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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description

PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Description

Panel Exhibit	Description
ARG-36	Commission Regulation (EU) No. 1198/2013 of 25 November 2013 terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No. 330/2013 making such imports subject to registration, Official Journal of the European Union , L Series, No. 315 (26 November 2013), pp. 67-68
ARG-37	Written Submission by CARBIO of 5 November 2012 in AD593 – Anti-dumping investigation concerning imports of biodiesel originating in, inter alia , Argentina
ARG-39	Letter dated 17 October 2013 from CARBIO and its members providing comments on the Definitive Disclosure
ARG-43	CARBIO and its Members, PowerPoint presentation on AD593 – Anti-dumping investigation concerning imports of biodiesel originating in, inter alia , Argentina, presented at the hearing held on 14 December 2012
ARG-46	

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Import Measures	Appellate Body Reports, Argentina – Measures Affecting the Importation of Goods , WT/DS438/AB/R /

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

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Union – Anti-Dumping Measures on Biodiesel from Argentina	AB-2016-4
European Union, Appellant/Appellee Argentina, Other Appellant/Appellee	Appellate Body Division:
Australia, Third Participant China, Third Participant Colombia, Third Participant Indonesia, Third Participant Mexico, Third Participant Norway, Third Participant Russia, Third Participant Saudi Arabia, Third Participant Turkey, Third Participant United States, Third Participant	Bhatia, Presiding Member Van den Bossche, Member Zhang, Member

1 INTRODUCTION

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

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

[1] WT/DS473/R, 29 March 2016.

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

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

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

[5] Panel Report, para. 2.2 (referring to Basic Regulation (Panel Exhibit ARG-1)).

[6] Panel Report, para. 2.3.

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

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

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

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

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

[8] Panel Report, para. 2.3 (referring

iv. Argentina had not established that the European Union acted inconsistently with Articles 2.2.2(iii) and 2.2 of the Anti-Dumping Agreement in its determination of the amount for profits applied in the construc tion of the Argentine producers' normal value [26];

v. The European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 19 94 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively [27];

vi. The European Union acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its examination of the impact of the dumped imports on the domestic industry, insofar as such examination related to production capacity and capacity utilization [28]; and

vii. Argentina had not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. [29]

b. With respect to Argentina's claims concerning the EU Basic Regulation:

i. Argentina had not established that the second subparagraph of Article 2(5) is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement and, as a consequence, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 [30];

ii. Argentina had not established that the second subparagraph of Article 2(5) is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 [31]; and, therefore

iii. Argentina had not established that the second subparagraph of Article 2(5) is inconsistent "as such" with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement. [32]

1.7. On 20 May 2016, the European Union notifi ed the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intentio n to appeal ctaii'sputesu9c25733 TD (wiof the D)-4.3(S)(Tm vTJ d)-6.7(

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

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

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

1.10. Having received comments on the request made by the European Union in its first letter[39], on 6 July 2016, pursuant to Rule 28(1) of the Working Procedures, the Division invited the European Union to submit an additional memorandum by 11 July 2016 to identify the precise points referred to by the third participants that allegedly had not been raised by Argentina, and to explain the reasons for its concerns with these points. In the same letter, the Division also invited Argentina and the third participants to respond in writing, if they so wished, by 14 July 2016.[40] By the deadlines set out above, the European Union

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

1.11. By letter of 19 July 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision. [43] The Chair of the Appellate Body explained that this was due to a number of factors, including the number and

ii. whether the Panel erred in its interpretation and application of Article 2.2 of the

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

5.1 The EU anti-dumping measur e on biodiesel from Argentina

5.7. The EU authorities concluded that "the domestic prices of the main raw material used by biodiesel producers in Argentina were … lower than the international prices due to the distortion created by the Argentine export tax system and, consequently, the costs of the main raw material were not reasonably reflected in the record s kept by the Argentinean producers under investigation in the meaning of Arti cle 2(5)" of the Basic Regulation. [71] The EU authorities therefore decided to revise the construction of the normal value in the Provisional Regulation and "disregard the actual costs of soya beans (the main raw ma terial purchased and used in the production of biodiesel) as recorded by the companies concerned in their accounts". [72] Instead, such actual costs

6 ANALYSIS OF THE APPELLATE BODY

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

6.1.1 Determination of dumping

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

6.2. We begin by examining the European Union's and Argentina's claims of error regarding the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement. We then turn to the European Union's claims of error under Article 2.2 of the Anti-Dumping Agreement. In that section, we also examine Argentina's claim of error regarding the Panel's interpretation of Article 4.5(In fr0-4.7(g)1.4(reemen(l)-6.2(a

by the parties pertaining to the object and purp ose of the Anti-Dumping Agreement shed light on the interpretative question before it, and thus did not examine those arguments in detail. [102]

6.8. On this basis, the Panel understood that the second condition in the first sentence of Article 2.2.1.1 relates to whether the costs set out in a producer's or exporter's records "correspond – within acceptable limits – in an accurate and reliable manner[] to all the actual costs incurred by the particular producer or exporter for the product under consideration". [103] In its view, this calls for a comparison between, on the one hand, the costs as reported in the records kept by the producer or exporter and, on the other hand, the costs actually incurred by that producer or exporter. To the Panel, this does not mean that an investigating authority must automatically accept whatever is reflected in the records. Ra ther, it is free to examine the reliability and accuracy of the costs reported in the records and, thus, whether those records reasonably reflect the costs assocrv3 b3lrth the production and sa le of the product under consideration. In the Panel's view, however, the examination of the records for purposes of determining whether they "reasonably reflect" costs within the meaning of Ar ticle 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, as proposed by the European Union. The Panel considered that the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred. [104]

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

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

[102] Panel Report, para. 7.238.
[103] Panel Report, para. 7.247. See also para. 7.242.
[104] Panel Report, para. 7.242 and fn 400 thereto.
[105] The Panel noted that, in US – Softwood Lumber V

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

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

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

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

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

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

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

[110] Panel Report, paras. 7.248-7.249.

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

[112] European Union's appellant's suls 0.38 184(s)1.26036-2.1(i45.4(96,)52h Tw (115t th)3. p)-8.,159 (referr6-2.1(ng t)5.3(o).1(Pane)3.9(l)5 para. 7.242), and 211.

[113]

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

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of

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

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

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

6.21. Turning to the relevant context for the interpretation of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, we note that the first condition specified in that sentence is that the "records [be] in accordance with the generally accepted accounting principles of the exporting country". The generally accepted accounting principles (GAAP) refer to principles, standards, and procedures that are commonly used, within a specific jurisdiction, for financial accounting and reporting purposes. Thus, the first condition in the first sentence of Article 2.2.1.1 relates to whether the records of a specific exporter or producer conform to the accounting principles, standards and procedures that are generally accepted and apply to such records in the relevant jurisdiction – i.e. the exporting country. This is a condition

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

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

they have actually incurred, the second condition in that sentence must be interpreted to mean something more than that. [150]

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

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

6.34. The European Union also takes issue with the Panel's statement that "the context provided by Article 2.2.2 [of the Anti-Dumping Agreement] suggests to [it] that, as a general principle, the actual data of producers/exporters is to be preferred in constructing the normal value" [155], and disputes that this supports the Panel's interpretation of Article 2.2.1.1. The European Union suggests that the Panel erroneously imported the word "actual" from Article 2.2.2 without considering that this provision refers to "actual data" pertaining to production and sale "in the ordinary course of trade" of the like product. To the European Union, it would be arbit80ry couth.7133 -152133 TD -.

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

6.48. To us, the European Union's argument risks

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

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

6.1.1.2.1 Introduction

6.58. We now turn to the Panel's interpretation and application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The European Union and Argentina [202]

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

6.61. Before examining the claims of error on appeal, we first summarize the Panel's interpretation and application of Ar ticle 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. We then exam ine the participants' claims that the Panel erred in its interpretation of these provisions. Subsequently, we turn to consider the European Union's claim that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement to the anti-dumping measure on biodiesel. Thereafter, we consider Argentina's request for us to complete the legal anal5(d)27(A)-4udAetAon3-bng 9.4(l)-6amCs6 cs.00.384(A)D .765 scn133 TD -.0003 c .8888 TTw [(The)98l estfind3.3s6

Panel found that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using, in the construction of

…

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

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

6.70. We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside

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

6.74. In light of our examination above of the phra ses "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "c ost of production ... in the country of origin" in Article VI:1(b)(ii) of the GATT 1994, we consider that these provisions do not limit the sources of

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

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

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

6.78. In challenging these Panel findings on appeal, the European Union first argues that they "are based upon and vitiated by [the Panel's] legally erroneous findings with respect to Article 2.2.1.1, and for this reason alone, with the reversal of the latter, the former should also be reversed".

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

6.1.1.2.5 Conclusions

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

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

6.85. We recall that, in constructing the normal value, the EU authorities replaced the actual costs of soybeans in the Argentine producers' records with the surrogate price of soybeans.[258] As a result, "the level of distortion mitigated by the [EU] authorities more or less amounted to the level of the export tax" on soybeans, given that the difference between the surrogate price of soybeans and actual costs of soybeans "roughly equalled the export tax".[259] In its comments on the Definitive Disclosure, the Association of Argentine Biodiesel Producers (CARBIO) argued that the

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

6.98. Our understanding of the phrase "margin of dumping as established under Article 2" is supported by the context provided by Article VI:2 of the GAR R 1t1r of aThcR -dump86(e 9.)8(V)6.7(d)1.98ed by8l 25.92

anti-dumping duties from exceeding a dumping margin that is determined consistently with

such circumstances, the fact that the duties were imposed at rates equal to the margins of dumping established with the use of zeroing necessa rily meant that those duties were in excess of

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

an injury indicator, and erred in focusing on the capacity utilization rates rather than overcapacity in absolute terms. [358]

6.120. The Panel began by recalling its finding that the EU authorities' treatment of the revised production capacity data submitted by the EBB was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. [359] The Panel then considered whether this finding of inconsistency

6.1.3.2 Relevant provisions

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

> Article 3
>
> Determination of Injury [368]
>
> 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.
>
> …
>
> 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia , the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. [369]

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

6.125. Article 3.5 requires that the determination of a causal relationship between the dumped imports and the injury to the domestic industry be based on "an examination of all relevant

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

6.126. With the above-mentioned considerations in mind, we turn to consider Argentina's claims

6.131. In any event, reading the Panel's statement in paragraph 7.466 in its context, we do not consider that the Panel intended to articulate or apply an interpretation of Articles 3.1 and 3.5.[383] Rather, in making the impugned statement in paragraph 7.466, the Panel merely affirmed the view that it had expressed in the preceding paragraphs of its Report regarding the irrelevance of

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

6.136. Argentina contests the Panel's characterization of the first sentence of Recital 165 as "a subsidiary point made by the EU authorities in response to a specific argument [described in Recital 163] that even in the absence of any im ports from Argentina and Indonesia, capacity utilization would have been low at 53% during the [investigation period]."[393]

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

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

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

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

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

6.144. In relation to Argentina's first claim of error, Argentina also contends that the Panel erred

EU authorities should have examined the overca pacity figures raised by CARBIO during the investigation and explained why, despite the substantial increase in overcapacity, they could still conclude that the injury suffered by the domest ic industry was caused by the alleged dumped imports. [408]

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

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

6.1.3.6 Conclusions

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

[408] Argentina's other appellant's submission, para. 361.
[409] It appears that CARBIO did not submit to the EU authorities the specific "ov593.72oDc wP5.2782 0e20.ecif672oD12.9(i9.1(o)-(s).4

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such" with the relevant provisions of the cove red agreements. Therefore, the European Union requests that we uphold these findings. [426]

6.2.2 The assessment of the meaning of municipal law

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

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

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

6.156. A party asserting that another party's municipal law is inconsistent "as such" with relevant WTO obligations bears the burden of introducing evidence as to the meaning of such law to substantiate that assertion. [434] When a municipal law is challenged "as such", the starting point for the analysis will be the text of that municipal law, on its face. [435] A complainant may seek to support its understanding of the meaning of the m unicipal law on the basis of the text of that municipal law only. A complainant may also seek to support its understanding of the meaning of the municipal law at issue with additional elements such as "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opws, tbns of

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

6.157. In the present dispute, before the Panel, Argentina took the position that confining the analysis to the text of the second subparagraph of Article 2(5) of the Basic Regulation would not suffice to arrive at a proper understanding of this provision.[438] In this regard, Argentina requests us to review not only the Panel's examination of the text of the second subparagraph of

is made pursuant to the first subparagraph in certain situations and pursuant to the second subparagraph in other situations. [453]

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

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

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

6.167. We recall our interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement at paragraphs 6.18-6.26. As discussed, the first senten

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

6.170. The measure at issue, namely, the second subparagraph of Article 2(5), is one of the provisions of Article 2 of the Basic Regulation.[458] Article 2, section A, of the Basic Regulation governs the determination of the normal value in anti-dumping investigations. Article 2 of the

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

Russia and Algeria [488]; Ammonium Nitrate from Russia [489]; Ammonium Nitrate from Ukraine [490]; Urea from Russia [491]; Urea from, *inter alia*, Croatia and Ukraine [492]; and Certain Welded Tubes and Pipes of Iron or Non-Alloy Steel from, *inter alia*

the costs established on the basis of sources of information other than those records that have been found, pursuant to the first subparagraph, to be unfit for use.[505]

6.197. For these reasons, we see no error in the Panel's statements that:

> nothing in the judgments cited by Argentina supports Argentina's reading of the relationship between the first two subparagraphs of Article 2(5), i.e. that the determination of whether the producer's records reasonably reflect the costs of production is made pursuant to the first subparagraph in certain situations and pursuant to the second subparagraph in other situations. Rather, the four judgments of the General Court cited by Argentina point in the direction of this determination being made pursuant to the first subparagraph of Article 2(5).[506]

6.198. In sum, having reviewed the Panel's evaluation of all the elements submitted by Argentina, we find that Argentina has not established that the Panel erred in its assessment of the second subparagraph of Article 2(5) of the Basic Regulation. Like the Panel, we do not see support in the text of the Basic Regulation, or in the other elements relied on by Argentina, for the view that it is in applying the second subparagraph of Article 2(5) that the EU authorities are to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion.

6.2.3.3 Whether the Panel acted inconsistently with Article 11 of the DSU

6.199. Argentina argues that the Panel failed to make an objective assessment of the matter before it, thereby acting inconsistently with Article 11 of the DSU. According to Argentina,

DSU"[512], but only those that are so material that, "taken together or singly"[513], they undermine the objectivity of the panel's assessment of the matter before it.[514]

6.201. With particular regard to a panel's duties in ascertaining the meaning of municipal law, the Appellate Body has found that, "[a]s part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it".[515] In doing so, "a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies".[516] When parties refer to elements in addition to the text of the municipal law, a panel must take account of all such elements, in order to engage in an objective assessment of the matter. As the Appellate Body clarified in US – Carbon Steel (India) :

> [I]t is incumbent on a panel to engage in a thorough analysis of the measure on its face and to address evidence submitted by a party that the alleged inconsistency with the covered agreements arises from a particular manner in which a measure is applied. While a review of such evidence may ultimately reveal that it is not particularly relevant, that it lacks probative value, or that it is not of a nature or significance to establish a *prima facie* case, this can only be determined after its probative value has been reviewed and assessed.[517]

6.202. Thus, in ascertaining the meaning of a municipal law, a panel is required to undertake a "holistic assessment" of all the relevant elements. At the same time, we emphasize that a review of whether a panel undertook a holistic assessment, and by so doing met its obligation under Article 11 of the DSU, should be guided by the specific circumstances of each case, the nature of the measure and the obligation at issue, and the evidence submitted by the parties. In other words, there is no single methodology that every panel must employ before it can be found to have undertaken a proper "holistic assessment".

6.203. Turning to the present dispute, we understand the crux of Argentina's claim under Article 11 of the DSU to be that the Panel failed to make an objective assessment of the matter because the Panel failed to undertake a "holistic assessment" of all the relevant elements in order to ascertain the meaning of the second subparagraph of Article 2(5).[518] Additionally, Argentina contends that the Panel's examination of the legislative history of the provision at issue, the academic articles, the alleged consistent practice of the EU authorities, and judgments of the General Court, was cursory and failed to address properly the details of each of these elements.[519]

6.204. We disagree with Argentina's assertion that the Panel's examination of the relevant elements was cursory. The Panel examined each of the elements referred to by the parties.[520] The mere fact that the Panel disagreed with Argentina's understanding of the various elements and agreed, in some respects, with the European Union's view does not equate to a breach of the Panel's duties under Article 11 of the DSU. It seems to us that Argentina has, in large part, recast the arguments that it made before the Panel in the guise of a claim under Article 11, which does not suffice as a basis for us to find that the Panel acted inconsistently with Article 11 of the DSU.[521]

6.205. As regards Argentina's assertion that the Panel failed to undertake a proper holistic assessment of all the relevant elements taken together in order to ascertain the meaning of the second subparagraph of Article 2(5), we recall that the Appellate Body addressed a similar

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[512] Appellate Body Report, EC – Fasteners (China) , para. 442.
[513] Appellate Body Report, EC and certain member States – Large Civil Aircraft , para. 1318. See also Appellate Body Report, EC – Fasteners (China) , para. 499.
[514] Appellate Body Reports, China – Rare Earths , para. 5.179.
[515] Appellate Body Reports, US – Countervailing and Anti-Dumping Measures (China) , para. 4.98; US - Carbon Steel (India) , para. 4.445.
[516] Appellate Body Reports, US – Countervailing and Anti-Dumping Measures (China) , para. 4.101; US - Shrimp II (Viet Nam) , para. 4.32.
[517] Appellate Body Report, US – Carbon Steel (India) , para. 4.454.
[518] Argentina's other appellant's submission, paras. 32, 148-155, and 161-175.
[519] Argentina's other appellant's submission, paras. 144-146.
[520] Panel Report, paras. 7.136-7.152.
[521] Appellate Body Report, EC – Fasteners (China) , para. 442.

claim by Viet Nam in US – Shrimp II (Viet Nam). In that case, the panel began its examination with the text of the measure at issue. The panel set out its preliminary finding on the basis of the text of the measure, before proceeding to its examination of the other elements submitted by the parties. In rejecting Viet Nam's arguments that the panel failed to undertake a "holistic assessment", and therefore was in breach of its duty under Article 11 of the DSU, the Appellate Body noted, with respect to the panel's preliminary conclusion on the basis of the text of the measure at issue, that:

> [t]hese statements, read in isolation, might unfortunately give the impression that the Panel was drawing a conclusion regarding the meaning and effect of Section 129(c)(1) on the basis of the text of that provision, taken alone. Yet, as noted above, these statements form part of a paragraph that clearly indicates at the outset that, at this step of its analysis, the Panel was examining the text of Section 129(c)(1). In subsequent paragraphs, the Panel proceeded to examine the relevance and import of argumentation and elements – beyond the text of Section 129(c)(1) – submitted by the parties regarding the meaning and effect of Section 129(c)(1).[522]

6.206. In that dispute, having reviewed the panel's reasoning in its entirety, the Appellate Body concluded that the panel properly relied on the various elements that it examined to inform its understanding of the meaning and effect of the measure at issue. Therefore, the Appellate Body found that the panel had complied with its duty under Article 11 of the DSU.[523]

6.207. Similarly, in the present dispute, the Panel made clear that the initial conclusion that it reached on the basis of its examination of the text of the second subparagraph of Article 2(5) of the Basic Regulation was only the first step in a multi-pronged analysis. At the outset of this section of its Report, the Panel preceded its assessment of the second subparagraph of Article 2(5) by explaining that it would proceed as follows:

> [M]indful of the need to conduct a "holistic assessment" of the evidence put forward by the parties, we proceed to determine the scope, meaning and content of the measure at issue, as they pertain to each of Argentina's two claims.
>
> We first consider the text of Article 2(5), second subparagraph, and the other evidence submitted by Argentina in order to determine whether they support Argentina's allegations concerning the scope, meaning, and content of this provision.[524]

6.208. Having examined the text of the second subparagraph of Article 2(5), the Panel explicitly characterized the results of that examination as a preliminary conclusion on the basis of the text, indicating that it would proceed to consider "the other evidence submitted by Argentina".[525] Thereafter, the Panel examined, and made intermediate findings[526], with respect to the legislative history that led to the introduction of the second subparagraph of Article 2(5), the alleged consistent practice of the EU authorities, and the four judgments of the General Court of the European Union, before coming to a conclusion based on its "holistic assessment" of all the evidence submitted by Argentina.[527]

6.209. Based on our review of the Panel's findings, we consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU, in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

6.210. Given our finding in paragraph 6.198 above, and our rejection of Argentina's claim under Article 11 of the DSU, we find that the Panel did not err in concluding that Argentina did not establish its case regarding the meaning of the challenged measure, or in finding, for this reason,

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[522] Appellate Body Report, US – Shrimp II (Viet Nam), para. 4.36.
[523] Appellate Body Report, US – Shrimp II (Viet Nam), paras. 4.50-451.
[524] Panel Report, paras. 7.126-7.127.
[525] Panel Report, para. 7.135.
[526] Panel Report, paras. 7.135, 7.143-7.144, 7.148, and 7.152.
[527] Panel Report, paras. 7.153-7.154.

that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.[528]

6.2.3.4 Conclusions

6.211. Regarding Argentina's claim of error with respect to the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement, having reviewed the Panel's evaluation of all the elements submitted by Argentina, we do not consider that Argentina has established that the Panel erred in its assessment of the second subparagraph of Article 2(5) of the Basic Regulation. Like the Panel, we do not see support in the text of the Basic Regulation, or in the other elements relied on by Argentina, for the view that it is in applying the second subparagraph of Article 2(5) that the EU authorities are to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. In this regard, we further consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

6.212. Accordingly, we find that the Panel did not err, and did not fail to comply with its duties under Article 11 of the DSU, in concluding that Argentina had not established its case regarding the meaning of the challenged measure, or in finding, for this reason, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.[529]

6.213. For these reasons, we uphold the Panel's finding, in paragraphs 7.154 and 8.1.b.i of its Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.

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

6.214. Argentina requests us to reverse the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[530] Argentina advances three grounds in support of its appeal.[531]

6.215. First, Argentina argues that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation, by finding that, even when "information from other representative markets" is used, the second subparagraph of Article 2(5) does not require the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries.[532] Second, Argentina contends that, in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation, the Panel acted inconsistently with Article 11 of the DSU by failing to conduct an objective, thorough, and holistic examination of all of the different elements put forward by Argentina.[533] Third, Argentina alleges that the Panel erred in finding that Argentina had to demonstrate that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner.[534] In Argentina's view, the approach by the Panel wrongly suggests that, in order to prevail with a claim that a measure is inconsistent "as such",

suggests that, in order to prevail with a claim that a measure is inconsistent "as such", it is necessary that the measure being challenged is mandatory. [535]

6.216. The European Union requests us to reject Argentina's claims of error and uphold the Panel's finding that the second subparagraph of Article 2(5) of the Basic Regulation is not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. As regards Argentina's first ground of appeal, the European Union highlights that the second subparagraph of Article 2(5) grants broad discretion to the EU authorities to resort to various options in constructing costs when they have determined, in applying the first subparagraph of Article 2(5), that the records kept by the party under investigation do not reasonably reflect the costs associated with production and sale. [536] Second, the European Union avers that the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU. [537] In response to Argentina's third ground of appeal, the European Union contends that, in order for a claim that a measure is inconsistent "as such" to prevail, it must be shown that the measure will necessarily be applied in a manner that is inconsistent with that Member's WTO obligations. For the European Union, this means that the measure at issue can only

6.220. The Panel found that the text of the second subparagraph of Article 2(5) does not support Argentina's argument that this measure requires the EU authorities, when they take the view that the costs of other domestic producers or exporters are not available or cannot be used, to construct the normal value on the basis of costs that do not reflect the costs of production in the country of origin. [543] Instead, the Panel found that the second subparagraph of Article 2(5) lays out a series of options for the EU authorities to establish the costs of production once it has been determined that the producer's records do not reasonably reflect the costs associated with the production and sale of the product being investigated. According to the Panel, on its face, the phrase "on any other reasonable basis, including information from other representative markets" in the second subparagraph of Article 2(5) is formulated in permissive terms, and does not require that the costs reported in the producer's records be replaced by costs in another country. [544]

6.221. With respect to the legislative history, the Panel considered that neither Recital 4 of Council Regulation (EC) No. 1972/2002 nor the second subparagraph of Article 2(3) of the Basic Regulation suggests that the options available under the second subparagraph of Article 2(5) are constrained in such a way that the EU authorities must systematically resort to information or prices not in the country of origin. [545] Further, the Panel stated that, while the decisions of the EU authorities submitted by Argentina as evidence of a consistent practice reveal that the EU authorities may resort to prices in countries other than the country of origin, any consistent practice emanating from these examples does not demonstrate that the second subparagraph of Article 2(5) requires them to do so. [546] Finally, the Panel found that the judgments of the General Court of the European Union cited by Argentina show that, in a situation in which the EU authorities determine that a producer's records do not reasonably reflect the costs of production because they are affected by a distortion, the EU authorities are entitled to establish the producer's costs on the basis of sources that are unaffected by that distortion, and may have recourse to sources of information outside the country of origin. The Panel considered this understanding to be consistent with its reading of the text of the second subparagraph of Article 2(5). [547]

6.222. Based on its consideration of the arguments of the parties, and of all the relevant elements submitted by Argentina, the Panel concluded that, even where the EU authorities do resort to information from other countries to construct the normal value, it does not necessarily follow that they act contrary to Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. [548] In the Panel's view, the language of the second subparagraph of Article 2(5) pertains to the sources of information (as opposed to the costs themselves) that may be used to

response, the European Union submitted that Argentina needed to establish that the measure mandates WTO-inconsistent action for its claim to succeed. [551]

6.224. The Panel found that Argentina had established that the second subparagraph of Article 2(5) permits the EU authorities to resort to costs outside the country of origin in some circumstances. Thus, the Panel found that Argentina had shown that this measure is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. However, the Panel stated that Argentina had not demonstrated that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner. The Panel found, as a consequence, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. [552]

6.2.4.2 The assessment of a complaint that a measure is inconsistent "as such" with WTO obligations

6.225. In respect of its claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina asserts that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation. Argentina also contends that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5). In addition, Argentina argues that the Panel employed an erroneous legal standard that a complainant must meet in order to prevail in a claim that a measure is inconsistent "as such".

6.226. Argentina's appeal raises questions concerning the legal standard for establishing whether a measure is inconsistent "as such" with WTO obligations. [553] As we stated in paragraph 6.154 above, a claim that a measure is inconsistent "as such" challenges a measure that has general and prospective application [554], whereas a claim that a measure is inconsistent "as applied" challenges one or more specific instances of the application of such a measure. [555] Indeed, a measure need not have been applied to be the subject of an "as such" challenge. [556] Given that complainants bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct, the "implications of such challenges are … more far-reaching than 'as applied' claims." [557]

6.227. Under the GATT 1947, panels distinguished between mandatory and discretionary legislation, finding that only legislation that mandated a violation of GATT obligations could be found to be inconsistent "as such" with those obligations. [558] The distinction between mandatory and discretionary legislation turned on whether there was relevant discretion vested in the executive branch of government. [559] The Appellate Body has since clarified that, as with any analytical tool, the importance of the "mandatory/discretionary" distinction may vary from case to case, and has, for this reason, cautioned against applying the distinction "in a mechanistic fashion". [560]

6.228. Moreover, there is no basis, either in the practice of the GATT and the WTO generally, or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measures can

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[551] Panel Report, para. 7.118 (referring to European Union's first written submission to the Panel, paras. 184-187; and second written submission to the Panel, paras. 38 and 82).

[552] Panel Report, para. 7.174 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483).

[553] Argentina's appeal also raises questions concerning the considerations that are relevant to ascertaining the meaning of a municipal law. In respect of this, we recall our discussion in paragraphs 6.153-6.156 above.

[554] Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172; *US – 1916 Act*, paras. 92-94.

[555] Appellate Body Reports, *US – 1916 Act*, paras. 60-61; *US – Continued Zeroing*, paras. 179-181; *US - Corrosion-Resistant Steel Sunset Review*, para. 81; *Argentina – Import Measures*, para. 5.103. See also Panel Report, *US – Continued Zeroing*, para. 7.46.

[556] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 82; *US – 1916 Act*, paras. 92-94. See also Panel Report, *US – Section 301 Trade Act*, paras. 7.80-7.81.

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

[558] Appellate Body Report, *US – 1916 Act*, para. 88 (referring to various GATT Panel Reports).

[559] Appellate Body Report, *US – 1916 Act*, para. 100.

[560] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

be challenged "as such". As the Appellate Body explained in

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

6.233. Argentina appeals the Panel's finding that, even when "information from other representative markets" is used, the second subparagraph of Article 2(5) does not "require the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries". [569] We understand the question raised by Argentina on appeal to be whether the Panel erred in finding that the phrase "on any other reasonable basis, including information from other representative markets" in the second subparagraph of Article 2(5) is formulated in permissive terms, and does not require that the costs reported in the producer's records be replaced by costs in another country. [570] Argentina contends that the second subparagraph of Article 2(5) is formulated in mandatory terms because, in circumstances where the records of an investigated producer do not reasonably reflect costs associated with the production and sale of the product, and the costs of other domestic producers or exporters cannot be used, the EU authorities must use information from other representative markets that does not reflect the costs of production in the country of origin.

precludes the possibility that the EU authorities may use "information from other representative markets" as the basis for arriving at the costs of production without adapting it to reflect the costs of production in the country of origin.[587]

6.245. As part of our "holistic assessment", we now turn to consider the various other elements relied on by Argentina to support its understanding of the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.[588] On appeal, Argentina challenges the Panel's assessment of these elements.

6.246. With respect to the legislative history that led to the introduction of the second subparagraph of Article 2(5) into the Basic Regulation, before the Panel, Argentina referred to Recitals 3 and 4 of Council Regulation (EC) No. 1972/2002, read in conjunction with the second subparagraph of Article 2(3) of the Basic Regulation. In this regard, the Panel found:

> [O]ur reading of the second subparagraph of Article 2(3) in conjunction with Recital 4 of Council Regulation 1972/2002 suggests that when the authorities determine that a particular market situation exists on the basis of the existence, inter alia, of

if, according to Argentina, the term "other repres entative markets" necessarily refers to markets outside the country of origin, the word "including" makes clear that the information from other representative markets is but one illustration of what may constitute "any other reasonable basis".

prices prevailing in countries other than the country of origin, they do not demonstrate that the second subparagraph of Article 2(5) of the Basic Regulation requires them to do so. [605]

6.257. Still in this regard, we note that the European Union refers to evidence submitted to the Panel concerning other decisions of the EU authorities. [606] Notably, in response to questioning at the oral hearing, the European Union pointed to the EU authorities' decision on Silicon from Russia. According to the European Union, this decision provides a clear example of a situation when the phrase "information from other representative markets" in the second subparagraph of Article 2(5) was understood to refer to information from a different geographical market, but one within the country of origin. However, we observe that, in that decision, the EU authorities explained that the investigation was initiated before the date of entry into force of the amendment to the

the DSU [617], Argentina's arguments that the Panel acted inconsistently with Article 11 of the DSU in reaching its findings regarding the consistency of the second subparagraph of Article 2(5) of the Basic Regulation with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 amount to no more than a recasting of the arguments that Argentina made before the Panel. This does not suffice as a basis for us to find that the Panel acted inconsistently with Article 11 of the DSU. [618]

6.265. Argentina also asserts that the Panel failed to undertake a proper holistic assessment of all the relevant elements taken together in order to ascertain the meaning of the second subparagraph of Article 2(5) of the Basic Regulation. Relying on the Appellate Body's reasoning in US – Shrimp II (Viet Nam) [619], it is our view, for the same reasons as those discussed in paragraphs 6.199-6.209 above, that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

6.266. Based on our finding in paragraph 6.262 above and our rejection of Argentina's claim under Article 11 of the DSU, we consider that the Panel did not err in finding that, "even when information from 'other representative markets' is used, Article 2(5), second subparagraph, does not … require the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries." [620]

6.267. As described in paragraphs 6.231-6.232 above, before the Panel, Argentina's challenge under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 consisted of two alternative lines of argument: (i) that the second subparagraph of Article 2(5) requires WTO-inconsistent action; and (ii) that, even if the second subparagraph of Article 2(5) does not require WTO-inconsistent action, it is nevertheless WTO-inconsistent because it provides for the possibility that such action may be taken. Having addressed Argentina's appeal concerning its first line of argument above, we now turn to Argentina's appeal concerning the Panel's finding on Argentina's second line of argument. Specifically, we examine Argentina's assertion that the Panel employed an erroneous legal standard for an "as such" challenge in stating that Argentina had not demonstrated that the second subparagraph of Article 2(5) of the Basic Regulation cannot be applied in a WTO-consistent manner.

6.2.4.5 Whether the Panel erred by employing an erroneous legal standard to find that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

6.268. Before the Panel, Argentina put forward an alternative to its argument that the second subparagraph of Article 2(5) of the Basic Regulation is mandatory. For Argentina, even if it does not mandate recourse to out-of-country costs, the fact that the second subparagraph of Article 2(5) permits the authorities to construct the cost of production using a basis other than the costs of production in the country of origin renders that measure inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. [621] The Panel, however, rejected this alternative argument, finding instead that, "while Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and … Article VI:1(b)(ii) of the GATT 1994, … Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner." [622]

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[617] At para. 6.209 above, we rejected Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in reaching its findings regarding the consistency of the second subparagraph of Article 2(5) of the Basic Regulation with Article 2.2.1.1 of the Anti-Dumping Agreement.

[618] Appellate Body Report, EC – Fasteners (China), para. 442.

[619] Appellate Body Report, US – Shrimp II (Viet Nam), paras. 4.36 and 4.50.

[620] Panel Report, para. 7.172. (emphasis original)

[621] Panel Report, para. 7.118 (referring to Argentina's opening statement at the first Panel meeting, para. 74; response to Panel question No. 24, para. 69; and second written submission to the Panel, paras. 147-149 and 162).

[622] Panel Report, para. 7.174 (referring to Appellate Body Report, US – Carbon Steel (India), para. 4.483).

6.269. On appeal, Argentina submits that this Panel finding is erroneous because it suggests that,

6.273. Our review of the Panel's analysis of Argentina's claim under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 suggests to us that the Panel proceeded as follows. The Panel first ascertained the meaning of the second subparagraph of Article 2(5) of the Basic Regulation [634] before examining the nature of the WTO obligations in

non-cooperation."[645] The Appellate Body made intermediate findings with respect to each of the elements before it[646], and concluded that those elements:

> [did] not establish conclusively that the measure requires an investigating authority to consistently apply inferences in a manner that would not comport with Article 12.7 in all cases of non-cooperation. Where inferences are drawn, this evidence of the use of "adverse inferences" does not establish conclusively that the measure at issue cannot be applied in a manner that comports with Article 12.7.[647]

6.278. In light of the obligation under Article 12.7 of the SCM Agreement, the Appellate Body examined all the relevant elements and found that India had failed to establish that the measure bore the meaning that India attributed to it.[648] As noted above, Article 12.7 directs an investigating authority to use "facts available" that reasonably replace the information that an interested party failed to provide, with a view to arriving at an accurate determination. For this reason, evidence that an adverse inference was drawn in a particular instance, or in several instances, could not, in itself, have sufficed to establish that the information selected did not reasonably replace the information in a manner consistent with Article 12.7. Thus, the finding of the Appellate Body related to the nature of the WTO obligation at issue, and the burden of proof with regard to India's assertion as to the meaning of the municipal law at issue.

6.279. For these reasons, we consider that the Panel in the present dispute took the Appellate Body's statements in *US – Carbon Steel (India)* out of context. To the extent that the Panel was expressing a legal standard for an "as such" challenge when it stated that "Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner"[649], the Panel misread the Appellate Body's statements in *US – Carbon Steel (India)*.

6.280. We recall that the WTO obligation at issue in the present dispute is found in Article 2.2 of

"information from other representative markets", they could adapt that information to reflect the costs of production in the country of origin, in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. We therefore find that Argentina has not satisfied its burden of proving that the second subparagraph of Article 2(5) of the Basic Regulation restricts, in a material way, the discretion of the EU authorities to construct the costs of production in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[651]

6.282. Like the Panel, we consider that "Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and … Article VI:1(b)(ii) of the GATT 1994."[652] However, the mere fact that the application of the second subparagraph of Article 2(5) could, in some circumstances, lead to WTO-inconsistency is not sufficient to discharge Argentina's burden to make a *prima facie* case that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. Accordingly, we find that the Panel did not err in finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[653]

6.2.4.6 Conclusions

manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

6.286. Like the Panel, we consider that "Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and … Article VI:1(b)(ii) of the GATT 1994."[655] To the extent that the Panel may have been expressing a legal standard for an "as such" challenge when it stated that "Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner"[656], we consider that this would be a misreading of a statement by the Appellate Body in US – Carbon Steel (India). In any event, the mere fact that the application of the second subparagraph of Article 2(5) could, in some circumstances, lead to WTO-inconsistency is not sufficient to discharge Argentina's burden to make a prima facie case that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

6.287. Consequently, we uphold the Panel's finding, in paragraphs 7.174 and 8.1.b.ii of its Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

6.2.5 Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement

6.288. Argentina submits that, because it has demonstrated that the Panel erred in finding that the second subparagraph of Article 2(5) of the Basic Regulation is not inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, it necessarily follows that the European Union has not ensured the conformity of its laws, regulations, and administrative procedures with the provisions of the Anti-Dumping

7.1.1 Determination of dumping

7.1.1.1 Article 2.2.1.1 of the Anti-Dumping Agreement

7.2. We consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement – that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under

reasons set out above. [658] Given these findings, and notwithstanding our reservations about certain aspects of the Panel's analysis under Article 2.4 of the Anti-Dumping Agreement, we do not

7.2 Claims concerning the second subparagra ph of Article 2(5) of the Basic Regulation

7.2.1 Article 2.2.1.1 of th e Anti-Dumping Agreement

7.7. Having reviewed the Panel's evaluation of a ll the elements submitted by Argentina, we do not consider that Argentina has established that the Panel erred in its assessment of the second subparagraph of Article 2(5) of the Basic Regulation. Like the Panel, we do not see support in the text of the Basic Regulation, or in the ot her elements relied on by Argentina, for the view that it is in applying the second subparagraph of Article 2(5) that the EU authorities are to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of th e product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. In this regard, we further consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation. Accordingly, we find that the Panel did not err, and did not fail to comply with its duties under Article 11 of the DSU, in concluding that Argentina had not established its case regarding the meaning of the challenged measure, or in finding, for this reason, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement. [663]

a. For these reasons, we uphold the Panel's finding, in paragraphs 7.154 and 8.1.b.i of the Panel Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is incons istent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.

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

7.8. Having reviewed the Panel's evaluation of al l the relevant elements, we find as follows. As regards Argentina's first line of argument, we fi nd that Argentina has not established that the Panel erred in rejecting the assertion that the second subparagraph of Article 2(5) of the Basic Regulation means that, where the costs of other domestic producers or exporters in the same country cannot be used, the EU authorities are required to use information from other representative markets that does not reflect the costs of production in the country of origin. In this regard, we further consider that the Panel conducted a proper examination and undertook a holistic assessment of the various elements before it. We therefore reject Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

7.9. For these reasons, we find that the Panel did not err, and did not fail to comply with its duties under Article 11 of the DSU, in stating that, "even when information from 'other representative markets' is used, Article 2(5), second subparagraph, does not … require the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries." [664]

7.10. With respect to Argentina's second line of argument, precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure an d the WTO obligations at issue. As regards the nature of the WTO obligations at issue, Ar ticle 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not limit th e sources of information or evidence that may be used in establishing the costs of production in the country of origin. However, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production" "in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects. As regards the measure at issue, we understand that nothing in the second subparagraph of Article 2(5) of the Basic Regulation precludes the possibility that, when the EU authorities rely on "information from other representative markets", they could adapt that information to reflect the costs of production in the country of origin, in a manner consistent with Article 2.2 of the Anti-Dumping Agreement

[663] Panel Report, para. 7.154.
[664] Panel Report, para. 7.172. (emphasis original)

and Article VI:1(b)(ii) of the GATT 1994. We therefore find that Argentina has not satisfied its burden of proving that the second subparagraph of Article 2(5) of the Basic Regulation restricts, in a material way, the discretion of the EU authorities to construct the costs of production in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.11. Like the Panel, we consider that "Argentina has established that Article 2(5), second subparagraph, is capable of being applied in a manner that is inconsistent with the European Union's obligations under Article 2.2 of the Anti-Dumping Agreement and … Article VI:1(b)(ii) of the GATT 1994."[665] To the extent that the Panel may have been expressing a legal standard for an "as such" challenge when it stated that "Argentina has not demonstrated that this provision cannot be applied in a WTO-consistent manner"[666], we consider that this would be a misreading of a statement by the Appellate Body in *US – Carbon Steel (India)*. In any event, the mere fact that the application of the second subparagraph of Article 2(5) could, in some circumstances, lead to WTO-inconsistency is not sufficient to discharge Argentina's burden to make a *prima facie* case that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.174 and 8.1.b.ii of the Panel Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.2.3 Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement

7.12. We have upheld the Panel's findings that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VIe

Signed in the original in Geneva this 6th day of September 2016 by:

Ujal Singh Bhatia
Presiding Member

Peter Van den Bossche
Member

Yuejiao Zhang
Member