Under its "as such" claims, Argentina is challenging one measure, namely Article 2(5), second subparagraph, of the Basic Regulation and not "two separate measures"[1] as the EU is claiming.

4. Regarding the **scope of the measure**, the EU errs when claiming that "the second subparagraph of Article 2(5) of the Basic Regulation [only] describes what the authorities can do after it has been determined that the records do not "reasonably reflect" costs, pursuant to the first subparagraph of Article 2(5) of the Basic Regulation".

5. This is, first of all, contrary to the text of Article 2(5), second subparagraph. Indeed, Article 2(5), second subparagraph, does not only provide to the authorities the legal basis to use information from other representative markets when information on the domestic market is not available or cannot be used but, at the very same time, it also provides the legal basis for disregarding the records of the producers in those situations.

6. The background, the consistent practice of the EU authorities and the judgements of the General Court of the EU, confirm that Article 2(5), second subparagraph, provides the legal basis for rejecting the records of the producers/exporters where prices are "artificially low" or "abnormally low" as a result of an alleged "distortion".

7. Regarding the background, it must be noted that the first subparagraph of Article 2(5) was introduced through Council Regulation No 3283/94 of 22 December 1994 which sought to implement the EU's international obligations arising from the ADA adopted during the Uruguay Round. In particular, by means of Article 2(5) of that regulation, it intended to implement the particular obligations laid down by Article 2.2.1.1 of the ADA. The second subparagraph of Article 2(5) was introduced by Regulation No 1972/2002 at the same time that Russia was granted full Market Economy Status, to provide a legal basis for the authorities to reject the cost data included in the records of the investigated party in case those costs reflect a price which is "abnormally low" or "artificially low", in comparison to prices in other markets, because of a "distortion" and to adjust or replace such costs by data which are not affected by such "distortion", as clearly stated in Recital 4 of Regulation No 1972/2002.

[1] EU's first written submission, para. 63.

8. The scope of Article 2(5), second subparagraph, as described by Argentina has been expressly confirmed by the General Court in the judgments referred to by Argentina.

In particular, in the second *Acron* case (Case T-118/10), the General Court expressly noted that the assessment "*whether the records reasonably reflect the costs*" is made pursuant to the second subparagraph of Article 2(5):[2]

> The institutions were therefore 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.[3]

9. Finally, the consistent practice of the EU authorities which has developed after the introduction into the Basic Regulation of Article 2(5), second subparagraph, confirms the foregoing. The *Aluminium Foil case* to which the EU refers is irrelevant since the determination was based in that case on Article 18 of the Basic Regulation.

10. It is clear from the foregoing that Argentina does not confuse the scope of the second subparagraph of Article 2(5) with the scope of the first subparagraph of Article 2(5), as asserted by the EU.[4] Instead, it is the defendant that artificially creates a non-existent two-steps approach between Article 2(5) first and second subparagraphs, on the basis of the allegation that the second subparagraph only describes "what the authorities are authorized to do in order to calculate the costs, when the company records cannot be used".[5] The EU's position should not prevail. That position is based on a simplistic reading of Article 2(5), first and second subparagraphs, taken in isolation, and without consideration of their context. As demonstrated above, the text of Article 2(5), second subparagraph, together with its background makes evident that it is pursuant to that particular provision that the authorities determine that records do not reasonably reflect the costs where the prices are "abnormally low" or "artificially low", in comparison to prices in other markets, because of an alleged "distortion". This has been expressly confirmed by the General Court, and is supported by the consistent practice of the EU authorities which has developed after the introduction into the Basic Regulation of Article 2(5), second subparagraph.

11. As to the **precise meaning and content of the measure challenged**, Argentina notes that the "measure on its face" is only "the starting point" for an "as such" analysis.[6] As the Appellate Body underlined, if "the meaning or content of the measure is not evident on its face, further examination is required"[7], as Argentina claims, so it is needed that the Panel "undertake a holistic assessment of all relevant elements (…)"[8] "(…) submitted by a party that the alleged inconsistency with the covered agreements arises from a particular manner in which a measure is applied".[9]

12. After reading the plain text of Article 2(5), second subparagraph, of the Basic Regulation, it is clear that this provision imposes an obligation on the authorities. Indeed, where information of the costs of other producers or exporters in the same country "is not available or cannot be used", then the costs must be adjusted or established on "any other reasonable basis, including information from other representative markets". The second part of that provision also directs the

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[2] Judgment of the General Court in *Acron OAO v Council of the EU*, Case T-118/10, para. 72 (Exhibit ARG-52).

[3] Judgment of the General Court in *Acron OAO and Dorogobuzh v Council of the EU*, para. 46 (Exhibit ARG-23).

[4] EU's opening statement at the first substantive meeting, para. 45.

[5] EU's opening statement at the first substantive meeting, para. 50.

[6] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[7] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168. See also Appellate Body Report, *US – Carbon Steel (India),* para. 4.446 referring to Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

[8] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.451 referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

[9] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.454.

authorities to reject the exporters' records for the same reason that they have to use information from other representative markets.

13. Furthermore, Recital 4 of Regulation No 1972/2002 explains the meaning and content of Article 2(5), second subparagraph. Recital 4 explicitly acknowledges that, in situations where, because of a particular market situation, sales do not permit a proper comparison, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration. The use of the words "in particular" demonstrates that the finding that the records do not reasonably reflect the costs is not limited to situations in which a particular market situation has been found to exist. The next sentence in Recital 4 establishes that this is to be the case whenever the costs are "affected by a distortion". The EU itself has noted that Article 2(5), second subparagraph, is used by the authorities in cases where, like in the case at hand, normal value is constructed because of lack of sales in the ordinary course of trade. It cannot just argue thereafter that Recital 4, which precisely seeks to explain the meaning and content of Article 2(5), second subparagraph, is not relevant for the interpretation of that provision.

14. The fact that Recital 4 is relevant for the interpretation of Article 2(5), second subparagraph in all circumstances is further supported by the fact that the General Court referred to Recital 4 even with regard to situations in which the normal value was constructed pursuant to a finding that there was no or insufficient sales in the ordinary course of trade.[10]

15. In conclusion, Regulation No 1972/2002, and in particular its Recital 4, are highly relevant for the understanding of the content and meaning of Article 2(5), second subparagraph. They demonstrate that Article 2(5), second subparagraph, provides the legal basis for (a) rejecting the cost data included in the records when they are affected by a "distortion", in particular, when they reflect prices that are "artificially low" and (b) for adjusting or establishing the costs in such a case on the basis of data from sources which are not affected by such distortions.

16. Argentina has also referred to the consistent practice of the EU authorities pursuant to Article 2(5), second subparagraph, of the Basic Regulation as a relevant element for the understanding of the meaning and content of Article 2(5), second subparagraph.[11] In all the cases referred to by Argentina, the EU authorities have described the prices of the input concerned as being "significantly lower" or "much lower" in comparison with prices in other markets, such as prices in the EU. The prices have been described as being "abnormally low" and/or "artificially low" prices. What is relevant is the consistency in the determinations made by the EU authorities, that is, where the prices of the inputs have been found to be "artificially low" or "abnormally low" because of an alleged distortion, the authorities have consistently concluded that the records did not reasonably reflect the costs associated with the production and sale of the product under consideration.

17. Finally, the judgements of the General Court are relevant for the understanding of the meaning and content of Article 2(5), second subparagraph, since the General Court has confirmed on the basis of Recital 4 of Council Regulation No 1972/2002 that the key element in the determination that the data were not "reasonable" is the existence of a "distortion".

18. In conclusion, when assessed in conjunction, these elements establish altogether that where the prices of the inputs are found to be "artificially low" or "abnormally low" in comparison to prices on other markets as a result of a "distortion", the records do not reasonably reflect the costs associated with the production and sale of the product under consideration and the costs included in the records are adjusted or replaced by information from other representative markets.

The Mandatory / Discretionary distinction

19. Argentina first notes that there is no provision in the ADA or any other Agreements which establishes a mandatory/discretionary standard that the Panel would have to apply. In other words, the Panel is required to examine whether the measure is consistent with the relevant WTO obligations, not whether the measure is discretionary or mandatory. Thus, the mandatory/discretionary distinction is not a test that panels are required to apply. At best, it could

[10] Judgment of the General Court in *Acron OAO and Dorogobuzh v Council of the EU*, Case T-235/08, para. 30 (Exhibit ARG-23).

[11] See Argentina's first written submission, section 4.2.2.

in certain cases be an "analytical tool", which, as established by the Appellate Body, should not be applied "mechanistically", and the significance of which would vary from case to case.[12]

20. Argentina submits that the starting point of the analysis in an "as such" claim is the provision with which the measure is claimed not to be consistent. Therefore, if the relevant WTO provision prohibits a certain conduct, the mere fact that the measure being challenged provides for such a conduct should lead to the conclusion that there is a violation. Thus, even if Article 2(5), second subparagraph, only provided for the possibility - and did not require – that the authorities reject the records in such situations, the mere possibility would render it inconsistent with Article 2.2.1.1 of the ADA. The same reasoning applies to Argentina's claim under Article 2.2 of the ADA.

21. Second, and in any case, Argentina submits that Article 2(5), second subparagraph, is not discretionary as alleged by the EU. The text of Article 2(5), second subparagraph, Regulation No 1972/2002, the consistent practice of the EU authorities as well as the judgments of the General Court show that the authorities do not have discretion with respect to situations in which the prices are found to be "abnormally low" or "artificially low" because of an alleged "distortion". In such cases, the authorities necessarily conclude that the records do not reasonably reflect the costs and replace or adjust the costs on the basis of information from other representative markets.

Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2.1.1 of the ADA and, as a result, Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994

22. Regarding the **interpretation of Article 2.2.1.1 of the ADA**, Argentina notes in relation to the text of that provision, that the structure of the first sentence of Article 2.2.1.1 clearly excludes any reasonableness test of the cost elements themselves.[13] This is supported by the fact that the sentence uses the adverb "reasonably" which relates to the verb "reflect" and not the adjective "reasonable" that would be used to describe the "costs". Thus, the test is not to determine whether the cost elements are "reasonable" in relation to any type of outside benchmarks, but whether the records of the producer/exporter investigated provide reasonable information of the costs that are associated with the production and sale of the product under consideration for that producer/exporter in the framework of that investigation.

The definition of the term "costs" as "charges or expenses" refers to a concrete amount by opposition to a hypothetical value, such as an international price, while the term "associated" does not in any away imply "a broad range of relations between the "costs" and the "production""[14] such that it could "capture the costs that would normally be associated with the production and sale of the goods".[15] The word "associated" simply means that the costs must "pertain"[16] to the production and sale of the product under consideration.

23. Regarding the context, Argentina notes that the second and third sentences of Article 2.2.1.1 confirm that the test under the first sentence is not about the reasonableness of the costs in relation to outside benchmarks but about the relationship between the costs and the production and sale of the product under investigation for each producer/exporter examined in the anti-dumping investigation at issue. Article 2.2 which refers to the "cost of production in the country of origin" means that Article 2.2.1.1 cannot imply a test whereby it is examined whether the "costs" are reasonable in light of benchmarks outside of the country of origin. As to Article 2.2.2 of the ADA, this provision which deals exclusively with the determination of the "amounts for administrative, selling and general costs and for profits" confirms that if the drafters had intended to authorize the authorities to use data other than those of the producers/exporters for the calculation of the "cost of production", they would have explicitly provided for that possibility in Article 2.2.1.1.

24. Finally, Argentina submits that "dumping" is about the "pricing behaviour" of the exporters/producers concerned and that this applies to both the "export price" and the "normal value" as the Appellate Body itself noted is *US – Zeroing (Japan)*. The European Union's view that

[12] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.
[13] Argentina's first written submission, para. 107.
[14] EU's first written submission, para. 137.
[15] EU's first written submission, para. 139.
[16] Panel Report, *Egypt – Steel Rebar*, para. 7.393.

the normal value is "the value that the products should have in normal circumstances" is inconsistent with the proposition that the normal value relates to the pricing behaviour of the exporter/producer investigated. Indeed, the dumping found in such circumstances would not result from the pricing behaviour of the exporter/producer concerned but from the difference between the export price of the exporter/producer concerned and a hypothetical value, namely the one that products *should have in normal circumstances*. This view departs from the definition of "dumping" which is said to relate to the pricing behaviour of the specific exporter/producer investigated.

25. Regarding the object and purpose, Argentina notes that, by claiming that the authorities should be authorized to address costs of inputs which are not "normal", the EU appears to seek to address so-called "input dumping" which has been described as "situation where materials or components that are used in manufacturing an exported product are purchased internationally or domestically at dumped or below cost prices, whether or not the product itself is exported at dumped prices".[17]

26. This issue was discussed by the Ad-Hoc Group on the Implementation of the Anti-Dumping Code of the Committee on Anti-Dumping Practices just before the Uruguay Round. There was, however, no consensus on this issue. Furthermore, the Draft Recommendation prepared by the Ad-Hoc Group confirms that no provision in the GATT or in the Anti-Dumping code authorized the use of anti-dumping duties to address "input dumping". As Argentina explained in its response to Panel's question No. 18, the negotiating history of Article 2.2.1.1 shows that there was no intention amongst the Parties to introduce "the requirements that the costs reflected in the records should be reasonable", as claimed by the defendant.[18] Furthermore, the issue of "input dumping" was raised during the Uruguay Round negotiations but was not addressed in the ADA.

27. In conclusion, the analysis of the text and context of Article 2.2.1.1 as well as of the object and purpose unambiguously demonstrates that this provision does not permit investigating authorities to reject data included in the exporter/producer's records because such data reflect "abnormally low" or "artificially low" prices because of a "distortion".

28. As to the **claims**, Argentina first submits that to the extent that the Panel confirms that Article 2.2.1.1 prohibits the rejection of data in the 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 that rejection falls within the category of what is prohibited by Article 2.2.1.1. Second, and in any case, Argentina submits that pursuant to Article 2(5), second subparagraph, the authorities are required to conclude that the records do not reasonably reflect costs when prices are found to be "abnormally low" or "artificially low" because of an alleged distortion, thereby violating Article 2.2.1.1 of the ADA.

Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994

29. Regarding the **interpretation** of Article 2.2 of the ADA, Argentina notes that the text of the provision is clear and necessarily requires that the data/evidence used must be data/evidence in the country of origin. Furthermore, even if evidence outside the country or origin could be used, it would have to be demonstrated that the cost of production which is based on such data/evidence constitutes the "cost of production in the country of origin".

30. As to the **claims**, Argentina submits that Article 2(5), second subparagraph, violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because it provides that, where the costs of other producers or exporters in the same country are not available or cannot be used, the costs shall be adjusted or established on any other reasonable basis, including information from other representative markets while Article 2.2 prohibits the construction of normal value on a basis other than "the cost of production in the country of origin". Furthermore, Argentina notes that the authorities do not have the "broad discretion" as claimed by the EU. The text of Article 2(5), second subparagraph, as confirmed by the practice, shows that where information from the

[17] Draft Recommendation concerning treatment of the practice known as input dumping, ADP/W/83/Rev.2.

[18] EU's opening statement at the first meeting of the Panel, para. 40.

domestic market is not available or cannot be used, the costs must be adjusted or replaced on any other reasonable basis including information from other representative markets.

C. CLAIMS AGAINST THE ANTI-DUMPING MEASURES ON IMPORTS OF BIODIESEL ORIGINATING IN ARGENTINA

As a preliminary matter, Argentina noted several factual inconsistencies in the EU's defense.

Claims pursuant to Articles 2.2 and 2.2.1.1 of the ADA and Article VI:1(b)(ii) of the GATT 1994 and consequential claim pursuant to Article 2.1 of the ADA and Article VI:1 of the GATT 1994

31. In the biodiesel investigation, the EU first rejected the cost of soybean that was reported by the producers under investigation and that was used to determine the cost of soybean oil, on the basis that they were found to be artificially lower that the international prices due to the distortion created by the Argentine export tax system. After the rejection of the reported costs of soybean, the EU went on to replace those costs with the reference FOB prices of soybean.

32. Argentina has claimed that the EU authorities were not entitled to examine whether the costs of soybeans "would pertain to the production and sale of biodiesel in normal circumstances, i.e. in the absence of the distortion caused by Argentina's export tax on the raw materials".[19] Therefore, by rejecting the cost data of soybeans as included in the records of the producers because they were "artificially lower than the international prices due to the distortion created by the Argentine export tax system"[20], the EU violated Article 2.2.1.1 of the ADA.

33. It is important to emphasise that the EU authorities not only wrongfully tested whether the costs reflected costs of soybeans that would normally be associated with the production and sale of biodiesel in normal circumstances, but they also wrongfully carried out this test in comparison with "international prices". As Argentina has underlined previously, comparison with benchmarks outside the country of origin is clearly incompatible with the express requirement in Article 2.2 that refers to the "cost of production *in the country of origin*".

34. The EU has explained that the international price of soybean - which has been used as benchmark - is the price that *would have* pertained to the production and sale of biodiesel in the absence of the export tax on soybean.[21] It has also stated that the difference between the international price and the domestic price of soybean (which is the price that was reported by the producers under investigation) is the export tax and other expenses incurred for exporting it.[22]

35. Argentina submits that implicit in these statements is the consideration that, in fact, the international price of soybean did not pertain to the production and sale of the biodiesel under investigation *in that investigation* and *in that case.* Therefore, according to the EU's own findings in the biodiesel investigation, the international price of soybean that was used as benchmark to determine that the costs of soybeans were not reasonably reflected in the records[23] is *not* associated with the production and sale of biodiesel within the meaning of the second proviso of the first sentence of Article 2.2.1.1 of the ADA.

36. Given that the international price of soybean is not a cost of the Argentinean producers that is associated with the production and sale of biodiesel in that investigation, the EU was not allowed, under the second proviso of the first sentence of Article 2.2.1.1, to test the records of the Argentinean producers against those costs.

37. Therefore, in rejecting the cost of soybean reported by the exporting producers when constructing normal value on grounds that those costs "were found to be artificially lower than the international prices", the EU acted inconsistently with Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994.

[19] EU's first written submission, para. 236.
[20] Definitive Regulation, Recital 38 (Exhibit ARG-22).
[21] See, for instance, EU's first written submission para. 236.
[22] Definitive Regulation, Recital 37 (Exhibit ARG-22).
[23] Definitive Regulation, Recital 38 (Exhibit ARG-22).

38. With regard to Article 2.2, Argentina submits that the ADA provides that the costs of production must be "the cost of production in the country of origin". According to this, Argentina has demonstrated that the EU violated this obligation since in calculating the cost of production of the Argentinean exporters/producers, it did not use domestic prices of soybeans, but the reference FOB prices of soybeans, net of fobbing costs.[24]

39. The reference FOB price of soybean minus fobbing costs, on the basis of which the EU calculated the cost of production, is not a "price to be paid for the act of producing" (i.e. cost of production) in Argentina (the country of origin), as it comprises the export tax on soybeans and because the domestic price of soybean is equivalent to the reference price *minus* fobbing costs and *minus* export taxes. The reference FOB price is, at best, a proxy of the export price of soybean but not a cost at which soybean is acquired domestically. It thus acted inconsistently with Article 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994.

40. Finally, for the reasons expressed in its opening statement[25] and in its response to Panel question No. 55, Argentina maintains its claims under Article 2.1 of the ADA and Article VI:1 of the GATT 1994.

The EU acted inconsistently with Articles 2.2 and 2.2.2(iii) of the ADA because the amounts for profits established by the EU were not determined on the basis of a reasonable method

41. Argentina asserts that, contrary to what the EU pretends, the mere fact of establishing an amount and then testing its reasonableness is insufficient to comply with the terms of Article 2.2.2(iii) of the ADA. In order to fulfil the requirements of that provision, the selected amount needs to be arrived at following a reasonable method. Given that the EU did not establish the amount for profits pursuant to any method, let alone a reasonable one, it has violated Articles 2.2.2(iii) and 2.2 of the ADA.

The EU acted inconsistently with Article 2.4 of the ADA in failing to make due allowance for differences affecting price comparability, including differences in taxation, and in precluding a fair comparison between export price and normal value

42. Argentina has shown that the manner in which the EU constructed normal value whereby it disregarded the domestic price of soybean as a basis to calculate the "oil share" (i.e. the value of the bean corresponding to the oil) and substituting it with the "FOB reference price" of soybean as a basis from which to calculate the "oil share" is inconsistent with Articles 2.2 and 2.2.1.1 of the ADA. This WTO-inconsistent manner of substituting the cost of soybean resulted in a normal value applied to the exporting producers that reflected the international price of soybean oil, as if the exporting producers were located outside of the territory of Argentina.

43. In subsequently calculating the dumping margin, the EU compared this "non-domestic" or "international" normal value of biodiesel with an export price that was fully "domestic", i.e. without the substitution or the adjustment of the cost of soybean out of which the "oil share" was calculated. By proceeding in that way, the EU acted as if it were calculating dumping margins of the finished product based on differences between the domestic price and the export price not of the product under consideration, but of its primary input. Therefore, the EU generated an artificial imbalance between the export price and the normal value.

44. As a consequence, Argentina has claimed that a difference exists between normal value and export price[26] and that this difference affects price comparability.[27] It consequently claims that the comparison between normal value and export price, absent an adjustment to account for this difference, is not a fair comparison and consequently it is inconsistent with Article 2.4 of the ADA.

The EU acted inconsistently with Article 9.3 of the ADA and Article VI:2 of the GATT 1994 in imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA

[24] Argentina's first written submission, paras. 245-254.
[25] Argentina's opening statement at the first meeting of the Panel, paras. 18-22.
[26] Argentina's first written submission, paras. 298-299.
[27] Argentina's first written submission, para. 300; Argentina's opening statement at the first meeting of the Panel, para. 85.

45. Argentina's claim is that the EU has imposed and levied anti-dumping duties in excess of the margin of dumping that it should have calculated in conformity with Article 2 of the ADA and that, consequently, it acted inconsistently with Article 9.3 of the ADA and Article VI:2 of the GATT 1994.[28]

46. The defense of the EU appears to suggest that the terms "margin of dumping" have a meaning under Article 9.3 that is different from the meaning assigned to those terms under Article 2 and that, therefore, the level of the duties imposed or levied on the dumped imports may be tested against a margin of dumping which is not the margin of dumping established in conformity with Article 2 of the ADA. In line with the EU's contention, under Article 9.3, the "margins of dumping" against which the duties are to be tested would be those that are found by the investigating authority, regardless of their consistency with Article 2. This line of thought runs counter to Article 2.1 of the ADA, which defines dumping "for the purpose of this agreement" and thus shows that the meaning is uniform throughout the agreement.[29] It is also inconsistent with the text of Article 9.3, which explicitly states "as established under Article 2" and not "as determined by the investigating authority".

The EU acted inconsistently with Articles 3.1 and 3.4 of the ADA in its evaluation of the production capacity, the utilization of capacity and the return on investment of the EU industry

47. Argentina first submits that **the EU's definition of capacity and capacity utilization is inconsistent with Article 3.4**. Article 3.4 contains no basis for excluding capacity that is "idle" or "not available for use" from the assessment of capacity utilization.[30] Moreover, the EU not only has not pointed to any textual or contextual basis that would support the exclusion of part of the production capacity from the analysis of the utilization of capacity, but has not offered any explanation of what this exactly means. Therefore, the EU acted inconsistently with Article 3.4 of the ADA in excluding part of the production capacity, namely the "idle" capacity, from the assessment of the utilization of capacity.

48. Second, Argentina submits that **the EU's assessment of production capacity and capacity utilization is not based on positive evidence**. Argentina notes that the domestic industry intended to exclude "idle" capacity from its production capacity from the beginning of the investigation, as indicated by the statement that idle capacity had *already* been excluded from the capacity figures of EBB members.[31] Against this background, the fact that the production capacity figures for non-EBB members included both their idle capacity and that of EBB members appears to have been a mistake.[32] The data, on which the evaluation of capacity utilization is based, appear not to be reliable because they are contradicted by a multiplicity of available public sources, including EBB itself.[33] In view of the foregoing, it must be concluded that the EU's evaluation of production capacity and capacity utilization was not based on positive evidence and was therefore inconsistent with Articles 3.1 and 3.4 of the ADA**.**

49. Third, **the EU did not conduct an objective examination of the domestic industry's production capacity and utilization of capacity**. The EU attempts to contradict Argentina's claims by stating that it selected a sample of EU companies and subjected their data to detailed examination and verification.[34] However, all the sampled producers were EBB members, whose production capacity figures excluded "idle capacity" from the beginning. Therefore, the verification of those *EBB* companies does not guarantee the accuracy of the figures relating to *non-EBB* members and to the industry as a whole, which concerns the figures that were adjusted.

[28] Argentina's first written submission, para. 309.
[29] See also, Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96.
[30] Argentina's first written submission, paras. 354-356.
[31] Submission by EBB of 17 September 2013, section 1.1 (Exhibit ARG-47).
[32] The fact that this is a mistake is also apparent from EBB's letter of 17 November 2013 which cautions that "… any calculation of non-EBB member production capacity would (…) still include idle capacity from EBB and non-EBB member and would lead to a false calculation". See Submission by EBB of 17 September 2013, section 1.3, Exhibit ARG-47.
[33] See Argentina's first written submission, para. 370.
[34] EU's response to Panel question No. 62, para. 91.

50. Fourth, **the EU did not consistently evaluate the utilization of capacity and return on investment**. In its answer to Panel question No. 63(b) and in its opening statement[35], Argentina has addressed the EU's argument that there were no sampled companies with so-called "idle" capacity.[36] As explained by Argentina, at least one of the sampled companies, Diester, appeared to have what would fall within the EU's vague definition of "idle" capacity, that is, capacity that was installed but which was not available for use. Therefore, Argentina maintains its claim that the EU acted inconsistently with Article 3.4 of the ADA in failing to evaluate the return on investments and the utilization of capacity in a consistent manner.

The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by certain factors was not attributed to the allegedly dumped imports

51. Regarding **overcapacity**, Argentina has demonstrated that the EU failed to make an appropriate assessment of the injury caused to the EU industry by its overcapacity. The EU's defense is entirely unconvincing for a number of reasons.

52. First of all, the EU confuses utilization of capacity as an injury indicator (under Article 3.4 of the ADA) and the overcapacity of its domestic industry as a cause of injury (under Article 3.5 of the ADA). Second, the confusion prevented the EU from ascertaining the impact of this cause of injury on capacity utilization as an injury indicator, thus understating the controlling importance of overcapacity as a source of injury. Third, there is a correlation between the increase in overcapacity and the decrease in profitability which, together with the decline in market share are the main injury indicators on which the EU has relied to come to the conclusion that the domestic industry was materially injured.[37] Therefore, contrary to the EU's assertions, the overcapacity *is* the cause of the declining profit and consequently, of the injury suffered by the domestic industry. Fourth, the profit of 3.5% of the domestic industry in 2009 to which the EU refers was, in fact, extremely low by the EU's own standards, namely a 15% injury elimination level set by the EU for the period April 2007 to March 2008.[38] This level which is well below the injury elimination level set by the EU itself disproves the EU's contention that the industry could be healthy with high overcapacity. In any case, Argentina recalls that between 2009 and the IP overcapacity did not remain constant but instead increased by 1,561,322MT. Fifth, even if no increase in imports would have taken place at all during the IP, the overcapacity would still be enormous.

53. To summarize, the continued overcapacity and its significant increase between 2009 and the IP was the main factor injuring the domestic industry and not the imports originating in Argentina and Indonesia. The above shows that the EU's decision to attribute controlling importance to the allegedly dumped imports as a source of injury instead of to the overcapacity of the domestic industry amounts to a failure to appropriately separate and distinguish the injurious effects of the overcapacity from those of the allegedly dumped imports. Therefore, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

54. Turning to the **long-term commercial strategy of the EU industry**, Argentina noted that the EU's arguments are unconvincing for various reasons. First, the EU's statement that the domestic industry was *compelled* to buy biodiesel from Argentina is not believable given that the imports from Argentina and Indonesia were not a marginal phenomenon in comparison to total imports. This argument also overlooks the fact that biodiesel production facilities in Argentina are either directly affiliated to the domestic industry or related through common ownership.

55. Second, the EU has not provided evidence that had the domestic industry not made those imports, traders would have made those imports. Finally, the argument about the maintenance of a customer base is unconvincing and contradicted by the fact that the EU itself added the imports made by the Union industry to the market share of the allegedly dumped imports, instead of adding it to the market share of the domestic industry.[39]

56. In view of the above, Argentina submits that the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to separate and distinguish the injurious effects of the domestic

[35] Argentina's opening statement at the first meeting of the Panel, paras. 100 and 101.
[36] EU's first written submission, para. 318.
[37] Provisional Regulation, Recital 118 (Exhibit ARG-30) and Definitive Regulation, Recitals 142 and 143 (Exhibit ARG-22).
[38] See Exhibit EU-14, recitals 181 and 182.
[39] Definitive Regulation, Recital 156 (Exhibit ARG-22).

industry's own commercial strategy, in qualifying it as "self-defense" and in incorrectly attributing its effects to the allegedly dumped imports.

57. With regard to **double-counting**, Argentina has claimed that the EU failed to appropriately assess the injurious effects of the double-counting regimes and that it failed to separate and distinguish its effects from those of the allegedly dumped imports. In responding to this claim, the EU has stated that, double-counting shifts demand within the Union industry and does not generate demand for imports and that Union producers of double-counting biodiesel experienced negative performance, suggesting that the decline of non-double counting producers cannot be attributed to the performance of the double-counting producers.[40]

58. Argentina disagrees with these arguments for the following reasons. First of all, the fact that the financial situation of the producers declined only after double-counting had been repealed in France is irrelevant, as the effects of double-counting materialized during the IP. Consequently, the injurious effects of that scheme should have, but were not distinguished and separated from the injury caused by the allegedly dumped imports as mandated by Article 3.5 of the ADA. Second, Argentina notes that the EU failed to examine double-counting regimes other than the French regime[41], despite the fact that their existence was brought to the attention of the investigating authority.

59. In view of the above, Argentina submits that the EU violated Articles 3.1 and 3.5 of the ADA in failing to examine double-counting and to distinguish and separate the injurious effects of double-counting from those of the allegedly dumped imports.

60. Finally, Argentina has claimed that the EU's industry is at a disadvantage because of a **lack of vertical integration and lack of access to raw materials**. The disadvantage results from the introduction of additional phase of transport into the production chain, which does not exist when the raw materials are processed on site. The significance of this disadvantage cannot be understated, especially in view of the fact that transport of the raw material is not only an additional phase, but occupies a much larger volume of cargo space.

61. In consequence, in failing to separate and distinguish the effects of the lack of vertical integration and the lack of access to raw materials from the injury caused by the allegedly dumped imports, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

62. For the reasons set out in this submission and in previous submissions, Argentina respectfully requests that this Panel find that:

I.- Article 2(5) of the Basic Regulation is inconsistent as such, with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data of the exporters as included in its records when those costs reflect prices which are "abnormally or artificially low", because the costs do not reflect market prices or because they are allegedly affected by a distortion; (B) Article 2.2 of the ADA 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", even though neither provision allows for an establishment of the costs on this basis. As a result, the EU acted inconsistently with Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA, and

II.- The anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 because the EU failed to calculate the cost of production on the basis of the records kept by the producers under investigation; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because the EU failed to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin; (C) Article 2.2.1.1 of the ADA because the EU included costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (D) As a result of the inconsistencies mentioned in points (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994; (E) Articles 2.2

[40] EU's first written submission, para. 339 and EU's response to Panel question No. 79.
[41] EU's response to Panel question No. 73.

and 2.2.2(iii) of the ADA because the EU failed to base the profit margin as a component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA; (F) Article 2.4 of the ADA because the EU failed to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and normal value; (G) Article 9.3 of the ADA and VI:2 of the GATT 1994 because the EU 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 ADA; (H) Articles 3.1 and 3.4 of the ADA because the EU's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the EU industry; (I) Articles 3.1 and 3.5 of the ADA since the EU failed to conduct an objective examination, based on positive evidence, of known factors other than the allegedly dumped imports in its non-attribution analysis; hence, the EU failed to ensure that the injury suffered by the domestic industry of the EU resulting from other factors was not attributed to the allegedly dumped imports. Argentina considers that the measures at issue should be withdrawn.

63. Argentina respectfully requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union should implement the recommendations and rulings of the DSB to bring its measures into conformity with the Anti-dumping Agreement and the GATT 1994.

ANNEX B-3

EXECUTIVE SUMMARY OF THE STATEMENT OF ARGENTINA
AT THE FIRST MEETING OF THE PANEL

1. Opening Remarks

1. Argentina asserts that we are not here because export taxes are the source of unfair advantages for producers in countries where exports are taxed, as the narrative of the EU suggests. We are here because of structural problems and lack of competitiveness in the EU industry of biodiesel. These structural problems are unfortunate in light of the huge subsidies granted to the biodiesel industry in Europe.

2. Argentina believes that the investigating authorities in the EU have a mandate to challenge export taxes at any cost. And it is what they did, even knowing that Argentina and Indonesia would bring a case before the WTO. However, export taxes are not only legal (there are no disciplines for export taxes under WTO law) but also legitimate instruments broadly used by developing countries and mainly for fiscal purposes.

2. Introduction

3. Despite being based on an intensely litigated agreement – the Anti-Dumping Agreement - this dispute is still unique on at least two counts: a) The first aspect is the fact that while dumping reflects the conduct of individual companies that export at prices below those in their own domestic market, in the case at hand, the European Union has targeted a series of practices that are very different from such price discrimination and are completely beyond the control of the exporting producers b) the second distinctive feature of this case which is derived from the first one, is the overt attempt by the European Union to expand the scope of application of the Anti-Dumping Agreement. According to the European Union, dumping would no longer be confined to the well-known practice of pricing the same product differently for different markets. Instead, it would also encompass differences in costs at which producers in different countries obtain inputs. Hence, as of the moment there is a difference in the price at which a producer can have access to a given input, and provided that such difference is reflected in the price of the final product, then, according to the European Union, that product is being dumped.

4. According to the above said, Argentina first challenges "as such" Article 2(5), second subparagraph, of the Basic Regulation, which provides that where the costs of the inputs in the records reflect prices that are found to be artificially or abnormally low in comparison with the prices on other markets, the costs have to be adjusted or established on another basis, including on the basis of information from other representative markets. This measure is manifestly inconsistent with the provisions of the Anti-Dumping Agreement and, in particular, with its Article 2 which precisely lays down the rules that must be followed for the determination of the normal value. This measure is of significant concern to Argentina given that the investigating authority endows itself with a margin of discretion that goes well beyond what is allowed under the Anti-Dumping Agreement. The European Union is, in fact, trying to create a new category of "dumping" which does not exist under the Anti-Dumping Agreement.

5. Argentina also challenges the anti-dumping measures imposed by the European Union on imports of biodiesel from, Argentina. These measures are based on manifestly flawed determinations of dumping since the European Union erroneously rejected the Argentinean producers' cost data for soybean and replaced them by the average of the FOB reference price, thereby finding dumping or artificially inflating the margins of dumping of the Argentinean producers. Furthermore, these measures are also based on manifestly flawed determinations relating to both injury and causality.

3. Request for a Preliminary Ruling and Preliminary Issues raised by the European Union

6. In Argentina's view, to the extent that the European Union cannot demonstrate that resolving these Article 6.2 claims would make any practical differences, these issues appear to be moot and, in Argentina's view, the Panel therefore does not need to examine them any further.[1]

7. The same comment applies to the European Union's claim about Argentina's alleged failure to identify the "specific measures at issue" in which it argued that the references to the terms "implementing measures and related instruments or practices" and to "related measures and implementing measures" in Argentina's Panel Request were too vague.[2] Argentina noted that these words were not on their face inconsistent with the requirement to identify the specific measures at issue and that, in any case, this objection appeared to be premature and unnecessary.

8. The European Union first asserts that the Panel must reject Argentina's claims pursuant to Article 2.1 of the Anti-Dumping Agreement and VI:1 of the GATT 1994 because they are definitional provisions that do not impose independent obligations[3] and is not applicable to situations where there are no sales in the ordinary course of trade.[4] However, Argentina remembers that in subparagraph 470 of its first written submission has explained that the European Union's violations of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 result from the numerous violations of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

9. The European Union erroneously argues that Argentina claims that a violation of Article 2.2 automatically constitutes a failure to comply with Article 9.3.[5] This is not correct. Argentina is not taking issue with the calculation of the normal value under its Article 9.3 claim. What Argentina has submitted is that the European Union has imposed definitive anti-dumping duties which exceed the margins of dumping as established under Article 2 of the Anti-Dumping Agreement.

4. Claims against Article 2(5), second subparagraph, of the Basic Regulation

10. Argentina is not challenging "two separate "measures""[6], as claimed by the European Union, but only one measure, namely Article 2(5), second subparagraph.

4.1 Claim under Article 2.2.1.1 of the Anti-Dumping Agreement

11. Argentina claims first that Article 2(5), second subparagraph, violates Article 2.2.1.1. In this sense, Argentina asserts that the introduction of the second subparagraph in Article 2(5) by Regulation No 1972/2002 gave a specific meaning and content to the condition 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". Under and pursuant to the new second subparagraph of Article 2(5), the authorities have to conclude that the records do not reasonably reflect costs associated with the production and sale of the product under consideration where they find that the costs of the inputs reflect prices that are "abnormally or artificially low" in comparison to prices on other markets.

12. Thus, it clearly flows from Regulation No 1972/2002 that, with the introduction of the second subparagraph of Article 2(5), a condition has been imposed on the authorities which must examine whether the costs of the inputs are not "abnormally or artificially low" in comparison to prices on other markets. This is actually supported by the wording of the second part of Article 2(5), second subparagraph, which refers to the adjustment or establishment of costs on any other reasonable basis including from other representative markets. The requirement to use information from other representative markets is rendered necessary precisely because the data on the domestic market are to be considered non-usable when they are found to be "artificially or abnormally low" in comparison with prices on other markets.

[1] Panel Report, *US – Countervailing and Antidumping Measures from China*, paras. 3.9 – 3.10.
[2] European Union's request for a preliminary ruling, paras. 8 – 9.
[3] European Union's first written submission, paras. 48 and 53.
[4] European Union's first written submission, para. 49.
[5] European Union first written submission, para. 56.
[6] European Union's first written submission, para. 63.

13. This is further supported by the consistent practice of the authorities, because it has been found that there is an automatic link between, on the one hand, prices that are found to be "abnormally or artificially low" in comparison to prices on other markets and, on the other hand, the finding that the costs are not reasonably reflected in the records. There is no discretion, and the practice confirms that.

14. Contrary to what European Union affirms, Argentina is not required to demonstrate that the "abnormally or artificially low" prices of the inputs is the only reason justifying the conclusion that the company records do not reasonably reflect the costs. Argentina is only required to demonstrate that the measure at issue necessarily requires the authorities to conclude that the records do not reasonably reflect the costs when the costs reflect prices that are found to be abnormally or artificially low.

15. The European Union claims that under the second condition of Article 2.2.1.1, the authorities can examine whether the records reflect costs that would normally be associated with the production and sale of the goods in normal circumstances.[7]

16. To defend its position, the European Union is thus obliged to distort the ordinary meaning of the terms of Article 2.2.1.1, adding words that are not there, such as "would normally be" and "in normal circumstances". As emphasized in Argentina's first written submission, such an interpretation is not only contrary to the ordinary meaning of the words, but also to the structure of the sentence and the context of this provision.

17. There is nothing in Article 2.2.1.1 or other provisions of the Anti-Dumping Agreement suggesting that the cost data of producers can be disregarded because they are lower than what they would be in other markets. Argentina underlined earlier, rejecting the costs of a producer on the ground that there are not "normal" in comparison to the prices in another country is fundamentally contrary to the concept of "dumping" in the Anti-Dumping Agreement.

4.2 Claim under Article 2.2 of the Anti-Dumping Agreement

18. Argentina asserts that the wording of Article 2(5) second subparagraph is clearly WTO inconsistent: it "mandates" the authorities to adjust or establish the costs "where such information is not available or cannot be used", "on any other reasonable basis, including information from other representative markets".

19. Furthermore, the European Union errs when it argues that it would be necessary to demonstrate that this provision requires "the investigating authority to use such information "in all cases"."[8] However, as the Appellate Body noted in an earlier case, in order to succeed with an "as such" claim,[9] Argentina is not required to demonstrate that in each and every case where Article 2(5) second subparagraph will be used, it will end in a result which is inconsistent with WTO rules. It is sufficient for Argentina to demonstrate that this rule will necessarily lead to violations of WTO rules in certain specified circumstances.

20. The European Union's interpretation that "[t]he 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 the country of origin, where the conditions of production and sale are not in the ordinary course of trade"[10] is untenable.

[7] European Union's first written submission, paras. 133, 139 and 144.
[8] European Union's first written submission, para. 186.
[9] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 172.
[10] European Union's first written submission, para. 198.

5. Claims regarding the Anti-Dumping Measures on imports of biodiesel originating in Argentina

5.1 Claims under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

5.1.1 The European Union misinterprets Article 2.2.1.1 of the Anti-Dumping Agreement

21. Argentina does not dispute that the costs against which the records must be tested are those that are "associated with the production and sale of the product under consideration". However, as Argentina has emphasized, the fact that the test refers to the "costs associated with the production and sale of the product under consideration" means that the determination must establish whether the costs in question effectively "pertain to the production and sale of the product in question", irrespective of whether the costs are lower than international prices or prices in other markets. In stating that it is entitled to consider "which costs would pertain to the production and sale of biodiesel in normal circumstances", the European Union is adding words which are not there, namely "would" and "in normal circumstances", and is thereby modifying the scope and meaning of this provision.

22. In the biodiesel anti-dumping investigation, the European Union did not examine whether the costs of soybeans in the producers' records reasonably related to the cost of producing and selling biodiesel in Argentina. Rather, it examined those costs against a hypothetical benchmark price and concluded that "the domestic prices of the main raw material used by the biodiesel producers in Argentina were […] artificially lower than the international prices due to the distortion created by the Argentine export tax system".[11]

23. Furthermore, the panel report in *EC – Salmon* confirmed that "the test for determining whether a cost can be used in the calculation of "cost of production" is whether it is "associated with the production and sale" of the like product", the costs being those of the "investigated party." The fact that the Panel in *EC – Salmon* defines the expression "cost of production" as "the price to be paid for the act of producing" does not in any way mean that the word "costs" could be understood as hypothetical prices.

5.1.2 The European Union acted inconsistently with Article 2.2.1.1 in using costs that are not associated with the production and sale of biodiesel for the construction of normal value

24. Argentina has shown that for the exporting producers, the FOB reference price is not a price that is associated with the production and sale of biodiesel. In fact, the reference FOB price is a statistical tool which is calculated by averaging FOB prices of the previous day.

5.1.3 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 failing to construct normal value on the basis of the cost of production in the country of origin

25. In calculating the cost of production, the European Union did not use the domestic price of soybeans, but the reference FOB price of soybeans, net of fobbing costs. By using the reference FOB price of soybeans, the European Union failed to construct normal value on the basis of the cost of production in the country of origin, thereby, acting inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

5.2 Claim under Article 2.4 of the Anti-Dumping Agreement: failure to make a fair comparison

26. Argentina argues that the difference between normal value and export price results from the use of the reference FOB price of soybean, which includes the export tax on soybeans in the construction of the normal value while the export price does not include any export tax at all. Consequently, it affects price comparability and also has a huge impact on the dumping margins.

[11] Definitive Regulation, recital (38), Exhibit ARG-22.

5.3 Claims under Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement in relation to production capacity and utilization of capacity

5.3.1 The European Union's definition of production capacity and utilization of capacity is inconsistent with Article 3.4 of the Anti-Dumping Agreement

27. At the outset, and as also noted by China[12], since Article 3.4 of the Anti-Dumping Agreement contains no reference to availability for use or idleness when providing that the injury assessment includes an evaluation of the utilization of capacity, the European Union's failure to include idle capacity in its evaluation of the utilization of capacity is therefore inconsistent with Article 3.4 of the Anti-Dumping Agreement. Argentina specifically notes that Article 3.4 of the Anti-Dumping Agreement mandates that all relevant economic factors and indices having a bearing on the state of the industry must be evaluated in the context of an injury assessment. The exclusion of capacity, which is a relevant economic factor, from the calculation of the utilization of capacity is thus inconsistent with this provision.[13]

5.3.2 The evaluation of production capacity and utilization of capacity is not based on positive evidence

28. Argentina maintains that the analysis of production capacity and utilization of capacity is not based on positive evidence, contrary to the requirements of Article 3.1 of the Anti-Dumping Agreement, for two reasons: a) the attribution of the "idle" capacity of EBB members and non-EBB members to the capacity of non-EBB Members is implausible due to the magnitude of the mistake, which amounts to almost six million tons and b) the new evidence submitted by the European Union in Exhibit EU-10 does not appear to directly relate to production capacity. Indeed, it only points to the fact that plants have stopped producing or have commenced insolvency proceedings. It does not demonstrate, however, that production capacity has ceased to exist.

5.3.3 The European Union's evaluation of production capacity and utilization of capacity does not involve an objective assessment

29. Contrary to the general obligation assumed under WTO, the European Union favoured evidence produced by one party but which is contradicted by publicly available and reliable information over the evidence on the record until that point.

5.3.4 The inconsistent evaluation of utilization of capacity and return on investment

30. Argentina objects to the inconsistent evaluation of both factors, since the so-called "idle" capacity was excluded from the evaluation of capacity utilization while it was included in the calculation of return on investment.[14]

5.3.5 Causation: overcapacity was a source of injury

31. Argentina maintains that the improper evaluation of the production capacity of the European Union industry under Article 3.4 of the Anti-Dumping Agreement prevented it from properly assessing overcapacity as a source of injury pursuant to Article 3.5. Indeed, an objective evaluation of production capacity and capacity utilization based on positive evidence would not have allowed the European Union to find that capacity utilization was increasing.

32. Furthermore, it is illogical to assert that because the utilization rate was consistently low, it could not be the cause of the decline in profitability or of the poor performance of the European Union industry, considering, especially in this case the gross level of the overcapacity.

33. To sum up, overcapacity was a factor known to the authorities, different from the dumped imports and also a source of injury, the effects of which the European Union was obliged to distinguish and separate from those caused by the allegedly dumped imports.

[12] China's third party submission, para. 151.
[13] Argentina's first written submission, para. 355.
[14] Argentina's first written submission, paras. 387-391.

5.3.6 Causation: long-term commercial strategy of importing biodiesel originating in Argentina as a source of injury

34. The facts show that rather than being forced to import biodiesel originating in Argentina, imports by the EU producers appear to have been a deliberate commercial strategy on their side. First of all, there is ample evidence on the record showing close relations, or even affiliation, to the same corporate groups of European and Argentinean producers, and secondly, the facts on the record show that 60% of total imports from Indonesia and Argentina during the IP were made by the EU industry itself.[15]

35. In conclusion, Argentina submits that the European Union was under the obligation to ensure that the injury resulting from the industry's long term commercial policy was not attributed to the domestic industry. Its failure to do so is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

[15] Provisional Regulation, recitals 132 to 136, Exhibit ARG-30 and Definitive Regulation, recital 151, Exhibit ARG-22.

ANNEX B-4

EXECUTIVE SUMMARY OF THE STATEMENT OF ARGENTINA
AT THE SECOND MEETING OF THE PANEL

1. Preliminary Issues

1. Regarding **Argentina's claim under Article 2.4**, Argentina has demonstrated that a difference exists between normal value and export price[1],that this difference affects price comparability[2] and therefore that, absent an adjustment to account for this difference, the comparison is not fair. In this regard, the *EC – Tube or Pipe Fittings* an the *EU – Footwear (China)* cases referred to by the European Union[3] are not relevant and must be rejected. Therefore, the European Union errs when arguing that Argentina's claim is outside the scope of Article 2.4.

2. Argentina's Claims against Article 2(5), second subparagraph, of the Basic Regulation

2.1 The scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation

2. Argentina argues that the European Union makes an effort to purport an over-simplistic reading of Article 2(5), second subparagraph, in complete isolation from its context when stating that it only "describes what the authorities are authorized to do in order to calculate the costs, when the company records cannot be used".[4] The fact that the determination that the records do not reasonably reflect the costs when they reflect prices that are "abnormally or artificially low" in comparison to prices on other markets because of an alleged distortion is made pursuant to Article 2(5), second subparagraph, of the Basic Regulation, does not only flow from the text of the provision and its background.[5] It has been also expressly confirmed by the practice and the General Court in the second *Acron case*.[6]

3. With regard to the **meaning and content** of Article 2(5), second subparagraph, the European Union had argued that the text of Article 2(5), second subparagraph, did not include the terms used by Argentina to describe the content and meaning of that measure.[7] Argentina has emphasized that, pursuant to Article 11 of the DSU the Panel should undertake a holistic assessment of all relevant elements, not only the text of the law, but also the consistent practice and the judgments of the General Court.

4. The European Union has also raised a new argument, namely that Argentina did not "establish the "scope, meaning and content" of the second subparagraph of Article 2(5) *in general*".[8] According *Argentina – Import Measures* in which the Appellate Body found that "in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, ***to the extent that such content is the object of the claims raised***"[9] this argument must be rejected.

5. On the other hand, the *US – Carbon Steel (India)* case[10] does not support the European Union's position. Indeed, the statement quoted by the European Union that "it is not clear why a number of instances of the application of the measure should in this case *conclusively establish the meaning of the measure at issue in general*, which in this case is confined to [the

[1] Argentina's first written submission, paras. 298-299; Argentina's second written submission, para. 103.
[2] Argentina's first written submission, para. 300, Argentina's opening statement at the first meeting of the Panel, para. 85 and Argentina's second written submission, para. 203.
[3] European Union's second written submission, paras. 25-27.
[4] European Union's opening statement, para. 50.
[5] Argentina's second written submission, paras. 16-33.
[6] Argentina's second written submission, paras. 34-41, 42.
[7] European Union's first written submission, paras. 85-86.
[8] European Union's second written submission, para. 50.
[9] Appellate Body Report, *Argentina – Import Measures*, para. 5.104.
[10] European Union's second written submission, paras. 51-52.

defending party's legislation]"[11], must be read in its context, since this statement[12] does not have the meaning that the European Union *pretends to read in it*.

2.2 Argentina has made a prima facie case on its claims against Article 2(5), second subparagraph, of the Basic Regulation

6. Argentina would like to emphasize that, in order to succeed with its "as such" claims, it is not necessary to demonstrate that the challenged measures requires the authorities to apply it in a manner inconsistent with the covered agreements "*in all cases*" as claimed by the European Union.[13]

7. Argentina has explained why, in its view, the discretionary/mandatory distinction is not relevant for the purposes of its claims and noted that, in any case, the measure at issue does not afford to the authorities the alleged "broad discretion" claimed by the European Union.

8. Firstly, and regarding as the discretionary/mandatory as an irrelevant distinction Argentina has noted that, if the relevant WTO provision prohibits a certain conduct, the fact that the measure being challenged provides for the possibility to adopt such a conduct, should lead to the conclusion that there is a violation of the said WTO provision.[14] Since Article 2.2.1.1 does not permit determinations that the records do not reasonably reflect costs in case of "artificially low" or "abnormally low" prices in comparison to prices on other markets because of an alleged distortion, and Article 2.2 does not permit the use of information other than information in the country of origin, Article 2(5), second subparagraph, must be found to be inconsistent with this specific provision as Argentina has argued.

9. Secondly, in order to make a *prima facie* case, Argentina has demonstrated that the assertion that Article 2(5), second subparagraph, affords broad discretion to the authorities is simply not true. It flows from the various elements presented by Argentina that the authorities do not have the discretion alleged by the European Union. The use of the term "shall" indicates the clear mandatory nature of the rule, and flies on the face of the assertion that second subparagraph of Article 2(5) of the Basic Regulation is framed in "permissive terms".[15] Moreover, the absence of discretion is supported by the consistent practice referred to by Argentina contrary to that of *US – Carbon Steel (India)*[16], and confirmed by the General Court.

10. In relation to Argentina's claims under Article 2.2, the cases referred to by the European Union showing that the EU authorities sometimes make adjustments based on domestic sources are totally irrelevant as well since Argentina is not taking issue with that type of adjustment.

3. Argentina's claims under Article 2.2.1.1 of the Anti-Dumping Agreement

3.1 Legal Interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

11. Argentina in the first place address an important preliminary issue, that is, the European Union claims that what the Panel has to do is to examine Argentina's interpretation and determine whether "this is indeed the proper interpretation of Article 2.2.1.1".[17] This is, however, an erroneous description of the Panel's task. The Panel has to determine whether Argentina has established that Article 2(5), second subparagraph, is inconsistent with Article 2.2.1.1. It is on the basis of all evidence and legal argumentation that the Panel has to determine whether Argentina has indeed demonstrated that Article 2(5), second subparagraph, is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

[11] European Union's second written submission, para. 51.
[12] See the Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480, first sentence.
[13] European Union's second written submission, para. 38.
[14] Argentina's opening statement at the first meeting of the Panel, para. 74; Argentina's second written submission, paras. 95 – 96.
[15] European Union's second written submission, para. 83.
[16] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480 in which the Appellate Body noted that "the United States placed a number of cases on the Panel records where the "worst possible inference" was not applied in instances of non-cooperation".
[17] European Union's second written submission, para. 90.

12. Argentina notes that, regarding the interpretation of Article 2.2.1.1, the European Union, in its second written submission, has focused on certain specific aspects such as the negotiating history, the findings of the panel in *US – Softwood Lumber V*, among others, which do not appear to be central to the interpretative exercise which must focus on the ordinary meaning of the terms, their context and the object and purpose of the Agreement.

13. First, the findings in *US – Softwood Lumber V*. The European Union attempts, by selectively quoting the Panel Report in that case, to create parallelisms between the situations in that case and the measure we are discussing in the present case. The situations at issue in *US – Softwood Lumber V* were, however, different from what we are discussing in this case.

14. Second, the reference to Note 2 Ad Article VI paragraphs 2 and 3 concerning the "multiple currency practices." The European Union´s reference to this Note has simply nothing to do with what we are discussing here. Therefore, this argument should be rejected. The definition of "dumping" in Article VI is contained in paragraph 1. The Ad Note, however, specifically refers to paragraphs 2 and 3. In fact, this Ad Note does not seek to change or have any influence on the definition of "dumping" which is included in Article VI:1, but only to authorize the levy of anti-dumping duties in the very specific circumstances identified therein. Lastly, Argentina's interpretation is confirmed by the negotiating history. The negotiating history makes clear that the drafters agreed that "only price dumping" as defined in Article VI would be allowed to justify the defensive duties which were an exception to GATT rules. For all the aforesaid, the attempt of the European Union to draw parallelisms between "multiple currency practices" and the characteristics of Argentina's export tax on soya beans[18] is manifestly inappropriate and unsupported by the proper interpretation of that provision.

15. Third, the definition of "cost" as provided by the Panel in *EC – Salmon (Norway)*, Argentina does not see much difference between a price that is "paid" and a price that is "incurred", since the word "cost" refers to a concrete amount and not to a hypothetical value.

3.2 Argentina's claim under Article 2.2.1.1 concerning anti-dumping measures on imports of biodiesel from Argentina

16. In its second written submission, the European Union fails to rebut the claims raised by Argentina. Instead, the European Union has focused on some factual issues which are manifestly incorrect.

17. First, the European Union argues that the export tax on soybeans "constitutes a mechanism for distorting the price of soya beans".[19] This is not so. Argentina has already explained.[20] Second, the European Union continues to wrongly argue that the FOB reference price is the "price to be paid" by the Argentinean producers for domestic purchases of soybeans in Argentina.[21] As emphasized several times, the FOB reference price is not a price that is payable on domestic transactions. Rather, it is a taxable basis for levying the corresponding export tax.

4. Claims under Article 2.2 of the Anti-Dumping Agreement

18. On the basis of the definition provided by the Panel in *EC – Salmon (Norway)*, the "cost of production" means "the price to be paid for the act of producing". Therefore, the "cost of production in the country of origin" refers to the price to be paid for the act of producing biodiesel in the country of origin, that is, in Argentina.

19. The EU authorities have used - and this is not disputed - an average of the FOB reference prices minus fobbing costs as the cost for soybeans when constructing normal value. The European Union in fact acknowledges that it is not the price at which soybean is purchased domestically, since it keeps on stating that the FOB reference prices reflect "the cost of soya beans that Argentine producers of biodiesel would have to incur, in the absence of the export tax".[22]

[18] European Union's second written submission, para. 124.
[19] European Union's second written submission, para. 127.
[20] Argentina's first written submission, Section 5.2.4, paras. 209 and 210.
[21] European Union's second written submission, para. 126.
[22] European Union's second written submission, para. 142.

20. By not using the "cost of production in the country of origin" the European Union violated Article 2.2 of the Anti-Dumping Agreement.

5. Background and Economic Context of the Antidumping Investigation Concerning Imports of Biodiesel.

21. The background to this dispute shows that the first full year of production of biodiesel in the European Union is 2005. By the end of 2007 EU's total consumption had slightly more than doubled. Interestingly the capacity utilization figures determined by the Commission for the sampled EU producers was 84%. There were imports from some countries but not from Argentina which, at that time, had no biodiesel industry.

22. Between 2007 and 2009, Community consumption literally exploded according to the Commission's own figures[23], but not as overwhelmingly as production capacity, which sky-rocketed in the same period and thereby creating huge overcapacity.[24]

23. The European Union has argued that this did not prevent the EU industry from still being profitable in 2009, suggesting that excess capacity is not a cause of injury such as to break the causal link. Interestingly enough however, the figures of profitability in the investigation concerning imports from the United States, show that in 2005 when overcapacity was not excessive yet, the profitability rate of the sampled producers was at 18.3% while by 2009, coinciding with an overcapacity of the Union industry of more than 11 million tons, profitability had dropped further by more than a third, to only 3.5%.

6. Claims under Article 3 of the Anti-Dumping Agreement

24. The European Union acted inconsistently with Articles 3.1 and 3.4 because its definition of capacity and capacity utilization is inconsistent with Article 3.4 and its assessment of these factors is neither based on positive evidence nor include an objective examination. Additionally to these inconsistencies, the EU also failed to properly evaluate the effects of the enormous overcapacity on the EU industry, thereby violating Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

25. Article 3.4 does not contain any rule allowing the exclusion of capacity that would be "idle" or "not immediately available for use". Argentina prefers to draw the Panel's attention to the fact that in the proceeding on photovoltaic modules from China as well as in the US biodiesel case the so-called "idle capacity" was not excluded from production capacity.[25]

26. In relation to this point Argentina explained in previous submissions that the European Union could simply not exclude part of the capacity from the assessment of the production capacity and utilization of capacity on the grounds that it was "idle" without violating Article 3.4 of the Anti-dumping Agreement.

27. The European Union's assessment of production capacity and the utilization of capacity is not based on positive evidence and does involve an objective examination as Argentina has shown. With respect to the "desk analysis and checking against publicly available sources", the European Union has not yet been able to produce the alleged "publicly available data" that would support these new figures and that they are contradicted by all publicly available data on record that appeared in the public file of the investigation. With respect to the verification of the data Argentina would like to highlight that, although the European Union did select a sample of Union producers and carried out a detailed examination of their data including on-the-spot verifications, this was done before the imposition of provisional duties. In any event, that early examination and verification actually confirmed the accuracy of the production capacity figures that were reported in the Provisional Regulation.

28. Finally, Argentina has demonstrated that the conclusions reached by the Commission as to why the effects of overcapacity did not break the causal link between dumped imports and injury, are not conclusions which could be reached by an unbiased and objective decision maker taking

[23] Provisional Regulation, Table 1 (Exhibit ARG-30).

[24] Provisional Regulation, Tables 1 and 4 (Exhibit ARG-30).

[25] Council Regulation 193/2009, recitals 125 – 128 (Exhibit EU-13) and Council Regulation 599/2009, recitals 148 – 152 (Exhibit EU-14).

into account the facts that were before the investigating authority, and in light of the explanations given[26] as explained in detail in Argentina's previous submissions.

29. The European Union thus failed to appropriately assess overcapacity and its effects on the situation of the domestic industry, leading to an erroneous conclusion about the causality between alleged dumped imports and the injury suffered by the EU industry.

30. Regarding the long-term commercial strategy of the European Union industry, the figures are undisputed and are self-explanatory. As a matter of fact, if the three producers whose imports reached 63%, 85% and 71% of their own production had not been excluded from the definition of the "Union industry", the proportion of imports made by the European Union producers would have exceeded the overall 60% ratio determined for the Union industry.

31. The sole justification given by the European Union to the massive imports from the countries concerned was that if the domestic industry had not imported biodiesel from Argentina, "that role would have been filled by independent traders". However, the European Union fails to offer a logical explanation as to why there was no increase in imports by such independent traders during the IP. Surely if the European Union producers found an advantage in importing from Argentina – so much so that they actually managed to increase their market share in the Union if their own production is added to their imports, then one would also have expected independent traders to equally find it attractive to import into the European Union. The European Union does not offer a logical explanation that would explain in which way the European Union producers were hoping to prevent independent traders from importing to the EU by doing it themselves.

[26] Panel Report, *EU – Footwear (China)*, para 7.484.

ANNEX B-5

EXECUTIVE SUMMARY OF THE RESPONSE OF ARGENTINA TO THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

1. Introduction

1. The request for a preliminary ruling filed by the European Union is based on arguments that are formalistic in nature, that are based on a selective reading of fragments of Argentina's panel and consultations requests out of context, or on arguments that are obscure or inaccurate. Therefore, preliminary objections by the European Union should all be rejected by the Panel. Argentina considers that (i) it has identified the specific measures at issue in its panel request, (ii) that it has presented the problem clearly in its panel request and (iii) that its panel request does not expand the scope of the dispute. Argentina will address each issue in turn.

2. Argentina has identified the specific measures at issue

2. The European Union takes issue with an alleged lack of clarity in the identification of the "specific measures at issue." In particular, the European Union takes issue with the references to "implementing measures and related instruments or practices" and to "related measures and implementing measures" in Section 1 of Argentina's panel request.[1]

2.1 The European Union's objection is unclear and inaccurate

3. The objection raised by the European Union falls short of accuracy and clarity.

4. Indeed, first, in relation to paragraph 1(A) of Argentina's panel request, the European Union notes that this paragraph refers to "any subsequent amendments, replacements, implementing measures and related instruments or practices". At paragraph 8 of its request for preliminary ruling, the European Union argues that the reference to "*implementing measures and related instrument or practices*" is too vague. However, in paragraph 9, the European Union argues that "Argentina's claims against "implementing measures and other related measures" in paragraph 1(A) and footnote 7 of its Panel Request fall outside the Panel's terms of reference; that reference to "other related measures" is unclear since the panel request refers to "implementing measures and related instruments or practices".

5. Second, in relation to paragraph 1(B), the European Union states that "[f]ootnote 3 mentions Commission Regulation 490/2013, while footnote 2 mentions Council Implementing Regulation 1194/2013."[2] However, this is manifestly incorrect. In fact, footnote 3 refers to both Commission Regulation (EU) No 490/2013 and Council Implementing Regulation (EU) No 1194/2013, while footnote 5 refers to Council Regulation (EU) No 490/2013 and footnote 6 refers to Council Implementing Regulation (EU) No 1194/2013.

2.2 The European Union's objection should be rejected entirely

6. The European Union contends that, by referring to "implementing measures and related instrument or practices" and "related measures and implementing measures" when describing the measures at issue, Argentina's panel request fails to comply with the provisions of Article 6.2, because it fails to "identify the specific measures at issue."[3] The requirements under Article 6.2 of the DSU to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly are central to the establishment of the jurisdiction of the Panel.[4]

7. As emphasized by the Appellate Body "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[5] The panel must therefore "scrutinize carefully the panel

[1] European Union's request for preliminary ruling, section 2, paras. 3-9.
[2] European Union's request for preliminary ruling, para. 6.
[3] European Union's request for preliminary ruling, para. 7.
[4] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.
[5] Appellate Body Report, *US – Carbon Steel*, para. 127.

request, read as a whole, and on the basis of the language used, in order to determine whether it is "sufficiently precise" to comply with Article 6.2 of the DSU."[6]

8. The European Union's suggestion that there is something vague in the references to "implementing measures and related instruments or practices" and to "related measures and implementing measures" lacks merits.

9. First of all, Argentina notes that these types of references are not uncommon in panel requests. As the Panel noted in *Australia – Tobacco Plain Packaging (Indonesia)*, the rulings in previous disputes in which this type of references has been challenged "suggest to us that a reference to unnamed measures such as those discussed above is not per se inconsistent with the specificity requirement in Article 6.2."[7] Argentina notes that the European Union fails to substantiate why, in the present case, the references concerned would be inconsistent with the specificity requirement in Article 6.2 of the DSU.

10. Argentina notes that "the obligation to identify the specific measure at issue does not oblige the complainant to set forth the "precise content" of the measure in its panel request."[8] As the Appellate Body emphasized, "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 needs be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[9]

11. Section 1, point A) of Argentina's panel request, refers to "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 as well as any subsequent amendments, replacements, implementing measures and related instruments or practices." Reading the sentence in its entirety, it is clear that the words "implementing measures and related instruments or practices" which are being challenged by the European Union necessarily refer to "Article 2(5) of Council Regulation (EC) No 1225/2009." Therefore, only measures relating to, that is having a sufficiently close nexus to, Article 2(5) of Council Regulation (EC) No 1225/2009 could fall within the scope of the "implementing measures and related instruments or practices." Therefore, this is not a "vague" reference as the European Union claims.

12. This is further supported by the narrative description of the substantive content and operation of the measures at issue in Section 2, point A), the heading and first two paragraphs which provide the following description:

> **Article 2(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries of the European Community (the "Basic Regulation)[7]**
>
> *Article 2(5) of the Basic Regulation inter alia provides that 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.*
>
> *Pursuant to this provision, when the European Union considers that the costs of manufacturing the product under consideration actually incurred by the producer under investigation are artificially low or are otherwise distorted, it does not calculate the costs on the basis of the records of the producer under investigation although those records are in accordance with the generally accepted accounting principles of the exporting countries and reasonably reflect the costs associated with the production and sale of the product under consideration but adjusts those costs or*

[6] Appellate Body Report, *EC – Fasteners*, para.562, referring to Appellate Body Reports, *US - Carbon Steel*, para.127; *US – Oil Country Tubular Goods Sunset Reviews*, paras.164 and 169, *US – Continued Zeroing*, para. 161 and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

[7] Preliminary Ruling of the Panel in *Australia – Tobacco Plain Packaging (Indonesia)*, para. 5.14.

[8] Panel Report, *China – Raw Materials*, Annex F-1, para. 8.

[9] Appellate Body Report, *US – Continued Zeroing*, para. 169.

establishes them on the basis of other data, including data pertaining to markets other than those of the exporting country.

[7] As well as any subsequent amendments, replacements, implementing measures and related instruments or practices

13. Thus, the above constitutes the description of the substantive content and operation of the challenged measures. It makes clear that the measures being challenged relate to Article 2(5) of the Basic Regulation. Thus, the only way to read "implementing measures and related instruments or practices" is in close connection to Article 2(5) of the Basic Regulation.

14. As to the reference to "related measures and implementing measures" in Section 1, point B), these terms are placed at the end of point B) which identifies the primary measures being challenged as "the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, inter alia, Argentina, as well as the underlying investigation.". Point B) then precisely identifies the anti-dumping measures, both in footnote 3 as well as in the next paragraphs of point B as covering (i) the provisional anti-dumping duties on imports of biodiesel originating in, inter alia, Argentina, pursuant 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 and (ii) the definitive measures imposed pursuant to 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. The last paragraph then concludes that the measures at issue include the anti-dumping measures identified above "as well as any subsequent amendments, replacements, related measures and implementing measures." It is clear that only measures relating to the anti-dumping measures imposed by the European Union on imports of biodiesel originating in Argentina could fall within the scope of the terms "related measures and implementing measures.

15. Argentina notes that the situation in the present case is similar to the one addressed by panels in recent cases, namely *India – Agricultural Products and Australia – Tobacco Plain Packaging (Indonesia)*. In that case, the Panel rejected the objection that "the panel request is not sufficiently precise to meet the requirements of Article 6.2 simply by virtue of the inclusion of the terms "related measures, or implementing measures."[10] In particular, the Panel emphasized that the "primary measures" were not broadly defined, but rather limited in view of their context.[11]

16. The references which the European Union takes issues with were necessary to protect the interests of Argentina as complaining party in order to avoid that a closely connected measure adopted after the establishment of the panel could be claimed not to be within the panel's terms of reference merely because not mentioned in the panel request. The Appellate Body has recognized that this constitutes a legitimate objective and serves the due process objective of preventing the complaining party from having to "adjust its pleading throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target"."[12] Hence, the aim of such references is to address the potential situation arising if the European Union were to adopt measures that are closely connected to, or change the legal nature of the existing measures during the course of the Panel proceedings. This situation arose in *EC – Chicken Cuts (Brazil)* in which, since the complainants' panel requests were not worded sufficiently broadly, they could not be interpreted as containing the new measures.[13]

17. In *EC – IT Products*, the Panel also noted that:

While we do not consider that the mere incantation of the phrase "any amendments or extensions and any related or implementing measures" in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as

[10] Preliminary Ruling of the Panel in *India – Agricultural Products*, para. 3.51.
[11] Preliminary Ruling of the Panel in *India – Agricultural Products*, para. 3.48.
[12] Appellate Body Report, *Chile – Price Band System*, para. 144.
[13] Panel Report, *EC – Chicken Cuts (Brazil)*, paras. 7.28-7.29.

> *the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review.*[14]

18. In conclusion, Argentina requests the Panel to reject the European Union's objection that "Argentina's claims against "implementing measures and other related measures" in Paragraph 1(A) and footnote 7 of its Panel Request, as well as Argentina's claims against "related measures and implementing measures" in Paragraph 1(B) of its Panel Request, fall outside the Panel's terms of reference".[15] First of all, the European Union failed to substantiate its objection. Second, this claim is premature and unnecessary. Third, when interpreted in their context, the words challenged by the European Union cannot be found to be vague and therefore are not "on their face" inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.

3. Argentina's panel request provides a brief summary of the legal bases of the complaint sufficient to present the problem clearly

19. The European Union argues that Argentina's panel request fails to meet the requirement to "present the problem clearly" in two aspects: by failing to identify the "legal basis" of the complaint and by failing to "plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed."[16]

20. Argentina notes that the requirement to "present the problem clearly" is not a standalone requirement. Article 6.2 of the DSU contains two requirements: (i) the obligation to identify the specific measure(s) at issue and (ii) the obligation to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3.1 The "inter alia" legal basis

21. The European Union first takes issues with the use of the word "inter alia" in sub-section 2(A). It argues that because of the words "inter alia", "[n]either the European Union, nor the Panel has any idea of what claims or legal bases Argentina will finally present in this case: the words "*inter alia*" make the list of claims in Argentina's panel request completely open-ended."[17]

22. Sub-section 2(a) of Argentina's panel request provides that:

> *A) 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 (the "Basic Regulation")*
>
> [...]
>
> *Argentina considers that Article 2(5) of the Basic Regulation is inconsistent as such with, inter alia, the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"):*
>
> *[...]*

23. In the first place, Argentina notes that the scope of the European Union's objection is unclear. Indeed, the European Union claims that "[t]his is inconsistent with Article 6.2 of the DSU and places the relevant claims outside the Panel's terms of reference."[18] It is, however, unclear which "relevant claims" would, according to the European Union, be placed outside the Panel's terms of reference.

[14] Panel Report, *EC – IT Products*, para. 7.140.
[15] European Union's request for preliminary ruling, para. 9.
[16] European Union's request for preliminary ruling, para. 10.
[17] European Union's request for preliminary ruling, para. 12.
[18] European Union's request for preliminary ruling, para. 13.

24. To the extent that the European Union were to argue that all the claims made by Argentina in Section 2, point A) would fall outside the Panel's terms of reference, this objection does not make any sense.

25. In fact, the European Union is focusing on the words "inter alia" in the introductory paragraph in isolation, without examining the context in which these words are used and in particular the list of legal claims included thereafter. As is clear from the panel request, the introductory paragraph in which the words "inter alia" are included is nothing else but the introductory clause to a detailed description of the specific legal bases of the different "as such" claims, as indicated by the colon that is written right after the parenthesis and before the list of items 1 to 4.

26. Furthermore, the claims made by Argentina and which are listed under points 1 to 4 of Section 2, point A) of Argentina's panel request, all precisely identify the provisions of the covered agreements that Argentina claims are being violated. For each claim, Argentina provides an explanation of the content of the claim so that the European Union knows the case it has to answer.

3.2 Paragraph 2 (B) of Argentina's Panel Request

27. The European Union also takes issue with the following paragraph in Sub-section 2, B) of Argentina's panel request:

> *Argentina considers that the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, inter alia, Argentina and the underlying investigation are inconsistent with the following provisions of the Anti-Dumping Agreement and of the GATT 1994:*
>
> *6. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because 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.*

28. The European Union claims that "[t]his paragraph fails to meet the requirements of Article 6.2 of the DSU"[19] for four reasons which must all be rejected.

29. First, the European Union claims that "Argentina's Panel Request fails to mention the specific sub-paragraph of Article 9.3, with which the challenged measures are supposed to be inconsistent."[20] There is, however, no such kind of general requirement "to refer to the specific sub-paragraph of the WTO treaty provision that is supposed to be infringed by the challenged measure".[21] The Appellate Body Report to which the European Union refers, found that:

> *There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint*[22]

30. Argentina's panel request indicates that the measures at issue are inconsistent with Article 9.3 and Article VI:2 of the GATT 1994 "because 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." While Article 9.3 indeed includes a chapeau and three sub-paragraphs, it is clear from the description of the claim (just quoted) that Argentina is taking issue with the chapeau. This interpretation is in accordance with the Report of the Appellate Body in *Thailand – H-Beams* which held that "a general reference to Article 3 of the Anti-Dumping Agreement without identifying the relevant paragraphs, was sufficient to fulfill the

[19] European Union's request for preliminary ruling, para. 15.
[20] European Union's request for preliminary ruling, para. 16.
[21] European Union's request for preliminary ruling, para. 16.
[22] Appellate Body Report, *Korea – Dairy*, para. 124.

requirements of Article 6.2 of the DSU, considering that the panel request "referred explicitly to the specific language of Article 3."[23]

31. Second, the European Union argues that "Argentina fails to articulate the exact claims it advances."[24] According to the European Union, it is not clear whether Argentina actually challenges (a) the comparison between the anti-dumping duty and the margin of dumping or (b) the method of calculation of the margin of dumping itself.[25]

32. However, there is no ambiguity about the claim of Argentina. In fact, as is clear from the structure of the panel request, Argentina first takes issue with the dumping margin determination under points 1, 2, 3, 4 and 5 of its panel request which all refer to specific obligations under Article 2 of the Anti-Dumping Agreement. Under point 6 of the panel request, as a next logical step, Argentina then claims that the European Union violated Article 9.3 by imposing and levying anti-dumping duties in excess of the margin of dumping to be established pursuant to Article 2 of the Anti-Dumping Agreement.

33. Argentina further notes that its first written submission confirms the meaning of the words used in the panel request.[26] Indeed, it is clear from paragraphs 307 to 309 of Argentina's first written submission that Argentina's claim under Article 9.3 focuses on the imposition and levying of anti-dumping duties in excess of the dumping margin, had the dumping margin been determined in conformity with Article 2 of the Anti-Dumping Agreement contrary to what the European Union did in this case as demonstrated in its previous claims

34. The third and fourth reasons submitted by the European Union are inapposite since they are based on the hypothetical assumption that "Argentina actually challenges the method of determining the dumping margin."[27] As Argentina has explained above, it is clear from both the wording of the panel request and the legal provision being challenged, namely Article 9.3, that Argentina's claim focuses on the fact that the duties have been imposed and levied "in excess" of the margin of dumping established in accordance with Article 2 of the Anti-Dumping Agreement.

4. The European Union's allegations concerning the expansion of the scope of the dispute

4.1 Arguments of the European Union

35. In section 4 of its request for a preliminary ruling, European Union alleges that Argentina has expanded the scope of the dispute in its panel request either as a result of the inclusion of new measures or as the result of the inclusion of new legal bases. The European Union notes that consultations circumscribe panel requests and, that, as a result, a panel request cannot include claims that were not included in the consultations request where these new claims expand the scope of the dispute or have the effect of changing the essence of the complaint.[28]

4.2 The applicable legal standard

36. Although Article 6.2 requires the complainant to indicate in its panel request "whether consultations were held", it does not require the measures and claims identified in the panel request as basis for the complaint to be *identical* to those identified in the consultations request.[29]

37. In *Brazil – Aircraft*, the Appellate Body emphasized that Articles 4 and 6 of the DSU do not "require a precise and exact identity between the specific measures that were the subject of

[23] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.24 referring to Appellate Body Report, *Thailand – H-Beams*, para. 90.
[24] European Union's request for preliminary ruling, para. 17.
[25] European Union's request for preliminary ruling, para. 17.
[26] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9 referring to Appellate Body Report, *US – Carbon Steel*, para. 127.
[27] European Union's request for preliminary ruling, para. 19.
[28] European Union's request for a preliminary ruling, para. 23, referring to Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice* and *US – Upland Cotton*.
[29] Preliminary Ruling of the Panel in *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 3.35.

consultations and the specific measures identified in the request for the establishment of a panel"[30]

38. In relation to the "legal basis" of the complaint in particular, the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "[i]t does not follow from the use of the same term [in Articles 4.4 and 6.2] […] that the claims made at the time of the panel request must be identical to those indicated in the request for consultations."[31]

39. It is important to underline that it is the panel request, not the consultations request, which determines the panel's terms of reference pursuant to Article 7 of the DSU. Moreover, as panels and the Appellate Body have consistently emphasized in past cases, the relevant provisions of the DSU do not require a "precise and exact" identity between the measures and claims identified in the request for consultations and those identified in the panel request.

40. Argentina will show why, taking into account the above legal standard, all the claims made in the panel request fall within this Panel's terms of reference and neither expand the scope of the dispute nor change the essence of the complaint.

4.3 The European Union's objection against the alleged inclusion of a new measure in the panel request

41. The European Union claims that Argentina's panel request challenges for the first time "*related practices*", in addition to Article 2(5) of Council Regulation 1225/2009 since the terms "related practices" were not included in Argentina's consultations request, thus expanding the scope of the dispute and changes the essence of Argentina's complaint.[32]

42. Argentina submits that this objection of the European Union was unnecessary and is clearly moot. Argentina is not challenging the European Union's practice as a distinct measure. In other words, Argentina is not challenging ""*related practices*", in addition to Article 2(5) of Council Regulation 1225/2009."[33] The measure being challenged is Article 2(5) of the Basic Regulation. Argentina refers to the practice of the European Union only to illustrate the content and scope of Article 2(5) of the Basic Regulation in view of its consistent application.[34] Accordingly, Argentina is not challenging a "new measure" since it is not asking that this Panel rule on "related practices", as shown in paragraph 468 of its first written submission.

4.4 The European Union's objections against the alleged inclusion of new legal bases in the panel request

4.4.1 The allegedly new and unclear "as applied" claim against Article 2(5) of the Basic Regulation

43. The European Union argues that Argentina brings a new and unclear claim against Article 2(5) of the Basic Regulation in a "not-numbered" paragraph. The European Union appears to refer to the unnumbered paragraph between paragraphs 3 and 4 of section B of the panel request.

44. This paragraph is not a "new claim" that Argentina is bringing, as this claim is not different from the claims raised under points 1, 2 and 3. This paragraph merely emphasizes that the European Union's violations of the provisions cited in points 1, 2 and 3 occurred as a result of the application of Article 2(5) of the Basic Regulation in the imposition of the measures on imports of biodiesel of Argentina. Argentina notes in this respect that the European Union itself points out that Commission Regulation and the Council Implementing Regulation imposing the provisional and definitive duties are based on Article 2(5) of the Basic Regulation.[35]

[30] Appellate Body Report, *Brazil – Aircraft*, para. 132.
[31] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 136.
[32] European Union's request for a preliminary ruling, paras.27 and 29.
[33] European Union's request for preliminary ruling, para. 27.
[34] Argentina's first written submission, section 4.2.2.
[35] European Union's request for a preliminary ruling, para. 38.

4.4.2 The allegedly new claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-Dumping Agreement

45. The European Union argues that Argentina's claim under Article 9.3 of the Anti-Dumping Agreement in section 2(A)(3) of the panel request falls outside of the Panel's terms of reference. It bases its argument on the fact that the request for consultations did not make any reference to Article 9.3 under section (b) and on the fact that section (b) of the consultations request did not refer to an alleged excess of the anti-dumping duty compared to the margin of dumping. The European Union thus considers that Argentina's claim under paragraph 2(A)(3) cannot be said to reasonably have evolved from the consultations.[36] Again, this objection lacks merit.

46. Argentina strongly disagrees with the European Union's contention that Argentina's as such claim under paragraph 2(A)(3) cannot reasonably be said to have evolved reasonably from the consultations request. First, as the European Union itself points out in paragraph 38 of its request for a preliminary ruling, Argentina raised a claim based on Article 9.3 in its as applied claims concerning the provisional and definitive anti-dumping measures.[37] Therefore, the imposition of anti-dumping duties in excess of the margin of dumping as a result of the application of Article 2(5) of the Basic Regulation has been the object of consultations.

47. In any case, as shown by its first written submission, Argentina is not bringing an as such claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-Dumping Agreement.[38] Indeed, Argentina considers that findings of inconsistency 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 Marrakesh Agreement Establishing the WTO with respect to Article 2(5) of the Basic Regulation would be sufficient to secure an effective resolution of this dispute.

4.4.3 The allegedly new claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994

48. The European Union argues that the claims based on Article VI:1 of the GATT 1994 in sections 2(A)1 and 2(A)2 of the panel request fall outside of the terms of reference of the Panel because this provision was not mentioned in the request for consultations. At the outset, Argentina notes that the claims it bring in this section are based Article VI:1(b)(ii) only.[39] Accordingly, Argentina limits its arguments to this specific provision. The objection raised by the European Union does not stand.

49. The European Union states that it cannot be argued that "adding new claims under Article VI:1 of the GATT does not change the "essence" of the complaint."[40] It bases this on the allegation that if Article VI:1 of the GATT 1994 is identical to the provisions of the Anti-Dumping Agreement that have already been cited, the addition of Article VI:1 would be redundant and the Panel would exercise judicial economy.[41]

50. This argument does not stand to reason. Nothing prevents Argentina from adding provisions that are identical in scope to an existing claim on which consultations were held.

51. Moreover, if the European Union intends to argue that Article VI:1(b)(ii) of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement are different in scope and that the "essence" of both provisions is different, then this is directly contradicted by the text and context of both provisions. The European Union has failed to point out what the difference in scope between both provisions is.

52. Article VI:1 of the GATT 1994 had been cited in the context of sections a.1 and a.2 of the consultations request in as *applied* claims that are similar to the as *such* claims at issue. Moreover, as already pointed out by Argentina, the content of Article VI:1(b)(ii) of the GATT 1994 is identical to Article 2.2 of the Anti-Dumping Agreement, which was cited in Argentina's consultations request in the section concerning the *as such claims*.

[36] European Union's request for a preliminary ruling, paras. 36-40.
[37] See section (a)(6) of the Request for consultations by Argentina, WT/DS/473/1.
[38] Argentina's first written submission, para. 468.
[39] Argentina's first written submission, paras. 133, 141 and 468.
[40] European Union's request for preliminary ruling, para. 43.
[41] European Union's request for a preliminary ruling, para. 43.

53. Argentina submits Article VI:1 of the GATT 1994 had been cited in the context of sections a.1 and a.2 of the consultations request in *as applied* claims that are similar to the *as such* claims at issue. Moreover, as already pointed out, the content of Article VI:1(b)(ii) of the GATT 1994 is identical to Article 2.2 of the Anti-Dumping Agreement, which was cited in Argentina's consultations request in the section concerning the *as such* claims. Argentina therefore respectfully requests that the Panel reject the European Union's purely formalistic objection and confirm that Argentina's claims under Article VI;1 of the GATT 1994 in relation to Section 2(A) are within the Panel's terms of reference.

4.4.4 The allegedly new claims against Article 2(5) of the Basic Regulation based on Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement

54. The European Union argues that the paragraph of the consultations request corresponding to section 2(A)(2) of the panel request only includes a claim based on Article 2.2.1.1 of the Anti-Dumping Agreement. It also argues that the corresponding claim in the consultations request refers only to the obligation that costs be calculated on the basis of the records kept by the exporters. The European Union thus argues that section 2(A)(2) of the panel request expands the scope of the dispute because they introduce a new legal basis (i.e., Article 2.2 of the Anti-Dumping Agreement) and because they introduce "a new type of complaint", that is, the use of costs not associated with the production and sale of the product under consideration.[42]

55. Argentina submits that the European Union carries out an unduly narrow reading when it reads section 2(A)2 of the panel request with reference to section b.2 of the consultations request only. The issue of the calculation of costs for the purpose of the construction of normal value is also addressed in section b.1 of Argentina's request for consultations, which refers to Article 2.2 of the Anti-Dumping Agreement. The assertion that Argentina added a provision in the panel request is therefore incorrect.

56. Moreover, there is a clear and logical connection between Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement. Indeed, Article 2.2.1.1 is a specific provision governing the calculation of costs for the construction of normal value. Article 2.2 concerns, among other matters, the construction of normal value and its components, including the cost of production. Argentina submits that consultations on the calculation of costs for the construction of normal value pursuant to Article 2.2.1.1 logically also cover the construction of normal value pursuant to Article 2.2, when such costs are being included in the construction of normal value.

57. Argentina also opposes the European Union's claim that it would have introduced in its panel request a "new type of complaint" when it refers to the use of costs not associated with the production and sale of the product under consideration. First of all, Argentina submits that this reference does not constitute a claim but an argument which is not required to be included in a panel request. Indeed, the Appellate Body emphasized that "Article 6.2 requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly."[43]

58. Furthermore, even if it is part of the claim, the European Union's claim is premised on an incorrect reading of Argentina's request for consultations. Indeed, the request for consultations refers in relevant part to Article 2.2.1.1 of the Anti-Dumping Agreement "which requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation." The request for consultations does not limit in any way Argentina's claim to certain aspects or parts of Article 2.2.1.1, first sentence. By referring to Article 2.2.1.1 "which requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation", Argentina refers to the first sentence of Article 2.2.1.1. Therefore, the reference in the panel request to the use of costs not associated with the production and sale of the product under consideration cannot be said to be a "new claim".

59. In view of the above, the European Union's objections under section 4.2.4 of its request for a preliminary ruling must fail.

[42] European Union's request for a preliminary ruling, paras 45 and 46.
[43] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

4.4.5 The allegedly new claim against the anti-dumping measures imposed by the European Union based on Article 2.1 of the Anti-Dumping Agreement

60. Finally, Argentina turns to the European Union's objection against the inclusion of Article 2.1 of the Anti-Dumping Agreement in section 2(B)4 of the panel request.

61. Argentina notes that it is a well-established principle of law that the burden of proof rests upon the party asserting the affirmative of a particular claim or defense. However, Argentina fails to see any substantiation by the European Union of why the addition of Article 2.1 of the Anti-Dumping Agreement results in an expansion of the scope of this dispute or why it cannot reasonably be said that the inclusion of this provision evolved from the consultations. In this respect, Argentina refers to paragraphs 51 to 53 of the European Union's request for a preliminary ruling, which contains only mere assertions but no substantiation. Consequently, the European Union's objection fails.

62. In any case, Argentina notes that it is not basing its claim concerning the profit determination on Article 2.1 of the Anti-Dumping Agreement.[44] As already highlighted in section 4.4.2 above, it would therefore appear not to be necessary for the panel to rule on this issue.

5. Conclusion

63. In light of the above, Argentina submits that the European Union's request for preliminary ruling should be rejected entirely.

64. First, the objection made by the European Union about the references to "implementing measures and related instruments or practices" and "related measures and implementing measures" should be rejected: first, because the European Union failed to substantiate its objection; second, since this claim is premature and unnecessary; and third, since these references comply with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.

65. Second, Argentina provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly in relation to the "as such" claims in section 2(A), as well as in relation to Argentina's claim under Article 9.3 of the Anti-Dumping Agreement in section 2(B)6.

66. Third, Argentina did not expand the scope of the dispute. Indeed, the "related practices" do not constitute a "new measure" that cannot be said to have "evolved" from the consultations and which, in any case, are not challenged by Argentina as a distinct measure. Furthermore, all the claims listed in the panel request were either included in the consultations request or can reasonably be said to have evolved from the claims listed in consultations request.

67. Accordingly, Argentina requests the Panel to find that the request for establishment of a Panel submitted by Argentina fully complies with the requirements of Article 6.2 of the DSU and that, consequently, all the measures and claims concerned fall within the Panel's terms of reference.

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[44] Argentina's first written submission, para. 470.

ANNEX C

ARGUMENTS OF THE EUROPEAN UNION

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INTRODUCTION

1. The EU demonstrates that both Argentina's claims with respect to the Basic Regulation and its claims with respect to the Provisional and the Definitive Regulations should be rejected as no inconsistency with the Anti-Dumping Agreement has been proved.

2. TERMS OF REFERENCE

2.1. CLAIMS ABANDONED BY ARGENTINA

2. Argentina has abandoned the following claims mentioned in its Panel Request: (1) any claim against "*related practices*"; (2) any claim under an "*inter alia*" legal basis; (3) the claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-dumping Agreement; (4) any distinct "*as applied*" claim against Article 2(5) of the Basic Regulation; (5) the claim against Article 2(5) of the Basic Regulation because the costs used are allegedly not "associated with the production and sale of the product under consideration"; and (6) the claim against the "profit determination" based on Article 2.1. The EU understands that, as Argentina has abandoned and does not pursue these claims, it cannot establish a *prima facie* case on them and that the Panel cannot make any findings on these claims.

2.2. OTHER ARGENTINE CLAIMS CHALLENGED BY THE EU

2.2.1. Argentina's failure to identify the "specific measure at issue"

3. First, Argentina appears to have abandoned the claim. Second, Argentina's assertions must be rejected. The EU's Request for a Preliminary Ruling was timely and in full compliance with the Panel's Working Procedures. "Objections to jurisdiction" of a Panel "*must be raised as early as possible*". On the substance of its Request, the EU has noted the Appellate Body's consistent case law, according to which references to "implementing measures and other related measures" do not identify the specific measures at issue. Accepting that all "measures" that "implement", or are "related" to Article 2(5) of the Basic Regulation fall within the Panel's Terms of Reference would have the perverse effect of bringing within the jurisdiction of this Panel all provisional and definitive Regulations of the EU based on Article 2(5).

4. The inclusion of the terms "implementing measures" and "related measures or instruments" in Argentina's Panel Request (a) creates an open-ended list of challenged "measures", (b) confuses the limits between the jurisdiction of this Panel and the jurisdiction of other panels, and (c) is not necessary in order to protect any legitimate interest of the complaining party; such legitimate interests are protected by other terms in the Panel Request, which are not challenged by the EU. Therefore, the challenged terms fail to meet the requirements of Article 6.2 of the DSU and fall outside the Panel's terms of reference.

2.2.2. Argentina's other claims

2.2.2.1 The claim against the Provisional and the Definitive Regulations based on Article 9.3 of the Anti-Dumping Agreement

5. The EU has argued that Argentina's Panel Request fails to articulate clearly the exact claim that it advances, because it is not clear whether Argentina's challenge is directed against (a) the comparison between the anti-dumping duty and the dumping margin, or (b) against the method of calculation of the dumping margin itself. The question of whether the claim under Article 9.3 is within the Panel's terms of reference is of limited value for the present dispute.

2.2.2.2 The claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994

6. Argentina's Panel Request includes claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994, which were not included in Argentina's Request for Consultations. However, Argentina's first written submission does not develop these claims. The question of whether the claims against Article 2(5) based on Article VI:1 of the GATT 1994 are within the Panel's terms of reference is of very limited value for the present dispute.

3. PRELIMINARY ISSUES

3.1. THE CLAIM UNDER ARTICLE 2.1 OF THE ANTI-DUMPING AGREEMENT

7. Given that Article 2.1 does not impose any independent obligation on WTO Members, it cannot serve as a legal basis for a distinct claim in WTO dispute settlement proceedings. Furthermore, Article 2.1 does not cover the situations where there are no domestic sales "in the ordinary course of trade". Therefore, the facts of this case fall outside the scope of Article 2.1 of the Anti-Dumping Agreement.

3.2. THE CLAIMS UNDER ARTICLE VI:1 OF THE GATT 1994

8. Since Article VI:1 of the GATT 1994 does not impose any independent obligation on WTO Members, it cannot serve as a legal basis for a distinct claim in WTO dispute settlement proceedings. Therefore, Argentina cannot base any claim on Article VI:1 of the GATT 1994.

3.3. THE CLAIM UNDER ARTICLE 9:3 OF THE ANTI-DUMPING AGREEMENT

9. Article 9.3 of the Anti-Dumping Agreement addresses the *comparison* between (a) the anti-dumping duties and (b) the dumping margins. It does not address the *calculation* of *normal value*. As a result, the complaining party must show something more than a simple erroneous calculation of normal value. The EU's interpretation is supported by the relevant case law. For example, in *EC – Salmon*, the Panel found that, in determining the dumping margin, the defending Member had acted inconsistently with a number of obligations imposed by Article 2 of the Anti-dumping Agreement. However, the Panel rejected the complaining Member's claims under Article 9.3 of the Anti-Dumping Agreement. Argentina's claim under Article 9.3 is conditioned upon the success of Argentina's claims under Article 2 of the Anti-Dumping Agreement. In these circumstances, Argentina's claims fall outside the scope of Article 9.3 of the Anti-Dumping Agreement and must be rejected.

4. ARGENTINA'S "AS SUCH" CLAIMS AGAINST THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

4.1. THE "AS SUCH" CLAIM UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

4.1.1. The reasons for rejecting Argentina's claim

4.1.1.1 Argentina is challenging "as such" a "measure" which does not exist

4.1.1.1.1 The scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation are clear on its face

10. Article 2(5) gives the anti-dumping authorities certain alternative options for establishing or adjusting the "costs associated with the production and sale of the product under investigation" when one of the provisos defined in the first subparagraph of Article 2(5) applies. The second subparagraph of Article 2(5) of the Basic Regulation describes what the authorities can do after it has been determined that the records do not "reasonably reflect" costs, pursuant to the first subparagraph of Article 2(5) of the Basic Regulation.

11. Given that the scope, meaning and content of the second subparagraph of Article 2(5) are clear "on its face", the consistency of the measure with the covered agreements must be assessed on the basis of the text of the legal instrument "alone".

4.1.1.1.2 Argentina distorts the scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation

12. The "measure" invented by Argentina simply does not exist. This conclusion is supported by a number of considerations. First, the conditions that must be met in order to determine whether the company records "reasonably reflect" costs are outside the scope of the second subparagraph of Article 2(5) of the Basic Regulation. Second, the terms "reflect market values", "regulated market", "abnormally low", or "artificially distorted", which Argentina uses to describe the "measure" that it challenges, do not even exist in the text of the second subparagraph of Article 2(5).

4.1.1.1.3 The "various elements examined" by Argentina do not give to the second subparagraph of Article 2(5) the scope, meaning and content asserted by Argentina

13. The first "element" identified by Argentina is the "historical perspective" of the second subparagraph of Article 2(5) of the Basic Regulation. However, the introduction of the second subparagraph of Article 2(5) in 2002 had no impact on the scope, the meaning or the content of the terms "reasonably reflect costs" in Article 2(5), which already existed in the first subparagraph of Article 2(5). The second "element" identified by Argentina is the "EU's practice". Nevertheless, the examples presented by Argentina in its first written submission do not suffice to establish a purported "practice" of the EU in the application of the second subparagraph of Article 2(5). The third element presented by Argentina consists of four judgments of the General Court of the EU. However, these judgments do not support Argentina's assertions since none of these judgments provides that the determination of whether company records "reasonably reflect costs" is made pursuant to the second subparagraph of Article 2(5).

4.1.1.2 Argentina has failed to establish that the purported "measure" that it challenges is "as such" inconsistent with the covered agreements

14. Argentina has asserted that it presents this "practice" only to illustrate the scope and content of the purported "measure" that it challenges. However, in order to achieve this result, Argentina would need to establish (a) that the "practice" is not "distinct from the measure itself", but, on the contrary, forms an "integral part of the measure itself" and is "necessarily applied in all instances"; and (b) that this "practice" is "required" by the measure, which must be "mandatory" and constitute a "binding requirement" to apply the measure in the same way in all cases. In the present case, Argentina has failed to establish any of these two requirements for either the first, or the second subparagraph of Article 2(5).

15. With regard to the first requirement, the plain text of the first subparagraph of Article 2(5) confirms that the provision affords broad discretion to the authorities to determine whether the records of a particular company "reasonably reflect costs", on the basis of their analysis of the facts in each individual case. With regard to the second, the evidence confirms the discretionary nature of Article 2(5). The use of the word "*entitled*" by the General Court confirms that, as a matter of municipal EU law, Article 2(5) is discretionary: it allows the authorities to take certain actions, but does not require them to do so in all cases.

4.1.1.3 Argentina advances an erroneous legal interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

4.1.1.3.1 The text of Article 2.2.1.1 of the Anti-Dumping Agreement

16. First, Argentina's thesis is based on the assertion that the costs reflected in the company records do not need to be "reasonable". Argentina is wrong. It is counterintuitive to assert that Article 2.2.1.1 of the Anti-Dumping Agreement mandates the investigating authorities to base their calculations on costs that are "unreasonable". In any event, the Panel Report in *Egypt – Steel Rebar* actually contradicts Argentina's thesis. The fact that the Panel required the relevant item to be *"reasonably related to the cost* of producing and selling rebar" shows that the word "reasonably" is also attached to the word "costs" in Article 2.2.1.1.

17. Second, Argentina seeks to dissociate the term "costs" in Article 2.2.1.1 from the word "prices". However, the Panel Report in *EC – Salmon* interpreted "costs of production" as "the *price*

to be paid for the act of producing". This shows that the "cost of production" is linked to the prices *to be paid* for the act of producing. If the panel considered that the required costs are the expenses that have actually already been incurred by the producer, it would have used the past tense of the verb "be" in its Report. By using the terms "to be paid", this panel finding confirms that the "reasonable costs" required by Article 2.2.1.1 are not necessarily only the expenses that have already been incurred by the producer.

18. Third, Argentina interprets the term "associated" in Article 2.2.1.1 as "actually incurred". It is submitted that the word "associated" has a broader meaning which captures a broader range of relations between the "costs" and the "production". Fourth, these terms "associated with the *production and sale*" are broad enough to capture the costs that *would normally be* associated with the production and sale of the goods. Fifth, Article 2.2.1.1 refers to the "costs associated with the production". It is uncontroversial that the cost of production depends on the cost of the raw material and other inputs used for the production and, hence to the prices of the raw material normally used for the production. Sixth, the use of the word "reflect" reinforces the conclusion that reasonableness in Article 2.2.1.1 is not limited only to the "expenses that have actually been incurred by the producer".

4.1.1.3.2 The context of Article 2.2.1.1 of the Anti-Dumping Agreement

19. Argentina's main thesis finds no support in the analysis of the context of the provision. First, where the Anti-Dumping Agreement wishes to refer to the expenses actually incurred by the producer, it expressly states so. Second, if Article 2.2.1.1 intended to have the records include only the "expenses actually incurred", then Article 2.2.1.1 would have included only the condition that records should be kept in accordance with the GAAP.

20. Third, Argentina is wrong when it asserts that the first sentence of Article 2.2.1.1 "refers to a cost allocation issue" and that "the second sentence provides what authorities have to do if they use an alternative cost allocation methodology". The first sentence of Article 2.2.1.1 uses the word "calculated" and not the word "allocation". Moreover, the first sentence of Article 2.2.1.1 refers to the records of the company as "data sources", while the second sentence refers to information that is *not* found in the records of the company, but that has been provided by the investigated companies in the course of the investigation. Finally, the second sentence of Article 2.2.1.1 allows the authorities to take into consideration "all available evidence on the proper allocation of costs, including that which is made available by respondents in the context of an anti-dumping investigation". This implies that the second sentence allows authorities to take into consideration cost information which is not found in the companies' records, but which has been provided later.

4.1.1.3.3 The object and purpose of the anti-dumping rules

21. Article VI:1 of the GATT 1994 shows that the object and purpose of the WTO anti-dumping rules is to prevent the industries of the exporting country from damaging the industries of the importing country through the use of prices that are artificially low, because of some abnormal condition (hence the reference to "normal" value). A cost of the raw materials used to produce the dumped goods which is not "normal" and which causes the "normal value" of the goods not to be "normal", falls squarely within the type of conditions that the WTO anti-dumping rules aim to address.

4.1.1.3.4 The case law of the WTO dispute settlement system

22. The Panel Report in *Egypt – Steel Rebar* confirms that the word "reasonably" is also linked to the word "costs" and, therefore, Argentina is wrong when it asserts that the costs reflected in the records do not need to be "reasonable". Likewise, the Panel Report in *EC – Salmon* establishes that "costs of production" means "prices to be paid for the act of producing" and not "expenses that have already been incurred by the producer". Most importantly, the Reports of the Appellate Body and the Panel in *US – Softwood Lumber V* clearly establish that Argentina's thesis is wrong. The Panel found that Article 2.2.1.1 does not impose on the investigating authorities any particular methodology in their assessing whether the records reasonably reflect costs. On appeal, the Appellate Body did not take issue with this interpretation of Article 2.2.1.1.

4.2. THE "AS SUCH" CLAIM UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

4.2.1. The second subparagraph of Article 2(5) of the Basic Regulation is not "as such" inconsistent with the covered agreements

4.2.1.1 The meaning and content of the provision

23. This broad discretion of Article 2.2 is established, *inter alia*, by the provision which allows investigating authorities to use "any other reasonable basis" in order to establish or adjust costs. At the same time, this provision does not "mandate" the authorities to use information from other representative markets. It only allows them to do so, if this is "reasonable".

24. Such discretion is also to be found in the second paragraph of Article 2(5). This is confirmed by the authorities' practice in cases such as *White phosphorus originating in Kazakhstan* or *Okoumé* plywood originating in China, which prove that the second subparagraph of Article 2(5) does not oblige the EU to seek production cost information outside the country of origin in all cases. This discretion is also confirmed by the judgments of the courts of the EU, where the use of the words "*may*" and "*entitled*" shows that the second subparagraph of Article 2(5) allows the investigating authorities a broad discretion in the choice of "reasonable sources of information".

4.2.1.2 The second subparagraph of Article 2(5) is not "as such" inconsistent with the covered agreements

25. A fundamental characteristic of an "as such" challenge against a "measure" is that the complaining party must establish that the measure is "necessarily inconsistent" with the covered agreements. Irrespective of whether using "information from other representative markets" is consistent with Article 2.2 of the Anti-Dumping Agreement, the second subparagraph of Article 2(5) does not "*require*" the investigating authority to use such information "*in all cases*".

4.2.2. Argentina suggests an erroneous interpretation of Article 2.2 of the Anti-Dumping Agreement

26. Neither Article 2.2.1.1 nor any other part of the Anti-Dumping Agreement provides a rule that explicitly deals with how costs should be determined when this proviso applies. Article 2(5) of the Basic Regulation properly deals with this issue in a manner which is fully consistent with the requirements of Article 2.2 of the Anti-Dumping Agreement.

27. First, the notion of "cost of production in the country of origin" is a legal one, but establishing the cost of production in a particular case involves determinations of fact. Such determinations are made with the aid of evidence. It cannot be excluded that evidence relating to that determination might originate in other countries. 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, where the conditions of production and sale are not in the "ordinary course of trade".

5. ARGENTINA'S CLAIMS REGARDING THE ANTI-DUMPING MEASURES ON BIODIESEL

5.1. ARGENTINA'S CLAIM IN RELATION TO THE USE OF THE RECORDS OF THE INVESTIGATED COMPANIES

5.1.1. The application of a measure that is found to be "as such" inconsistent with the covered agreements.

28. Argentina asserts that a finding that a provision is "as such" inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement would necessarily lead to a finding that the application of that provision in a particular situation is also inconsistent with Article 2.2.1.1. Given that the second subparagraph of Article 2(5) of the Basic Regulation is not "as such" inconsistent with Article 2.2.1.1, the issue raised by Argentina is moot in the present case.

5.1.2. The alleged "improper establishment of facts"

29. In regard to trade, the notion of "distortion" implies an interference with the normal operation of the market. The distortion identified in the Definitive Regulation is that caused by the existence of an export tax on soya beans and oil. This tax had the consequence that the prices of these products in the domestic market were lowered, and that effect in its turn had consequences for those companies that used these products.

30. The fact that, within the limits set by the state, market forces continue to operate, does not diminish or cancel the distortive effect on trade of an export tax. Likewise, the fact that domestic prices follow the trends in international prices is irrelevant in so far as the distortion accounts for the difference between those prices.

31. As far as Argentina's assertions in relation to the "main raw material" for biodiesel are concerned, the EU notes that it based its calculation of the biodiesel's cost of production and normal value on the cost of soya bean already at the provisional stage and that the Argentine companies under investigation had not expressed any concern or other comment, following disclosure.

5.1.3. The interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

5.1.3.1 The text of Article 2.2.1.1 of the Anti-Dumping Agreement

32. Argentina repeats its main thesis that Article 2.2.1.1 allegedly refers to the "expenses actually incurred by the producer". First, Article 2.2.1.1 does not include the words "expenses actually incurred by the producer". Second, Article 2.2.1.1 uses the terms "costs associated with the production and sale of the product". The word "associated" has a broader meaning than the words "actually incurred" and captures a broader range of relations between the "costs" and the "production".

33. Third, Argentina is wrong when it asserts that there is no relation between the word "costs" and the notion of "prices", for purposes of Article 2.2.1.1. The Panel in *EC – Salmon* has confirmed that the ordinary meaning of the terms "cost of production" may be considered to be the "prices to be paid for the act of producing".

34. Fourth, the Panel Report in *EC – Salmon* confirms that the "cost of production" is linked to the prices *to be paid* for the act of producing. By using the terms "to be paid", this Panel finding confirms that the costs captured by Article 2.2.1.1 are not the expenses that have actually been incurred by the producer. Fifth, Article 2.2.1.1 uses the terms "costs associated to the production", which the Panel in *EC – Salmon* has interpreted as the prices to be paid *for the act of producing*. The provision does not include the terms "incurred by the producer". Sixth, in *US – Softwood Lumber V,* both the Panel and Appellate Body accepted that an investigating authority is entitled to find that the company records do not "reasonably reflect costs", where they do not reflect prices charged at "arms-length" transactions.

5.1.3.2 The context of Article 2.2.1.1

35. Argentina asserts that Article 2.2.1.1 does not require the costs to be "reasonable", but that it requires, instead, that "unreasonable" costs be "reasonably" reflected in the company records. The EU has already shown that the Panel Report in *Egypt – Steel Rebar*, to which we refer, contradicts Argentina's assertion.

36. Article 2.2.1.1 does not impose any obligations on companies in relation to their accounting methods. It simply allows investigating authorities not to base their cost calculation on the companies' records, where either of the two conditions is not met. Argentina repeats the assertion that Article 2.2.1.1 deals with a "cost allocation issue". The EU has already exposed the fallacy of Argentina's assertion in the relevant section of this submission on the "as such" claim, to which we refer.

37. Argentina also seeks to use as "context" the provisions of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994. The EU has already dealt with Argentina's

interpretation of Article 2.2 of the Anti-Dumping Agreement and the issue of "country of origin" in the relevant section of this submission on the "as such" claim under Article 2.2 of the Anti-Dumping Agreement and we refer to that section.

38. Article 2.2.2 conditions the use of the "actual data pertaining to production" costs on the existence of *ordinary course of trade*. This supports the EU's thesis that it was not obliged to use the "actual data pertaining to production and sales" of biodiesel as recorded in the investigated companies' accounts, because the production and sale of biodiesel were not in the ordinary course of trade. Moreover, where the amounts cannot be determined "on this basis", then Article 2.2.2(iii) allows the investigating authorities to use "*any other reasonable method*". It is noted that Article 2.2.2(iii) does *not* impose any requirement that, in these circumstances, the data on the cost of production must be those prevailing in the country of origin.

5.1.3.3 The object and purpose of the Anti-Dumping Agreement

39. Argentina asserts that the EU's interpretation "subverts the fundamental purpose of the Anti-Dumping Agreement and uses the Agreement to address differences in price between the export price of the product concerned and international prices, instead of comparable prices on the domestic market". Argentina's assertion is wrong for a number of reasons.

40. First, the Definitive Regulation's dumping determination is not based on the difference between the export price of *biodiesel* and the international price of *biodiesel* but on the comparison between the export price of the Argentine biodiesel and the normal value of the Argentine biodiesel. Second, the Definitive Regulation found that Argentine biodiesel was dumped into the EU and, as a result of that dumping, the EU's industry suffered material injury. This is precisely the object and purpose of the WTO anti-dumping rules, as expressed in Article VI:1 of the GATT 1994.

5.2. ARGENTINA'S CLAIM IN RELATION TO "COUNTRY OF ORIGIN"

41. On the basis of the observations previously mentioned, the EU considers that Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 entitles the EU's investigating authorities to use the data that they used in order to calculate the normal value of Argentine biodiesel.

5.3. ARGENTINA'S CLAIM IN RELATION TO THE USE OF COSTS ALLEGEDLY "NOT ASSOCIATED WITH THE PRODUCTION AND SALE" OF BIODIESEL

42. The EU has already shown above that the term "associated" has a broader meaning than the words "actually incurred", or "actually paid" and that the Panel Report in *Egypt – Steel Rebar* uses the term "*pertain* to the production". Moreover, Article 2.2.1.1 mentions the costs associated *with the production*, as opposed to the expenses incurred by the *producer*. As the Panel in *EC – Salmon* has confirmed, the "costs of production" should be understood as the prices to be paid "for the *act of producing*".

5.4. ARTICLES 2.2 AND 2.2.2(III) OF THE ANTI-DUMPING AGREEMENT AND AMOUNTS FOR PROFITS

43. In setting the 15% margin of profit that the EU applied in constructing the normal value of biodiesel for Argentinian exporters, the EU was applying Article 2(3), first subparagraph, of the Basic Regulation, which follows the rule in Article 2.2 of the Anti-Dumping Agreement by specifying that a constructed normal value "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".

44. The EU submits that the method on the basis of which it determined the level of profits was reasonable and that the resulting margin was itself reasonable for the reasons stated below. Firstly, the figure is appropriate "on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve". Secondly, each situation must be assessed on its own merits taking into account the specific circumstances of the case. Thirdly, the figure was not out of line with that adopted in other investigations, for example that concerning biodiesel originating in the United States. Fourthly, the short and medium term borrowing rate in Argentina was around 14%, and it was reasonable to expect biodiesel producing companies to obtain a profit margin that

exceeded this level. Fifthly, biodiesel companies enjoyed a level of profit higher than 15% during the investigation period, albeit that they benefited from distorted costs. Sixthly, comparison with the target profit for the domestic industry in the absence of dumped imports is not relevant because it has a different purpose than the construction of the normal value.

5.5. Article 2.4 of the Anti-Dumping Agreement and Allowances for Price Comparability

45. The EU does not argue that a constructed price can never be the subject of adjustment in order to secure a fair comparison. Furthermore, the whole of Argentina's case with regard to Article 2.4 amounts to no more than an assertion that the method adopted by the EU for constructing the normal value could not, without adjustment, result in a fair comparison. There is no attempt to set the claim in a context, or to find guidance in the factors listed in Article 2.4 as appropriate for consideration as justifying allowances for differences. Such neglect is not surprising since none of them lends any support to the argument that Argentina presents.

5.5.1. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 vis-à-vis the level of anti-dumping duties imposed

46. 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 claims that the EU has answered in the preceding paragraphs. Since Argentina has failed to establish the earlier claims these consequential claims must also fail.

5.6. Articles 3.1, 3.4, 3.5 of the Anti-Dumping Agreement vis-à-vis production capacity, utilization of capacity and return on investment

5.6.1. Legal arguments and claims

47. Argentina claims that the EU's treatment of "idle" plant in the context of capacity does not accord with the meaning of that word in the phrase "utilization of capacity" in Article 3.4 of the Anti-Dumping Agreement.

48. There is no definition of "capacity" in the Agreement. In its Definitive Regulation the EU excluded "idle" plant, that is to say plant that "was not in such a state that it would have been available for use during the IP". Such plant would make no contribution to the "maximum amount or number that can be … produced", and its exclusion therefore accords with the ordinary meaning of the term "capacity".

49. The EU submits costs of relevant undertaking are taken into account when considering other factors in the list in Article 3.4, notably the factor of "actual and potential decline in … profits". "Utilization of capacity" is a factor distinct from costs and should be treated as such.

50. Whether the "idle" plants are included in the production capacity, or are excluded, the implications regarding injury are the same. In the first case the low capacity utilization is an indication of injury, in the second the closing or mothballing of plants is an indication of injury.

51. Argentina accuses the EU of not making available the "publicly available material" relating to idle capacity. There is no such obligation in any of the provisions of the Agreement invoked by Argentina in its Panel Request, and it is therefore outside of the Panel's terms of reference.

52. Argentina alleges that the presentation of data in the Definitive Regulation obstructed the arguments that the exporters wished to make about the causes of the EU's injury. However, all the data, concerning both "idle" and non-idle capacity were available to the exporters, and they were in no way inhibited from presenting arguments to the effect that the idle plants were a cause of injury. The factors listed in Article 3.4 are not exclusive.

53. Argentina also raises the issue of proper "evaluation" in regard to the issue of return on investment which it alleges was based on a different dataset to that used for production capacity. The EU has already shown that this issue is outside the terms of reference of the Panel.

54. Argentina argues that an assessment of "utilization of capacity" for the purposes of Article 3.4 that is based on a definition of capacity that is inconsistent with that provision, and was

not based on positive evidence, etc., in some way disqualifies that assessment from contributing to a finding of causation vis-à-vis the utilization of capacity. However, Argentina cannot shortcut the requirements of Article 3.5, which addresses the issue of causation, by invoking similar concepts in Article 3.4.

55. Argentina also alleges that the EU gave inadequate consideration to the issues of low capacity utilization and overcapacity. The data shows that the EU industry installed more capacity than there was demand in the EU, and possibly more capacity than EU demand plus export demand. However, the data available for the Definitive Regulation showed that capacity utilization, although low, was actually increasing and consequently could not have been a cause of injury in the sense of Article 3.5.

56. Argentina also alleges that the capital intensive nature of the biodiesel industry aggravates its sensitivity to overcapacity as the cause of injury. However, this capital intensive nature is a constant feature of the industry, whereas the injury to the EU industry has not been constant but has developed over the period of investigation.

5.7. Articles 3.1 and 3.5 of the Anti-Dumping Agreement vis-à-vis long-term commercial strategy

57. Argentina argues that the mere fact that imports by the EU industry from Argentina and Indonesia aggravated the low capacity utilization rate invalidates the conclusion that these imports did not break the causal link between the dumped imports and the injury to the EU industry. The fact that the chain of causation was indirect does not mean that it did not exist. Consequently, this was not an injury caused by an "other factor" which, under Article 3.5, need to be separated and distinguished.

5.8. Articles 3.1 and 3.5 of the Anti-Dumping Agreement vis-à-vis double counting

58. The evidence in question (Exhibit ARG-37, p. 35) concerned only one country, France, and came from only one producer, Diester. The evidence presented by Argentina itself indicates that the fall in production attributed to the French scheme in year 2011 was expected to be more than cancelled in 2012. The Definitive Regulation notes the financial performance of the sampled EU producers, which included Diester, declined only after the ending of the scheme.

59. Argentina presents no evidence of detrimental consequences of double counting in other EU Member States, and, as it explains in the Definitive Regulation, the EU could find none.

5.9. Articles 3.1 and 3.5 of the Anti-Dumping Agreement Vis-à-vis Vertical Integration, etc.

60. Almost all of the features identified by Argentina are constant in their nature and effects and therefore do not qualify as "causes" of injury within the meaning of Article 3.5. They cannot therefore be responsible for the deterioration in the condition of the industry which the EU has determined constitutes "injury" within the meaning of Article 3.4.

61. Even if consideration is given to these factors Argentina never explains why vertical integration is a more efficient way of operating in this industry. Nor is it clear whether the advantage is claimed because of common ownership (which in any case does not extend to growers of beans) or geographic proximity.

6. CONCLUSION

62. Argentina has failed to make a *prima facie* case on any of its claims. The EU has shown that all of the claims pursued and developed in Argentina's first written submission are unfounded and based on erroneous interpretations of the covered agreements. The EU respectfully requests the Panel to reject all of Argentina's claims.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INTRODUCTION

1. The European Union's second written submission focuses on the issues raised by Argentina in its Opening Statement and in its Replies to the Panel's Questions during the first substantive meeting with the Panel.

2. TERMS OF REFERENCE

2. During the First Hearing, Argentina confirmed that it has abandoned the claims challenged by the EU as being outside the Panel's terms of reference. Argentina has also abandoned the claims against "implementing measures and related instruments" and "related measures and implementing measures". This confirms the consequences described in paragraph 13 of the European Union's first written submission.

3. PRELIMINARY ISSUES

3.1. THE CLAIMS UNDER ARTICLE 2.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1 OF THE GATT

3. Argentina accepts in essence that Article 2.1 of the Anti-Dumping Agreement (ADA) and Article VI:1 of the GATT cannot serve as a legal basis for "distinct" claims in WTO dispute settlement proceedings. Both parties agree on this point. However, Argentina asserts that its claims under these two provisions are "consequential" and dependant on its claims under Articles 2.2 and 2.2.1.1 of the ADA.

4. First, the EU considers that the reasoning of the Panel in *EU – Footwear* supports the rejection of Argentina's corresponding claims in the present case. In that case the Panel argued that "under China's approach all dumping related claims could be brought under Article 2.1 alone, supported by the assertion that the obligations asserted are 'created' elsewhere". Importantly, the Panel also rejected China's claims under Article VI:1 of the GATT, stating that its analysis on the claims under Article 2.1 of the ADA also applied.

5. Second, Argentina's assertion that its claims under these two Articles are "consequential" and dependant on other claims under different legal provisions essentially constitutes a request to the Panel to exercise judicial economy on these claims. Since Argentina recognizes that these claims do not aim at protecting some specific and distinct legal right or interest, the EU doubts whether raising them is compatible with the Members' obligations under Article 3.10 of the DSU.

6. Third, there is nothing in Argentina's Panel Request that would indicate that Argentina was making some claims as "distinct" and others as "consequential". Indeed, the references to Article 2.1 of the ADA and Article VI:1 of the GATT seem to be on an equal footing with the references to other Articles in Argentina's Panel Request.

7. The conclusion is that Argentina's new assertions on the "consequential" nature of its claims under Article 2.1 of the ADA and Article VI:1 of the GATT must be rejected for lack of proper legal basis.

8. Moreover, in the present case both parties agree that there were no sales of biodiesel in Argentina in the ordinary course of trade. However, in its response Argentina fails to discuss the importance of the terms "in the ordinary course of trade" in Article 2.1 and the terms "when there are no sales of the like product in the ordinary course of trade" in the first line of the chapeau of Article 2.2. As a result, Argentina's statement fails to rebut the EU's objection that the facts of this case fall outside the scope of Article 2.1.

9. The conclusion is that Argentina's claims under Article 2.1 of the ADA and Article VI:1 of the GATT are manifestly unfounded in law and must be summarily rejected by the Panel.

3.2. THE CLAIMS UNDER ARTICLE 2.4 AND ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

3.2.1. Argentina's claims fall outside the scope of these provisions

10. The EU argues that Article 2.4 does not apply to the investigating authority's establishment of normal value and supports its interpretation with the Panel Report in *Egypt – Steel Rebar*. In that case, the Panel found that Article 2.4 "refers to the comparison of export price and normal value; i.e., the calculation of the dumping margin" and has to do "not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the *nature of the comparison* of export price and normal value".

11. In the case at hand, Argentina considers that investigating authorities have failed to calculate properly the product's normal value, resulting in a comparison between the normal value and the export price that was not "fair" (hence the alleged violation of Article 2.4) and a calculation of the "wrong" dumping margin. According to Argentina, the "wrong" dumping duty calculated was higher than the "correct" dumping margin (hence the alleged violation of Article 9.3).

12. Therefore, Argentina is challenging the *calculation* of the normal value itself (which falls within the scope of Article 2.2) and not the "*nature of the comparison*" between normal value and export price, which is the subject matter of Article 2.4, or the comparison of the anti-dumping duties with the dumping margin, which is the subject matter of Article 9.3. Argentina's claims consequently fall outside the scope of these articles.

13. The EU draws further support for this view from the Panel Report in *EC – Tube or pipe fittings*. In that case, Brazil argued that the EU had used some "wrong" data when constructing normal value and, consequently, had calculated the "wrong" normal value in breach of Articles 2.2 and 2.2.2 of the ADA. Brazil also argued that the EU had "breached the requirement to make a fair comparison between normal value and export price", in violation of Article 2.4. Given the similarity of these claims with the present case, the EU respectfully submits that the Panel should reject Argentina's claims under Article 2.4.

14. In the specific circumstances of the present case, the rejection of Argentina's claims under Article 2.4 necessarily leads to the rejection of Argentina's claims under Article 9.3 because Argentina's case lies solely on the alleged "incorrect" calculation of the dumping margin.

3.2.2. Argentina has failed to make a prima facie case

15. First, Argentina should have shown that the definitive anti-dumping duties are higher than the definitive dumping margins. Instead of that, Argentina compares the *definitive* anti-dumping duties with the *provisional* dumping margins.

16. Second, in a Reply to a Panel's Question, Argentina reproduces an excerpt from the Panel Report in *EU – Footwear (China)* which is not relevant for the present case, because it addressed a very different situation and a very different claim. Indeed, China had only argued that Article 2.4 imposed obligations on the investigating authority when it was constructing normal value whereas Argentina asserts that its Article 2.4 claim does not relate to the construction of normal value.

17. Moreover, Argentina refers to that excerpt out of context. The sentence in the Panel Report immediately following Argentina's excerpt states that "these allowances can only be made *after* the normal value and the export price have been established".

18. Third, the Panel Report in *EU-Footwear (China)* actually supports the EU's position in the present case. That Panel Report confirms that Article 2.4 allows investigating authorities the discretion to make any "due allowances" that they consider necessary and to follow any "methodology" that they consider appropriate.

19. These Panel findings are in line with the Panel Report in *EC – Tube or Pipe Fittings* which noted "the absence of any precise textual guidance in the Agreement concerning how adjustments

are to be calculated", as well as the "absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison".

20. In the present case, Argentina has failed to show that the EU's investigating authorities have exercised their discretion in an arbitrary manner when comparing the normal value with the export price and establishing the dumping margin. This is an additional reason for which Argentina's claims under Article 2.4 must be rejected.

4. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS "AS SUCH" CLAIMS

4.1. INTRODUCTION

21. The EU has argued that, in order to make a prima facie case on its "as such" claim under Article 2.2.1.1 and Article 2.2 of the ADA, Argentina had to establish *inter alia* (a) the "precise content" of the measure that it challenges; and (b) that the challenged "measure" constitutes a binding requirement that requires the investigating authorities to apply it in all cases in a manner which is inconsistent with the covered agreements.

4.2. THE REQUIREMENT TO ESTABLISH THE "PRECISE CONTENT" OF THE WRITTEN "RULE OR NORM"

22. In its recent Report in *Argentina-Import Measures*, the Appellate Body found that when bringing an "as such" challenge against a "rule or norm", the complaining party must clearly establish, *inter alia*, the "precise content of the challenged measure, to the extent that such content is the object of the claims raised".

23. In the present case, Argentina has confirmed that it challenges "as such" a written piece of legislation, namely the second sub-paragraph of Article 2(5) of the Basic Regulation. However, Argentina has failed to establish the "precise content" of that written piece of legislation.

24. First, the EU showed that Argentina has confused the scope of the first sub-paragraph of Article 2(5) with the scope of the second sub-paragraph of Article 2(5) of the Basic Regulation. This is confirmed by the evidence that Argentina itself has put on the record of the case such as the judgment of the General Court in *Acron*. The judgments of the EU's courts clearly show that the second subparagraph of Article 2(5) does *not* have the "precise content" asserted by Argentina.

25. Moreover, the EU's authorities were already making the same determinations with respect to company records on the basis of the first subparagraph of Article 2(5) at a time when the second subparagraph of Article 2(5) did not even exist. A good example of this is the Regulation concerning *Aluminium foil originating in China and Russia* which included the legal test found in the first sentence of Article 2.2.1.1 of the ADA and the first subparagraph of Article 2(5) of the Basic Regulation. Additionally, this regulation also included the term "reliable", used by the Panel in *US – Softwood Lumber V* to describe the meaning of the terms "reasonably reflect costs" in Article 2.2.1.1 of the ADA.

26. Second, Argentina itself has acknowledged that the "measure" it challenges is not found in the text of the second subparagraph of Article 2(5). Instead, it challenges the EU's application of Article 2(5) of the Basic Regulation only in certain specific circumstances, namely where "the prices of the inputs have been found to be artificially low or abnormally low because of an alleged distortion". Therefore, Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation.

27. In *US – Carbon Steel (India)*, India presented similar claims. However, the Appellate Body rejected India's claims and found that "it is not clear why a number of instances of the application of the measure should in this case conclusively *establish the meaning of the measure at issue in general*, which in this case is confined to [the defending party's legislation]". In the present case Argentina has also failed to establish the meaning of the second subparagraph of Article 2(5) *in general*. Consequently, this prevents Argentina from making a *prima facie* case on any of its "as such" claims, including under both Article 2.2.1.1 and 2.2 of the ADA.

28. Third, Argentina has offered a number of different and inconsistent descriptions of the "content" of the measure that it is challenging both under Article 2.2.1.1 and under Article 2.2 of the ADA. For example, in paragraph 25 of its Opening Statement, Argentina asserts that the second subparagraph of Article 2(5) offers the authorities *discretion* and does not oblige them to act in any specific way. In contrast, in paragraphs 54, 68, 70 and 72 of this statement, Argentina asserts that "there is *no discretion*" and that the provision is mandatory.

29. The consequence is that Argentina fails to establish the "precise content" of the second subparagraph of Article 2(5). In these circumstances, it is impossible for the Panel to understand precisely what is the "matter" before it.

30. When the Panel prompted Argentina to show the source of these varying descriptions in the text of the second subparagraph of Article 2(5), Argentina failed to do so. Indeed, its reliance on Recital 4 of Regulation 1972/2002 is misplaced. This Recital cannot be used as a source of interpretation of *all* the situations covered by Article 2(5) of the Basic Regulation because it refers to "particular market situation" and makes no reference to situations where there are "no sales in the ordinary course of trade", which is the situation of the present case. Also, the first sentence of Recital 4 clearly shows that the determinations of whether the records "reasonably reflect costs" were already being made under the first subparagraph of Article 2(5), which already existed at the time of the introduction of Recital 4.

31. Lastly, the European Union has provided examples of investigations to demonstrate that the second subparagraph of Article 2(5) does not oblige the investigating authorities to seek the cost-information outside the country of origin in all cases. In its response, Argentina argues that these examples are not relevant, because they do not "concern a situation in which the prices were found to be abnormally low or artificially low because of a distortion". This response confirms that Argentina does not challenge "as such" the second subparagraph of Article 2(5), but the purported application of that provision in certain specific examples.

32. The conclusion is that Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation (or in the words of the Appellate Body the "meaning" of the second subparagraph of Article 2(5) "*in general*") for purposes of its "as such" claims under either Article 2.2.1.1, or Article 2.2 of the ADA.

4.3. THE REQUIREMENT TO ESTABLISH THAT THE CHALLENGED MEASURE MANDATES CONDUCT THAT IS NECESSARILY INCONSISTENT WITH THE COVERED AGREEMENTS

33. In *US – Carbon Steel (India)*, India had put forward two alternative claims. First, that the covered agreement did not allow the defending party's investigating authorities to take certain actions. Second, that although the measure at issue provided that a specific administrative action may be taken (i.e. "an inference may be drawn"), it more accurately meant that in all cases the defending party's investigating authorities *necessarily* took that action. In support of its claims, India relied on the practice developed by the defending party's authorities but did not challenge "as such" that practice.

34. In relation to India's first claim, the Appellate Body rejected it, noting that the measure was framed in "permissive terms". In relation to India's second claim, the Appellate Body found that the challenged measure was "a discretionary measure rather than a binding requirement" to act in a certain way. The Appellate Body also found that the "practice" identified by India was not required by the measure, but was rather developed pursuant to the discretion afforded by the measure. This meant that the "practice appeared to be distinct and separate from the measure at issue" and was not necessarily applied in all instances.

35. In the present case, Argentina originally claimed that the second subparagraph of Article 2(5) "establishes a rule which is mandatory". However, according to its Opening Statement Argentina appears to have changed its claim. It now advances a new theory, pursuant to which "even if" the second subparagraph of Article 2(5) is discretionary and not mandatory, "the fact that the measure provides for the possibility" to act in a certain way "will necessarily be inconsistent with Article 2.2.1.1" of the ADA. Argentina has not provided further explanation about this new theory. Dealing with a similar situation in the case *EC – Fasteners*, the Appellate Body found that belated modifications of the nature of the complaining party's claims give rise to due process issues.

36. In any event, this modification confirms that Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation and, in contrast, offers two contradictory theories of that "content". The EU respectfully submits that the Panel should reject the "as such" claims of Argentina in the present case, just like the Appellate Body rejected India's "as such" claims in *US – Carbon Steel (India)*.

37. Argentina's first theory is that "the use of the verb 'shall' in Article 2(5), second subparagraph is evidence of the mandatory nature of the measure". Like India *US – Carbon Steel (India)*, Argentina relies on the EU's purported "practice" but does not make a claim that the "practice" itself constitutes a WTO-inconsistent measure.

38. The Panel should apply the Appellate Body's legal test in *US – Carbon Steel (India)*, namely to assess whether the second subparagraph of Article 2(5) of the Basic Regulation is "a discretionary measure", or "a binding requirement" to act in the same way in all cases.

39. Moreover, the Panel should also take into consideration the General Court judgments put on the record by Argentina and showing that, just like in *US – Carbon Steel (India)*, the exercise of the investing authorities' discretion is subject to "rules and disciplines separate from" the second subparagraph of Article 2(5), namely the general principles of the EU administrative law.

40. The Panel should conclude that Argentina has failed to show that the second subparagraph of Article 2(5) "mandates" the investigating authorities to act inconsistently with Article 2.2.1.1, or Article 2.2 of the ADA. Consequently, Argentina's "as such" claims must be rejected.

41. Argentina's new second theory is that the "mere fact that Article 2(5), second subparagraph, provides for the possibility [to find that records do not reasonably reflect costs because they are artificially low or abnormally low] would necessarily render the measure inconsistent with Article 2.2.1.1. The same reasoning applies to Argentina's claim under Article 2.2".

42. If the Panel decides that it has the authority to assess this new belated theory, then the Panel should apply the legal test of *US – Carbon Steel (India)*, namely to "assess whether, pursuant to the authorisation contained in the text of the measure, the investigating authority is *required* to act inconsistently" with the covered agreements.

43. In addition, the Panel should also take into consideration the fact that there have been examples where the authorities have used domestic sources from the country of origin (like in the case of *Okoume Plywood Originating in China*), or the accounts of the parent company (like in the case of *White Phosphorus Originating in Kazakhstan*) in order to establish the "reasonable" costs. This evidence shows that the authorities' use of some "other reasonable basis" depends on the particular circumstances of each case. This means that the second subparagraph of Article 2(5) does not *require* the investigating authority to act inconsistently with the covered agreements.

44. The Panel shall conclude that Argentina's "as such" claims must be rejected.

5. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1

5.1. ARGENTINA'S MAIN THESIS

45. Argentina's claim is premised on the theory that the terms "reasonably reflect the costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 of the ADA mean that the records should include the expenses actually incurred by the company under investigation. Argentina's theory is that the costs do not need to be "reasonable" themselves, but that the records need to reflect "reasonably" the expenses actually incurred.

46. Argentina has confirmed its claims and the fact that the first sentence of Article 2.2.1.1 relates exclusively to a cost allocation issue, in its Replies to the Panel's Questions. Argentina also provided a list of the types of situations that, in its view, would allow an investigating authority to disregard the recorded costs; all of them relate to the allocation of costs that have actually been incurred.

47. It is important to note that contrary to the view of certain Third Parties, Argentina's claim does not entertain the possibility of disregarding the recorded costs in situations where there have been intra-group transactions on a non-arms' length basis.

48. Therefore, Argentina has confirmed that its claim is premised on a specific legal interpretation of Article 2.2.1.1: (a) that the proviso on "reasonably reflect the costs" relates exclusively to the records and not the costs, i.e., that the costs themselves do not need to be reasonable; (b) that the records meet the condition of the proviso where they report the costs that have actually been incurred by the investigated company; (c) that the proviso of Article 2.2.1.1 relates exclusively to issues of proper allocation of the costs that have actually been incurred by the investigated company; and (d) that investigating authorities can *never* disregard or adjust the costs that have actually been incurred by the investigated company for other reasons, even where these costs are distorted.

49. This means that, in order to make a *prima facie* case on its "as such" claim, Argentina must establish that this is indeed the proper interpretation of Article 2.2.1.1. This also means that the Panel is not required to assess whether the second subparagraph of Article 2(5) of the Basic Regulation is consistent with some other interpretation of Article 2.2.1.1 of the ADA.

5.2. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

50. First, the EU notes that the "legislative history" leading to the adoption of Article 2.2.1.1 actually contradicts: (a) Argentina's assertion that the proviso relates only to cost allocation issues; and (b) Argentina's excessively restrictive interpretation of the terms "reasonably reflect the costs". Therefore, Argentina fails to substantiate its interpretation of Article 2.2.1.1.

51. Second, Argentina's discussion of the Panel Report in *US – Softwood Lumber V* is not convincing because Argentina focuses on a statement of the Panel which it reads out of context. A more detailed analysis of the Panel's findings shows that they actually contradict Argentina's claims in the present case. Indeed, the Panel's finding was that Article 2.2.1.1 does not *mandate*, or *require* investigating authorities to reject the recorded costs. In contrast, the Panel did *not* find that Article 2.2.1.1 does not *allow* investigating authorities to disregard the recorded costs, where they consider that they are not "reasonable" because they do not reflect market values. Therefore, the statement of the Panel, to which Argentina refers, has limited scope: the Panel finds that the investigating authorities are not *obliged* to treat the recorded costs in a certain way; but the Panel does *not* find that the authorities are not *allowed* to disregard the recorded costs as "unreasonable", where these costs do not reflect market values.

52. Quite to the contrary, the analysis of the entire reasoning of the Panel confirms that Article 2.2.1.1 *allows* authorities to disregard the recorded costs, where they do not reflect market values. The Panel expressly acknowledged that the recorded costs would be "reasonable" for purposes of Article 2.2.1.1, only if it could be shown that they corresponded to market prices.

53. In the case of Tembec, the investigating authority followed a methodology which used the "market values" as "benchmark" and compared the values recorded in the books with market values in order to determine whether the recorded values were "reasonable" for purposes of Article 2.2.1.1. The Panel's treatment of this methodology it important for the present case because it confirms that the notion of "reasonably" in the first sentence of Article 2.2.1.1 is not limited only to the records, but also covers the recorded costs and values. It also confirms that investigating authorities can use market prices as "benchmarks" in order to confirm the "reasonableness" of the recorded costs and values. The same conclusions are drawn from the Panel's assessment of the West Fraser investigation which accepted that "an arm's length test" may be carried out in order to determine whether these costs are "reliable", and that the recorded costs may be adjusted accordingly. The Panel's approach was confirmed by the Appellate Body on appeal.

54. The conclusion is that the Panel Report in *US – Softwood Lumber V* directly contradicts the main thesis of Argentina's challenge and leads to the rejection of Argentina's claims under Article 2.2.1.1 of the ADA.

55. Third, Argentina's argumentation is based on the theory that a dumping determination cannot rest on "external factors unrelated to the exporter or producer". However, Article VI of the GATT does not limit the notion of dumping only to situations that arise out of the exporters' "voluntary" pricing behaviour. Quite to the contrary, the notion of dumping also covers situations that are created by the action of governments and are, in that sense, "exogenous" or "external" to the "intention" of the exporters.

56. This interpretation is supported by considering the Note 2 *Ad* Article 6 paragraphs 2 and 3 (i.e. "Multiple currency practices can in certain circumstances constitute a subsidy to exports […] or *can constitute a form of dumping* […] which may be met by action under paragraph 2 [of the Article VI of the GATT]. By "multiple currency practices" is meant practices by governments or sanctioned by governments"), with due regard to the negotiating history of the Note and the context in which it appears. Its purpose is filling out the definitions contained in those provisions.

57. This has two important implications. Firstly, the text of the GATT expressly provides that government action can lead to a situation of dumping and that importing countries may impose anti-dumping duties. The consequence is that Argentina's legal interpretation of Article 2.2.1.1 fails. Given that this erroneous legal interpretation of Article 2.2.1.1 is the basis for both (a) the "as such" claim against the second subparagraph of Article 2(5) of the Basic Regulation; and (b) the claim against the specific anti-dumping measure on biodiesel, Argentina cannot make a *prima facie* case on either of these claims.

58. Secondly, the fact that the GATT expressly refers to multiple currency practices as a type of government measure that may lead to a situation of dumping provides some insights on the nature and market effects that such measures should have in order to fall within the scope of the dumping provisions in Article VI and the ADA.

59. Multiple currency practices involve a government induced manipulation of the ordinary operation of the market, which substantially affects and distorts pricing. These are precisely the characteristics of Argentina's export tax on soya beans. Argentina has expressly acknowledged that (a) the export tax on soya beans is a measure of the Government of Argentina and (b) that the effect of the export tax on soya beans is to reduce the domestic price of soya beans in Argentina in comparison to the level that this domestic price would have in the absence of the export tax. Consequently, Argentina's export tax falls squarely within the types of government measures that may lead to dumping and that "may be met by action" under Article VI:2 of the GATT.

60. Fourth, Argentina makes certain inconclusive statements in relation to the Panel Report in *EC – Salmon*. Firstly, Argentina fails to address the Panel's choice of words, contradicting its theory that Article 2.2.1.1 restricts the notion of "reasonably reflect costs" only to those that have actually already been incurred by the investigated company.

61. Secondly, Argentina asserts that the price used by the EU's investigating authorities "is clearly not the price to be paid by the Argentinean producers for domestic purchases of soybeans in Argentina". This contradicts Argentina's previous acknowledgements regarding the "price to be paid" by the Argentinian producers for domestic purchases of soya beans, in the absence of the government measure that distorts the price of soya beans.

62. It is noted that the information provided by Argentina in its Replies to the Panel's Questions confirms that the export tax on soya beans indeed constitutes a mechanism for distorting the price of soya beans. Argentina has also confirmed that the reason for which it determines this "reference FOB price" is to "monitor possible pricing *divergences* in the local market. The effect of that mechanism is to ensure that the resulting domestic price for soya beans is below the domestic price that would have prevailed in the absence of the export tax.

63. Therefore, the way Argentina implements the export tax on soya beans constitutes, is in essence, a mechanism of intervention on the domestic price of soya beans.

64. Fifth, Argentina makes some statements in relation to the terms "associated with the costs" in Article 2.2.1.1 of the ADA, which are not convincing. Indeed, Argentina qualifies the "reference FOB price" as a "hypothetical benchmark price" and asserts that the FOB reference price is "not a 'real' price in the sense that it is an average that is used for the calculation of the export tax.

Argentina thus contradicts its previous acknowledgement that in the absence of the export tax, the domestic price of soya beans would have been the "reference FOB price" less the transaction and fobbing costs.

65. In the present case, the investigating authorities took as a basis the FOB reference price (which the Government of Argentina itself had determined) and followed exactly the methodology that Argentina itself acknowledges would lead to the calculation of the domestic soya bean prices in the absence of the export tax.

66. The conclusion is that Argentina's interpretation of Article 2.2.1.1 of the ADA is erroneous. Consequently, Argentina fails to make a *prima facie* case on the claims that it bases on Article 2.2.1.1.

6. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

67. First, Argentina's main assertion is that the distinction between costs and evidence pertaining to the determination of costs suggested by the EU is "artificial" and has no basis in the text or the context of Article 2.2. However, the ADA itself makes such a distinction, when it contains a specific Article entitled "Evidence"(i.e., Article 6). Therefore, Argentina's assertion is unfounded.

68. Second, Argentina advances various arguments on the interpretation of Article 2.2.2(iii) of the ADA. Its main argument is that "the use of data other than that of the country of origin must explicitly be provided for" and that Article 2.2.2 of the ADA supposedly "does not provide for a similar exception or authorisation for the determination of the cost of production". Argentina also asserts that "Article 2.2.2 lays down the criteria for determining the reasonable amounts of SG&A and for profits only and not for the cost of production". As well as "the fact that Article 2.2.2(iii) refers to any other reasonable method for the determination of SG&A and profits can certainly not be applied to the determination of the cost of production".

69. Argentina's arguments are not convincing because the chapeau of Article 2.2.2 and Article 2.2.1.1 use the same terms to refer to the same production and sales costs. There is no reason for which the "any other reasonable method" of Article 2.2.2(iii) would relate only to the production and sales costs of the chapeau of Article 2.2.2, but not the same production and sales costs mentioned in Article 2.2.1.1.

70. Third, despites questions from the Panel, Argentina has failed to explain how an investigating authority could determine costs in a situation where there are no usable data from the country of origin.

71. Consequently, Argentina has failed to substantiate its interpretation of Article 2.2 and has failed to make a *prima facie* case on the claims that it bases on this provision.

7. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS CLAIMS UNDER ARTICLE 2.2.1.1 AND ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AGAINST THE ANTI-DUMPING MEASURE ON BIODIESEL

72. Argentina has failed to show that the prices used by the EU's investigating authorities were from "outside the country of origin". Argentina has simply asserted that "the EU did not use the domestic price of soybeans" and that "the EU failed to construct normal value on the basis of the cost of production in the country of origin".

73. The EU considers that, the prices used by the investigating authorities were from the country of origin and reflected the cost of soya beans that Argentine producers of biodiesel would have to incur, in the absence of the export tax.

74. Consequently, Argentina fails to make a *prima facie* case on its claims against the anti-dumping measure on biodiesel under Article 2.2 of the ADA, irrespective of whether that provision allows the use of evidence from outside the country of origin, or not.

8. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS CLAIMS IN RELATION TO PROFITS

75. In its Replies to the Panel's Questions, Argentina appears to draw a distinction between the "reasonable method" of Article 2.2.2(iii) and the figure of profits to be established. Argentina notes that Article 2.2.2(iii) does not "use the terms 'any reasonable amount'" and, on that basis, Argentina appears to assert that the profit figure does not need to be "reasonable", but that the methodology must be "reasonable". This assertion that is clearly wrong. The chapeau of Article 2.2 refers to a "reasonable amount for administrative, selling and general expenses and for profits".

76. In any event, the methodology followed by the investigating authorities in the present case closely resembles the methodology followed by the US authorities and approved by the Panel in *US – Softwood Lumber V*, albeit in order to calculate a different cost item. This is clearly a "method" for the calculation of the profits that is "reasonable".

77. In these circumstances, the EU submits that the Panel should reject Argentina's claim, just as the Panel rejected Canada's "*post hoc* rationalisation" objections in *US – Softwood Lumber V*.

9. ARTICLE 3 CLAIMS

78. Argentina persists in accusing the EU of having adopted the wrong definition of capacity. In the provisional and definitive Regulations the EU described the state of the various EU biodiesel producing facilities, and gave a clear explanation of the criterion it applied in assessing utilisation of capacity. While rejecting the EU's explanation Argentina has quietly abandoned its own criterion of capacity based on the notion of what a plant was "designed to produce". Instead, it proposes a new criterion of "potential" for production. Its suggestion that the negotiating history contributes to the interpretation of the text lacks all conviction, and trails off into platitude.

79. Argentina's only interest in the data on "capacity utilisation" is to proceed to the further step of identifying it as an "other factor" cause of injury. During the investigation the exporters suggested that the injury was caused through over-expansion. However, the evidence obtained by the EU and Argentina itself acknowledges that what it calls the "enormous overcapacity" is "continuous" and "existed in 2009", i.e. throughout the period considered. To the contrary, the EU believes that capacity utilisation is an indicator of the level of efficiency at which an industry is operating.

80. Argentina again accuses the EU of failing to make an objective assessment in its evaluation of production capacity and utilisation of capacity. The best answer that the EU can give is to ask the Panel to examine the careful justification for its conclusions that was provided by the EU, in particular in the Definitive Regulation at Recitals 130 to 133, and 161 to 171. These passages speak for themselves.

81. On the issue of causation, Argentina's argument hypothesises the "total elimination of imports originating in Argentina and Indonesia" as compared to the EU volume of production. The EU does not see what would be learnt from such an exercise. Indeed, the aim of the causation analysis, in situations where there are said to be "other factors", is to separate and distinguish the various causes.

82. Argentina suggests that these imports and the anti-dumping proceedings are being choreographed by multinational companies for ends of their own. It means that corporate groups "might have decided that their interests were better served by activating trade defence mechanisms in the European Union". Firms producing in the EU are, regardless of ownership, in principle entitled to the remedies provided by the anti-dumping legislation if the conditions set out there are satisfied. The idea that a firm might see an advantage in having its own goods subjected to anti-dumping duties seems somewhat far-fetched. Furthermore, the EU (consistent with Article 4.1(i) of the ADA) has already excluded three producers from the definition of the EU industry because the high level of their imports from Argentina.

83. The EU maintains that Argentina's claim that the EU, when examining injury in accordance with Article 3.4 of the ADA, failed to properly consider the factor 'return on investment' is outside the Panel's terms of reference because it was not mentioned in the Panel Request. The EU supports its contention referring to the Appellate Body Report *China – Raw Materials* in which the

claimants "failed to present the legal basis for their complaints with sufficient clarity to comply with Article 6.2 of the DSU".

84. The importance of examining each of the factors listed in Article 3.4 of the ADA has been stressed by the Appellate Body in *Thailand-H-Beams*. There are fifteen of these factors. Clearly it would not be sufficient for the panel request to merely state that they had not been properly examined without indicating which factors in particular the failure lay.

85. Argentina's reference to the Appellate Body's report in the *Wheat Gluten* case on the issue of "continuing" conditions has no bearing on the point that the EU has made. Rather it addresses the timing of injury caused by various factors. The EU makes provision for such issues of timing to be taken into account by tracking developments in the condition of the domestic industry, and the potential causes of injury, over a "period considered" of three and a half years, ending in the dumping "investigation period" of one year. It is just this approach that enables the EU to respect the obligation to separate and distinguish the various factors that may be causing injury. In particular, it permits the EU to distinguish those factors that are changing from those that are constant.

10. CONCLUSION

86. Argentina has failed to make a *prima facie* case on any of its claims. The European Union respectfully requests the Panel to reject all of Argentina's claims.

ANNEX C-3

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN UNION AT THE FIRST MEETING OF THE PANEL

1. INTRODUCTION

1. The opening statement of the EU will focus on some of the issues raised by certain Third Parties in their submissions.

2. THIRD-PARTY SUBMISSIONS REVEAL BROADER CONSENSUS ON CERTAIN ISSUES

2. A number of Third Parties, in particular the United States, Australia and Turkey, have expressed views that are very close to the legal interpretations and arguments put forward by the EU in its First Written Submission. This is also partially the case for Third Parties that have generally supported Argentina's claims like China. The conclusion that the EU draws from the submissions of the Third Parties is that there is broad consensus that, in principle and in certain circumstances, Article 2.2.1.1 allows investigating authorities to disregard company records, where the costs recorded are not reasonable. There is also broad consensus that, in principle and in certain circumstances, Article 2.2 allows the authorities to use evidence from outside the country of origin in order to calculate the cost of production in the country of origin.

3. However, there seems to be a disagreement on which are the "certain conditions" that must be met, for these principles to apply. On that regard, the EU stresses that Article 2(5) of the Basic Regulation does not allow "unfettered discretion" to its authorities, which are required to act reasonably and are subject to judicial control. In any case, the EU argues that the present panel is not required to come up with any exhaustive lists of conditions.

4. More importantly, the panel only needs to determine whether Argentina has made a prima facie case on its claims. To do so, the Panel only needs to decide whether Argentina has met its burden of showing (a) that the specific provisions of Article 2(5) of the Basic Regulation, which it challenges "as such", fall within the category of what is not permissible under Article 2.2.1.1 and (b) that it is never permissible to use evidence from outside the country of origin in order to calculate the costs of production. Since Article 2(5) of the Basic Regulation does not define the terms "reasonably reflects costs" nor define the conditions that would allow the investigating authorities to seek outside the country of origin the evidences for the costs, the EU does not see how it is possible for Argentina to succeed in its "as such" claims.

3. BROADER LEGAL POINTS RAISED BY SOME THIRD PARTIES

5. The EU considers that some broader legal interpretations advanced by certain third parties, which Argentina has not put forward, are outside the Panel's terms of reference, or fall outside the scope of the present dispute. In any case, these interpretations are also legally erroneous, as further explained.

4. EXPORT TAXES OR DUTIES

6. Regarding the impact of export taxes and export duties on anti-dumping investigations, some Third Parties have expressed the view that anti-dumping rules cannot be used to address the distortive effects of export duties, asserting that Article XI:1 of the GATT allows the imposition of export duties. This view is legally incorrect because there is nothing in the GATT that would prevent an investigating authority from taking into consideration the distortive effects of export duties and export taxes when constructing the normal value of the product under consideration.

7. More precisely, Article XI:1 does not allow anything, but only contains a prohibition. The definition of quantitative restrictions does not include export duties and export taxes. But, this does not mean that Article XI:1 authorises WTO Members to introduce export duties or export taxes.

8. The fact that export duties and export taxes fall outside the scope of Article XI:1 of the GATT does not mean that the effects of such export taxes and export duties fall outside the scope of Article VI of the GATT. Using a similar reasoning to that of Appellate Body in the case *Argentina – Import Measures,* the EU notes that Article XI:1 does not contain any "express language identifying its relationship" with Article VI of the GATT. Moreover, there is no language in Article XI:1 or Article VI of the GATT stating that the anti-dumping authorities of WTO Members cannot take into account the distortive effects of export duties or export taxes in anti-dumping investigations. Lastly, there is no specific obligation or language in Article XI:1 that could be said to conflict with the provisions of Article VI of the GATT. The use of the forceful term "condemn" in Article VI provides further support for the conclusion that export duties and export taxes and their distortive effects do not fall outside the scope of Article VI of the GATT and of anti-dumping investigations.

9. The Panel's rejection of Argentina's claims in the present dispute will not have the effect of indirectly declaring all export taxes or export duties as WTO-inconsistent because the investigation will still be subject to the strict procedural requirements of the Anti-Dumping Agreement and not necessarily always lead to a finding of dumping.

10. The distortive effects of export taxes and export duties are well known and well documented. They are the result of government intervention and of the protection afforded to the exporting country's downstream industry.

5. THE NOTION OF DUMPING

11. It has been argued by certain third parties that the anti-dumping rules are "only concerned with examining the private pricing behaviour of producers". As a consequence of this purported "nature" of dumping, "the investigation authority cannot reject the costs recorded in the producer/exporter's accounts on grounds exogenous to that producer/exporter", such as the "full range of governmental policy interventions that are entirely outside the control of the producer/exporter themselves". The EU believes that the panel should reject these erroneous assertions for a number of reasons.

12. There is no textual basis in Article VI of the GATT or in the Anti-Dumping Agreement for such a "subjective element" in the anti-dumping rules that would consider dumping as an intentional "price discrimination". To the contrary, both Article VI:1 of the GATT and Article 2 of the Anti-Dumping Agreement define dumping in objective terms: introduction of products "into the commerce of another country at less than the normal value of the products".

13. Dumping is not defined by reference to the domestic prices in the exporting country but by reference to the "normal value" of the products. Article VI:1 of the GATT lists certain types of evidence that could be used as proxy to identify the "normal value". This article confirms that dumping is not related to exporters' purported "intention" but only to the value that the products should have in normal circumstances. Also, the calculation of dumping would be deprived of practical effects if "exogenous" costs elements beyond the exporters own control would be excluded. Anti-dumping rules would thus be rendered ineffective.

14. Article VI:5 of the GATT acknowledges that there can be situations which could be subject of both a countervailing duty and an anti-dumping duty. Therefore, the text of this article acknowledges that government actions may be at the source of dumping and material injury. To further support this conclusion, the EU relies on the Appellate Body report in the case *United States – Anti-dumping and Countervailing duties (China)* in which it was established that "exogenous factors", such as the actions of the government of the exporting country, may very well be the source of dumping.

15. The reliance of certain Third Parties on the Appellate Body Reports in the zeroing cases is misguided. Indeed, in this case the Appellate Body was not dealing with the construction of the normal value, but only whether the investigating authority should look at individual transactions separately, or whether it should look at the "aggregation of all export transactions". The Appellate Body discussed the export price part of the comparison and not the normal value.

6. THE SITUATION UNDER THE ANTI-DUMPING CODE IN THE 1980S

16. Another Third Party referred to the situation that prevailed under the anti-dumping Code and especially views and documents from 1982 and 1984. The EU considers that the passages cited by Indonesia do not support its interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement since the Code was very different from the current version of the Anti-Dumping Agreement and did not include any provision like Article 2.1.1.1.

17. In the alternative, should those statements still have some relevance today, they would contradict Indonesia's and Argentina's interpretation of Article 2.2.1.1. Indeed, in its Article 1(4) the anti-dumping Code did not provide that the costs should normally be calculated on the basis of the records kept by the investigated companies, or that these records should reasonably reflect the costs associated with the production and sale of the relevant goods. To remedy this omission, WTO members have included the first sentence of Article 2.2.1.1 in the Anti-Dumping Agreement: costs reflected in companies' records must be reasonable.

18. In any event, paragraph 5 of the draft recommendation on the implementation of the anti-dumping Code, to which Indonesia refers, expressly limits the scope of the recommendation to situations where the inputs are purchased "in the ordinary course of trade". However, Article 2.2.1.1 of the Anti-Dumping Agreement applies to situations where there are no sales in the ordinary course of trade such as in the present dispute.

7. ARGENTINA HAS FAILED TO MAKE A PRIMA FACIE CASE ON ITS "AS SUCH" CHALLENGE UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

19. The EU considers Argentina's "as such" challenge against the second subparagraph of Article 2(5) of the EU's Basic Regulation is a more relevant point for the Panel's analysis. In the light of certain comments made by Third Parties in their submissions, the EU will submit the following: first, Argentina's failure to establish, as a matter of fact, the content and scope of the second subparagraph of Article 2(5); second, Argentina's failure to articulate properly, let alone establish, the "precise content" of the "norm or rule" that it purports to challenge "as such" and third, Argentina's failure to establish that the "norm or rule" that it purports to challenge "as such" is the type of measure that can be the subject of an "as such" challenge.

8. THE SCOPE OF THE SECOND SUBPARAGRAPH OF ARTICLE 2(5)

20. It is by now clear to all participants in these proceedings that Argentina's challenge against the *second* subparagraph of Article 2(5) of the Basic Regulation under Article 2.2.1.1 of the Anti-Dumping Agreement is factually wrong. In its First Written Submission, Argentina has simply confused the scope of the second subparagraph of Article 2(5) with the scope of the first subparagraph of Article 2(5). Any other theory advanced by China and Indonesia is factually untenable. This is made clear by the text of the two subparagraphs of the Article 2(5) of the Basic Regulation. It is also made clear by the fact that the EU had already made determinations similar to the ones challenged by Argentina in the present case, on the basis solely of the first subparagraph of Article 2(5), before the second subparagraph of Article 2(5) was even introduced. Indonesia even acknowledges this latter fact in footnote 27 of its Third Party Submission.

21. While the first subparagraph of Article 2(5) is repeating "verbatim the conditions on the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement", the second subparagraph does not relate to Article 2.2.1.1, but simply fills a gap, describing what actions authorities are authorised to take in order to calculate the costs when the company records cannot be used. In the Anti-Dumping Agreement, the closest provision to this second paragraph is subparagraph (iii) of Article 2.2.2, which refers to "any reasonable method" and to "any reasonable basis". This article was the inspiration for the drafting of the second subparagraph of Article 2(5). Therefore, the EU concludes that Argentina has simply directed its "as such" challenge under Article 2.2.1.1 of the Anti-Dumping Agreement against the wrong provision of the Basic Regulation.

9. ARGENTINA HAS FAILED TO ESTABLISH THE "PRECISE CONTENT" OF THE "NORM OR RULE" THAT IT CHALLENGES

22. The Appellate Body has confirmed that, in order to substantiate an "as such" claim, the complaining party must first establish, *inter alia*, the "precise content" of the "rule or norm" that it challenges. In the present case, Argentina has failed to articulate properly, let alone establish, the "precise content" of the norm that it challenges "as such" under Article 2.2.1.1 of the Anti-Dumping Agreement.

23. If Argentina is challenging "as such" Article 2(5) of the Basic Regulation "and more specifically its second paragraph", this challenge must fail. Indeed, there is broader consensus that this subparagraph allows EU authorities to act in a certain manner but does not oblige them, or mandate them to do so. If Argentina does not challenge this provision, its position is inconsistent. It challenges the "condition" that "refers in particular to situations where the prices are 'artificially low' or 'affected by a distortion'", the purported "continuous and established practice" of the EU, and Article 2(5) second paragraph of the Basic Regulation" which purportedly "refers to situations where the prices of an input are 'abnormally or artificially low' because they are set in a 'regulated market' or because of the existence of some alleged 'distortion' on the domestic market".

24. Since Argentina has already acknowledged that it does not challenge "as such" any "practice" and consequently that any such challenge against a "practice" would be outside the Panel's terms of reference, it could assumed that Argentina challenges a written "norm or rule", i.e the second subparagraph of Article 2(5). Nonetheless, Argentina still does not offer consistency even in the description of the content of that "norm or rule" it is "as such" challenging. The EU understands that Argentina considers that the challenged "measure" is to be found beyond the actual text of Article 2(5) of the Basic Regulation. However, the EU submits that Argentina has failed to articulate properly and to establish with the requisite evidence the "precise content" of its claims.

10. ARTICLE 2(5) OF THE BASIC REGULATION ALLOWS THE INVESTIGATING AUTHORITIES DISCRETION

25. The EU believes that it by now clear that Art 2(5) does not mandates the investigating authorities to act in a particular manner and allows the authorities' discretion. In light of the recent Appellate Body Report in *US – Carbon Steel (India)*, the discretionary nature of Article 2(5) of the Basic Regulation is fatal to Argentina's "as such" claims against Article 2(5).

26. The EU finds problematic assertions like one made by China, which considers that in order to challenge "as such" a "rule or norm", it is "not necessary to show that it 'mandates' a WTO-inconsistent outcome in every case". First, China does not offer any textual basis. Second, China's reference to the paragraph 172 of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews* contradicts its position. Indeed, this paragraph does not refer to the "particular circumstances" asserted by China. Also China fails to explain how its assertion can be compatible with the nature of an "as such" claim, which according to the Appellate Body is directed against "laws and regulations". To the contrary, China's assertion transforms in essence every "as applied" claim to an "as such" claim, by renaming the application of the law in a specific case to an application in "particular", or "defined", or "at least certain" circumstances. Therefore, China's assertions must be rejected.

11. THE MEANING OF THE TERM "ASSOCIATED" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

27. The EU in its First Written Submission noted that the ordinary meaning of the term "associated" is broader than the meaning of the words "actually incurred". It also noted that the Panel Report in *Egypt-Steel Rebar* supports its understanding of the ordinary meaning of the term "associated", because it uses the term "pertain", instead of the words "actually incurred".

28. Indonesia disagreed with EU interpretation and noted that the chapeau of Article 2.2.2 of the Anti-Dumping Agreement also uses the term "pertain" to "refer to the actual data" of the company under investigation. The EU believes that its interpretation is the preferable one for several reasons.

29. The ordinary meaning of the term "pertain" is "be appropriate" or "related". These terms are broader than the words "actually incurred". Therefore that ordinary meaning does not limit Article 2.2.1.1 to only those costs that have "actually been incurred" by the specific company under investigation.

30. The EU's interpretation is confirmed by the context in which these terms are used. Indeed, Article 2.2.1.1, which is the subject of the present analysis, does not use the words "actual data" contained in the chapeau of Article 2.2.2 and referred by Indonesia, but the word "reasonably".

31. The chapeau of Article 2.2.2 of the Anti-Dumping Agreement uses the term "pertaining to" in the context of the "ordinary course of trade". In contrast, the words "ordinary course of trade" are not found in Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, the term "pertaining to" in the chapeau of Article 2.2.2 is used in order to convey a different meaning form the term "associated" in Article 2.2.1.1 of the Anti-Dumping Agreement.

32. The EU notes that the chapeau of Article 2.2.2, in combination with subparagraph (iii) of Article 2.2.2, provides that, in the absence of "ordinary course of trade", the investigating authority may use "any other reasonable method".

12. ISSUES RELATING TO ARGENTINA'S "AS APPLIED" CLAIMS

33. The EU disagrees with the argument made by China that it has used "an average of the FOB reference prices" without making any "adjustment to this evidence". The EU's position was acknowledged by Argentina.

34. The EU also disagrees with certain Third Parties taking the view that the prices used by the investigating authority were not from the "country of origin" for a number of reasons: the investigation revealed that the prices used were actually fixed by the government of Argentina, the prices were applied in Argentina, paid in Argentina and ensured that Argentinian producers of soya bean and soya bean oil received the same net price irrespective of the destination of their goods. This is not a case of application of the proviso on "information from other representative markets", but a case of application of the proviso on "any other reasonable basis", authorised by Article 2(5).

35. Consequently, Argentina's "as applied" claim against the Definitive Regulation, based on Article 2.2 of the Anti-Dumping Agreement, must fail. And this, irrespective of whether Article 2.2 allows investigating authorities to seek evidence from outside the country of origin in order to calculate the costs of production in the country of origin.

ANNEX C-4

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN UNION AT THE SECOND MEETING OF THE PANEL

1. INTRODUCTION

1. The European Union's Opening Statement will address the points raised by Argentina in its Second Written Submission.

2. TERMS OF REFERENCE / PANEL'S FINDINGS

2. In relation to Argentina's "as such" claim, the only measure before the Panel is the second subparagraph of Article 2(5) of the Basic Regulation, as well as any subsequent amendments or replacements to that specific subparagraph. In relation to Argentina's "as applied" claims, the only measures before the Panel are the Provisional Regulation and the Definitive Regulation, as well as any subsequent amendments or replacements to these specific Regulations.

3. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS "AS SUCH" CLAIMS

3.1. ARGENTINA HAS FAILED TO ESTABLISH THE PRECISE CONTENT OF THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

3.1.1. Argentina misrepresents the scope of the second subparagraph of Article 2(5) of the Basic Regulation

3.1.1.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation

3. In paragraph 26 of its Second Written Submission, Argentina acknowledges that the first subparagraph of Article 2(5) "implements the particular obligations laid down by Article 2.2.1.1 of the Anti-Dumping Agreement" and "closely mirrors the wording of Article 2.2.1.1". Paradoxically, Argentina continues to insist that it is the second subparagraph of Article 2(5) that provides the legal basis for the decision not to rely on the records of the investigated companies.

4. In paragraphs 12 and 18 of its Second Written Submission, Argentina draws a distinction between what it calls the "first part of Article 2(5) second subparagraph [and] the second part of that provision". Argentina also asserts that the options given to the investigating authorities under "the second part of Article 2(5) second subparagraph" "imply" that they also constitute the "reasons why information of the domestic market cannot be used". However, there is nothing in the text of either the first or the second subparagraph of Article 2(5) that could support Argentina's assertion.

3.1.1.2 The lack of similarity with the *EC-Fasteners* case

5. In paragraph 15 of its Second Written Submission, Argentina compares the present dispute with the situation faced by the Panel in *EC – Fasteners*. In that case, the Appellate Body found that in the absence of a specific provision, Article 9(5) of the Basic Regulation also concerned the calculation of dumping margins.

6. In the present situation, the first subparagraph of Article 2(5) addresses precisely the question of the conditions that must be met in order to base the cost calculation on the company records.

3.1.1.3 Recital 4 of Regulation 1972/2002

7. Argentina has repeatedly referred to Recital 4 of Regulation 1972/2002, with which the second subparagraph was added to Article 2(5). However, the text of that Recital does not support Argentina's arguments.

8. First, the text of Recital 4 shows that Article 2(5) had already been the legal basis for the authorities' determination of whether the records reasonably reflected costs, before the introduction of the second subparagraph of Article 2(5). Second, in paragraph 69 of its Second Written Submission, Argentina confuses the *sales* of the like product [governed by Article 2(3)] with the "records that do not reasonably reflect the costs" associated with the production and sale of the relevant product. Third, in paragraph 70 of its Second Written Submission, Argentina asserts that Recital 4 "emphasises that the records *must* be found not to reasonably reflect the costs". However, Recital 4 expressly refers to guidance as to what has to be done after it has already been determined that the records do not reasonably reflect the costs. Fourth, Recital 4 does not have any impact on the interpretation of "reasonably reflect costs".

3.1.1.4 The alleged "background" of the second subparagraph of Article 2(5) of the Basic Regulation

9. Argentina continues to insist that the "purpose" of the introduction of the second subparagraph of Article 2(5) "was to provide a legal basis for the authorities to achieve effects similar to those applied under NME treatment to Russia, although it was being granted full MES".

10. In support of its assertions, Argentina refers to several comments of scholars listed in paragraph 43 of its First Written Submission. However, at the time of the publications, all the scholars referred to were actively involved in defending Russian companies in anti-dumping investigations relating to the application of Article 2(5) of the Basic Regulation. In these circumstances, it is doubtful whether their statements can be used as a source of interpretation of Article 2(5).

3.1.1.5 The judgments of the General Court

11. Argentina has submitted as Exhibits certain judgments of the General Court which actually contradict its description of the scope of the second subparagraph of Article 2(5).

12. The General Court's judgments in Cases T-235/08 and T-118/10 confirm three points. First, that the first subparagraph of Article 2(5) is the legal basis that authorises the investigating authorities to determine whether the records "reasonably reflect costs". Second, that the second subparagraph of Article 2(5) only provides the alternative sources of data that the investigating authorities may use when it has already been determined that the company records cannot be used, pursuant to the first subparagraph of Article 2(5). Third, that the first and the second subparagraphs of Article 2(5) *authorise* the investigating authorities to take certain actions, but do *not mandate* them to do so.

3.1.1.6 Examples of application of the first subparagraph of Article 2(5) of the Basic Regulation by the European Union's investigating authorities before 2002

13. Argentina insists that the EU's investigating authorities had never determined that company records do not "reasonably reflect costs" before 2002.

14. First, the EU's investigating authorities routinely used the provision which today is the first subparagraph of Article 2(5) in order to determine whether the company records "reasonably reflect" the relevant costs between 1995 and 2002, at a period when the second subparagraph of Article 2(5) did not exist. Example are the 2000 investigation on *Urea and Ammonium Nitrate originating in Algeria et al*., the 2001 investigation on certain *Iron or steel ropes and cables originating in the Czech Republic, Russia, Thailand, et al., the* 1996 investigation on *Polyester textured filament yarn originating in Indonesia and Thailand*, and the 2000 investigation on *Tube or pipe fittings originating in Brazil, the Czech Republic, et al*.

15. Second, Argentina errs when it asserts that the investigations involving an application of Article 18 of the Basic Regulation are not relevant for purposes of Article 2(5). Even where they apply Article 18, the EU's investigating authorities still use the information supplied by the companies to the extent possible. Examples are the 2000 investigation on *Synthetic staple fibres of polyester originating in Australia, Indonesia and Thailand* and the investigation on *Aluminium foil originating in China and Russia*.

3.1.2. Other shortcomings of Argentina's "as such" claims

16. To sum up, Argentina purports to challenge "as such" the second subparagraph of Article 2(5) of the Basic Regulation under Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement. Argentina's challenge under Article 2.2.1.1 of the Anti-Dumping Agreement must be rejected for the simple reason that the scope of the second subparagraph of Article 2(5) has nothing to do with the content of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

3.1.2.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation is clear

17. In its Second Written Submission, Argentina refers to the Appellate Body Report in *US – Corrosion Resistant Steel* and acknowledges that when a measure is challenged "as such" the starting point for the analysis "must be the measure on its face". Argentina also refers to the Appellate Body Report in *US – Hot Rolled Steel* and acknowledges that "further examination is required", only if the "meaning or content of the measure is *not* evident on its face".

18. The EU has explained the reasons for which the scope, meaning and content of the second subparagraph of Article 2(5) are clear and evident on the basis of the provision's text. Argentina has actually acknowledged this fact in paragraph 50 of its Second Written Submission when it took issue with the EU's "exclusively focusing on the terms of Article 2(5), second subparagraph".

3.1.2.2 Argentina's description of the second subparagraph of Article 2(5) of the Basic Regulation

19. The text of Argentina's Second Written Submission in essence confirms the EU's objection: there is still no concise and uniform description of the meaning and content of the second subparagraph of Article 2(5), despite the clarity of the provision's text.

20. Argentina has also failed to identify the "precise content" of the second subparagraph of Article 2(5). Therefore, Argentina cannot make a *prima facie* case on an "as such" claim against the second subparagraph of Article 2(5) either under Article 2.2.1.1, or under Article 2.2 of the ADA.

3.2. ARGENTINA HAS FAILED TO SHOW THAT THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION IS "AS SUCH" INCONSISTENT WITH THE COVERED AGREEMENTS

3.2.1. Argentina ignores the Appellate Body Report in *US – Carbon Steel (India)*

21. In its Second Written Submission, Argentina asserts that "there is no provision" in the covered agreements which "establishes a mandatory/discretionary standard that the Panel would have to apply". However, Argentina omits to mention that the Appellate Body has used the "discretionary" nature of particular measures as a ground for rejecting "as such" claims against them. The most recent example is the Appellate Body's Report in *US – Carbon Steel (India)*.

22. In its Second Written Submission, Argentina states that providing for the possibility of "the use of a basis other than the cost of production in the country of origin renders the measure inconsistent with Article 2.2 of the ADA". However, Argentina is not consistent in its description of the content of the second subparagraph of Article 2(5) and has failed to establish that this provision mandates any particular conduct which is necessarily inconsistent with the covered agreements.

3.2.2. Argentina's refusal of the discretion afforded to the investigating authorities by the second subparagraph of Article 2(5) of the Basic Regulation

3.2.2.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation

23. The text of the second subparagraph of Article 2(5) says nothing about the determination of whether the company records can be used or not. Therefore, Argentina cannot assert that the text of the second subparagraph of Article 2(5) "mandates" any conduct in relation to the determination of whether company records reasonably reflect costs.

24. Argentina's arguments are based on the use of the word "shall" in the text of the second subparagraph of Article 2(5). However, the word "shall" in the text of the second subparagraph of Article 2(5) addresses the obligation of the investigating authorities to proceed with the construction of the normal value so that they can complete the anti-dumping investigation. It does not relate to any single method that the investigating authorities may use in order to establish or adjust the costs.

3.2.2.2 The alleged "practice" of the European Union's investigating authorities

25. In paragraphs 102 to 104 of its Second Written Submission, Argentina states that "in all cases which involved a situation of 'abnormally low' or 'artificially low' prices caused by an alleged 'distortion', information on the domestic market could not be used and the authorities used information from other representative markets".

26. As already noted, the investigations of the EU's authorities do not support Argentina's arguments on the purported "absence of discretion" afforded by the second subparagraph of Article 2(5).

3.2.2.3 The judgments of the General Court

27. In paragraph 105 of its Second Written Submission, Argentina states that the "use of the word 'entitled'" in the judgments of the General Court "does not confirm that Article 2(5) is discretionary". However, the ordinary meaning of the word "entitle" is "to grant someone a right". The use of the word "entitled" means that the General Court considers that the second subparagraph of Article 2(5) grants to the investigating authorities the right to act in a certain way, without obliging them.

28. Moreover, Argentina omits to mention that the relevant paragraph of the General Court's judgment, to which it refers, reads as follows: "The institutions were therefore fully **entitled** to conclude that …". This makes clear that the General Court was actually examining whether the investigating authorities had gone beyond the discretion that both the first and the second subparagraphs of Article 2(5) affords them.

3.3. CONCLUSION

29. To sum up, Argentina has failed to make a *prima facie* case on its "as such" claims against the second subparagraph of Article 2(5) under Article 2.2.1.1 and Article 2.2 of the ADA.

4. ARGENTINA ADVANCES AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ADA

4.1. THE TEXT OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

30. Argentina reiterates that this provision requires the "records to reasonably reflect" the relevant costs and that there is no "reasonableness test of the cost elements themselves". In support of its assertions, Argentina inaccurately refers to paragraph 7.393 of the Panel Report in *Egypt – Steel Rebar*. The real text contradicts Argentina's understanding and confirms the EU's interpretation.

31. In paragraph 113 of its Second Written Submission, Argentina asserts "the term 'costs' as 'charges or expenses' refers to a concrete amount by opposition to a hypothetical value". However, the use of these "hypothetical" amounts is allowed by Article 2.2 of the ADA in constructing the normal value.

32. In paragraphs 115 to 117 Argentina states that the relevant costs "are necessarily the costs of the specific exporter/producer" who is involved in the anti-dumping investigation. However, the ADA allows the investigating authority to use costs from outside the specific company.

33. In paragraph 116 Argentina misrepresents the Panel's Report in *Egypt – Steel Rebar*. In reality, the Panel's findings are the opposite of what is asserted by Argentina, showing that the determination of whether company records "reasonably reflect costs" depends on the facts of each case.

34. In paragraph 117, Argentina misquotes paragraph 7.483 of the Panel Report in *EC – Salmon*. The Panel does not "note" that the costs "necessarily refer to the costs actually incurred" but referred to costs associated with the production and sale "of the *like* product".

4.2. The Context of Article 2.2.1.1 of the Anti-Dumping Agreement

35. In paragraph 119 of its Second Written Submission, Argentina asserts that the second and third sentences of Article 2.2.1.1 "illustrate the types of issues that may arise under the second condition of Article 2.2.1.1, first sentence". However Argentina fails to take into consideration the important textual differences between these sentences.

36. In paragraphs 122 to 126, Argentina asserts that "the costs associated with the production and sale' do not need to be reasonable. This argument fails on the basis of the texts of the chapeau of Article 2.2, Article 2.2.1.1 and Article 2.2.2(iii).

37. In paragraphs 127 to 133, Argentina seeks to build certain arguments on the purported definition of dumping. However, in paragraph 127 Argentina omits to mention that the condition for the application of Article 2.1 is the existence of domestic sales in the ordinary course of trade. Also, in paragraphs 128 to 134, Argentina refers to the zeroing cases without mentioning that they did not involve the construction of normal value.

4.3. The Object and Purpose of the Anti-Dumping Agreement

38. Argentina discusses two points: (a) the ad hoc group on the implementation of the anti-dumping code of the Tokyo Round; and (b) the negotiating history of the Anti-Dumping Agreement in the Uruguay Round. However, none of them supports Argentina's position.

39. In relation to the first point, the documents discussed by Argentina in paragraphs 142 to 144 of its Second Written Submission are irrelevant for the present dispute. In relation to the second point, the negotiating history of Article 2.2.1.1 actually supports the European Union's interpretation.

5. Argentina advances an erroneous interpretation of Article 2.2 of the ADA

40. Argentina's Second Written Submission does not provide any convincing factual evidence or legal arguments to support its excessively restrictive interpretation of the chapeau of Article 2.2 of the Anti-Dumping Agreement. For example, in paragraph 152, Argentina's argument is circular. In paragraphs 153 and 156 Argentina contradicts itself with respect to paragraph 154.

6. Factual Elements Relating to the Biodiesel Investigation

41. There are no "factual inconsistencies" in the EU's submissions and statements in the present dispute.

42. Indeed, in paragraph 169 of its Second Written Submission, Argentina actually confirms that prices were "published by the government of Argentina". In paragraph 174, Argentina makes reference to the use of the term "particular market situation" in the Definitive Regulation. However, this notion is not relevant in the present dispute. In this paragraph, Argentina also makes reference to the "DET system" and the "export tax on soybean and soybean oil" whereas there is no real difference between the two terms. In paragraph 172, Argentina asserts that there is a contradiction regarding the levels of imports between the figures in the Regulations and those presented in the Reply to the Panel's Question 78. However, there is non since Recital 133 of the Provisional Regulation refers to imports by EU's "producers" rather than to the "industry".

7. Paragraphs 175 to 196 of Argentina's Second Written Submission

43. In paragraphs 185 to 187, Argentina is relying on the wrong legal authority since the relevant findings of the Panel in *Egypt – Steel Rebar*, do not relate to the issue of "benchmarking". In paragraphs 188 and 189, Argentina contradicts its Reply to Question 43. In paragraphs 191 and 193 although the FOB reference prices "reflected" international prices, Argentine-determined FOB reference prices cannot themselves be "international prices". Finally, in paragraph 192 Argentina's

theory is incorrect because the third sentence of Article 2.2.1.1 expressly provides that costs can be adjusted in certain circumstances.

8. ARGENTINA'S OTHER CLAIMS

8.1. THE ISSUE OF PROFITS

44. Argentina has failed to make a *prima facie* case on its claims against the amount of profits established by the investigating authorities. For example, in paragraph 145 Argentina appears to assert that it is the methodology that needs to be "reasonable" and not the profit figure that needs to be "reasonable'. However Article 2.2 of the ADA expressly refers to a "reasonable amount for […] profits".

8.2. THE CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

45. First, if Argentina refers to the concept of "differences affecting price comparability", in the sense of Article 2.4 of the ADA, the EU confirms that it denies that such differences exist in the present case.

46. Second, Argentina has admitted during the First Hearing that it does not claim that the investigating authorities should have added the value of the export tax to the export price of biodiesel.

47. Third, Argentina reverses the order of the analysis by stating that the investigating authorities could have acted consistently with Article 2.4, while acting inconsistently with Article 2.2 of the ADA.

8.3. THE CLAIM UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

48. In paragraph 209, Argentina statement confirms that it is in reality challenging the construction of normal value. Such a challenge may fall within the scope of Article 2, but falls outside the scope of Article 9.3 of the Anti-Dumping Agreement.

49. In paragraph 213, Argentina states that the EU's interpretation could lead to a situation, which is not the type of situations that Article 9.3 covers.

50. Finally, in paragraph 213, Argentina refers to paragraph 132 of the Appellate Body Report in *US – Zeroing (EC)*. However these findings have no relation to the construction of normal value, or to a claim under Article 9.3 of the Anti-Dumping Agreement which is based on an allegedly erroneous construction of normal value, similar to the claims put forward by Argentina in the present case.

9. ARTICLE 3 CLAIMS

51. In paragraph 216, Argentina continues to treat the issue of "utilisation of capacity" as a stand-alone issue, divorced from its context.

52. Recital 131 of the Definitive Regulation sets out the findings of the investigation. Since Argentina accepted the investigating authorities' provisional judgment on the matter, Argentina should also accept the authorities' final judgment.

53. Argentina refers to the case of Diester. The verification of Diester took place before the Provisional Regulation had been adopted and when the issue of "idle" plants had not emerged as a serious factor.

54. As regards causation and the role of overcapacity, the investigating authorities had made clear that the production figures presented in the Provisional Regulation could no longer be relied upon.

55. Argentina argues that the EU was in effect a trader in biodiesel. This contradicts Argentina's previous allegation that the industry vastly overextended its production capacity.

56. Argentina wrongly accuses the investigating authorities of failing to examine double-counting regimes other than the French regime.

57. The investigating authorities' findings did not dispute that other factors had contributed to the situation of the EU industry. However, having analysed and distinguished those factors, they found that they did not undermine the conclusion that the dumped imports were a cause of the material injury that had been identified.

ANNEX C-5

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

1. INTRODUCTION

1. Article 6.2 of the *Dispute Settlement Understanding* (DSU) requires that a request for the establishment of a panel (Panel Request) must, *inter alia*, (a) identify the specific measures at issue; (b) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly; and (c) indicate whether consultations were held. Argentina's Panel Request in the present case fails to meet these requirements. For this reason, the European Union requests the Panel to issue a preliminary ruling, confirming that the claims identified in the present submission are outside the Panel's terms of reference.

2. The Panel's Working Procedures provide, in paragraph 7, that a party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The Working Procedures also provide that, if the European Union requests such a ruling, Argentina shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel. Therefore, the European Union's request for a preliminary ruling is submitted timely and properly, in accordance with the Panel's Working Procedures.

2. ARGENTINA'S FAILURE TO IDENTIFY THE "SPECIFIC MEASURES AT ISSUE"

3. The need for precision in panel requests flows from the two essential purposes of the terms of reference: (a) to define the scope of the dispute and (b) to serve the due process objective of notifying the parties and third parties of the nature of the complainants' case.[1] To meet this need of precision, a Panel Request must specify the measures challenged with sufficient particularity, so as to indicate the nature of the measure and the gist of what is at issue.[2]

4. Argentina's Panel Request contains a section entitled "1. The Measures at issue." This section purports to "enumerate" the "measures" which Argentina is challenging. The section contains two paragraphs.

5. Paragraph 1(A) of Argentina's Panel Request starts by mentioning Article 2(5) of Council Regulation (EC) 1225/2009 and continues by referring to "any subsequent amendments, replacements, *implementing measures and related instruments or practices*." This phrase also appears in footnote 7 of Argentina's Panel Request, which compliments Argentina's definition of what Argentina calls the "Basic Regulation."

6. Paragraph 1(B) of Argentina's Panel Request lists certain "anti-dumping measures imposed by the European Union." Footnote 3 mentions Commission Regulation 490/2013, while footnote 2 mentions Council Implementing Regulation 1194/2013. Paragraph 1(B) concludes by asserting that the "measures at issue" also include "any subsequent amendments, replacements, *related measures and implementing measures*."

7. These elements in Argentina's Panel Request fail to comply with the provisions of Article 6.2 of the DSU, because they fail to "identify the specific measures at issue."

8. In particular, the references to "*implementing measures and related instruments or practices*" and to "*related measures and implementing measures*" are too vague and do not allow the identification of the specific instruments that the references aim to cover. The Appellate Body has already found that references to "*implementing measures and other related measures*" do not

[1] For example, Appellate Body Report, *EC-Chicken Cuts*, para. 155, where there are further references to other Appellate Body Reports.

[2] Appellate Body Report, *US-Continued Zeroing*, para. 169.

"identify the specific measures at issue, as required in Article 6.2 of the DSU and, therefore, fall outside the panels' terms of references.[3]

9. Consequently, Argentina's claims against "implementing measures and other related measures" in Paragraph 1(A) and footnote 7 of its Panel Request, as well as Argentina's claims against "related measures and implementing measures" in Paragraph 1(B) of its Panel Request, fall outside the Panel's terms of reference.

3. ARGENTINA'S FAILURE TO "PRESENT THE PROBLEM CLEARLY"

10. The requirement to "present the problem clearly" aims at enabling the Panel, the defending party and third parties to know *which* obligations are allegedly violated, as well as *how* the challenged measures are allegedly inconsistent with these obligations. The general requirement to "present the problem clearly" has two aspects. First, the panel request must identify the "legal basis" of the complaint. In order to meet the requisite standard of clarity, the panel request may be required to specify particular sub-paragraphs of a treaty provision.[4] Second, the panel request must "plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed."[5] Argentina's Panel Request fails to meet both these requirements.

3.1. *THE "INTER ALIA" LEGAL BASIS*

11. Argentina's Panel Request has a Section "2", entitled "Legal Basis for Claims." Sub-section 2(A) includes a paragraph that reads: "Argentina considers that [name of measure] is inconsistent as such with, *inter alia*, the following provisions of the [names of covered agreements]."

12. The use of the words "*inter alia*" indicates that the list of provisions of the covered agreements expressly listed in Sub-section 2(A) of Argentina's Panel Request is not exhaustive. Argentina retains for itself the possibility to add more, unspecified provisions of the covered agreements, as "legal bases" for its claims *after* the circulation of the Panel Request. Neither the European Union, nor the Panel has any idea of what claims or legal bases Argentina will finally present in this case: the words "*inter alia*" make the list of claims in Argentina's Panel Request completely open-ended.

13. Consequently, Argentina's Panel Request fails to identify properly the legal basis of the complaint and fails to "present the problem clearly." This is inconsistent with Article 6.2 of the DSU and places the relevant claims outside the Panel's terms of reference.

3.2. *PARAGRAPH 2(B)6 OF ARGENTINA'S PANEL REQUEST*

14. Sub-section 2(B) of the Panel Request purports to present Argentina's views on the "anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia,* Argentina." The introduction of Sub-section 2(B) includes a footnote 8, which refers the reader to footnote 3. Footnote 3 refers to Commission Regulation 490/2013 and to Council Implementing Regulation 1194/2013.

15. Paragraph 2(B)6 of Argentina's Panel Request states that these two legal instruments are inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT, because "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." This paragraph fails to meet the requirements of Article 6.2 of the DSU, for a number of reasons.

16. First, Paragraph 2(B)6 alleges that the challenged measures are inconsistent with "Article 9.3 of the Anti-Dumping Agreement." However, Article 9.3 of the Anti-Dumping Agreement is composed of a *chapeau* and three sub-paragraphs. Each of these deals with a different set of conditions. Argentina's Panel Request fails to mention the specific sub-paragraph of Article 9.3, with which the challenged measures are supposed to be inconsistent. This runs against Article 6.2 of the DSU, which requires Panel Requests to refer to the specific sub-paragraph of the WTO treaty

[3] Appellate Body Report, *EC-Selected Customs Matters*, para. 152, footnote 369. See also, Panel Report, *China-Raw Materials*, Annex F-1, para. 17.

[4] For example, Appellate Body Report, *Korea-Dairy*, para. 124.

[5] For example, Appellate Body Report, *China-Raw Materials*, para. 220.

provision that is supposed to be infringed by the challenged measure, where there are such sub-paragraphs containing different sets of obligations.[6]

17. Second, Argentina fails to articulate clearly the exact claim it advances. Paragraph 2(B)6 alleges that the European Union "imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established." From this wording it is not clear whether Argentina actually challenges (a) the comparison between the anti-dumping duty and the margin of dumping (e.g., that there was some numerical mistake in the text of the Regulation resulting in the mentioned amount of the duty being higher than the mentioned amount of the dumping margin); or (b) the method of calculation of the margin of dumping itself. In other words, it is not clear whether Argentina's challenge should be understood as being directed against the "*in excess*", or against the "*should have been established*."

18. In that context, it is noted that the calculation of the anti-dumping duty is discussed in paragraphs 214 to 219 and in Article 1 of the Council Implementing Regulation. In contrast, the calculation of the margin of dumping is discussed in paragraphs 59 to 65 of the Council Implementing Regulation. Paragraph 2(B)6 of Argentina's Panel Request fails to explain plainly which of these two different sections of the Council Implementing Regulation it challenges. The result is that the European Union does not understand the scope of the challenge against which it must defend itself and the Panel does not understand the scope of the challenge facing it.

19. Third, even if we assume *arguendo* that Argentina actually challenges the method of determining the dumping margin, then again Paragraph 2(B)6 fails to comply with the requirements of Article 6.2 of the DSU. The determination of the dumping margin was based on (a) the calculation of the "normal value"; (b) the calculation of the "export price"; (c) the comparison between them; and (d) the analysis of certain requests presented by Argentinean exporters. Both the Commission Regulation and the Council Implementing Regulation discuss each of these issues separately, in four different sections with four different titles.[7] Paragraph 2(B)6 fails to explain plainly which of these issues (and which of the corresponding sections of the Regulations) it challenges. Again, the European Union and the Panel cannot understand the scope of the challenge facing them.

20. Fourth, even if we further assume *arguendo* that Argentina actually challenges only the fourth relevant section of the Regulations, i.e., the one entitled "Dumping Margins", then again Paragraph 2(B)6 fails to comply with the requirements of Article 6.2 of the DSU.

21. The relevant section 2.4 of the Council Implementing Regulation discusses two different and distinct issues. First, in paragraphs 59 to 60, the Regulation discusses a request advanced by "all cooperating Argentine exporting producers" in relation to the imposition of a "single duty for all cooperating exporting producers." Second, in paragraphs 61 to 64, the Regulation discusses a completely different request submitted by another three companies. These companies requested to "be included in the list of cooperating exporting producers." Their request was rejected because, either they were not exporting themselves to the European Union, or because they were not producing biodiesel during the investigation period. Paragraph 2(B)6 of the Panel Request does not provide the faintest indication of which of these two issues Argentina is actually challenging. Again, the European Union and the Panel cannot understand the scope of the challenge facing them.

22. Consequently, Paragraph 2(B)6 of Argentina's Panel Request falls outside the Panel's terms of reference.

4. ARGENTINA'S PANEL REQUEST EXPANDS THE SCOPE OF THE DISPUTE

23. Consultations requests constitute a prerequisite for panel requests and, as a result, they "circumscribe the scope of panel requests."[8] The Appellate Body has held that a panel request cannot include claims (either in relation to "challenged measures", or in relation to "legal bases"), which were not included in the corresponding consultations request, where these "new" claims

[6] Appellate Body Report, *Korea-Dairy*, para. 124.

[7] The Commission Regulation in paras. 40 to 46; paras. 47 to 49; paras. 50 to 55 and paras. 56 to 59 respectively. The Council Implementing Regulation in paras. 35 to 48; paras. 49 to 54; paras. 55 to 58; and paras. 59 to 65, respectively.

[8] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, para. 137. See also Panel Report, *China-Broiler Products*, para. 7.219.

"expand the scope of the dispute",[9] or have the effect of "changing the essence of the complaint."[10]

24. In the present case, Argentina's Panel Request includes a great number of such new claims, which expand the scope of the dispute and change the essence of the complaint set out in Argentina's request for consultations (Consultations Request).

25. These new claims include the following: (1) a new claim against a new "measure", which Argentina calls "*practices"* related to Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 1(A)**); (2) an unclear "as applied" claim against Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 2(B)3**); (3) a new claim under Article 9.3 of the Anti-dumping Agreement against Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 2(A)3**); (4) a new claim under GATT Article VI:1 against Article 2(5) of Council Regulation 1225/2009, alleging use of information other than that in the country of origin (**Panel Request Paragraph 2(A)1**); (5) a new claim under GATT Article VI:1 against Article 2(5) of Council Regulation 1225/2009, alleging not using the records kept by the producers and, further alleging, using costs not associated with the production and sale of the product under consideration (**Panel Request Paragraph 2(A)2**); (6) new claims under Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement against Article 2(5) of Council Regulation 1225/2009, alleging using costs not associated with the production and sale of the product under consideration (**Panel Request Paragraph 2(A)2**); (7) a new claim under Article 2.1 of the Anti-dumping Agreement against the Commission Regulation and the Council Implementing Regulation, alleging "unreasonable" determination of the amounts of profits (**Panel Request Paragraph 2(B)4**).

26. The sheer number and breadth of these new claims suffices to illustrate that Argentina's Panel Request seeks to expand the scope of the dispute. The individual analysis of each of these new claims further establishes that Argentina's Panel Request changes the "essence" of the complaint.

4.1. NEW "MEASURES" PRESENTED BY ARGENTINA FOR THE FIRST TIME IN THE PANEL REQUEST

27. Paragraph 1(A) of Argentina's Panel Request challenges for the first time "*related practices"*, in addition to Article 2(5) of Council Regulation 1225/2009. In contrast, Argentina's Consultations Request did not include any such reference. Argentina's Consultations Request, in its Paragraph b., refers solely to Article 2(5) of Council Regulation 1225/2009, i.e., a specific, written legal provision. The claim against "*related practices*" is a new claim, which expands the scope of the dispute and changes the essence of Argentina's complaint.

28. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009. Therefore, Argentina's decision to add the new claim against "*related practices*" in its Panel Request cannot be said to have "evolved" from the consultations.

29. It is also noted that the Consultations Request expressly stated that Argentina challenges Article 2(5) of Council Regulation 1225/2009 "*as such*." The reference to an "*as such*" claim further shows that Argentina was challenging a specific, written legal provision and not the application of that legal provision. Argentina's attempt to add a claim on the application of Article 2(5) of Council Regulation 1225/2009 changes the essence of the original complaint.

30. Consequently, the claim against "related practices" in Paragraph 1(A) of Argentina's Panel Request expands the scope of the dispute and changes the essence of the complaint and, therefore, falls outside the Panel's terms of reference.[11]

[9] Appellate Body Report, *US-Upland Cotton*, para. 293.

[10] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, paras. 137 and 138.

[11] As mentioned above, this new claim is also too vague and imprecise and fails to identify properly the specific measure at issue. Therefore, this new claim fails to comply with the requirements of Article 6.2 of the DSU for a number of different reasons.

4.2. NEW "LEGAL BASES" RAISED BY ARGENTINA FOR THE FIRST TIME IN THE PANEL REQUEST

4.2.1. The new and unclear "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009

31. Between Paragraph 2(B)3 and Paragraph 2(B)4 of the Panel Request, Argentina has inserted a new, not-numbered paragraph which seems to introduces an "*as applied*" challenge against Article 2(5) of Council Regulation 1225/2009. The role of this not-numbered paragraph is ambiguous. The Consultations Request expressly stated in Paragraph b. that Argentina was challenging Article 2(5) of Council Regulation 1225/2009 only "*as such*", without any reference to an "*as applied*" claim. The Panel Request repeats the reference to the "*as such*" claim in the last sub-paragraph of the *chapeau* of Paragraph 2(A).

32. On its face, it is not clear whether this not-numbered paragraph is intended to introduce an "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009. In any event, if we assume *arguendo* that Argentina is introducing an "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009, then such claim is new and expands the scope of the original dispute, as presented in Argentina's Consultations Request. In addition, it seems to be misplaced in section B, which rather deals with the provisional and the definitive regulations.

33. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009.

34. Therefore, all the elements that would have allowed Argentina to include the "*as applied*" challenge against Article 2(5) of Council Regulation 1225/2009 were at the disposal of Argentina already at the time it submitted its Consultations Request. However, Argentina did not advance these claims in its Consultations Request. Allowing Argentina to ignore the consequences of its own decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

35. Consequently, this claim of Argentina falls outside the Panel's terms of reference.

4.2.2. The new claim against Article 2(5) of Council Regulation 1225/2009 based on Article 9.3 of the Anti-dumping Agreement

36. Paragraph 2(A)3 of Argentina's Panel Request introduces a new claim against Article 2(5) of Council Regulation 1225/2009, based on Article 9.3 of the Anti-dumping Agreement. Argentina claims for the first time that Article 2(5) of Council Regulation 1225/2009 is "*as such*" inconsistent with Article 9.3 of the Anti-dumping Agreement, because, allegedly, the "amount of the anti-dumping duty to be imposed exceeds the margin of dumping."

37. This claim did not exist in Argentina's Consultations Request. Paragraph b. of the Consultations Request (which dealt with Article 2(5) of Council Regulation 1225/2009) did not make any reference to Article 9.3 of the Anti-dumping Agreement. Moreover, Paragraph b. of the Consultation Request did not make any reference to an alleged "excess" of the anti-dumping duty, if compared with the margin of dumping. Therefore, there is no doubt that the claim in Paragraph 2(A)3 of the Panel Request is a new claim, which expands the scope of the dispute and changes the essence of Argentina's original complaint.

38. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. Argentina was also aware of all the facts that would have allowed Argentina to allege that the anti-dumping duty was in excess of the dumping margin. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims under

Article 9.3 of the Anti-dumping Agreement against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009.[12]

39. Therefore, all the elements that would have allowed Argentina to challenge Article 2(5) of Council Regulation 1225/2009 under Article 9.3 of the Anti-dumping Agreement were at the disposal of Argentina already at the time it submitted its Consultations Request. However, Argentina did not advance these claims in its Consultations Request. Allowing Argentina to ignore the consequences of its own decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

40. Consequently, Argentina's new claim against Article 2(5) of Council Regulation 1225/2009, alleging an inconsistency with Article 9.3 of the Anti-dumping Agreement, as well as that the anti-dumping duty allegedly "exceeds" the dumping margin, falls outside the Panel's terms of reference.

4.2.3. New claims against Article 2(5) of Council Regulation 1225/2009 based on Article VI:1 of the GATT 1994

41. Paragraph 2(A)1 and Paragraph 2(A)2 of Argentina's Panel Request include new claims against Article 2(5) of Council Regulation 1225/2009 that are based on Article VI:1 of the GATT 1994. Argentina's Consultations Request did not include any claim based on Article VI:1 of the GATT. It also did not include any claims against Article 2(5) of Council Regulation 1225/2009 based on the GATT 1994.[13] Therefore, these claims are new and they expand the original scope of the dispute.

42. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Already at the time of its Consultations Request, Argentina was fully aware that Article 2(5) of Council Regulation 1225/2009 is part of the European Union's anti-dumping legislation. Therefore, there was nothing preventing Argentina from challenging Article 2(5) of Council Regulation 1225/2009 under Article VI:1 of the GATT, which is part of the GATT Article dealing with anti-dumping. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request already included claims against Article 2(5) of Council Regulation 1225/2009 that were based on the Anti-dumping Agreement.

43. Moreover, Argentina cannot argue that adding new claims under Article VI:1 of the GATT does not change the "essence" of the complaint, alleging that the original complaint was already based on the Anti-dumping Agreement and further alleging that its scope is the same with the scope of Article VI of the GATT. If Article VI:1 of the GATT and the provisions of the Anti-dumping Agreement included in Argentina's Consultations Request had identical scope, then the addition of a claim based on GATT Article VI:1 in the Panel Request would have been redundant and the Panel would simply exercise judicial economy on it. The fact that Argentina chose to add the new GATT Article VI:1 claim in its Panel Request shows that Argentina considers that the two sets of provisions have different scope and that the "essence" of GATT Article VI:1 is different from the "essence" of the provisions of the Anti-dumping Agreement included in the Consultations Request. Therefore, by adding the GATT Article VI:1 claim in its Panel Request, Argentina confirms that it changes the "essence" of its original complaint.

44. Consequently, Argentina's new claims under Article VI:1 of the GATT fall outside the Panel's terms of reference.

4.2.4. New claims against Article 2(5) of Council Regulation 1225/2009 based on Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement

45. In Paragraph 2(A)2 of its Panel Request, Argentina alleges the violation of Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement "for two reasons." As "second reason", Argentina asserts that Article 2.2 and 2.2.1.1 of the Anti-dumping Agreement "require that the costs used be associated with the production and sale of the product under consideration."

[12] See Paragraph a.6 of Argentina's Consultations Request.

[13] The Consultations Request included claims against Article 2(5) of Council Regulation 1225/2009 only based on the Anti-dumping Agreement and the Marrakesh Agreement; see Paragraph b. of Argentina's Consultations Request.

46. These are new claims against Article 2(5) of Council Regulation 1225/2009, which were not included in Argentina's Consultations Request; the corresponding paragraph in Argentina's Consultations Request appears to be Paragraph b.2, which (a) includes only a claim based on Article 2.2.1.1 of the Anti-dumping Agreement and (b) refers to the calculation of costs "on the basis of records kept by the exporter." The new claims in Argentina's Panel Request expand the scope of the dispute and change the essence of the complaint because (a) they introduce a new legal basis (i.e., Article 2.2 of the Anti-dumping Agreement); and (b) they introduce a new type of complaint (i.e., the alleged use of costs not "associated with the production and sale of the product under consideration").

47. There are no facts that could support a finding that these new claims might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. Argentina was also aware of all the facts that would have allowed Argentina to articulate this claim in its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation alleging a violation of Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement and referring to the alleged inclusion of "costs not associated with the production and sale of the product under consideration."[14]

48. Therefore, Argentina could have made this claim against Article 2(5) of Council Regulation 1225/2009 in its Consultations Request, but did not do so. Allowing Argentina to ignore the consequences of its decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

49. Consequently, Argentina's new claims against Article 2(5) of Council Regulation 1225/2009, based on Article 2.2 and Article 2.2.1.1 of the Antidumping Agreement and alleging the use of costs not associated with the production and sale of the product under consideration, are outside the Panel's terms of reference.

4.2.5. The new claim against the Commission Regulation and the Council Implementing Regulation based on Article 2.1 of the Anti-dumping Agreement

50. In paragraph 2(B)4 of its Panel Request, Argentina alleges that the European Union acted inconsistently with "Articles 2.1, 2.2 and 2.2.2(iii) of the Anti-dumping Agreement", because it failed to determine the "amounts of profit" on the "basis of a reasonable method." The corresponding paragraph in Argentina's Consultations Request is Paragraph a.5, where Argentina alleges that the European Union failed to determine the "amounts of profit" in "accordance with the rules established under" Articles 2.2 and 2.2.2 of the Anti-dumping Agreement.

51. These two paragraphs provide a good example of the difference between (a) "refining the contours" of a claim and (b) expanding the scope of the dispute. The Panel Request relies on Article 2.2.2(iii) of the Anti-dumping Agreement, while the Consultations Request referred to Article 2.2.2 in general. This development can probably "reasonably be said" to have "evolved from the consultations." The same can be said for the description of the claim: the Panel Request alleges a determination not "on the basis of a reasonable method", while the Consultations Request mentioned more generally a determination not "in accordance with the rules established under" Articles 2.2 and 2.2.2. The text of the Panel Request is a more precise version of the more general text used in the Consultations Request.

52. In contrast, Argentina's addition of a new claim under Article 2.1 of the Anti-dumping Agreement cannot "reasonably be said" to have "evolved from the consultations." Argentina was in possession of all the elements that would have allowed it to advance a claim under Article 2.1 of the Anti-dumping Agreement already at the time of the Consultations Request. The potential "refining of the contours" of Argentina's claims, brought about by the consultations, was the clarification of the precise sub-paragraph of Article 2.2.2 that would serve as legal basis for its claim. Argentina went farther than that in its Panel Request: it added a new legal basis for its claim.

[14] Argentina's Consultations Request, Paragraph a.3.

53. At the time of the Consultations Request, Argentina decided not to challenge the European Union's determination of profits under Article 2.1 of the Anti-dumping Agreement, although it could have done so. Article 6.2 of the DSU requires that Argentina be now held to the consequences of that decision.

54. Consequently, Argentina's new claim under Article 2.1 of the Anti-dumping Agreement in paragraph 2(B)4 of its Panel Request is outside the Panel's terms of reference.

5. CONCLUSION

55. The European Union requests the Panel to issue a preliminary ruling confirming that the claims of Argentina's Panel Request that are discussed in the present submission are outside the Panel's terms of reference.

56. The European Union also requests that this preliminary ruling be issued before the date on which the European Union's first written submission is due. This will allow the European Union to identify the precise claims to which it will need to defend itself in its first written submission.

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ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF AUSTRALIA

I. THE MEANING OF THE LANGUAGE "RECORDS [THAT] REASONABLY REFLECT THE COSTS ASSOCIATED WITH THE PRODUCTION AND SALE OF THE PRODUCT UNDER CONSIDERATION" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

1. A material issue in this matter is the interpretation of the language "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 of the *Anti-Dumping Agreement*. This language derives from the first sentence of Article 2.2.1.1, which reads:

> 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. Two questions are of critical importance to this analysis: what it means for records to reasonably reflect the costs associated with production and sale of the product under consideration; and, whether records that accurately detail the actual expenses of the exporter or producer automatically constitute records that must be used in the calculation of costs (provided they also accord with generally accepted accounting principles (GAAP) – in this submission Australia assumes that the GAAP proviso is met). Relevantly, the Panel in *China – Broiler Products (US)*[1] noted that:

> … although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with [generally accepted accounting principles - GAAP] or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration.

3. Argentina argues that records that detail the actual expenses of the exporter or producer would reasonably reflect the costs associated with production and sale of the product under consideration, and so must be used in the production cost calculation under Article 2.2.1.1. In Australia's view, this may not always be the case. Rather, Article 2.2.1.1 permits investigating authorities to look beyond the records to consider whether the costs reflected therein are reasonably related to the cost of producing and selling the product. The reasonableness of costs of inputs or raw materials would be relevant to this analysis.

4. In this respect, Australia recalls the Panel's approach to analysing the calculation of cost of production in *Egypt – Rebar (Turkey)*[2], where the Panel considered that it must:

> … reach a conclusion as to whether…there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation.

5. This supports a reading of Article 2.2.1.1 whereby any element that "reasonably" relates to the cost associated with production and sale should be taken into account, including in relation to inputs or raw materials, and might lead to the adjustment or replacement of certain costs. Indeed, this appears to be the situation in *US – Softwood Lumber*, where the Panel did not take issue with

[1] Report of the Panel, *China – Broiler Products (US)*, para. 7.164.
[2] Report of the Panel, *Egypt – Rebar (Turkey)*, para. 7.393.

respect to testing for arm's length prices.[3] In such cases, where the investigating authority has established that the records do not reasonably reflect the costs, there is no obligation under Article 2.2.1.1 to calculate costs using the records.[4]

6. This interpretation is consistent with the ordinary meaning of Article 2.2.1.1 and is the only sensible reading when considered in context, which is Article 2 on the determination of dumping. First, Article 2.1 of the *Anti-Dumping Agreement* sets down the usual basis for the determination of dumping: namely, the proper comparison between the normal value of the imported product in the ordinary course of trade in the country of origin or export, and the export price of the product in the country of import. Such a comparison must be a fair comparison by virtue of Article 2.4 of the *Anti-Dumping Agreement*.

7. Second, Article 2.2 of the *Anti-Dumping Agreement* provides for situations where there are no sales in the ordinary course of trade, or where such sales do not permit a proper comparison because of the low volume of sales or a particular market situation. Pursuant to Article 2.2, the authorities in these circumstances are required to disregard these sales and use a comparable price of the like product when exported to an appropriate third country, or to construct normal value.

8. Given that the application of an anti-dumping methodology should be assessed on a case by case basis, and the situations in which cost construction is required are determined by Article 2.2, Article 2.2 is central to this analysis.

9. As such, in situations where costs are being constructed under Articles 2.2 and 2.2.1.1, a holistic analysis of costs is warranted in order to arrive at a proper cost calculation that provides a point of comparison that is closest to a "normal" value.[5] All costs that would be reasonably related to the production of the goods, or at least those that are significant enough to affect the overall production costs, are relevant to such an analysis.

10. To suggest that the meaning of the first sentence of Article 2.2.1.1 prevents or limits investigating authorities from examining whether records reasonably reflect costs, having established that there are no sales in the ordinary course of trade or that such sales do not permit a proper comparison, would render this provision inutile. It would be circuitous in preventing authorities to address not being able to make a proper comparison in determining the margin of dumping.

II. THE OBJECT AND PURPOSE OF THE ANTI-DUMPING AGREEMENT

11. In Australia's view, such a reading of Article 2.2.1.1 is not contrary to the object and purpose of the *Anti-Dumping Agreement*, to the extent that one can be established.

12. The Panel in *US – Zeroing (EC)* observed with respect to the *Anti-Dumping Agreement* that "specific objectives are difficult to discern with any facility or compelling force due to the lack of anything that could properly be described as constituting a clear statement of the objectives of the *AD Agreement*".[6]

13. Nevertheless, to the extent that guidance can be drawn from Article VI.1 of the GATT 1994, Australia notes that the practice condemned therein hinges on the introduction of a product into the commerce of an importing country at "less than its normal value" – that is, at less than the comparable price, "in the ordinary course of trade". While Article VI:1 establishes the point of comparison within the ordinary course of trade, this does not preclude other points of comparison when normal value must be constructed because there are no sales within the ordinary course of trade. In Australia's view, an interpretation of Article 2.2.1.1 that allowed an investigating authority to consider, in a holistic way, the reasonableness of costs, and to adjust them if appropriate, would not run counter to Article VI.1 of the *Anti-Dumping Agreement*.

[3] Report of the Panel, *US – Softwood Lumber V*, para. 7.332.
[4] Report of the Panel, *US – Softwood Lumber V*, para. 7.236.
[5] *Anti-Dumping Agreement*, Article 2.1.
[6] Report of the Panel, *US – Zeroing (EC)*, footnote 292.

III. THE MANDATORY/DISCRETIONARY DISTINCTION IN "AS SUCH" CLAIMS

14. In Australia's view, a Panel should be guided by the mandatory/discretionary distinction in assessing whether a Member's legal instrument is inconsistent with its WTO obligations "as such".

15. The Appellate Body in *US – 1916 Act* found that the mandatory/discretionary distinction was a threshold consideration in determining whether legislation could be challenged 'as such', endorsing the approach of GATT panels that only legislation which *mandated* inconsistent action could be challenged 'as such'.[7] This approach appears to have been recently followed by the Appellate Body in *US – Carbon Steel (India)*, where it found that a US regulation was not inconsistent 'as such' with Article 12.7 of the *Agreement on Subsidies and Countervailing Measures* because the regulation did not *require* inconsistent conduct but was of a 'discretionary nature'.[8] While other rulings have left open the question of whether a discretionary measure could be challenged 'as such'[9], in *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body maintained that the mandatory/discretionary nature of a measure remained relevant to an assessment of whether a measure was 'as such' inconsistent with a Member's obligations, even if it did not have to be considered as a 'preliminary jurisdictional matter'.[10] As the Appellate Body held in *US – Section 211*, 'where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations'.[11]

[7] Appellate Body Report, *US – 1916 Act*, paras. 88-89.

[8] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483.

[9] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 89, 93; Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, footnote 334 to para. 159; Appellate Body Report, *US – Zeroing (EC)*, paras. 211, 214; Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54.

[10] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. See also Panel Report, *US – Section 301 Trade Act*, para. 7.53, where the panel stated that 'The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited'.

[11] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259.

ANNEX D-2

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF CHINA

I. Introduction

1. The People's Republic of China ("China") intervenes in this case because of its systemic interest in the correct interpretation of GATT 1994 and the Anti-Dumping Agreement ("ADA"). Through its written submission, oral statement and responses to the Panel's questions, China has discussed the request of the European Union ("EU") for a preliminary ruling ("PRR"), presented its views on the interpretation of Articles 2.2.1.1 and 2.2 of the ADA, made observations on the meaning of Article 2(5) of the EU Basic Regulation and its consistency with Articles 2.2.1.1 and 2.2, and made observations on certain claims with respect to elements of the EU determination in the Biodiesel investigation, including the EU approach to cost adjustments, profit determination, price comparability, and injury and causation issues.

II. The Request for a Preliminary Ruling

2. First, as to the EU's objections in Section 2 of the PRR, China considers that the references to "implementing measures and related instrument or practices" and "related measures and implementing measures" in the Panel Request are not *per se* inconsistent with the specificity requirement in Article 6.2. The Panel must consider the Panel Request as a whole, and, in particular, to examine whether the measures that are implemented or related were precisely identified in that Request. Second, as to the EU's objections in Section 3.2 of the PRR, China submits that there is no mandatory requirement to refer to a specific sub-paragraph of a treaty provision. A panel should examine whether a general reference to a treaty provision meets Article 6.2 on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue. China also recalls that a "brief summary" of the legal basis should be distinguished from arguments in support of a particular claim, which are not required to be included in a panel request. Third, as to the EU's objection in Section 4.2.4 of the PRR, China notes that both provisions concerned have been invoked to challenge Article 2(5) of the Basic Regulation in both the request for consultations and the Panel Request. It thus appears that Argentina has not added new legal basis in the Panel Request, but just clarified the connection between the challenged measure and the legal basis. Finally, China considers that PRR is not the only way to address preliminary issues. Parties may present views on many of these issues in their submissions and/or statements and expect panels to make findings in final reports. Unnecessary or premature requests should not be encouraged.

III. Interpretation of Articles 2.2.1.1 and 2.2 of the ADA

A. "Dumping" Reflects Pricing Behaviours of Individual Producers/Exporters

3. To properly interpret Articles 2.2.1.1 and 2.2, it is appropriate to begin with the foundational concept of "dumping". Dumping is the result of the "pricing behaviour of individual exporters or foreign producers". Thus, anti-dumping measures can be applied only to remedy injury caused by the pricing behaviour of an individual producer/exporter, which results in price discrimination between the producer's home market and the export market.

4. In line with this foundational concept of dumping, an authority cannot reject the costs recorded in the individual producer/exporter's records on grounds exogenous to that producer/exporter. Exogenous factors, such as the regulatory environment in which a producer operates, or the way in which duties or taxes affect market conditions for goods or services upstream to production of the product under consideration are, by definition, entirely outside the control of a producer/exporter. The market outcomes of government policy measures have nothing to do with the commercial conduct of the producer/exporter. They cannot therefore be the grounds to reject the accurately recorded costs. Otherwise, anti-dumping proceedings cease to be a remedy for the pricing behaviour of producers or exporters, and instead become a tool for authorities to penalize imports for cost advantages that foreign producers may enjoy.

B. Article 2.2.1.1 Does Not Permit Rejection of Recorded Costs on the Ground that They Are "Artificially Lower" than Hypothetical Costs

5. Article 2.2.1.1 does not permit authorities to reject recorded costs on the ground that they are lower than they would be if sourced in a market that, unlike the country of origin, remains unaffected by governmental policy interventions that affect costs.

6. First, a "reasonably reflect" assessment must be focused on the costs associated with production and sale of the product under consideration by the specific producer/exporter, and not the costs of a hypothetical producer or exporter.

7. This is made clear by the privileged status given to "records kept by the exporter or producer under investigation" under Article 2.2.1.1. It is also reflected in the explicit reference to the costs "associated with" the production and sale of "the product under consideration". To be "associated with" the production of the product under consideration, the costs must be connected with the product that is produced by the producer under investigation and exported to the importing Member. A cost taken from a hypothetical market does not in any way pertain to the production of the product by the investigated producer, and thus is not "associated with" the production of the product under consideration.

8. Furthermore, the circumstances identified in the second and third sentences of Article 2.2.1.1, in which a producer's records might not be a reasonable reflection of the costs, confirm that the determination of reasonableness does not extend to factors exogenous to the producer/exporter. Specifically, the issues of "proper allocation" of costs, "amortization", "depreciation" and "capital expenditure" all concern cost accounting choices made by the specific producer/exporter and any related companies with which it shares costs.

9. Article 2.2.2 provides further context. It also reflects the producer/exporter-specific focus when prescribing the basis for determination of administrative, selling and general (or "AS&G") costs, which are other cost components to be used in constructing normal value.

10. Second, if a benchmark is used to assess whether records reasonably reflect costs, such a benchmark must relate to costs in the country of origin and not costs in some hypothetical market where the market and regulatory conditions of the country of origin do not exist. Since Article 2.2.1.1 begins with the phrase "[f]or the purpose of paragraph 2", the scope of the costs considered under both Articles 2.2.1.1 and 2.2 is the same, i.e. "costs of production in the country of origin". In addition, Article 2.2.2, another provision within "paragraph 2" of Article 2, also requires that AS&G costs be determined on the basis of costs in the country of origin. In short, whether records reasonably reflect costs must be assessed within the boundaries of the country of origin. It is impermissible, as a matter of law, to benchmark a producer or exporter's recorded costs against an international market price or prices from other countries.

11. Third, the object and purpose of the ADA is to discipline the rules governing anti-dumping investigations and measures, for which the foundation stone is the existence of dumping by exporters or producers. A determination of the existence of dumping requires analysis of the pricing behaviours of the individual producers/exporters. Government measures affecting the costs of a producer or exporter may be relevant for the application of other covered agreements if they are specific subsidies, or if they take the form of impermissible export restrictions. However, since dumping is a producer/exporter-specific concept, it is not consistent with the object and purpose of the ADA to seek to remove the impact of governmental policy interventions that are entirely exogenous to the producer/exporter under consideration.

C. Article 2.2 Does Not Allow Use of Non-Country of Origin Costs

12. Article 2.2 is clear and explicit in requiring that the "cost of production" used to construct normal value must be the cost "in the country of origin". The language of Article 2.2 is less flexible than the language of Article 14(d) of the SCM Agreement. Thus, while the use of out of country benchmarks may sometimes be permissible under the SCM Agreement, a producer's costs under the ADA are, quite simply, the "costs of production in the country of origin".

13. The EU does not take issue with the requirement that "costs" under Article 2.2 reflect the "cost of production in the country of origin", but argues that the evidence required to establish

such costs may originate in other countries. First, the issue regarding the appropriate source of evidence only arises when the costs recorded by a specific producer or exporter need to be adjusted. Since authorities are not permitted to disregard recorded costs on the ground that they are "artificially low" because of governmental policy intervention, there is no need to refer to any sources of evidence other than the producer's records themselves in these circumstances. Second, in cases where cost records of a specific producer/exporter need to be adjusted because of issues pertaining to that producer or exporter, an authority shall consider evidence from *within* the country of origin, which might include evidence regarding costs from other producers/exporters of the investigated product, or from a related sector or industry. Third, only in very exceptional cases where there is a complete lack of evidence available in the country of origin, might an authority consider evidence of costs from third countries. In such a scenario, an authority could not simply deem out-of-country evidence to reflect the cost of production in the country of origin. Rather, such evidence could only be used as a starting point upon which to determine costs of production in the country of origin. In other words, if third country evidence is used, the specific market conditions in the country of origin must be factored in and the final costs of production must reflect the costs in the country of origin. Relevant market conditions that should be considered by an investigating authority include how policy or regulatory factors, including taxes and duties, impact on the price and availability of inputs and other factors of production.

IV. "As Such" Claims in Relation to Article 2(5) of the Basic Regulation

14. At the outset, China recalls that in order for a rule or norm of general and prospective application to be found to be, as such, WTO-inconsistent, it is not necessary to show that a rule or norm "mandates" a WTO-inconsistent outcome in *every* case. Rather, the complainant must provide evidence demonstrating that the application of the challenged rule will necessarily be inconsistent with that Member's WTO obligations *in defined circumstances*. China also recalls that the Appellate Body has provided guidance on how to examine the meaning of municipal law, requiring panels to undertake a holistic assessment of all relevant elements. China concurs with Argentina that the meaning of Article 2(5), second sub-paragraph, should be examined in a way taking into account elements other than the text, including: (i) its context and "logic", (ii) its consistent application by the EU authority, and (iii) the judgment of EU courts on its meaning.

15. As an immediate context, the first sub-paragraph of Article 2(5) includes the same "reasonably reflect" clause. There exists a special logical link between the two sub-paragraphs, i.e. the first sub-paragraph requires the authority to use the records of the parties concerned as the basis to calculate costs if this condition, together with another condition, is fulfilled, while the second sub-paragraph requires the authority not to use the records if the same condition is not met. Thus, the EU's argument that the conditions that must be met in order to determine whether the company records "reasonably reflect" costs are *outside of the scope* of the second subparagraph fails by disregarding this special link.

16. The context that should be taken into account also covers Recitals 3 and 4 of Council Regulation (EC) No 2972/2002, and Article 2(3), second sub-paragraph, of the Basic Regulation. Recital 4 clarifies that the circumstances in which records do not reasonably reflect costs cover the situations where "because of a particular market situation sales of the like product do not permit a proper comparison". According to Article 2(3), second sub-paragraph, a particular market situation may be deemed to exist when "prices are artificially low". Recital 3 of the Council Regulation (EC) No 2972/2002 further clarifies that particular market situations cover "market impediments", which may result in domestic prices being out of line with world-market prices or prices in other representative markets. Reading these provisions together, Article 2(5), second sub-paragraph, appears to require the investigating authority to reject the records of the parties concerned on the ground that "prices are artificially low" or for reasons relating to the situation of the *entire* market caused by governmental policy interventions, instead of a situation relating to or caused by conducts of a *specific* producer/exporter.

17. The above reading is confirmed by the application of Article 2(5). The practice of the EU authority indicates that it will disregard the costs correctly recorded by the specific producer/exporter under investigation if it determines that such costs are "artificially" lower than the "hypothetical" costs that would be borne in a theoretical market where the prices of relevant inputs were not affected by governmental policy interventions. In the investigation concerning imports of biodiesel from, *inter alia*, Argentina, the EU authority disregarded the actual cost of soya beans as recorded by the companies concerned on the ground that such cost (domestic

prices of soya beans) was "artificially lower" than a "hypothetical" cost (international prices). It is clearly indicated by the authority that this determination is not unique, but falls well "[with]in the meaning of Article 2(5)". In *Seamless Pipes and Tubes of Iron or Steel from Croatia, Romania, Russia and Ukraine*, the EU determined that the correctly accounted gas prices "could not reasonably reflect the costs associated with the production and distribution of gas" because that price "was much lower than the average export prices from Russia to both Western and Eastern parts of Europe". The authority also indicated that it reached this determination "as provided for in Article 2(5) of the basic Regulation", which implies that the above practice appears to be an automatic application of Article 2(5).

18. In summary, Article 2(5), second sub-paragraph, appears necessarily to require the EU authority to reject records of a producer/exporter under investigation that accurately account for the costs incurred by that producer/exporter, for the sole reason that the recorded costs are "artificially low" compared to the hypothetical costs that would be incurred in a market unaffected by governmental policy interventions; and appears to require, in the above situations, that the costs be "adjusted or established" on the basis of information from "other representative markets", when the costs of other producers/exporters in the same country are also "artificially low" compared to the hypothetical costs and other "reasonable" bases are not available.

19. Therefore, Article 2(5), second sub-paragraph appears to be, as such, inconsistent with Article 2.2.1.1 of the ADA, under which an authority is not entitled to reject the producer's recorded costs simply because the costs incurred by the producer are lower than hypothetical costs unaffected by circumstances such as governmental policy interventions. It also appears to be, as such, inconsistent with Article 2.2 of the ADA, which requires that the costs of production used to construct normal value must be those "in the country of origin".

V. Claims with Respect to the Anti-Dumping Measures on Argentine Biodiesel

A. Claims with Respect to the Adjustment of Costs

20. As to Argentina's claims in relation to the EU's rejection of the producers/exporters' records, China notes that the Definitive Determination clearly stated that the *sole* reason for the EU authority to conclude that the costs of soya beans were not reasonably reflected in the records and to disregard the actual costs as recorded was that the domestic prices of soya beans used by biodiesel producers in Argentina were found to be artificially lower than international prices due to the "distortion" created by the Argentine export tax system. The EU thus violates Article 2.2.1.1 because under this provision an authority is not permitted to depart from accurately accounted costs, for the sole reason that such costs are "artificially low" compared to the hypothetical costs unaffected by governmental policy interventions.

21. As to Argentina's second claim with respect to the adjustment of costs, China notes that the EU, having disregarded the recorded costs of soya beans, replaced this element of cost of production with an average FOB reference price. By definition, a FOB export price is not a price that is available to domestic Argentine producers, but a price available to buyers in the export market. It is not reflective of the cost of soya beans "in the country of origin", but reflects market conditions in markets outside of Argentina. Thus, even if the EU authority had no other evidence regarding such costs in Argentina, and, instead, were justified in referencing evidence relating to market conditions in export markets, it would have been necessary to adjust this "raw" evidence to ensure that it elucidated, in a sufficiently probative way, the "costs of production in the country of origin". By simply replacing the recorded cost of soya beans with an average FOB reference price, without taking account of the significantly different conditions affecting the price for exported soya beans, the EU acted inconsistently with Article 2.2.

22. Argentina also claims that the EU acted inconsistently with Article 2.2.1.1 by including, in its calculation of the cost of production of biodiesel, a cost not associated with the cost of production and sale of biodiesel. As explained by the panel in *EC – Salmon (Norway)*, Article 2.2.1.1 requires costs of production used for purposes of constructing normal value to be the "costs associated with production and sale of the product under consideration". Self-evidently, the price of soya beans exported from Argentina is *not* a cost associated with production and sale of biodiesel in Argentina, because exported soya beans are necessarily *not* available to producers of biodiesel in Argentina and the Argentine producers did not pay that price minus fobbing costs for soybeans. By including

a cost that was not associated with the cost of production and sale of biodiesel, the EU acted inconsistently with Article 2.2.1.1.

B. Claims with Respect to the Determination of Profits

23. China anticipates that the Panel, as required under Article 17.6(i) of the ADA, will examine whether the EU authority's establishment and evaluation of the relevant facts was unbiased and objective. In addition, it appears that the authority failed to indicate the method it used to determine the profit margin. At most, it just gave a general rationale, which does not describe a "method". Finally, amounts of profit determined on the basis of a method under Article 2.2.2(iii) are subject to further a reasonability test. An authority that adopts such a method is required to explain why it considers the method adopted to be reasonable.

C. Claims with Respect to Fair Comparison

24. China recalls that an authority bears a general obligation to ensure fair comparison and *no* differences that "affect price comparability" are precluded from being the object of an allowance. These requirements apply generally to the calculation of a dumping margin, and specifically, the construction of normal value does not preclude consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared.

25. There appears to be no disagreement between the parties with respect to the fact that the normal value and the export price that are used by the EU incorporated different prices of soya beans, i.e. the former includes an average of the reference FOB prices (minus fobbing costs) while the latter incorporates domestic prices. The different prices of soya beans, or the difference in the cost of inputs, fall within the scope of "other differences" affecting price comparability. Therefore, even assuming that the EU was entitled to disregard the domestic costs of soya beans and use international prices for the construction of normal value, it should have made due allowance for the above difference in order to ensure a fair comparison.

D. Claims in Relation to Injury and Causation

26. First, China wishes to draw the Panel's attention to some of the arguments and facts submitted by Argentina, particularly paragraphs 368, 376, 377, 378 and 390 of its first written submission. This material raises a question as to whether the EU based its determination on "affirmative, objective, verifiable, and credible" evidence, and whether the EU conducted the relevant examination in an unbiased manner, as required under Article 3.1 of the ADA.

27. Second, China notes that the terms "utilization of capacity" in Article 3.4 of the ADA contain no reference to a concept such as "availability for use" or "idleness". There is no legal basis to overlook such capacity in the injury determination.

28. Third, the key question for examining Argentina's Article 3.5 claims is whether the factors "other than dumped imports" identified by Argentina were injuring the EU industry at the same time as the dumped imports. To the extent that Argentina successfully establishes the facts of its case, the EU authority failed to undertake a proper non-attribution analysis.

ANNEX D-3

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF COLOMBIA

I. INTRODUCTION

1. Members of the Panel and distinguished delegates, Colombia has a systemic interest in the application of several provisions of the WTO's Covered Agreements discussed by the parties to this dispute, and while not taking a final position on the specific merits of this case, Colombia will provide its views on some of the legal claims advanced by them.

1. "As such" Claim's legal standard

2. According to Argentina's first written submission, there is a continued and consistent practice by the European Union, when applying Article 2(5) second paragraph of the EU Basic Regulation. In this respect, when the prices of raw materials included in the records of the producers, are considered to be "abnormally or artificially low", due to a regulated, or distorted, market, the European Communities have been adjusting these prices in accordance with the costs of other producers in the same country, or any other reasonable basis, including information from other representative markets. This continued practice, in Argentina's view, constitutes an "as such" violation to certain articles of the Antidumping Agreement.

3. Whenever a Member presents an "as such" claim, it must establish, through arguments and supporting evidence, at least that [1] the alleged measure - rule or norm- is attributable to the responding Member; [2] its precise content; and indeed, [3] that it does have a general and prospective application".[1] The AB further states that the "evidence [presented] may include proof of the systematic application of the challenged measure. According to the AB in *US – Carbon Steel*, "Such evidence, will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinion of legal experts and the writings of recognized scholars".[2] Furthermore, when a complaining party substantiates an "as such" challenge against laws, regulations, or other instruments of a Member that have general and prospective application, a complainant may submit evidence of the application of such legislation.[3]

4. Even though Colombia will not take a final position on the issue, it is of the opinion that in the present case, the Panel has to take into account all evidence submitted by the Parties, in order to determine if Article 2(5) is "as such" contrary to Article 2.2.1.1 of the ADA. Hence, Colombia respectfully suggests the Panel to review this matter, bearing in mind the considerations above mentioned.

2. Construction of the term "reasonably reflects the costs" in Article 2(5)'s second paragraph

5. For the EU, the costs presented by the Argentinian producers of biodiesel, do not "reasonably" reflect the cost of production, given that soybeans have an export tax in Argentina, which makes the internal price lower than the international price. In the EU's view, since the records presented by the producers do not reflect what the cost would "normally be" they do not reasonably reflect the cost of production. Hence, the EU proceeds to calculate the biodiesel's "normal costs of production" by using the soybeans' international prices. On the other hand, Argentina argues that Article 2.2.1.1 of the ADA's scope does not allow an investigating authority to reject the records on the basis of input price distortions.

6. Argentina, in its first written submission, interprets the terms "costs" "reasonably" and "reflect", to determine that the combined phrase "reasonably reflects the costs" refers to the charges or expenses that have actually been incurred in by the producer. The term "reasonably"

[1] Appellate Body Report, *US — Zeroing (EC)*, para. 198.
[2] Appellate Body Report on *US – Carbon Steel*, para. 157 (emphasis added); see also Panel Report on *Mexico – Rice*, para. 6.26.
[3] Panel Report *EC — IT Products*, para. 7.108.

acts as an adverb to the verb reflect. Thus, since the word "reasonably", which means "at a reasonable rate; to a reasonable extent", operates on the verb reflect and not on the noun "costs". Therefore, it is reasonable to construe such provision, interpreting that it refers to "the way the costs are reflected in the records", rather than to "the costs reflected in the records", as the EU submits.

7. Taking into account the submissions of both parties, it is Colombia's opinion that the interpretation based on the ordinary meaning of the term "reasonably reflects the costs" should be more similar to the one presented by Argentina, inasmuch as the ordinary meaning of this term refers to the actual cost of production a producer should reflect in its records, given the syntax of the phrase. Additionally, Article 2.2.1.1 refers to a situation in which the Member that imposes an antidumping measure is actually investigating the costs of production of producers of the exporting Member. Even if the text of Article 2.2.1.1 does not explicitly provide that the costs are actually the same that those charges incurred by the producer, from the ordinary meaning of the terms, it is not possible to draw that the "costs" have to be the ones "normally associated with the production and sale of goods".[4]

8. Furthermore, it is relevant to consider that one of the purposes of the Antidumping Agreement is to provide a multilaterally agreed framework of rules governing actions against injurious dumping practices.[5] In Colombia's opinion, the issue that raised the investigating authority's concern i.e. products whose inputs have regulated markets, where the price of the input is affected by a government's measure, does not seem to fall under the scope of the Antidumping Agreement. Under this premise, the antidumping measures imposed by the EU to biodiesel from Argentina might be contrary to the object and purpose of the ADA. In any case, the Panel should address this matter carefully when ruling on this issue.

9. Colombia recognizes that the object and purpose of the WTO is to liberalize trade and to eliminate distortions that provide unfair advantages to some goods over others. It also acknowledges the EU's power to conduct investigations on products that are imported under unfair conditions that favour them, causing damages to the national industry. However, Colombia is also aware that the WTO provides Members with different tools, under different Agreements, designed to address different barriers to trade; thus Members should apply these tools accordingly. Consequently, in Colombia's opinion, the Panel should take into account the availability of these other tools, when determining if the EU acted consistently when applying an antidumping measure.

3. Is the interpretation of the scope of Article 3.4 of the ADA, presented by the Parties, consistent with WTO law?

10. Article 3.4 of the ADA plays an important role in setting out how an investigating authority must determine injury, listing the relevant economic factors that must be evaluated in the determination of injury.[6] However, it is important to highlight that Article 3.4 explicitly establishes that "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance".

11. Colombia considers that the standard set above, must guide the analysis of the Panel to assess the impact of the dumped imported products in the domestic industry, regarding: i) whether the exclusion of "idle" plants contributes to a satisfactory evaluation of the state of the industry, and; ii) whether the October 1st 2013 Definitive Disclosure's resubmitted data obeys to the obligation, set forth in article 3.4 of the ADA, to carry out an "objective examination" on the basis of "positive evidence".

12. Thus, Colombia considers that the Panel must take into account all relevant factors at issue when evaluating the state of the industry in light of the last sentence of Article 3.4, rather than relying its analysis solely on the breach of Article 3.4, in accordance to the "production capacity and utilization capacity" factors.

[4] EU's First Written Submission. Para 139.
[5] Panel Report, *US — Zeroing (EC)*, footnote 292.
[6] Van den Bossche, Zdouc, The Law and Policy of the World Trade Organization, Cambridge University Press, (2013), pag. 705.

13. Colombia submits that the terms "objective examination" and "positive evidence" included in Article 3.1 of the ADA serve as relevant context in the interpretation of the last sentence of Article 3.4, due to the fact that "objective examination" puts an obligation on Investigating Authorities to conduct an objective analysis, without favouring the interests of any interested party, but always based on "positive evidence".

14. In light of the above mentioned arguments, the sentence "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance", when interpreted in accordance with its ordinary meaning, in its context and in light of the object and purpose of the ADA, does not allow the authorities to: i) base their decisions taking into account "one or several of these factors as decisive guidance" and; ii) to base their decision on unclear economic factors or to favour the interests of any interested party.

4. The Non Attribution Test obligations under Article 3.5 of Antidumping Agreement

15. Colombia notes that if, as stated by Argentina, "… even in the total absence of imports, the utilization of the EU's productive capacity would only have reached around 50% and the EU did not rebut or contradict that information …", it is necessary to question what motivated the EU's industry to increase its capacity of production, despite the allegedly dumped imports during the investigation period. In that sense, Colombia considers that the Panel's analysis should take into account the possibility that the EU misread the biodiesel sector or had high expectations about future changes in the prices conditions, which in the end never materialized.

16. The decision to expand the capacity of production, despite the real level of production that a market may absorb, results in an inadequate decision and generates undesirable consequences, such as reductions in the utilization of that capacity. When facing these particular conditions, damage to the national industry becomes an expected result. This damage cannot be attributable to imports.

5. CONCLUSION

17. Colombia considers that this case raises important questions on the application of certain provisions of the ADA Agreement and the GATT of 1994. While not taking a final position on all aspects of the merits of the case, Colombia requests the Panel to carefully review the scope of the claims in light of the remarks made in this hearing.

18. Mr. Chairman, distinguished members of Panel, and representatives of the Parties and Third Parties, with these comments Colombia hopes to contribute to the legal discussion of this case and would like to thank this opportunity to express its views on the present dispute. Thank you for your kind attention and we remain at your disposal to answer any questions.

ANNEX D-4

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF INDONESIA

1. "AS SUCH" CLAIM CONCERNING ARTICLE 2(5) OF THE EUROPEAN UNION'S BASIC ANTI-DUMPING REGULATION

1.1 Scope and content of Article 2(5) of the Basic Anti-Dumping Regulation

1. The construction of the contested measure in the present dispute has been supported by Argentina with evidence beyond its text. In line with the approach prescribed by the Appellate Body[1], the legislative background, administrative practice and domestic court rulings put forward by Argentina should be reviewed by the Panel.

2. As regards the scope and content of the measure at issue, Indonesia sees the second subparagraph of Article 2(5) as introducing a WTO-inconsistent condition or requirement - not provided for in the Anti-Dumping Agreement or any WTO-covered Agreements - which has to be met in order for the GAAP-consistent records of an exporter or producer which reflect the recorded costs associated with the production and sales of the product under consideration in the country of origin, to be used to calculate the cost of production. Failing the satisfaction of this condition, the European Union determines that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, and adjusts the costs of production of the investigated exporter or producer in a WTO-inconsistent manner.

3. The contested provision obliges the European Union investigating authority to use input costs unaffected by "distortions" for establishing the cost of production, which is a requirement not provided for in the WTO-covered Agreements. In this pursuit, it requires the investigating authority to undertake the 'distortion test' and replace/adjust, in a WTO-inconsistent manner, the actual-recorded input costs of exporters or producers in case those costs are found to be distorted on the basis of out-of-country of origin prices of the inputs. These additional requirements have been woven into the reasonable reflection of costs criterion. The above scope and content is evident from the clear explanation in recital 4 of Council Regulation (EC) No. 1972/2002, as well as a string of anti-dumping cases in which the contested provision was applied. In fact this practice has been applied consistently where the European Union was presented with allegations by the complainants or was aware of a causal factor that could lead to a distortion of input costs in the investigated country.

4. Contrary to the European Union's claim of the discretionary nature of the provision[2], the use of costs not affected by distortions is a norm set by the second subparagraph of Article 2(5) of the Basic Anti-Dumping Regulation and is necessarily WTO-inconsistent. Indeed, this is supported by the European Union's vehement justification of the WTO-consistency of the assessment of reasonableness of costs *per se* and of the use of reasonable costs in constructing the normal value[3], as well as the adjustment/rejection of raw material costs that are "*not "normal"*".[4]

1.2 Violation of Article 2.2.1.1 of the Anti-Dumping Agreement

5. If an investigating authority decides to construct the normal value, Article 2.2.1.1 comes into play.

6. First, previous Panel reports[5] have established that the first sentence of Article 2.2.1.1 sets out a rule and imposes a positive obligation on investigating authorities to calculate costs of

[1] Appellate Body Report, *US – Carbon Steel* (*India*), paras. 4.446, 4.451, 4.454; Appellate Body Report, *US – Carbon Steel*, para. 157; Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 168.

[2] European Union, first Written Submission, paras. 113-114, 119-124.

[3] European Union, first Written Submission, paras. 131-133.

[4] European Union, first Written Submission, para. 157.

[5] Panel Report, *China – Broiler Products*, paras. 7.160, 7.161; Panel Report, *EC – Salmon (Norway)*, para. 7.483; Panel Report, *US – Softwood Lumber V*, paras. 7.237, 7.310, 7.316.

production on the basis of the records kept by the exporter or producer under investigation[6], *provided* that two cumulative conditions are met, namely that the records of the investigated exporter or producer are consistent with the GAAP of the exporting country, and they reasonably reflect the costs associated with the production and sale of the product under consideration. Therefore, the second subparagraph of Article 2(5) of the European Union's Basic Anti-Dumping Regulation is WTO-inconsistent in so far as it imposes an additional condition to use undistorted input costs.

7. Second, a literal reading of the first sentence of Article 2.2.1.1 indicates that both the conditions apply to the *records*. The negotiating history of the provision supports such interpretation. Moreover, the drafters while modifying the various pre-Uruguay round texts of the Anti-Dumping Agreement starting from the Carlisle I text, did not insert the word "costs" after the conjunction "and" in the first sentence of Article 2.2.1.1 or indicate in any other manner that the reasonable reflection criterion is related to the costs. Therefore, the interpretation of the European Union that the word "reasonably" is attached to the word "costs" is untenable and is based on reading words into the text of the provision that do not exist.[7]

8. Third, the two conditions enumerated in the first sentence of Article 2.2.1.1 are aimed at assessing the reliability of the records *tout court* and as indicated by the structure of Article 2.2.1.1 were not meant to be mutually exclusive. The GAAP-consistency criterion is concerned with the reliability of the records of the investigated exporter/producer (or group) from an overall accounting perspective and costs are a part of the whole set of financial accounting data. If a company does not satisfy this condition, the investigating authority is not obliged to use the records of the investigated exporter or producer and it would not even test whether the records reasonably reflect costs associated with the production of the product under consideration. The next condition that records reasonably reflect the costs associated with the production and sale of the product under consideration is not linked to the issue of reasonability of costs but to the fact that from the perspective of product-specific costs involving allocations, the cost of production of the product under consideration should be reasonably reflected in the records. This is indicated by the specific reference to the words "product under consideration" in the context of the reasonable reflection of costs criterion. In fact such an interpretation is also supported by the second and third sentences of Article 2.2.1.1 which function within the ambit of the requirement set forth by the first sentence that records reasonably reflect the costs associated with the production of the product under consideration. Indeed, from a practical perspective, allocations would be necessary or relevant only in the context of product-specific cost accounting, since otherwise, the full/unallocated/aggregated company-wide costs would anyway exist in the GAAP-consistent records pertaining to the whole company.

9. Fourth, Article 2.2.1.1 and Article 2.2 do not require an assessment of the reasonableness of the costs of inputs recorded in the accounting records of the investigated exporter or producer *per se*, nor do these articles mandate that costs of inputs should be "reasonable" in comparison to any benchmark. This is attested by the fact that a reasonability condition is only specified with regard to SG&A costs and profits in Article 2.2 of the Anti-Dumping Agreement. Moreover, the concept of individual dumping margins as a means to address the individual pricing behaviour of exporters or producers[8] would lose meaning if the reasonability of each exporter or producer's cost of production were to be assessed on the basis of a standard cost of production or a standard cost for inputs as done by the European Union in the *Biodiesel* investigation.

10. Fifth, the text of Article 2.2.1.1 read in light of footnote 6 and the last sentence of Article 2.2.1 sets a parameter that the reasonable reflection of costs is to be assessed on the basis of the actual costs incurred by an exporter or producer in the investigation period. The enquiry under the first sentence of Article 2.2.1.1 does not allow the inclusion of costs that have not been incurred (in the investigation period) by the investigated exporter or producer, and that cannot be linked in any manner to the actual act of production by the exporter or producer concerned since such costs would never be recorded in the exporter or producer's records at the company-wide level or product-specific level. Moreover, it would be illogical to talk of allocation of costs that have not been incurred but should have been incurred. Indeed, the reference to start-up costs in

[6] Panel Report, *US – Softwood Lumber V*, para. 7.236.

[7] European Union, First Written Submission, para. 133. The United States also seems to hold a similar view as the European Union. United States, First Written Submission, paras. 18, 21.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 111.

footnote 6 and the recovery of costs in the last sentence of Article 2.2.1[9] leaves no room for doubt that the costs concerned by these provisions are those that would have already been incurred by the exporter or producer/group.

11. Last, investigating authorities need to assess individually in every case to the extent individual exporters or producers are investigated, as to whether or not their records reasonably reflect the costs associated with the production of the product under consideration by them. However, the parameters that are to be applied as regards the assessment of the reasonable reflection of the costs in the records cannot be determined by authorities on a case-by-case basis. This is because the clear parameters as identified above have been set out in the covered agreements in an unambiguous manner. Moreover, if investigating authorities were permitted to determine the parameters on a case-by-case basis, it would induce legal uncertainty as regards the application of Article 2.2.1.1 and could easily result in the same situation being treated differently by different WTO Members or different situations being treated in the same manner which is contrary to the fundamental principle of non-discrimination that is a pillar of the WTO Agreements.

1.3 Violation of Article 2.2 of the Anti-Dumping Agreement

12. In US – Softwood Lumber V, the Panel considered that Article 2.2 "concerns the establishment of 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 that price cannot be used".[10] Thus, the purpose of the constructed normal value is to create a "comparable price" for the like product if it were sold on the domestic market of the country of origin in the ordinary course of trade to comply with the definition of dumping within the meaning of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. The definition of dumping will lose meaning if the normal value is constructed using out-of-country of origin input costs as it will not yield a "comparable price" and a finding of dumping will in most cases be a foregone conclusion, particularly where low cost countries are targeted.

13. If an investigating authority decides to construct the normal value on the basis of the cost of production *in the country of origin* plus SG&A costs and profits, it does not have the discretion to use third country prices or cost data for any purpose including for the sort of 'non-distortion test' as done by the European Union or the calculation of the costs of production if it deems that these are not reasonable/undistorted. The text and context of Article 2.2 do not permit any exceptions to this rule. Thus, an investigating authority cannot directly or indirectly - by means of using evidence as suggested by the European Union - adopt international prices or third country prices to adjust the costs of an exporter or producer if it considers that the records of that investigated party do not reflect "reasonable" costs associated with the production of the product under consideration.

14. Moreover, if the European Union's interpretation and practice were to be upheld, legally it implies that in each case that an investigating authority would resort to out-of-country of origin input costs, it would be working on the basis of an assumption that an exporter or producer would have different input costs if there were sales of the like product in the ordinary course of trade in the domestic market. Such assumption cannot be justified on the basis of any provision in the WTO-covered agreements and flies in the face of the requirement for an investigating authority to base its determination on a proper establishment of facts. In fact the European Union itself admits that it aimed at determining a cost of production in the country of origin in the *Biodiesel* case in the absence of distortion and thus calculated a figure which was a "*hypothetical one*".[11]

[9] The final sentence of Article 2.2.1 states that sales below costs in the country of export may be considered as not being in the ordinary course of trade and may be disregarded in determining the normal value provided that they are made within an extended period of time, in substantial quantities and are at "*prices which do not provide for the recovery of all costs within a reasonable period of time*". The reference to "*recovery of all costs*" can only be intended when such costs have been incurred in the first place.

[10] Panel Report, *US – Softwood Lumber V*, para. 7.278.

[11] European Union, First Written Submission, para. 205.

2. CLAIM UNDER ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT – DEFINITION OF "UTILIZATION OF CAPACITY"

15. In the Shorter Oxford English Dictionary, the meaning of the term "capacity" is "*ability to receive, contain, hold, produce or carry*".[12] This is the generic definition that should be considered. According to this definition, the reference is to the ability to produce *tout court* regardless of the fact that the ability to produce is immediate or is useable subject to some investments/upgrading/overhauling etc. In any event, as long as the production capacity remains installed, it cannot be excluded that it can be put back into production.

16. Additionally, the term used in Article 3.4 of the Anti-Dumping Agreement is "utilization of capacity" and not utilization of 'productive' capacity or 'useable' capacity or 'operative' capacity. Therefore, the clear reference is to all capacity, including capacity that may not be used or be useable at a particular point in time. If the drafters had intended that only the utilization of 'productive' or 'useable' or on-line 'operative' capacity be assessed, implying in other words the exclusion of "idle capacity", this would have been specified in Article 3.4 through the use of any of the terms noted above.

17. Indonesia also notes that there is no definition of "idle capacity" in the Anti-Dumping Agreement. Thus, if the Panel were to agree with the European Union's theory, and consider that "idle capacity" be excluded from the definition of the term "utilization of capacity", there would be extreme ambiguity in the interpretation of this indicator. Per the Shorter Oxford English Dictionary, the meaning of the word "idle" is "*inactive, unoccupied, not moving or in operation*".[13] Thus the term "idle capacity" can be interpreted very widely.

18. To summarize, the full installed capacity of the domestic industry should be considered for the assessment of "utilization of capacity" and this was also supposedly the intention of the drafters of the Anti-Dumping Agreement. A contrary interpretation would make the assessment of this injury indicator un-objective and discriminatory as authorities or complainants could apply different definitions of "idle capacity" in different contexts.

[12] Shorter Oxford English Dictionary, Sixth Edition, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 341.

[13] Shorter Oxford English Dictionary, Sixth Edition, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 3487.

ANNEX D-5

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF MEXICO[1]

MEXICO'S THIRD-PARTY SUBMISSION ON THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

I. INTRODUCTION

1. Mexico thanks the Panel for this opportunity to submit comments regarding the preliminary objections and the parties to the dispute for giving access to their respective submissions.

2. The foregoing is very important for third-party Members, as it enables them to gain a better understanding of the dispute and, where appropriate, to submit comments prompted by systemic interest.

II. RELATED MEASURES AND IMPLEMENTING MEASURES

3. In its request for a preliminary ruling dated 24 November 2014, the European Union observes that the references made by Argentina in its request for the establishment of a panel to "implementing measures and related instruments or practices" and "related measures and implementing measures" should be considered as falling outside the Panel's terms of reference, since, in the opinion of the European Union, these terms do not comply with the provisions of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in that they fail to specifically identify the measures at issue.[2]

4. Mexico does not share the European Union's view. The phrase that includes related and implementing measures is a common phrase that complainants usually include in panel requests – precisely to avoid respondents from subsequently issuing a measure related to or deriving from the original measure at issue that is also non-compliant and goes beyond the panel's terms of reference. In previous disputes, complainants have incorporated this type of phrase and the panels have considered within their terms of reference future measures issued in relation to those being challenged.[3]

5. In this case, as regards "related measures and implementing measures", Argentina explains that the terms "related measures and implementing measures" are at the end of Section 1, point (B), which identifies the primary measures being challenged. It is therefore clear that only the measures related to the imposition of anti-dumping measures ("*medidas compensatorias*") by the European Union with respect to imports of biodiesel originating in Argentina could fall within the scope of the terms "related measures and implementing measures".[4]

6. Argentina further points out that the purpose of including such terms is to prevent the potential situation of the European Union issuing new measures related to those challenged by Argentina that would fall outside the Panel's terms of reference because they have not been expressly and individually identified by the complaining party. Consequently, the terms used by Argentina are necessary to protect its interests as complaining party, in order to avoid that a measure that is adopted after the establishment of the panel and is closely connected to the measure at issue may be excluded from the panel's terms of reference.[5]

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[1] Mexico indicated that its two submissions to the Panel (third-party submission on the European Union's request for a preliminary ruling and response to Panel question No. 2) should serve as the executive summary of its third-party arguments.

[2] Request for a preliminary ruling by the European Union, paras. 8-9.

[3] Appellate Body Report, *China - Raw Materials*, paras. 245 and 246. See also the Panel's ruling in *India - Agricultural Products* (DS430), which specifically analyses the question of whether the "related measures" and the "implementing measures" mentioned in the panel request are included within the Panel's terms of reference, preliminary ruling by the Panel, *India - Agricultural Products* (DS430) (document WT/DS430/5), paras. 3.40 and 3.51.

[4] Response of Argentina to the request for a preliminary ruling by the European Union, para. 21.

[5] Response of Argentina to the request for a preliminary ruling by the European Union, para. 29.

7. Mexico considers that the Panel should recognize these measures as falling within its terms of reference.

III. CLAIMS THAT EXPAND THE SCOPE OF THE DISPUTE

8. The European Union observes that Argentina's request for the establishment of a panel expands the scope of the dispute as presented in Argentina's request for consultations. According to the European Union, the panel request includes a great number of new claims, which changes the essence of the complaint raised in the consultations. The European Union requests that the following claims be considered as falling outside the Panel's terms of reference:[6]

a. The inclusion of "*related practices*" in the claim relating to Article 2(5) of Council Regulation (EC) No. 1225/2009, in paragraph 1(A) of the panel request. The European Union adds that the request for consultations expressly stated that what was being challenged was the above provision "*as such*", which means that what is being referred to is a specific, written legal provision and not the application of that provision.[7]

b. It is not clear whether the insertion of a paragraph between paragraphs 2(B)3 and 2(B)4 of the panel request is intended to introduce an "*as applied*" claim against Article 2(5) of Council Regulation (EC) No. 1225/2009.[8]

c. Argentina claims for the first time that Article 2(5) of Council Regulation (EC) No. 1225/2009 is "*as such*" inconsistent with Article 9.3 of the Anti-Dumping Agreement, because, allegedly, the amount of the anti-dumping duty ("*cuota compensatoria*") to be imposed exceeds the margin of dumping.[9]

d. Paragraphs 2(A)1 and 2(A)2 of the panel request include new claims against Article 2(5) of Council Regulation (EC) No. 1225/2009 that are based on Article VI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Argentina's request for consultations did not include any claim based on Article VI:1.[10]

e. A new claim is introduced in relation to the scope of Article 2(5) of Council Regulation (EC) No. 1225/2009, based on Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and referring to the inclusion as "costs not associated with the production and sale of the product under consideration".[11]

f. Argentina's claim regarding the European Union's determination of profits under Article 2.1 of the Anti-Dumping Agreement.[12]

9. Mexico recalls that the Appellate Body has noted that Articles 4 and 6 of the DSU do not require a "precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel, provided that the 'essence' of the challenged measures had not changed".[13] In *US - Upland Cotton*, the Appellate Body made clear that it did not intend to impose too rigid a standard for the "precise and exact identity" between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the request for the establishment of a panel, which according to Article 7 of the DSU is that which governs the panel's terms of reference.[14]

[6] Request for a preliminary ruling by the European Union, paras. 23-26.
[7] Request for a preliminary ruling by the European Union, paras. 27-30.
[8] Request for a preliminary ruling by the European Union, paras. 31-35.
[9] Request for a preliminary ruling by the European Union, paras. 36-40.
[10] Request for a preliminary ruling by the European Union, paras. 41-44.
[11] Request for a preliminary ruling by the European Union, paras. 45-49.
[12] Request for a preliminary ruling by the European Union, paras. 50-54.
[13] Appellate Body Report, *Brazil - Aircraft*, para. 131. In this case, the Appellate Body considered that the measures at issue (export subsidies for regional aircraft) were the subject of consultations and were referred to the DSB for consideration. The regulatory instruments that came into effect in 1997 and 1998 (following the consultations held on 18 June 1996) did not change the essence of the export subsidies at issue. The Appellate Body accordingly concluded that the export subsidies for regional aircraft, including the instruments that came into effect after consultations were held between Canada and Brazil, were properly before the Panel (Appellate Body Report, *Brazil - Aircraft*, paras. 132 and 133).
[14] Appellate Body Report, *US - Upland Cotton*, para. 293.

10. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body established that the same standard concerning the degree of identity that must exist between the request for consultations and the panel request applies with respect to the "legal basis" of the complaint. A complaining party may learn of additional information during consultations that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. It is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the addition of provisions (in the panel request) does not have the effect of changing the essence of the complaint.[15]

11. Argentina's conclusion in each particular case is that each of the assumptions contested by the European Union concerns claims that evolved out of those raised in the request for consultations but that "some connection" exists between the two.[16] Hence, the Panel should look at whether the allegedly "new claims" noted by the European Union actually derive from claims previously identified by Argentina in the request for consultations. In any event, the Panel should consider an analysis such as that referred to by the Panel in *India - Agricultural Products* in order to determine whether "some connection" exists:

> [W]e recall the words of the Appellate Body in *US - Carbon Steel* that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[17]

[15] Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice,* para. 138. The Appellate Body stated the following:

> "In our view, the same logic applies with respect to the legal basis of the complaint. A complaining party may learn of additional information during consultations - for example, a better understanding of the operation of a challenged measure - that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations - namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the 'legal basis' in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint."

[16] Response of Argentina to the request for a preliminary ruling by the European Union, para. 66.

[17] Preliminary ruling by the Panel, *India - Agricultural Products* (DS430) (document WT/DS430/5), para. 3.48.

MEXICO'S THIRD-PARTY RESPONSE TO PANEL QUESTION NO. 2

CLAIMS UNDER ARTICLE 2.2.1.1 AND 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994

Interpretation of the provisions of the covered agreements invoked by Argentina

(...)

2. (to all third parties) What are the parameters or criteria under Article 2.2.1.1 or any other provision of the covered agreements governing the manner in which an investigating authority shall determine whether the records reasonably reflect the costs associated with the production and sale of the product concerned? Or are the investigating authorities free to make this determination on case-by-case basis?

Mexico's response:

Mexico sees nothing in Article 2.2.1.1 of the Anti-Dumping Agreement that would enable it to conclude that there are any fixed parameters for making such a determination. Nor does it see any contextual elements that would enable it to conclude that such parameters exist. Consequently, Mexico considers that the investigating authorities have a measure of discretion to reach this determination on a case-by-case basis.

ANNEX D-6

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF NORWAY

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. We will not comment upon all the issues raised by the Parties. Rather, we will confine ourselves to offer some views on the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

2. As we know, the first sentence provides that:

> *[f]or the purposes 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.*

3. The parties disagree, amongst others, on whether Article 2.2.1.1 allows the "investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be 'abnormally or artificially low'".[1]

4. A legal analysis of a WTO provision starts, of course, with an inquiry into the ordinary meaning of the terms. Article 2.2.1.1 uses the word "shall", which indicates that it establishes an obligation of some sort. In this case, the word "shall" is qualified by the terms "normally" and "provided that". We understand "normally" in this context to point to the existence of conditions, rather than to "alter the characterization of [the] obligation as constituting a 'rule'".[2]

5. The obligation on the investigating authorities according to Article 2.2.1.1, is subject to two cumulative conditions:

i) that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

ii) that such records reasonably reflect the costs associated with the production and sale of the product under consideration.

6. If these two conditions are fulfilled, the investigating authorities "shall normally" calculate the costs on the basis of records kept by the exporter or producer under investigation.

7. In light of the ordinary meaning of the terms in Article 2.2.1.1, Norway notes that both conditions seem to relate to the quality of the records as such. It is the records that must be in accordance with the GAAP, and the records that must "reasonably reflect the costs associated with the production and sale of the product under consideration". The European Union, however, argues that the second condition should be interpreted to mean that the costs themselves need to be reasonable. The European Union submits, amongst others, that "it would be counterintuitive to assert that Article 2.2.1.1 […] mandates the investigating authorities to base their calculations on costs that are 'unreasonable'".[3]

8. In our view, by asserting this, the European Union is reading into Article 2.2.1.1 words that are simply not there. The structure of the first sentence of Article 2.2.1.1 does not suggest an interpretation that the records must reflect costs that are reasonable – or not "abnormally or artificially low". Rather, the structure and the ordinary meaning of the terms suggest that the second condition only concerns whether the records in a reasonable way reflects the costs associated with the production and sale of the product under consideration.

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[1] Argentina' First Written Submission, paras. 87 and 88. See also Argentina's First Written Submission para. 195. European Union's First Written Submission, for instance, paras. 154 and 254.

[2] See Appellate Body Report, *United States – Clove Cigarettes,* para. 273.

[3] European Union's First Written Submission, para. 131.

9. Accordingly, Norway is of the opinion that Article 2.2.1.1 does not allow investigation authorities to disregard the records in situations where the authorities find that the costs reflected in the records are "abnormally or artificially low", as long as the two explicitly mentioned conditions are met.

10. This concludes Norway's statement. I thank you for your attention.

ANNEX D-7

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF THE RUSSIAN FEDERATION

Introduction

1. The Russian Federation intervened in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, in particular the Anti-Dumping Agreement. The Russian Federation would like to provide its views on: a) the input cost adjustment practice used by the European Union in its anti-dumping investigations; b) the legal interpretation of the words "reasonably reflect" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement; c) Article 2.2 of the Anti-Dumping Agreement that requires construction of normal value on the basis of costs in the country of origin of the product under consideration; and d) the concept of "dumping" in the context of the Anti-Dumping Agreement.

A. The Input Cost Adjustment Practice Used by the European Union in Its Anti-Dumping Investigations

2. The Russian Federation strongly condemns the practice of input cost adjustment and considers it to be inconsistent with both the provisions of the WTO agreements and the spirit of the WTO in general.

3. This practice, based on Articles 2(3) and 2(5) of the Basic Regulation[1], is very similar to the treatment of non-market economies that the European Union applied in its antidumping procedures to imports from the Russian Federation when it had non-market economy status. As Argentina concludes in section 4.1 of its First written submission, the amendments introduced to the Basic Regulation in 2002 allow the investigating authorities of the European Union to continue using non-market economy techniques with respect to countries that have been granted full market economy status and even to countries that have always been recognized as market economies and have been WTO members. Thus, the European Union has widely expanded the application of the cost adjustment practice, and uses it for protectionist purposes. The present case clearly demonstrates this.

4. It is worth noting that the General Court of the European Union has found that the non-market economy techniques which, as it was mentioned, create the same consequences for the exporters as the practice of input cost adjustment violate Article 2 of the Anti-Dumping Agreement.[2]

B. The Legal Interpretation of the Words "Reasonably Reflect" in Article 2.2.1.1 of the Anti-Dumping Agreement

5. Based on the ordinary meaning of the words "reflect" and "reasonably", the Russian Federation is of the position that the proper reading of the phrase "reasonably reflect" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement is that records reasonably depict expenses incurred by the producer for the production and sale of the product under consideration.

6. In Article 2.2.1.1, the word "reasonably" is attached to the verb "reflect" and not to the word "costs". As Argentina correctly concluded, "this sentence does not provide that the records must reflect 'reasonable costs' or 'costs which are reasonable in light of prices on other markets'.

[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), OJ L 343, 22.12.2009, p. 51 and corrigendum to Council Regulation (EC) No 1225/2009, OJ L 7, 12.1.2010, p. 22 as amended by Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 (OJ L 237, 3.9.2012, p. 1), Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012 (OJ L 344, 14.12.2012, p. 1) and Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 (OJ L 18, 21.1.2014, p. 1).

[2] Case *T-512/09, Rusal Armenal ZAO* v *Council of the European Union,* Judgment of the General Court of the European Union of 5 November 2013.

Rather, the issue is only whether the records reflect the costs associated with the production and sale of the product under consideration in a reasonable manner".[3]

7. Moreover, the plain meaning of the term "cost" focuses on what is actually paid, rather than on the value or *reasonableness* of what is paid. Taking into account that Article 2.2.1.1 of the Anti-Dumping Agreement refers to GAAP, the term "cost" is used in an accounting sense. The focus of the inquiry is on whether the costs are *reasonably reflected in the records*, and *not* whether the costs *per se* were reasonable having regard to some extraneous economic considerations.

8. Article 2.2.1.1 of the Anti-Dumping Agreement does not provide that investigating authorities can reject or adjust the costs reasonably reflected in exporter's records on the basis that prices for the product under consideration or its inputs are lower in comparison with international prices or prices in other markets. If negotiators had agreed on the inclusion of such an option, they would have explicitly described it in the text of this provision. However, the drafters have neither mentioned it, nor set any criteria, or defined the circumstances in which costs associated with the production and sale of the product concerned accurately reflected in the records of the producer may be considered as not being "reasonable".

9. The interpretation advocated by the European Union when the prices of certain raw materials are considered to be "abnormally or artificially low" in comparison with prices in third countries or international prices not only erodes the comparative advantage of a Member, but is discriminatory towards countries which enjoy comparative advantages in different areas. The European Union's approach undermines the concept of comparative advantage, which is recognized to be the basis for international trade. Countries should not be discriminated against for having a comparative advantage, whether it is the cost of raw materials or labor etc.

10. It should be stressed that the Anti-Dumping Agreement does not envisage the use of "international prices" in anti-dumping investigations. Prices for inputs are determined in national markets depending on local market conditions and may vary considerably. With this in view, the question arises as to in which market prices for inputs are supposed to be chosen as benchmarks (to be considered "at the world level") for comparison with the costs actually incurred by the producer/exporter under investigation in order to conclude that they are "reasonable" or not. Even prices of commodities that are set at exchanges (for example, the London Metal Exchange) cannot be viewed as international prices in the context of anti-dumping investigations. The use of abstract "international prices" as a basis for determination of normal value or export price contradicts both the letter and the spirit of the Anti-Dumping Agreement.

11. Thus, the European Union's interpretation of the term "reasonably reflect" is neither supported by the text of Article 2.2.1.1 of the Anti-Dumping Agreement, nor does it reflect the intention of the drafters.

C. Article 2.2 of the Anti-Dumping Agreement Requires Construction of Normal Value on the Basis of Costs in the Country of Origin of the Product under Consideration

12. The Russian Federation considers that Article 2.2 of the Anti-Dumping Agreement, including Article 2.2.1.1, expressly and unambiguously requires that the margin of dumping must be determined by comparison with the cost of production *in the country of origin*. By providing the possibility to determine the cost of production to construct normal value on "information from other representative markets", Article 2(5) of the Basic Regulation is in sharp contrast with the requirement of Article 2.2.1.1 of the Anti-Dumping Agreement.

13. Article 2.2 of the Anti-Dumping Agreement contains a chapeau and several paragraphs. The chapeau provides a general rule, and paragraphs describe more specific rules related to the construction of normal value. The connection between the chapeau and other paragraphs is explicit, in particular through the numbering and the opening phrases "[f]or the purpose of paragraph 2" that appear in Articles 2.2.1.1 and 2.2.2. This fundamental structure and logic of Article 2.2 as a whole indicates that interpretation of its paragraphs should remain within the parameters of the chapeau and therefore the source of information for calculation of normal value is the domestic market of the exporting country.

[3] Argentina's First Written Submission, para. 104.

14. The support for this interpretation is found, in particular, in Article 2.2.2 of the Anti-Dumping Agreement that describes several ways to determine "the amounts for administrative, selling and general costs and for profits", all of which relate to data *in the country of origin*.

D. The Concept of "dumping" in the Context of the Anti-Dumping Agreement

15. The Panel should interpret provisions of the Anti-Dumping Agreement in their context, including the definition of "dumping" reflected in Article 2.1 of the Anti-Dumping Agreement.[4]

16. The Appellate Body has confirmed in several cases that the opening phrase of this Article – "For the purpose of this Agreement" – means that this definition of 'dumping' applies to the entire Anti-Dumping Agreement, and is central to the interpretation of other provisions of the Agreement.[5] They "relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country".[6]

17. It follows from the interpretation of the Appellate body that: (1) the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement must be applied in a coherent fashion, and cannot be of variable content or application;[7] (2) the term "dumping" relates to a *product*, meaning the product under consideration as a whole. Moreover, it is the exporter's pricing behaviour that may result in dumping. Thus, the concept of "dumping" in the context of the Anti-Dumping Agreement does not deal with the price of the product's inputs.

18. Finally, the Russian Federation supports Argentina's understanding that Article 2.2.1.1 refers to the "costs" which are "associated with the production and sale of the product under consideration". Argentina states, *inter alia,* that "it shows that this condition deals with the costs relating to 'the *product* under consideration' and *not with the costs of the inputs*".[8]

19. As Argentina, the Russian Federation is deeply concerned that the European Union's erroneous interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, reflected in the measure at issue, results in broadening the circumstances under which WTO Members may apply anti-dumping duties and thus undermines the concept of "dumping" provided for in Article 2.1 of the Anti-Dumping Agreement.

Conclusion

20. In sum, the legal analysis of Article 2.2 of the Anti-Dumping Agreement as a whole reveals that Article 2.2, including Article 2.2.1.1, does not permit the use of the data of a third country for the purpose of calculation of constructed normal value. The European Union's interpretation of the term "reasonably reflect" is neither supported by the text of Article 2.2.1.1 of the Anti-Dumping Agreement, nor does it reflect the intention of the drafters. The European Union's interpretation broadens the circumstances under which the WTO Members may apply anti-dumping duties and thus undermines the concept of "dumping" provided in Article 2.1 of the Anti-Dumping Agreement. In its legal interpretation of Article 2.2.1.1, the Panel should examine the text of this provision in the context of Articles 2.2, 2.2.2 and 2.1 of the Anti-Dumping Agreement.

[4] Argentina's First Written Submission, paras. 125-126.

[5] Appellate Body Reports, *US – Softwood Lumber V*, para. 93; *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 126; *US – Zeroing (Japan)*, para. 109; *US – Zeroing (Japan)*, para. 140.

[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 109 (emphasis original).

[7] Appellate Body Report, *US – Continued Zeroing*, para. 280.

[8] Argentina's First Written Submission, para. 103 (emphasis added).

ANNEX D-8

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS
OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia focuses its comments on a number of important systemic issues that are central to the dispute relating to (A) the requirement to base the determination of costs on the records of the investigated foreign exporter or producers, (B) the requirement to base the normal value on the costs in the country of origin rather than on an out-of-country benchmark, (C) the WTO consistency of export duties as a legitimate policy instrument and (D) the need for a proper injury and causation analysis.

II. ANALYSIS

2. Saudi Arabia considers that the anti-dumping instrument requires Members to examine private pricing behaviour of foreign producers in a given set of circumstances. It does not concern the comparison of a foreign producer or exporter's export price against an undefined international reference price or "normal" value that does not reflect the prices or conditions in the producer or exporter's country of origin. There is no textual basis in the Anti-Dumping Agreement for an investigating authority to question the reasonableness of input costs simply because these may be lower in the country of origin than in a third country or world market.

A. Recorded Cost Data Reasonably Associated With The Production And Sale Of The Product Concerned Cannot Be Rejected Based On An Allegation That They Are "Artificially Low" or "Distorted"

3. Article 2.1 of the Anti-Dumping Agreement reflects the fundamental principle that a dumping determination must be made on the basis of the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Domestic prices can only be disregarded when there are no sales of the like product in the ordinary course of trade or when the sales do not permit a proper comparison because of the particular market situation or the low volume of sales in the domestic market of the exporting country. Article 2.2 dictates the alternative bases for determining the normal value in such situations and offers only two options: either the comparable price of the like product when exported to an appropriate third country, provided that this price is representative or "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[1] In terms of "the cost of production in the country of origin", Article 2.2.1.1 of the Anti-Dumping Agreement imposes an obligation to calculate the costs on the basis of the records kept by the exporter or producer under investigation. The only conditions for using such records are that the records are kept "in accordance with the generally accepted accounting principles of the exporting country" and that the records "reasonably reflect the costs associated with the production and sale of the product under consideration". If that is the case, the records of the producer under investigation must be used.[2]

4. Article 2.2.1.1, first sentence, thus reflects the producer-specific and country-specific nature of the anti-dumping instrument which is only concerned with examining the private pricing behaviour of producers based on their recorded costs actually incurred in association with the production and sale of the product under consideration. The second part of the first sentence of Article 2.2.1.1 provides the exceptional circumstances under which the general rule does not apply. First, if the records are not kept in accordance with the generally accepted accounting principles of the exporting country, there is no requirement to use them. This is another reflection of the country-specific nature of the anti-dumping instrument. Second, if the records in question do not "reasonably reflect" the costs "associated with the production and sale of the product under consideration," the recorded costs do not have to be used either. This condition goes to the relationship between the recorded costs and the production and sale of the product under consideration, and not of a different or larger group of products.

[1] See Article 2.2 of the Anti-Dumping Agreement.
[2] See Article 2.2.1.1 of the Anti-Dumping Agreement.

5. The analysis may consider which costs are sufficiently associated with the production and sale of the product under consideration. So, the "reasonableness" test in Article 2.2.1.1 does not allow an investigating authority to question the general "reasonableness" of the costs recorded, such as by comparing them to costs of producers in other countries or to an international reference price. It merely concerns the association of the recorded costs with the product under consideration as compared with other products of the exporter to which certain costs may also be associated.

6. Saudi Arabia is of the view that the text of Article 2.2.1.1, when read in its ordinary meaning and in the context of Articles 2.1 and 2.2 of the Anti-Dumping Agreement, confirms that an investigating authority is not allowed to adjust, let alone reject, the cost data of foreign producers and exporters merely because it considers those costs to be "artificially low" when compared to an international benchmark or otherwise "distorted". In *EC – Salmon (Norway),* the panel noted that "the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product".[3] Similarly, in *US – Softwood Lumber V*, the panel noted that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the market value of those [costs]," and that to accept the "argument that Article 2.2.1.1 requires an investigating authority to ensure that the [cost] reasonably reflects the market value 'would require us to read into the text words which are simply not there'".[4] This interpretation is also supported by the object and purpose of the Anti-Dumping Agreement which, among others, is to introduce disciplines on WTO Members when conducting anti-dumping investigations. It allows Members to protect their producers from material injury caused by the private pricing behaviour of foreign producers. 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. Other multilateral or unilateral instruments are available to address measures that are alleged to distort the market environment and trade.

7. In sum, the exporter or producer's recorded costs are to be used when constructing the normal value as long as the records are kept in accordance with the generally accepted accounting principles of the exporting country and as long as the records reflect costs that are reasonably associated with the production and sale of the product concerned. There is no legal basis in the Anti-Dumping Agreement that would allow an investigating authority to question the reasonableness of the level of the recorded costs or to examine these costs in the light of an international reference price.

B. An Investigating Authority Is Not Permitted To Construct Normal Value On The Basis Of A Cost That Is Not The Cost In The Country Of Origin

8. Article 2.2 of the Anti-Dumping Agreement imposes an obligation to calculate the normal value on the basis of the costs of production in the country of origin. Saudi Arabia considers that the text of this provision when read in its context is clear and does not allow the imposition of an artificial cost of production that reflects an international reference price. This provision reflects the country-specific nature of an anti-dumping investigation that is limited to examining whether the export price is lower than the normal value of the product concerned of the in the country of origin from the exporter under investigation. The immediate context of Article 2.2 of the Anti-Dumping Agreement confirms this reading that requires "normal value" to be constructed based on in-country data. First, Article 2.2.1.1 requires the use of the recorded costs of the foreign exporter for constructing normal value. Second, Article 2.2.2 concerning construction of administrative, selling and general costs and profits provides that such amounts shall be linked to the country of origin. Therefore, both elements of the constructed normal value need to be based on information from the country under investigation and cannot be established by way of reference to out-of-country benchmarks such as international reference prices. Given that the producer's cost of production will be the same whether it exports or sells domestically, the level of the costs compared to other markets is simply irrelevant for purposes of the price discrimination question in a dumping investigation.

[3] Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[4] Panel Report *US – Softwood Lumber V*, para. 7.321 and footnote 446.

9. Finally, the obligation to consider and accept cost data of exporting producers is also relevant for the comparison of the normal value and the export price under Article 2.4, which sets out the general obligation that any comparison has to be "fair" thus connoting "impartiality, even-handedness, or lack of bias".[5] Article 2.4 thus requires that "due allowances" shall be made "for differences which affect price comparability". This means that "allowances should not be made for differences that do not affect price comparability".[6] Accordingly, no adjustments should be made when there are no differences in terms of costs of production of the goods whether destined for domestic or export sale. In addition, allowances for factors affecting price comparability should reflect costs actually incurred by exporting producers. Adjustments that do not reflect actual costs but are rather imposed to adjust the actual costs in the light of some abstract and theoretical "normal cost" benchmark are not appropriate under Article 2.4 and would skew the comparison and violate the important obligation of making a "fair comparison".

10. In sum, the text of Article 2.2 of the Anti-Dumping Agreement, when read in its context and in the light of the object and purpose of the Anti-Dumping Agreement, is unequivocal and requires that the costs used for constructing normal value are those of the country of origin. An investigating authority is not to impose international reference prices of what they consider the costs ought to be in the country of origin and cannot "adjust" costs to reflect such an international reference price.

C. Export Duties Are Permitted Under GATT Article XI And Cannot Be Contravened By Anti-Dumping Measures

11. Saudi Arabia recalls that it is clear from the text of the WTO Agreements, Article XI:1 of the GATT 1994, and from the relevant WTO jurisprudence that Members are permitted to maintain export duties. In *China – Raw Materials,* there was consensus among the panel, the Appellate Body and the disputing parties that WTO Members have the right under the GATT 1994 to impose export duties.[7] In the past, proposals were made to ban or strictly discipline the use of export duties. However, these proposals did not receive the support of the Membership. In the context of accession negotiations, the question of limiting the use of export duties is also frequently raised, and sometimes clear commitments have been made. Absent such commitments, however, export duties remain a permitted policy instrument, just like import duties. Import tariffs, export taxes, and other tariff and non-tariff related regulatory measure together constitute the market environment in which the producer operates. In an anti-dumping investigation, they are to be taken as a given. There is no basis for effectively seeking to prevent Members from employing a WTO consistent instrument like export duties through the imposition of dumping duties. The only "adjustments" that can be made under Article 2.4 relate to the differences affecting price comparability. Export duties do not affect this comparison. The anti-dumping instrument shall not be used to prevent Governments from adopting WTO-consistent measures (such as export taxes) or to undo Members' comparative advantages, simply because it is more difficult or impossible to do so under other instruments like the Agreement on Subsidies and Countervailing Measures. The anti-dumping instrument permits Members to protect domestic industries from the injurious effects of discriminatory pricing practices of foreign exporters and not from differences in market environments.

D. The Requirement To Conduct An Objective Examination Based On Positive Evidence Of Injury And Causation

12. Saudi Arabia wishes to underline the importance of a proper injury analysis in preventing abuse of the anti-dumping instrument. If there is no positive evidence of material injury resulting from the dumped imports and if the authority has failed to separate and distinguish the injury caused by other factors so as to make sure that it did not attribute such injury to the dumped imports, there is no basis for the imposition of anti-dumping measures. The injury analysis in an anti-dumping investigation is not a "tick-the-box exercise" where the authorities merely look at the injury factors in Article 3 and make a simple non-attribution analysis. The investigating authorities must engage in a critical and searching analysis of the facts on the record and conduct an

[5]Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada),* para. 138 (quoting the relevant dictionary meaning of "fair" as "just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards", and "offering an equal chance of success". (*Shorter Oxford English Dictionary*, 5th Ed., W. R. Trumble and A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 915)).

[6] Appellate Body Report, *US – Zeroing (EC)*, para. 156.

[7] Appellate Body Reports, *China – Raw Materials,* para. 293.

unbiased and proper evaluation of the facts. It must make sure to address and analyze "all relevant economic factors" and to engage with interested parties on the other factors that are affecting the domestic industry at the same time. If the injury is caused by other factors, there is no basis for imposing anti-dumping duties. It would not be permitted by the text of the Agreement and it would not make sense to impose a trade restriction on foreign producers to address a problem not caused by these producers. Consumers would pay the price for an unlawful and ineffective measure. The causation analysis is thus a particularly important part of the investigating authority's injury determination.

III. CONCLUSION

13. First, Saudi Arabia considers that a cost determination has to be made on the basis of the producer's cost data as reflected in the records of the exporting producer, if such records are kept in accordance with generally accepted accounting principles in the exporting country and have not been demonstrated to be a manifestly inaccurate reflection of the costs borne by the producer in question with respect to the production and sale of the product under consideration. The proviso in Article 2.2.1.1 of the Anti-Dumping Agreement that recorded cost data "reasonably reflect costs" does not permit the rejection of the producer's recorded costs simply because the investigation authority considers those costs to be "artificially low". Second, Article 2.2 of the Anti-Dumping Agreement imposes a clear obligation to base the normal value on the costs in the country of origin rather than on an out-of-country benchmark such as an international reference price. This is in line with the country-specific and producer-specific nature of the anti-dumping investigation. Third, export duties are a legitimate policy instrument that is expressly permitted by Article XI:1 of the GATT 1994. This must be taken into consideration when examining the disciplines imposed on Members under the Anti-Dumping Agreement. Fourth, if there is no positive evidence of material injury resulting from the dumped imports and if the authority has failed to separate and distinguish the injury caused by other factors so as to make sure that it did not attribute such injury to the dumped imports, there is no basis for the imposition of anti-dumping measures.

ANNEX D-9

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF TURKEY

I. RECORDS KEPT BY PRODUCER/EXPORTERS UNDER ARTICLE 2.2.1.1 OF THE ADA

1. Article 2 is considered to be as one of the cornerstone articles of the ADA which sets comprehensive and detailed rules concerning the components of dumping and how the dumping margin should be calculated.

2. As dumping is determined through a fair comparison between the normal value and export price, the source and calculation methodology of these two sets of data is at the heart of an ADA-consistent determination of the dumping margin.

3. At this point, Article 2.2.1.1 of the ADA elevates itself to critical level which designates the source of the primary element of the normal value, namely the costs of production and sales of the product under consideration.

4. The Article reads as:

> 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. *(emphasis added)*

5. As discussed in the rulings of *EC – Salmon*[1] and *China – Broiler*[2], Article 2.2.1.1 necessitates that, for the purpose of establishing normal value, the investigating authority is normally obliged to use the records kept by the producer or exporter if these records are in accordance with the generally accepted accounting principles, and reasonably reflect the costs associated with the production and sale of the product under consideration (POC). Turkey understands that the drafters of the article presume that the records found in the books of the company should "normally" mirror costs associated with the production and sales of POC. The word "normally", in this context, indicates that the investigating authority has less room to maneuver if the conditions, indicated in the second half of the sentence, are met. The article displays a comprehensible mechanics and necessitates the investigating authority to provide reasoned and adequate explanation to deviate from the "rule" and opt into work with the "derogation"[3] if it decides to do so.

6. Confirmed by the latest rulings in the WTO case law, the investigating authority has the discretion not to take legal path stipulated in the first part of the sentence and use alternative sources if the records are either inconsistent with the generally accepted accounting principles (GAAP) of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration. As pointed out in the case law the conditions of GAAP-consistency and reasonableness do not overlap in every case and that GAAP-consistency *per se* does not necessarily lead to the conclusion that the records reasonably reflect costs of production and sales.[4] To our understanding even if the records of the producers or exporters are in line with the GAAP, the investigating authority may still examine whether the records of the exporter or producer reasonably reflect the costs associated with the production and sale POC.

7. The point to be clarified in Article 2.2.1.1 is the definition of the word "*reasonably*". The ordinary meaning of "*reasonably*" encompasses, *inter alia,* "*sufficiently*", "*legitimately*", "*justly*", "*suitably*" and "*fairly*".[5] In Turkey's view "*reasonableness*" is established if there is no implausible

[1] Panel Report *EC – Salmon*, para. 7.483.
[2] Panel Report *China – Broiler*, para. 7.164.
[3] Panel Report *China – Broiler*, paras. 7.161-164.
[4] Panel Report *China – Broiler*, para. 7.166.
[5] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 9 January 2015, <http://www.oed.com/view/Entry/159074>

discrepancy between records and costs associated with the production and sales of the POC and as long as these costs and records reflect sufficiently reliable price levels. Under this legal interpretation, Turkey underlines that every case involving the "*reasonableness*" test should be handled on its own merits through the assessment of the peculiarities of the exporting country's market.

8. In regard to the discussion concerning the contextual margin of the phrase "... [c]osts associated with the production and sale of product under consideration", Turkey would like to note that, Turkey does not share the approach that an expense can only be considered as a "cost", if this expense is incurred by the producer/exporter.[6] Depending on the cost recording methodology and characteristics of the production and sale of the POC, certain expenses may become subject to realization at the end of the financial year. For coherency in their records, companies often set benchmark figures reflecting actual realizations of last financial year. Any figure that is above or below of this benchmark is recorded accordingly. Turkey understands that, disregarding expenses that are not incurred may lead to an asymmetry in a comprehensive evaluation of the costs.

9. In connection with these discussions, Turkey would also like to briefly comment on the second sentence of Article 2.2.1.1. In Turkey's view, this provision does not necessarily compel the investigating authority to use cost allocation method of the producer/exporters. The sentence reads as:

> [A]uthorities 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 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. *(emphasis added)*

10. The word "*including*" indicates that the cost allocation methodology of producer or exporter is one of the available evidences that the investigating authority may resort. There is no indication that the investigating authority has to start its evaluation by considering the cost allocation system of producer or exporter. From a different point of view, the drafters of the article formulated a step by step approach stipulating that the cost allocation methods of producer or exporter can be used if such allocations have been historically utilized by the producer or exporter particularly concerning amortization, depreciation, capital expenditures and development costs. Therefore, the rule does not require the investigating authority to use the cost allocation methodology of the producer or exporter unless the mentioned conditions are met.

[6] Argentina's first written submission, para. 102.

ANNEX D-10

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF THE UNITED STATES

I. ARGENTINA'S CLAIMS REGARDING THE INTERPRETATION OF ARTICLE 2 OF THE AD AGREEMENT

A. "As Such" Inconsistency Requires Examination of Whether the Measure Necessarily Requires WTO-Inconsistent Action or Precludes WTO-Consistent Action

1. The United States agrees that a complainant may allege that another Member's legislation or regulation is inconsistent with a covered agreement "as such" or "independently from the application of that legislation in specific instances". To prove an "as such" claim, the complainant must demonstrate that the identified measure requires the responding party to act in a WTO-inconsistent manner or precludes that party from acting in a WTO consistent manner. In this context, the EU emphasizes the express *discretion* of the investigating authorities under Article 2(5) of the Basic Regulation to adjust costs. In particular, the European Union observes that: (i) text of paragraph one of Article 2(5) *does not require* that investigating authorities depart from exporter or producer cost data, and (ii) the "rest of the evidence" (*e.g.*, judgments of the General Court of the European Union and determinations in other investigations) does not demonstrate that the investigating authorities are *mandated* to act in a particular manner.

2. The United States considers the Appellate Body's recent analysis in *US – Carbon Steel (India)* informative. The Appellate Body report in *US – Carbon Steel (India)* reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements requiring an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement. The Appellate Body ultimately concluded that these materials did not "establish conclusively that the measure requires an investigating authority to consistently" act contrary to the relevant WTO obligation.

B. The Panel's Analysis of Article 2.2.1.1 of the AD Agreement Should Be Informed by the Text and Context of the AD Agreement

3. Both Argentina's "as such" and "as applied" claims are dependent on the interpretation and meaning of Article 2.2.1.1 of the AD Agreement. As explained below, the United States considers that Article 2.2.1.1 requires an investigating authority to "normally" rely on producers' or exporters' books and records, but, as permitted by the text of the provision, the authority may look beyond these records in limited circumstances.

1. Investigating Authorities Shall Normally Calculate Costs on the Basis of Records Kept by Producers or Exporters

4. As a preliminary matter, the United States considers that Article 2.2.1.1 requires an investigating authority to normally calculate costs on the basis of records kept by an exporter's or producer's books, provided that (i) the books and records are in accordance with the GAAP of the exporting country, and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. This view was adopted by panel in *China – Broiler Products*. Thus, in situations where books and records are kept in accordance with GAAP 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 pursuant to Article 2.2.1.1.

5. The qualification to the obligation in Article 2.2.1.1 is reinforced by the use of the term "normally," which is defined as "in the usual way" or "as a rule". Thus, the term "normally" in conjunction with the two conditions ("provided that") in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances. To that end, as the *China – Broiler Products* panel report noted, if the investigating authority finds that the books and records do not meet the stated conditions, the authority is "bound to explain why it departed from the norm and declined to use a respondent's books and records".

2. Article 2.2.1.1: "Costs"

6. With respect to the interpretation of the second condition, "reasonably reflect the costs associated with the production and sale of the product under consideration," the parties attribute a number of differing meanings to these terms. Argentina fails to explain how the use of "costs" over an analogous term, like "prices," implies that "costs" must then refer exclusively to the "charges or expenses that have been actually incurred by producer". Moreover, the panel in *EC – Salmon (Norway)* did not find any meaningful distinction between "costs" and "prices" when it defined "cost of production" as the "price to be paid for the act of producing". In the context of Article 2, the United States considers the difference between "cost" and "price" to be a matter of perspective, and not one of substance.

7. Argentina's argument that "costs" relates only to expenses "actually" incurred by producers is undermined by adjacent text in Article 2. The drafters of the AD Agreement chose to utilize an express limitation – to amounts actually incurred by the producer – elsewhere in Article 2. For instance, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Further, Articles 2.2.2(i) and 2.2.2(ii) both pertain to the determination of "general costs". According to Argentina, the term "costs" is inherently specific to expenses "actually incurred by the producer". Argentina's interpretation would therefore render superfluous the "actually incurred and realized" by the "exporter or producer" language utilized in Articles 2.2.2(i) and 2.2.2(ii).

8. For these reasons, the United States does not consider the use of the term "costs" in the context of Article 2.2.1.1 to be indicative of a limitation with respect to the "actual amount incurred" as reflected by the producer's own books and records.

3. Article 2.2.1.1: "Reasonably" in Relation to "Costs"

9. In Argentina's view, Article 2.2.1.1 requires the use of an exporter's or producer's records whenever that exporter or producer transposes, within reason, its actual expenses to its records. Argentina's argument is contrary to the ordinary meaning of Article 2.2.1.1. The plain language provides that the "costs" used for the calculating normal value shall "normally" be based on the exporter's or producer's records, but that the costs need not be used if they do not reasonably reflect the costs associated with the production and sale of the product under consideration. The panel report in *Egypt – Rebar* supports this interpretation.

10. Argentina's argument also would seem to render redundant the first and second conditions in Article 2.2.1.1. Specifically, the first condition of Article 2.2.1.1 permits costs to be rejected based on books and records not in accordance with GAAP. However, under Argentina's interpretation, the second condition would establish yet another requirement that producer records faithfully reflect the costs incurred by producers. Although GAAP may serve as an indicia that costs are reasonable, because accounting principles typically ensure costs are properly sourced and recorded, this may not in all instances be sufficient. Further, the United States does not understand Article 2.2.1.1 to solely refer to "cost allocation" issues. The first sentence of Article 2.2.1.1 refers to costs "calculated", rather than "allocated". That "allocated" is explicitly mentioned elsewhere in the text, but not in the first sentence of 2.2.1.1, contradicts Argentina's argument.

11. When read together with other terms in Article 2.2.1.1 – and in particular "reflect the costs associated with" – the term "reasonably" can be understood to establish a substantive reasonableness standard for the costs reflected in the producer's or exporter's records. The United States notes that the language of Article 2.2.1.1 leaves open what costs may be "unreasonable" such that the records do not reasonably reflect the costs associated with the production and sale of the product. The panel reports in *China – Broiler Products* and *US – Softwood Lumber V* do not provide further guidance on this issue. Further, in *US – Softwood Lumber V* the panel found that Article 2.2.1.1 did not *obligate* the investigating authority to reject unreasonable costs, or to use producer cost data, as reflected in their books and records, if demonstrated to be unreasonable. In fact, the panel noted that "Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records 'reasonably reflect the costs associated with the production and sale of the product under consideration'".

12. As demonstrated by *US - Softwood Lumber V*, it is clear that, on an individual-respondent basis, adjustments are permitted to account for "unreasonable" costs, the recordation of which nonetheless complies with GAAP. For instance, inputs purchased from a related or affiliated supplier that do not reasonably reflect a respondent's costs may require an adjustment to the cost as recorded in the exporter or producer's books and records. This adjustment – to ensure that the data reasonably reflect the costs associated with production or sale of the product – is typically based on record evidence including sales to the first non-affiliated party, costs incurred by other exporters or producers, or other evidence of the appropriate costs.

13. The United States further notes that the context provided by the language of Article 2.2 supports the understanding that market conditions may lead to records reflecting "unreasonable" costs. Article 2.2 provides that where there exists a "low volume of the sales in the domestic market of the exporting country" or a "particular market situation," sales in the domestic market do not permit a proper comparison. The text of Article 2.2 therefore contemplates circumstances where some peculiarity, structure, distortion, or other occurrence of the domestic market makes a direct comparison to home market prices impossible.

14. The United States understands Article 2.2.1.1 to permit investigating authorities to consider whether a particular cost is unreasonable, and whether it may be adjusted, so long as the investigating authority sufficiently explains its determination.

4. Article 2.2.1.1: "Associated with the Production and Sale of the Product Under Consideration"

15. Finally, it is revealing that, rather than modify "reasonably reflects costs" with the phrases "actually incurred" or "by the exporter or producer in question," Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration". The term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product. Further, the use of the term "associated with" conveys a conception of costs more general than just those borne by the specific respondent.

16. Prior panel reports support this view. For instance in *Egypt – Rebar*, the panel described the analysis of "costs associated with the production and sale of the product under consideration" as "hing[ing] on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question *in that case*". The second condition of the first sentence of Article 2.2.1.1 is not simply a reformulation of the requirement that records be GAAP compliant. Specifically, the United States understands that Article 2.2.1.1 does not require the use of a particular respondent's records where the costs documented in those records are determined to be "unreasonable" or otherwise unrelated to the production of the product under review. While the United States takes no position on the facts underlying this dispute, it does consider there to be a range of reasons related to individual respondents, as well as larger market conditions, which may render particular costs to be unreasonable. Pursuant to Article 2 of the AD Agreement, with adequate supporting record evidence and explanation regarding its departure from the exporter or producer's records, an investigating authority may address that cost when determining a reasonable normal value.

C. Article 2.4 of the AD Agreement Addresses Issues of Price Comparability and Not the Proper Determination of Normal Value

17. Argentina argues that the EU did not establish the existence of a margin of dumping for the respondents on the basis of a fair comparison between the export price and the normal value. Argentina's claim under Article 2.4 is intended to address the "clear difference between normal value and export price". The United States considers the issue of the calculation of a proper normal value a matter for claims under Article 2.2.1.1, while issues related to the comparison between normal value and export prices should be considered under Article 2.4.

18. It is clear that Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. However, the text of Article 2.4 presupposes that the appropriate normal value has been identified. The United States in this context agrees in principle with both complainant and respondent, that the use of constructed normal value does not preclude the need for due allowances or adjustments where necessary. However, the United States submits that the

Panel should consider: first, whether there is a relevant difference between the constructed value and the export value, and second, whether such a difference has an effect on "price comparability".

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. DISCUSSION OF EXAMINATION OF ARTICLE 2.2.1.1 OF THE AD AGREEMENT

A. Interpretive Approach to the "Reasonably Reflects the Costs" Analysis

19. The United States would like to highlight its concerns with the interpretive approach to Article 2.2.1.1's "reasonably reflect" clause suggested by Argentina and some of the third parties. Nothing in the text of Article 2.2.1.1 limits the various possible rationales or reasons why, in exceptional circumstances and when warranted by record evidence, an investigating authority may find that the costs set out in a producer's or exporter's records do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the United States understands that the proper way to apply the "reasonably reflect" clause – and indeed the only way consistent with the text of the provision – is to examine, on a case-by-case basis, the rationale provided by an administering authority when it makes a determination that the costs set out in the records of the producer or exporter do not reasonably reflect the costs associated with production and sale.

20. In contrast, Argentina and some of the third parties to this dispute are advocating the position that Article 2.2.1.1 must be interpreted to include various proposed *a priori* limitations. That is, regardless of any record evidence that may demonstrate that a producer's records do not reflect costs associated with production and sale, and prior to any finding by an investigating authority, Argentina suggests Article 2.2.1.1 imposes certain limitations on the investigating authority's analysis. In the following paragraphs, the United States will examine some of these proposed *a priori* limitations, and explain how they cannot be supported under the rules of interpretation applicable to the WTO Agreement.

21. First, Argentina argues that the text of Article 2.2.1.1 restricts the investigating authority's "reasonably reflect" analysis to the books of the exporter or producer directly involved in the anti-dumping investigation. That is, the analysis is limited to expenses that have been "actually incurred by the producer". This argument, however, has no basis in the text of Article 2.2.1.1. The language "associated with" in the "reasonably reflects" clause similarly implies a less rigid connection between the relevant costs and the parties to the investigation than suggested by Argentina and several third parties.

22. Further, the AD Agreement also refutes the proposed interpretation that a "reasonably reflect" determination must be based only on information related to the specific producer or exporter responding to the anti-dumping investigation. For instance, the GAAP of each WTO Member is a factual matter, to be determined based on information that is necessarily exogenous to a producer's or exporter's records.

23. In addition to the context provided by Article 2.2.1.1, other text in Article 2 is contrary to Argentina's proposed interpretation. Given the express directions as to "actual data" in Article 2.2.2 and its proximity to Article 2.2.1.1, it is difficult to conclude that the drafters intended to include the *a priori* limitation in Article 2.2.1.1 that Argentina suggests. The United States also notes that although, in this particular dispute, the exporting Member is arguing against the use of the "reasonably reflect" clause, this may not be the case in every dispute. As was the case in *US – Softwood Lumber V*, there may well be circumstances in which an exporter or producer would argue against the use of its own books and records and in favour of an alternative source of cost information.

24. For all these reasons, a proposal to limit the information examined in a "reasonably reflect" determination cannot be supported. Neither the text of Article 2.2.1.1, nor context provided by other provisions of the AD Agreement, require an investigating authority to ignore any type of potentially relevant evidence.

25. Second and more broadly, it has been suggested that "dumping" relates exclusively to the behaviour of the exporter or producer, and it is *a priori* inappropriate to consider information not

directly related to the exporter's or producer's conduct. However, Article 2.2 of the AD Agreement refers to the existence of a "particular market situation" where sales in the domestic market do not permit a proper comparison. That a factor external to a specific exporter or producer – the particular market situation – governs normal value directly refutes the proposition that, as a number of third parties contends, dumping relates exclusively to the behaviour of the exporter or producer. Additionally, recorded costs related to inputs purchased from related corporate enterprises are regularly viewed as potentially unreasonable.

B. Relation to other WTO Agreements

26. It has been suggested in this dispute that because the issue of recorded costs that do not "reasonably reflect" the cost of producing the product under investigation might also be addressable under other covered agreements (such as the Agreement on Subsidies and Countervailing Measures), the AD Agreement therefore does not permit departure from such recorded costs when calculating normal value. However, the fact that one covered agreement could, in theory, address a given practice does not mean that the other covered agreements cannot do so as well. Indeed, the WTO Agreement contains many instances of overlapping obligations. To the extent this argument is intended as a reference to the "double-counting" issue addressed in *US – Anti-Dumping and Countervailing Duties (China)*, the reference in fact undercuts the argument for an *a priori* limitation with respect to finding recorded costs to be unreasonable.

C. Relevance of "Input Dumping" Discussions

27. Finally, the United States does not agree that certain pre-Uruguay Round discussions of "input dumping" – a term never used in the AD Agreement – is in any way relevant to the factors that may be examined in making a "reasonably reflect" determination under Article 2.2.1.1. "Input dumping" pertains to the narrow issue of whether materials or components used in manufacturing an exported product are purchased at dumped or below cost prices. Conversely, this dispute centers on the broader issue of whether investigating authorities must *a priori* limit the factors examined in deciding whether recorded costs reasonably reflect the associated cost of production and sale of the product.

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