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In the World Trade Organization
Before the Appellate Body

European Union — Anti-Dumping Measures on Biodiesel from Argentina

(DS473)

Appellant Submission
by the European Union

Geneva, 20 May 2016

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1. INTRODUCTION

1. The Panel Report that is the subject of the present appeal contains several errors of interpretation and application of the provisions of the Anti-Dumping Agreement, which led the Panel to erroneous findings and conclusions. For the reasons set out in its submissions to the Panel, and for the reasons to be further elaborated in this submission to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse the legal findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report as identified in the Notice of Appeal and in this submission.

2. The Panel Report under appeal dealt for the first time with several complex questions, the most important ones relating to the interpretation of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. The first question sought to establish whether, under Article 2.2.1.1, an investigating authority may find that the records of a producer/exporter do not "reasonably reflect the costs associated with the production and sale of the product under consideration" on the ground that the records reflect costs (especially of inputs) that the authority considers to be abnormally or artificially low due to a *state-induced* distortion, and specifically a *de jure* discriminatory[1] export tax. The second question pertained to whether an investigating authority may, under Article 2.2 of the Anti-Dumping Agreement, reject/replace/adjust the producer/exporter's costs of production by using information *published in the exporting country*, based on data from the country of origin and adjusted to reflect the price that would prevail in the country of origin but for the export tax, when it has been first determined that the records do not "reasonably reflect" the costs associated with the production and sale of the products under consideration.

3. In this submission, *first* the European Union will address the Panel's errors with respect to its findings regarding the European Union's alleged failure to calculate the cost of production of the product under investigation on the basis of the records kept by the producers under Article 2.2.1.1 of the Anti-Dumping Agreement. *Second*, the European Union will show that the Panel incorrectly interpreted and applied Article 2.2 of the Anti-Dumping Agreement by finding that the European Union allegedly failed to construct the normal value on the basis of the cost of production in the country of origin. *Third*, the European Union will address the Panel's errors in the interpretation and application of Article 9.3 of the Anti-Dumping Agreement when finding that the European Union imposed anti-dumping duties allegedly in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

4. As a consequence, the European Union requests the Appellate Body to reverse the Panel's findings and conclusions, particularly as set out in paragraphs 8.1 (c)(i),(ii) and (vii) of its Report.

[1] That is, in the sense that it applies to export sales, but not to domestic sales of soya.

2. EXECUTIVE SUMMARY[2]

2.1. THE PANEL ERRED BY FINDING THAT THE EUROPEAN UNION "FAILED TO CALCULATE THE COST OF PRODUCTION OF THE PRODUCT UNDER INVESTIGATION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS" PURSUANT TO ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

2.1.1. Overview of the correct interpretation of the condition at issue, considered in its context and in light of the relevant object and purpose

5. The condition at issue is the phrase "records … reasonably reflect the costs …" in Article 2.2.1.1. The **specific and narrow** issue that is before the Appellate Body is how **the condition at issue** should have been interpreted and applied to **the specific factual and evidential pattern in this case**. The Appellate Body should not adjudicate on other issues that might arise under the Anti-Dumping Agreement or Article VI of the GATT 1994.

6. Article 2 sets out a **definition** which contains **the most fundamental elements** of the determination of dumping, including **normal value** and **price comparability**. Article 2.2.1.1 is framed as a provision to be applied "for the **purpose of paragraph 2**", namely **for the purpose of establishing a normal value**.

7. It is important to note that an investigating authority may need to apply Article 2.2.1.1 **more than once** in the same dumping margin calculation: for example, in determining whether or not domestic sales are in the ordinary course of trade by reason of price; and then again in determining normal value based on costs of production, SG&A and profit.

8. The interpretation and application of Article 2.2 should be systematic and coherent with reference to several issues: in particular, the consistent references to **all costs**, and the consistent references to **reasonableness**.

9. **There are no costs excluded from Article 2.2.1**, which refers to "**all costs**". By definition, when Article 2.2.1 refers to "selling … costs" it is also referring to the cost of sales. The first sentence of Article 2.2.1.1 refers to **all costs**. It is with respect to **all costs** that the records kept by the investigated firm must be in accordance with the local GAAP. And it is with respect to **all costs** that the records kept by the investigated firm must reasonably reflect the costs associated with the production and sale of the product under consideration.

10. A standard of reasonableness is referenced in several parts of Article 2.2 as a whole and throughout that provision, and, in the condition at issue, informs not only the term reflect, but also the determination of the costs of production and sale. Any unreasonable costs cannot be reasonably reflected in the records of an investigated firm.

11. The first sentence of Article 2.2.1.1 contains two **conditions**. The first relates to GAAP, whilst the second is the condition at issue ("records … reasonably reflect the costs …"). This is not an obligation, but a condition. Such a condition –

[2] Total number of words (including footnotes but excluding executive summary) = 28319; total number of words of the executive summary = 2752.

consequence structure is **not the same**, as a matter of law, to a general rule – exception structure.

12. If the relevant conditions are fulfilled, then, according to Article 2.2.1.1, a particular **consequence** follows: **normally** the costs shall be calculated on the basis of the records of the investigated firm. The meaning of this part of the provision is not before the Appellate Body in this appeal.

13. Article 2.2.1.1 indicates some of the circumstances in which it may be justified to replace or adjust specific cost items in the records of the investigated firm, although **these issues are not before the Appellate Body in this appeal** (cost allocations "historically utilized", non-recurring items of cost and start-up operations, and the existence of an "association or compensatory arrangement")**.**

14. Articles 2.2.1.1 and Article 2.2.2 are not mutually exclusive. The phrase at issue cannot be properly interpreted as meaning that a standard of reasonableness informs the term "reflect", but not the determination of the costs associated with production and sale.

15. There are several indicators supporting the EU's view in the overall context. *First*, the repeated use of the term "**normal**" throughout the relevant provisions, including in Articles 2 of the Anti-Dumping Agreement and VI of the GATT 1994. *Second*, the repeated references to the concept of a "**proper comparison**" or "comparable prices" or a "fair comparison" throughout the relevant provisions. *Third*, the references to the concept of something that is "**representative**" throughout the relevant provisions. *Fourth*, the repeated use of the term "**reasonable**" throughout the relevant provisions. **How could it be that, in the condition at issue, a standard of reasonableness informs the determination of the costs associated with sales, but not production?**

16. *Fifth*, it may be reasonable/necessary in certain circumstances to refer to an external proxy for the purposes of applying the two conditions in the first sentence of Article 2.2.1.1. This is exactly what the first condition foresees, by reference to local GAAP, which is an **external** element to the records kept by the investigated firm.

17. *Sixth*, the phrase "**associated** with the production and sale" is drafted in relatively general and abstract terms and should govern the matter, not the term "actual", which does not appear in the text.

18. *Seventh*, Article 2.2.1.1 provides that the investigating authority must consider **all available evidence** on the proper allocation of costs, **not limited** to the evidence coming from the investigated firm.

19. *Eighth*, if one of the conditions provided for in Article 2.2.1.1 is not satisfied, then the obligation to normally use the records kept by the investigated firm does not apply. The provision is silent as to what method is to be used to establish the costs of production and sale in such circumstances, which should be **informed by a standard of reasonableness**.

20. *Ninth*, an investigating authority could either replace or **adjust** specific costs in the records kept by the investigated firm. The reference to taxation in Article 2.4 confirms that an adjustment pursuant to the first sentence of Article 2.2.1.1 is an appropriate and objective response to a *de jure* discriminatory export tax designed precisely to have the effect of masking the dumping. **As a matter of law**, dumping

is also **defined** as arising when the export price is less than the normal value calculated on the basis the **costs** associated with production and sale, **properly and reasonably determined**.

21. *Tenth*, it is precisely because export taxes are not covered by Article XI of the GATT 1994 that one must be careful to make sure that other disciplines are correctly understood so as to permit a reasonable and appropriately calibrated response to the existence of such *de jure* discriminatory and trade-distorting measures.

2.1.2. Legal errors in the Panel's reasoning, findings and conclusions

22. Even before embarking on its analysis, the Panel appears to have pre-judged the issue by framing the question using tendentious language.

23. The Panel opined that the **purpose** of paragraph 2 is to elaborate rules for determining the cost of production in the country of origin. Rather, the purpose of paragraph 2 is to elaborate rules for determining a value that is normal, or a normal value.

24. The Panel opined that the first sentence of Article 2.2.1.1 consists of a "**general rule**" and two "**derogations**". None of the three previous cases invoked supports the Panel's statement.

25. The Panel considered that the focus of the condition at issue is on the specific producer/exporter under investigation, and what is contained in its records. Instead, the focus of the condition is **equally** on **both** the **records** kept by the investigated firm and the **costs** associated with the production and sale of the product under consideration.

26. The Panel's reference to **Article 6.10** is misplaced. Article 2 provides that, in certain circumstances, the same data from the same source may be used in order to determine, in part, the dumping margins of several exporters.

27. The Panel opines that GAAP generally encompass a requirement that all costs have **actually** been incurred, concluding then that the second condition must **also** be referring to the "actual" costs. The Panel fails to explain how its observation relates to its line of reasoning. The Panel's reference to an **association or compensatory arrangement** between the investigated firm and one of its suppliers sheds contextual light on what situations might justify replacing or adjusting the records kept by the investigated firm.

28. The Panel makes a series of statements that confirm that one should search for a "proxy" that is "appropriate", "accurate" and "reliable".

29. The Panel erroneously finds support in **footnote 6,** which it construes as **s**uggesting that the cost data must in all circumstances be specific to each individual exporter or producer.

30. The Panel fails to look properly at the context in Article 2.2.2, as it refers to actual data pertaining to production and sales **in the ordinary course of trade**.

31. The Panel makes three erroneous statements about object and purpose, relating to the lack of a preamble of the Anti-Dumping Agreement, a confusion with the supplementary means of interpretation and the very language of Article 2.2.1.1. The Panel rejects the EU's submission that the second Ad note to Articles VI:2 and

VI:3 of the GATT 1994 (on multiple currency practices) supports its arguments in this case.

32. The Panel makes certain assertions about provisions in the protocols of accession of certain Members.

33. Having concluded this part of its analysis, the Panel then reviews three other panel reports. In fact, each of them (*US – Softwood Lumber V* , *Egypt – Steel Rebar* and *EC-Salmon (Norway)*) lends support to EU's position. Investigating authorities may at least test the recorded costs against market values, in order to determine whether the records reasonably reflect the costs. Taken together, those findings confirm that previous panels did not foreclose the possibility that an investigating authority may disregard or adjust costs which do not reflect market values.

2.1.3. The Panel erred not only in its interpretation but also in its application of Article 2.2.1.1 and particularly the condition at issue, in light of the Vienna Convention and the existing case law

34. The Panel failed to conduct a **holistic analysis** of the ordinary meaning, context and object and purpose of Article 2.2.1.1.

35. With respect to its **ordinary meaning**, the Panel understood the first sentence of Article 2.2.1.1 to relate exclusively to a cost allocation issue. This is contradicted by the panel's findings in *US-Softwood Lumber V*.

36. The phrase "costs associated with" refers to the costs related to, which cannot be equated to "costs actually incurred". Article 2.2.1.1 does not include the words "expenses *actually* incurred by the producer".

37. The immediate **context of the phrase** at issue suggests that to "reasonably reflect costs associated with production and sale", records must reflect something more than simply the "expenses actually incurred".

38. The Panel's reliance on Article 6.10 fails for several reasons, related to the calculation of the normal value or the export price.

39. The **object and purpose** of the WTO anti-dumping rules can be discerned from Article VI:1 of the GATT 1994, as to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low, because of some abnormal condition (hence the reference to "normal" value), within reasonable limits. The second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 confirms that in certain circumstances *price distortion caused by governmental action* can also cause dumping.

2.2. THE PANEL ERRED WHEN FINDING THAT THE EUROPEAN UNION "FAILED TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN" AS REQUIRED BY ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

2.2.1. Legal standard under Article 2.2 of the AD Agreement

40. A distinction must be made between "cost…in the country of origin" and the evidence pertaining to such cost. Indeed, Article 2.2, as a whole, does not forbid

outright the use of data on the cost of production from countries other than the country of origin. Article 2.2.2(iii) expressly refers to the use of "any other reasonable method".

41. The Anti-Dumping Agreement contains no rule that precludes securing evidence from outside the country of origin in order to identify the costs in the country of origin. Article 6 does not impose any limits on the countries from which evidence may be obtained.

42. Article 2.5 is instructive: normal value is based on the comparable price either in the country of export or in the country of origin, according to the circumstances.

2.2.2. The Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement by "not using the actual costs "in the country of origin" when constructing the normal value"

43. The Panel stated that certain claims of Argentina under Article 2.2 were consequential, and it did not make findings in that respect. However, the Panel opined that the measure at issue is inconsistent with Article 2.2 because the normal value was not constructed on the basis of the "actual" costs "in the country of origin".

44. A price derived from a price at the border can by definition be simultaneously characterised as both an international price and a price in Argentina. The Panel fails to recognise that the subtraction of the fobbing costs renders the result a reasonable proxy for the normal price of soya in Argentina.

45. During the first substantive meeting, Argentina confirmed that the prices used by the European Union's investigating authority were indeed "constructed" by the Government of Argentina on the basis of various sources, including information from **Argentinean** ports. Accordingly, they were prices "in the country of origin" as per Article 2.2.

46. Costs and evidence pertaining to those costs are separate elements. *First*, the notion of "the cost of production in the country of origin" set out in Article 2.2 is a legal one, while establishing the cost in a particular case involves determinations of fact, made with the aid of evidence. *Second*, the possibility of using "any other reasonable method" in Article 2.2.2(iii) implies that Article 2.2, as a whole, does not impose an absolute prohibition on the use of data on the cost of production from countries other than the country of origin (when sales are not in the "ordinary course of trade").

2.3. THE PANEL ERRED WHEN FINDING THAT THAT THE EUROPEAN UNION "IMPOSED ANTI-DUMPING DUTIES IN EXCESS OF THE MARGINS OF DUMPING THAT SHOULD HAVE BEEN ESTABLISHED UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT"

2.3.1. Legal standard under Article 9.3 of the Anti-Dumping Agreement

47. It is undisputed that the ordinary meaning of the phrase "the margin of dumping as established under Article 2" is that of a margin of dumping established *in accordance with the provisions of Article 2*.

48. A Member's failure to comply with the provisions of Article 2 does not automatically constitute a failure to comply with Article 9.3.

2.3.2. The Panel's errors regarding Argentina's claim under Article 9.3 of the Anti-Dumping Agreement

49. The Panel made several errors in interpreting and applying Article 9.3 to the facts of the present case.

50. *First*, the European Union submits that Article 9.3 addresses the *comparison* between the anti-dumping duties and the dumping margins, as opposed to addressing the *calculation* of the normal value

51. *Second*, the Panel erred when it inferred from its previous findings with regard to Articles 2.2.1.1 and 2.2 that the European Union also breached Article 9.3.

52. *Third*, the Panel erred by seeking to rely on the dumping margins calculated in the Provisional Regulation, effectively implying that this is what the determination should have been, thus exceeding the authority vested in it pursuant to the DSU and the rules in the Anti-Dumping Agreement, which is to determine whether or not the measure at issue is WTO consistent. The Panel should have limited itself to determining if the investigating authority's evaluation of the facts was unbiased and objective, as provided for in Article 17(6)(i).

2.4. CONCLUSIONS

53. As a consequence, the European Union requests the Appellate Body to find that the Panel erred when finding that the European Union acted inconsistently with Articles 2.2.1.1, 2.2 and 9.3, reverse the Panel's findings and conclusions in paragraphs 7.247, 7.248, 7.249, 7.260, 7.367 and 8.1 (c)(i),(ii) and (vii) of its Report.

54. Having reversed the Panel's respective findings and conclusions the Appellate Body is not in a position to complete the legal analysis, and should not do so.

3. THE PANEL ERRED BY FINDING THAT "THE EUROPEAN UNION FAILED TO CALCULATE THE COST OF PRODUCTION OF THE PRODUCT UNDER INVESTIGATION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS" PURSUANT TO ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

55. The European Union submits that the Panel erred in the interpretation and application of the first sentence of Article 2.2.1.1, and particularly the condition at issue, when finding that the European Union "failed to calculate the cost of production of the product under investigation on the basis of the records kept by the producers under Article 2.2.1.1 of the Anti-Dumping Agreement". As a result,

the European Union requests the Appellate Body to reverse the Panel's findings in that respect.[3]

3.1. SUMMARY OF THE PANEL'S FINDINGS

56. Argentina argued before the Panel that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement (and, as a consequence, with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994) by determining that the costs of the main raw material in the production of biodiesel (soybean oil and soybeans) were not reasonably reflected in the records kept by the Argentine producers under investigation, as those costs were artificially lower than what domestic market prices would have been, but for the distortion created by the Argentine differential export tax (DET) system.[4]

57. The Panel started by asserting that the term "shall" in the first sentence of Article 2.2.1.1 indicates that it establishes a mandatory rule in this respect, whereas the term "normally" suggests that this rule may be derogated from under certain conditions.[5] Accordingly, the first sentence of Article 2.2.1.1 provides for two circumstances in which an investigating authority may disregard the records kept by the producer/exporter under investigation when calculating the necessary costs in order to construct the normal value. Of the two expressly mentioned situations, the second is at issue in the present proceedings, as the EU's investigating authority found that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.[6]

58. In seeking to ascertain the meaning of the phrase "records…reasonably reflect the costs associated with the production and sale …", the Panel equated that phrase with the costs that producers *actually* incur in manufacturing and selling the product in question. The Panel considered that in certain circumstances records which might be consistent with GAAP might still not adequately report the *actual* costs incurred by the producer/exporter under investigation, offering as examples cases of the specific producer/exporter under investigation being part of "a vertically-integrated group of companies in which the actual cost of production of particular inputs is spread across different companies' records, or in which transactions between such companies are not at arms-length or indicative of the actual costs involved in the production of the product under consideration".[7]

59. The Panel did not find that there may be other circumstances than the ones offered as examples, when the records do not reasonably reflect the respective costs. The Panel did not analyse in detail the arguments with respect to the object and purpose of the Anti-Dumping Agreement[8] and disagreed with the European Union

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3 Panel Report, para. 8.1(c)(i); particularly paras. 7.247, 7.248 and 7.249.

4 Argentina's first written submission, paras. 204-207.

5 Panel Report, para. 7.227.

6 Recital 38, Definitive Regulation (Exhibit ARG-22); European Union's response to Panel question no. 82, paras 10-14.

7 Panel Report, para. 7.232.

8 Panel Report, para. 7.238.

that there may be other situations of dumping created by the action of governments, apart from multiple currency practices.[9]

60. According to the Panel, the object of the comparison "is to establish whether the records reasonably reflect the costs *actually* incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred".[10]

61. The Panel then concluded that the proper interpretation of the phrase "records … reasonably reflect the costs associated with the production and sale" in Article 2.2.1.1 requires "an assessment of whether the costs set out in a producer's records correspond – within acceptable limits – in an accurate and reliable manner, to all the actual costs incurred by the particular producer or exporter for the product under consideration".[11]

62. In light of the foregoing considerations, the Panel found that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by "failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers".[12] The Panel found it unnecessary to address Argentina's consequential claims under Articles 2.2 of the Anti-Dumping Agreement and VI:1(b)(ii) of the GATT 1994.[13]

3.2. LEGAL ARGUMENT

63. The European Union submits that the Panel erred when finding that Article 2.2.1.1 of the Anti-Dumping Agreement mandates the construction of the normal value solely on the basis of the records kept by the producers, even when domestic prices of inputs are distorted by state intervention.

3.2.1. Overview of the correct interpretation of the condition at issue, considered in its context and in light of the relevant object and purpose

64. The report under appeal is the first panel report on the specific issues arising in the present case, when there are no sales in the ordinary course of trade, resulting in the construction of normal value based on the costs of production and sales, and the domestic market is distorted by state intervention in the form of a *de jure* discriminatory export tax on the main raw material used in the production of the product under consideration. With this in mind, in this section the European Union provides an overview of the condition at issue, considered in its context and in light of the relevant object and purpose.

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9 Panel Report, paras 7.239-7.240.

10 Panel Report, para. 7.242.

11 Panel Report, para. 7.247.

12 Panel Report, para. 7.249.

13 Panel Report, para. 7.250.

65. The condition at issue in this part of the appeal is the phrase "records … reasonably reflect the costs …" in Article 2.2.1.1. In setting out, in this section, an overview of the condition at issue, considered in its context and in light of the relevant object and purpose, the European Union aims merely to explain how the customary rules of interpretation of public international law should have been applied in this case. In doing so, at the same time, we wish to emphasise that the **specific and narrow** issue that is before the Appellate Body in this part of the appeal is how **the condition at issue** should have been interpreted and applied to **the specific factual and evidential pattern in this case**. In this respect, we expect the Appellate Body to adjudicate on that issue only, and not on any other issues that might arise under the Anti-Dumping Agreement or Article VI of the GATT 1994. Article 2 of the Anti-Dumping Agreement is a complex provision, drafted at a high level of abstraction, in condensed terms, intended to be flexible enough so as to encompass different anti-dumping laws of different Members, as well as capable of being applied in a reasonable and operational manner to the myriad of factual and evidential patterns that might arise in any number of individual cases. To clarify, in the context of this part of the appeal, any other aspects of that provision, without having before you a specific factual and evidential pattern pertaining to such other aspect, would, in our respectful submission, seriously risk to inappropriately and unnecessarily interfere with the delicate balance of rights and obligations agreed by the Members. The Appellate Body's task is to resolve the specific dispute that is before it.

66. The condition at issue sits within Article 2.2.1.1. Article 2 is concerned with the determination of dumping (Article 3 continues with the determination of injury). Article 2.1 sets out a **definition** which contains **the most fundamental elements** of the determination of dumping, including **normal value** and **price comparability**. Article 2.2 is concerned with the establishment of a value that is normal, or, more shortly, a normal value – a term that is not defined in Article 2.2: rather, by the Anti-Dumping Agreement's own terms, what Article 2.2 does is to set out rules that implement the concept of a normal value, as that concept appears in Article VI of the GATT 1994. Article 2.3 is concerned with the establishment of export price. Article 2.4 is concerned with making a fair comparison between the normal value and the export price, making appropriate adjustments to the extent that they have not already been made pursuant to Articles 2.2 or 2.3. Article 2.5 is concerned with the issue of transhipment, and explains that if certain conditions are present (the list is open) data should be used from the country of origin; but that otherwise data from the country of export should normally be used. Article 2.6 contains a definition of the term "like product". Article 2.7 specifies that Article 2 is without prejudice to the second Ad note to Article VI:1 of the GATT 1994 (thus, reversing the rule in the explanatory note to Annex 1A of the WTO Agreement that, in case of conflict, the Anti-Dumping Agreement would prevail over the GATT 1994).

67. Following the definition of dumping, and the introduction of the notions of normal value and price comparability in Article 2.1 of the Anti-Dumping Agreement, Article 2.2 elaborates **the rules for determining normal value.** When there are no domestic sales of the like product or, for various reasons, such sales cannot be used, the choice lies between a comparable representative price to a third country or a constructed normal value. Article 2.2 contains two sub-paragraphs. Article 2.2.1 focuses in on the question of when domestic sales or sales to a third country

may be treated as not in the ordinary course of trade by reason of price (when they are below the costs of production plus administrative, selling and general costs). Article 2.2.2 focuses in on how to determine amounts for administrative, selling and general costs and profit "for the purpose of paragraph 2", that purpose being to determine a normal value.

68. Article 2.2.1 itself contains one further sub-paragraph: Article 2.2.1.1. By its own terms, Article 2.2.1.1 is framed as a provision to be applied "for the **purpose of paragraph 2**". The term "purpose" appears in the singular. To understand the provision properly, we must therefore look back to the single purpose of paragraph 2. We must neither improperly expand nor narrow that single purpose. Nor must we break down paragraph 2 into multiple purposes and arbitrarily select one of them, to the exclusion of others. The single purpose of paragraph 2 is, as we have already observed, to set out rules governing the establishment of a value that is normal or, for short, a normal value. Thus, we must correctly understand the first sentence of Article 2.2.1.1 as requiring that, **for the purpose of establishing a normal value**, provided that certain conditions are met, costs shall normally be based on the records of the investigated firm.

69. In this respect, it is important to note that an investigating authority may need to apply Article 2.2.1.1 **more than once** in the same dumping margin calculation: for example, in determining whether or not domestic sales are in the ordinary course of trade by reason of price; and then again in determining normal value based on costs of production, administrative, selling and general costs and profit. This is an important point. Argentina and the Panel present the matter as if Article 2.2.1.1 only comes into play when determining a constructed normal value pursuant to the final phrase of Article 2.2, and they would apparently like you to casually adopt the same assumption in these proceedings. However, the correct legal observation is that Article 2.2.1.1 may **first** come into play when determining, for example, whether domestic sales are not in the ordinary course of trade by reason of price. In this respect, the investigating authority does not pass through the final phrase of Article 2.2, but moves instead to Article 2.2.1 (which twice uses the term reasonable) and then on to Article 2.2.1.1. Furthermore, even if domestic sales are rejected as a basis for a normal value, this only leads the investigating authority to the bi-furcation between a comparable and representative price to a third country and a constructed normal value, and the price to a third country is also subject to the analysis in Article 2.2.1 (by that provision's own terms), and thus Article 2.2.1.1. This means that, even on this **second** circuit the investigating authority may get to Article 2.2.1.1 without ever reaching the final phrase of Article 2.2. Thus, the critical point to note is that Article 2.2.1.1 must be interpreted and applied in a manner that fully comports with these first and second circuits of the provision, and not, as Argentina and the Panel would appear to have it, only by considering the **third**.

70. Thus, the consequence of interpreting and applying Article 2.2.1.1 incorrectly (as reflected in Argentina's arguments and the Panel's findings) is that an investigating authority might never get to the question of a constructed normal value, but be forced instead to base normal value on domestic sales, or price to a third country, irrespective, according to the Panel, of how aberrational the underlying data may be.

71. As we read through Article 2.2 we think it is important to be clear about what precisely these provisions are referring to. For reasons that will become clear as we progress with the analysis, we would like to do this now, twice: once focusing on **selling or sales costs**; and a second time focusing on the term "**reasonable**".

72. Turning to the first issue, as we engage on a first circuit of the provision, we first encounter the relevant terms in Article 2.2.1., which refers to "costs of production plus administrative, selling and general costs". **We do not think that this means that something is excluded from Article 2.2.1**. As we read the rest of the provision, we note that it refers to "**all costs**", and then uses the term "costs" three further times in the same sense. So, at the risk of stating the obvious, it must be that, by definition, when Article 2.2.1 refers to "selling … costs" it is also, by its own terms, referring to the cost of sales.

73. Following the logical progression of analysis in Article 2.2, we read in the first sentence of Article 2.2.1.1 the term "costs". Since this is a nested provision, we think that this term "costs" follows on from the three uses of the term "costs" in Article 2.2.1, thus also from the term "**all costs**", and thus also from the phrase "costs of production plus administrative, selling and general costs" (that is, including, by definition, the cost of sales). Thus, when we come to the second use of the term "costs" in the first sentence of Article 2.2.1.1 we consider it reasonable to conclude that it has the same meaning as when it is used the first time in that sentence: it simply means the costs, without limitation. When we then read the reference to "costs … associated with the production and sale" in the condition at issue we think this makes perfect sense, since when one is looking at a firm engaged in the production and sale of a particular product, all of the types of costs that it is incurring are, in some sense, and by definition, necessarily associated in some way with the production and sale of that product. Reading on in the second and third sentences of Article 2.2.1.1 and footnote 6 we find seven further references to costs, which appear to confirm this analysis. Finally, in Article 2.2.2, we find a continuation of the same logic: the amounts for administrative, selling and general costs and for profits are to be based on actual data pertaining to production and sales in the ordinary course of trade. Nothing is excluded (and consistent with this, Article 2.2.2(i) and (ii) both refer to production and sales).

74. If we determine that domestic sales are not in the ordinary course of trade by reason of price and reach the bifurcation between a comparable and representative price to a third country and constructed normal value, we may embark on a **second** circuit of these provisions with respect to price to a third country, and we would reach the same conclusions regarding the various references we have set out above.

75. Finally, if we engage on a **third** circuit (with respect to constructed normal value) we reach the same conclusions. When the final phrase of Article 2.2 refers to "cost of production … plus a reasonable amount for administrative, selling and general costs and for profits", nothing is excluded – the term "selling … costs" makes it clear that the costs of sales are included. This is further confirmed by Article VI:1(b)(ii) of the GATT 1994, which refers to the cost of production plus an addition for selling cost and profit: nothing is excluded, because the cost of sales is expressly included by the reference to selling costs.

76. Our **conclusion**, which should not be controversial, but which is significant, is that the first sentence of Article 2.2.1.1 refers to **all costs**. It is, of course, with respect

to **all costs** that the records kept by the investigated firm must be in accordance with the local GAAP. And it is, of course, with respect to **all costs** that the records kept by the investigated firm must reasonably reflect the costs associated with the production and sale of the product under consideration.

77. Turning to the second issue, and following the same logical progression of analysis, one circuit at a time, when we first arrive at the phrase "costs of production plus administrative, selling and general costs" in Article 2.2.1 we note that there is no express reference to the term "reasonable". **We do not think that this means that a standard of reasonableness does not inform the determination of these costs.** We note that the term reasonable is twice subsequently used in that provision. We also note that the term "reasonable" in Article 2.2.2(iii) demonstrates that a standard of reasonableness informs the determination of the amounts for administrative, selling and general costs and for profits as well as the production and sales data on which they are based. We further note that the condition at issue contains the term "reasonable", and that it is informed by the notions of normal value and price comparability. Article VI:1(b)(ii) of the GATT 1994 also uses the term reasonable to qualify selling cost (that is, cost of sales) and profit. We reach the same conclusions on the second circuit, with respect to a comparable and representative price to a third country. Finally, we reach the same conclusion on the third circuit. The fact that the final phrase of Article 2.2 only uses the term "reasonable" with respect to the amounts for administrative, selling and general costs and for profits **does not lead to the conclusion** that the determination of the costs associated with production can be unreasonable, for all the reasons set out in this submission.

78. These observations are important to us because what we are asking for is an interpretation and application of this provision that is systematic and coherent with specific reference to these two issues: the consistent references to **all costs**; and the consistent references to **reasonableness**. We don't think that Argentina's position achieves this.

79. The first sentence of Article 2.2.1.1 contains two **conditions**, introduced by the term "provided that"'. The first condition relates to GAAP, whilst the second condition is the condition at issue ("records … reasonably reflect the costs …"). It is important to be clear that this is not an obligation, but a condition. This means that what is specifically at issue in this part of the appeal is a condition, not an obligation. The specific issue in dispute between the parties before the Panel was whether or not the measure at issue is inconsistent with Article 2.2.1.1 insofar as the measure at issue determined that this condition was not fulfilled; the Panel found the measure inconsistent because, according to the Panel, a determination of the costs associated with production and sale is **never** informed by a standard of reasonableness; and the specific issue on appeal is whether or not, in this respect, the Panel erred in the interpretation or application of the terms of Article 2.2.1.1 that set out this condition.

80. If the relevant conditions are fulfilled, then, according to the terms of Article 2.2.1.1, a particular **consequence** follows. That consequence is framed as an obligation (through the use of the term "shall"). Specifically, the consequence is that **normally** the costs are to be calculated on the basis of the records of the investigated firm. Thus, by its own terms, the first sentence of Article 2.2.1.1 does not establish the consequence as an absolute rule, but frames the consequential

obligation by using the term "normally". Also by its own terms, the first sentence of Article 2.2.1.1 does not explicitly set out what circumstances may be considered "normal" and what circumstances may be considered "not normal". Furthermore, the Panel explicitly and repeatedly stated that it was making no findings with respect to this issue, and this issue is therefore not before you in this appeal.[14] In other words, the issue of whether or not, in the condition at issue, a standard of reasonableness informs the determination of the costs associated with production and sale (which is before you) is **not the same** as the question of the circumstances that would not be normal within the meaning of the term "normal" incorporated by reference in the first sentence of Article 2.2.1.1 and the meaning of the term "normally" used in the first sentence (such issues not being before you). As in many other provisions of the covered agreements (such as Article 2.4), these different terms complement each other, and it is possible that in some cases some facts or some evidence may be pertinent, in different ways, to each or both of them. Nevertheless, in the specifically negotiated text of the first sentence of Article 2.2.1.1 these issues (what is normal and what is reasonable) are not the same, and that distinction must be respected.

81. It is important to recognise and acknowledge, in the design and architecture of the first sentence of Article 2.2.1.1, that there are two conditions that, if satisfied, result in a specific consequence. Such a condition – consequence structure is **not the same**, as a matter of law, to a general rule – exception structure, and it would be legally erroneous to interpret and apply the provision as if it were framed as a general rule – exception, when that is not the case.

82. By its own terms, Article 2.2.1.1 does indicate some of the circumstances in which it may be justified to reject/replace/adjust specific cost items in the records of the investigated firm although, once again, **these issues are not before you in this appeal**.[15] For example, the **second sentence** of Article 2.2.1.1 refers to cost allocations have been "historically utilized" by the investigated firm, in particular as regards amortization, depreciation, allowances for capital expenditures and other development costs. Thus, a specific cost allocation might be in accordance with GAAP and otherwise "reasonably reflect the costs …", but it might not have been "historically utilized" by the investigated firm, as opposed to being specifically engineered for the purposes of completing the questionnaire response. Thus, in such a situation, instead of calculating costs exclusively on the basis of the records kept by the investigated firm, an investigating authority may be entitled to reject/replace/adjust such costs (by definition, by having recourse to information or data exogenous to the records kept by the investigated firm). The same comment applies with respect to the **third sentence** of Article 2.2.1.1 (including footnote 6), which relates to non-recurring items of cost and start-up operations. Also in this situation, instead of calculating costs exclusively on the basis of the records kept by the investigated firm, an investigating authority may be entitled to reject/replace/adjust such costs. The same comment applies with respect to the existence of an **"association or compensatory arrangement"** as referenced in Article 2.3. The Appellate Body has recognised that rejecting transactions between affiliates in favour of transactions that are in the ordinary course of trade is

14 Panel Report, para. 7.227, final sentence and footnotes 380 and 388.

15 Panel Report, para. 7.227, final sentence and footnotes 380 and 388.

consistent with Article 2.1, and thus consistent with the purpose (establishing a normal value) that Article 2.2.1.1 is expressly directed towards achieving.[16] If such adjustments would not be made pursuant to Article 2.2.1.1 (the terms adjusted and adjustment appear in the third sentence and in footnote 6), then they would only have to be made instead pursuant to Article 2.4.

83. We also think that it is important to properly appreciate the relationship between Article 2.2.1.1 and Article 2.2.2. The two provisions are not mutually exclusive, any more than Articles 2.2.1 and 2.2.2 are mutually exclusive. By their own terms, Article 2.2.1, Article 2.2.1.1 and Article 2.2.2 are concerned with the determination of the costs of production plus administrative, selling and general costs (including the costs of sales). Just like Article 2.2.1.1, Article 2.2.2 states that it is to be applied "for the purpose of paragraph 2", that is, for the purpose of establishing a value that is normal, or, for short, a normal value. Consistent with this, the first sentence of Article 2.2.2 does not state that the amounts for administrative, selling and general costs and profit must be based on actual data. That would be an incomplete, imbalanced and legally erroneously statement. Rather, it states, by its own terms, that the amounts for administrative, selling and general costs and profit must be based on actual data pertaining to production and sales **in the ordinary course of trade**. When the amounts cannot be determined on such basis, they may be calculated on the basis of (that is, through rejection/replacement/adjustment) other data: the same general category of products; data of other exporters or producers; or any other reasonable method, subject, with respect to profit, to a cap, which takes the situation **normally** pertaining in the domestic **market** as a proxy or benchmark.

84. Coming to the heart of the dispute, we consider that the phrase "records … reasonably reflect the costs associated with the production and sale of the product under consideration" cannot be properly interpreted as meaning that a standard of reasonableness informs the term "reflect" but not the determination of the costs associated with production and sale. This would mean that, as the Panel would have it, no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do. In the context of Article 2.2 the investigating authority can reject domestic sales as not in the ordinary course of trade on the grounds that the underlying data is unreasonably distorted; and in the context of Article 2.2.2, the investigating authority could use a reasonable methodology to replace/reject/adjust those very same (unreasonable) production or sales costs and any administrative, selling or general costs or profit based on them; but in the context of Article 2.2.1.1 it would be powerless to act. This a proposition that it is hard to make sense of. If data is to be properly rejected/replaced/adjusted in such provisions, in order to ensure the integrity of the dumping margin calculation, it cannot be that, in the context of the condition at issue, the investigating authority is forced to re-introduce the very same data, which it has lawfully excluded elsewhere.[17]

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[16] The point is confirmed by the Panel at para. 7.232, final sentence. See: Appellate Body Report, *US – Hot-Rolled Steel*, paras. 159-173.

[17] Appellate Body Reports, *China – HP-SSST*, para. 5.52 ("… MOFCOM was required, in its determination, to explain why it determined an amount for SG&A costs "based on the application

85. To be clear, we are not speaking of the issue of how to transpose data contained, for example, in an invoice from an unrelated supplier into the records of the investigated firm. This is the narrow "reflects" issue, which the Panel has found to be informed by a standard of reasonableness. Rather, we are speaking of the question of whether or not the data on the invoice from the unrelated supplier can be reasonably and meaningfully used to determine whether or not dumping is occurring. For the Panel, **no standard of reasonableness informs this question, and, for the Panel, there is no fetter on this absolute proposition**. The costs in the records kept by the investigated firm could be one tenth or even one hundredth of the costs associated with the production and sale of the product under consideration, and yet the investigating authority would be powerless to appropriately calibrate the measure to be applied in such circumstances. We don't think this is correct. We don't think that it makes sense to speak of an unreasonable cost being reasonably reflected.

86. When we look carefully at the overall context we find many indicators supporting our conclusion.

87. *First*, the repeated use of the term "**normal**" throughout the relevant provisions, including in Article VI of the GATT 1994; in the basic definition in Article 2.1; in Article 2.2, footnote 2, Article 2.2.1, and footnote 5; in Articles 2.2.1.1 and 2.2.2 (by cross-reference) and Article 2.4. The overarching requirement that the export price must be compared with a value that is normal, that is, a normal value, provides compelling support for the proposition that a standard of reasonableness must inform not only the term "reflect" but also the determination of the costs associated with production and sale.

88. *Second*, the repeated references to the concept of a "**proper comparison**" or "comparable prices" or a "fair comparison" throughout the relevant provisions, including in Article VI of the GATT 1994; in Article 2.2 and footnote 2; in Articles 2.2.1.1 and 2.2.2 (by cross-reference); and in Article 2.4. The overarching requirement that export price must be compared with a value that is normal, that is, a normal value, on the basis of a proper and fair comparison, provides compelling support for the proposition that a standard of reasonableness must inform not only the term "reflect" but also the determination of the costs associated with production and sale.

89. *Third*, the repeated references to the concept of something that is "**representative**" throughout the relevant provisions, including in Article 2.2 and footnote 2. We think that the legal fact that there is a requirement of representativeness also support the proposition that a standard of reasonableness must inform not only the term "reflect" but also the determination of the costs associated with production and sale.

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of coefficients to data that had already been excluded for the purpose of constructing normal value". In the absence of such an explanation provided by MOFCOM in its written report, we fail to see how the Panel could have found China to have acted consistently with its obligations under Article 2.2.2 of the Anti-Dumping Agreement.") (footnote omitted); Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 507: ("In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted."). See also paras. 5.215, 5.231 and 5.233.

90. *Fourth*, the repeated use of the term "**reasonable**" throughout the relevant provisions, including in Article VI of the GATT 1994; in Article 2.2, Article 2.2.1, and footnote 5; in Article 2.2.1.1 and footnote 6; in Article 2.2.2 and Article 2.2.2(iii); in Articles 2.2.1.1 and 2.2.2 (also by cross-reference); and in Articles 2.3 and 2.4. The Panel appears to consider that, whilst a standard of reasonableness does inform a determination of the amounts for administrative, selling and general costs and profit, no standard of reasonableness informs a determination of the costs associated with production and sale. In this respect, the Panel appears to have overlooked at least two important legal facts.

91. In the first place, Article 2.2.2 refers, by its own terms, to actual data pertaining to **production and sales** in the ordinary course of trade. By definition, a reasonable amount for administrative, selling and general costs and profit cannot be based on unreasonable costs of production and sales, so the reasonableness standard must also inform the determination of **the costs of production and sales**.

92. In the second place, as we have already outlined above, the various relevant provisions of Article 2.2 refer to **all costs**, which can only mean that when reference is made to selling costs (with respect to which Argentina accepts that a standard of reasonableness does inform the determination) reference is also being made to the cost of sales. **But how could it be that, in the condition at issue, a standard of reasonableness informs the determination of the costs associated with sales, but not production?** This would appear to be what the Panel's conclusion implies, and it amounts in effect to a **gross internal inconsistency in the Panel's reasoning**. The Panel makes this error because, instead of interpreting and applying the provision according to its ordinary meaning, viewed in its context and in light of its object and purpose, the Panel seeks to clinically isolate one term from another, and one provision from another. In fact, as we shall explain below, the Panel constructs an argument of insidious intent that, from the outset, is apparently directed towards attempting to sustain the remarkable and startling conclusion (especially for an adjudicator engaged in a legal process) that no standard of reasonableness informs the determination of the costs associated with production, apparently without carefully or properly considering this issue in the context of each of the three circuits of the relevant provisions that we have referred to above. In fact, it appears to us that this was a conclusion that the Panel assumed from the outset, and then attempted to support by arranging the arguments accordingly.

93. In this respect, it is important to understand that reasonableness is a **two way street**. The position of Argentina and the Panel appears to be that if there are circumstances in which the costs associated with the production and sale of the product under consideration, as reflected in the records of the investigated firm, are **unreasonably high**, there are no circumstances in which an investigating authority would be required to make an adjustment. Of course, this would have the effect of **artificially inflating the dumping margin**. We do not agree with this proposition. The second and third sentences of Article 2.2.1.1 and footnote 6 are precisely designed to address situations in which simply taking the costs of production and sale in the records kept by the investigated firm would be unreasonable because they would be associated with exceptional capital expenditures or start-up costs (that is, abnormal situations), and thus be unreasonably high. As a matter of simple logic, it is impossible to reject/replace/adjust such costs without reaching for information that is exogenous

to the investigated firm's records (even if such information only relates, for example, to amortization or depreciation periods used in other representative markets). Indeed, by its own terms, the second sentence does not refer only to the records kept by the investigated firm, but rather expressly refers to the evidence made available by the exporter or producer in the course of the investigation – without limitation as to its source or origin. And it is clear from the express terms of footnote 6 that, in such a situation, the determination is to be informed by a standard of what is "reasonable".

94. Finally, we consider that these observations are also supported by Article 17(6)(i) of the Anti-Dumping Agreement, which refers to the establishment of facts being proper, unbiased and objective. We find it difficult to understand the Panel's position that the determination of the costs associated with production and sale could be unreasonable in the sense that we have outlined above, and yet "proper", "unbiased" and "objective".[18]

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[18] See also, for example: Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)* (interpreting Article 14(b) of the SCM Agreement) ("Instead, to make an objective assessment of the matter, the Panel was also required to test the **reasonableness** of the methodology employed, including in the light of alternative plausible explanations. The Panel should have verified whether the USDOC provided a **reasonable** explanation as to how the proxy benchmark approximated a "comparable commercial loan which the firm could actually obtain on the market" within the meaning of Article 14(b) of the SCM Agreement."); Appellate Body Report, *US – Hot-Rolled Steel*, para. 83 (interpreting paragraph 3 of Annex II) ("… we see, 'in a timely fashion', in paragraph 3 of Annex II as a reference to a '**reasonable** period' …"); Panel Report, *Guatemala – Cement II*, para. 8.251 (interpreting Article 6.8) (" … in our view, such consequences only arise if the investigating authority itself has acted in a **reasonable** … manner."); Panel Report, *US – Customs Bond Directive*, para. 7.283 (interpreting Article 18.5 of the Anti-Dumping Agreement and Article 32.6 of the SCM Agreement) ("… in our view, in order for a notification to be effective, it must be made within a **reasonable** time …); Panel Report, *China – Autos (US)*, para. 7.278, footnote 441 (interpreting Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement) (" … while a less than complete overlap of imported and domestic goods may not preclude a like product determination, it may nonetheless have implications for the objectivity and **reasonableness** of a price effects analysis based on … baskets of goods. …"); Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.334 (interpreting Article 15.2 of the SCM Agreement ("In our view, Article 15.2 of the *SCM Agreement* does not set forth any particular methodology for examining price undercutting, as long as the methodology chosen is **reasonable** and objective."); Panel Report, *China – Broiler Products*, para. 7.186 (interpreting the second sentence of Article 2.2.1.1) ("The issue before the Panel is whether MOFCOM, in applying its own cost allocation methodology, complied with the requirements in the second sentence of Article 2.2.1.1 to consider all available evidence to arrive at the proper allocation of costs. In particular, the Panel is faced with the questions of: (i) whether MOFCOM took into consideration "compelling evidence" with respect to the **reasonableness** of its own methodology and available alternatives; and (ii) whether MOFCOM improperly included costs not associated with the production and sale of the product under consideration in the costs it allocated to that product."); Panel Report, *China – GOES*, para. 7.51 (on the decision to initiate anti-dumping or countervailing duty proceedings the panel must assess the **reasonableness** of the investigating authority's conclusions on whether there is sufficient evidence).

95. *Fifth*, we don't understand why the Panel found it so difficult to accept the proposition that it may be reasonable and even necessary in certain circumstances to refer to an external proxy for the purposes of applying the two conditions in the first sentence of Article 2.2.1.1. In this respect, we pointed out to the Panel that this is exactly what the first condition foresees, because it directs the investigating authority to have regard to local GAAP, which is something that is **external** to the records kept by the investigated firm. The investigating authority is called upon to compare the records kept by the firm with that external proxy in order to determine whether or not they are "in accordance" with such external proxy. We submit that, within this process, there is room for reasoned judgement, which is confirmed by the text of Article 2.2.1.1 insofar as it refers to **generally accepted** accounting principles. The investigating authority would therefore need to take a view on the question of whether or not the accounting principles that may be discussed in a particular case are generally accepted, a determination that must surely be informed by a standard of reasonableness. Why is it so surprising, therefore, that, the second condition, which immediately follows and is integrated with the first condition, should also be informed by a standard of reasonableness in its entirety?

96. *Sixth*, we believe that our position is well supported by the phrase "**associated** with the production and sale", which we think is drafted in relatively general and abstract terms. For example, if one would stop in the street an economist with an average knowledge of the relevant sector and ask, for example: what are the "costs associated with the production of biodiesel" (tracking the exact language of the condition at issue), he or she would no doubt reply by listing, for example, soya[19], land, equipment, energy and labour. Not only would he or she have some sense of what are the costs associated with the production of biodiesel, he or she would also have some sense of their relative importance, including, for example, that soya is the main ingredient, accounting for about 80%-90% of the total costs. In other words, one would get an answer framed in **general and abstract terms**. If one would respond by saying: I'm sorry, you have made a mistake, because the **only** correct answer to this question is that the costs associated with the production of biodiesel are **just what the government says they are**, and could "actually" be zero (the extreme position implicitly adopted by Argentina and the Panel), one would no doubt get a reply commensurate with that statement. In short, the condition at issue uses the term "associated", not, as Argentina and the Panel would have it, the term "actual", and it must be interpreted and applied on the basis of the terms actually used by the treaty.

97. This line of reasoning is supported by the observation that the first sentence of Article 2.2.1.1 states that "… costs shall normally be calculated …". Thus, contrary to what Argentina and the Panel appear to believe, the provision does not take as its starting point the records kept by the investigated firm, but rather the "costs" to be calculated, that is, those associated, in more general and abstract terms, with the production and sale of the product under consideration. Furthermore, the costs to be calculated are to be calculated merely "on the basis of" the records kept by the investigated firm. In other words, the provision does

[19] In this submission, we use the term soya generally, to refer to soya beans and soya oil, which we think is more than sufficient for the purposes of the matters to be decided in this appeal.

not state that the costs **shall be** the costs in the records kept by the investigated firm (if they are reasonably reflected), as Argentina and the Panel effectively read the provision. Rather, the provision states that the "costs" to be calculated are to be normally calculated "on the basis of" the records kept by the investigated firm, which is not the same statement.[20]

98. *Seventh*, we point to the rule in Article 2.2.1.1 that the investigating authority must consider **all available evidence** on the proper allocation of costs, **not limited** to the evidence coming from the investigated firm. This is a compelling provision. It would mean that where, for example, there would be an issue of the proper allocation of costs as between the investigated firm and one of its suppliers, the investigating authority is mandated not to limit itself to the records kept by the investigated firm, but must consider all available evidence. In this particular case, the effect of the export tax is, of course, a cost/benefit shift in favour of biodiesel producers at the expense of soya suppliers.[21] We don't think there would be any point in mandating an investigating authority to **consider** other evidence if it would be precluded, in whole or in part, from referring to such other evidence for the purposes of rejecting/replacing/adjusting the costs in the records kept by the investigated firm. That would be to reduce the provision to a nullity, which would not be an acceptable interpretation. Similarly, Article 6.12 of the Anti-Dumping Agreement provides that various groups may provide information relevant to the determination of dumping. Requiring the investigating authority to consider all the evidence is consistent with the fact that, as outlined above, Article 2 is a complex provision, which represents a finely balanced compromise between the interests of all the Members, and which therefore calls for a balanced and **reasonable** approach when interpreting and applying its provisions.

99. *Eighth*, we point to the fact that it is uncontroversial that, if one of the conditions provided for in Article 2.2.1.1 is not satisfied, then the obligation to normally use the records kept by the investigated firm does not apply. The provision is silent as to what method is to be used to establish the costs of production and sale in such circumstances. Argentina and the Panel seem to consider that such a process **is not informed by a standard of reasonableness**. We do not agree with this proposition. We believe that the calculation must still be a reasonable one, for all the reasons that we have outlined above, which is precisely why we have used that term in the second sub-paragraph of Article 2(5) of our Basic Regulation.

100. This is an important point. In these proceedings we will certainly see Argentina continuing to be evasive on this question. That is because there is no answer to the question that Argentina can give without forfeiting the case. If Argentina opines that no standard of reasonableness informs this process it will have finally come out of the woods with respect to the question of just how extreme and unreasonable its position is, with a proposition that is untenable as a matter of law. On the other hand, if Argentina agrees that a standard of reasonableness does inform this process, it will have to explain how and why, and in doing so, it will

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[20] Appellate Body Report, *EC – Hormones*, para. 163 and Panel Report, *India – Agricultural Products*, para. 7.202 (confirming that the term "based on" in Article 3.1 of the SPS Agreement is a less rigorous standard than "conform to").

[21] European Union's first written submission, paras. 226-227, and the documents there referenced and exhibited.

have to agree with the EU's arguments. For how can a standard of reasonableness inform the silence if it does not equally inform the condition at issue? Absent any specific provisions in the Anti-Dumping Agreement separating these matters, the condition at issue is more than just a gateway to the silence. If a standard of reasonableness informs adjustment and replacement (which it must) one can only reasonably conclude that it informs the whole process, including rejection. When one reaches the point at which the other side is unable or unwilling to answer a question that is central to the dispute, the matter has, in fact, resolved itself. In such a situation, the adjudicator's task is substantially facilitated, because all that is necessary is to simply to bring that matter into the light by providing an appropriate explanation in the adjudication.

101. *Ninth*, in approaching the situation described in the preceding paragraph in a reasonable way, we believe that an investigating authority could either reject/replace/**adjust** specific costs in the records kept by the investigated firm. The terms "adjusted" and "adjustment" are expressly used in Article 2.2.1.1 and in footnote 6. The same term "adjustment" is also used in footnote 7 to Article 2.4, which itself uses the synonym "allowance". There is thus an overlap in this respect between Article 2.2 and Article 2.4, in the sense that adjustments will only be justified pursuant to Article 2.4 to the extent that they have not already been made pursuant to Article 2.2. Precisely the same is true of the relationship between Articles 2.3 and 2.4, insofar as adjustments will only be justified pursuant to Article 2.4 to the extent that they have not already been made pursuant to Article 2.3 when constructing the export price. This relationship is confirmed by the third and fourth sentences of Article 2.4, which precisely confirm the overlap between Articles 2.3 and 2.4. The significance of this observation lies in the fact that Article 2.4 refers expressly to taxation (without limiting that term to export **taxation**) as an objective reason for making an adjustment. If an adjustment would be objectively justified pursuant to Article 2.4 **in response to that type of measure**, there is every reason to conclude that it would objectively justified pursuant to Article 2.2 (which expressly foresees the making of adjustments) as a reasonable response to a situation in which the costs of production have been deliberately and artificially reduced by the exporting Member. In short, the reference to taxation in Article 2.4 confirms that an adjustment pursuant to the first sentence of Article 2.2.1.1 is an appropriate and objective response to a *de jure* discriminatory export tax designed precisely to have the effect of masking the dumping.

102. Thus, for example, it is uncontroversial that if an export transaction of the product under consideration would be subject to an export tax whilst the normal value (whether based on domestic sales, sales to a third country, or costs) would not be subject to such tax, then an adjustment would be warranted. Similarly, if the soya in the exported bio-diesel would be subject to an export tax whilst the normal value (whether based on domestic sales, sales to a third country, or costs) would not, then an adjustment would also be warranted.

103. To appreciate the significance of these observations it is helpful to recall what is actually happening in the current case. The starting point is to consider the situation absent any export tax in which the export price is 100 and the normal value is 120 (90 of which is the domestic price of soya). It is not controversial that dumping is occurring and causing injury to the domestic industry of the importing Member. The exporting Member then decides to intervene. It imposes a *de jure*

discriminatory export tax on soya, the amount of which is calculated on the basis of data about the domestic soya market, and which is specifically calibrated so as to reduce the domestic price of the soya to 60. Now, says the exporting Member, there is no longer any dumping, even though, from the perspective of the industry in the importing Member, nothing has changed: imports are still pouring in at a price of 100 and causing injury (and in fact the export price is likely to be further depressed by the artificially low price of the raw material). This cannot be correct. The concept of "fair comparison" and "price comparability" in Article 2.4 must be fully operational **irrespective of the method used to determine normal value**, and including, therefore, the situation in which normal value is constructed. The provision, by its own terms, refers expressly to **any difference** that affects **price comparability** (that is, the ability of the investigating authority to compare export price and normal value so as to meaningfully determine whether or not dumping is actually occurring). In the above example, there clearly is a difference, insofar as the tax is imposed **only on exports** of soya, and this difference does impact on price comparability, that is, the investigating authority's ability to discern whether or not dumping is in fact continuing. A tax imposed on all soya would not, without more, have this consequence, because it would be neutral as to the relative destination of the soya (whether domestic or export) and thus, all other things being equal, neutral as to the relative distribution of volumes, and thus prices.

104. Argentina cannot escape by arguing that the export tax impacts the domestic price of soya equally with respect to both the export price and the domestic price of biodiesel, precisely because normal value in this case is not based on domestic sales of biodiesel, but rather on costs of production and sale. **As a matter of law**, dumping is **defined** not just as international **price discrimination**, but also as arising when the export price is less than the normal value calculated on the basis the **costs** associated with production and sale, **properly and reasonably determined**.

105. In sum, and to be clear, we are not arguing that, in this case, an adjustment was made pursuant to Article 2.4, nor that one could have been made pursuant to Article 2.4. But we are arguing that the concepts of "fair comparison" and "price comparability" referred to in Article 2.4, together with the express reference to taxation, provide compelling context to support the proposition that the records kept by an investigated firm do not reasonably reflect the costs associated with the production of the product under consideration, if those costs have been deliberately and effectively reduced to artificially low levels by *de jure* discriminatory **export** tax specifically designed to achieve that objective. It is precisely because of the difficulty of getting at the adjustment problem through the medium of Article 2.4 that we must recognise the possibility of getting at it through the medium of the condition at issue, which must be properly understood as **informed by a standard of reasonableness,** not just with respect to the term reflect but also with respect to the determination of the costs associated with production and sale.

106. In this respect, the Panel's findings with respect to Argentina's claim under Article 2.4 of the Anti-Dumping Agreement are telling.[22] Argentina tried to characterise

[22] Panel Report, paras. 7.292-7.306.

what the European Union did in this case with respect to the costs of soya as creating an "artificial imbalance", necessitating an adjustment under Article 2.4 of the Anti-Dumping Agreement. That argument was rejected by the Panel. The Panel's reasoning in this part of its report strongly supports the view that, not only was no adjustment available under Article 2.4, but that the "artificial" result was **created by the *de jure* discriminatory export tax**; and that what the investigating authority did was simply to neutralise that artificial result, by properly understanding that, in the condition at issue, a standard of reasonableness informs not only the term reflect but also the determination of the costs associated with production and sale. The only thing that the Panel failed to do was to appreciate what its very own reasoning with respect to Article 2.4 necessarily implies when it comes to interpreting and applying the condition at issue.[23]

107. This conclusion is confirmed by the Appellate Body Report in *EC – Fasteners (Article 21.5 – China)*. In that report the Appellate Body correctly reasoned that if an adjustment is lawfully introduced in the context of determining a normal value (in that case, through the use of the analogue country methodology) there is no obligation to make a corresponding un-adjustment pursuant to Article 2.4, which would be circular and absurd. One does not have to go back to the very cost that has previously been rejected.[24] In the present case, Argentina's position is that even if an adjustment under Article 2.2.1.1 would be introduced, it would have to be un-adjusted pursuant to Article 2.4, which is equally circular and absurd. The Panel's reasoning is that there should be no adjustment under either provision. But this fails to take into account the fact dumping is defined not only in terms of international price discrimination, but also in terms of export prices that are below a normal value based on costs. If the Panel is right, there is no limit to the ability of the exporting State to intervene to reduce such costs – to one tenth or one hundredth of what they should be – without the investigating authority being able to respond. This is not a balanced or reasonable proposition: there must be a more balanced and reasonable consideration of the rights and obligations of different Members, achieved through the proper understanding that the entirety of the condition at issue is informed by a standard of reasonableness. The correct answer to this part of the puzzle is therefore that, if the costs in the records kept by the investigating firm do not reflect, reasonably, the costs associated with the production and sale of the product under consideration, then an adjustment under Article 2.2.1.1 may be due; and there is no basis for a circular and absurd un-adjustment pursuant to Article 2.4. In short, the line of reasoning followed by the Appellate Body in *EC – Fasteners (Article 21.5 – China)* is correct.

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[23] Consequently, we include in the scope of our appeal the statement in the second sentence of paragraph 7.296 of the Panel Report, to the effect that, supposedly, nothing in Article 2.4 provides guidance when it comes to considering how normal value and export price should be determined, including the question of whether or not a standard of reasonableness informs not just the term reflect but also the determination of the costs associated with production and sale.

[24] Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 507: ("In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted."). See also paras. 5.215, 5.231 and 5.233.

108. *Tenth*, and finally, we recall that Argentina has a number of times tried to suggest in this case that because export taxes are not caught by Article XI of the GATT 1994 its submissions regarding the condition at issue must be accepted.[25] This argument is misconceived. In fact, the very opposite is true. It is precisely because export taxes are not covered by Article XI of the GATT 1994 that, when they make an appearance in the context of other disciplines, we must be extremely careful to make sure that such other disciplines are correctly understood so as to permit a reasonable and appropriately calibrated response to the existence of such *de jure* discriminatory and highly trade-distorting measures.[26] For example, if someone would allege that an export tax would give rise to a subsidy, whether or not that is the case would have to be answered based on an objective, balanced and reasonable interpretation and application of Articles 1 and 2 of the SCM Agreement. It would be no defence for the Member imposing the export tax to point out that export taxes are not covered by Article XI of the GATT 1994. In exactly the same way, the issue before you in this case must be determined on the basis of an objective, balanced and reasonable interpretation and application of the condition at issue. The approach adopted should also take into account the fact that the Members dealt with dumping and subsidies in the same provision of the GATT 1994, making specific provision for double-counting, in a manner that suggests that they did not intend for there to be a "gap" between the two disciplines, through which unfair trade can creep.

109. In fact, it is also important to remember that, in WTO law, *de jure* discriminatory export subsidies and import substitution subsidies are prohibited under the SCM Agreement, and would never benefit from Article XX of the GATT 1994. That is because they set up a legal mechanism that, by its own terms, partitions markets by creating different conditions of supply and demand. This strikes at a fundamental objective of the WTO, which is to integrate markets for the benefit of everyone. And it is fundamentally unnecessary, because there would always be an alternative, less trade restrictive measure, capable of achieving whatever (legitimate) objective the subsidising Member might be pursuing. For the same reason, *de jure* discriminatory fiscal and regulatory measures are generally likely to find it very difficult to pass the necessity test in Article XX of the GATT 1994, because there will almost always be an alternative.

110. Thus, just because Article XI of the GATT 1994 does not cover export taxes, that should not mean that we lose sight of the fact that a *de jure* discriminatory export tax is a highly trade distorting measure, which partitions markets and strikes at fundamental WTO objectives. If Argentina wishes to support its biodiesel producers at the expense of its soya producers, there are alternative methods that it is free to use, provided that it complies with the relevant terms of the applicable WTO Agreements. As we explained to the Panel, the European Union promotes free and fair trade, is mindful of the absolute and comparative advantages that Members have, and respects different levels of development and general

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25 See, for example, Panel Report, footnote 290.

26 See, in particular, the discussion in paras. 16-24 of the European Union's opening oral statement at the first meeting, with particular reference to the Appellate Body Report in *Argentina – Import Measures* and the relationship between Articles XI and VIII of the GATT 1994.

regulation.[27] None of this is what we are dealing with in this case. Instead, we are dealing with a *de jure* discriminatory export tax that is highly trade distorting, highly market partitioning and could be a highly effective way of masking dumping, but for the standard of reasonableness that we believe must inform the entirety of the condition at issue. In this respect, we must also take into account that the objective of an anti-dumping duty is not to raise duties, but simply to offset the dumping by incentivising an increase in the export price (which can also be achieved by obtaining a price undertaking to that effect). That is, all we are speaking of is a calibrated and reasonable neutralisation of the effect of the *de jure* discriminatory export tax. From this perspective, arguing that we need to preserve the possibility for other policy instruments, including the Anti-Dumping Agreement, to be reasonably responsive to such situations, instead of absolutely eliminating their role by reading terms into the treaty that are simply not there, looks like an unassailable proposition.

111. In this respect, Argentina's suggestion that export taxes are "just not a problem" in WTO law is contradicted by the fact that the entire Membership, including Argentina, have insisted that various acceding Members include relevant disciplines on export taxes in their accession protocols. This confirms that, in fact, Argentina agrees, along with the rest of the Membership, that export taxes are an issue; and further confirms that, in interpreting and applying other provisions of the covered agreements in a situation where export taxes are at issue, we must ensure that we do so in an objective, balanced and **reasonable** way. This helps us to see that, in fact, there is still a reasonable equivalence between all the Members on this matter. Those with provisions on export taxation in their accession protocols are prevailed upon not to use them. And those without may find themselves subject to an anti-dumping measure that simply offsets their effects. This is undoubtedly one of the reasons why all of the third parties offering an independent view on these issues agreed with the European Union that the correct interpretation of the condition at issue is that a standard of reasonableness informs not only the term reflect, but also the determination of the costs associated with production and sale.[28] Furthermore, all the indications are that the Membership considers that, in any event, the systematic use of export taxes (as opposed to their use in exceptional and thus temporary situations), without consultation with or consideration of the interests of other Members, is particularly inappropriate, and would therefore justify a reasonable re-balancing.[29]

112. In sum, if one dons a grotesque mask and looks in the mirror one sees something that is grotesque; not something that is normal or ordinary; and not something that is a fair, proper and reasonable representation of the underlying reality. All that the investigating authority did in this case was to remove the mask in order to get to the reality, as the provisions of the Anti-Dumping Agreement enjoin it to do. WTO dispute settlement is not, or at least should not be, a masquerade: it is a place

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27 EU second written submission, para. 5.

28 European Union opening oral statement at the first meeting, paras. 4-8.

29 See, for example, the Note to Annex 6 of China's Accession Protocol: ("China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.").

where all Members stand openly, equally and respectfully, having consented to subject themselves to an adjudication that is, fundamentally, **reasonable**, both in a legal sense, and in the sense of being reflective of the real world. In the real world, a great many natural persons who have substantially invested both financially and personally in the business of producing biodiesel in the European Union, also for environmental reasons, have had the rug of security and predictability pulled out from under them, as they experience export prices of biodiesel from Argentina that are actually less than the price of the raw material. This is what this *de jure* discriminatory, highly trade distorting, market partitioning, and unnecessary measure is actually doing – in the real world. To tell these people that there is absolutely nothing they can do, no matter how unreasonable the situation, would be to seriously let them down. To tell them, on the other hand, that a re-balancing is available, provided that it is calibrated and **reasonable**, would be in the long term interests of all Members, and indeed the WTO system itself.[30]

3.2.2. Legal errors in the Panel's reasoning, findings and conclusions

113. The European Union submits that the Panel committed several legal errors when finding that the European Union acted inconsistently with Article 2.2.1.1 in adopting the measure at issue. As indicated above, we identify a series of specific errors. Each of them taken in isolation, or any combination thereof, demonstrates that the Panel erred in the interpretation and application of the condition at issue.

114. Even before embarking on its analysis the Panel appears to have pre-judged the issue by framing the question using tendentious language. Thus, in paragraph 7.222, the Panel appears to have **framed the question** in terms of whether or not the records kept by the investigated firm reasonably reflect the "**actual**" costs associated with the production and sale of the product under consideration. However, as we further explain below, it was precisely a point of contestation between the parties as to whether this term "actual" should effectively be read into the condition at issue, with Argentina supporting the proposition and the European Union contesting it. Thus, right from the start, the Panel's analysis is coloured by Argentina's assertions, which does not comfort the reader searching for an objective, balanced and reasonable analysis.

115. The Panel then opined, in the first sentence of paragraph 7.227, that the **purpose** of paragraph 2 is to elaborate rules for determining the cost of production in the country of origin. We do not agree with this statement. Rather, we would submit that the purpose (in the singular) of paragraph 2 is to elaborate rules for determining a value that is normal, or a normal value. The Panel's statement erroneously narrows that purpose to one specific aspect of paragraph 2, arbitrarily excluding the other aspects of paragraph 2. Furthermore, it fails to appreciate that,

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30 Appellate Body Report, *Japan – Alcoholic Beverages II*, paras. 122-123: ("… WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.").

as we have explained above, the condition at issue must be interpreted and applied not only on the possible third circuit of the provision, but also the first and second, and indeed in all contexts in which the condition at issue might be applied. This fundamental error is subsequently re-iterated throughout the Panel's analysis.

116. Next, the Panel observes that the first sentence of Article 2.2.1.1 establishes the records of the investigated firm as the "**preferred**" source of information but does not explain how this observation pertains to its analysis.[31] No such express language is to be found in the first sentence of Article 2.2.1.1. A more precise statement would be that the first sentence of Article 2.2.1.1 contains two **conditions** and one **consequence**. The provision is to be objectively applied. If the two conditions are satisfied, the consequence follows (subject to other relevant provisions, as outlined above). If one of the two conditions is not satisfied, the consequence does not follow.

117. Nor is it clear what the Panel means when it makes the observation that there is a preference in the first sentence. Presumably, the Panel means to refer to some notional preference on the part of the persons negotiating and concluding the text of the Anti-Dumping Agreement. But the authentic expression of their intent is the text of the Anti-Dumping Agreement and specifically the text of the first sentence of Article 2.2.1.1, which rather calls for an even-handed and objective approach. As a matter of principle, it is perfectly possible that, in a particular case examined under this provision, one of the two conditions might not be satisfied, meaning that, in such a case, the consequence provided for would never come into play. It just depends on the fact and evidence patterns in individual cases.

118. This is confirmed by the terms of Article 2.5, which relates to transhipment. By contrast to the first sentence of Article 2.2.1.1, in that provision, if one of the three illustrative conditions in the final sentence is satisfied the comparison is with the price in the country of origin; but if none of the relevant conditions are satisfied, then the comparison must "normally" be made with the price in the country of export. In this respect, therefore, the arrangement of the conditions and the consequential obligation is the mirror image of what appears in the first sentence of Article 2.2.1.1. Neither provision refers expressly to a preference, one way or the other: they both simply call for an objective, even-handed, balanced and reasonable interpretation and application.

119. It is possible that, in making its observation, the Panel was borrowing from Article 2.2.2, which does establish a preference between the first sentence and the second sentence of that provision. However, no such structure exists in the first sentence of Article 2.2.1.1.

120. In sum, irrespective of whether or not there is a preference to be discerned in the first sentence of Article 2.2.1.1, that issue has little if any pertinence to the issue arising in this case, and is therefore an element of the Panel's analysis that we may legitimately place on one side. It does not support Argentina's position.

121. Next, the Panel opined, also in paragraph 7.227, that the first sentence of Article 2.2.1.1 consists of a "**general rule**" and two "**derogations**" (although elsewhere it did use the correct term – condition). We submit that characterising Article 2.2.1.1

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[31] The Panel made the same statement in paragraph 7.131 of the Panel Report.

as containing a general rule and two derogations is incorrect. As explained above Article 2.2.1.1 contains two conditions. If these two conditions are satisfied, a specific consequence follows. A condition – consequence relationship is not the same as a general rule – derogation relationship,[32] and the Panel's mischaracterisation of the provision constitutes legal error. The truth is that the first sentence itself is **silent** on what is a normal situation and what is not a normal situation; and is **silent** on how to proceed in a situation that is not normal.

122. The Panel sought to support its statement by referring to three previous cases. However, these cases do not support the Panel's statement. The *Clove Cigarettes* case relates to an entirely different field of WTO law (regulatory law) and concerned a short provision that was expressly drafted as a general rule and an *exception*.[33] In any event, the Appellate Body expressly recognised that the category of situations not subject to the normal rule was not limited to the exception in paragraph 5 of the Doha Ministerial Decision, but also included those resulting from a consideration of *other provisions*, and specifically Article 2.12 of the TBT Agreement.[34] In the same way, as set out above, we consider that a consideration of the meaning of the first sentence of Article 2.2.1.1 requires a proper consideration of Article 2.2, to which it expressly refers.

123. Nor do we consider that the Panel Report in *China – Broiler Products* (which did not benefit from Appellate review) supports the Panel's statement. In that case the panel merely reasoned that Article 2.2.1.1 means that an investigating authority is *bound to explain* why it departs from the records of the investigated firm.[35] The panel did not address the question that is the subject of this part of the appeal.

124. Nor do we consider that the *Fasteners* case supports the Panel's statement. In that case, the Appellate Body reasoned that it could look beyond the express terms of Article 6.10 (which provided for one exception) to *other provisions* of the Anti-Dumping Agreement (Articles 6.10.2 and 9.5) in order to discern the existence of other exceptions. In the same way, as we have explained above, we consider that a consideration of the meaning of the first sentence of Article 2.2.1.1 requires a proper consideration of Article 2.2, to which it expressly refers.

125. In fact, later in its analysis, the Panel expressly and repeatedly referred to the first sentence of Article 2.2.1.1, correctly, as containing two conditions, one of which was at issue.[36] Thus, in this respect, the Panel Report contains a series of glaring internal inconsistencies when it comes to the legal characterisation of the terms at issue.

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32 We refer, in this respect, to the SPS case law concerning the relationships between Articles 3.1 and 3.3 and 5.1 and 5.7 of the SPS Agreement.

33 Appellate Body Report, *US – Clove Cigarettes*, paras. 271 and 275.

34 Appellate Body Report, *US – Clove Cigarettes*, para. 283.

35 Panel Report, *China – Broiler Products*, para. 7.1641 ("In our view, the use of the term "normally" in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records.")

36 Panel Report, para. 7.227, final sentence; para. 7.228.

126. Next, the Panel opined that the focus of the condition at issue is on the specific producer/exporter under investigation, and what is contained in its records.[37] On any view, this is an imbalanced and incomplete statement. Irrespective of what the condition at issue means, a correct statement is that the focus of the condition is **equally** on **both** the **records** kept by the investigated firm and the **costs** associated with the production and sale of the product under consideration. Both Participants agree that the condition at issue contemplates a comparison between two things: the records kept by the investigated firm on the one hand, and something else on the other hand. And the focus of the provision is on both of these, equally. The Participants are disagreeing about what the latter half of this comparison refers to. The European Union believes that it refers to the costs associated with production and sale, and that the standard of reasonableness informs those determinations. Argentina believes that it refers to "actual" costs, even though this term does not appear in the condition at issue. Thus, the Panel's statement in this respect is inaccurate and tendentious, because it is simply driving towards the conclusion that, in truth, the Panel has already assumed.

127. This error is compounded by the Panel's associated assertion that this is consistent with **Article 6.10** of the Anti-Dumping Agreement, insofar as that provision states that the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer.[38] As we have explained above, many provisions of Article 2 contemplate the possibility that, in certain circumstances, the same data from the same source may be lawfully used in order to determine, in part, the dumping margins of two or more exporters. This is the case, for example, with respect to Article 2.2.2, paragraphs (ii) and (iii). There is no conflict between these provisions and Article 6.10. Rather, all of these provisions must be read together harmoniously. Thus, the Panel's observation once again is driving towards the conclusion that it has apparently already assumed, and begs the very question in dispute. If, as the EU believes to be the case, not only the costs associated with sale but also the costs associated with production are informed by a standard of reasonableness; and if the determination of the replacement/adjustment data must also be reasonable, as we also believe to be the case, then the condition at issue would be just one more example, along with Article 2.2.2(ii) and (iii), of the manner in which all of these provisions must be read harmoniously together, in order to achieve a balanced and reasonable approach.[39]

128. In paragraph 7.232 the Panel turns to a discussion of the first and second conditions in the first sentence of Article 2.2.1.1. The Panel opines that GAAP generally encompass a requirement that all costs that have **actually** been incurred are reported in the records kept by an investigated firm. In what might be described as the crux of its reasoning, the Panel opines that "this suggests to us" that the second condition must **also** be referring to whether or not the records kept by the investigated firm reasonably reflect the "actual" costs associated with the production and sale of the product under consideration. But the Panel does not explain the basis for this leap of faith. The Panel merely offers a statement that is

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37 Panel Report, para. 7.228, final sentence.

38 Panel Report, footnote 381.

39 The Panel re-iterates this error in paragraphs 7.233 and 7.236.

both a non-sequitur, but also internally incoherent: it opines that the existence of the second condition reflects the fact that records might be consistent with GAAP, but nevertheless not adequately report actual costs. This makes no sense, and directly contradicts its prior statement that GAAP would require the records to adequately report the actual costs.

129. The Panel then continues in paragraph 7.232 by referring to the rules regarding the proper allocation of costs and relevant time periods, which appears to be a reference to the **second and third sentences of Article 2.2.1.1**. However, the Panel fails to explain how this observation relates to its line of reasoning. As we have explained above, the second and third sentences indicate situations that would not be normal. This means that, even if the two conditions in the first sentence are met, such that the specified consequence applies as an obligation, an investigating authority would still be entitled to reject/replace/adjust the records kept by the investigated firm if, for example, the cost allocations would not have been historically utilized by the investigated firm (with the investigating authority basing itself, in this respect, on exogenous data). But how is this observation supposed to support the Panel's assertion that we must read the term "actual" into the condition at issue, when it is plainly not there? In our view, the Panel's observation provides **no support** for that proposition.

130. The Panel concludes paragraph 7.232 by offering as "another example" the problem of an **association or compensatory arrangement** between the investigated firm and one of its suppliers. Precisely the same comments apply. This does shed contextual light on what situations might justify rejecting/replacing/adjusting the records kept by the investigated firm. However, it provides no justification whatsoever for the proposition that we should read the term "actual" into the condition at issue, when that term is not there in the text.

131. In fact, in this respect, not only the Panel's reasoning but also Argentina's position reveals yet another glaring internal inconsistency. Argentina's position – clearly stated - is that the existence of an association or compensatory arrangement between the investigated firm and an input supplier **does justify** the rejection/replacement/adjustment of a production cost appearing in the records kept by the investigated firm.[40] It is important to be clear what Argentina is saying here: the "actual" invoice from the supplier says 10; this is "reasonably reflected" in the records of the investigated firm (which also say 10); but, **Argentina acknowledges**, if there is an association or compensatory arrangement between the investigated firm and the supplier, **the investigating authority is entitled to conclude that the records do not reasonably reflect the costs associated with the production and sale of the production under consideration**. But what, according to Argentina is the legal basis for such a proposition? The legal basis can **only** be that, in such circumstances, it would be **unreasonable** to force an investigating authority to conclude that 10 is the cost **associated** with the raw material in question, precisely because that number is "unreliable" (as that term is used in Article 2.3). Thus, by the terms of its own arguments, which appear to have also been adopted by the Panel, Argentina actually recognises, even if inadvertently, what is, after all, not a very remarkable proposition: a standard of

[40] Panel Report, para. 7.186, third sentence.

reasonableness informs not only the term reflect but also the determination of the costs associated with production and sale.

132. Argentina's admission in this respect is doubly significant, because, of course, the supplier could be either private or public, and could in fact be the State – and still the same reasoning would apply. There is, in this sense, fundamentally no difference between such a situation (that is, a public supplier) and a situation in which the State has imposed a *de jure* discriminatory export tax, calibrated to achieve precisely the same result. In this sense, as we have explained above, the export tax *is* a compensatory arrangement, insofar as it effects a cost/benefit shift in favour of producers of biodiesel.[41]

133. In paragraph 7.233 the Panel repeats its gross error concerning the purpose of paragraph 2, which we have already dealt with above. However, in passing, the Panel makes a series of statements that are quite extraordinary, because they precisely confirm what the European Union is saying in this case. Specifically, the Panel recognises that what we are searching for in all of this discussion is a "proxy" (that is, a benchmark) that is "appropriate", "accurate" and "reliable". We could not agree more with those statements. However, if the Panel had properly stated the scope of the purpose of paragraph 2 (which is to determine a value that is normal, or a normal value), instead of artificially narrowing it and arbitrarily excluding certain elements, it might have immediately understood that the very language that it was using was just another way of saying that a reasonableness standard must inform the entirety of the condition at issue. The idea of using such proxies or benchmarks is one that is entirely familiar in the context not only of the Anti-Dumping Agreement (such as, for example, in Article 2.2.2(iii)), but also in the context of the SCM Agreement, and there is nothing problematic about such an approach. It is particularly easy to do when one is confronted with one of the types of State intervention expressly referenced in Article 2.4 (taxation), and when the State has repeatedly acknowledged that the measure was designed to achieve the effect at issue, and does actually achieve that effect, and even provides the necessary data to make the adjustment, as in this case.

134. Next, the Panel opines, in paragraphs 7.234 and 7.235, that its reasoning is supported by **footnote 6** because, like Article 6.10, this suggests that the cost data must in all circumstances be specific to each individual exporter or producer. We have already explained above, with respect to Article 6.10, why this is a bogus argument.

135. The Panel then tackles Article 2.2.2, but fails to look closely or properly at the context afforded by that provision – and in this respect we refer to the explanations that we have already provided above. Ultimately, the Panel appears to opine that Article 2.2.2 supports its analysis because it refers to "actual" data. Thus, it appears that what the Panel has done is to "borrow" the term "actual" from Article 2.2.2 and insert it into the condition at issue, notwithstanding the fact that it does not appear in that provision. Leaving aside the question of whether or not such transposition is appropriate (given that the term that appears in Article 2.2.1.1 is not "actual" but rather the more general and abstract term "associated"), one thing

[41] European Union's first written submission, paras. 226-227, and the documents there referenced and exhibited.

is abundantly clear: a context observation must fairly and even-handedly have regard to **all of the relevant text**; it cannot arbitrarily and subjectively select some text, but exclude other parts of the very same phrase. In this respect, the point to note is that Article 2.2.2 refers to actual data pertaining to production and sales **in the ordinary course of trade**. Thus, to the extent that this was the Panel's line of reasoning, the Panel appears to be suggesting that the condition at issue refers to records that reasonably reflect the actual costs associated with the production and sale of the product under consideration **in the ordinary course of trade** (that also being one of the fundamental and overarching elements in the definition of dumping, as set out in Article 2.1). And yet, this would precisely confirm what the EU is saying in this case, which is that a standard of reasonableness (understood in this context in terms of ordinary course of trade) must inform the entirety of the condition at issue. The Panel also appears to have overlooked the fact that a standard of reasonableness does inform Article 2.2.2 as a whole, including with respect to the costs of production and sale.

136. In paragraph 7.238 the Panel makes three erroneous statements about object and purpose. First, it opines that, because the Anti-Dumping Agreement contains no preamble, considerations of object and purpose are not relevant. That is incorrect. Even in the absence of a preamble, other provisions can provide guidance regarding object and purpose. Article VI of the GATT 1994, for example, which the Anti-Dumping Agreement implements, can provide guidance about the object and purpose of the Anti-Dumping Agreement. The key point to take away from such guidance is that the anti-dumping instrument should be interpreted and applied in a balanced and reasonable way. Injurious dumping is condemned; and dumping is understood in terms of price discrimination but also in terms of an export price below cost, properly and reasonably determined, with adjustments being appropriate in the case of differences in taxation that would otherwise frustrate the determination of normal value and price comparability. Second, the Panel opines that an interpretation of Article 2.2.1.1 does not leave the meaning of the condition at issue equivocal or ambiguous, so object and purpose is irrelevant. In other words, it relegates object and purpose to a supplementary means of interpretation, which is inconsistent with the customary rules of interpretation of public international law, as codified, at least in part, in Articles 31 to 33 of the Vienna Convention. Third, it appears to overlook the fact that the very sentence at issue begins with an express reference to the purpose (in the singular) of paragraph 2; and then proceeds to misstate that purpose in an erroneously narrow way, erroneously and arbitrarily excluding other elements of paragraph 2. This constitutes a serious legal defect in the Panel's reasoning.

137. In paragraphs 7.239-7.240 the Panel rejects the EU submission that the second Ad note to Articles VI:2 and VI:3 of the GATT 1994 (on multiple currency practices) supports its arguments in this case. However, contrary to what the Panel states, the European Union was not referring to this provision in order to make an argument that the Anti-Dumping Agreement "is generally intended to cover any distortion arising out of government action". This is a gross misstatement of our position, which was rather specifically focussed on defending the particular measure at issue in these proceedings, which refers to a *de jure* discriminatory export tax specifically designed to mask dumping, and demonstrably having that effect. Rather, the European Union referred to this provision in support of its view that a standard of reasonableness informs the entirety of the condition at issue, and that

in this respect an investigating authority is right to look at "all the evidence", even if some of that evidence does not emanate from the records of the investigating firm itself, but rather relates to the actions of the State.[42] We think this is equally confirmed by the observations that we have made above with respect to a public supplier, where there is an association or compensatory arrangement. The point is further confirmed by the reference in Article VI:5 of the GATT 1994 to the "same situation" of dumping and subsidisation, as clarified by the Appellate Body's case law. If it is true that actions of States can simultaneously give rise to a subsidy and dumping, then it is all the more true that actions of States are perfectly capable of constituting an attempt to mask dumping, and that such attempts can only be unmasked if the provisions of the Anti-Dumping Agreement are interpreted and applied in a balanced and reasonable way. We also referred to this issue because the documents that we submitted to the Panel demonstrated that the Membership sees multiple currency practices as a **type of dumping**, that is, as something that would mask dumping if not adjusted for. This confirms that our response to the *de jure* discriminatory export tax in this case was reasonable and justified.

138. In this respect, it is not controversial that, in order to make a dumping calculation, the export price and the normal value must be expressed in the same currency. Multiple currency practices do therefore open up the possibility for an exporting Member to manipulate an anti-dumping calculation either by independently manipulating the export price and normal value of the product at issue (a matter that it might be possible to adjust for under Article 2.4), or by manipulating the costs in the records kept by an investigated firm (which would be analogous to what has occurred in this case). In the latter case it would, in our view, be appropriate to address the problem through the optic of a reasonableness standard that informs the determination of the costs associated with production and sale, notwithstanding the fact that the evidence would relate to the actions of the State. The Panel fails to engage with this question and its failure to do so compounds the errors in its reasoning.

139. Finally, in paragraph 7.241, the Panel makes certain assertions about certain provisions in the protocols of accession of certain Members. We think these issues are remote from the issue that arises in this case and are not before the Appellate Body. We would strongly object to any attempt to draw them into these proceedings. Suffice is to say that the Panel's comment in this respect is extraordinary cursory and almost certainly incorrect, given that the protocols state expressly and repeatedly that they apply together with and consistently with the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Furthermore, the notion that the drafters considered these provisions to be 'explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin' is directly contradicted by the negotiating history.[43]

140. Having concluded this part of its analysis, the Panel then reviews three other panel reports, taking the view that these support the position of Argentina rather than the

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42 In this respect, see, in particular, the observations set out in the European Union's first opening oral statement, at paras. 25-32.

43 European Union's second written submission, para. 117, footnote 136.

position of the European Union. Since these panel reports did not benefit from appellate review on the relevant points, we will consider them here only briefly. We do consider that each of them lends support to our position.

141. First, the panel in *US – Softwood Lumber V* confirms that investigating authorities may at least test the recorded costs against market values, in order to determine whether the records reasonably reflect the costs.

142. That panel dealt with a claim that the investigating authority erred under Article 2.2.1.1 by taking into account the level of profit derived from selling woodchips (a by-product generated in the production of softwood lumber).[44] In that case, Canada argued that the US DOC's methodology resulted in the calculation of costs that were not "associated with" the actual cost of producing and selling softwood lumber.[45]

143. The panel found that Article 2.2.1.1 does *not* impose positive obligations on the investigating authorities, other than those expressly provided therein:

> Thus, Article 2.2.1.1 […] simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration.[46]

144. In other words, the panel's finding was that Article 2.2.1.1 does not *mandate*,[47] or *require*[48] investigating authorities to reject the recorded costs. In contrast, the panel did *not* find that Article 2.2.1.1 does not *allow* investigating authorities to disregard the recorded costs, where they consider that they are not "reasonable" because they do not reflect market values.[49]

145. In the case of Tembec, the US investigating authority considered that:

> "Market value" is different from "cost". Commerce has used market value as a benchmark for determining the reasonableness of prices paid by a company to purchase a by-product from an affiliated company. It also has used market value as a benchmark for determining the reasonableness of values assigned to a by-product in interdivisional transactions. However, this does not mean that a "reasonable amount" will *equal* "market value". Market value will include the cost of a good, but it will also include other elements, such as selling expenses and profit.[50]

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44 The panel in *US – Softwood Lumber V* was confronted with the claim that, in the case of Tembec, the investigating authority (US DOC) erred by using the costs reflected in the producers' records, as it took into account company-wide costs of goods and not expenses incurred only by a certain division within the company. Panel Report, *US – Softwood Lumber V*, para. 7.250.

45 Panel Report, *US – Softwood Lumber V*, para. 7.251.

46 Panel Report, *US – Softwood Lumber V*, paras 7.237 and 7.316.

47 Panel Report, *US-Softwood Lumber V*, para. 7.315.

48 Panel Report, *US-Softwood Lumber V*, para. 7.305.

49 European Union's second written submission, para. 104.

50 Panel Report, footnote 445, quoting the US' second written submission, para. 92.

146. The panel concluded by rejecting Canada's claim that the United States acted inconsistently with Article 2.2.1.1.[51] It is in that context that the first sentence in paragraph 7.324 of that panel report should be understood.

147. Second, the European Union also recalls that the panel in *Egypt – Steel Rebar* interpreted Article 2.2.1.1 to mean that "the costs reflected in the records must be 'reasonable' for the production of the good in question", and to "reflect the broader notion of 'associated', instead of the narrow notion of 'actually incurred'".[52]

148. In *Egypt – Steel Rebar* the panel found that Article 2.2.1.1 required it to examine whether:

> …there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling rebar…[53]

149. The fact that the panel required the relevant item to be "*reasonably related to the cost* of producing and selling rebar" shows that the word "reasonably" is also attached to the word "costs" in Article 2.2.1.1. This means that, to meet the second condition of Article 2.2.1.1, the costs reflected in the records must be "reasonable" for the production of the good in question. Costs which do not reflect market values cannot be said to be reasonable.

150. Third, the European Union notes that the panel in *EC-Salmon (Norway)* interpreted "costs of production" as "the price to be paid for the act of producing".[54] As already explained before the Panel, this finding has two important implications.[55] On the one hand, it shows that there is no meaningful difference between the term "costs" and the term "prices". On the other hand, this finding shows that the "cost of production" is linked to the prices to be paid for the act of producing. If the panel considered that the required costs are the expenses that have actually already been incurred by the producer, it would have used the past tense of the verb "be" in its report; for example, the "prices paid", or the "prices that were paid". However, the panel did not use the past tense. By using the terms "to be paid", this panel finding confirms that the "reasonable costs" required by Article 2.2.1.1 are not necessarily only the expenses that have already been incurred by the producer.[56]

151. It follows from the above that previous panels confirmed that:

- investigating authorities may at least test the recorded costs against market values, in order to determine whether they are "reasonable";

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51 Panel Report, *US-Softwood Lumber V*, para. 7.324.

52 European Union's first written submission, paras 133 and 138.

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

54 Panel Report, *EC-Salmon (Norway)*, para. 7.481.

55 European Union's first written submission, paras 134- 136.

56 On the specific facts of that case the panel concluded that the allocation methodology on the basis of a three year average was not appropriate, as the non-recurring costs did not relate exclusively to the farming-related activities for a given salmon generation (Panel Report, *EC – Salmon (Norway)*, paras 7.506-7.507).

- costs which do not reflect market values cannot be considered reasonable; and
- "reasonable costs" are not necessarily only the expenses that have already been incurred by the producer.

152. Taken together, the findings above confirm that previous panels did not foreclose the possibility that an investigating authority may reject/replace/adjust costs which do not reflect market values. On the specific facts of those cases, it was in fact not necessary to take costs into account other than those actually incurred, while market values were considered an appropriate benchmark for comparison with the recorded costs.

153. In light of the preceding observations, we respectfully submit that each of the legal errors that we have identified, or any combination of them, supports our submission that the Panel erred in its interpretation of Article 2.2.1.1 and particularly the condition at issue. When the condition at issue is properly contextualised, we submit that a standard of reasonableness informs not only the term reflect, but also the determination of the costs associated with production and sale. We therefore request that the Panel's findings on this issue be reversed.

3.2.3. The Panel erred not only in its interpretation but also in its application of Article 2.2.1.1 and particularly the condition at issue, in light of the Vienna Convention and the existing case law

154. In this section the European Union focusses on explaining how and why the Panel erred not only in its interpretation but also in its application of Article 2.2.1.1 and particularly the condition at issue, in light of the Vienna Convention and the existing case law. We recognise that it is in the nature of things that there may be some overlap between this section and the preceding sections.

155. The European Union will start by analysing the ordinary meaning of the terms "records…reasonably reflect the costs associated with the production and sale" of the products under consideration, continuing with the context and then referring to the object and purpose of the Anti-Dumping Agreement. The European Union will then briefly recall the relevant case law, which does not foreclose the possibility that an investigating authority may reject/replace/adjust costs which do not reflect market values.

156. The European Union notes that the Panel did a three-stage, separate analysis of the ordinary meaning, the context of the provisions at issue and then left aside, as unnecessary, a detailed analysis of the object and purpose of the Anti-Dumping Agreement. At the outset, the European Union submits that the Panel should have instead conducted a **holistic analysis** taking into account the different elements of interpretation contemplated by Article 31 of the Vienna Convention and only then should it have drawn any conclusions.

157. With respect to the **ordinary meaning of the phrase** "records…reasonably reflect the costs associated with",[57] the Panel analysed two main components: "records…reasonably reflect" and "costs associated".

158. The Panel understood **"records…reasonably reflect"** to mean that "the records of a producer/exporter must depict all the costs it has incurred in a manner that is – within acceptable limits – accurate and reliable".[58] Although the European Union never stated so, the Panel considered that the European Union seemed to suggest that "reasonably" is an adverb that modifies the term "costs".[59] The Panel further stated that "Article 2.2.1.1 does not involve an examination of the "reasonableness" of the costs themselves".[60]

159. The European Union does not contest that "reasonably" is an adverb, which modifies the verb "reflect" in a phrase where the subject is the producer/exporter's records. However, the costs must themselves be "reasonable" if the records are to reasonably reflect them. The two aspects cannot be logically dissociated. As explained above, we think that a reasonableness standard informs the determination not only of the costs associated with sale but also of the costs associated with production.

160. The Panel erred when it drew an artificial distinction between the records which should reasonably reflect the costs and costs which did not need to be reasonable. In the case of a government induced price distortion like the differential export tax system in the present proceedings, records cannot reasonably reflect costs which are not reasonable in themselves. It cannot be that such a distortion affects the reasonableness of the costs, but not the reasonableness of the records.[61]

161. Contrary to what Argentina argued before the Panel,[62] the first sentence of Article 2.2.1.1 does not relate exclusively to a cost allocation issue. The European Union recalls that both Argentina and certain third parties accepted that the notion of "reasonably reflecting costs" in Article 2.2.1.1 of the Anti-Dumping Agreement allows investigating authorities to reject/replace/adjust costs relating to non-arms' length transactions.[63]

162. This interpretation is supported by the panel's findings in *US-Softwood Lumber V*. In the case of Tembec, the investigating authority followed a methodology which used the "market values" as "benchmark" and compared the values recorded in the books with market values in order to determine whether the recorded values were "reasonable" for the purposes of Article 2.2.1.1. Moreover, the authority's

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57 The French version reads "registres….. tiennent compte raisonnablement des frais associés à la production et à la vente du produit considéré", while the Spanish version provides that "registros …reflejen razonablemente los costos asociados a la producción y venta del producto considerado".

58 Panel Report, para. 7.231.

59 Panel Report, para. 7.230.

60 Panel Report, footnote 400.

61 Argentina's response to Panel question no. 4, para. 3. See also Argentina's response to Panel question no.13, para. 25.

62 Argentina's response to Panel question no. 11, para. 24.

63 China's third party submission, para. 39.

determination that the recorded values were "reasonable" was based on the finding that the prices recorded in the company books were actually similar to market prices less the value of profits.

163. The panel not only acquiesced in that methodology, but also expressly approved it. The panel found that, as the "the actual cost of the input will normally be lower than the market value", the only way the investigating authority "could have determined that the valuation […] recorded in Tembec's books was reasonable […] when compared to [Tembec's] sales prices to unaffiliated purchasers" was for the investigating authority to make the relevant adjustments.[64] Therefore, the panel expressly acknowledged that the "valuation recorded" would be "reasonable" for the purposes of Article 2.2.1.1, only if it could be shown that it corresponded to market prices.

164. With regard to the phrase **"costs associated with"**, the European Union notes that the Panel failed to perform a similar analysis of the ordinary meaning of the term "associated" to that it conducted with regard to "records…reasonably reflect".

165. The *Oxford English Dictionary* defines "associated" as "connected in thought, mentally related".[65] It follows that "costs associated" may be understood as "costs related to" or "appropriate for".[66] The European Union submits that "associated" or "related to" cannot be equated to "costs actually incurred". The word "associated" has a broader meaning than the words "actually incurred" and captures a broader range of relations between the "costs" and the "production", than the narrower terms "actually incurred".

166. Article 2.2.1.1 does not include the words "expenses *actually* incurred by the producer". The Panel read into the text of Article 2.2.1.1 words that did not actually exist.

167. Several panel reports support the European Union's understanding of this matter. Even if on the facts of those cases panels may have finally considered the costs actually incurred, there are several findings which confirm that the panels did not foreclose the possibility that an investigating authority would use other costs than those actually incurred. To the contrary, such panels gave their blessing to investigating authorities which tested the recorded costs against market values, in order to determine whether the records reasonably reflect the costs.[67]

168. In this respect, the European Union finds support for its position in the *Egypt-Steel Rebar* report, where the panel did not use the words "actually incurred". Instead, the panel found that "costs associated with the production and sale" are those which "*pertain* to the production and sale".[68] The choice of the term "*pertain*" shows that the panel was seeking a term that would reflect the broader notion of

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64 Panel Report, *US-Softwood Lumber V*, para. 7.322.

65 Oxford English Dictionary, http://www.oed.com/view/Entry/11976?redirectedFrom=associated#eid, accessed 17 May 2016.

66 European Union's opening oral statement at the first substantive meeting, para. 73.

67 Panel Report, *US-Softwood Lumber V*, para. 7.324.

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

"associated" and not the narrower word "actually incurred". The *Oxford English Dictionary* defines "to pertain" as "to relate to; to refer to".[69]

169. As the European Union explains with regard to the context of Article 2.2.1.1, Article 2.2.2 does not support a reading of "pertain to" meaning "actually incurred".[70]

170. Therefore, the European Union was fully entitled to consider which costs would *pertain* (= relate) to the production and sale of biodiesel in normal circumstances, i.e. in the absence of the distortion caused by Argentina's differential export tax system.

171. Moreover, the panel in *EC-Salmon (Norway)* confirms that the "cost of production" is linked to the prices *to be paid* for the act of producing. If the panel considered that the associated costs are the expenses that have *actually* already been incurred by the producer, it would have used the past tense of the verb "be". However, the panel did not do so. By using the terms "to be paid", this finding confirms that the costs captured by Article 2.2.1.1 are not the expenses that have actually been incurred by the producer.

172. In addition, by referring to "the act of producing" the same panel did not use the terms "incurred by the producer". Therefore, the plain text of the provision and the panel's finding confirm that, in interpreting the notion of "costs associated with the production and sale" in Article 2.2.1.1, those costs are not necessarily the expenses actually incurred by the investigated company. Quite to the contrary, Article 2.2.1.1 is broad enough to capture the costs that would normally be paid for the *act of producing*.

173. In light of the above, an analysis of the ordinary meaning of the phrase "records…reasonably reflect the costs associated with the production and sale" warrants the conclusion that the costs reflected in the records should be reasonable themselves and that "costs associated" cannot be reduced to "costs actually incurred".

174. With regard to the **context of the phrase** "records…reasonably reflect the costs associated with the production and sale", the European Union notes that the immediate context is provided by the phrase "records are in accordance with the generally accepted accounting principles of the exporting country".

175. The Panel erred when it rejected the EU's argument according to which the fact that Article 2.2.1.1 includes a second condition shows that to "reasonably reflect costs associated with production and sale", records must reflect something more than simply the "expenses actually incurred".[71]

176. The European Union explained that the generally accepted accounting principles (GAAP) require companies to record costs that they have actually incurred, a

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69 Oxford English Dictionary, http://www.oed.com/view/Entry/141585?redirectedFrom=pertain#eid, accessed 17 May 2016.

70 European Union's opening oral statement at the first substantive meeting, paras 73-75.

71 Panel Report, para. 7.232, European Union's first written submission, para. 149.

proposition with which the Panel agreed.[72] This means that, if indeed, the purpose of Article 2.2.1.1 would be that the records should include only the "expenses actually incurred", then it would have included only the condition that records should be kept in accordance with the GAAP, since that would have been sufficient to ensure that the records include the costs actually incurred by the producer under investigation. It would not have been necessary for Article 2.2.1.1 to include the second condition, namely that the records "reasonably reflect" the "costs associated with production and sale".

177. The Panel sought to justify its reading of the phrase "records…reasonably reflect the costs associated with the production and sale" as meaning "records…reflect costs actually incurred" by offering several examples which, in its opinion, still refer to "costs actually incurred", while they are not covered by the GAAP.

178. The Panel then refers as another element of the context to the purpose of calculating the cost of production and constructing the normal value on the basis of that cost under Article 2.2, which is to identify an appropriate proxy for the price "of the like product in the ordinary course of trade in the domestic market of the exporting country" when that price cannot be used.[73] The Panel considers that "costs associated" in Article 2.2.1.1 can be only costs that a producer actually incurred, as otherwise the proxy chosen would be inappropriate.[74]

179. In the present case Argentina itself recognized that there were no sales of the products at issue in the ordinary course of trade in Argentina.[75] This situation resulted from state intervention,[76] which distorted market prices. It was therefore necessary to construct normal value. In constructing normal value, it was necessary to determine the costs associated with the production and sale of the product under consideration. In this context, it was found that the costs in the records kept by the investigated firm did not reasonably reflect the costs associated with the production and sale of the product under consideration, because of the export tax. It was therefore necessary to reject those parts of the records and replace or adjust them, using a reasonable methodology. That reasonable methodology consisted of having recourse to an appropriate proxy determined by reference to market prices, as reflected in the prices published by the Argentinian authorities themselves, which are based on domestic data and in fact also correspond to domestic prices, certainly after the deduction of the fobbing costs, and not by reference to the actual costs incurred by the producers.

180. The Panel tries to find support for its understanding by referring to Article 6.10 of the Anti-Dumping Agreement, pertaining to the determination of an individual margin of dumping for each known producer/exporter concerned.[77] In this context,

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72 Panel Report, para. 7.232, referring to Argentina's first written submission, para. 228; European Union's first written submission, paras 148-149.

73 Panel Report, *Thailand – H-Beams*, para. 7.112; and Panel Report, *US – Softwood Lumber V*, para. 7.278.

74 Panel Report, para. 7.233.

75 Argentina's first written submission, para. 250.

76 The Argentinian market was found to be "heavily regulated by the state" (recital 28, Definitive Regulation).

77 Panel Report, para. 7.233.

the European Union points to the fact that the investigating authority rejected a request by the cooperating Argentine companies, which asked for a single duty to be imposed on them.[78] In practice, the investigating authority calculated individual margins of dumping for the different producers/exporters concerned.[79] The fact that the costs associated with the production and sale of the products under investigation may include costs of inputs which are constructed taking into account the specificities of a market heavily regulated by the State does not render automatically all costs equal and, as a consequence, dumping margins not individually determined.

181. In this respect, there are several important observations to be made. First, when constructing the normal value even when some costs are the same, the resulting normal values can be different. There are several instances in which constructing the normal value may in fact involve taking into account certain identical costs. One such example concerns the calculation of the costs of production. In a market heavily regulated by the state the costs of inputs (raw materials) may be the same for all producers/exporters, while other costs of production, such as direct labour costs and manufacturing overheads (like depreciation), will most likely be different, which will finally lead to different normal values for individual producers/exporters.

182. Second, individual dumping margins are determined as a comparison between the normal value and the export price. So even in case constructed normal values are, in part, the same for several exporters, dumping margins may still differ because of different export prices.

183. Third, with respect to administrative, selling and general costs and profits, Article 2.2.2 (ii) expressly provides for a weighted average of the actual amounts incurred and realized by other exporters.

184. Therefore, as we have also explained above, the existence of common elements at different levels of constructing the normal value cannot constitute in itself a reason which would invalidate the determination of dumping margins.

185. It follows from the above that Article 6.10 of the Anti-Dumping Agreement cannot be read as providing contextual support for the understanding that there are no circumstances where there may be certain identical costs in the costs structure of different producers for the purposes of constructing the normal value and then determining individual dumping margins.

186. With regard to footnote 6 to Article 2.2.1.1, the Panel considers that:

> [It] is implicit in this footnote that costs are to be assessed on the basis of the specific circumstances of each producer/exporter and the costs that they incur, such as those pertaining to start-up operations.[80]

187. Based on that observation, the Panel concludes that "costs associated" cannot be understood as "costs normally associated" but rather as "costs actually incurred".

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78 Recitals 59-65, Definitive Regulation.

79 Recital 65, Definitive Regulation.

80 Panel Report, para. 7.235.

The European Union disagrees, as we have already indicated above. As previously mentioned, input costs are one element of the production costs structure and there are other elements which may differentiate between different producers.

188. Article 2.2.2 offers a useful context for understanding Article 2.2.1.1. First of all, the express reference to the "actual data" of the producer/exporter in Article 2.2.2 relates only to production and sales *in the ordinary course of trade. A contrario*, the respective actual data need not be used where the like product is not sold in the ordinary course of trade. This is also the present case. As Argentina itself acknowledges, the interested parties did not contest that sales of the products at issue were not made in the ordinary course of trade.[81]

189. Indeed, the chapeau of Article 2.2.2 uses the words "shall be based on actual data pertaining to production and sales in the ordinary course of trade". In contrast, Article 2.2.1.1 uses the words "reasonably reflect the costs associated with the production and sale". It is also noteworthy that Article 2.2.1.1 does not use the words "actual data", but the word "reasonably". Thus, the different structures in which the terms are used support the EU's view that the term "pertain" used by the panel in *Egypt-Steel Rebar* and the word "associated" in Article 2.2.1.1 of the Anti-Dumping Agreement are intended to confirm their ordinary meaning, which is "related to". Accordingly, the Panel erred when conferring on this phrase the very different meaning of "actually incurred".[82]

190. As explained above, the European Union submits that the Panel failed to conduct a holistic interpretation of Article 2.2.1.1, as it did not properly analyse **the object and purpose of the Anti-Dumping Agreement**:

> [W]e do not consider that an interpretation of the text of Article 2.2.1.1 in context leaves its meaning equivocal or ambiguous. We therefore do not consider that arguments pertaining to the object and purpose of the Anti-Dumping Agreement shed light on the meaning of the particular question of interpretation before us, and we therefore do not examine those arguments in detail.[83]

191. While Article 32 of the Vienna Convention, concerning "supplementary means of interpretation", speaks of a meaning left ambiguous or obscure and of a result which is manifestly absurd or unreasonable, there is no such conditionality in Article 31 of the Vienna Convention, which bears the title "general rule of interpretation". Indeed, there is a general rule of interpretation (in the singular), according to which an international treaty should be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

192. For methodological reasons, the different elements are normally analysed separately and in a certain order, starting with the ordinary meaning and ending with the object and purpose, but this should not result in a mechanistic distinction. To the contrary, the different elements of interpretation should be analysed harmoniously together, as part of only one general rule of interpretation.

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81 Argentina's first written submission, para. 250.

82 Panel Report, para. 7.236.

83 Panel Report, para. 7.238.

193. In *US — Softwood Lumber V (Article 21.5 — Canada)*, the Appellate Body considered it unnecessary to engage in an analysis of the object and purpose of the Anti-Dumping Agreement, due to the fact that neither participant referred to the object and purpose in its written submission.[84] This is different from the present case, in which both parties made several submissions before the Panel with regard to the object and purpose of the Anti-Dumping Agreement.[85]

194. The European Union submits that it is not necessary that an agreement contains a preamble for a panel to be able to discern its object and purpose.[86] There are other legislative techniques, for instance the adoption of an explanatory memorandum, which may serve a similar purpose. In the present case, the European Union notes that the object and purpose of the WTO anti-dumping rules can be easily discerned from Article VI:1 of the GATT 1994, provision on which the Anti-Dumping Agreement elaborates, which provides that the WTO Members:

> "…recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury…"

195. This provision shows that the object and purpose of the WTO anti-dumping rules is to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low, because of some abnormal condition (hence the reference to "normal" value). A cost of raw materials used to produce dumped goods which is not "normal" and which causes the "normal value" of the goods not to be "normal", falls squarely within the type of conditions that the WTO anti-dumping rules aim to address.

196. The European Union finds further support with regard to its understanding of the object and purpose of the Anti-Dumping Agreement in the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994, from which it clearly follows that *price distortion caused by governmental action* can also cause dumping.

197. The European Union disagrees with the Panel's view that the second *Ad* Note is an isolated example of government-induced price distortion causing dumping:

> The second *Ad* Note to Articles VI:2 and VI:3 is, on its own terms, limited to "multiple currency practices", and its very existence indicates that it should be treated as an exceptional and specialized provision. We therefore see no reason to extrapolate from this provision that the concept of "dumping" is generally intended to cover any distortion arising out of government action or circumstances such as those surrounding Argentina's export tax system and its impact on soybean prices as an input material for biodiesel.[87]

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84 Appellate Body Report, *US — Softwood Lumber V (Article 21.5 —Canada)*, para. 118.

85 For instance, Argentina's first written submission, paras. 119-127 and 238-241, EU's first written submission, paras. 155-159 and 250-254.

86 Panel Report, para. 7.238.

87 Panel Report, para. 7.240.

198. Article VI of the GATT does not limit the notion of dumping only to situations that arise out of the exporters' "voluntary" pricing behaviour. Quite to the contrary, the notion of dumping also covers situations that are created by the action of governments and are, in that sense, "exogenous" or "external" to the "intention" of the exporters.

199. The second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 reads as follows:

> Multiple currency practices can in certain circumstances constitute a subsidy to exports […] or *can constitute a form of dumping* […] which may be met by action under paragraph 2 [of Article VI of the GATT]. By "multiple currency practices" is meant *practices by governments* or sanctioned by governments.

200. Contrary to what the Panel found in its report, the significance of this Note is not "limited to multiple currency practices".[88] This Note is intended as an explanation of the notion of dumping in Article VI, rather than an exception which is specific to multiple currency practices. This text may be contrasted with that of the second *Ad* Note 2 to Article VI:1, which envisages a departure from the ordinary rules in the case of exports from non-market economy countries. Its context (two paragraphs of Article VI that elaborate the notions of dumping and subsidy) as well as the examination of its negotiating history, confirm that this type of government measure is just one example of dumping and not a "limitation to the definition of dumping".[89]

201. Thus, the text of the GATT expressly provides that government action can lead to a situation of dumping and that importing countries may impose anti-dumping duties in order to offset or prevent the dumping resulting from government measures.

202. Moreover, the fact that the GATT expressly refers to multiple currency practices as a type of government measure that may lead to a situation of dumping provides some insights on the nature and market effects that such measures should have in order to fall within the scope of the dumping provisions in Article VI and the Anti-Dumping Agreement.

203. The notion of multiple currency practices is described by the IMF as "action by a Member […] that of itself gives rise to a spread of more than 2 percent between buying and selling rates for spot exchange transactions between the Member's currency and any other Member's currency", as well as "action by a Member […] which results in mid-point spot exchange rates of other Members' currencies against its own currency in a relationship which differs by more than 1 percent from the midpoint spot exchange rates for these currencies in their principal markets".[90]

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88 Panel Report, para. 7.240.

89 Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Thirty-Second Meeting of Commission A, held on 23 July 1947 in Geneva, Verbatim Report, p. 12 (Exhibit EU-15).

90 Executive Board Decision 6790-(81/43) of March 20, 1981, as amended by Decision 11728-(98/56) of May 21, 1998, SM/81/34, Sup.1, in Selected Decisions and Selected Documents of the International Monetary Fund, Thirty-Seventh Issue, Washington, D.C. December 31, 2013, p. 634 (Exhibit EU-16**).**

204. Therefore, one of the characteristics of multiple currency practices is that they constitute a specific government intervention affecting prices, as opposed to general government regulation enacting general rules or standards. Indeed, in the present case, the application of the *de jure* discriminatory export tax on soya beans was such a specific, albeit indirect governmental price intervention.

205. Another element of multiple currency practices is that the IMF defines them on the basis of a margin of difference from the market prices as determined in "their principal markets". This has two important implications. First, there is no limitation as to the geographical area from where the market price used as benchmark comes: the "principal markets" for a currency may well be in a major international financial centre which is located outside the exporting country. Second, it indicates that "too small" deviations from the market price are irrelevant for the determination of the margin. In any event "too small" deviations would always be irrelevant in a dumping investigation, because the recorded cost would be very close to the market price and, consequently, replacing the one with the other would not have a material impact on the investigation.

206. Another characteristic of multiple currency practices is that there is no distinction between direct and indirect practices (for example, the GATT includes "practices by governments or sanctioned by governments"). This is another element which is present in the case of the Argentine *de jure* discriminatory export tax, which indirectly affects the price of soya beans.

207. To sum up, multiple currency practices involve a government induced manipulation of the ordinary operation of the market, which substantially affects and distorts pricing. These are precisely the characteristics of Argentina's export tax on soya beans. Argentina has expressly acknowledged that (a) the export tax on soya beans is a measure of the Government of Argentina and (b) that the effect of the export tax on soya beans is to reduce the domestic price of soya beans in Argentina in comparison to the level that this domestic price would have in the absence of the export tax.[91] Consequently, Argentina's export tax falls squarely within the types of government measures that may lead to dumping and that "may be met by action" under Article VI:2 of the GATT.

208. Therefore, the "object and purpose" of the WTO anti-dumping rules is to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low, because of some abnormal condition, including abnormal conditions induced by governmental action, and particularly the *de jure* discriminatory export tax used by Argentina in this case, which is precisely one of the objective factors referred to in Article 2.4.

209. In conclusion, the analysis of the ordinary meaning of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, read in its proper context and taking into consideration the object and purpose of the WTO antidumping rules, contradicts the Panel's findings, according to which investigating authorities must base their calculations exclusively on the actual costs as opposed to market prices and according to which the notion of dumping does not cover a distortion arising out of governmental action like the one at issue in the present proceedings.

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91 Argentina's response to Panel question no. 43, para. 120.

210. As already explained in the previous sections, the existing case-law does not address directly the questions at the core of the present proceedings. However, it offers indications that a course of action of the kind followed by the EU investigating authority in the case of biodiesel from Argentina is permissible under the WTO rules. Contrary to what the Panel has found, the panel reports in *US-Softwood Lumber V*, *Egypt-Steel Rebar* and *EC-Salmon (Norway)* do not foreclose the possibility that, when there are no sales in the ordinary course of trade, an investigating authority may construct the normal value by taking into account market prices and not actual costs, distorted by governmental intervention. In other words, they fully support the view that, in the condition at issue, a standard of reasonableness informs not only the determination of the costs associated with sales, but also a determination of the costs associated with production.

3.3. CONCLUSIONS

211. In light of the foregoing, the European Union requests the Appellate Body to *find* that the Panel erred when finding that the measure at issue is inconsistent with Article 2.2.1.1, and particularly the condition at issue, because, according to the Panel, whilst a standard of reasonableness does inform the determination of the costs associated with sales, no standard or reasonableness informs the determination of the costs associated with production. We therefore request the Appellate Body to *reverse* the Panel's findings in paragraphs 7.247, 7.248, 7.249 and 8.1(c)(i) of its Report.

212. Having reversed the Panel's findings and conclusions on this issue, the European Union submits that the Appellate Body is not in a position to complete the legal analysis, and should not do so. Not only are there numerous significant facts that remain undetermined by the Panel or absent from the Panel record, but there is also, in this respect, an absence of any meaningful analysis by the Panel. Furthermore, because the Panel determined the matter before it on the basis of particularly abstract reasoning, there has been no proper or full exchange of views between the parties, or for that matter a process properly associating the third parties, with respect to the question of how the correct standard of reasonableness should inform the particular facts and evidence in this case. It is now well established in the case law that, in such circumstances, the Appellate Body is not in a position to complete the legal analysis, and should not do so.

4. THE PANEL ERRED WHEN FINDING THAT THE EUROPEAN UNION "FAILED TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN" AS REQUIRED BY ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

213. The European Union submits that the Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement by not using the actual costs "in the country of origin" when constructing the normal value. As a result, the European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.260 and 8.1(c)(ii) of its report.

4.1. SUMMARY OF THE PANEL'S FINDINGS

214. Before the Panel, Argentina claimed that the European Union violated Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by, allegedly, not using the actual costs in Argentina when constructing the normal value. Accordingly, the Panel analysed whether the "cost of production" used by the EU investigating authority for soybeans can be understood to be a cost "in the country of origin", that is, in Argentina, as required by Article 2.2 of the Anti-Dumping Agreement.

215. The Panel noted that the EU investigating authority replaced the average actual purchase price of soybeans during the IP, as reflected in the records of the producers, with the average reference price of soybeans published by the Argentine Ministry of Agriculture for export, FOB Argentina, minus fobbing costs, during the IP,[92] since that would have been the price paid by the Argentine producers in the absence of the export tax system.[93] The EU authorities considered that this reference price reflected the level of prices and that this would have been the price paid by the Argentine producers (in Argentina) in the absence of the differential export tax system (DET).[94]

216. The Panel considered that, by disregarding the price actually paid by Argentine producers for soybeans and replacing it with "the price at which those companies would have purchased the soya beans in the absence of [the]… distortion",[95] the EU investigating authority used a cost which is not a cost "in the country of origin".[96] The fact that the price used by the EU investigating authority was published by the Argentine Ministry of Agriculture, and thus, was a price published in Argentina, was deemed irrelevant by the Panel.

217. For these reasons, the Panel found that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by constructing the normal value using a "cost" that was not prevailing "in the country of origin".

4.2. LEGAL ARGUMENT

218. The present case raises several complex legal issues that have not previously been examined in panel or Appellate Body reports. Such issues include the meaning of "cost of production in the country of origin" in Article 2.2 and how an investigating authority may proceed if costs are distorted by governmental action, and particularly in the form of a *de jure* discriminatory export tax, as in this case. Specifically, the question is, if one reaches a point in the analysis where it is correct to conclude that one cannot simply use the records kept by the investigated firm, but must reject/replace/adjust them in part, what exogenous data or evidence is the investigating authority entitled to refer to for that purpose? In particular, if the investigating authority refers for this purpose to information published by the exporting Member, based on data taken from the domestic market of the exporting

92 Definitive Disclosure, Annex II, p. 1 (Exhibit ARG-38) (BCI).

93 Definitive Disclosure, para. 32 (Exhibit ARG-35).

94 Panel Report, para. 7.257.

95 Definitive Disclosure, para. 35 (Exhibit ARG-35).

96 Panel Report, paras 7.257-7.258.

Member, and adjusted for fobbing costs (as in the case), is it correct to conclude that the investigating authority has acted inconsistently with Article 2.2 on the grounds that it has not calculated a normal value based on costs of production "in the country of origin"?

4.2.1. Legal standard under Article 2.2 of the AD Agreement

219. There is no case law speaking directly to the interpretation of the notion "in the country of origin". However, there are panel reports which address indirectly this issue, in the context of Article 2.2.1.1.

220. For instance, the European Union recalls that the panel is *EC-Salmon (Norway)* found that:

> Article 2.2 identifies the circumstances when an investigating authority may be entitled to determine the margin of dumping through a comparison between export price and: […] (ii) constructed normal value ("the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits"). As we have already observed, a cost may be used to calculate "cost of production" for the purpose of establishing constructed normal value when it is "associated" with production and sale of the like product during the period of investigation. It follows that a comparison between export price and a constructed normal value that is derived from a "cost of production" calculated on the basis of costs that are *not* "associated" with production and sale of the like product during the period of investigation will be inconsistent with Article 2.2. [footnotes omitted][97]

221. In the previous section, with regard to Article 2.2.1.1, the European Union has explained in detail that "associated with" is to be understood as "relating to" and not as the panel erroneously interpreted it - "actually incurred".

222. A distinction must be made between "cost…in the country of origin" and the evidence pertaining to such cost. Indeed, Article 2.2, as a whole, does not forbid outright the use of data on the cost of production from countries other than the country of origin, when the conditions of production and sale in the country of origin are not in the ordinary course of trade. On the contrary, Article 2.2.2(iii), for example, expressly refers to the use of "any other reasonable method".

223. Reading the text of Article 2.2 in its context, the European Union notes that the Anti-Dumping Agreement contains no rule that precludes securing evidence from outside the country of origin in order to identify the costs in the country of origin. For instance, Article 6 of the Anti-Dumping Agreement, which concerns evidence, does not impose any limits on the countries from which evidence may be obtained. Quite to the contrary, Article 6.12 expressly provides that various groups outside the country of origin can provide information which is relevant to the investigation regarding dumping. This information may well relate to the good's cost of production.

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97 Panel Report, *EC-Salmon (Norway)*, para. 7.528.

224. In this respect, Article 2.5 of the Anti-Dumping Agreement, which concerns transhipment, is instructive. According to that provision, normal value will be based on the comparable price either in the country of export or in the country of origin, according to the circumstances. In the latter case, apparently, the Panel (and Argentina) would take the view that the measure would be inconsistent with Article 2.1, which refers to the exporting country. This is absurd: one provision of the Anti-Dumping Agreement cannot be read as mandating something that another provision of the Anti-Dumping Agreement is read as prohibiting. Instead, it is necessary to search for and prefer a way of interpreting and applying the provisions in a harmonious way, which is balanced and reasonable. Properly construed, this is how we must also understand the relationship between Article 2.2 and Article 2.2.1.1. The former does not establish an absolute prohibition, but must be read in a reasonable and balanced way, in the light of the all the evidence arising in a particular case.

4.2.2. The Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement by "not using the actual costs "in the country of origin" when constructing the normal value"

225. The Panel began by stating that certain of Argentina's claims under Article 2.2 of the Anti-Dumping Agreement were consequential, and that it would make no findings in that respect.[98] However, the Panel then went on to make an additional finding that the measure at issue is inconsistent with Article 2.2 because the normal value was, allegedly, not constructed on the basis of the normal value in the country of origin.[99] However, a careful review of the Panel's findings reveals that they are in fact based on its erroneous findings with respect to Article 2.2.1.1. Thus, in paragraph 7.257 the Panel states that the EU disregarded the "actual" soya prices and replaced that data with the data published by Argentina. At the end of paragraph 7.258 the Panel states that the EU used that data precisely because it was not the cost of soya in Argentina, by which the Panel means the "actual" cost of soya in Argentina. The Panel makes the same statement in the second and final sentences of paragraph 7.259. Accordingly, the Panel's findings are based upon and vitiated by its legally erroneous findings with respect to Article 2.2.1.1, and for this reason alone, with the reversal of the latter, the former should also be reversed.

226. Second, in any event, the Panel's findings should be reversed because they fail to recognise that a price derived from a price at the border can by definition be simultaneously characterised as both an international price and a price in Argentina. Furthermore, and in any event, the Panel further fails to recognise that the subtraction of the fobbing costs renders the result a reasonable proxy for the normal price of soya in Argentina.

227. Third, the Panel also fails to recognise that, in any event, Article 2.2.1.1 does not preclude an investigating authority from having regard to evidence relating to matters outside the country of origin, if to do so would be helpful in determining

98 Panel Report, para. 7.250.

99 Panel Report, paras. 7.255-7.260.

the costs associated with the production and sale of the product under consideration; and in then determining what data to use to reject/replace/adjust the records kept by the investigated firm. In particular, as we have explained above, the Panel's analysis assumes that the investigating authority is engaged in what we have referred to above as the third circuit of the provision, and therefore places all the emphasis on the final phrase of Article 2.2. However, the Panel fails to understand that Article 2.2.1.1 must be interpreted and applied in a manner that also comports with what we have referred to above as the first and second circuits of the provision. For this reason also the Panel has erred in both the interpretation and the application of Articles 2.2.1.1 and Article 2.2.

228. Developing these points further, the European Union recalls that during the first substantive meeting with the Panel, Argentina confirmed that the prices used by the European Union's investigating authority were indeed "constructed" by the Government of Argentina on the basis of various sources, including information from **Argentinean** ports such as Rosario and Bahia Blanca. Argentina also confirmed that these prices did not include the costs associated with export. This supports the conclusion that the Government of Argentina was "constructing", or "determining" these prices in a manner that would remove the elements of export-related costs.

229. The European Union considers that, by doing so, the Government of Argentina was actually seeking to calculate itself the prices that Argentine buyers of soya beans would pay **domestically**, in the absence of the distortion caused by the export tax on soya beans. This conclusion is reinforced by the fact that the Government of Argentina used these prices in order to calculate the export tax for soya beans. In other words, the Government of Argentina first calculated the domestic prices of soya beans that would have existed in the absence of the distortion and, then, applied the measure which caused the distortion in order to bring about the domestic prices of soya beans that the Government of Argentina sought to achieve.

230. In these circumstances, the European Union considers that the prices used were indeed reflecting the soya bean costs that the Argentine producers of biodiesel would have to bear in Argentina, in the absence of the state-induced distortion. This means that they were costs "in the country of origin" within the meaning of Article 2.2 of the Anti-Dumping Agreement.[100] The Panel itself expressly recognised this point at an earlier stage in its analysis:[101] unfortunately it appears to have forgotten its prior findings by the time it reached this part of the assessment.

231. The European Union partially agrees with the Panel that Article 2.2 does not restrain an investigating authority with regard to the relevant sources of information:

> We note, however, that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not limit

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100 European Union's response to Panel questions no. 45, paras 58-60.

101 Panel Report, para. 7.165: " … the EU authorities adjusted the actual input costs on the basis of reference prices which, in their view, reflected what **domestic prices** for the inputs would have been in the absence of the distortions created by the export tax …" (bold emphasis added).

> the sources of information that may be used in establishing the costs of production; what they do require, however, is that the authority construct the normal value on the basis of the "cost of production" "in the country of origin". While this would, in our view, require that the costs of production established by the authority reflect conditions prevailing in the country of origin, we do not consider that the two provisions prohibit an authority resorting to sources of information other than producers' costs in the country of origin.[102]

232. There are several elements which support the view according to which costs and evidence pertaining to those costs are separate elements.

233. First, the notion of "the cost of production in the country of origin" set out in Article 2.2 is a legal one. However, establishing the cost in a particular case involves determinations of fact and such determinations are made with the aid of evidence. Typically the determination of a firm's cost of production in a particular country will require evidence pertaining to that country, but it cannot be excluded that evidence relating to that determination might originate in other countries. For example, evidence of the cost of imports might be verified by means of invoices issued by exporters in other countries.

234. Support for the distinction between costs and the evidence pertaining to the determination of costs can be found in the context of Article 2.2. Article 2.2.1.1, second sentence, when discussing the proper allocation of costs, directs the authorities to "consider all available evidence". These costs are the very ones referred to in Article 2.2, i.e., "in the country of origin", but no suggestion is made that the "available evidence" should be restricted in that way.

235. Contextual support for the distinction is also to be found by comparing the wording of Article 2.2 with that of Article VI:1(a) and (b) of the GATT 1994. The former is a transposition of the latter. The options of the price of export to a third country and the cost of production plus profit are stated in subparagraphs (b)(i) and (ii) of Article VI:1.

236. However, some changes have been made to the wording of subparagraph (b)(ii), which speaks of "the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit". In contrast, Article 2.2 speaks of "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". Thus, the words "of the product" have been omitted in the text of the Anti-Dumping Agreement. In Article VI:1 "the product" is the one which is said to be being dumped. The omission of this term in Article 2.2 suggests an intention that in the calculation of the constructed price the focus does not need to be exclusively on the specific company under investigation and the production of its goods.

237. Support for such an interpretation can also be found in Article 2.2.2, which says that, when amounts for administrative, selling and general costs cannot be determined on the basis of "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation", then "any reasonable method" can be used.

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[102] Panel Report, para. 7.171. See also Panel Report, paras. 7.160 and 7.169.

238. Second, there is a broader point to be made about Article 2.2.2. The possibility of using "any other reasonable method" in Article 2.2.2(iii) implies that Article 2.2, as a whole, does not impose an absolute prohibition on the use of data on the cost of production from countries other than the country of origin, where the conditions of production and sale are not in the "ordinary course of trade". There are circumstances, such as those provided for in Article 2.2.2(iii), where data on the cost of production from countries other than the country of origin may be used in the calculation of costs "for the purpose of" Article 2.2. It is noted that in the present case Argentina expressly acknowledges that the conditions of production and sale of biodiesel in Argentina are not in the ordinary course of trade.[103]

239. Consequently, the European Union understands that under Article 2.2 of the Anti-Dumping Agreement the costs to be determined are those of the country of origin, but the evidence for making such a determination is not subject to such limitation.

4.3. CONCLUSIONS

240. In light of the foregoing, the European Union requests the Appellate Body to *find* that Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by, allegedly, using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value; and, thus, to *reverse* the Panel's findings in paragraphs 7.260 and 8.1(c)(ii) of its report.

241. Having reversed the Panel's findings and conclusions on this issue, the European Union submits that the Appellate Body is not in a position to complete the legal analysis, and should not do so. Not only are there numerous significant facts that remain undetermined by the Panel or absent from the Panel record, but there is also, in this respect, an absence of any meaningful analysis by the Panel. Furthermore, because the Panel determined the matter before it on the basis of particularly abstract reasoning, there has been no proper or full exchange of views between the parties, or for that matter a process properly associating the third parties, with respect to the question of how Article 2.2 should be interpreted and applied to the particular facts and evidence in this case. It is now well established in the case law that, in such circumstances, the Appellate Body is not in a position to complete the legal analysis, and should not do so.

5. THE PANEL ERRED WHEN FINDING THAT THAT THE EUROPEAN UNION "IMPOSED ANTI-DUMPING DUTIES IN EXCESS OF THE MARGINS OF DUMPING THAT SHOULD HAVE BEEN ESTABLISHED UNDER ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT"

242. The European Union submits that the Panel erred in the interpretation and application of Article 9.3 of the Anti-Dumping Agreement. In view of those errors, the European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.367 and 8.1(c)(vii) of its Report.

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[103] Argentina's first written submission, para. 250.

5.1. SUMMARY OF THE PANEL'S FINDINGS

243. Before the Panel, Argentina submitted that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement.

244. The Panel understood that the question before it referred to whether the phrase "margin of dumping as established under Article 2" in Article 9.3 meant the margin of dumping that *was actually determined* by the investigating authority regardless of any errors or inconsistencies with Article 2, or, to the contrary, whether it meant the margin of dumping that an investigating authority *would have established* in the absence of any errors or inconsistencies with that Article.[104]

245. The Panel decided that "as established under Article 2" implies that the margin of dumping should in all cases be established consistently with the disciplines of Article 2.[105] The Panel reached this interpretation by relying on the Appellate Body's findings in *US - Zeroing (Japan)*, considering that what matters in such a situation was not the margin of dumping actually determined by the investigating authority, but a margin of dumping without the errors that an investigating authority might have made (i.e. zeroing).[106]

246. However, the Panel noted that an error or inconsistency in calculating the margin of dumping under Article 2 did not necessarily lead to a violation of Article 9.3 insofar as the upper limit of the margin is concerned.[107] The Panel considered that Article 9.3 established a ceiling and that there might be situations, like the application of the lesser duty rule, when the anti-dumping duties may be lower than the dumping margin which would have been established in accordance with Article 2.[108]

247. The Panel further considered that the dumping margins established in the Provisional Regulation provide a reasonable approximation of what margins calculated in accordance with Article 2 might have been.[109] Relying on its previous findings under Articles 2.2.1.1 and 2.2, the Panel then concluded that Argentina made a *prima facie* case of violation of Article 9.3, which the European Union failed to rebut.

5.2. LEGAL ARGUMENT

248. The European Union submits that Article 9.3 concerns a comparison between the dumping margin and the anti-dumping duties and not the construction of the normal value, which is subject to other specific provisions. A violation of Article 2

104 Panel Report, para. 7.358.

105 Panel Report, para. 7.359.

106 Panel Report, para. 7.361.

107 Panel Report, para. 7.360.

108 Panel Report, para. 7.363.

109 Panel Report, para. 7.365.

does not automatically result in a violation of Article 9.3 of the Anti-Dumping Agreement.

5.2.1. Legal standard under Article 9.3 of the Anti-Dumping Agreement

249. There is not much previous case-law on the interpretation of Article 9.3 of the Anti-Dumping Agreement in light of its relationship with Article 2 of the Anti-Dumping Agreement.

250. It is undisputed that the ordinary meaning of the phrase "the margin of dumping as established under Article 2" is that of a margin of dumping established *in accordance with the provisions of Article 2*.

251. In *EC-Salmon (Norway)*, the panel found that, in determining the dumping margin, the defending Member had acted inconsistently with a number of obligations imposed by Article 2 of the Anti-Dumping Agreement.[110] However, the panel rejected the complaining Member's claims under Article 9.3 of the Anti-Dumping Agreement.[111] It follows that a Member's failure to comply with the provisions of Article 2 does not automatically constitute a failure to comply with Article 9.3 of the Anti-Dumping Agreement.

252. In the present case the Panel also found that there might be situations, like the application of the lesser duty rule, when the anti-dumping duties might be lower than the dumping margin which would have been established in accordance with Article 2.[112]

5.2.2. The Panel's errors regarding Argentina's claim under Article 9.3 of the Anti-Dumping Agreement

253. The European Union submits that the Panel made several errors in interpreting and applying Article 9.3 to the facts of the present case.

254. *First*, the European Union submits that Article 9.3 addresses the *comparison* between the anti-dumping duties and the dumping margins, as opposed to addressing the *calculation* of the normal value.[113] The European Union explained before the Panel that there are specific provisions of the Anti-Dumping Agreement which concern the calculation of the normal value and of the dumping margin. Article 9.3 is not about such an exercise.

255. Thus, the European Union considers that what the text of Article 9.3 requires is merely a comparison between the anti-dumping duties actually imposed and the dumping margin actually calculated by the investigating authority, irrespective of the investigating authority's possible errors when calculating the dumping margin.

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110 Panel Report, *EC-Salmon (Norway)*, para. 8.1.

111 Panel Report, *EC-Salmon (Norway)*, paras 7.749 and 8.2.

112 Panel Report, para. 7.363.

113 European Union's first written submission, para. 57. See also the EU's request for a preliminary ruling concerning Article 9.3.

256. Article 9.3 does not call for a comparison with the value of what *should have been calculated* under Article 2 of the Anti-Dumping Agreement. The WTO-consistency of the calculation of the margin of dumping is a separate legal question from the comparison called for in Article 9.3. These are two different stages in the analysis and the finding of a WTO-inconsistency in stage 1 should not automatically lead to a finding of WTO-inconsistency in stage 2. As a result, the complaining party must show something more than a simple erroneous calculation of normal value in order to put forward a successful claim under Article 9.3 of the Anti-Dumping Agreement.[114]

257. This understanding is supported by the context of the Anti-Dumping Agreement insofar as it contains two separate sets of rules in Article 2 and Article 9, the former of which concerns the construction of normal values and the calculation of dumping margins, and the latter of which regulates the imposition and collection of anti-dumping duties.[115]

258. The European Union finds further support of its understanding in the panel's findings in *EC – Salmon (Norway),* which demonstrate that a violation of Article 2 does not automatically lead to a violation of Article 9.3. [116]

259. *Second*, the Panel erred when it inferred from its previous findings with regard to Articles 2.2.1.1 and 2.2 that the European Union also breached Article 9.3. As the European Union has demonstrated in this appeal, the Panel's interpretations of Articles 2.2.1.1 and 2.2 are flawed and should be accordingly reversed by the Appellate Body. The reversal of the Panel's findings with respect to either Article 2.2.1.1 or Article 2.2 should therefore result in the reversal of its findings with respect to Article 9.3.

260. Third, the Panel erred by seeking to rely on the dumping margins calculated in the Provisional Regulation,[117] effectively implying that this is what the determination should have been, thus exceeding the authority vested in it pursuant to the DSU and the special or additional rules in the Anti-Dumping Agreement, which is simply to determine whether or not the measure at issue is WTO inconsistent. In this respect, the Panel should have limited itself to determining if the investigating authority's evaluation of the facts was unbiased and objective, as provided for in Article 17(6)(i) of the Anti-Dumping Agreement.

261. Therefore, the European Union submits that the Panel made an error when finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement.

5.3. CONCLUSIONS

262. In sum, the European Union requests the Appellate Body to *find* that the Panel *erred* when finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by applying

114 European Union's first written submission, para. 57.

115 European Union's first written submission, para. 60.

116 Panel Report, *EC – Salmon (Norway)*, paras 7.749 and 8.2.

117 Panel Report, para. 7.364-365.

anti-dumping duties which exceeded the actual margin of dumping that should have been established under Article 2; and, thus, to *reverse* the Panel's findings in paragraphs 7.367 and 8.1(c)(vii) of its report. For the reasons we have already indicated above, having reversed the Panel's findings, the Appellate Body will not be in a position to complete the legal analysis, and should not do so.

6. CONCLUSION AND RELIEF REQUESTED

263. For the reasons set out in this submission, the European Union respectfully requests the Appellate Body to:

- *find* that the Panel erred when finding that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by "failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers"; and, thus, to *reverse* the Panel's findings in paragraphs 7.247, 7.248, 7.249 and 8.1(c)(i) of its report;
- *find* that Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by "using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value"; and, thus, to *reverse* the Panel's findings in paragraphs 7.260 and 8.1(c)(ii) of its report; and
- *find* that the Panel erred when finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by "imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement"; and, thus, to *reverse* the Panel's findings in paragraphs 7.367 and 8.1(c)(vii) of its report.

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