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In the World Trade Organization

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

(DS473)

**Opening Statement
of the European Union
in the Second Hearing**

Geneva, 9 June 2015

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Short Title	Full Case Title and Citation
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC- Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>Egypt- Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>US- Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted on 19 December 2014
<i>US- Corrosion Resistant Steel</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Hot Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697

LIST OF EXHIBITS

EU-17	Announcements of the European Court of Justice on an Appeal brought on 23 April 2013 against the judgment of the General Court in Case T-235/08 and on an Appeal brought on 23 April 2013 against the judgment of the General Court in Case T-118/10; OJ [2013] C 171/23 and C 171/24.
EU-18	Council Regulation 1251/2009 of December 18, 2009, OJ [2009] L 338/5.
EU-19	Council Regulation 1995/2000 of 18 September 2000 on solutions of urea and ammonium nitrate originating in Algeria, Belarus, Lithuania, Russia and Ukraine, OJ [2000] L 238/15.
EU-20	Commission Regulation 617/2000 of 16 March 2000 on solutions of urea and ammonium nitrate originating in Algeria, Belarus, Lithuania, Russia and Ukraine, OJ [2000] L 75/3.
EU-21	Commission Regulation 449/2000 of 28 February 2000 on malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand, OJ [2000] L55/3.
EU-22	Council Regulation 2160/96 of 11 November 1996 on polyester textured filament yarn originating in Indonesia and Thailand, OJ [1996] L 289/14.
EU-23	Council Regulation 1522/2000 of 10 July 2000 on synthetic staple fibres of polyester originating in Australia, Indonesia and Thailand, OJ [2000] L175/10.
EU-24	Commission Regulation 1235/2003 of 10 July 2003 on silicon originating in Russia, OJ [2003] L 173/14.
EU-25	Commission Regulation 230/2001 of 2 February 2001 on certain iron or steel ropes and cables originating in the Czech Republic, Russia, Thailand and Turkey, OJ [2001] L 34/4.

1. INTRODUCTION

1. Mr. Chairman, honourable members of the Panel, ladies and gentlemen,
2. The European Union would like to thank you for your work in these dispute settlement proceedings. We would also like to thank the members of the Secretariat for supporting you, as well as the interpreters for their assistance during the present meeting.
3. The European Union's Opening Statement will address the points raised by Argentina in its Second Written Submission. Given that Argentina's Second Written Submission was quite comprehensive, our opening statement is a little longer than usual. We are grateful for your patience.

2. TERMS OF REFERENCES / PANEL'S FINDINGS

4. We will start with a few remarks on the identity of the claims that are before the Panel and on which the Panel can make findings.
5. In paragraph 12 of its First Written Submission, the European Union had listed a number of claims that Argentina had abandoned or did not pursue in the present dispute settlement proceedings. As mentioned in paragraph 6 of the European Union's Second Written Submission, Argentina has confirmed that it does not pursue any of these claims.
6. In paragraphs 17 to 21 of its First Written Submission and in paragraph 7 of its Second Written Submission, the European Union noted that Argentina had also abandoned its claims against "implementing measures and related instruments " to Article 2(5) of the Basic Regulation and "related measures and implementing measures" to the Provisional and Definitive Regulations. Argentina confirmed again that it does not pursue these claims. In paragraph 7 of its Second Written Submission, Argentina states that any discussion of these claims has an "absence of any practical implications for the dispute at issue".
7. Moreover, in its Reply to Panel's Question 23, Argentina has again confirmed that the only "measure" that it is challenging "as such" is the "second subparagraph of Article 2(5) of the Basic Regulation" and that it does not challenge any "practice"

- of the European Union. Argentina also does not challenge the first subparagraph of Article 2(5) of the Basic Regulation.
8. The combined reading of Argentina's Panel Request with Argentina's submissions and statements in the course of the proceedings leads to the conclusion that the Panel can make findings only in relation to the following measures.
 9. First, 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.
 10. Second, 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**
11. Argentina continues to confuse the scope of the second subparagraph of Article 2(5) of the Basic Regulation with the scope of the first subparagraph of Article 2(5).
 - 3.1.1.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation
 12. The texts of these two provisions are clear. The first subparagraph reflects the text of Article 2.2.1.1 of the Anti-Dumping Agreement and authorises the investigating authorities to determine whether the company records are in accordance with the GAAP and whether they reasonably reflect the costs associated with the production and sale of the relevant goods.
 13. The second subparagraph has nothing to do with this determination. It comes into play after this determination has been made. It authorises the investigating authorities to use various alternative sources in order to identify the information

- that would allow them to calculate the costs, where the company records cannot be used.
14. Paradoxically, in paragraph 26 of its Second Written Submission, Argentina acknowledges that the first subparagraph of Article 2(5) of the Basic Regulation "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".¹ Therefore, it is very strange that Argentina continues to insist that it is allegedly 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.² Argentina's assertion implies that, between 1995 and 2002, the European Union's investigating authorities did *not* have the legal authority to disregard company records, in application of the conditions of Article 2.2.1.1 of the Anti-Dumping Agreement, despite the fact that the first subparagraph of Article 2(5) existed and "closely mirrored" the text of Article 2.2.1.1 throughout that period. It is clear that Argentina's assertion is wrong.
15. 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".³ 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".⁴
16. 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. Quite to the contrary, the text of the second subparagraph provides for exactly the opposite of what Argentina asserts. In particular, it provides that, if one of the conditions of the first subparagraph is not met, then the investigating authorities can exercise one of the listed options. It does not provide for the inverse, i.e., that if one of these situations exists, then the conditions of the first subparagraph are not met.

¹ See also Argentina's Second Written Submission, para. 16.

² Argentina's Second Written Submission, paras. 23 and 28.

³ See also Argentina's Second Written Submission, para. 49.

⁴ Argentina's Second Written Submission, paras. 19 and 63.

- Argentina's assertion inverses the order of the words in the second subparagraph of Article 2(5) and distorts the text's meaning.
17. Moreover, the second subparagraph of Article 2(5) does not provide any "reasons why information of the domestic market cannot be used".⁵ It provides that, where one of the conditions of the first subparagraph is not met, then the costs shall be adjusted or established on the basis of "the costs of other producers or exporters in the same country". Does this constitute a "reason why information of the domestic market cannot be used"? Evidently not. Quite to the contrary, the text clearly refers to information from the "same country".
 18. Likewise, the second subparagraph of Article 2(5) provides that the investigating authorities may, ultimately, use "any other reasonable basis". The reference to "any other *reasonable* basis" again does not constitute any "reason why information of the domestic market cannot be used". Consequently, Argentina's assertion has no basis in the text of the second subparagraph of Article 2(5).
 19. Another textual element that shows that the first subparagraph of Article 2(5) is the legal basis for the determination of whether the information in the company records can be used is that it reflects both "conditions" or "requirements" found in Article 2.2.1.1 of the Anti-Dumping Agreement, namely (a) that company records are in accordance with the GAAP; and (b) that they reasonably reflect the costs associated with the production and sale of the relevant goods. In contrast, the second subparagraph of Article 2(5) refers only to the second of these situations. This textual difference conclusively establishes that the determination of whether the company records can be used is based on the first subparagraph of Article 2(5). The second subparagraph of Article 2(5) only provides the alternative sources of information that the investigating authorities may use, if it has already been determined pursuant to the first subparagraph that one of the conditions mentioned in the first subparagraph has not been met.
 20. Argentina actually acknowledges that its interpretation finds no support in the text of Article 2(5) of the Basic Regulation. In paragraph 46 of its Second Written Submission it states that the European Union's interpretation is "based on a

⁵ Argentina's Second Written Submission, paras. 19 and 63.

- simplistic reading of Article 2(5), first and second subparagraphs, taken in isolation". It is actually the clear meaning of the plain text of these provisions.
21. Likewise, in paragraph 50 of its Second Written Submission, Argentina takes note of the European Union's argument that the "text of the second subparagraph of Article 2(5) is simple and clear". In response to that argument, Argentina asserts that the European Union focuses "exclusively on the terms of Article 2(5), second subparagraph and fails to take into account the various elements submitted by Argentina". Through this statement, Argentina in essence acknowledges that the text of the second subparagraph of Article 2(5), on its face, does not support Argentina's assertions. Indeed, if one "focuses exclusively" on the "terms of Article 2(5)", then Argentina's "as such" challenge fails.
22. The conclusion is that the text of the two subparagraphs of Article 2(5) of the Basic Regulation clearly establishes that the measure challenged by Argentina "as such" does not have the meaning and content asserted by Argentina. The consequence is that Argentina's "as such" claim against the second subparagraph of Article 2(5) of the Basic Regulation under Article 2.2.1.1 of the Anti-Dumping Agreement cannot succeed.

3.1.1.2 The lack of similarity with the *EC-Fasteners* case

23. In paragraph 15 of its Second Written Submission, Argentina compares the present dispute with the situation faced by the Panel in *EC-Fasteners*. However, the two situations are completely different and cannot be compared.
24. As Argentina itself acknowledges, in *EC-Fasteners*, the Appellate Body found that none of the other provisions of the Basic Regulation addressed the question of whether individual or country-wide dumping margins should be calculated.⁶ In the absence of a specific provision regulating this issue, the Appellate Body concluded that Article 9(5) of the Basic Regulation also concerned the calculation of dumping margins.⁷ This is completely different from the situation in the present dispute.

⁶ Argentina's Second Written Submission, para. 15, footnote 18.

⁷ Argentina's Second Written Submission, para. 15, footnote 19.

25. In the present case, the first subparagraph of Article 2(5) of the Basic Regulation addresses precisely the question of the conditions that must be met in order to base the cost calculation on the company records. Therefore, there is no need to look for another provision in the Basic Regulation that might have a "close and necessary link" with that issue.⁸ The first subparagraph of Article 2(5) is the legal basis for that determination. Consequently, the arguments that Argentina seeks to base on *EC-Fasteners* fail.

3.1.1.3 Recital 4 of Regulation 1972/2002

26. Given that the text of the second subparagraph of Article 2(5) does not support Argentina's "as such" claims, Argentina has tried to seek support for its assertions elsewhere. Argentina has repeatedly referred to Recital 4 of Regulation 1972/2002, with which the second subparagraph was added to Article 2(5) of the Basic Regulation. However, the text of that Recital does not support Argentina's arguments. Quite to the contrary, it actually confirms the European Union's interpretation of the second subparagraph of Article 2(5).

27. First, Recital 4 states that the reason for the addition of the second subparagraph to Article 2(5) was to "give some guidance as to what has to be done, if pursuant to Article 2(5) [of the Basic Regulation], the records do not reasonably reflect the costs associated with the production and sale" of the relevant goods. Recital 4 goes on to list various "sources" from which the "relevant data should be obtained" in order to calculate the costs in "these circumstances".

28. 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 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

⁸ Argentina's Second Written Submission, para. 15, footnote 17.

- 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.
29. It is also important to note that Recital 4 expressly states that the second subparagraph of Article 2(5) gives some guidance on what has to be done if the records do not reasonably reflect the costs. In contrast, Recital 4 does not state that the second subparagraph of Article 2(5) gives any guidance on the conditions that must be met in order to determine *whether* the records reasonably reflect the costs or not.
30. Consequently, the text of Recital 4 actually confirms that the legal basis for the determination of whether the records "reasonably reflect costs" is the first subparagraph of Article 2(5) and not the second subparagraph of Article 2(5) of the Basic Regulation.
31. Second, in paragraph 69 of its Second Written Submission, Argentina refers to the notion of a "particular market situation" and asserts that "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 relevant goods. We disagree with Argentina's statement.
32. Argentina confuses, on the one hand, the *sales* of the like product with, on the other hand, the "records that do not reasonably reflect the costs" associated with the production and sale of the relevant product. The first issue relates to the question of whether the normal value should be based on the domestic sales of the like product. This issue is governed by Article 2(3) of the Basic Regulation, which Argentina has not challenged and which is outside the Panel's terms of reference.
33. The second issue relates to the very different question of what sources can be used in order to construct the normal value, if it has already been determined, pursuant to the first subparagraph of Article 2(5), that the company records cannot be used. The "domestic sales of the like product" do not have any relevance at this stage of the analysis: the investigating authorities are not looking at the *sales* of the

- relevant goods any more. The second subparagraph of Article 2(5) comes into play after it has been already determined that the company records cannot be used and, in the words of Recital 4, provides the investigating authorities with "some guidance as to what has to be done" in order to identify other appropriate sources for the relevant information. This "guidance" does not have any relevance for the determination of whether the records reasonably reflect costs pursuant to the first subparagraph of Article 2(5).
34. 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, there is nothing in the text of Recital 4 which could support Argentina's assertion. Quite to the contrary, Recital 4 expressly refers to guidance to be given as to what has to be done after it has already been determined that the records do not reasonably reflect the costs. Recital 4 has no relation to the determination of whether the records "reasonably reflect costs".
35. Fourth, in footnote 58 of its Second Written Submission, Argentina refers to paragraph 93 of the European Union's First Written Submission. That paragraph states that Recital 4 is not relevant for the interpretation of the terms "reasonably reflect costs". The European Union's statement is true. The addition of the second subparagraph to Article 2(5) of the Basic Regulation in 2002 did not have any impact on the interpretation of the terms "reasonably reflect costs", because these terms were already governed by the pre-existing first subparagraph of Article 2(5), which was not amended. Consequently, Recital 4, which explains the reasons for the introduction of the second subparagraph, also does not have any impact on the interpretation of the terms "reasonably reflect costs", which are governed by the first subparagraph of Article 2(5) of the Basic Regulation.
36. We note that, in paragraphs 71 to 73 of its Second Written Submission, Argentina develops various arguments in relation to a statement purportedly found in paragraph 93 of the European Union's First Written Submission.⁹ Argentina probably refers to a typographic mistake in paragraph 94 of the European Union's First Written Submission, which reads "...irrelevant for the interpretation of the

⁹ Argentina's Second Written Submission, footnote 58.

second subparagraph...", instead of the correct "...irrelevant for the interpretation of the *first* subparagraph...". We mention this point for reasons of clarity.

3.1.1.4 The alleged "background" of the second subparagraph of Article 2(5) of the Basic Regulation

37. Argentina continues to insist that the "purpose" of the introduction of the second subparagraph of Article 2(5) of the Basic Regulation "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
38. Argentina's assertions are wrong. The purpose of the introduction of the second subparagraph of Article 2(5) is clear from the text of the provision, as well as from Recital 4. Its purpose was to provide guidance on the sources that could be used in order to identify the costs associated with the production and sale of the relevant goods, where the company records could not be used.
39. In support of its assertions, Argentina refers to "several comments of scholars underlying this important point".¹¹ Argentina has listed the sources of these comments in paragraph 43 of its First Written Submission.
40. The first source is a publication by Mr. Boronikov and Mr. Evtimov.¹² It is public knowledge that Mr. Boronikov and Mr. Evtimov are attorneys representing Russian companies in anti-dumping investigations involving the application of Article 2(5) of the Basic Regulation. For example, Mr. Boronikov and Mr. Evtimov are the attorneys representing the Russian companies in the *Acron* cases before the courts of the European Union.¹³ The Exhibits produced by Argentina confirm this point and expressly state that "Mr. Boronikov [is an] attorney in Brussels in charge of different Russian anti-dumping cases for many years".¹⁴

¹⁰ Argentina's Second Written Submission, para. 31.

¹¹ Argentina's Second Written Submission, paras. 29 and 66.

¹² Argentina's First Written Submission, footnote 15.

¹³ Appeal brought on 23 April 2013 in case T-235/08 and in case T-118/10 against the judgments of the General Court, OJ [2013] C 171/23 and 24, **Exhibit EU-17**.

¹⁴ **Exhibit ARG-7**, footnote 402.

41. The second source is a publication by Mrs. Englebutzeder.¹⁵ The specific excerpt reproduced by Argentina in paragraph 43 of its First Written Submission appears to be based on statements made by Mr. Luff to the Moscow Times.¹⁶ Argentina's Exhibit confirms that, just like Mr. Boronikov and Mr. Evtimov, Mr. Luff was also an "attorney in Brussels in charge of different Russian anti-dumping cases for many years".¹⁷
42. The European Union does not doubt that these are distinguished scholars. However, at the time of the publications, all of them 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). The fact that they were defending Russian companies at the time of the publications does not mean that the second subparagraph of Article 2(5) was indeed aimed at addressing particularly Russia.
43. In any event, Argentina itself has insisted that Article 2(5) has been applied to companies from many different countries and not just from Russia.¹⁸ This provides additional support to the conclusion that Argentina's assertions relating to the purported "background" of the second subparagraph of Article 2(5) are flawed.

3.1.1.5 The judgments of the General Court

44. Argentina has submitted as Exhibits certain judgments of the General Court which actually contradict Argentina's description of the scope of the second subparagraph of Article 2(5).
45. For example, the General Court's judgment in Case T-235/08 expressly states that the "first sentence of the first subparagraph of Article 2(5) of the Basic Regulation" contains two "requirements" and that it is the "second requirement" of that "first sentence", which "entitles" the investigating authorities to ascertain

¹⁵ Argentina's First Written Submission, footnote 16.

¹⁶ **Exhibit ARG-7**, footnotes 399, 402 and 403.

¹⁷ **Exhibit ARG-7**, footnote 402.

¹⁸ Argentina's Second Written Submission, para. 82, referring to Argentina's Reply to Question 35(b).

- whether the records reasonably reflect the costs.¹⁹ This confirms that the first subparagraph of Article 2(5) is the legal basis for the determination of whether the records reasonably reflect the costs.
46. Moreover, the judgment states that the investigating authorities may make adjustments "on the basis of sources of information other than the records, in accordance with the second sentence of the first subparagraph of Article 2(5)".²⁰ This confirms that the second subparagraph of Article 2(5) only deals with the "sources of information" that may be used where the company records cannot be used.
47. The judgment also states that "it must be examined whether the Council was entitled to disregard the cost of gas actually borne by the applicants" and "whether the Council was entitled to adjust that cost upwards".²¹ The General Court concludes that the authorities were "entitled" to "make adjustments on the basis of sources of information other than the records, in accordance with the second sentence of the first subparagraph".²² It is noted that the General Court uses the term "*entitled*", and not the word "*obliged*". This confirms that both the first and the second subparagraphs of Article 2(5) simply authorise and do *not* mandate the investigating authorities to take the relevant actions.
48. Importantly, the General Court also found that "the wording of Article 2.2.1.1 of the Anti-Dumping Agreement does not differ significantly from the text of the first sentence of the first subparagraph of Article 2(5)",²³ while "the provisions mentioned in the second sentence of the first subparagraph of Article 2(5) are not mentioned in the Anti-Dumping Agreement".²⁴ It is not disputed that it is Article 2.2.1.1 of the Anti-Dumping Agreement that deals with the question of whether the records reasonably reflect costs. Therefore, by finding that the equivalent of

¹⁹ **Exhibit ARG-23**, para. 34. As already explained in the European Union's written submissions, the General Court refers to the first subparagraph of Article 2(5) as the "first sentence of the first subparagraph" and to the second subparagraph of Article 2(5) as the "second sentence of the first subparagraph".

²⁰ **Exhibit ARG-23**, para. 34.

²¹ **Exhibit ARG-23**, para. 36.

²² **Exhibit ARG-23**, paras. 34 and 46.

²³ **Exhibit ARG-23**, para. 67.

²⁴ **Exhibit ARG-23**, para. 68.

- Article 2.2.1.1 of the Anti-Dumping Agreement in the European Union's domestic legal order is the first subparagraph of Article 2(5) of the Basic Regulation and not the second subparagraph, the General Court confirms that the first subparagraph of Article 2(5) is the legal basis for the determination of whether the records reasonably reflect costs.
49. The text of the General Court's judgment in Case T-118/10 is quite similar to that of Case T-235/08. For example, that judgment states that the "first sentence of the first subparagraph of Article 2(5)" contains two requirements and that the "second requirement" of that "first sentence" is the one that "entitles the institutions to ascertain whether the records reasonably reflect the costs".²⁵ It also states that the investigating authorities may make "adjustments on the basis of sources of information other than the records, in accordance with the second sentence of the first subparagraph of Article 2(5)".²⁶ Furthermore, it states that "it must be examined whether the Council was entitled to disregard the cost of gas actually borne by the applicant" and concludes that the investigating authorities were indeed "fully entitled" to do so and to make adjustments "by having recourse to other sources".²⁷
50. Therefore, these General Court judgments confirm three points. First, they confirm that it is the first subparagraph of Article 2(5) that authorises the investigating authorities to determine whether the records "reasonably reflect costs". Second, they confirm 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, they confirm 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.
51. Despite the fact that these General Court judgments clearly establish that the first subparagraph of Article 2(5) is the legal basis for the determination of whether

²⁵ Exhibit ARG-52, paras 34 and 35.

²⁶ Exhibit ARG-52, para 35.

²⁷ Exhibit ARG-52, paras. 37 and 53.

- company records "reasonably reflect costs", Argentina seeks to draw the opposite conclusion. Argentina develops two main arguments.
52. First, in paragraphs 37 and 38 of its Second Written Submission, Argentina states that the General Court examined the second subparagraph of Article 2(5), in order to conclude that the records did not reasonably reflect the costs and that the General Court considered Recital 4 "to be central in its examination" of whether the records reasonably reflected the costs. We do not agree with Argentina's statements.
53. First, the General Court's confirmation that the first subparagraph of Article 2(5) is the legal basis for the determination of whether the records reasonably reflect costs is found in paragraph 45 of its judgment, where the General Court expressly refers to the "first sentence of Article 2(5)". That paragraph also shows that even the applicants in that case perceived the "first sentence of Article 2(5)" as the legal basis for the investigating authorities' determination of whether the records reasonably reflected the costs.
54. Second, we note that in paragraph 36 of its judgment, the General Court announced that it will examine two issues: (a) whether the Council was entitled to disregard the company records, because they did not reasonably reflect the costs; and (b) whether the Council was entitled to adjust these costs "taking into account the price of gas on the market which it regarded as representative". Therefore, in the paragraphs of its judgment that followed, the General Court was discussing the application of both the first subparagraph of Article 2(5), which governed the first issue, and the second subparagraph of Article 2(5), which governed the second issue. This is confirmed in paragraph 46 of its judgment, where the General Court concluded that the authorities were entitled both (a) to conclude that the records did not reasonably reflect the costs (pursuant to the first subparagraph of Article 2(5)); and (b) to adjust the costs "by having recourse to other sources" (pursuant to the second subparagraph of Article 2(5)). It is also confirmed by the fact that, in paragraphs 37 to 42 of its judgment, the General Court briefly presented *all* the provisions of Article 2(5) of the Basic Regulation. For example, in paragraph 38, the General Court referred to certain subparagraphs of Article 2(5), which clearly are not relevant for the examination of whether the authorities were entitled to disregard the company records in that specific case.

55. Therefore, the reference to Recital 4 in these paragraphs does not mean that the General Court considered it relevant for the analysis of whether the company records reasonably reflected the costs. Quite to the contrary, the General Court's references to Recital 4 in these paragraphs related to its analysis of whether the Council was entitled to use alternative sources for the cost information, pursuant to the second subparagraph of Article 2(5). They did not relate to its analysis of whether the company records reasonably reflected the costs, pursuant to the first subparagraph of Article 2(5).
56. The conclusion is that Argentina's assertions in paragraphs 37 and 38 of its Second Written Submission are unfounded.
57. Second, Argentina seeks to draw support for its argumentation from certain statements of the General Court in its judgment in Case T-118/10. However, Argentina presents these statements out of their context, which leads to the misrepresentation of their true meaning.²⁸
58. Argentina focuses on paragraph 72 of the General Court's judgment in Case T-118/10 and asserts that the General Court confirmed that the "determination of whether company records reasonably reflect costs [...] is made pursuant to the second subparagraph of Article 2(5)".²⁹ Argentina's assertion is wrong for a number of reasons.
59. First, the interpretation given by Argentina to the General Court's statement directly contradicts the General Court's findings in that particular part of its judgment.
60. In paragraphs 70 to 72 of its judgment, the General Court was dealing with the question of whether the first and the second subparagraphs of Article 2(5) of the Basic Regulation could be examined in the light of Article 2.2.1.1 of the Anti-Dumping Agreement. The General Court found that the text of the "first sentence

²⁸ It is noted that this judgment of the General Court is currently subject to a pending appeal (submitted by Mr. Boronikov and Mr. Evtimov in the name of the applicants) before the European Court of Justice. Therefore, the General Court's legal interpretations in this case have not yet been confirmed by the European Court of Justice.

²⁹ Argentina's Second Written Submission, para. 42.

- of the first subparagraph of Article 2(5)" did not differ significantly from the "wording of Article 2.2.1.1 of the Anti-Dumping Agreement".³⁰
61. In contrast, the General Court found that the "provisions mentioned in the second sentence of the first subparagraph of Article 2(5) of the Basic Regulation" are not mentioned in Article 2.2.1.1 or any other provision of the Anti-Dumping Agreement. This led the General Court to the conclusion that the provisions of the second subparagraph of Article 2(5) cannot be interpreted in light of Article 2.2.1.1, or any other provision of the Anti-Dumping Agreement.³¹
62. These findings of the General Court confirm that, in the European Union's domestic legal order, the issue of "records reasonably reflecting costs" is dealt with by the first subparagraph of Article 2(5) of the Basic Regulation and not by the second subparagraph of Article 2(5). This is seen by the fact that the General Court identifies the first subparagraph of Article 2(5) of the Basic Regulation with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.
63. The General Court also finds that the second subparagraph of Article 2(5) does not have an equivalent provision in the Anti-Dumping Agreement and cannot be interpreted in light of the Anti-Dumping Agreement. This finding conclusively establishes that the General Court considers that the second subparagraph of Article 2(5) is *not* dealing with the determination of whether company records reasonably reflect costs. This is because the Anti-Dumping Agreement *does* contain a provision dealing with this issue: Article 2.2.1.1. Therefore, if the General Court considered that the second subparagraph of Article 2(5) is the legal basis for the determination of whether company records reasonably reflect costs, it would have concluded that the second subparagraph *can* be interpreted in light of the Anti-Dumping Agreement and, in particular, in light of Article 2.2.1.1. However, this is the opposite of what the General Court actually concluded.
64. Second, Argentina ignores the entire content of that judgment, which is the proper context within which the specific statement of the General Court should be read. In the part of its judgment that discusses the scope of Article 2(5) of the Basic

³⁰ Exhibit ARG-52, para. 70.

³¹ Exhibit ARG-52, para. 71.

- Regulation, the General Court confirms that the first subparagraph of Article 2(5) is the legal basis for the determination of whether the company records reasonably reflect the costs. In particular, in paragraph 52 of its judgment, the General Court confirms that the analysis of whether the company records reasonably reflect the costs is done under the "first sentence of Article 2(5)". It is noted that the applicants in that case shared that understanding, as evidenced by the General Court's reference to their "interpretation" of the first sentence of Article 2(5).³²
65. In contrast, in paragraph 72 of its judgment, the General Court was not discussing the scope of Article 2(5) of the Basic Regulation in the European Union's domestic legal order. It was addressing a different issue, namely whether the Anti-Dumping Agreement provides some definition for the notion of a "particular market situation", which is found in Article 2(3) of the Basic Regulation.³³ Paragraph 72 expresses the General Court's conclusion on that specific issue. In the structure of the judgment, paragraph 72 is not meant to offer an authoritative interpretation of either the first or the second subparagraphs of Article 2(5). Therefore, the General Court's statement, on which Argentina focuses, does not constitute a legal finding, or an interpretation of a rule of law in relation to the scope of the second subparagraph of Article 2(5) of the Basic Regulation.
66. In addition, Argentina has sought to use paragraph 72 of the General Court's judgment in Case T-118/10 in order to assert that "Recital 3 and the new sentence added in Article 2(3) by Regulation 1972/2002" are "relevant contextual elements for the proper understanding" of the second subparagraph of Article 2(5).³⁴ In particular, Argentina asserted that the General Court has confirmed that "Article 2(3), including the new additional sentence, constitutes a contextual element for the interpretation of Article 2(5) second subparagraph, in particular of the situations in which the records are to be found not to reasonably reflect the costs".³⁵ The European Union disagrees with Argentina's position.

³² **Exhibit ARG-52**, para. 52.

³³ OJ [2009] L 338/5, **Exhibit EU-18**, para. 25. **Exhibit ARG-52**, para. 43.

³⁴ Argentina's Second Written Submission, para. 74.

³⁵ Argentina's Second Written Submission, para. 75.

67. The General Court stated that "it must be pointed out that Article 2(3) of the Basic Regulation refers only to the criteria for disregarding the methods for establishing normal value based on the price of the product on the domestic market of the exporting country". The General Court went on to confirm that Article 2(3) "does not prescribe the detailed rules for calculating the production costs for establishing the constructed normal value, that calculation being governed by Article 2(5)".³⁶ Therefore, the General Court expressly found that Article 2(3) of the Basic Regulation is not relevant for the determination of whether the company records reasonably reflect the relevant costs (which falls within the ambit of the first subparagraph of Article 2(5)), or for the determination of the sources from which the investigating authorities may draw information in order to calculate the relevant costs (which falls within the ambit of the second subparagraph of Article 2(5)). This contradicts Argentina's assertion that Article 2(3) "constitutes a contextual element for the interpretation" of the second subparagraph of Article 2(5).
68. The conclusion is that the General Court's judgment in Case T-118/10, read in its entirety, contradicts Argentina's assertions and confirms that the legal basis for the determination of whether the company records reasonably reflect costs is the first subparagraph of Article 2(5) and not the second subparagraph.

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

69. Argentina continues to insist that the European Union's investigating authorities had never determined that company records do not "reasonably reflect costs" before 2002.³⁷ This is a very strange assertion particularly in light of the fact that Argentina acknowledges that the first subparagraph of Article 2(5) of the Basic Regulation has existed since 1995 and that its text closely reflects the provisions of Article 2.2.1.1 of the Anti-Dumping Agreement.
70. Argentina advances two main points. First, that there has never been any example of a determination that company records do not "reasonably reflect costs" before

³⁶ **Exhibit ARG-52**, para. 43.

³⁷ Argentina's Second Written Submission, para. 45.

- 2002, other than the case of *Aluminium foil originating in China and Russia*. Second, that this particular example is "irrelevant", because the determination was based on "facts available pursuant to Article 18 of the Basic Regulation".³⁸ Both these assertions of Argentina are unfounded.
71. First, there have been other examples of application of what is today the first subparagraph of Article 2(5) of the Basic Regulation before 2002. One of them is the 2000 investigation on *Urea and Ammonium Nitrate originating in Algeria et al.*³⁹ In that investigation, the sole Algerian exporting producer cooperated with the investigating authorities and there was no application of Article 18 of the Basic Regulation.⁴⁰ The investigating authorities first applied Article 2(3) of the Basic Regulation and concluded that the normal value had to be constructed.⁴¹ The authorities then examined whether the "manufacturing costs" reflected in the company records were "sufficiently reliable" pursuant to Article 2(5) of the Basic Regulation and determined that they had to be replaced by figures that "were considered reasonable".⁴²
72. Therefore, this is an example of a determination of whether company records "reasonably reflect the costs associated with the production and sale" of the relevant goods, which took place before 2002, i.e., at a time when the second subparagraph of Article 2(5) did not exist.
73. The same investigation provides an example of a determination that the company records actually did reasonably reflect the relevant costs. The complainant had argued that the records of the Lithuanian producer did not "reasonably reflect the costs associated with the production and sale" of the relevant goods, because *inter alia* the recorded cost of gas reflected a "gas price, judged to be too low".⁴³ The investigating authorities rejected the complainants' claim and found that "there was

³⁸ Argentina's Second Written Submission, para. 44.

³⁹ Council Regulation 1995/2000, OJ [2000] L 238/15, **Exhibit EU-19**; Commission Regulation 617/2000, OJ [2000] L/ 75/3, **Exhibit EU-20**.

⁴⁰ **Exhibit EU-20**, Recital 10.

⁴¹ **Exhibit EU-20**, Recital 11.

⁴² **Exhibit EU-20**, Recital 12.

⁴³ **Exhibit EU-19**, Recital 17.

- no evidence to suggest that the prices charged were not reliable, or did not reflect the true cost of supply".⁴⁴
74. Therefore, this investigation constitutes both (a) an example of application of the first subparagraph of Article 2(5) of the Basic Regulation, prior to the 2002 introduction of the second subparagraph of Article 2(5); and (b) an example where the European Union's investigating authorities determined that the recorded costs were reasonable despite the fact that the complainants had argued that the authorities should have used "figures obtained from a [European Union] gas supplier showing what was considered to be the lowest reasonable price the Lithuanian producer could be expected to have paid for gas".⁴⁵
75. A similar example can be seen in the 2001 investigation on certain *Iron or steel ropes and cables originating in the Czech Republic, Russia, Thailand, et al.*⁴⁶ In that case, one Korean exporting producer was purchasing the raw material (wire) from a related company. It requested the investigating authorities to calculate the cost of production of the product concerned by taking the cost of production of the raw material from the related company. The investigating authorities applied what is today the first subparagraph of Article 2(5) of the Basic Regulation, rejected the Korean company's request and used the costs that "were entered into the company accounts". The reason for that was that the "purchasing price was found to be at arms-length" and thus considered to "reasonably reflect the cost associated with the production of the product under consideration".⁴⁷
76. This example confirms that the European Union's investigating authorities determined whether the company records "reasonably reflect the costs associated with the production and sale" of the relevant goods under what is today the first subparagraph of Article 2(5) of the Basic Regulation, even before the introduction of the second subparagraph. It also confirms that the investigating authorities consider that the company records do "reasonably reflect costs", where the relevant costs are based on "arms' length" transactions, i.e., where they reflect market

⁴⁴ **Exhibit EU-19**, Recital 17.

⁴⁵ **Exhibit EU-19**, Recital 17.

⁴⁶ Commission Regulation 230/2001, OJ [2001] L 34/4, **Exhibit EU-25**.

⁴⁷ **Exhibit EU-25**, Recital 45.

- prices. This interpretation of the notion of "reasonably reflect costs" is fully in line with the findings of the Panel in *US-Softwood Lumber V*.⁴⁸ It is noted that there is broader consensus on this interpretation, as evidenced by the fact that it has been supported by Third Parties in the present dispute, such as China.⁴⁹
77. Another example is the 1996 investigation on *Polyester textured filament yarn originating in Indonesia and Thailand*.⁵⁰ The investigating authorities found that the Indonesian producers' records did not "reasonably reflect" the "costs associated with the [production] of the first quality [of yarn] exported" to the European Union.⁵¹ The authorities adjusted these production costs on a basis which they considered "reasonable".⁵² On another cost element, the authorities also "considered appropriate to offset against financial expenses only financial income, which showed a clear link with the production and sale of PTY".⁵³ This investigation is another example of application of the first subparagraph of Article 2(5) of the Basic Regulation, prior to the 2002 introduction of the second subparagraph.
78. Another example is the 2000 investigation on *Tube or pipe fittings originating in Brazil, the Czech Republic, et al.*⁵⁴ The exporting company from the Czech Republic had cooperated and there was no application of Article 18 of the Basic Regulation.⁵⁵ The investigating authorities found that the company records did not reasonably reflect the relevant costs for "a number of export product types", because the "cooperating company had classified them as being identical and reported one single cost of manufacturing for those types", while these product types were in fact different and had a different cost of manufacturing.⁵⁶ The investigating authorities used the "cost of manufacturing of those different product

⁴⁸ For example, European Union's Second Written Submission, paras. 110 to 112.

⁴⁹ For example, China's Third Party Submission, para. 39.

⁵⁰ Council Regulation 2160/96, OJ [1996] L 289/14, **Exhibit EU-22**.

⁵¹ **Exhibit EU-22**, Recital 14.

⁵² **Exhibit EU-22**, Recital 14.

⁵³ **Exhibit EU-22**, Recital 15.

⁵⁴ Commission Regulation 449/2000, OJ [2000] L 55/3, **Exhibit EU-21**.

⁵⁵ **Exhibit EU-21**, Recitals 53 and 60.

⁵⁶ **Exhibit EU-21**, Recital 60.

- types" in order to calculate the normal value.⁵⁷ This is one more example of a determination of whether the company records "reasonably reflect costs" of manufacturing pursuant to the first subparagraph of Article 2(5) of the Basic Regulation, prior to the 2002 introduction of the second subparagraph.
79. The conclusion is that the European Union's investigating authorities routinely used the provision which today is the first subparagraph of Article 2(5) of the Basic Regulation 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. Therefore, Argentina's assertions are unfounded.
80. 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) of the Basic Regulation. Even where they apply Article 18 of the Basic Regulation, the European Union's investigating authorities still use the information supplied by the companies to the extent possible.
81. An example can be seen in the 2000 investigation on *Synthetic staple fibres of polyester originating in Australia, Indonesia and Thailand*.⁵⁸ In that case, the investigating authorities applied Article 18 of the Basic Regulation in relation to an Indonesian company, but also declared that "information supplied by this company was still used to the extent possible for the purpose of this investigation".⁵⁹ The investigating authorities went on to apply what is today the first subparagraph of Article 2(5) of the Basic Regulation and find that, in relation to the costs of production of the second and third qualities, the company records "did not reasonably reflect the costs associated with the production and sale of the product under consideration as provided in Article 2(5) of the Basic Regulation", because they did not include *inter alia* "labour cost".⁶⁰
82. The investigating authorities made the same determinations in *Aluminium foil originating in China and Russia*, where they stated that "the constructed normal

⁵⁷ **Exhibit EU-21**, Recital 60.

⁵⁸ Council Regulation 1522/2000, OJ [2000] L175/10, **Exhibit EU-23**.

⁵⁹ **Exhibit EU-23**, Recital 33.

⁶⁰ **Exhibit EU-23**, Recital 35.

value was established using as much of the company's own information as possible".⁶¹ Adjustments to the "company's data" were made only where the investigating authorities found that the company records did not "reasonably reflect the costs", or "the company's amount for depreciation" had to be brought "into line with GAAP".⁶²

83. The conclusion is that Argentina's assertions are unfounded. The fact that the investigating authorities may have applied Article 18 of the Basic Regulation in relation to a particular company does not make the investigation "irrelevant" for purposes of the application of the first subparagraph of Article 2(5) of the Basic Regulation.
84. Moreover, these examples establish that, in the European Union's domestic legal order, the legal basis for the determination of whether the company records "reasonably reflect costs" is the first subparagraph of Article 2(5) of the Basic Regulation, and not the second subparagraph. Consequently, Argentina's "as such" challenge against the *second* subparagraph of Article 2(5) under Article 2.2.1.1 of the Anti-Dumping Agreement must be rejected.

3.1.2. Other shortcomings of Argentina's "as such" claims

85. 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. We believe that it is by now clear that 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) of the Basic Regulation has nothing to do with the content of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. As we have just explained, this is a point which has been expressly confirmed by the General Court in all the judgments that Argentina has placed on the record of the present dispute.⁶³ We hope that Argentina will not spend any more of the limited time and resources of this Panel in debating a point which has clearly been settled.

⁶¹ **Exhibit EU-1**, Recital 44.

⁶² **Exhibit EU-1**, Recitals 45 and 46.

⁶³ For example, **Exhibit ARG-23**, paras. 67 and 68; **Exhibit ARG-52**, paras. 70 and 71.

86. Moving on, we will now discuss certain other shortcomings in Argentina's "as such" claims against the second subparagraph of Article 2(5), under both Articles 2.2.1.1 and 2.2 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

87. 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".⁶⁴ 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".⁶⁵ Argentina also acknowledges that the "Appellate Body has recognised that a holistic evaluation [...] could be necessary when the meaning of the measure being challenged cannot be discerned clearly from its text only".⁶⁶

88. In light of these statements, one would expect Argentina to explain *why* the "meaning or content" of the second subparagraph of Article 2(5) of the Basic Regulation is *not* clear and "evident on its face". However, Argentina does not do so. Argentina does not explain which is the element of the second subparagraph of Article 2(5) whose meaning "cannot be discerned clearly from its text only". Argentina also does not explain which is the "unclear meaning" that it purportedly seeks to clarify through recourse to "other evidence".

89. The European Union has explained the reasons for which the scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation are clear and evident on the basis of the provision's text.⁶⁷ Argentina has actually acknowledged this fact when it took issue with the European Union's "exclusively focusing on the terms of Article 2(5), second subparagraph".⁶⁸ That statement of

⁶⁴ Argentina's Second Written Submission, para. 53.

⁶⁵ Argentina's Second Written Submission, para. 54.

⁶⁶ Argentina's Second Written Submission, para. 58.

⁶⁷ European Union's First Written Submission, paras. 74 to 77.

⁶⁸ Argentina's Second Written Submission, para. 50.

- Argentina shows that Argentina itself acknowledges that "the terms" of the second subparagraph of Article 2(5) clearly contradict Argentina's assertions.
90. In its Second Written Submission Argentina also refers to the recent Report of the Appellate Body in *US-Carbon Steel (India)*.⁶⁹ Argentina does not seem to assert that this Report stands for the proposition that the Panel is obliged to engage in the unnecessary exercise of examining the purported "other evidence" submitted by the complaining party, even where the content and meaning of the domestic provision challenged "as such" is clear and evident on the basis of the measure's text only. Indeed, such an interpretation would be against the procedural economy of the DSU, because it would require the Panel to ignore the clear meaning of the text of the challenged measure and waste the limited resources of the WTO dispute settlement system in a useless examination of the "other evidence" submitted by the complaining party.
91. In any event, Argentina does not seem to advocate such an interpretation in the present case. In the very next paragraph of its Second Written Submission following its reference to the Appellate Body Report in *US-Carbon Steel (India)* (i.e., paragraph 58), Argentina expressly acknowledges that a "holistic evaluation" is warranted only "when the meaning of the measure being challenged cannot be discerned clearly from its text only".
92. In these circumstances, the European Union considers that the Panel can base its findings on the clear meaning of the text of the second subparagraph of Article 2(5) and summarily reject the various pieces of purported "evidence" that Argentina has provided in support of an interpretation that actually distorts the true meaning of the challenged provision. This is true for Argentina's "as such" claims both under Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement.

3.1.2.2 Argentina's description of the second subparagraph of Article 2(5) of the Basic Regulation

93. The European Union has already discussed Argentina's imprecise, variable and inconsistent descriptions of the alleged content of the second subparagraph of

⁶⁹ Argentina's Second Written Submission, para. 57.

- Article 2(5) of the Basic Regulation.⁷⁰ The text of Argentina's Second Written Submission in essence confirms the European Union'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.
94. Argentina refers to the purported "consistent" application of the second subparagraph of Article 2(5) by the European Union's investigating authorities.⁷¹ The European Union has shown that both the first and the second subparagraphs of Article 2(5) have already been applied in ways that are different from the ones described by Argentina.⁷²
95. In its Second Written Submission, Argentina dismisses again the examples provided by the European Union, asserting that "what is relevant" is the way that the investigating authorities have treated *only* those cases "where the prices of the inputs have been found to be artificially low, or abnormally low because of an alleged distortion".⁷³ Argentina follows that approach both in relation to its "as such" claims under Article 2.2.1.1 of the Anti-Dumping Agreement and in relation to its "as such" claims under Article 2.2 of the Anti-Dumping Agreement. For example, in relation to the latter claims, in paragraph 102 of its Second Written Submission, Argentina dismisses various examples of different applications of the second subparagraph of Article 2(5) of the Basic Regulation by the investigating authorities, asserting that they do not involve "the circumstances provided for in the measure challenged by Argentina". Argentina repeats that it challenges only those cases that "involve situations of abnormally low or artificially low prices caused by an alleged distortion".⁷⁴
96. Therefore, Argentina's Second Written Submission confirms that Argentina has actually put together a number of instances of application of the first subparagraph and/or the second subparagraph of Article 2(5) and has presented them as the

⁷⁰ For example, European Union's Second Written Submission, paras. 53 to 58.

⁷¹ Argentina's Second Written Submission, paras. 77 to 84.

⁷² For example, European Union's Second Written Submission, paras. 50 and 61, where there are further references to the European Union's First Written Submission. See also the examples mentioned in this Opening Statement.

⁷³ Argentina's Second Written Submission, paras. 81 and 83.

⁷⁴ Argentina's Second Written Submission, para. 102.

"meaning and content" of the second subparagraph of Article 2(5) of the Basic Regulation. Argentina disregards all the other instances of application of these two provisions and considers them as being outside the scope, meaning and content of the "measure that Argentina challenges".⁷⁵ However, Argentina has repeatedly confirmed that it challenges "as such" under both Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement only one measure: the second subparagraph of Article 2(5) of the Basic Regulation.⁷⁶

97. The consequence of Argentina's litigation strategy is that it puts itself in a self-contradicting and self-defeating position. On the one hand, it challenges "as such" specifically the second subparagraph of Article 2(5).⁷⁷ On the other hand, it expressly acknowledges that it does not challenge *all* of the instances of (real or potential) application of the second subparagraph of Article 2(5).⁷⁸ And, at the same time, it attributes to the second subparagraph of Article 2(5) instances of application of the first subparagraph of Article 2(5).
98. This means that, besides the erroneous attribution of the application of the first subparagraph of Article 2(5) to the second subparagraph, Argentina has also failed to identify the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation. In these circumstances, Argentina cannot make a *prima facie* case on an "as such" claim against the second subparagraph of Article 2(5) of the Basic Regulation either under Article 2.2.1.1, or under Article 2.2 of the Anti-Dumping Agreement.

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)*

99. The European Union has shown that Argentina's "as such" claims under both Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement must be rejected,

⁷⁵ Argentina's Second Written Submission, para. 102.

⁷⁶ Argentina's Second Written Submission, para. 11.

⁷⁷ Argentina's Second Written Submission, para. 11.

⁷⁸ Argentina's Second Written Submission, paras. 82, 83 and 102.

- because the second subparagraph of Article 2(5) of the Basic Regulation does not require the investigating authorities to act inconsistently with the covered agreements.⁷⁹ 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".⁸⁰
100. 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)*, which Argentina conveniently ignores in its Second Written Submission. Likewise, Argentina omits to mention that the Appellate Body has not enunciated any general principle confirming that "non-mandatory" measures can indeed be "as such" inconsistent with the covered agreements.
101. Argentina appears to acknowledge that its position is rather weak on this point. This is probably the reason for its belated attempt to modify the nature of its challenge against the second subparagraph of Article 2(5) of the Basic Regulation. In paragraphs 95 and 96 of its Second Written Submission, Argentina advances a new theory, pursuant to which the "mere fact that the measure challenged" provides for the "possibility – and d[oes] not require – that the authorities reject the records" and grants the "possibility to use information from other representative markets", would "lead to the conclusion that there is a violation".⁸¹ Argentina asserts that "this is the case for its claims under both Articles 2.2.1.1. and 2.2 of the Anti-Dumping Agreement".⁸²
102. Argentina reiterates this new theory in paragraphs 161 to 166 of its Second Written Submission, in relation to its "as such" claim under Article 2.2 of the Anti-Dumping Agreement. Argentina states that providing for the possibility of "the

⁷⁹ European Union's Second Written Submission, paras. 64 to 84. European Union's First Written Submission, paras. 116 to 126.

⁸⁰ Argentina's Second Written Submission, para. 93.

⁸¹ Argentina's Second Written Submission, paras. 95 and 96.

⁸² Argentina's Second Written Submission, para. 95.

- 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 Anti-Dumping Agreement".⁸³
103. However, Argentina is not consistent in its description of the content of the second subparagraph of Article 2(5). In the paragraphs that were just mentioned, Argentina states that the second subparagraph of Article 2(5) of the Basic Regulation affords discretion to the investigating authorities. In contrast, right after these paragraphs and, in particular, in paragraphs 97 to 106 and paragraphs 164 to 165 of its Second Written Submission, Argentina reverts to its original theory and argues that the second subparagraph of Article 2(5) of the Basic Regulation does *not* afford any discretion to the investigating authorities.
104. The ambiguity in Argentina's description of the nature of the second subparagraph of Article 2(5) is another fact that helps establish that Argentina has failed to identify the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation. Indeed, an important element of that "precise content" is whether it is mandatory or discretionary, i.e., whether it obliges the investigating authorities to act in a certain manner, or whether it affords the investigating authorities discretion in the way that they may act.
105. Argentina's inconsistent description of the meaning and content of the second subparagraph of Article 2(5) has some important implications for the Panel's analysis. If Argentina's case is ambiguous as to the exact nature of the second subparagraph of Article 2(5), then the Panel will have to find that Argentina has failed to establish the "precise content" of the challenged measure and, consequently, will have to reject Argentina's "as such" claims. Argentina cannot keep both options open.
106. If, on the other hand, Argentina's case is that the second subparagraph of Article 2(5) is mandatory, then the Panel will not need to examine whether a potential discretionary measure could be inconsistent with the covered agreements. In the circumstances of the present case, such analysis would be purely theoretical and would not help to bring an effective resolution to the dispute.

⁸³ Argentina's Second Written Submission, para. 162.

107. For reasons of completeness, the European Union notes that Argentina's statements in relation to its "as such" claims against "discretionary" measures are not correct. Given that Argentina has not developed sufficiently that argumentation in its Second Written Submission and respecting the Panel's time constraints in this Second Hearing, the European Union will not repeat at this stage the points that it has already discussed in its own written submissions.⁸⁴
108. In paragraph 166 of its Second Written Submission, Argentina changes again course and states that "the authorities have to adjust or replace costs on [...] information from other representative markets which is not the cost of production in the country of origin", pursuant to the second subparagraph of Article 2(5). This seems to indicate that Argentina argues again that the second subparagraph of Article 2(5) is of "mandatory" nature. Then Argentina states that it is sufficient for its "as such" claim under Article 2.2 of the Anti-Dumping Agreement to show that the "rule will necessarily lead to WTO-inconsistent results".⁸⁵ However, Argentina has failed to establish that the second subparagraph of Article 2(5) of the Basic Regulation mandates any particular conduct which is necessarily inconsistent with the covered agreements. The consequence is that Argentina's "as such" claims fail.
109. Finally, in paragraph 163 of its Second Written Submission, Argentina "notes the absence of any reference to the 'country of origin'" in the second subparagraph of Article 2(5), which "merely requires the use of 'information from other representative markets'". To begin with, the second subparagraph of Article 2(5) does not "require" the use of any particular "information", other than "information" which is "reasonable" in light of the facts of each case.
110. Moreover, there is no reference to any "country other than the country of origin" in the text of the second subparagraph of Article 2(5). Therefore, it is very possible that the investigating authorities may apply the second subparagraph of Article 2(5) without resorting to evidence from outside the country of origin. The European Union has submitted examples of investigations where the relevant "information from other representative markets" was taken from inside the country

⁸⁴ For example, European Union's Second Written Submission, paras. 64 to 84.

⁸⁵ Argentina's Second Written Submission, para. 166.

of origin, such as the case of *Silicon originating from Russia*, which we will discuss in more detail shortly.⁸⁶ The conclusion is that whatever argument Argentina may seek to develop through its statements in paragraph 163 of its Second Written Submission, fails.

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

111. As just mentioned, Argentina again reverses course in paragraphs 97 and 164 of its Second Written Submission and argues that the second subparagraph of Article 2(5) does not afford any discretion to the investigating authorities. Argentina seeks support for this argument in the "elements" that it discusses in paragraphs 100 to 106 of its Second Written Submission. These are the same "elements" that Argentina has used in its effort to ascribe to the second subparagraph of Article 2(5) a purported "meaning and content" that is contrary to the provision's text.⁸⁷ It is not clear how those "elements" could establish the alleged "mandatory" nature of the second subparagraph of Article 2(5), when they have already failed to establish the other aspects of the provision's "precise content".
112. Argentina refers to the text of the second subparagraph of Article 2(5); to the alleged "practice" of the investigating authorities and to the judgments of the General Court. However, none of these supports Argentina's arguments on the purported "mandatory" nature of the provision.

3.2.2.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation

113. 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. Argentina implicitly acknowledges this point, because it focuses its discussion of the text of the provision only on the issue of the alternative sources of information for the adjustments (i.e., its "as such" claim

⁸⁶ Exhibit EU-24, Recital 25.

⁸⁷ Argentina's Second Written Submission, paras. 16 to 45 and 60 to 87.

- under Article 2.2 of the Anti-Dumping Agreement) and not on the question of whether the company records can be used (i.e., its "as such" claim under Article 2.2.1.1 of the Anti-Dumping Agreement).⁸⁸ For these reasons, our discussion will also focus on Argentina's arguments in relation to its claims under Article 2.2 of the Anti-Dumping Agreement.
114. Argentina's arguments are based on the use of the word "shall" in the text of the second subparagraph of Article 2(5). However, this is not convincing. It is uncontroversial that an anti-dumping investigation, once started, must be completed. If the normal value needs to be constructed, there must be some domestic legal instrument that describes the rules and procedures that must be followed in order to construct the normal value. 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. In order to do so, the investigating authorities must establish or adjust the relevant costs in some way. This is confirmed by the fact that the word "shall" is placed right before the words "be adjusted or established".
115. However, the word "shall" does not relate to any single method that the investigating authorities may use in order to establish or adjust the costs. This is confirmed by the fact that the various options listed in the second subparagraph of Article 2(5) are connected through the word "or". These options are the costs of other producers/exporters in the same country, *or* where such information is not available *or* cannot be used, *any other reasonable* basis. Therefore, the text of the second subparagraph of Article 2(5) requires the investigating authorities to proceed with the anti-dumping investigation, but does not oblige the authorities to use one and the same source of information in all cases.
116. Indeed, the discretion allowed to the investigating authorities by the provision is very broad. First, the provision offers various grounds for deciding whether the costs of other domestic producers can be used. Second, the provision offers the broad discretion to use *any other* source of information, without any limitation or

⁸⁸ Argentina's Second Written Submission, paras. 100 and 101.

direction other than that it must be *reasonable*. Third, the reference to "information from other representative markets" is just an example of an "*other*" source that could be used. It does not limit the options of potential *other* sources; this is confirmed by the fact that it is introduced by the word *including*. Moreover, there is no limitation or direction as to what constitutes an "other representative market". There is no indication that this should be a market outside the country of origin. The only requirement is that it should constitute a *reasonable basis* for the establishment or adjustment of the relevant costs.

117. Argentina asserts that the "reasonable basis necessarily refers to something different than the costs of other producers/exporters in the domestic country".⁸⁹ However, Argentina's assertion is unfounded. The text of the second subparagraph of Article 2(5) refers to "any *other* reasonable basis". The word *other* shows that the term "reasonable" includes the costs in the same country, if this is reasonable in light of the facts of each particular case.
118. The conclusion is that the word "shall" in the text of the second subparagraph of Article 2(5) of the Basic Regulation does not support Argentina's argument on the alleged "mandatory" nature of the provision. Quite to the contrary, the text of that provision clearly establishes that it allows a broad discretion to the investigating authorities.

3.2.2.2 The alleged "practice" of the European Union's investigating authorities

119. 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". Argentina also dismisses the examples of investigations where different sources of information were used, stating that Argentina "is not able to discern neither their relevance nor their connection to the circumstances of the case at

⁸⁹ Argentina's Second Written Submission, para. 101.

hand", because they did not involve the "circumstances provided for in the measure challenged by Argentina".⁹⁰

120. The European Union has already noted that these statements of Argentina confirm that it does not challenge "as such" the second subparagraph of Article 2(5) of the Basic Regulation. In that paragraph of its Second Written Submission, Argentina expressly states that the "measure that it challenges" is one that involves the application of the second subparagraph of Article 2(5) only in certain specific "circumstances". This does not constitute an "as such" challenge against the second subparagraph of Article 2(5) and it is already a sound basis for the Panel to reject Argentina's "as such" claims.
121. In addition, Argentina's statements do not support its argument on the purported "absence of discretion" afforded by the second subparagraph of Article 2(5). As the Appellate Body has already held, a number of instances of the application of a measure does not conclusively establish the meaning of the measure at issue in general, particularly where the measure is a specific written legal provision.⁹¹ Therefore, the fact that the investigating authorities chose to use these particular sources of information, in light of the facts of the specific cases, does not mean that the second subparagraph of Article 2(5) *obliged* them to do so. Quite to the contrary, these outcomes were simply the result of the investigating authorities' exercising the discretion afforded to them by the second subparagraph of Article 2(5).
122. The fact remains that there are examples where the investigating authorities used sources of information other than information from representative markets outside the country of origin, in applying the second subparagraph of Article 2(5) of the Basic Regulation. This confirms that the second subparagraph of Article 2(5) does not oblige the investigating authorities to use always information from representative markets outside the country of origin.

⁹⁰ Argentina's Second Written Submission, para. 102.

⁹¹ European Union's Second Written Submission, para. 51, referring to the Appellate Body Report in *US-Carbon Steel (India)*.

123. An example can be seen in the investigation on *Imports of silicon originating in Russia*.⁹² In that case, the investigating authorities found that the price charged by Russian electricity suppliers to two silicon producers "could not reasonably reflect the costs associated with the production of electricity, when compared to prices of representative electricity producers in [...] Russia, including those in Russia".⁹³ It was, therefore, concluded that the energy cost was not reliable for these two producers, pursuant to the first subparagraph of Article 2(5) of the Basic Regulation. The investigating authorities went on to establish or adjust this cost on the basis of the "power price charged to another producer in Russia", pursuant to the second subparagraph of Article 2(5).⁹⁴
124. Therefore, this is one more example of a case where the determination of whether the company records reasonably reflected costs, pursuant to the first subparagraph of Article 2(5), was based on a comparison with domestic prices in the country of origin. It is also one more example of a case where the investigating authorities used domestic information from the country of origin in order to establish the costs, pursuant to the second subparagraph of Article 2(5).
125. The conclusion is that the investigations of the European Union authorities do not support Argentina's arguments on the purported "absence of discretion" afforded by the second subparagraph of Article 2(5) of the Basic Regulation.

3.2.2.3 The judgments of the General Court

126. 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, Argentina's statement is not correct. The ordinary meaning of the word "entitle" is "to grant someone a right". Therefore, the use of the word "entitled" in these judgments 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, but does not oblige them to do so.

⁹² Commission Regulation 1235/2003, OJ [2003] L 173/14, **Exhibit EU-24**.

⁹³ **Exhibit EU-24**, Recital 25.

⁹⁴ **Exhibit EU-24**, Recital 25.

127. It is noted that the General Court found that it should examine "whether the Council was [...] entitled to adjust the cost upwards taking into account the price of gas on the market which it regarded as representative".⁹⁵ In contrast, the General Court did not state that it should examine whether the Council was *obliged* to adjust these costs. This confirms that the General Court considered that the second paragraph of Article 2(5) does not oblige the investigating authorities to use information from markets outside the country of origin.
128. It is also noted that the European Union's investigating authorities shared this understanding of the second subparagraph of Article 2(5). The same judgment states that the "Council claims that it was entitled [...] to adjust the price of gas on the basis of information from other representative markets".⁹⁶ If the Council considered that the second subparagraph of Article 2(5) imposed on it the *obligation* to use this information as a basis for the adjustments, then it would have stated so in its submissions to the General Court.
129. Argentina asserts that the General Court's use of the word entitled "flows from the manner in which the applicant formulated its complaint".⁹⁷ However, Argentina's assertion is unfounded. The General Court used the word "entitled" already at the part of its judgment where it was simply describing the scope of the provisions that it had to interpret and where it was not referring to the parties' specific claims. In particular the General Court described the second subparagraph of Article 2(5) as a provision which "entitles the institutions [...], where necessary, to make adjustments on the basis of sources of information other than the records".⁹⁸ This confirms that Argentina's assertions must be rejected.
130. Argentina also asserts that the General Court "confirmed that the existence of a 'distortion' necessarily meant that the cost items were not reasonably [...] and [...] had to be adjusted".⁹⁹ Argentina's statement is not correct. The words "necessarily

⁹⁵ **Exhibit ARG-23**, para. 36.

⁹⁶ **Exhibit ARG-23**, para. 35.

⁹⁷ Argentina's Second Written Submission, para. 105.

⁹⁸ **Exhibit ARG-23**, para. 34.

⁹⁹ Argentina's Second Written Submission, para. 105.

meant" are not found in the judgment of the General Court to which Argentina refers.¹⁰⁰

131. 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...".¹⁰¹ 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) of the Basic Regulation affords them.
132. The conclusion is that Argentina's assertions must be rejected. The discretionary nature of the second subparagraph of Article 2(5) of the Basic Regulation leads to the rejection of Argentina's "as such" claims against it.

3.3. CONCLUSION

133. To sum up, the European Union takes the view that Argentina has failed to make a *prima facie* case on its "as such" claims against 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 for a number of reasons. Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5). Argentina has confused the scope of the second subparagraph with the scope of the first subparagraph. The second subparagraph of Article 2(5) does not have the meaning and content asserted by Argentina. And, the discretionary nature of the second subparagraph of Article 2(5) means that Argentina's "as such" challenge against it must be rejected.

4. ARGENTINA ADVANCES AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

134. We now move to the arguments that Argentina has developed in its Second Written Submission in relation to the legal interpretation of the Anti-Dumping Agreement.

4.1. THE TEXT OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

¹⁰⁰ Argentina's Second Written Submission, footnote 95.

¹⁰¹ **Exhibit ARG-23**, para. 46.

135. In relation to Article 2.2.1.1 of the Anti-Dumping Agreement, Argentina reiterates the thesis that the provision requires the "records to reasonably reflect" the relevant costs and that there is no "reasonableness test of the cost elements themselves".¹⁰² In support of its thesis, Argentina states that the Panel Report in *Egypt-Steel Rebar* "noted that the test is not about whether the costs are 'reasonable', but whether the costs effectively 'pertain' to the production and sale" of the relevant goods.¹⁰³ Argentina supports this statement with a reference to paragraph 7.393 of the Panel Report in that case.¹⁰⁴ Unfortunately, Argentina's quotation of that paragraph of the Panel Report is not accurate.
136. In reality, paragraph 7.393 of the Panel Report in *Egypt-Steel Rebar* reads as follows:
- We note [...] first that cost of production is to be calculated based on the actual books and records [...] but that second, the costs to be included are those that reasonably reflect the costs associated with the production and sale of the product under consideration.
- [...] Thus, in particular, we must [...] reach a conclusion as to whether [...] the short-term interest income was 'reasonably' related to the cost of producing and selling rebar and that the [investigating authority] thus should have included it in the cost of production calculation.
137. The real text of the Panel Report shows that the assertions advanced by Argentina are unfounded. First, the Panel did not "note that the test is not about whether the costs are 'reasonable'". Paragraph 111 of Argentina's Second Written Submission misquotes the Panel Report.
138. Second, the Panel found that the "*costs* to be included are those that *reasonably reflect the costs* associated with the production and sale". This confirms that the focus of the analysis is on the costs themselves. It also confirms that the costs used in the calculation must be those that are "reasonable" for the production and sale of the relevant goods.

¹⁰² Argentina's Second Written Submission, para. 110.

¹⁰³ Argentina's Second Written Submission, para. 111.

¹⁰⁴ Argentina's Second Written Submission, footnote 101.

139. The conclusion is that the Panel Report in *Egypt-Steel Rebar* contradicts Argentina's assertions and confirms the European Union's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.
140. In paragraph 113 of its Second Written Submission, Argentina asserts that "the term 'costs' as 'charges or expenses' refers to a concrete amount by opposition to a hypothetical value". It is not clear what Argentina means by "hypothetical value". It is uncontroversial that Article 2.2 of the Anti-Dumping Agreement allows investigating authorities to establish or adjust the costs associated with the production and sale of the relevant goods when certain conditions are met, such as when the company records are not kept in accordance with the GAAP of the country of origin. Moreover, Article 2.2 of the Anti-Dumping Agreement allows the investigating authorities to establish or adjust the "reasonable amount of administrative, selling and general expenses and profits". In all of these instances, the costs used by the investigating authorities may well be different from the amounts actually mentioned in the company records and in that sense they may be called "hypothetical". However, the use of these "hypothetical" amounts is allowed by Article 2.2 of the Anti-Dumping Agreement in the process of constructing the normal value. The conclusion is that Argentina's statement in paragraph 113 of its Second Written Submission fails to support Argentina's case.
141. In paragraphs 115 to 117 of its Second Written Submission, Argentina reiterates its position that the company records meet the conditions of Article 2.2.1.1 of the Anti-Dumping when they simply report the costs that have actually already been incurred. Argentina seeks to support its position by stating that the relevant costs "are necessarily the costs of the specific exporter/producer" who is involved in the anti-dumping investigation.¹⁰⁵ However, there are a number of problems with Argentina's thesis.
142. First, it ignores the fact that Article 2.2.1.1 of the Anti-Dumping Agreement allows the investigating authorities to disregard the costs that are recorded in the company's books when the books are not in accordance with the GAAP. This

¹⁰⁵ Argentina's Second Written Submission, para. 115.

- shows that the recorded costs must comply with broader rules and are not only defined by reference to the specific exporter/producer.
143. Second, Argentina's reference to the "product under consideration" does not help its thesis. The "product under consideration" in an anti-dumping investigation may be exported/produced by more than a single exporter/producer. Therefore, these words do not imply that the relevant costs must be limited only to the costs of one exporter/producer.
144. Third, Article 2.2 of the Anti-Dumping Agreement governs how investigating authorities are to establish administrative, selling and general expenses and profits. Article 2.2.2(ii) expressly allows investigating authorities to use figures from companies other than the specific exporter/producer. Likewise, Article 2.2.2(iii) allows investigating authorities to calculate expenses and profits by reference to companies other than the specific exporter/producer. Moreover, the profit margins may be uniform for all the exporters/producers involved in the anti-dumping investigation.
145. The conclusion is that the Anti-Dumping Agreement allows the investigating authority to use cost and data information from outside the specific company, when it constructs normal value. Therefore, Argentina's thesis cannot be accepted.
146. In paragraph 116 of its Second Written Submission, Argentina offers an inaccurate description of the Panel Report in *Egypt-Steel Rebar*. First, Argentina misrepresents the Panel's statement that "no respondent attempted to submit such evidence or advance such an argument during the course of the investigation, in spite of the IA's providing them the opportunity to do so".¹⁰⁶ The Panel had stated at the outset that its "task" was to examine whether there was any "evidence of record".¹⁰⁷ Therefore, the statement to which Argentina refers was a simple factual finding, which supported the Panel's conclusion that there was no such "evidence of record". That statement does not constitute a legal interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

¹⁰⁶ Argentina's Second Written Submission, footnote 115.

¹⁰⁷ Panel Report, *Egypt Steel Rebar*, para. 7.393.

147. More importantly, Argentina misrepresents the Panel's Report when it asserts that "as explained by the Panel in that case, the test is about whether or not a given cost item of the exporter/producer concerned "pertains" to the production and sale of the product under consideration for that exporter/producer in that case".¹⁰⁸ In reality, the Panel's finding is exactly the opposite of what asserted by Argentina:

This determination in turn hinges 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 investigation.¹⁰⁹

148. We see that there is no reference to any specific "exporter/producer", as erroneously asserted by Argentina. Moreover, we see that there is a reference to the cost elements "pertaining to the production and sale of the product". This statement is in line with the statement of the Panel Report in *EC-Salmon*, where the Panel found that the cost of production was the "price to be paid for the act of producing".¹¹⁰ It confirms that the term "associated with the production and sale" establishes a link between the costs and the act of producing the good, as opposed to the expenses that have already been incurred by a specific company.

149. Finally, Argentina misrepresents the Panel's statement that "we do not believe that the issue raised by this claim can be resolved on this basis" and the Panel's reference to "in that investigation" and to "in that case".¹¹¹ These statements simply reflected the Panel's finding that the issue was not whether it was generally permissible "not to offset interest expense with interest income", as argued by the defending party. The Panel found that the permissibility of "offsetting interest expense with interest income" depended on the facts of each case.

150. To the extent that these Panel statements have some relevance for the present case, they are actually supporting the case of the European Union. The Panel's findings in *Egypt-Steel Rebar* show that the determination of whether company records "reasonably reflect costs" depends on the facts of each case. This is precisely the position of the European Union in the present dispute. In contrast, it is Argentina

¹⁰⁸ Argentina's Second Written Submission, para. 116.

¹⁰⁹ Panel Report, *Egypt Steel Rebar*, para. 7.393.

¹¹⁰ Panel Report, *EC-Salmon*, para. 7.481.

¹¹¹ Panel Report, *Egypt-Steel Rebar*, para. 7.393.

that asserts that there can *never* be such adjustments, irrespective of the facts of any particular case. This is a position which is very similar to the one rejected by the Panel in *Egypt-Steel Rebar*.

151. In paragraph 117 of its Second Written Submission, Argentina misrepresents the findings of the Panel in *EC-Salmon*. Argentina asserts that the Panel "noted that the costs necessarily refer to the 'costs actually incurred'".¹¹² Unfortunately, in paragraph 7.483 of the Panel Report, to which Argentina refers,¹¹³ the Panel does not "note" that the costs "necessarily refer to the costs actually incurred". In reality, it does not use any of the words presented by Argentina. The actual text of paragraph 7.483 of the Panel Report in *EC-Salmon*, reads as follows:

In our view, the fact that GAAP-consistent records, which reasonably reflect costs "associated with the production and sale" of the like product [...] implies 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. We understand that the Panel in *Egypt-Steel Rebar* came to a similar conclusion.

152. It is noted that the Panel referred to costs associated with the production and sale "of the *like* product". The Panel did not use the words "associated with the production and sale of the specific product by the specific producer". The use of the term "like" product confirms that, reporting the costs actually incurred by the specific company in order to produce the specific good, does not suffice to make the company records "reasonably reflect the costs associated with the production and sale" for purposes of Article 2.2.1.1. The Panel's choice of words flatly contradicts Argentina's thesis.
153. The conclusion is that the text of Article 2.2.1.1 of the Anti-Dumping Agreement does not support Argentina's legal interpretation.

4.2. THE CONTEXT OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

154. In paragraph 119 of its Second Written Submission, Argentina makes some inconclusive statements relating to the "different sentences" of Article 2.2.1.1.

¹¹² Argentina's Second Written Submission, para. 117.

¹¹³ Argentina's Second Written Submission, footnote 117.

Argentina does not explain why the second and third sentences of Article 2.2.1.1 allegedly "confirm" that the test in the first sentence is allegedly "not about the reasonableness of the costs". In any event, Argentina's assertion 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" is wrong. Argentina fails to take into consideration the important textual differences between these sentences.¹¹⁴

155. In paragraph 121 of its Second Written Submission, Argentina states 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". However, the second subparagraph of Article 2(5) of the Basic Regulation does not provide for such a test. For this reason, Argentina's statement is not relevant for the present dispute and the European Union will not discuss it any further at this stage.
156. In paragraphs 122 to 126 of its Second Written Submission, Argentina asserts that the "costs associated with the production and sale" of the relevant goods in Article 2.2.1.1 do not need to be reasonable, because the word "reasonable" is used only in the chapeau of Article 2.2 and in Article 2.2.2 in relation to the administrative, selling and general expenses and profits. However, this assertion is not convincing, for a number of reasons.
157. First, both the chapeau of Article 2.2 and Article 2.2.2(iii) refer to "reasonable" administrative, *selling* and general expenses. Likewise, Article 2.2.1.1 refers to "costs associated with the production and *sale*" of the relevant goods. Argentina fails to explain what is the difference between, on the one hand, the *selling* expenses, which Argentina acknowledges must be "reasonable" and, on the other hand, the costs associated with the *sale* of the relevant goods, which Argentina asserts do not need to be reasonable. On the basis of their texts, the chapeau of Article 2.2, Article 2.2.1.1 and Article 2.2.2(iii) cover the same costs, at least as far as *selling*, or associated with the *sale* costs are concerned.
158. Argentina probably understands that its position is weak on this point. This is seen by the fact that it refers only to the "cost of production" in paras. 122, 123 and 126

¹¹⁴ European Union's First Written Submission, paras. 150 to 154.

- of its Second Written Submission and has omitted all references to the "costs associated with the production *and sale*".
159. However, Article 2.2.2 expressly refers to data pertaining to "production and sale" of the relevant goods, just like Article 2.2.1.1 refers to "costs associated with the production and sale" of the relevant goods. There is an obvious textual similarity, which Argentina's theory cannot explain. There is also an issue of logic: why should the "data pertaining to production and sale" be "reasonable" for purposes of Article 2.2.2, but be "unreasonable" for purposes of Article 2.2.1.1?
160. The conclusion is that Argentina's theories on the relation between Article 2.2.1.1 and the other provisions of Article 2.2 fail.
161. In paragraphs 127 to 133 of its Second Written Submission, Argentina seeks to build certain arguments on the purported definition of dumping. However, none of them is convincing.
162. In paragraph 127 of its Second Written Submission, Argentina refers to Article 2.1 of the Anti-Dumping Agreement. However, it 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. Where there are no such sales, as was the case with the Biodiesel investigation, the provisions of Article 2.2 of the Anti-Dumping Agreement apply.
163. In paragraphs 128 to 134 of its Second Written Submission, Argentina seeks support for its theory in the zeroing cases. However, it fails to address the fact that the issue in those cases was whether the dumping margin should be calculated on the basis of each individual transaction by a single exporter, or on the basis of all the transactions performed by the same exporter. Therefore, the question that had to be answered in those cases was whether to aggregate or not the transactions of a single exporter. Unlike the present dispute, the zeroing cases did not address the issue of whether the company records reasonably reflected the costs associated with the production and sale of the relevant goods.
164. Moreover, the zeroing cases did not involve the construction of normal value. They dealt with the export price part of the dumping margin calculation, which helps to explain the Appellate Body's focus on the "pricing behaviour" of the same exporter in different transactions. In paragraph 133 of its Second Written Submission, Argentina notes that the pricing behaviour of the exporter "relates" to

both the normal value and the export price. It is uncontroversial that the pricing decisions of exporters may well be influenced by their costs. However, the opposite is not true: the construction of normal value normally does not depend on the exporter's export prices or pricing behaviour. This is an important element that differentiates the present dispute from the situation faced by the Appellate Body in the zeroing cases and precludes the transposition of the Appellate Body's findings in those cases to the issues before the Panel in the present case.

165. In that regard, it is interesting to note paragraph 137 of Argentina's Second Written Submission. In that paragraph, Argentina tries to distinguish the present case from the Appellate Body Report in *US-Anti-Dumping and Countervailing Duties (China)* on the ground that that case did not relate to the construction of normal value. Argentina's position in relation to that Appellate Body Report is inconsistent with its position in relation to the zeroing cases, which also did not involve the construction of normal value. And, Argentina's assertion that government actions cannot be at the source of dumping,¹¹⁵ is simply wrong, as the European Union has already shown in its previous written submissions. We will not repeat these points at this stage.

4.3. THE OBJECT AND PURPOSE OF THE ANTI-DUMPING AGREEMENT

166. In relation to the object and purpose of the Anti-Dumping Agreement, Argentina's Second Written Submission discusses only two points: (a) the ad hoc group on the implementation of the anti-dumping code of the Tokyo Round;¹¹⁶ and (b) the negotiating history of the Anti-Dumping Agreement in the Uruguay Round.¹¹⁷ However, none of them supports Argentina's position.
167. In relation to the first point, it is uncontroversial that the Tokyo Round anti-dumping code did not include a provision equivalent to Article 2.2.1.1. This has two important implications. First, the anti-dumping code cannot be used as a source of interpretation of Article 2.2.1.1. Second, the introduction of Article 2.2.1.1 in the Anti-Dumping Agreement signals the agreement of the WTO

¹¹⁵ Argentina's Second Written Submission, para. 137.

¹¹⁶ Argentina's Second Written Submission, paras. 142 to 144.

¹¹⁷ Argentina's Second Written Submission, para. 145.

- Members to introduce new rules and disciplines, which did not exist under the anti-dumping code.
168. The consequence is that the documents discussed by Argentina in paragraphs 142 to 144 of its Second Written Submission are irrelevant for the present dispute. If they still have some relevance, then this is to provide support to the European Union's interpretation: the "controversial" issue of the Draft Recommendation under the anti-dumping code was resolved through the introduction of Article 2.2.1.1 in the Anti-Dumping Agreement.
169. In relation to the second point, the negotiating history of Article 2.2.1.1 actually supports the European Union's interpretation. We will not repeat at this stage the points made in our Second Written Submission.¹¹⁸
170. The conclusion is that there is nothing in the object and purpose of the Anti-Dumping Agreement that could support Argentina's thesis. Quite to the contrary, the object and purpose of Article VI of the GATT and of the Anti-Dumping Agreement support the European Union's interpretation.
171. In paragraphs 147 to 151 of its Second Written Submission Argentina restates various points which it has already discussed in earlier parts of its Second Written Submission. The European Union has already addressed them in the relevant parts of its Opening Statement and will not repeat this discussion at this stage.
5. **ARGENTINA ADVANCES AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT**
172. In paragraph 152 of its Second Written Submission, Argentina states that "any adjustment" made pursuant to Article 2.2.1.1 "is subject to the broader rule contained in Article 2.2 that the cost of production must be the cost of production in the country of origin". However, that statement is inconclusive. Article 2.2.1.1 has been inserted into Article 2.2 in order to describe the preferred sources to be used in order to calculate the costs of Article 2.2. However, it does not provide what sources can be used, if the preferred sources do not meet the conditions of the first sentence of Article 2.2.1.1. Argentina's statement that the answer to this question is given by the chapeau of Article 2.2 is circular. If the chapeau of

¹¹⁸ European Union's Second Written Submission, paras. 93 to 98.

- Article 2.2 had the answer to that question, then there would have been no need for Article 2.2.1.1 in the Anti-Dumping Agreement.
173. In paragraphs 153 and 156 of its Second Written Submission, Argentina states that the distinction between the notion of "costs" and the "evidence pertaining to the determination of costs" is artificial. However, Argentina contradicts itself in paragraph 154 of its Second Written Submission, where it states that the "evidence/data to be used are those in the country of origin". That statement shows that Argentina actually accepts that there is a distinction between the "costs" and the "evidence pertaining to the determination of the costs".
174. Moreover, Argentina's statement that the evidence must come from the country of origin¹¹⁹ is contradicted by the provisions of Article 6 of the Anti-Dumping Agreement.¹²⁰
175. In paragraphs 156 and 157 of its Second Written Submission, Argentina states that the European Union "disregards the point" that "adjustments would need to be made in order to ensure that the evidence taken from outside the country correctly reflects the situation in the country of origin". We do not consider that the European Union has "disregarded" this point. Quite to the contrary, in the Biodiesel investigation the investigating authorities made certain adjustments on the relevant data in order to ensure that the resulting cost would reflect as closely as possible the domestic price in Argentina in the absence of the distortion.¹²¹
176. In paragraph 158 of its Second Written Submission, Argentina states that it "needs to be demonstrated how the evidence used [...] correctly reflects the 'cost of production' in the exporter's country of origin". It is difficult to see the relevance of this statement for Argentina's "as such" claim under Article 2.2.1.1 of the Anti-Dumping Agreement, because Argentina does not explain how this demonstration should be done. Moreover, even if Argentina were to assert that the European Union has failed to make this demonstration in some particular case, it is still not

¹¹⁹ Argentina's Second Written Submission, paras. 155 and 156.

¹²⁰ European Union's Second Written Submission, paras. 134 and 135.

¹²¹ Argentina's First Written Submission, para. 162.

clear how this would support Argentina's "as such" challenge against the second subparagraph of Article 2(5) of the Basic Regulation.

177. In paragraph 159 of its Second Written Submission, Argentina states again that the provisions of Article 2.2.2 of the Anti-Dumping Agreement cannot provide any support for the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement. However, Argentina itself has considered the provisions of Article 2.2.2 as the "context" within which Article 2.2.1.1 must be interpreted.¹²² Argentina has even referred to the provisions of Article 2.2.2(iii) as "context" in order to support its argument 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".¹²³ Therefore, Argentina's attempt to dissociate Article 2.2.1.1 from Article 2.2.2 in paragraph 159 of its Second Written Submission is not convincing.
178. The conclusion is that Argentina's Second Written Submission does not provide any factual evidence or legal arguments that render convincing Argentina's excessively restrictive interpretation of the chapeau of Article 2.2 of the Anti-Dumping Agreement.

6. FACTUAL ELEMENTS RELATING TO THE BIODIESEL INVESTIGATION

179. In paragraphs 168 to 170 of its Second Written Submission, Argentina takes issue with the expression "prices fixed by the government of Argentina", found in the European Union's Opening Statement in the First Hearing. However, the European Union was not asserting that the government of Argentina fixed the prices at which soya bean and soya bean oil was being traded inside Argentina. The full statement of the European Union was that "the government of Argentina fixed the prices of soya bean and soya bean oil, which the investigating authority used as a basis in order to calculate the cost of soya bean and soya bean oil in Argentina".¹²⁴ Therefore, the European Union was referring to the "average of the reference prices of soya beans published by the Argentine Ministry of

¹²² Argentina's First Written Submission, paras. 112 to 114.

¹²³ Argentina's First Written Submission, para. 114.

¹²⁴ European Union's Opening Statement in the First Hearing, para. 81.

- Agriculture".¹²⁵ In paragraph 169 of its Second Written Submission, Argentina actually confirms that these prices were "published by the government of Argentina". Moreover, during the First Hearing, Argentina confirmed that it is the government that determines these prices on the basis of a "basket" of various prices and sources.¹²⁶ Therefore, there is no "factual inconsistency" in the European Union's statement.
180. It is interesting to note that in paragraph 170(d) of its Second Written Submission, Argentina states that there is no "direct governmental intervention" in the determination of the domestic prices of soybeans and soybean oil. This probably constitutes Argentina's acknowledgment that the export tax system that it has put in place constitutes an *indirect* government intervention in the determination of these domestic prices.
181. In paragraph 174 of its Second Written Submission, Argentina makes various statements in relation to the use of the term "particular market situation" in the Definitive Regulation. It is not clear what is the relevance of these statements in the present case. The Provisional Regulation and the Definitive Regulation expressly state that, in applying Article 2(3) of the Basic Regulation, the investigating authorities found that the domestic sales of biodiesel in Argentina could not be used for the calculation of the dumping margin because there were no domestic sales in the ordinary course of trade.¹²⁷ Therefore, it is clear that the investigating authorities did not find that there was a "particular market situation" in the Argentine market for biodiesel, for purposes of Article 2(3) of the Basic Regulation and Article 2.2 of the Anti-Dumping Agreement. The conclusion is that the notion of a "particular market situation", in the sense of these two provisions, is not relevant in the present dispute.
182. Argentina also makes some inconclusive statements in relation to the "DET system" and the "export tax on soybean and soybean oil".¹²⁸ However, there is no real difference between the two terms. The "DET system" includes the export

¹²⁵ Definitive Regulation, Recital 40.

¹²⁶ Argentina's Reply to Question 44.

¹²⁷ Provisional Regulation, Recital 45. Definitive Regulation, Recital 28.

¹²⁸ Argentina's Second Written Submission, para. 174.

taxes and a reference to the DET system may be a reference to any part of that system. Moreover, the European Union's reference to the specific export tax on soya beans in the present dispute flows naturally from the way that Argentina has framed its claims. Indeed, Argentina does not raise any claim in relation to the "differential" aspect of the DET system. As a result, the "differential" aspect of the DET system is outside the Panel's terms of reference and the European Union does not have any reason to refer to it.

183. In paragraph 172 of its Second Written Submission, 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. The Panel asked whether the 60% figure mentioned in Recital 133 of the Provisional Regulation referred to imports by the European Union "producers", or the European Union "industry".
184. In fact, there is no contradiction, since Recital 133 refers to quantities that "they" have imported, referring to the European Union's "producers" (in plural), mentioned in the preceding Recital, rather than to the "industry" (which is consistently referred to in the singular). Where an error did arise was when this statement was repeated in Recital 151 of the Definitive Regulation and reference was made to the European Union industry, rather than the European Union producers.
185. The conclusion is that there are no "factual inconsistencies" in the European Union's submissions and statements in the present dispute.

7. PARAGRAPHS 175 TO 196 OF ARGENTINA'S SECOND WRITTEN SUBMISSION

186. In that part of its Second Written Submission Argentina reiterates the points it has already presented in paragraphs 107 to 146 of its Second Written Submission. The European Union will not address these points again at this stage. We will provide only some comments on certain points that seem not to be included in other parts of Argentina's Second Written Submission.
187. In paragraphs 185 to 187 of its Second Written Submission, Argentina asserts that the European Union used "as a benchmark" the international price of soybean minus the export tax and argues that 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". Argentina asserts that this contradicted the Panel's findings in *Egypt-Steel Rebar*, in particular, on the question of whether the costs "pertain to the production and sale" of the relevant goods "in that investigation and in that case".

188. However, Argentina is relying on the wrong legal authority. That finding of the Panel in *Egypt-Steel Rebar* did not relate to the investigating authority's determination of whether the company records reasonably reflected the relevant costs; it related to the question of what cost elements the investigating authorities could use when establishing or adjusting the relevant costs. This is seen in paragraph 7.389 of the Panel Report in *Egypt-Steel Rebar*, which describes the complaining party's claims and reads:

Turkey claims that by failing to deduct short-term interest income from interest expense in computing the net interest expense which it included in the cost of production and constructed normal value, the IA violates Article 2.2.1.1 [...]

189. Therefore, the relevant findings of the Panel in *Egypt-Steel Rebar*, to which Argentina relies, do not relate to the issue of "benchmarking". The arguments that Argentina seeks to build on these findings fail.
190. In paragraphs 188 and 189 of its Second Written Submission, Argentina states that the "FOB reference price minus fobbing costs is not a cost that is associated with the production and sale of the biodiesel under consideration".
191. However, Argentina's statements are inaccurate. Argentina has already acknowledged that the FOB reference price minus fobbing costs was very close to the domestic price of soya bean that Argentine biodiesel producers would have to pay in Argentina in the absence of the government induced distortion.¹²⁹ Therefore, these prices "pertained to the production" of the specific good which was subject to the specific investigation in that specific case, because they reflected the soya bean prices that the biodiesel producers would have to bear in Argentina in normal circumstances, i.e., in the absence of the distortion.

¹²⁹ Argentina's Reply to Question 43.

192. In paragraphs 191 and 193 of its Second Written Submission, Argentina accuses the European Union of "playing with the words". However, the fact remains that the prices used by the investigating authorities were determined by the government of Argentina on the basis of a "basket" of sources.¹³⁰ It was the government of Argentina that selected those sources. The fact that the government of Argentina may have selected as sources also various international markets justifies the statement that the FOB reference prices "reflected" international prices, which is found in the text of the Definitive Regulation. However, this does not transform the Argentine-determined FOB reference prices themselves into "international prices".
193. Finally, in paragraph 192 of its Second Written Submission Argentina takes issue with the European Union's use of the word "hypothetical" in its First Written Submission. Likewise, in paragraph 194 of its Second Written Submission, Argentina states that the prices used by the investigating authorities were not the prices "at which soybean is acquired domestically". Argentina's statements are based on the premise that the company records "reasonably reflect costs" when they simply contain the "expenses actually incurred" by the relevant companies. However, if this was the case, then it would be impossible to ever establish or adjust the costs contained in company records. Argentina's theory implies that the figure arrived at after such establishment of adjustment would always be rejected as "hypothetical", because it would not be the actual figure contained in the company records. This theory cannot be correct. The third sentence of Article 2.2.1.1 expressly provides that costs can be adjusted in certain circumstances. Moreover, the possibility of establishing or adjusting the costs on the basis of sources other than the company records, when the relevant conditions are met, is implicit in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The conclusion is that Argentina's theory must be rejected.

8. ARGENTINA'S OTHER CLAIMS

8.1. THE ISSUE OF PROFITS

¹³⁰ Argentina's Reply to Question 44.

194. In paragraph 145 of its Second Written Submission, the European Union noted that Argentina appears to assert that it is the methodology that needs to be "reasonable" and not the profit figure that needs to be "reasonable". Argentina's Second Written Submission appears to confirm that this is precisely Argentina's theory.
195. In particular, in paragraph 197(a) of its Second Written Submission, Argentina states that the European Union has provided a "justification of the figure that the European Union arrives at, but does not indicate how or according to what procedure or method the European Union arrived at this figure". Therefore, Argentina appears to assert that the fact that the profit "figure" is actually reasonable is not sufficient to ensure compliance with the chapeau of Article 2.2 and with Article 2.2.2 of the Anti-Dumping Agreement. The European Union disagrees with Argentina's theory and notes that Article 2.2 of the Anti-Dumping Agreement expressly refers to a "reasonable amount for [...] profits".
196. In paragraph 199 of its Second Written Submission, Argentina states that "the European Union did not establish the amount of profits pursuant to any method, let alone a reasonable one". Besides the fact that the European Union has already described the methodology it followed in order to establish the profit figure,¹³¹ there is one more problem with Argentina's statement: Argentina does not explain what would actually be a reasonable method.
197. Argentina makes various negative statements in relation to each step of the methodology followed by the investigating authorities in order to identify an appropriate profit margin and then test the reasonableness of that margin.¹³² However, Argentina does not provide any explanation of what would be a "reasonable" method, to which the method actually followed by the investigating authorities should be compared in order to confirm its own "reasonableness". This is a shortcoming that prevents Argentina from making a *prima facie* case on its claims relating to the amount of profits.
198. Finally, in paragraph 198 of its Second Written Submission, Argentina states that the "European Union pays particular attention to the target profit set for the

¹³¹ European Union's Replies to Questions 51, 52 and 53, where there are further references to the European Union's First Written Submission.

¹³² Argentina's Second Written Submission, para. 197(a) to (d).

European Union industry in the earlier anti-dumping investigation concerning imports of biodiesel originating in the United States" and asserts that this constitutes a *post hoc* rationalisation.

199. Argentina's assertion is unwarranted. Argentina omits to mention that it was Argentina itself that raised this issue in paragraph 282 of its First Written Submission, which led the Panel to ask Question 53 precisely on this point. The European Union had no option but to respond to the Panel's question and to explain the fallacies in paragraph 282 of Argentina's First Written Submission.
200. The conclusion is that Argentina has failed to make a *prima facie* case on its claims against the amount of profits established by the investigating authorities.

8.2. THE CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

201. There are only three points in Argentina's discussion of its claims under Article 2.4 of the Anti-Dumping Agreement in its Second Written Submission that merit some comment at this stage of the proceedings.
202. The first point is Argentina's statement that the European Union has allegedly "not denied that there is a difference between normal value and the export prices".¹³³ It is not clear what Argentina means. The notion of the dumping margin is defined as the difference between the normal value and the export price. Therefore, the existence of a difference between the two values is not something extraordinary in an anti-dumping investigation. On the other hand, if Argentina refers to the concept of "differences affecting price comparability", in the sense of Article 2.4 of the Anti-Dumping Agreement, then, for the avoidance of any doubt, the European Union confirms that it denies that such differences exist in the present case.
203. The second point is Argentina's statement that the European Union could have "made an adjustment [...] to export price".¹³⁴ The European Union recalls Argentina's admission during the First Hearing that it does not claim that the investigating authorities should have added the value of the export tax to the

¹³³ Argentina's Second Written Submission, para. 204.

¹³⁴ Argentina's Second Written Submission, para. 206.

export price of biodiesel.¹³⁵ We invite the Panel to take note of this inconsistency in Argentina's statements.

204. The third point is Argentina's statement that the investigating authorities could have acted consistently with Article 2.4, while still acting inconsistently with Article 2.2 of the Anti-Dumping Agreement.¹³⁶ This statement is creative, but it actually reverses the order of the analysis. In reality, Argentina should have been able to show that the conduct of the investigating authorities was *inconsistent* with Article 2.4, *despite being consistent* with Article 2.2 of the Anti-Dumping Agreement. This would have been a claim under Article 2.4 that would have been independent from the allegedly erroneous calculation of the normal value and which would have related to the "nature of the comparison" between normal value and export price. However, Argentina has not done so. Argentina has actually challenged the construction of normal value. Such a claim falls outside the scope of Article 2.4 of the Anti-Dumping Agreement.

8.3. THE CLAIM UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

205. In paragraph 209 of its Second Written Submission, Argentina states: "given that the only difference between both stages was the source of information used to construct normal value, Argentina has thus established that the definitive anti-dumping duties imposed exceed the margin of dumping as established under Article 2". Likewise, in paragraph 211 of its Second Written Submission, Argentina states that it "has fully established the European Union's violation" because it has "first determined the margins of dumping established under Article 2 (as shown by the calculations at the provisional stage)" and has, then, "demonstrated that the definitive duties exceed those margins of dumping".
206. These statements are wrong. Argentina fails to explain why the difference between (a) the dumping margins calculated during the definitive stage; and (b) the dumping margins calculated during the provisional stage, allegedly "fully establishes" that the definitive anti-dumping duties exceed the dumping margin. In

¹³⁵ European Union's Second Written Submission, para. 22.

¹³⁶ Argentina's Second Written Submission, para. 206.

- reality, Argentina should have compared the definitive anti-dumping duties with the definitive dumping margins.
207. Argentina's explanation seems to be that the definitive dumping margins were incorrect, because the normal values on which they were based were not calculated consistently with Article 2 of the Anti-Dumping Agreement. Argentina appears to take the view that the provisional dumping margins were the correct ones, because they were based on the "correct" constructed normal value.¹³⁷ However, this confirms that Argentina is in reality challenging the construction of normal value and not the comparison of the final anti-dumping duties with the final dumping margins. 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.
208. In paragraph 213 of its Second Written Submission, Argentina states that the European Union's interpretation could lead to a situation where a "WTO Member would not act inconsistently with Article 9.3 [...] as long as it levies duties that do not exceed the investigating authorities dumping margin determinations, even when those determinations are inconsistent with Article 2".
209. However, this is not the type of situations that Article 9.3 covers. If the construction of the normal value was inconsistent with Article 2, then the complaining party would be able to challenge it under Article 2 of the Anti-Dumping Agreement. A claim under Article 9.3 would need to show some inconsistency related to the nature of the comparison between the anti-dumping duties and the dumping margins and not simply an erroneous construction of normal value in violation of Article 2. To paraphrase the aphorism used by Argentina in relation to its claim under Article 2.4, Argentina's claim could fall within the scope of Article 9.3 if Argentina could show that the investigating authorities acted inconsistently with Article 9.3, despite having constructed the normal value consistently with the provisions of Article 2.2. However, this is not the claim that Argentina puts forward in the present case.
210. Finally, in paragraph 213 of its Second Written Submission, Argentina refers to paragraph 132 of the Appellate Body Report in *US-Zeroing (EC)* and states that it

¹³⁷ Argentina's Second Written Submission, para. 208 and 212.

provides that the margin of dumping must have "been established consistently with Article 2.1 and 2.4.2" of the Anti-Dumping Agreement.¹³⁸ However, that paragraph of the Appellate Body Report does not include any reference to Articles 2.1 or 2.4.2. In that part of its Report, the Appellate Body was simply addressing the issue of whether the investigating authority should calculate dumping margins on the basis of an "aggregation of all intermediate results" of "comparisons made at an intermediate stage". The Appellate Body concluded that the "assessed anti-dumping duties have to be compared" with the margins of dumping that "reflect the results of all the multiple comparisons carried out at an intermediate stage of the calculation".¹³⁹ These Appellate Body's 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.

211. The conclusion is that Argentina's claim falls outside the scope of Article 9.3 of the Anti-Dumping Agreement.

9. ARTICLE 3 CLAIMS

212. In paragraph 216 of its Second Written Submission, Argentina continues to treat the issue of "utilisation of capacity" as a stand-alone issue, divorced from its context. Accusing the European Union of wrongfully excluding part of the production capacity from the recorded capacity, simply assumes what it purports to prove.
213. The investigating authorities replaced the figures presented in the Provisional Regulation when they identified the mistaken basis on which they had been calculated. 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.
214. Argentina describes the criterion adopted by the investigating authorities for defining capacity as "extremely vague". The Definitive Regulation speaks of

¹³⁸ Argentina's Second Written Submission, footnote 207,

¹³⁹ Appellate Body Report, *US-Zeroing (EC)*, para. 132.

- "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 in previous years to manufacture biodiesel".¹⁴⁰ It also speaks of "capacity that had been installed was not immediately available for use, or only available for use with significant investment".¹⁴¹ These are practical criteria, which the investigating authorities considered provided a workable basis for applying the notion of capacity. Moreover, the Definitive Regulation noted that "no alternatives were provided by any interested party".¹⁴² We note that Argentina has not made any such proposal.
215. Even if the figures given in the Provisional Regulation were valid, they could hardly be said to give significant support to the thesis that overcapacity was a cause of the increasing injury suffered by the European Union's industry during the period concerned. The Provisional Regulation made this point in Recital 137.
216. The European Union confirms that Argentina is mistaken in stating that the production capacity figures presented by the EBB and included in the Provisional Regulation were intended to *exclude* that of idle facilities.¹⁴³ The confidential version of the EBB submission of 17 September 2013 makes clear that its estimate was intended to *include* idle capacity.
217. Argentina purports to find that the figures presented by the investigating authorities in support of their conclusion lack credibility. However, the only figures on which the injury conclusions are justified are the ones in the Definitive Regulation. These are the figures that, after lengthy investigation involving the EBB and other sources, the investigating authorities felt they could rely on. That Argentina has a preference for those contained in the Provisional Regulation is very obvious, but such a preference is not a basis for accepting their reliability. Argentina has stressed the requirement of positive evidence, but does not provide any in support of its own arguments. The reality of its supposed "multiplicity of available public sources",¹⁴⁴ has already been exposed.¹⁴⁵

¹⁴⁰ Definitive Regulation, Recital 131.

¹⁴¹ Definitive Regulation, Recital 132.

¹⁴² Definitive Regulation, Recital 133.

¹⁴³ Argentina's Second Written Submission, paras. 219 and 224.

¹⁴⁴ Argentina's Second Written Submission, para. 221.

218. Argentina refers again to the case of Diester, which as one of the sampled producers, was found to have slightly reduced its capacity during the period considered.¹⁴⁶ 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. It merely confirmed the reduction in capacity.
219. As regards causation and the role of overcapacity, Argentina rests its case on the production figures presented in the Provisional Regulation. However, the investigating authorities had made clear that they could no longer be relied upon.
220. The European Union industry may have suffered from overcapacity and this overcapacity may have had some effect on its profitability. However, that was the situation already at the beginning of the period concerned and it continued throughout the period. In fact, the data show that the industry actively worked to reduce capacity during this time. This means that, if anything, one might expect the injury caused by overcapacity to have decreased whereas other data of the industry show increasing injury. In any event, in so far as overcapacity may be a cause of injury, this must be because of the costs that it imposed on the industry. This point was explicitly addressed by the investigating authorities, which calculated that the fixed costs associated with operating biodiesel plants were "only a small proportion (roughly 5%) of total production costs".¹⁴⁷
221. Argentina argues that the European Union industry was in effect a trader in biodiesel, rather than a producer of biodiesel.¹⁴⁸ However, immediately before making this argument, Argentina has been alleging that the industry vastly overextended its production capacity. The two arguments contradict one another. What would be the point of building increasing volumes of capacity, if the intention was to be an importer and reseller of the finished product? In reality, the position that the European Union industry found itself was a common one for industries facing dumped imports. To keep themselves in business and to maintain their customer base, while seeking protection against unfair imports, they imported

¹⁴⁵ European Union's First Written Submission, para. 309.

¹⁴⁶ Argentina's Second Written Submission, para. 225.

¹⁴⁷ Definitive Regulation, Recitals 164 to 166.

¹⁴⁸ Argentina's Second Written Submission, para. 237.

- and resold dumped imports that would otherwise have gone directly to their customers, or been imported by traders. Argentina accuses the investigating authorities of failing to provide evidence that traders would have imported the same volumes of dumped biodiesel.¹⁴⁹ However, this is not the point. The point is that the industry perceived the risk of such trade and reacted accordingly. Even Argentina admits that there were significant purchases by traders.
222. Argentina accuses the investigating authorities of failing to examine double-counting regimes other than the French regime.¹⁵⁰ As the Provisional and the Definitive Regulations show, the Union took the issue of double-counting seriously.¹⁵¹ Information about national schemes, particularly at the level of actual implementation, was difficult to obtain. For this reason, the investigating authorities looked at the European Union producers which it had included in its sample to discover the effects of such schemes. On the basis of this examination, it could identify no significant consequences from the operation of the schemes. Had there been such consequences, the financial position of companies that manufactured double-counted biodiesel would have been distinguished from those that did not. Apart from a minor effect in one company, the investigating authorities could not identify any such distinction.¹⁵²
223. Regarding Argentina's arguments on vertical integration, it is possible that some physical factors may lower costs of production, just as other such factors may make the products more expensive.¹⁵³ However, these factors are constants and so do not explain the increasing harm suffered by the European Union industry during the period under consideration. It is not clear how Argentina seeks to refute this proposition.¹⁵⁴
224. To read Argentina's account of the causes of injury, one would remain entirely oblivious of the sharp increase in volume of imports of dumped biodiesel from

¹⁴⁹ Argentina's Second Written Submission, para. 240.

¹⁵⁰ Argentina's Second Written Submission, para. 246.

¹⁵¹ Definitive Regulation, Recitals 173 to 179. Provisional Regulation, Recital 145.

¹⁵² Definitive Regulation, Recital 175. As already explained in previous written submissions, the scheme in question ended, rather than started, in September 2011.

¹⁵³ Argentina's Second Written Submission, paras. 248 to 251.

¹⁵⁴ Argentina's Second Written Submission, para. 250.

Argentina at prices that markedly undercut those of the European Union industry. The investigating authorities' findings did not dispute that other factors had contributed to the situation of the European Union 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.

225. It seems that Argentina is prepared to make such an admission, at least tacitly. Argentina asserts that overcapacity, the factor on which it has placed greatest emphasis, rather than imports from Argentina, was the "main factor" detrimentally affecting the European Union industry.¹⁵⁵ However, although the 1969 Anti-Dumping Code required that the dumped imports be "demonstrably the *principal* cause of material injury", this term does not appear in the Anti-Dumping Agreement. The latter speaks of the dumped imports' "causing injury" and the notion has no basis either there, or in Article VI of the GATT. In fact, the recognition that there may be more than one causal factor, which is implicit in Article 3.5 of the Anti-Dumping Agreement, implies that some factors may be less important than others and, yet, remain causal factors.

10. CONCLUSION

226. Mr. Chairman, this concludes the European Union's Opening Statement. We would like to thank you for your attention as well as for your patience.

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¹⁵⁵ Argentina's Second Written Submission, para. 235.