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In the World Trade Organization
Before the Appellate Body

European Union — Anti-Dumping Measures on Biodiesel from Argentina

(AB-2016-4)

Appellee Submission
by the European Union

Geneva, 7 June 2016

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1. INTRODUCTION

1. Argentina's other appeal focuses on a number of "as such" claims, mainly with regard to the compatibility of the second sub-paragraph of Article 2(5) of the EU's Basic Anti-Dumping Regulation with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement.

2. The European Union considers that Argentina's claims should be rejected. *First*, Argentina wrongly focuses its claims on the second sub-paragraph of Article 2(5), while the EU investigating authorities make the respective determinations under the first sub-paragraph of Article 2(5). *Second*, Argentina reads words that do not exist in the respective legal texts. The EU investigating authorities are under no obligation to use data from outside the country of origin as per the second sub-paragraph of Article 2(5).

3. The European Union briefly recalls that the Appellate Body has considered that "as such" challenges to a Member's legislation are "serious challenges", particularly as Members are presumed to have enacted their laws in good faith.[1] The European Union also recalls that, consistent with the generally applicable principles regarding the burden of proof applicable in WTO disputes, it is for the complainant to establish the WTO-inconsistency of provisions of domestic law, which Argentina failed in the present case.

4. According to the Appellate Body, the "mandatory/discretionary distinction" is only an analytical tool, which may vary from case to case and should not be applied in a mechanistic fashion.[2] The European Union also recalls that in "as such" challenges the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure "as such" can be assessed on that basis alone.[3]

5. Finally, with regard to the "as applied" claims, in essence Argentina argues that the Panel did not make a fair comparison between normal value and export price and that the Panel failed to distinguish overcapacity from capacity utilization.

6. The European Union considers that the Panel did not err in its analysis, both with respect to the challenged "as such" and "as applied" findings, and that the Appellate Body should reject in their entirety Argentina's claims in its other appellant submission and uphold the Panel's findings covered by Argentina's appeal.

7. For the reasons that we have explained in our submissions to the Panel and to the Appellate Body, the measure at issue in this case represents no more than a calibrated and reasonable response to the intended and actual effects of a *de jure* discriminatory export tax, which is highly trade distorting, market partitioning, and unnecessary. The export tax is not only highly anti-social *vis-à-vis* other WTO Members, but also thoroughly bad for Argentina's economy and a serious obstacle

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1 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173.

2 Appellate Body Report, *US — Corrosion-Resistant Steel Sunset Review*, para. 93 and footnote 94.

3 Appellate Body Report, *US — Corrosion Resistant Steel Sunset Review*, para. 168, where there is further reference to the Appellate Body Report in *US-Carbon Steel*, para. 157.

to Argentina realising the full benefits of its membership of the WTO. This has now been expressly recognised by the new government of Argentina itself.[4] Consequently, today, the measure at issue is *aligned with* Argentina's revised policies. From this perspective, the measure at issue is actually contributing to bringing about good, market-based, governance in Argentina, and the dispute settlement system has a golden opportunity to contribute to that process.

2. EXECUTIVE SUMMARY[5]

2.1. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT AND THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION "AS SUCH"

8. The **first** sub-paragraph of Article 2(5) is concerned with the application of the **first** sentence of Article 2.2.1.1 as a matter of EU law. If a simple comparison is made between the two provisions it is clear that there is no "as such" inconsistency.

9. By contrast, the **second** sub-paragraph of Article 2(5) is concerned to set out what is to be done, as a matter of EU law, if one of the two conditions is not met: in effect, it partially completes the **silence**, for the purposes of EU law.

10. With regard to **the text of the second sub-paragraph** of Article 2(5), *first*, a provision can govern a particular question even if it does not elaborate further detailed criteria. *Second*, just because one provision might be context for another

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[4] "Mauricio Macri on Monday made his first big economic announcement as Argentina's new president, scrapping taxes on agricultural exports in a bid to boost precariously low central bank reserves. Confirming a campaign promise to Argentina's key farming sector, the world's largest exporter of soyabean derivatives, Mr Macri said taxes on grain and beef exports will be removed immediately, while a 35 per cent tax on soya exports will be cut by 5 percentage points a year. The move represents the first in a raft of imminent reforms as Mr Macri seeks to kick-start Argentina's flagging economy, and aims to return profitability to the country's struggling farmers who often came to blows with the former president, Cristina Fernández, over heavy-handed government intervention. "This country cannot get by without farmers," Mr Macri said on Monday, surrounded by a wheat field in the province of Buenos Aires, near one of the focal points of bruising farming strikes in 2008 that were held in protest against punitive rises in export taxes. "You will have to do your bit, which is to export fewer [unrefined] grains," Mr Macri told a group of farmers, urging them to add more value to their produce. "We have to go from being the breadbasket of the world to the supermarket of the world," he said. To compensate for the fall in revenues, the government hopes the measures will stimulate a dramatic increase in production and to receive more through taxes on profits. Mr Macri also promised to crack down on tax evasion. "It is the correction of an error committed by the previous government," said Gustavo Grobocopatel, president of one of Argentina's largest farming groups, Los Grobo. While Argentina's tax agency has estimated that farmers are hoarding as much as $11.4bn of soya, corn and wheat, officials hope to attract at least $6bn dollars through farming exports in the short term, in order to bolster foreign exchange reserves which fell below $25bn last week. Some economists calculate that liquid reserves are close to zero. Nevertheless, analysts say farmers are likely to continue hoarding grains until Mr Macri fulfils another campaign promise to unify Argentina's chaotic exchange rate regime and implement a de facto devaluation, which would allow farmers to receive more pesos for their exports. …" Financial Times, 14 December 2015: http://www.ft.com/cms/s/0/3f7cf388-a275-11e5-8d70-42b68cfae6e4.html#.

[5] Total number of words (including footnotes but excluding executive summary) = 14964; total number of words of the executive summary = 1477.

does not mean that the determination provided for in the first is in fact made pursuant to the second. *Third*, the European Union does not understand how the second sub-paragraph can be applied before the first.

11. With regard to **the context of the second sub-paragraph** of Article 2(5), *first*, Argentina confuses the alleged preparatory work (supplementary means of interpretation) with the context. None of Argentina's assertions lends support to its interpretation. *Second*, in EU law recitals do not "establish rules", they provide **reasons**. The relevant EU law rule is in the first sub-paragraph. *Third*, the sequence of determinations mooted by Argentina does not demonstrate that the second sub-paragraph does anything other than partially complete the silence, for the purposes of EU law. *Fourth*, none of the quoted authors suggests that the second sub-paragraph of Article 2(5) governs the question at issue.

12. With regard to the **alleged consistent EU practice,** Argentina did not seek its review "as such" before the Panel. An analysis of all cases invoked reveals that, conceptually, each of them has a two-step structure.

13. With regard to the **judgments of the General Court of the European Union**, they clearly reflect the two-step structure. The Court found that the second sub-paragraph partially completes the silence as a matter of EU law.

14. Argentina asserts that the **Panel's analysis is vitiated by two erroneous premises**. However, the rule in the first sub-paragraph of Article 2(5) provides for the relevant criteria, and no further criteria are supplied by the second sub-paragraph.

15. With regard to **the so-called mandatory/discretionary analytical tool**, the language that concerns the determination of whether or not the records of the firm reasonably reflect the costs associated with production and sale is contained in the first sub-paragraph.

16. With regard to **Article 11 of the DSU,** the Panel made an objective assessment of the matter before it, including an objective assessment of the facts.

17. The Appellate Body does not need to reach the stage of **completing the legal analysis**, because Argentina's submission does not disclose any basis on which to reverse the Panel's findings.

2.2. ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION "AS SUCH"

18. With regard to the **interpretation of Article 2.2**, the Panel did not err by finding that it does not limit the sources of information that may be used in establishing the costs of production. Argentina ignores the possibility that there may be situations where information from the country of origin is deficient or absent.

19. The Panel did not err in its determination of **the scope, meaning and content of Article 2(5), second sub-paragraph**.

20. With regard to the **text of Article 2(5), second sub-paragraph**, *first*, resort to "any other reasonable basis" is part of several options that the authorities have at their disposal. There is no obligation to use information from "other representative markets". *Second*, there may be other reasonable "bases" in the country of origin. *Third*, "other representative markets" may include other relevant product markets

in the country of origin. *Fourth*, Article 2(5), second sub-paragraph, refers to the **sources of information** that may be used to establish an investigated producer's costs, as opposed to the **costs** themselves.

21. With regard to the **legislative history**, neither the second sub-paragraph of Article 2(3) nor Recital 4 of Regulation 1972/2002 suggest that the EU authorities must systematically resort to information not in the country of origin. They both inform only the case of a "particular market situation".

22. With regard to the **alleged consistent practice of the EU authorities**, Argentina did not challenge the alleged practice itself. The practice, as a (potential) measure, should be distinguished from the instrument. Several examples confirm that the authorities enjoy a broad discretion.

23. With regard to the **judgments of the General Court of the European Union**, they show that the EU authorities are *entitled* to establish the producer's costs on the basis of sources that are unaffected by that distortion.

24. Finally, the Panel **did not fail to make an objective assessment of the matter** as required by Article 11 of the DSU.

25. **The Panel did not apply an erroneous legal standard for the establishment of the "as such" claim**. Argentina has not demonstrated that the provision at issue cannot be applied in a WTO-consistent manner and that it *will necessarily be inconsistent with the EU's WTO obligations*. The second sub-paragraph does not *require* the investigating authority to use information from outside the country *in all cases*, as confirmed by the practice.

2.3. ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT AND THE EU ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

26. The claims and arguments under Article 2.2.1.1 and Article 2.4 are closely related. Fundamentally, the EU is arguing that an adjustment was justified, because a standard of **reasonableness** informs the interpretation and application of the entirety of the second condition in the first sentence of Article 2.2.1.1.

27. Article 2.4 is important context for understanding the circumstances in which it is justified to make an adjustment under Article 2.2.1.1. Article 2.4 expressly mentions taxation, which is an action done by the State. Furthermore, Article VI of the GATT 1994 relates to both dumping and subsidisation.

28. It is not disputed in this case that there is an approximate **correlation** between the rate of the export tax and the consequent reduction in the price of soya in Argentina. The **difference** in Article 2.4 is not the **result** of the comparison. The "difference" pertains to what has to be adjusted **before** the comparison is made.

29. The measure at issue did not make the adjustment pursuant to Article 2.4, but following the determination that the second condition in the first sentence of Article 2.2.1.1 was not fulfilled; and on the basis of the second sub-paragraph of Article 2(5), which partially completes the silence for EU law purposes. If the adjustment was reasonable and justified, there is no basis for making an un-adjustment under Article 2.4. If the measure is inconsistent with Article 2.2.1.1, the position under Article 2.4 is moot.

2.4. THE PANEL'S FINDINGS UNDER ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

30. The EU authorities concluded that (i) during the period considered the state of the domestic industry deteriorated, while (ii) low capacity utilization was a constant or permanent feature of the EU biodiesel industry.

31. The conclusion of the EU authorities on the issue of overcapacity is unchanged from the Provisional to the Definitive Regulation. The Panel did not err when finding that the revised data in the Definitive Regulation did not have a role in the EU authorities' conclusion on overcapacity as an "other factor" causing injury. The EU authorities relied on what Argentina accepts as the correct data (Provisional Regulation), determining that overcapacity was a constant during the investigation period and therefore could not be a relevant factor.

32. A finding of inconsistency with Articles 3.1 and 3.4 does not automatically render the non-attribution analysis with respect to overcapacity inconsistent with Articles 3.1 and 3.5.

33. The absolute figures revealed nothing about the significance of the increase. An objective and unbiased investigating authority may examine the issue of overcapacity on the basis of capacity utilization.

2.5. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2.1.1

34. *First*, Argentina has not requested the Appellate Body to reverse the Panel's exercise of judicial economy with respect to Argentina's second claim under Article 2.2.1.1.

35. *Second*, the first sentence of Article 2.2.1.1 does not create an obligation on importing Members to only use, in the construction of normal value, costs associated with the production and sale of the product under consideration.

36. *Third*, Argentina merely repeats its prior claims and arguments.

37. *Fourth*, the process to which Argentina is referring is not governed by the first sentence of Article 2.2.1.1, but by the second sub-paragraph of Article 2(5), which partially completes the silence for the purposes of EU law.

3. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT AND THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION "AS SUCH"

3.1. THE MEANING OF THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5)

38. Argentina argues that the **second** sub-paragraph of Article 2(5) of the Basic Regulation is "as such" inconsistent with an obligation imposed on the European Union by the first sentence of Article 2.2.1.1. In this respect, Argentina makes a long, complicated, repetitive and imprecise submission (which appears to start with the alleged preparatory work and/or circumstances of conclusion), as it struggles to make out a case that, plainly, does not exist. We will endeavour to be brief in our response.

39. It is uncontroversial that the first sentence of Article 2.2.1.1 contains two **conditions** that, if met, result in the **obligation** set out in that provision. It is equally uncontroversial that it does not state what is to be done if one of those conditions is not met: this is the **silence** to which reference has been made from time-to-time throughout these proceedings.

40. Evidently, the **first** sub-paragraph of Article 2(5) is concerned with the application of the **first** sentence of Article 2.2.1.1 as a matter of EU law. If a simple comparison is made between the two provisions it is clear that there is no "as such" inconsistency.

41. By contrast, the **second** sub-paragraph of Article 2(5) is concerned to set out what is to be done, as a matter of EU law, if one of the two conditions is not met: in effect, it partially completes the **silence**, for the purposes of EU law.

42. Already from these few observations it is apparent that Argentina's attempts to argue that the **second** sub-paragraph of Article 2(5) is inconsistent with the **first** sentence of Article 2.2.1.1 must fail, because, conceptually, there is simply no match between the two provisions. No match was ever intended and none exists.

43. We can confirm this by simply considering what the situation would be if the second sub-paragraph of Article 2(5) would be deleted. Nothing would preclude the European Union, or any other Member with similarly structured legislation, from adopting "as applied" measures based on a determination that the records of an investigated firm do not reasonably reflect the costs associated with production and sale. This is exactly the current situation with respect to the first condition (local GAAP). In others words, the **root** of *what Argentina is complaining about in this part of the appeal* simply does not reside in the second sub-paragraph of Article 2(5). Rather, it resides in the first sentence of Article 2.2.1.1 and the question of whether or not a standard of reasonableness informs the entirety of the second condition, and the question of whether or not the term "actual" is to be read into the text of that condition. These are issues that are, in effect, simply **transposed untouched** from the first sentence of Article 2.2.1.1 into the first sub-paragraph of Article 2(5).

44. With think that these comments are sufficient to dispose of the matter in this case.[6] We do not think it necessary to labour through the lengthy and repetitive consideration of text, context, practice and court judgments that follows. Nevertheless, for the assistance of the Appellate Body, we will now briefly address the various submissions that Argentina makes.

3.1.1. The text of the second sub-paragraph of Article 2(5)

45. *First*, Argentina submits that the Panel **contradicts itself**.[7] We do not agree. The Panel found: (i) that the first sub-paragraph of Article 2(5) includes a condition that the records of the investigated firm reasonably reflect the costs associated with production and sale; (ii) that this condition is not further elaborated in the first or second sub-paragraphs; and (iii) that the second sub-paragraph describes

[6] Since Argentina's claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement are consequential, we do not believe that they require further comment.

[7] Argentina's other appellant submission, para. 43.

consequences that follow if the condition in the first sub-paragraph is not met. These statements do not disclose any internal contradiction in the Panel's reasoning. Contrary to what Argentina appears to argue, a provision can govern a particular question even if it does not elaborate further detailed criteria with respect to the rule it contains.

46. *Second*, Argentina submits that the Panel erroneously read the first and second sub-paragraphs of Article 2(5) **in isolation** from each other.[8] We do not agree. The Panel correctly assessed each sub-paragraph on its own terms, whilst appropriately taking into account the context of the other. Just because one provision might be context for another does not support the conclusion that the determination provided for in the first is in fact made pursuant to the second.

47. *Third*, Argentina submits that the Panel erred when reading a **sequential order** between the first and second sub-paragraphs.[9] We do not agree. We do not understand how Argentina imagines that the second sub-paragraph can be applied before the first.

48. *Fourth*, and finally, Argentina submits that the Panel erred when it observed that the second sub-paragraph **does not contain any of the terms or concepts used by Argentina** to describe the measure.[10] This is just a repetition of Argentina's submissions regarding context, practice and judgments of the General Court of the European Union, which are dealt with elsewhere.

3.1.2. The context of the second sub-paragraph of Article 2(5)

49. *First*, Argentina makes certain assertions about the legislative history of Article 2(5).[11] In fact, these submissions appear to relate to the alleged preparatory work and/or circumstances of conclusion, rather than the context, that is, to supplementary means of interpretation within the meaning of Articles 31 and 32 of the Vienna Convention. In our submission, a better guide here is the plain meaning of the text, which it would clearly not be justified to set aside on the basis of Argentina's assertions about legislative history. In any event, none of these assertions lend any support to Argentina's submission that the second sub-paragraph of Article 2(5) establishes the EU law rule that corresponds to the WTO law rule by reference to which Argentina frames it claim. The WTO rule is in the first sentence of Article 2.2.1.1; and the EU law rule that corresponds to it is in the first sub-paragraph of Article 2(5).

50. *Second*, Argentina submits that the Panel erred in its consideration of Recital 4 of Regulation No 1972/2002.[12] We do not agree. A recital explains the **reasons** for which a provision is adopted. Recital 4, first sentence, explains that the purpose of the second sub-paragraph of Article 2(5) is to give some guidance as to what has to be done if the records do not reasonably reflect the costs associated with

8 Argentina's other appellant submission, paras. 44-47.

9 Argentina's other appellant submission, paras. 48-49.

10 Argentina's other appellant submission, paras. 50.

11 Argentina's other appellant submission, paras. 61-63.

12 Argentina's other appellant submission, paras. 64-68.

production and sale. This is an allusion to the rule in the first sub-paragraph of Article 2(5), which in turn implements the second condition in the first sentence of Article 2.2.1.1. However, it does not follow that the new provision also implements the second condition. As explained above, the new provision simply partially completes the silence, for the purposes of EU law. Similarly, Recital 4, first sentence, closes with an allusion to a particular market situation, which is a reference to Article 2(3) of the Basic Regulation and Article 2.2 of the Anti-Dumping Agreement. Again, it does not follow from this (or from Recital 3)[13] that the new provision also implements Article 2.2. Finally, the second sentence of Recital 4 recalls that, in such circumstances, the relevant data should be obtained from sources unaffected by such distortions. Once again, it does not follow from this that the new provision is doing anything other than partially completing the silence, for the purposes of EU law: the recital is just explaining the reasons for which the new provision is adopted. The same comments apply with respect to the Explanatory Memorandum. Thus Argentina's conclusion that Recital 4 "establishes the rule"[14] that Argentina alleges to exist is clearly incorrect. In EU law recitals do not "establish rules", they provide reasons. The relevant EU law rule is in the first sub-paragraph of Article 2(5).

51. *Third*, Argentina makes certain assertions about Article 2(3) of the Basic Regulation, when read "in conjunction with" Recital 4.[15] We do not agree that these arguments support Argentina's position. The sequence of determinations mooted by Argentina is the following: there is a particular market situation (Article 2(3) implementing Article 2.2) because of the artificially low price of a raw material (Article 2(3)); normal value is constructed; the records of the investigated firm do not reasonably reflect the costs associated with production and sale (first sub-paragraph of Article 2(5) and second condition in Article 2.2.1.1) (Argentina asserts that this follows "automatically" from the finding of the particular market situation); the silence is completed for the purposes of EU law (second sub-paragraph of Article 2(5)). This sequence does not demonstrate that the second sub-paragraph of Article 2(5) does anything other than partially complete the silence, for the purposes of EU law.

52. *Fourth*, Argentina submits that the Panel erred in its consideration of "articles by scholars" on the basis of which the Panel should have concluded that a determination that the records of an investigated firm do not reasonably reflect the costs associated with production and sale "is actually made pursuant to Article 2(5), second sub-paragraph".[16] We do not agree with these assertions. As the Panel observed,[17] none of these authors suggest that the second sub-paragraph of Article 2(5) governs the question of whether or not the records reasonably reflect the costs associated with production and sale.

3.1.3. Alleged consistent EU practice

13 Argentina's other appellant submission, para. 69.

14 Argentina's other appellant submission, para. 69.

15 Argentina's other appellant submission, paras. 71-73.

16 Argentina's other appellant submission, paras. 74-76.

17 Panel Report, para. 7.144.

53. To recall, Argentina did not seek review of an alleged EU practice "as such" before the Panel. Rather, Argentina refers to an alleged EU practice as allegedly supporting its claim that the second sub-paragraph must be given a meaning that demonstrates that it is inconsistent with the first sentence of Article 2.2.1.1.

54. Argentina submits that the Panel erred in its analysis of the alleged consistent practice of the EU authorities in applying the second sub-paragraph of Article 2(5). Argentina refers to a number of instances in which other EU measures refer "in general" to Article 2(5). Argentina faults the Panel for allegedly assuming that such other measures are based on the first sub-paragraph.[18] We do not agree that these submissions support Argentina's case. A review of each of the eight quotations set out in Argentina's appellant submission[19] reveals that, conceptually, each of them has a two-step structure. First, it is found that the records kept by the investigated firm do not reasonably reflect the costs associated with production and sale (first sub-paragraph of Article 2(5)). Second, it is stated that, as a consequence, an adjustment is appropriate (second sub-paragraph of Article 2(5)). Argentina itself notes that the first type of reference is "immediately followed" by the second type of reference.[20] The fact that these extracts refer to Article 2(5) (which currently has four sub-paragraphs) does not support Argentina's assertion that the second sub-paragraph, rather than the first, is what implements the first sentence of Article 2.2.1.1 in EU law.

55. In this respect, the Panel's reference to the *Aluminium Foil* case does not disclose any legal error.[21] That case contains a determination of the type that Argentina is complaining about, and it was made before the insertion of the second sub-paragraph of Article 2(5). That it was made on the basis of facts available is irrelevant. Thus, Argentina's assertion that all the measures it refers to post-date the insertion of the second sub-paragraph is factually inaccurate.[22] In any event, the only thing that would follow from such an observation, even if true (*quod non*), would be that the EU authorities did not make a determination pursuant to the first sub-paragraph until such time as the silence was partially completed as a matter of EU law by the second sub-paragraph. It does not follow from this that the determination provided for in the first sub-paragraph is actually made pursuant to the second sub-paragraph, as Argentina asserts.[23]

3.1.4. Judgments of the General Court of the European Union

56. Argentina asserts that the Panel erred in its assessment of four judgments of the General Court of the European Union (essentially delivered at the same time). According to Argentina, these judgments support its view that the determination that the records kept by the investigated firm do not reasonably reflect the costs associated with production and sale is made pursuant to the second sub-paragraph

18 Argentina's other appellant submission, paras. 77-92.

19 Argentina's other appellant submission, para. 82.

20 Argentina's other appellant submission, para. 83.

21 Argentina's other appellant submission, para. 86.

22 Argentina's other appellant submission, para. 88.

23 Argentina's other appellant submission, para. 88.

of Article 2(5) and not the first. Specifically, Argentina asserts that the Court made "one single assessment" (this is, in essence, the same argument as the argument that Argentina makes with respect to the alleged consistent EU practice).[24] We disagree.

57. The quotations that Argentina provides from the judgments[25] clearly reflect the two-step structure through the use of terms such as "therefore" and "consequently". As we have already explained above, the reference to Recital 4 of Regulation No 1972/2002 is about the reasons for the adoption of the second sub-paragraph of Article 2(5) and does not "establish a rule" that displaces the first sub-paragraph, as Argentina asserts.[26] The Court did not state in *Acron I* that the determination that records kept by an investigated firm do not reasonably reflect the costs associated with production and sale is made pursuant to the second sub-paragraph of Article 2(5) (and in this respect the quotations provided by Argentina are significantly incomplete).[27] Rather, it found that the second sub-paragraph partially completes the silence as a matter of EU law, with the consequence that it could not be interpreted in the light of the Anti-Dumping Agreement. Evidently, neither the parties nor the Court were concerned to interpret the first sub-paragraph of Article 2(5) in the light of the first sentence of Article 2.2.1.1 because, as we have already recalled above, they are basically identical. Finally, if one examines paragraphs 44 to 51 of the judgment of the General Court in Case T-118/10 (to which paragraph 72 expressly refers)[28] one finds that it precisely confirms everything that the EU has been explaining about the distinction between the first and second sub-paragraphs of Article 2(5).[29]

3.1.5. The Panel's analysis is allegedly vitiated by two erroneous premises

58. Argentina asserts that the Panel's analysis is alleged vitiated by two erroneous premises, namely (1) that the first and second sub-paragraphs of Article 2(5) necessarily involve different steps and (2) that the determination that the records kept by an investigated firm do not reasonably reflect the costs associated with the production and sale is necessarily distinct from the determination as to which data to use. We do not agree that this part of Argentina's appellant submission supports its case, or adds anything to what Argentina has already said. As we have already explained above, the rule in the first sub-paragraph of Article 2(5) is what provides the relevant criteria, and no further criteria are supplied by either the first or second sub-paragraphs.[30] As we have also already explained above, the alleged "single analysis" in the alleged consistent EU practice and judgments of the Court does not exist and these documents do not support Argentina's assertions about the

24 Argentina's other appellant submission, paras. 93-114.

25 Argentina's other appellant submission, paras. 104, 105 and 107.

26 Argentina's other appellant submission, paras. 106-108.

27 Argentina's other appellant submission, para. 109.

28 Argentina's other appellant submission, para. 110.

29 Argentina's other appellant submission, paras. 110-113.

30 Argentina's other appellant submission, para. 119.

meaning of the second sub-paragraph.[31] Finally, as we have also already explained above, the alleged "automaticity" referred to by Argentina also does not support Argentina's assertions about the meaning of the second sub-paragraph.[32]

3.2. THE SO-CALLED MANDATORY/DISCRETIONARY ANALYTICAL TOOL

59. Argentina makes certain assertions about the second sub-paragraph of Article 2(5), viewed in the light of the so-called mandatory/discretionary analytical tool.[33] We consider these assertions to be misconceived. Argentina's problem is not whether or not there is mandatory language in the second sub-paragraph of Article 2(5) (Argentina refers in this respect to the phrase "shall be adjusted or established"). Rather, Argentina's problem is that, contrary to what Argentina is asserting, this is not language that concerns the determination of whether or not the records of the firm reasonably reflect the costs associated with production and sale. *That* language is contained in the first sub-paragraph ("Costs shall … provided that …").

60. Argentina cannot solve its problem by asserting that the second sub-paragraph "provides for the possibility" of such a finding.[34] The second sub-paragraph simply makes no provision in this respect. That is because, as we have already explained above, it does not implement the second condition in the first sentence of Article 2.2.1.1. Rather, it partially completes the silence, as a matter of EU law.

3.3. ARTICLE 11 OF THE DSU

61. Argentina asserts that the Panel has acted inconsistently with Article 11 of the DSU because it has allegedly failed to make an objective assessment of the matter before it, including an objective assessment of the facts. Argentina complains that the Panel's analysis was not thorough, too brief, and not holistic. It refers back to or repeats a number of its prior assertions and arguments.[35]

62. We do not agree that the Panel has acted inconsistently with Article 11 of the DSU with respect to this matter, for all the reasons set out above. In this respect, we believe that we can be of assistance to the Appellate Body. We agree with the Appellate Body that mixed questions of law and fact, or legal characterisations of facts, are legal issues that may be taken on appeal without reference to Article 11 of the DSU. This includes the question of whether or not a municipal law is "as such" inconsistent with a specified provision of the covered agreements. An integral part of that assessment is the meaning of the municipal law. The meaning of something is not a fact. Facts are things susceptible to being observed and evidenced. Meaning refers to how we understand things, that is, what is going on inside our heads. Thus, if a municipal court has stated that a municipal law means "X", then the statement that "the municipal court has stated that the law means X"

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31 Argentina's other appellant submission, para. 120.

32 Argentina's other appellant submission, para. 120.

33 Argentina's other appellant submission, paras. 122-134.

34 Argentina's other appellant submission, para. 124.

35 Argentina's other appellant submission, paras. 135-175.

is a statement of fact. However, the statement that "the municipal law means X" is not a statement of fact, but a legal characterisation of fact. The distinction is a subtle but important one.

63. Accordingly, since we find nothing new in this part of Argentina's other appellant submission, we believe that it does not require any further lengthy consideration. The EU is not arguing that Argentina should have brought this part of the appeal under Article 11 of the DSU. Rather, we simply meet Argentina on its own terms, in a legal context, and explain that the second sub-paragraph of Article 2(5) does not mean what Argentina asserts it to mean.

3.4. REQUEST FOR COMPLETION OF THE LEGAL ANALYSIS

64. Argentina requests the Appellate Body to complete the legal analysis.[36] The European Union considers that the Appellate Body will not reach this stage, because Argentina's submissions do not disclose any basis on which to reverse the Panel's findings. However, even if the Appellate Body were to reach this stage, we believe that it could only confirm that, before the Panel and in these appeal proceedings, Argentina has failed to demonstrate that the second sub-paragraph of Article 2(5) is "as such" inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, for all the reasons set out above and in our Appellant Submission.

4. ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION "AS SUCH"

4.1. THE PANEL DID NOT ERR IN ITS INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

65. Argentina maintains that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not permit the use of information other than producers' costs in the country of origin and do not only require that the costs of production "reflect conditions prevailing in the country of origin".[37]

66. Argentina argues that the Panel erred by finding that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 "do not limit the sources of information that may be used in establishing the costs of production" and it understands the Panel's findings as implying that the "cost of production" is a notional concept.[38]

67. The European Union disagrees. As we will further develop below, the concept of "cost of production" in Article 2.2 cannot be understood as limiting in any way the sources of information which may be used in order to establish such costs. Argentina attempts to add to the text of the Anti-Dumping Agreement and to read in words which are not there.

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36 Argentina's other appellant submission, paras. 176-193.

37 Argentina's other appellant submission, para. 205.

38 Argentina's other appellant submission, para. 207.

68. The fact that there are explicit provisions allowing investigating authorities to disregard domestic prices and costs when determining the normal value that are provided for under the second *Ad* Note to Article VI:1 of the GATT 1994[39] or in the protocols of accession of certain Members is a distinct matter from the fact of establishing the cost of production in the country of origin based on information from different sources. In the former case the costs themselves are from outside the country of origin, while in the latter only the information is from outside the country of origin, while the costs to be established are in the country of origin.

69. The Panel's use of the phrase "require that the costs of production established by the authority reflect conditions prevailing in the country of origin" addresses the situation where information from the country of origin is deficient or absent. Argentina's approach is to ignore the possibility of such a situation existing.[40] The process of constructing a price in such a situation inevitably requires using information other than the costs of the particular producer, since these do not exist or are unusable. Argentina cannot deny the possibility that evidence from outside the country will in some circumstances be the most pertinent in constructing a cost of production inside the country.

70. The European Union does not dispute that Article 2.2 speaks of the cost of production in the country of origin. However, what Argentina wants to add to the text of Article 2.2 is a distinct matter. Article 2.2 cannot be understood as limiting the sources of information that may be used in establishing the costs of production, as the Panel has correctly found. Thus, the European Union agrees that what Article 2.2 requires is that the costs of production established by the investigating authority reflect conditions prevailing in the country of origin.[41]

71. Despite its lengthy examination, Argentina resolutely fails to address the fundamental problem: how to calculate costs in the country of origin when local evidence is unavailable or unusable.[42] Argentina concludes that a measure that **merely permits** use of non-local information is "as such" inconsistent with Article 2.2. It provides no argument or authority for such a conclusion, which should therefore be dismissed.[43]

4.2. THE PANEL DID NOT ERR IN ITS DETERMINATION OF THE SCOPE, MEANING AND CONTENT OF ARTICLE 2(5), SECOND SUB-PARAGRAPH, OF THE BASIC REGULATION

72. In essence, Argentina argues that when a determination pursuant to Article 2(5), first sub-paragraph of the Basic Regulation is made (that the records kept by the investigated firm do not reasonably reflect the costs associated with production and sale), the second sub-paragraph further requires the EU investigating authorities to adjust or establish the costs on the basis of other information, which

39 Arguably this provision is not relevant in the present case, since it applies even where cost information is available.

40 Argentina's other appellant submission, para. 212.

41 Panel Report, para. 7.171.

42 Argentina's other appellant submission, para. 234.

43 Argentina's other appellant submission, para. 235.

may include costs other than those in the country of origin. Argentina considers that this renders Article 2(5), second sub-paragraph, inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[44]

73. Argentina formulates three main allegations:

> - that the Panel erred in finding that Article 2(5), second sub-paragraph, is formulated in permissive terms and provides a number of alternative bases for the establishment or adjustments of costs; [45]
>
> - that the Panel erred in finding that the language of Article 2(5), second sub-paragraph, pertains to the sources of information as opposed to the costs themselves; [46]
>
> - that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU.[47]

74. The European Union notes from the outset that the Panel did not err when finding that Article 2(5), second sub-paragraph, of the Basic Regulation is not inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

75. The European Union submits that the second sub-paragraph of Article 2(5) of the Basic Regulation grants broad discretion to the EU investigating authorities to resort to various options in constructing the normal value when they have determined under the first sub-paragraph of Article 2(5) that the records kept by the investigated firm do not reasonably reflect the costs associated with production and sale.

76. **The text of Article 2(5), second sub-paragraph**, provides a number of alternative bases on which the EU investigating authorities may establish or adjust the costs where they have determined first, pursuant to the first sub-paragraph of Article 2(5), that the records kept by the investigated firm do not reasonably reflect the costs associated with production and sale.

77. On its face, the phrase of the second sub-paragraph at issue is formulated in permissive terms. The first option is for the EU investigating authorities to use the costs of other producers or exporters in the country of origin. Where "such information is not available or cannot be used", they can resort to "any other reasonable basis", including "information from other representative markets".

78. There are a number of observations to be made.

79. *First*, the text of the Basic Regulation expressly provides for use of the costs of other producers or exporters in the country of origin.

80. *Second*, resort to "any other reasonable basis", including "information from other representative markets" is part of several options that the investigating authorities

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44 For example, Argentina's other appellant submission, para. 236; Argentina's first written submission, paras. 134-140.

45 Argentina's other appellant submission, paras. 239-254.

46 Argentina's other appellant submission, paras. 255-266.

47 Argentina's other appellant submission, paras. 267-275.

have at their disposal. In examining the text Argentina concentrates on the overall obligation to get information ("shall"), but ignores the wide discretion afforded to the investigating authorities.[48] Even if there was an obligation to use "any other reasonable basis", as Argentina suggests,[49] there is definitely no obligation to use information from "other representative markets".

81. *Third*, resort to "any other reasonable basis" is not to be equated with "information from outside the country of origin".

82. Argentina considers that the phrase "on any other reasonable basis" necessarily relates to information other than information from other domestic producers, thus referring only to information from outside the country of origin.[50]

83. However, as the Panel correctly found, even if the phrase "on any other reasonable basis" refers to something other than "the costs of other producers or exporters in the same country", there may be "bases" or sources of information in the country of origin other than the costs of other producers or exporters of the investigated products. The Panel further considered that a different understanding would make the phrase "including information from other representative markets" inutile.[51] Accordingly, the Panel rejected Argentina's argument according to which the reference to "any other reasonable basis" necessarily is a reference to costs outside the country of origin.

84. The European Union agrees with the Panel's conclusion. The phrase "on any other reasonable basis" gives a broad discretion to the investigating authorities in order to establish or adjust costs. The second sub-paragraph of Article 2(5) does not define the terms "reasonable basis", nor does it provide an exhaustive list of the types of evidence that should be understood as "reasonable". Therefore, there is no limitation or restriction imposed on the authorities' discretion to decide what is "reasonable".

85. The second sub-paragraph of Article 2(5) does not provide that the use of information from other representative markets is the only "reasonable" basis that the authorities may use. As a result, this provision does not "mandate" the authorities to use information from other representative markets. It only allows them to do so, if this is "reasonable".[52]

86. *Fourth*, even the reference to "information from other representative markets" cannot be automatically equated with "information from outside the country of origin". Indeed, "other representative markets" may include other relevant product markets in the country of origin. A market may be defined in terms of a product market, and as a geographical market, and for that matter in terms of a temporal market. There is no indication that the phrase "other representative markets" refers

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48 Argentina's other appellant submission, para. 239.

49 Argentina's other appellant submission, para. 240.

50 Argentina somehow implies at the beginning of its argumentation (for example, Argentina's other appellant submission, para. 242) that information from "other representative markets" equates to information out of country, but makes this allegation explicit only later in the submission (for example, Argentina's other appellant submission, para. 265).

51 Panel Report, para. 7.159.

52 European Union's first written submission, paras. 177- 178.

only to geographical markets with respect to the product at issue (in the country of origin and outside the country of origin).

87. *Fifth*, even if "information from other representative markets" includes information outside of the country of origin, one has to distinguish between costs in the country of origin and information (evidence) serving to determine such costs. Information from outside the country of origin may be used in certain circumstances to determine the costs and construct the normal value in the country of origin.

88. Argentina contends that the text of Article 2(5), second sub-paragraph, requires the EU investigating authorities, where they take the view that the costs of other domestic producers or exporters are not available or cannot be used, to construct the normal value on the basis of costs in other countries than the country of origin.[53] Argentina maintains that the term "cost" refers to something concrete and not to an abstract or notional concept.[54]

89. The European Union agrees with the Panel, which correctly found that Article 2(5), second sub-paragraph, refers to the **sources of information** that may be used to establish an investigated producer's or exporter's costs, as opposed to the **costs** themselves. Article 2(5), second sub-paragraph *does not require* the EU investigating authorities to construct the normal value so as to reflect costs in other countries.[55]

90. Argentina claims that the use of the word "information" in Article 2(5), second subparagraph indicates that it has the same meaning as costs.[56] However, the phrase "such information" clearly means information **about** costs. The two terms are not the same. Costs may exist even if there is no information about them. Furthermore, information about costs is a matter of degree – it may be partial or full.

91. Argentina fails to conduct a proper analysis of the text of the measure at issue, reaching the pointless distinction between using acquired information (quite how it is "used" is not clear) and then adjusting it, as opposed to adjusting or replacing the producer's costs with that information.[57] Argentina's observation that information from other representative markets "necessarily reflects costs prevailing in other countries and not those in the country of origin" is answered by the process of adjustment that must be done to make the information appropriate to the country of origin.[58] Furthermore, the "consistent practice" of the EU authorities does not support its conclusions.[59]

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53 Argentina's other appellant submission, para. 265.

54 Argentina's other appellant submission, para. 208.

55 Panel Report, para. 7.160.

56 Argentina's other appellant submission, para. 258.

57 Argentina's other appellant submission, para. 263.

58 Argentina's other appellant submission, para. 266.

59 See also European Union's appellee submission, paras. 99-107.

92. Hence, the very text of Article 2(5), second sub-paragraph, cannot be read as requiring the EU investigating authority to construct the normal value on the basis of costs not prevailing in the country of origin. Accordingly, the European Union agrees with the Panel's conclusion in paragraph 7.161 of its Report.

93. Argentina further contends that there are other arguments, to be found in the legislative history, in the alleged consistent practice of the EU investigating authorities, and in several judgments of the General Court of the European Union, supporting its views. The European Union disagrees.

94. With regard to the **legislative history** pertaining to the inclusion of the second sub-paragraph of Article 2(5) in the Basic Regulation, Argentina contends that Recital 4 of Council Regulation 1972/2002 should be understood as establishing that the investigating authorities not having any discretion with regard to obtaining data from sources which are not affected by distortions.[60]

95. The European Union agrees with the Panel, which correctly found that neither the second sub-paragraph of Article 2(3) nor Recital 4 of Council Regulation 1972/2002 suggest that the options available to the EU investigating authorities are constrained in such a way that they must systematically resort to information or prices not in the country of origin.[61]

96. In the context of the Article 2.2.1.1 "as such" claims, the European Union explained before the Panel that Recital 4 and the "new sentence in Article 2(3) of the Basic Regulation" are irrelevant for the interpretation of the second sub-paragraph of Article 2(5).[62] According to the first sub-paragraph of Article 2(3), an investigating authority may need to "calculate the normal value of the like product on the basis of the cost of production" in two different situations: first, where there are no or insufficient domestic sales of the like product in the ordinary course of trade; and, second, where the domestic sales do not permit a proper comparison, because of a particular market situation.[63] In other words, an investigating authority may find itself calculating costs and applying Article 2(5) in two different situations: either because there are no or insufficient domestic sales in the ordinary course of trade; or, because there is some particular market situation in the country of origin.

97. However, both Recital 4 and the "new sentence added in Article 2(3)" inform only one of these two situations, i.e., the "particular market situation".[64] Neither Recital 4, nor the "new sentence added in Article 2(3)" refer to the other potential situation that may lead an investigating authority to apply Article 2(5), i.e., that of "no or insufficient domestic sales in the ordinary course of trade". It is noted that the anti-dumping measures against biodiesel originating in Argentina, which are the source of the present dispute, relate precisely to a situation of no domestic sales in the ordinary course of trade.

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60 Argentina's other appellant submission, para. 244.

61 Panel Report, para. 7.163.

62 European Union's first written submission, paras 94-96.

63 Article 2(3), first sub-paragraph of the Basic Regulation.

64 Argentina acknowledges this fact in its first written submission, paras. 41 and 55.

98. Given that Recital 4 and the "new sentence added in Article 2(3)" do not cover all the situations that may lead an investigating authority to apply Article 2(5), they do not offer a proper basis for the interpretation of the provisions of Article 2(5). They cannot, especially, be relied upon in situations where the construction of normal value is the result of the lack of domestic sales in the country of origin in the ordinary course of trade.

99. With regard to the **alleged consistent practice of the EU investigating authorities**, Argentina contends that there are several examples of application of the provision at issue which support the view that Article 2(5), second sub-paragraph requires the EU investigating authorities to resort to prices outside the country of origin.[65] Argentina did not challenge the WTO-consistency of the alleged practice itself.[66]

100. Argentina seeks to establish a consistent practice on the part of the EU authorities and to interpret Article 2(5) as mandatory in this respect. However, the Appellate Body in *US - Carbon Steel (India)* distinguished between the practice, as a (potential) measure, and the instrument (in the present case Article 2(5) second subparagraph), as a distinct measure.

> We recall, however, that our review above of the judicial decisions referred to by India suggests that any "practice" of the investigating authority in applying the measure is not required by the measure, but is rather developed pursuant to the discretion afforded by the measure. The "practice" also appears to be distinct and separate from the measure at issue. It is therefore not clear to us why a number of instances of the application of the measure should, in this case, conclusively establish the meaning of the measure at issue in general […] [original footnotes omitted][67]

101. Consequently, even if Argentina could establish a consistent practice, this would not necessarily taint Article 2(5) itself. Again, Argentina has not claimed that the practice itself is a measure, or at least Argentina has not challenged the practice as a measure in its own right.

102. As the Panel correctly found, while the examples of application of the provision at issue cited by Argentina reveal that the EU investigating authorities may resort to prices in countries other than the country of origin, any consistent practice emanating from these examples does not demonstrate that Article 2(5), second sub-paragraph, *requires* them to do so. The mere fact that the investigating authorities opted to act in a certain manner in the past does not mean that the provision at issue requires them to do so in all cases.[68]

103. The European Union recalls that there are examples which confirm that the EU investigating authorities enjoy a broad discretion under the second sub-paragraph of Article 2(5).

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65 Argentina's other appellant submission, paras. 246-248.

66 European Union's first written submission, para. 68, referring to Argentina's response to the European Union's preliminary ruling request.

67 Appellate Body Report, *US- Carbon Steel (India)*, para. 4.480.

68 Panel Report, para. 7.166.

104. For example, in *White phosphorus originating in Kazakhstan*, the "reasonable basis" used by the European Union's investigating authorities was not "information from other representative markets", but the accounts of the parent company:

> …in accordance with Article 2(5) of the Basic Regulation, the records of the exporting producer did not reasonably reflect the costs associated with the production and sale of the product under investigation. It was therefore warranted to correct the reported costs accordingly.
>
> The accounts of the mother company were consolidated accounts for the whole group, i.e., they also contained data of the activities of the exporting producer in Kazakhstan. The mining rights recorded related to the overall mining activities, including the one of exporting producer in relation to the production of white phosphorus. It was therefore considered justified to correct the reported costs of manufacturing on this basis.[69]

105. Another example can be seen in *Okoumé plywood originating in China*, where the "reasonable basis" used by the European Union's investigating authorities was *market prices within the country of origin*:

> One company purchased veneers from a related company. Since the transfer price of these transactions did not reasonably reflect the costs associated with the production of these veneers, they had to be replaced with a non-related transaction price, which was set at the price of other transactions of the company with unrelated suppliers.[70]

106. Similarly, in *Urea from, inter alia, Croatia and Ukraine*, costs were found to be distorted, but the Commission refrained from making any adjustment on the basis of out-of-country data.[71]

107. These examples confirm that the second sub-paragraph of Article 2(5) does **not** oblige the European Union to seek production cost information outside the country of origin in all cases. Quite to the contrary, the relevant determinations of the investigating authorities depend on the facts of each case.

108. With regard to the **judgments of the General Court of the European Union**, Argentina contends that the Panel erred in its understanding of these judgments, which should be read as confirming that when the EU investigating authorities conclude that the exporters' records are not reasonable they do not enjoy any discretion.[72] Argentina selectively quotes from the judgments it invoked.

109. As the Panel correctly found, the judgments quoted by Argentina show that, in a situation in which the EU investigating authorities determine that a producer's

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69 Commission Decision 2013/81, terminating the anti-dumping procedure concerning imports of white phosphorus, also called elemental or yellow phosphorus, originating in the Republic of Kazakhstan, OJ L 43, p.38, Recitals 36-37 (Exhibit EU-3).

70 Commission Regulation 988/2004 imposing provisional anti-dumping duties on imports of okoumé plywood originating in the People's Republic of China, OJ L 181, p. 5, Recital 51 (Exhibit EU-4).

71 Regulation 240/2008, Recitals 24-26 (Exhibit ARG-20).

72 Argentina's other appellant submission, para. 251.

records do not reasonably reflect the costs associated with production and sale because they are affected by a distortion, the EU investigating authorities are *entitled* to establish the producer's costs on the basis of sources that are unaffected by that distortion, and may have recourse to sources of information outside the country of origin.[73]

110. The European Union submits that the broad discretion enjoyed by the investigating authorities is also confirmed by the judgments of the General Court of the European Union. For example, in *Acron*, the General Court found that, on the basis of the second sub-paragraph of Article 2(5), the information used in order to adjust or establish the costs "*may* be taken from…any other reasonable source of information, including information from other representative markets".[74] Likewise, the General Court stated that the investigating authorities were "fully *entitled* to conclude that…that item had to be adjusted by having recourse to other sources…".[75]

111. The use of the words "*may*" and "*entitled*" shows that, as a matter of European Union law, the second sub-paragraph of Article 2(5) allows the investigating authorities a broad discretion in the choice of reasonable sources of information.

112. Finally, the Panel **did not fail to make an objective assessment of the matter** as required by Article 11 of the DSU.

113. Argentina alleges that the Panel failed to make a thorough and holistic examination of the elements submitted by Argentina, in particular in relation to the legislative history and the consistent practice of the EU investigating authorities.[76]

114. The European Union submits that the Panel's analysis of the legislative history, the alleged practice of the EU investigating authorities and the judgments of the General Court of the European Union cannot be construed as a failure to fulfill its obligations under Article 11 of the DSU.

115. In support of its claims Argentina has brought a number of repetitive arguments, which failed, before the Panel, to make a *prima facie* case with regard to the alleged "as such" inconsistency of the measure at issue with the European Union's WTO obligations. The Panel carefully analysed all the allegations advanced by Argentina and justified its conclusions with respect to each of them.

116. Argentina accuses the Panel of giving insufficient consideration to its arguments regarding the legislative history.[77] However, the Panel refers in paragraph 7.163 of its Report to the analysis which it conducted with regard to this legislative history when dealing with Argentina's first claim.

117. It cannot be said that the Panel failed to make a holistic assessment of all these elements and rather analysed the text of the measure in isolation from the other

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73 Panel Report, para. 7.168.

74 Case T-235/08, Acron and Dorogobuzh v Council, judgment of 7 February 2013, EU:T:2013:65, para. 39 (Exhibit ARG-23).

75 Judgment *Acron*, para. 46.

76 Argentina's other appellant submission, para. 267.

77 Argentina's other appellant submission, para. 271.

elements. In the present case the Panel did not even need to resort to the analysis of those other elements. As the Appellate Body clarified before, in situations like the present one, when the meaning and content of the measure are clear on their face, then the consistency of the measure "as such" can be assessed on that basis alone.[78]

4.3. THE PANEL DID NOT APPLY AN ERRONEOUS LEGAL STANDARD FOR THE ESTABLISHMENT OF THE "AS SUCH" CLAIM

118. Argentina maintains that the Panel erred in two instances: by requiring that a measure results in WTO-inconsistent results in all instances in which it is applied and by suggesting that in order to prevail in an "as such" claim, it is necessary that the measure being challenged is mandatory.[79]

119. The Panel has found that while Article 2(5), second sub-paragraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner.[80]

120. Argentina itself quotes the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, where it found that in an "as such" claim a measure *will necessarily be inconsistent with that Member's WTO obligations*.[81] But Argentina ignores the very language of the second sub-paragraph of Article 2(5), which will *not* lead to results *necessarily* inconsistent with the European Union's WTO obligations. According to the Oxford English Dictionary "necessarily" means "**unavoidably, compulsorily**".[82] The European Union fails to understand how the phrase at issue can be understood as unavoidably or compulsorily requiring the EU investigating authorities to act contrary to the European Union's WTO obligations.

121. According to the Appellate Body, an "as such" claim can succeed only if:

> …the text of the measure on its face…identif[ies] elements *requiring* an investigating authority to engage in conduct inconsistent with [the covered agreements]…
>
> Or

78 Appellate Body Report, *US — Corrosion Resistant Steel*, para. 168, where there is further reference to the Appellate Body Report in *US-Carbon Steel*, para. 157.

79 Argentina's other appellant submission, para. 277.

80 Panel Report, para. 7.174.

81 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

82 http://www.oed.com/view/Entry/125625?redirectedFrom=necessarily#eid, accessed on 26 May 2016.

> …the judicial decisions, the [administrative regulations], the legislative history of the measure and quantitative and qualitative material on the application of the measure…establish conclusively that the measure *requires* an investigating authority to consistently [act] in a manner that would not comport with [the covered agreements] in all cases…[emphasis added][83]

122. As the European Union already explained before the Panel, in the present case none of these elements is present. Irrespective of whether using "information from other representative markets" is consistent with Article 2.2 of the Anti-Dumping Agreement, the second sub-paragraph of Article 2(5) does not "*require*" the investigating authority to use such information "*in all cases*".[84]

5. ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT AND THE EU ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

123. Argentina claims on appeal that the Panel erred when it found that Argentina failed to demonstrate that the measure at issue is inconsistent with Article 2.4 because it did not make a fair comparison between normal value and export price. Argentina requests the Appellate Body to reverse the Panel's finding and complete the legal analysis by affirming Argentina's claim.[85]

124. As we have already observed in our appellant submission, we consider that the claims and arguments under Article 2.2.1.1 and Article 2.4 are closely related.[86] Fundamentally, taken in the round, the European Union is arguing that an adjustment was justified; Argentina is arguing that it was not. The European Union is arguing that the adjustment was justified because a standard of reasonableness informs the interpretation and application of the entirety of the second condition in the first sentence of Article 2.2.1.1. And we are further arguing that we were not required to make an un-adjustment pursuant to Article 2.4. Argentina is arguing that no adjustment was justified pursuant to Article 2.2.1.1. And that, in any event, such adjustment was inconsistent with Article 2.4, and either should never have been made, or, if made, should have been un-done pursuant to Article 2.4. Thus, if Argentina would be successful with its claims and arguments under Article 2.2.1.1, the discussion under Article 2.4 would become essentially moot, the latter not being the provision upon which the investigating authority relied in this case. The Panel found the measure inconsistent with Article 2.2.1.1, and rejected Argentina's claim under Article 2.4 because the difference alleged to exist by Argentina was

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83 Appellate Body Report, *US-Carbon Steel (India)*, para. 4.483. Argentina attempts to distinguish *US- Carbon Steel (India)* from the present case by claiming that in the former circumstances the action in question (use of adverse inferences) could in some circumstances be taken without illegality, whereas in the latter (present case) the action (use of out-of-country data) is always illegal (Argentina's other appellant submission, para. 288). However, in the former case one could, at least in theory, define a category that consisted of the circumstances in which the action would always be illegal. The situation within that category would then be the same as that in the present case.

84 European Union's first written submission, para. 186.

85 Argentina's other appellant submission, paras. 294-325.

86 European Union's appellant submission, paras. 101-107.

not, according to the Panel, a "difference" within the meaning of Article 2.4. Against this background, Article 2.4 is not the central provision in this case.

125. That being said, Argentina and the European Union agree that Article 2.4 is important context for understanding the circumstances in which it is justified to make an adjustment pursuant to Article 2.2.1.1. In this respect, Argentina advances three propositions with which the European Union agrees, and that are, in this respect, highly significant:

- Article 2.4 must be interpreted and applied in an objective and even-handed way and in manner that renders its provisions equally and fully effective, **irrespective of the method used for determining normal value** (domestic sales in the ordinary course of trade that permit a proper comparison; or a comparable and representative price to an appropriate third country in the ordinary course of trade; or a constructed normal value);[87]
- In this case, there is a "**difference**" (although we disagree on what that difference is); [88]
- In this case, there is an effect on "**price comparability**".[89]

126. In order to better explain our position we would like to walk through the way in which Article 2.4 is applied in the situation that is the **inverse** of the one arising in this case. Thus, we would like to consider the situation of a tax (or import duty) on a raw material when used in the production of a finished product destined for the domestic market, but which is not due or which is refunded when the finished product is destined for the export market. This is actually quite common in the field of anti-dumping.[90]

127. We begin in a situation without the tax. The export price and the domestic price of biodiesel are both 100 and the costs of production and sale are 90. There is no dumping. Now, a tax of 30 is imposed on soya, but only when used in the production of biodiesel destined for the **domestic** market. All other things being equal, the normal value will now be 130 (without adjustment), **either because the producer increases its domestic sales price of biodiesel, or because normal value will be based on costs of production and sale, plus profits**. In either case, without adjustment, dumping will be found. This would clearly be a false positive. An adjustment must be made. For example, the normal value could be adjusted

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87 Argentina's other appellant submission, paras. 300 - 306, particularly at para. 305: ("The obligation to make a fair comparison and due allowance for differences affecting price comparability applies in all anti-dumping investigations, including those in which the normal value is constructed pursuant to Article 2.2").

88 Argentina's other appellant submission, para. 309.

89 Argentina's other appellant submission, paras. 310.

90 See, for example, the discussion at paras. 317 and 320 of the Argentina's other appellant submission. Article 2(10)(b) of the Basic Regulation, which is titled "Import charges and indirect taxes", provides as follows: "An adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country and not collected or refunded in respect of the product exported to the Community."

downwards by 30 so that there is a fair and proper comparison with the export price.

128. It is important to note the following:

- In this example, which is very common in real life, we are concerned with an issue of **taxation**. Taxation is something that is done by the State. Taxation is expressly mentioned in Article 2.4 as the kind of factor that is capable in principle of justifying and in fact requiring an adjustment.
- In the example, the product under investigation is biodiesel. However, insofar as we are concerned with the tax, we are concerned with the tax on soya. Specifically, we are concerned with the question of the taxation or non-taxation of soya, including when incorporated in biodiesel, according to whether or not the biodiesel is destined for the domestic or export market. The fact that we are concerned with **the taxation of the raw material** does not lead to the conclusion that an adjustment is unnecessary.
- In the example, there is a "**difference**", and that difference is the difference between the taxation of soya when used in the production of biodiesel destined for the domestic market (30) and the taxation of soya when used in the production of biodiesel destined for the export market (0).
- In the example, the difference that we have just identified does affect **price comparability**, and this is so **irrespective of the method used to determine normal value**.

129. In such a case, an adjustment, whether in establishing normal value or subsequently when making the comparison with export price, is clearly necessary in order to ensure that the comparison is "fair"; or in other words in order to ensure that there is "price comparability"; or in other words in order to ensure that the export price is compared with a value that is normal. The final sentence of Article 2.4, in particular, confirms that this process is informed by a standard of reasonableness. All of this is completely uncontroversial.

130. It is also significant to note that such arrangements are deemed not to be subsidies.[91] This does not mean no adjustment should be made under the Anti-Dumping Agreement. This is consistent with the point that we have made in our appellant submission that Article VI of the GATT relates to both dumping and subsidisation, and does not envisage a gap through which unfair trade should be permitted to creep.[92]

131. Now, let us turn the example around and impose the tax of 30 instead only on soya used in the production of biodiesel destined for export, but not biodiesel destined for domestic consumption. The same reasoning applies, obverted. We are looking at taxation; we are looking at the taxation of the raw material; there is a difference in the rate of taxation as between the domestic and export markets; that difference

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91 SCM Agreement, footnote 1.

92 European Union's appellant submission, para. 108.

affects price comparability irrespective of the method used to determine normal value; and an adjustment is necessary in order to ensure a fair and proper comparison between the export price and the normal value, and avoid the risk of a false negative (that is, that dumping would be masked). All of this is also completely uncontroversial.

132. The only difference between the situation described in the preceding paragraph and the situation arising in this case is that, in this case, the export tax is not imposed on the soya incorporated in the exported biodiesel; it is just imposed on the export of soya.[93] And the sleight-of-hand that Argentina is trying to pull-off seeks to take advantage of the fact that data about exported soya, **viewed in isolation**, is not something that would typically feature in a determination of whether or not biodiesel is being dumped. Hence, Argentina asserts, we can no longer look at or take into account in any way the difference between the taxation of soya used domestically and the taxation of exported soya, no matter how extreme the difference. Similarly, Argentina asserts, when thinking about what are the costs associated with the production and sale of biodiesel, we can no longer look at or take into account in any way the difference between the taxation of soya used domestically and the taxation of exported soya, no matter how extreme the difference.

133. Argentina is surely mistaken. In this respect, the key term in Article 2.4 is the term "**difference**". Furthermore, as we have explained above, Article 2.4 mandates an investigating authority to take into account differences in the taxation **of the raw material**. And as we have also repeatedly explained, we are not picking-up data about exported soya viewed in isolation: we are focussing on the difference in the taxation of soya depending upon whether it is used domestically or exported. The thing that is the difference, conceptually, does not change as a function of the particular levels at which the two numbers are set. If the relevant difference is the difference between A and B, this continues to be the case irrespective of whether A is zero and B is 10, or B is zero and A is 10. Finally, as a matter of fact it is not disputed in this particular case that there is an approximate **correlation** between the rate of export tax and the consequent reduction in the price of soya in Argentina.[94] Our conclusion is that what we have done in this measure is entirely in line with general principles as they result from a consideration of Article 2.4. In other words, it is **reasonable**. That is why we say it is consistent with Article 2.2.1.1, which also relates, by its own terms, to the making of adjustments, and which refers to records that ***reasonably*** reflect the costs associated with the production and sale of the product under consideration.

134. As indicated above, we disagree with how Argentina presents the "difference" for the purposes of Article 2.4, and we believe that this is an issue that merits closer scrutiny.

135. The European Union considers that the difference is just the difference between: the rate of tax imposed on exports of the soya, (that is, the export tax); and the rate of tax imposed on soya used domestically (which is zero).

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93 Panel Report, para. 7.301.

94 Argentina's other appellant submission, para. 309.

136. Argentina asserts that the difference "results from the use in the normal value of the reference FOB price minus fobbing costs for soybeans, which includes the export tax, whilst the export price is based on the domestic cost for soybeans and does not include any export tax at all."[95] In other words, Argentina asserts that the difference is the difference between: the export price of biodiesel; and the normal value of biodiesel as determined by the EU authorities in the measure at issue, after making the contested adjustment. We don't think that this statement by Argentina is correct.

137. What Argentina is referring to is the **result** of a comparison between an export price and a normal value. Argentina's claim is that this was not a fair comparison because, according to Argentina, there was no comparability between what was compared. However, quite clearly, the **result** of the comparison is not what Article 2.4 is referring to when it refers to a **difference**. What Article 2.4 is referring to when it uses the term "difference" is something that has to be adjusted for **before** the comparison is even made, that is, before the result is even known, precisely in order to ensure price comparability. In effect, what Argentina's circular argument is affirming is that, because the firm was found to be dumping, an adjustment should have been made in order to mask the dumping margin, which is, of course, an absurd proposition.

138. Argentina concludes by stating that what we are looking at is a "difference in taxation" within the meaning of Article 2.4.[96] We agree that there is a "difference in taxation" within the meaning of Article 2.4. We also agree that the difference between the export tax and the domestic tax on soya approximately corresponds to the decrease in the domestic price of soya. However, the "difference" within the meaning of Article 2.4 is not, as Argentina asserts, the **result** of the comparison between the export price and the normal value, as adjusted. The difference is the difference in the export and domestic tax rates on soya.

139. We think that our position is fully consistent with the Appellate Body Report in *EC – Fasteners (Article 21.5 – China)*.[97] All we are saying is that if an adjustment is reasonable and justified under Article 2.2.1.1 (and we believe we have explained why that is the case), there is no requirement to make an un-adjustment pursuant to Article 2.4.

140. Finally, as we have also explained in our appellant submission, Argentina cannot escape by alleging that the export tax on soya impacts equally on both sides of the comparison and that, in such circumstances, adjustments are **never** appropriate. The most obvious example that disproves Argentina's proposition is the case of a compensatory arrangement impacting both sides of the comparison in equal measure. Thus, Argentina actually **agrees** that if there is a compensatory arrangement that relates to the supply of raw material at an artificially low price (impacting both the domestic and the export price of biodiesel) it would be justified to conclude that the records of the investigated firm do not reasonably reflect the costs associated with the production and sale of the product under

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95 Argentina's other appellant submission, para. 309

96 Argentina's other appellant submission, para. 309.

97 Argentina's other appellant submission, paras. 317-323.

consideration. This means that Argentina can only be agreeing that, in truth, a standard of reasonableness **does inform** not only the term "reflect", but also the determination of the costs associated with production and sale.

141. To conclude, the adjustment in this case was not made pursuant to Article 2.4; it was made following the determination that the second condition in the first sentence of Article 2.2.1.1 was not fulfilled; and on the basis of the second sub-paragraph of Article 2(5), which partially completes the silence for the purposes of EU law. If, as we believe to be the case, the adjustment was reasonable and justified, there is no basis for making an un-adjustment pursuant to Article 2.4. If the measure is inconsistent with Article 2.2.1.1, the position under Article 2.4 is moot.

142. What the investigating authority did in this case was, in effect, no more than the obverse of what it would do in the case of a tax or duty on a raw material used domestically, but not imposed when that raw material is incorporated in an exported product. In both cases, in an even-handed and objective way, an authority is expected and at least entitled to make the necessary adjustments in order to ensure a fair and proper comparison between an export price and a value that is normal, the entire process being informed by a standard of **reasonableness**.

6. THE PANEL'S FINDINGS UNDER ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

143. Argentina claims that the Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to the EU investigating authorities' non-attribution analysis concerning overcapacity.[98] In particular, Argentina alleges that the EU investigating authorities' examination of "overcapacity" as a factor causing injury to the EU domestic industry did not rest on "positive evidence" and did not involve an "objective examination" of such evidence, and that the Panel failed to distinguish overcapacity from capacity utilization.

144. In reaching the conclusions with regard to Argentina's claims under Articles 3.1 and 3.5, the Panel considered whether the non-attribution analysis of the EU investigating authorities "was tainted by, i.e. based on or affected by, the downward revision of the figures of the domestic industry's production capacity".[99]

145. In that regard, the Panel correctly noted that:

> [I]n both the Provisional and the Definitive Regulation, i.e. irrespective of which set of figures they considered, the EU authorities found that the level of capacity utilization was low and stable during the period considered, whereas the profitability of the sampled producers had deteriorated during the same period.[100]

98 Argentina's other appellant submission, paras. 326-372.

99 Panel Report, para. 7.462.

100 Panel Report, para. 7.463.

146. The EU investigating authorities concluded, on the one hand, that during the period considered the state of the domestic industry deteriorated, while, on the other hand, during the same period low capacity utilization was a constant or permanent feature of the EU biodiesel industry. Therefore, it was clear that low capacity utilization was not an injury factor, and thus the deteriorating state of the domestic industry could be explained only by reference to the dumped imports.

147. The European Union agrees with the Panel, which noted that the conclusion of the EU authorities on the issue of overcapacity is unchanged from the Provisional to the Definitive Regulation. Indeed, the investigating authorities' findings were not influenced by the use of the revised vs. the initial data and/or the trends associated with these data. Both at the provisional and the definitive stage the data showed a low rate of capacity utilization.[101]

148. The European Union recalls that Argentina argued before the Panel that the data in the Provisional Regulation was the "correct" capacity and capacity utilization data.[102] However, what that data in the Provisional Regulation clearly shows is that overcapacity was not a major cause of injury.[103] As the Definitive Regulation merely confirmed the findings in the Provisional Regulation,[104] "the revision of the production capacity and capacity utilization figures in the Definitive Determination did not taint the EU authority's determination on overcapacity".[105]

149. The European Union recalls that the investigating authorities concluded that no evidence was provided to support the view that the low capacity utilization rate was causing injury to such an extent as to break the causal link between dumped imports and the injury.[106]

150. Accordingly, the Panel did not err when finding that the revised data in the Definitive Regulation did not have a role in the EU investigating authorities' conclusion on overcapacity as an "other factor" causing injury. Argentina's argument with regard to the "significant role" in the EU's investigating authorities conclusions should be dismissed on the basis of the clear findings the Panel made in paragraphs 7.463 and 7.465.

151. The Panel's conclusion in paragraph 7.466 should be understood in the light of its analysis in the preceding paragraph with regard to the language in Recital 165 of the Definitive Regulation, where it clearly found that:

> Read in context, this statement **does not convince us** that the EU authorities' conclusion with respect to the issue of overcapacity **was based on, or affected by**, the revised data.[emphasis added][107]

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101 Panel Report, para. 7.463.

102 Argentina's first written submission, para. 370.

103 Provisional Regulation, Recital 140 (Exhibit ARG-30).

104 Definitive Regulation, Recital 171 (Exhibit ARG-22).

105 Panel Report, para. 7.463.

106 Definitive Regulation, Recital 164 (Exhibit ARG-22).

107 Panel Report, para. 7.465.

152. In light of this clear finding of the Panel, the European Union does not see the necessity to engage again in the comparative analysis of the evolution of production capacity, capacity utilization and overcapacity in the Provisional and the Definitive Regulations. Furthermore, the reference Argentina makes to Recital 170 of the Definitive Regulation is not supportive of its arguments, as that recital refers rather to capacity than to capacity utilization.[108]

153. In addition, Argentina ignores the preceding Panel finding according to which:

> It is clear from the EU authorities' findings that their conclusions were not dependent on, or even affected by, the use of the revised vs. the initial data and/or the trends associated with these data, as in either case, the data showed a low rate of capacity utilization.[109]

154. In light of the above, contrary to what Argentina alleges,[110] the Panel did not find that the same revised data was used and relied upon by the EU investigating authorities in the context of the non-attribution analysis. The EU investigating authorities relied on what Argentina accepts as the correct data (that used in the Provisional Regulation), determining that overcapacity was a constant during the investigation period and therefore could not be a relevant factor.

155. As the Panel correctly concluded, in the present case a finding of inconsistency with Articles 3.1 and 3.4 of the Anti-Dumping Agreement[111] does not automatically render the non-attribution analysis with respect to overcapacity inconsistent with Articles 3.1 and 3.5.[112]

156. Before the Panel Argentina also argued that in their non-attribution analysis the EU investigating authorities improperly focused on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered.[113] However, all that the absolute figures reveal is that there was, as presented by the exporter, an increase; they revealed nothing about the significance of the increase, an issue of crucial importance.

157. In that respect, the Panel correctly found that capacity utilization is logically related to overcapacity, as the rate of capacity utilization reflects the amount of excess capacity of the domestic industry in relative terms:

> [W]e see no basis in Article 3 of the Anti-Dumping Agreement – and Argentina has identified none – to support the proposition that an investigating authority would have to consider or give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms.[114]

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108 Argentina's other appellant submission, para. 348.

109 Panel Report, para. 7.463.

110 Argentina's other appellant submission, para. 342.

111 While in the previous section on Articles 3.1 and 3.4 the Panel made no conclusion with regard to the accuracy in fact of the revised data, it still found that the EU investigating authorities did not exercise sufficient care in assessing the accuracy of this data. Panel Report, para. 7.411.

112 Panel Report, para. 7.466.

113 For instance, Argentina's first written submission, para. 406.

114 Panel Report, para. 7.468.

158. The European Union agrees with the Panel that an objective and unbiased investigating authority may examine the issue of overcapacity on the basis of capacity utilization, which is "a more pertinent and informative basis on which to assess the issue of overcapacity" rather than in terms of the evolution of the domestic industry's overcapacity.[115]

159. Thus, Argentina's argument according to which the Panel failed to distinguish between overcapacity and capacity utilization should be dismissed. Argentina explains that:

> While "overcapacity" refers to a situation where a producer has capacity larger than what is required by the demand on a particular market, "capacity utilization" refers to the actual production as a percentage of the total capacity.[116]

160. Depending on the definition given to the term "capacity" in the phrase "capacity utilization", there might be circumstances in which this term and "overcapacity" could be distinguished. Nothing in the facts of the current case suggests that a meaning was intended other than one directly correlating "over capacity" with "capacity utilization". Argentina has presented no evidence or arguments to support its apparent assertion to the contrary.

7. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2.1.1

161. Argentina requests that, if the Appellate Body were to reverse the Panel's findings with respect to what Argentina refers to as its first claim under Article 2.2.1.1, then the Appellate Body should complete the legal analysis with regard to what Argentina refers to as its second claim under Article 2.2.1.1. According to Argentina, its second claim is that, by using the FOB reference price of soya, the measure at issue used a cost that is not associated with the production and sale of the product under consideration.[117]

162. *First*, Argentina has not requested the Appellate Body to reverse the Panel's exercise of judicial economy with respect to Argentina's second claim under Article 2.2.1.1. If no such request has been made, the Appellate Body cannot reverse that part of the Panel Report. If that part of the Panel Report cannot be reversed, there is no basis on which the Appellate Body could complete the legal analysis.

163. *Second*, the first sentence of Article 2.2.1.1 does not create an obligation on importing Members to only use, in the construction of normal value, costs associated with the production and sale of the product under consideration. Rather, it contains two conditions. If these conditions are satisfied, there is an obligation to normally base the cost calculation on the records kept by the investigated firm. One of the conditions that must be fulfilled in order for the obligation to apply is

115 Panel Report, para. 7.468.

116 Argentina's other appellant submission, para. 357.

117 Argentina's other appellant submission, paras. 373-390.

that the records ***reasonably*** reflect the costs associated with the production and sale of the product under consideration.

164. *Third*, under this heading, Argentina merely repeats its prior claims and arguments, because it asserts that Article 2.2.1.1 refers to what Argentina calls "actual" costs and not what Argentina calls "hypothetical" costs.[118] This is the same as Argentina's first claim under Article 2.2.1.1.

165. *Fourth*, the process to which Argentina is referring is not governed by the first sentence of Article 2.2.1.1. Rather, it is governed by the second sub-paragraph of Article 2(5) of the Basic Regulation, which, in this respect, partially completes the silence for the purposes of EU law.

166. We would like to further illustrate and clarify this latter point with an example. The records kept by the investigated firm contain the number 10. The investigating authority determines that this number (10) does not reasonably reflect the costs associated with the production and sale of the product under consideration. In this case, that determination was made because of the existence of the export tax on soya. This means that the second condition in the first sentence of Article 2.2.1.1 is not fulfilled. Consequently, the obligation to normally base the calculation of costs on the records kept by the investigated firm does not apply. Note that the investigating authority has not yet decided to reject, replace or adjust the number 10. Rather, following its determination that the number 10 does not reasonably reflect the costs associated with production and sale, the position is simply that it finds itself not bound by the obligation in the first sentence. The investigating authority then moves to the silence.

167. In that context, the investigating authority must decide what to do next. To recall, the European Union considers that this process is informed by a standard of reasonableness, whilst Argentina and the Panel do not consider that to be the case. The investigating authority could decide to "reject" the number 10, that is, it could decide not to use it in the calculation of costs. Note that it is not obliged to do so. There might or might not be reasons for not doing so, depending on the facts and evidence in a particular case. If it does decide to "reject" the number 10, it will have to "replace" it with something. For example, it could replace the number 10 with the number 15, if it has a reasonable basis for determining that the number 15 is appropriate. It could, for example, base itself on the costs of other producers or exporters in the same country, or make the necessary determination on any other reasonable basis, including information from other representative markets. If the investigating authority uses the number 15 we may also say that the number 10 has been "adjusted" to 15. In essence, these are just two different ways of saying the same thing.

168. As we have explained in our appellant submission, we consider that Argentina is mistaken about the interpretation of the second condition in the first sentence of Article 2.2.1.1, as well as Article VI(b)(ii) of the GATT 1994. The preparatory work confirms that the only reason why the reference to selling costs and profit in Article VI(b)(ii) of the GATT 1994 was added to the pre-existing draft was to **clarify** that the reference to cost of production **includes** not only profit but all

[118] Argentina's other appellant submission, para. 386.

other costs entering into a normal selling price,[119] no further discussion of this matter taking place once the proposed change was made.

169. The use of the term "reasonable" in this context is understandable given that the variable 'profit' is dependent on both the variable 'costs' and the variable 'domestic selling price'; and since domestic selling prices have, by definition, already been rejected once one reaches the point of constructing normal value, one may reasonably anticipate that profit will have to be established on some other basis. However, it does not follow from this, on the basis of attempted *a contrario* reasoning, that the determination of the costs of production and sale is not informed by a standard of reasonableness. The term reasonableness is also used with respect to the term "selling cost". Furthermore, the term "cost of production" was understood to **include** all costs, including both selling cost and profit, meaning that it must be the whole calculation that is informed by a standard of reasonableness. This is further reflect by the use of the term "addition": if it were possible to add a reasonable selling cost and profit to an *unreasonable* cost of production that would simply deprive the qualification of all utility, which would not be an acceptable interpretation. This is precisely why the second condition in the first sentence of Article 2.2.1.1 must be properly understood as informed by a standard of reasonableness in its entirety.

170. Thus, the correct way to read all of the relevant provisions is not to arbitrarily select some of them and engage in an attempt at *a contrario* reasoning, which in fact delivers incoherent and contradictory results, but rather to consider all of them together, and to search for and prefer a harmonious interpretation.[120] If one does that, the simple solution that immediately presents itself is blindingly obvious: a standard of reasonableness informs the determination of all the costs associated with production and sale.

8. CONCLUSIONS

171. In light of the preceding observations, the European Union requests the Appellate Body *to reject* in their entirety Argentina's claims in its other appellant submission *and uphold* the Panel's findings covered by Argentina's claims.

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119 United Nations, Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, Committee II, Draft Report of the Technical Sub-Committee, London, E/PC/T/C.II/54, 16 November 1946, pages 11-12 ("Article 11. Anti-dumping and Countervailing Duties"), at page 12, paragraph 1(b): ("It was understood that … "cost of production" should include not only profit but all other elements entering into a normal selling price."). Available at: https://docs.wto.org/gattdocs/q/UN/EPCT/CII-54.PDF.

120 Appellate Body Report, *Korea – Dairy*, para. 81 ("In light of the interpretative principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.") (original italic emphasis) (footnotes omitted); Appellate Body Report, *US – Continued Zeroing*, para. 268 ("The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective."). *See also* Appellate Body Report, *Argentina – Footwear*, para. 81; Appellate Body Report, *US – Upland Cotton*, para. 549.