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EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS473/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Revised on 27 January 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel on 25 November 2014.

4. The Panel shall meet in closed session. The parties, and Members who have notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all the members of its own delegation and shall ensure that each member of its own delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event, no later than in its first written submission to the Panel. If Argentina requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Argentina shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal and answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comments, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of it into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibit upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Argentina could be numbered ARG-1, ARG-2, etc. If the last exhibit in connection with the first submission was numbered ARG-5, the first exhibit of the next submission thus would be numbered ARG-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including in writing prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Argentina to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Argentina presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Argentina. If the European Union chooses not to avail itself of that right, the Panel shall invite Argentina to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that

interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than in responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each executive summary submitted by each party of opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages each. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXX@wto.org, XXXX@wto.org and XXXX@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted 25 November 2014

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS473.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as BCI by the Commission of the European Union in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. As required by Article 18.2 of the DSU, a party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these working procedures to protect BCI. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigation at issue in this dispute. All third party access to BCI shall be subject to the terms of these working procedures.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party under the terms specified in these procedures, or an outside advisor to a party or third party for the purposes of this dispute.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

7. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

8. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF ARGENTINA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF ARGENTINA

I. INTRODUCTION

1. Argentina has initiated this dispute with regard to two different measures: first, Article 2(5) of Council Regulation (EC) No 1225/2009 (hereinafter, the Basic Regulation), that Argentina challenges as being inconsistent "as such" with several provisions of the Anti-Dumping Agreement (hereinafter, ADA), and the General Agreement on Tariffs and Trade 1994 (hereinafter, GATT 1994), and second, the anti-dumping measures imposed by the European Union (hereinafter, EU) on imports of biodiesel originating in Argentina[1], that Argentina submits that are inconsistent with several obligations under the ADA and the GATT 1994.

II. "AS SUCH" CLAIMS IN RELATION TO ARTICLE 2(5) OF COUNCIL REGULATION (EC) NO 1225/2009 OF 30 NOVEMBER 2009 ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EUROPEAN COMMUNITY

A. Background, scope and content of Article 2(5) of the Basic Regulation

2. The original version of Article 2(5) of the Basic Regulation as adopted in 1994 to implement the ADA did not contain the provision currently set out in its second paragraph, which Argentina challenges in the present dispute. This paragraph has been added by Council Regulation (EC) No 1972/2002 of 5 November 2002. The historical overview of this provision shows that the second paragraph of Article 2(5) has actually been introduced to keep the possibility in the calculation of normal value to disregard the "costs" of the producers when the authorities consider that these costs are "*abnormally or artificially low*", because they do not reflect "*market values*" or are "*distorted*".

3. According to Council Regulation (EC) 1972/2002 and the consistent practice of the EU authorities Article 2(5), second paragraph, of the Basic Regulation refers to situations where the prices of an input are "abnormally or artificially low" because they are set in a "regulated market" or because of the existence of some alleged "distortion" on the domestic market. This interpretation has been confirmed by the General Court of the EU. Article 2(5), second paragraph, requires, in such a situation, that these costs "be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets." Such a rule is inconsistent with various provisions of the ADA and of the GATT 1994.

B. Article 2(5) of the Basic Regulation violates Article 2.2.1.1 of the ADA and, as a result, Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994

4. Article 2.2.1.1 of the ADA, correctly interpreted in accordance with the principles of treaty interpretation does not allow investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be "abnormally or artificially low", because they do not reflect market values or because they are allegedly distorted.

- **The ordinary meaning of Article 2.2.1.1 of the ADA**

5. Article 2.2.1.1 establishes an obligation on the investigating authorities to calculate the costs "on the basis of records kept by the exporter" when constructing normal value, provided that two

[1] Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ 2013 L 141 and Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ 2013 L 315. (Definitive Regulation).

conditions are fulfilled: (i) such records are in accordance with the generally accepted accounting principles (GAAP) of the exporting country and (ii) such records reasonably reflect the costs associated with the production and sale of the product under consideration.

6. There are only two exceptions to the above obligation to calculate costs on the basis of the records kept by the exporters. It is only where the records are inconsistent with GAAP or that they do not reasonably reflect the costs associated with the production and sale of the product under consideration that the authorities have the right not to use the data in the records. Whenever the records are consistent with GAAP of the exporting country and they reasonably reflect the costs associated with the production and sale of the product, the investigating authorities *must* calculate the costs on the basis of the records kept by the exporter or producer.

7. The second condition included in Article 2.2.1.1, first sentence, does not authorize the authorities to reject or adjust the data in the records because the prices are "*abnormally or artificially low*", because they do not reflect "*market values*" or are "*distorted*". This interpretation flows from the ordinary meaning of the words of Article 2.2.1.1, first sentence and from the structure of that sentence. In providing that the records must reasonably reflect "the costs" associated with the production and sale of the product under consideration, Article 2.2.1.1 of the ADA expressly refers to the charges or expenses which have actually been incurred by the producer concerned for the production and sale of the product under consideration, regardless of whether such costs are lower than international prices or of whether they are, in the authorities' view, market-based.

8. Moreover, the word "reasonably" in Article 2.2.1.1 is attached to the verb "reflect" and not to the word "costs". This sentence does not provide that the records must reflect "reasonable costs" or "costs which are reasonable in light of prices on other markets". This analysis excludes an interpretation that refers to whether the costs included in the records are in line with international prices or prices on other markets. In other words, the sentence does not provide that the records must reflect costs which are reasonable, but that they must reflect "costs associated with the production and sale of the product under consideration" and in a reasonable way.

- **The context of Article 2.2.1.1, first sentence, of the ADA**

9. The second and third sentences of Article 2.2.1.1 provide relevant context in construing the obligation set out in the first sentence. The second sentence provides what the authorities have to do if they use an alternative cost allocation methodology. This confirms that the second condition in the first sentence refers to a cost allocation issue.

10. Article 2.2.2 of the ADA deals with "the amounts for administrative, selling and general costs and for profits" which are also central elements for constructing normal value. It flows from this rule that if the drafters of the ADA had intended to authorize the authorities to use, for the purposes of the calculation of the cost of production, data other than those of the producers, they would have explicitly provided so. Furthermore, the different ways set out in Article 2.2.2 to determine SG&A and profit all relate to data in the country of origin. This supports the view that a "reasonability" test under Article 2.2.1.1, first sentence, by reference to data outside the country of origin is not relevant and contrary to the principles found in the context of the dumping determination.

11. Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 expressly refer to "the cost of production *in the country of origin*". Since Article 2.2.1.1 of the ADA seeks to provide further details "for the purposes of paragraph 2", it is clear that the interpretation of Article 2.2.1.1 must be consistent with Article 2.2, to which Article 2.2.1.1 directly refers. The express indication in Article 2.2 of the ADA (and Article VI:1 of the GATT 1994) that the cost of production is the one "in the country of origin" does not allow to conclude that the "costs" referred to in Article 2.2.1.1 could be found to be "unreasonable" in view of benchmarks outside of the country of origin, such as prices in other markets. Since the construction of the normal value must be based on the "cost of production in the country of origin", it does not make any sense to reject costs on the ground that they would not reflect international prices or prices in other markets.

12. An interpretation of the first sentence of Article 2.2.1.1 whereby the cost data could be rejected because they are lower than prices in other markets is inconsistent with the requirement

under Article 2.2 of the ADA that the constructed normal value be based on the "cost of production in the country of origin".

- **The object and purpose of the ADA**

13. By providing that the records are not reasonable if the cost data reflect prices which are lower than the prices on other markets, Article 2(5), second paragraph, undermines the fundamental logic of "dumping" which is based on a comparison between the export price of the product concerned and the price of the like product on *the domestic market*, as defined in Article VI:1 of the GATT 1994 and 2.1 of the ADA.

- **Case law**

14. The interpretation according to which the first sentence of Article 2.2.1.1 of the ADA does not allow investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration when the prices of these inputs in their domestic market are found to be "abnormally or artificially low", because they do not reflect market values or because they allegedly are distorted is confirmed by the Panel Reports in *US – Softwood Lumber V*[2], *EC – Salmon*[3], and *Egypt – Steel Rebar*.[4]

C. Article 2(5) of the Basic Regulation is inconsistent with Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994

15. Article 2(5) of the Basic Regulation violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 since those provisions expressly require that the margin of dumping must be determined by comparison with the cost of production in the country of origin.

16. Article 2.2 expressly provides that when the margin of dumping is established by comparison with a constructed normal value, the comparison shall be made with "the cost of production in the country of origin". Article VI:1(b)(ii) of the GATT 1994 similarly refers to "the cost of production of the product in the country of origin." Since Article 2(5), second paragraph, of the Basic Regulation provides that the costs shall be adjusted or established "on the basis of the costs of other producers or exporters in the same country, or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets", it is inconsistent with Article 2.2 and Article VI:1(b)(ii) of the GATT 1994 which require to use the cost of production "in the country of origin".

D. The EU violates Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA

17. Since Article 2(5), second paragraph, of the Basic Regulation violates Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1 of the GATT 1994, it follows that the EU has not ensured the conformity of its laws, regulations and administrative procedures with the provisions of the ADA and of the GATT 1994 and, therefore, has also violated Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA.

III. CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL ORIGINATING IN ARGENTINA

A. The EU acted inconsistently with Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 in failing to calculate the cost of production on the basis of the records kept by the producers under investigation

18. Argentina submits that the EU acted inconsistently with the obligation laid down in the first sentence of Article 2.2.1.1 of the ADA since it calculated the exporting producers' cost of soybean on the basis of an average of the FOB reference price and not on the basis of cost of soybean

[2] Panel Report, *US – Softwood Lumber V*, para. 7.321.
[3] Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[4] Panel Report, *Egypt – Steel Rebar*, para. 7.393.

included in the accounting records of those producers.[5] If this Panel finds that Article 2(5) of the Basic Regulation is *as such* inconsistent with Article 2.2.1.1 of the ADA, it follows that its application in the anti-dumping investigation concerning imports of biodiesel originating in Argentina necessarily produced a result that is also inconsistent with Article 2.2.1.1 of the ADA. In any case, Argentina submits that the violation of these provisions is supported by five arguments.

19. First, Argentina submits that the finding that the records of the Argentinean producers did not reasonably reflect the costs of "the main raw material" is based on an improper establishment of the facts. This finding ignores the fact that prices in Argentina are freely set and based on offer and demand, as recognized by the EU itself in both the Definitive Regulation and in the parallel anti-subsidy investigation.

20. Second, in finding that the costs of the main raw material were not reasonably reflected in the records of the exporting producers, the EU ignored the ordinary meaning of the terms of the first sentence of Article 2.2.1.1 of the ADA. By referring to the term "costs", Article 2.2.1.1 refers to the expenses actually incurred by the producer. Therefore, the fact that the cost of soybean incurred and reported by the exporters was lower than the international price did not allow the EU to conclude that the records of the exporters do not reasonably reflect the *costs* of soybean associated with the production and sale of biodiesel.

21. Third, the interpretation of the first sentence of Article 2.2.1.1 of the ADA at the basis of the EU's refusal to base the cost of soybean on the records of the exporting producers cannot be reconciled with the structure of that provision. In this sentence, "records" is the subject, "costs" the object, "reflect" the verb and "reasonably" the adverb which qualifies the term "reflect". The misplaced reading of "international prices" into the second condition of Article 2.2.1.1 of the ADA leads to the result that for "records" to reflect "costs" according to the interpretation of the EU, such records should have reflected costs that a producer actually never incurred, namely, in this case, the FOB reference price of soybean.

22. Fourth, the refusal of the EU to base the cost of soybean on the records of the producers under investigation is based on a reading of Article 2.2.1.1 of the ADA that is not supported by the context of this provision. The second and third sentences of Article 2.2.1.1, dealing with cost allocation issue, show that the "reasonably reflect" condition in the first sentence of Article 2.2.1.1 refers to the actual costs incurred by the producers instead of international prices. Furthermore, Articles 2.2 of the ADA and VI:1(b)(ii) of the GATT 1994 expressly refer to the cost of production *in the country of origin*. Given that Article 2.2.1.1 of the ADA is aimed at further specifying that clause, Article 2.2.1.1 must be read in a manner that is consistent therewith. Therefore, it does not make any sense to reject costs on the grounds that they would not reflect "international prices", since it implies a comparison with prices outside of the country of origin. Argentina also reiterates the reference to Article 2.2.2 of the ADA in this respect.

23. Fifth, Argentina submits that, in finding that the records of exporting producers "do not reasonably reflect costs" because they do not reflect international prices despite the fact that they reflect the costs actually paid by the exporting producer, and in replacing the costs reflected in those records by international prices, the EU undermines the object and purpose of the ADA which is to counteract dumping that occurs when the export price is less than the comparable price, in the *domestic* market and not on any other markets. The EU subverted the fundamental purpose of the ADA and used the Agreement to address differences in price between the export price of the product concerned and international prices, instead of comparable prices on the domestic market.

B. The EU acted inconsistently with Article 2.2 of the ADA and Article VI: 1(b)(ii) of the GATT 1994 in failing to construct normal value of biodiesel on the basis of the cost of production in Argentina

24. In replacing the cost of soybean reported in the records of the exporting producers by an average of the FOB reference price, the EU failed to construct normal value on the basis of the cost of production in the country of origin. Consequently, the EU acted inconsistently with Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994.

[5] It is worth recalling that the Definitive Regulation confuses soybean and soybean oil as the direct input in the production of biodiesel. It thus deliberately blurs the distinction between the product concerned (biodiesel), the main input used in its production in Argentina (soybean oil), and indirect inputs used for the production of the direct inputs (soybean).

C. The EU acted inconsistently with Article 2.2.1.1 of the ADA by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production

25. By using the average of the reference FOB price minus fobbing costs during the investigation period (IP), the EU included in its calculation of the cost of production of biodiesel a cost which is not associated with the cost of production and sale of biodiesel within the meaning of Article 2.2.1.1 of the ADA. Since the producers under investigation did not pay the reference FOB price minus fobbing costs for soybeans but, instead an amount representing the *actual* cost of soybean included in their records, Argentina submits that, the price of soybean used by the EU to calculate the cost of production is not a price that is associated with the production and sale of the like product. Therefore, the EU acted inconsistently with Article 2.2.1.1 of the ADA.

26. As a result of the inconsistencies mentioned in (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994.

D. The EU acted inconsistently with Articles 2.2 and 2.2.2(iii) of the ADA because the amounts for profits established by the EU were not determined on the basis of a reasonable method

27. When determining the reasonable amount for profits, the EU did not calculate the reasonable amount for profits on the basis of the chapeau of Article 2.2.2 of the ADA or on subparagraphs (i) or (ii) of that provision, choosing instead to base it on "any other reasonable method" pursuant to Article 2.2.2(iii) of the ADA. Argentina submits that the amount for profits established by the EU of 15% is not based on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA and cannot be considered to be "reasonable" within the meaning of Article 2.2 *in fine* of the ADA.

28. In both the Provisional and Definitive Regulations, the EU failed to provide any explanation of how it determined a profit margin of 15%. The 15% figure does not result from any "method" within the meaning of Article 2.2.2(iii) of the ADA, let alone a reasonable one. Argentina fails to see how a World Bank figure concerning the short to medium term lending rate can be understood to be a relevant justification of the 15% profit margin determination. Moreover, Argentina explained that it was unreasonable to consider that the Argentinean biodiesel industry is "young and innovative", at a time when production had peaked and the market had matured significantly.

E. The EU acted inconsistently with Article 2.4 of the ADA in failing to make due allowance for differences affecting price comparability, including differences in taxation, and in precluding a fair comparison between export price and normal value

29. Argentina submits that the EU acted inconsistently with Article 2.4 of the ADA in failing to make a fair comparison between normal value and export prices within the meaning of that provision, as a fair comparison would have required that due allowance be made for differences affecting price comparability. This inconsistency arose as a result of a comparison of, on the one hand, a constructed normal value that included an average of the reference FOB price of soybeans (minus fobbing costs) with, on the other hand, an export price that incorporated the domestic price of soybeans.

30. In the Definitive Regulation, the EU deducted the expenses incurred for exporting the soybean from the reference FOB price. Therefore, the difference between the price of soybean included in the constructed normal value and the domestic price of soybean reflected in the export price is approximately equal to the export tax on soybean. The EU itself acknowledged that its methodology yielded a result which, from a numerical point of view, was similar to simply adding the export tax to the cost of the raw material.

F. The EU acted inconsistently with Article 9.3 of the ADA and Article VI: 2 of the GATT 1994 in imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA

31. In order to have the dumping margin determination made in conformity with Article 2 of the ADA, the EU should have based the cost of production on the records of the producers under investigation and it should have ensured that the profit margin determination was based on a reasonable method pursuant to Article 2.2.2(iii) of the ADA. Therefore, the EU has imposed and levied anti-dumping duties in excess of the margin of dumping that it should have calculated in conformity with Article 2 of the ADA. As a result, it acted inconsistently with Article 9.3 of the ADA and VI:2 of the GATT 1994.

G. The EU acted inconsistently with Articles 3.1, 3.4 and 3.5 of the ADA in its evaluation of the production capacity, the utilization of capacity and the return on investment of the EU industry

32. Argentina submits that the utilization of capacity was overstated and that a proper evaluation would have revealed that capacity utilization was in fact significantly lower than the figures reflected in the Definitive Regulation. Argentina claims that the EU failed to ensure that injury arising out of the overcapacity of the domestic industry was not attributed to the dumped imports. This is the result of, among others, the EU's failure to properly evaluate the utilization of capacity of its domestic industry.

33. Throughout the investigation, overcapacity was identified as a factor having an impact on the state of the industry by the investigated companies as well as by the Government of Argentina. In the course of the injury analysis conducted by the EU, the European Biodiesel Board (hereinafter, EBB) submitted information that showed that capacity of the domestic industry grew throughout the investigation period. In a submission dated 17 September 2013, the EBB suddenly asserted that the figures concerning production capacity of the EU industry needed to be adjusted to exclude the "idle" capacity. On 1 October 2013, the EU issued the Definitive Disclosure where it accepted the resubmitted data and altered the findings on capacity and capacity utilization that it had made in the Provisional Regulation. However, the Definitive Disclosure did not contain further information on the methodology used by the EU to assess this information or further elaboration of what was meant by "close scrutiny of this resubmitted data".

34. Argentina claims that the EU acted inconsistently with Articles 3.1 and 3.4 of the ADA *first*, because the EU's definition of "utilization of capacity" is inconsistent with Article 3.4 of the ADA, *second*, because its analysis of the production capacity and the utilization of capacity of the EU industry was not based on positive evidence; *third,* because the injury determination did not involve an objective examination; *fourth,* because the evaluation of the production capacity and of the utilization of capacity is not adequate and that the EU therefore acted inconsistently with Article 3.4 of the ADA and *fifth,* because the indicators "utilization of capacity" and "return on investment" were not evaluated in a consistent manner.

- **The EU's definition of utilization of capacity is inconsistent with Article 3.4 of the ADA**

35. Argentina notes that the terms "utilization of capacity" in Article 3.4 of the ADA contain no reference to a concept such as "availability for use" or "idleness". Consequently, in the framework of Article 3 of the ADA, the entirety of production capacity must be taken into account regardless of whether it is allegedly "available for use" or not. It is undeniable that all of an industry's production capacity, whether it is available for immediate use or not, generates costs. Failure to take production capacity that is not ready for use or that is "idle" yields an inaccurate picture of the state of the domestic industry. In adopting a definition whereby the evaluation of "utilization of capacity" excludes so-called "idle" capacity, the EU acted inconsistently with Article 3.4 of the ADA.

- **The EU acted inconsistently with Article 3.1 and 3.4 of the ADA in failing to base its analysis of the production capacity and the utilization of capacity on positive evidence**

36. At a late stage in the proceedings, the EBB submitted a document requesting the exclusion of supposedly idle capacity, a change in production capacity figures by EBB that amounted to 26.53% of total production capacity in the EU or 5,898,000 tons during the IP.[6] This amounts to almost three times the combined amounts of imports originating in Argentina and Indonesia during the IP. Argentina submits that the evidence on which the evaluation of the utilization of capacity is based is implausible first because the alleged "mistake" in EBB's submissions would have been impossible to overlook, and second, because if the "mistake" had existed, major inconsistencies in the data submitted by EBB concerning production capacity of non-EBB Members would have been evident, especially in view of the fact that the entirety of the alleged "idle capacity" of the EU industry was allocated to non-EBB Members, which are a minority sector of the EU industry.

37. In stark contrast to the multiplicity of publicly available sources confirming the accuracy of the data in the Complaint and the Provisional Regulation, the data provided by EBB in its submission of 17 September 2013 appear to consist of mere assertions by EBB. The EU stated in the Definitive Regulation that it cross-referenced EBB's submission to "publicly available data concerning in particular idle capacity as well as capacity of producers that ceased operations due to financial difficulties" but it does not state what these publicly available data are. The reliance on undisclosed yet supposedly public sources further calls into question the reliability and creditworthiness of the evidence on which evaluation of the capacity of the Union industry was based.

38. Argentina notes that (1) this "publicly available data" was not placed on the public file of the investigation, (2) it is contradicted by all other publicly available sources that do appear on the public file of the investigation and (3) the EU did not clarify what the "cross-referencing" exercise entailed. As a result, Argentina submits that the data on which the evaluation of production capacity and capacity utilization is based, is not reliable.

39. Moreover, Article 3.4 of the ADA does not allow for an exclusion of production capacity that is "idle" from the evaluation of the utilization of capacity. As a result, the "idleness" of production capacity is a fact that is neither relevant nor pertinent to the question of what constitutes production capacity within the meaning of Article 3.4 of the ADA; it is production capacity regardless of whether it is "idle" or "available for use." As a result, to the extent that the assessment of production capacity and utilization of capacity is based on evidence concerning the fact that part of the capacity is allegedly "not available for use", it is based on evidence that is irrelevant and impertinent.

40. Therefore, the EU failed to base its injury determination on positive evidence and acted inconsistently with Articles 3.1 and 3.4 of the ADA.

- **The EU acted inconsistently with Articles 3.1 and 3.4 of the ADA in failing to conduct an objective examination of the production capacity and the utilization of capacity of its domestic industry**

41. The unusual exclusion of production capacity that was "idle" had the effect of understating the production capacity of the EU biodiesel industry by 5,898,000 tons during the IP or 26.53% of total capacity. This understatement, in turn, overstates the utilization of capacity and thus negates the significance of the overcapacity of the EU industry as a cause of injury that is different from that of the allegedly dumped imports. Argentina submits that in weighing and balancing the evidence before it, the EU did not act in an even-handed manner. Indeed, the exclusion of production capacity that was "not available for use" was based on evidence that is not credible and which at the same time favoured the interests of EBB in the investigation. As a result, the examination was not "objective" within the meaning of Article 3.1 of the ADA. The EU has therefore acted inconsistently with Articles 3.1 and 3.4 of the ADA.

[6] The magnitude of the figures involved speaks for itself. While EBB was perfectly able to detect, examine and isolate the economic effect supposedly caused by imports less than 1,500,000 tons in a market almost ten times bigger, it was unable to detect that the total EU production capacity had been overstated by almost six million tons.

- **The EU acted inconsistently with Article 3.4 of the ADA in failing to adequately evaluate the production capacity and utilization of capacity of the domestic industry of the EU**

42. When stating that production capacity remained "relatively stable" the EU failed to properly evaluate production capacity at the provisional stage as it failed to properly analyze this factor by "placing it in context in terms of the particular evolution of the data".[7] Argentina submits that the EU equally failed to adequately evaluate the production capacity and utilization capacity of the EU industry at the definitive stage. Consequently, the EU acted inconsistently with Article 3.4 of the ADA.

- **The EU acted inconsistently with Article 3.4 of the ADA in failing to evaluate utilization of capacity and return on investment in a consistent manner**

43. To the extent that the EU eliminated so-called "idle capacity" from the production capacity of the EU industry, while basing the evaluation of the return on investment on the basis of all assets employed in the production of biodiesel, it would appear that both factors were based on data which lack consistency. Indeed, while the "return on investment" appears not to exclude "idle" assets, the EU's evaluation of the utilization of capacity did. Thus, Argentina submits that the EU failed to evaluate the return on investments and the utilization of capacity in a consistent manner. Consequently, the EU acted inconsistently with Article 3.4 of the ADA.

H. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the overcapacity of the EU industry was not attributed to the allegedly dumped imports

- **Figures concerning production capacity and utilization of capacity are incorrect**

44. The EU made a determination concerning production capacity and utilization of capacity based on a definition of utilization of capacity which is inconsistent with Article 3.4 of the ADA, which was not based on positive evidence, which did not involve an objective examination and which was not based on an adequate evaluation. The correct figures would have shown a much higher production capacity of the EU industry and, consequently, a much lower utilization of capacity.

- **Errors in the assessment of the overcapacity in the Provisional Regulation**

45. The EU appeared to assume, incorrectly, that the arguments of the interested parties concerned only the low capacity utilization, instead of referring to overcapacity. The EU industry had expanded production capacity by 38% during the period 2008-2011, i.e. far beyond what the market could absorb and despite the already extremely low rates of utilization of capacity in 2008. Even a superficial consideration of these arguments on overcapacity would have shown that based on the figures of the Provisional Regulation, unused capacity increased from 11,613,000 tons in 2009 to 13,174,629 tons during the IP, an increase of 1,561,322 tons.

- **The findings relating to fixed costs are incorrect**

46. Argentina refers to the statement that fixed costs do not bear any relation to capacity utilization rates, which is one of the reasons why the EU rejected the allegation that there was a causal relationship between the overcapacity of the EU industry and the injury it suffered. This statement appears to be based on a misunderstanding. Indeed, the fact that fixed costs remain constant at different capacity utilization rates is precisely the reason why the low capacity utilization rates result in fixed costs being disproportionately high on a per unit basis.

47. In addition to the fact that, contrary to the statements of the EU, the weight of the fixed costs in the total cost of production is impacted by the rate of capacity utilization, Argentina disputes the notion that fixed costs were low and that, therefore, the low rates of capacity utilization were not a "decisive" factor of injury, as stated in Recitals 164 and 166 of the Definitive Regulation.

[7] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

- **The findings that low capacity utilization rates are not a decisive factor cannot be reconciled with the EU's statements that the biodiesel industry is capital intensive**

48. The EU mentions repeatedly that the biodiesel industry is capital intensive. Capital-intensive industries require large financial commitments to produce the first unit of any good and thus require high capacity utilization to achieve economies of scale and achieve a return on investment. Argentina submits that the finding that the very significant overcapacity of the EU industry was not a decisive factor of injury cannot be reconciled with the statements throughout the Provisional and Definitive Regulations that the biodiesel industry is capital-intensive.

I. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the alleged injury caused by the EU industry's long term commercial strategy of importing the product under consideration was not attributed to the allegedly dumped imports

49. The EU failed to properly assess the injury arising from the EU industry's strategy of importing the product under consideration, thereby failing to separate and distinguish the injurious effects of this commercial strategy from those of the allegedly dumped imports.

50. The EU itself recognized that imports made by the EU industry were one of the reasons for the low capacity utilization rate. Therefore, the commercial strategy pursued by the EU industry, which consisted of sourcing the product under consideration in Argentina through related entities, was a cause of injury. The statement that the imports were temporarily made in self-defense is contradicted by their sheer volume: over 60% of total imports by the EU's own recognition.

J. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the double-counting regimes was not attributed to the allegedly dumped imports

51. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA as a result of the failure to recognize that the double-counting regimes injured the EU industry at the same time as the allegedly dumped imports and/or of the failure to appropriately assess the injurious effects of those regimes. In failing to examine the effects of the double-counting regimes in force in other EU Member States besides France, the EU failed to appreciate the full extent of the injurious effects of those regimes. The EU misplacedly insisted that double-counting only shifts demand, although it also reduces demand. Finally, Argentina disputes the relevance of the contention that the double-counting regime was in force only during a part of the IP in France.

K. The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by the lack of vertical integration and the access to raw material of the EU industry was not attributed to the allegedly dumped imports

52. Argentina contends that the EU failed to comply with the non-attribution obligation in relation to the lack of vertical integration and the lack of access to raw materials of the EU industry. The EU did not undertake any steps to separate and distinguish the injurious effects arising out of these factors from the injurious effects of the allegedly dumped imports. Therefore, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

IV. CONCLUSION

53. Argentina respectfully requests that this Panel find that:

> I.- Article 2(5) of the Basic Regulation is inconsistent *as such*, with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data of the exporters as included in its records when those costs reflect prices which are "abnormally or artificially low", because the costs do not reflect market prices or because they are allegedly affected by a distortion; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the costs shall be adjusted or established in certain cases "on any other reasonable basis,

including information from other representative markets", even though neither provision allows for an establishment of the costs on this basis. As a result, the EU acted inconsistently with Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA, and

II.- The anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 because the EU failed to calculate the cost of production on the basis of the records kept by the producers under investigation; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because the EU failed to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin; (C) Article 2.2.1.1 of the ADA because the EU included costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (D) As a result of the inconsistencies mentioned in points (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994; (E) Articles 2.2 and 2.2.2(iii) of the ADA because the EU failed to base the profit margin as a component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA; (F) Article 2.4 of the ADA because the EU failed to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and normal value; (G) Article 9.3 of the ADA and VI:2 of the GATT 1994 because the EU imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA; (H) Articles 3.1 and 3.4 of the ADA because the EU's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the EU industry; (I) Articles 3.1 and 3.5 of the ADA since the EU failed to conduct an objective examination, based on positive evidence, of known factors other than the allegedly dumped imports in its non-attribution analysis; hence, the EU failed to ensure that the injury suffered by the domestic industry of the EU resulting from other factors was not attributed to the allegedly dumped imports. Argentina considers that the measures at issue should be withdrawn.

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

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF ARGENTINA

A. INTRODUCTION

1. Argentina has demonstrated, and the European Union (hereinafter the "EU") has failed to rebut, that, under Article 2(5) second subparagraph of the Basic Regulation, as reflected in the consistent practice of the EU authorities and the judgments of the General Court of the EU, when the prices of inputs are found to be "abnormally low" or "artificially low" in comparison to prices in other markets, as a result of an alleged "distortion", it is concluded that the costs are not reasonably reflected in the records of the producer concerned and are thus adjusted or replaced by data on any other reasonable basis, including information from other representative markets. This measure is clearly inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement (hereinafter the "ADA").

2. Argentina has also demonstrated that several aspects of the anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the provisions of the ADA, including the dumping margin determinations and the injury and causality determinations.

B. ARGENTINA'S CLAIMS AGAINST ARTICLE 2(5), SECOND SUBPARAGRAPH, OF THE BASIC REGULATION

The measure at issue

3. Under its "as such" claims, Argentina is challenging one measure, namely Article 2(5), second subparagraph, of the Basic Regulation and not "two separate measures"[1] as the EU is claiming.

4. Regarding the **scope of the measure**, the EU errs when claiming that "the second subparagraph of Article 2(5) of the Basic Regulation [only] describes what the authorities can do after it has been determined that the records do not "reasonably reflect" costs, pursuant to the first subparagraph of Article 2(5) of the Basic Regulation".

5. This is, first of all, contrary to the text of Article 2(5), second subparagraph. Indeed, Article 2(5), second subparagraph, does not only provide to the authorities the legal basis to use information from other representative markets when information on the domestic market is not available or cannot be used but, at the very same time, it also provides the legal basis for disregarding the records of the producers in those situations.

6. The background, the consistent practice of the EU authorities and the judgements of the General Court of the EU, confirm that Article 2(5), second subparagraph, provides the legal basis for rejecting the records of the producers/exporters where prices are "artificially low" or "abnormally low" as a result of an alleged "distortion".

7. Regarding the background, it must be noted that the first subparagraph of Article 2(5) was introduced through Council Regulation No 3283/94 of 22 December 1994 which sought to implement the EU's international obligations arising from the ADA adopted during the Uruguay Round. In particular, by means of Article 2(5) of that regulation, it intended to implement the particular obligations laid down by Article 2.2.1.1 of the ADA. The second subparagraph of Article 2(5) was introduced by Regulation No 1972/2002 at the same time that Russia was granted full Market Economy Status, to provide a legal basis for the authorities to reject the cost data included in the records of the investigated party in case those costs reflect a price which is "abnormally low" or "artificially low", in comparison to prices in other markets, because of a "distortion" and to adjust or replace such costs by data which are not affected by such "distortion", as clearly stated in Recital 4 of Regulation No 1972/2002.

[1] EU's first written submission, para. 63.

8. The scope of Article 2(5), second subparagraph, as described by Argentina has been expressly confirmed by the General Court in the judgments referred to by Argentina.

In particular, in the second *Acron* case (Case T-118/10), the General Court expressly noted that the assessment "*whether the records reasonably reflect the costs*" is made pursuant to the second subparagraph of Article 2(5):[2]

> The institutions were therefore fully entitled to conclude that one of the items in the applicants' records could not be regarded as reasonable and that, consequently, that item had to be adjusted by having recourse to other sources from markets which the institutions regarded as more representative and, consequently, the price of gas had to be adjusted.[3]

9. Finally, the consistent practice of the EU authorities which has developed after the introduction into the Basic Regulation of Article 2(5), second subparagraph, confirms the foregoing. The *Aluminium Foil case* to which the EU refers is irrelevant since the determination was based in that case on Article 18 of the Basic Regulation.

10. It is clear from the foregoing that Argentina does not confuse the scope of the second subparagraph of Article 2(5) with the scope of the first subparagraph of Article 2(5), as asserted by the EU.[4] Instead, it is the defendant that artificially creates a non-existent two-steps approach between Article 2(5) first and second subparagraphs, on the basis of the allegation that the second subparagraph only describes "what the authorities are authorized to do in order to calculate the costs, when the company records cannot be used".[5] The EU's position should not prevail. That position is based on a simplistic reading of Article 2(5), first and second subparagraphs, taken in isolation, and without consideration of their context. As demonstrated above, the text of Article 2(5), second subparagraph, together with its background makes evident that it is pursuant to that particular provision that the authorities determine that records do not reasonably reflect the costs where the prices are "abnormally low" or "artificially low", in comparison to prices in other markets, because of an alleged "distortion". This has been expressly confirmed by the General Court, and is supported by the consistent practice of the EU authorities which has developed after the introduction into the Basic Regulation of Article 2(5), second subparagraph.

11. As to the **precise meaning and content of the measure challenged**, Argentina notes that the "measure on its face" is only "the starting point" for an "as such" analysis.[6] As the Appellate Body underlined, if "the meaning or content of the measure is not evident on its face, further examination is required"[7], as Argentina claims, so it is needed that the Panel "undertake a holistic assessment of all relevant elements (…)"[8] "(…) submitted by a party that the alleged inconsistency with the covered agreements arises from a particular manner in which a measure is applied".[9]

12. After reading the plain text of Article 2(5), second subparagraph, of the Basic Regulation, it is clear that this provision imposes an obligation on the authorities. Indeed, where information of the costs of other producers or exporters in the same country "is not available or cannot be used", then the costs must be adjusted or established on "any other reasonable basis, including information from other representative markets". The second part of that provision also directs the

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[2] Judgment of the General Court in *Acron OAO v Council of the EU*, Case T-118/10, para. 72 (Exhibit ARG-52).

[3] Judgment of the General Court in *Acron OAO and Dorogobuzh v Council of the EU*, para. 46 (Exhibit ARG-23).

[4] EU's opening statement at the first substantive meeting, para. 45.

[5] EU's opening statement at the first substantive meeting, para. 50.

[6] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[7] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168. See also Appellate Body Report, *US – Carbon Steel (India),* para. 4.446 referring to Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

[8] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.451 referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

[9] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.454.

authorities to reject the exporters' records for the same reason that they have to use information from other representative markets.

13. Furthermore, Recital 4 of Regulation No 1972/2002 explains the meaning and content of Article 2(5), second subparagraph. Recital 4 explicitly acknowledges that, in situations where, because of a particular market situation, sales do not permit a proper comparison, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration. The use of the words "in particular" demonstrates that the finding that the records do not reasonably reflect the costs is not limited to situations in which a particular market situation has been found to exist. The next sentence in Recital 4 establishes that this is to be the case whenever the costs are "affected by a distortion". The EU itself has noted that Article 2(5), second subparagraph, is used by the authorities in cases where, like in the case at hand, normal value is constructed because of lack of sales in the ordinary course of trade. It cannot just argue thereafter that Recital 4, which precisely seeks to explain the meaning and content of Article 2(5), second subparagraph, is not relevant for the interpretation of that provision.

14. The fact that Recital 4 is relevant for the interpretation of Article 2(5), second subparagraph in all circumstances is further supported by the fact that the General Court referred to Recital 4 even with regard to situations in which the normal value was constructed pursuant to a finding that there was no or insufficient sales in the ordinary course of trade.[10]

15. In conclusion, Regulation No 1972/2002, and in particular its Recital 4, are highly relevant for the understanding of the content and meaning of Article 2(5), second subparagraph. They demonstrate that Article 2(5), second subparagraph, provides the legal basis for (a) rejecting the cost data included in the records when they are affected by a "distortion", in particular, when they reflect prices that are "artificially low" and (b) for adjusting or establishing the costs in such a case on the basis of data from sources which are not affected by such distortions.

16. Argentina has also referred to the consistent practice of the EU authorities pursuant to Article 2(5), second subparagraph, of the Basic Regulation as a relevant element for the understanding of the meaning and content of Article 2(5), second subparagraph.[11] In all the cases referred to by Argentina, the EU authorities have described the prices of the input concerned as being "significantly lower" or "much lower" in comparison with prices in other markets, such as prices in the EU. The prices have been described as being "abnormally low" and/or "artificially low" prices. What is relevant is the consistency in the determinations made by the EU authorities, that is, where the prices of the inputs have been found to be "artificially low" or "abnormally low" because of an alleged distortion, the authorities have consistently concluded that the records did not reasonably reflect the costs associated with the production and sale of the product under consideration.

17. Finally, the judgements of the General Court are relevant for the understanding of the meaning and content of Article 2(5), second subparagraph, since the General Court has confirmed on the basis of Recital 4 of Council Regulation No 1972/2002 that the key element in the determination that the data were not "reasonable" is the existence of a "distortion".

18. In conclusion, when assessed in conjunction, these elements establish altogether that where the prices of the inputs are found to be "artificially low" or "abnormally low" in comparison to prices on other markets as a result of a "distortion", the records do not reasonably reflect the costs associated with the production and sale of the product under consideration and the costs included in the records are adjusted or replaced by information from other representative markets.

The Mandatory / Discretionary distinction

19. Argentina first notes that there is no provision in the ADA or any other Agreements which establishes a mandatory/discretionary standard that the Panel would have to apply. In other words, the Panel is required to examine whether the measure is consistent with the relevant WTO obligations, not whether the measure is discretionary or mandatory. Thus, the mandatory/discretionary distinction is not a test that panels are required to apply. At best, it could

[10] Judgment of the General Court in *Acron OAO and Dorogobuzh v Council of the EU*, Case T-235/08, para. 30 (Exhibit ARG-23).

[11] See Argentina's first written submission, section 4.2.2.

in certain cases be an "analytical tool", which, as established by the Appellate Body, should not be applied "mechanistically", and the significance of which would vary from case to case.[12]

20. Argentina submits that the starting point of the analysis in an "as such" claim is the provision with which the measure is claimed not to be consistent. Therefore, if the relevant WTO provision prohibits a certain conduct, the mere fact that the measure being challenged provides for such a conduct should lead to the conclusion that there is a violation. Thus, even if Article 2(5), second subparagraph, only provided for the possibility - and did not require – that the authorities reject the records in such situations, the mere possibility would render it inconsistent with Article 2.2.1.1 of the ADA. The same reasoning applies to Argentina's claim under Article 2.2 of the ADA.

21. Second, and in any case, Argentina submits that Article 2(5), second subparagraph, is not discretionary as alleged by the EU. The text of Article 2(5), second subparagraph, Regulation No 1972/2002, the consistent practice of the EU authorities as well as the judgments of the General Court show that the authorities do not have discretion with respect to situations in which the prices are found to be "abnormally low" or "artificially low" because of an alleged "distortion". In such cases, the authorities necessarily conclude that the records do not reasonably reflect the costs and replace or adjust the costs on the basis of information from other representative markets.

Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2.1.1 of the ADA and, as a result, Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994

22. Regarding the **interpretation of Article 2.2.1.1 of the ADA**, Argentina notes in relation to the text of that provision, that the structure of the first sentence of Article 2.2.1.1 clearly excludes any reasonableness test of the cost elements themselves.[13] This is supported by the fact that the sentence uses the adverb "reasonably" which relates to the verb "reflect" and not the adjective "reasonable" that would be used to describe the "costs". Thus, the test is not to determine whether the cost elements are "reasonable" in relation to any type of outside benchmarks, but whether the records of the producer/exporter investigated provide reasonable information of the costs that are associated with the production and sale of the product under consideration for that producer/exporter in the framework of that investigation.

The definition of the term "costs" as "charges or expenses" refers to a concrete amount by opposition to a hypothetical value, such as an international price, while the term "associated" does not in any away imply "a broad range of relations between the "costs" and the "production""[14] such that it could "capture the costs that would normally be associated with the production and sale of the goods".[15] The word "associated" simply means that the costs must "pertain"[16] to the production and sale of the product under consideration.

23. Regarding the context, Argentina notes that the second and third sentences of Article 2.2.1.1 confirm that the test under the first sentence is not about the reasonableness of the costs in relation to outside benchmarks but about the relationship between the costs and the production and sale of the product under investigation for each producer/exporter examined in the anti-dumping investigation at issue. Article 2.2 which refers to the "cost of production in the country of origin" means that Article 2.2.1.1 cannot imply a test whereby it is examined whether the "costs" are reasonable in light of benchmarks outside of the country of origin. As to Article 2.2.2 of the ADA, this provision which deals exclusively with the determination of the "amounts for administrative, selling and general costs and for profits" confirms that if the drafters had intended to authorize the authorities to use data other than those of the producers/exporters for the calculation of the "cost of production", they would have explicitly provided for that possibility in Article 2.2.1.1.

24. Finally, Argentina submits that "dumping" is about the "pricing behaviour" of the exporters/producers concerned and that this applies to both the "export price" and the "normal value" as the Appellate Body itself noted is *US – Zeroing (Japan)*. The European Union's view that

[12] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.
[13] Argentina's first written submission, para. 107.
[14] EU's first written submission, para. 137.
[15] EU's first written submission, para. 139.
[16] Panel Report, *Egypt – Steel Rebar*, para. 7.393.

the normal value is "the value that the products should have in normal circumstances" is inconsistent with the proposition that the normal value relates to the pricing behaviour of the exporter/producer investigated. Indeed, the dumping found in such circumstances would not result from the pricing behaviour of the exporter/producer concerned but from the difference between the export price of the exporter/producer concerned and a hypothetical value, namely the one that products *should have in normal circumstances*. This view departs from the definition of "dumping" which is said to relate to the pricing behaviour of the specific exporter/producer investigated.

25. Regarding the object and purpose, Argentina notes that, by claiming that the authorities should be authorized to address costs of inputs which are not "normal", the EU appears to seek to address so-called "input dumping" which has been described as "situation where materials or components that are used in manufacturing an exported product are purchased internationally or domestically at dumped or below cost prices, whether or not the product itself is exported at dumped prices".[17]

26. This issue was discussed by the Ad-Hoc Group on the Implementation of the Anti-Dumping Code of the Committee on Anti-Dumping Practices just before the Uruguay Round. There was, however, no consensus on this issue. Furthermore, the Draft Recommendation prepared by the Ad-Hoc Group confirms that no provision in the GATT or in the Anti-Dumping code authorized the use of anti-dumping duties to address "input dumping". As Argentina explained in its response to Panel's question No. 18, the negotiating history of Article 2.2.1.1 shows that there was no intention amongst the Parties to introduce "the requirements that the costs reflected in the records should be reasonable", as claimed by the defendant.[18] Furthermore, the issue of "input dumping" was raised during the Uruguay Round negotiations but was not addressed in the ADA.

27. In conclusion, the analysis of the text and context of Article 2.2.1.1 as well as of the object and purpose unambiguously demonstrates that this provision does not permit investigating authorities to reject data included in the exporter/producer's records because such data reflect "abnormally low" or "artificially low" prices because of a "distortion".

28. As to the **claims**, Argentina first submits that to the extent that the Panel confirms that Article 2.2.1.1 prohibits the rejection of data in the records merely because those data are found to be "abnormally low" or "artificially low" because of an alleged distortion, Article 2(5), second subparagraph, must be found to be inconsistent with Article 2.2.1.1 because that rejection falls within the category of what is prohibited by Article 2.2.1.1. Second, and in any case, Argentina submits that pursuant to Article 2(5), second subparagraph, the authorities are required to conclude that the records do not reasonably reflect costs when prices are found to be "abnormally low" or "artificially low" because of an alleged distortion, thereby violating Article 2.2.1.1 of the ADA.

Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994

29. Regarding the **interpretation** of Article 2.2 of the ADA, Argentina notes that the text of the provision is clear and necessarily requires that the data/evidence used must be data/evidence in the country of origin. Furthermore, even if evidence outside the country or origin could be used, it would have to be demonstrated that the cost of production which is based on such data/evidence constitutes the "cost of production in the country of origin".

30. As to the **claims**, Argentina submits that Article 2(5), second subparagraph, violates Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because it provides that, where the costs of other producers or exporters in the same country are not available or cannot be used, the costs shall be adjusted or established on any other reasonable basis, including information from other representative markets while Article 2.2 prohibits the construction of normal value on a basis other than "the cost of production in the country of origin". Furthermore, Argentina notes that the authorities do not have the "broad discretion" as claimed by the EU. The text of Article 2(5), second subparagraph, as confirmed by the practice, shows that where information from the

[17] Draft Recommendation concerning treatment of the practice known as input dumping, ADP/W/83/Rev.2.

[18] EU's opening statement at the first meeting of the Panel, para. 40.

domestic market is not available or cannot be used, the costs must be adjusted or replaced on any other reasonable basis including information from other representative markets.

C. CLAIMS AGAINST THE ANTI-DUMPING MEASURES ON IMPORTS OF BIODIESEL ORIGINATING IN ARGENTINA

As a preliminary matter, Argentina noted several factual inconsistencies in the EU's defense.

Claims pursuant to Articles 2.2 and 2.2.1.1 of the ADA and Article VI:1(b)(ii) of the GATT 1994 and consequential claim pursuant to Article 2.1 of the ADA and Article VI:1 of the GATT 1994

31. In the biodiesel investigation, the EU first rejected the cost of soybean that was reported by the producers under investigation and that was used to determine the cost of soybean oil, on the basis that they were found to be artificially lower that the international prices due to the distortion created by the Argentine export tax system. After the rejection of the reported costs of soybean, the EU went on to replace those costs with the reference FOB prices of soybean.

32. Argentina has claimed that the EU authorities were not entitled to examine whether the costs of soybeans "would pertain to the production and sale of biodiesel in normal circumstances, i.e. in the absence of the distortion caused by Argentina's export tax on the raw materials".[19] Therefore, by rejecting the cost data of soybeans as included in the records of the producers because they were "artificially lower than the international prices due to the distortion created by the Argentine export tax system"[20], the EU violated Article 2.2.1.1 of the ADA.

33. It is important to emphasise that the EU authorities not only wrongfully tested whether the costs reflected costs of soybeans that would normally be associated with the production and sale of biodiesel in normal circumstances, but they also wrongfully carried out this test in comparison with "international prices". As Argentina has underlined previously, comparison with benchmarks outside the country of origin is clearly incompatible with the express requirement in Article 2.2 that refers to the "cost of production *in the country of origin*".

34. The EU has explained that the international price of soybean - which has been used as benchmark - is the price that *would have* pertained to the production and sale of biodiesel in the absence of the export tax on soybean.[21] It has also stated that the difference between the international price and the domestic price of soybean (which is the price that was reported by the producers under investigation) is the export tax and other expenses incurred for exporting it.[22]

35. Argentina submits that implicit in these statements is the consideration that, in fact, the international price of soybean did not pertain to the production and sale of the biodiesel under investigation *in that investigation* and *in that case.* Therefore, according to the EU's own findings in the biodiesel investigation, the international price of soybean that was used as benchmark to determine that the costs of soybeans were not reasonably reflected in the records[23] is *not* associated with the production and sale of biodiesel within the meaning of the second proviso of the first sentence of Article 2.2.1.1 of the ADA.

36. Given that the international price of soybean is not a cost of the Argentinean producers that is associated with the production and sale of biodiesel in that investigation, the EU was not allowed, under the second proviso of the first sentence of Article 2.2.1.1, to test the records of the Argentinean producers against those costs.

37. Therefore, in rejecting the cost of soybean reported by the exporting producers when constructing normal value on grounds that those costs "were found to be artificially lower than the international prices", the EU acted inconsistently with Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994.

[19] EU's first written submission, para. 236.
[20] Definitive Regulation, Recital 38 (Exhibit ARG-22).
[21] See, for instance, EU's first written submission para. 236.
[22] Definitive Regulation, Recital 37 (Exhibit ARG-22).
[23] Definitive Regulation, Recital 38 (Exhibit ARG-22).

38. With regard to Article 2.2, Argentina submits that the ADA provides that the costs of production must be "the cost of production in the country of origin". According to this, Argentina has demonstrated that the EU violated this obligation since in calculating the cost of production of the Argentinean exporters/producers, it did not use domestic prices of soybeans, but the reference FOB prices of soybeans, net of fobbing costs.[24]

39. The reference FOB price of soybean minus fobbing costs, on the basis of which the EU calculated the cost of production, is not a "price to be paid for the act of producing" (i.e. cost of production) in Argentina (the country of origin), as it comprises the export tax on soybeans and because the domestic price of soybean is equivalent to the reference price *minus* fobbing costs and *minus* export taxes. The reference FOB price is, at best, a proxy of the export price of soybean but not a cost at which soybean is acquired domestically. It thus acted inconsistently with Article 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994.

40. Finally, for the reasons expressed in its opening statement[25] and in its response to Panel question No. 55, Argentina maintains its claims under Article 2.1 of the ADA and Article VI:1 of the GATT 1994.

The EU acted inconsistently with Articles 2.2 and 2.2.2(iii) of the ADA because the amounts for profits established by the EU were not determined on the basis of a reasonable method

41. Argentina asserts that, contrary to what the EU pretends, the mere fact of establishing an amount and then testing its reasonableness is insufficient to comply with the terms of Article 2.2.2(iii) of the ADA. In order to fulfil the requirements of that provision, the selected amount needs to be arrived at following a reasonable method. Given that the EU did not establish the amount for profits pursuant to any method, let alone a reasonable one, it has violated Articles 2.2.2(iii) and 2.2 of the ADA.

The EU acted inconsistently with Article 2.4 of the ADA in failing to make due allowance for differences affecting price comparability, including differences in taxation, and in precluding a fair comparison between export price and normal value

42. Argentina has shown that the manner in which the EU constructed normal value whereby it disregarded the domestic price of soybean as a basis to calculate the "oil share" (i.e. the value of the bean corresponding to the oil) and substituting it with the "FOB reference price" of soybean as a basis from which to calculate the "oil share" is inconsistent with Articles 2.2 and 2.2.1.1 of the ADA. This WTO-inconsistent manner of substituting the cost of soybean resulted in a normal value applied to the exporting producers that reflected the international price of soybean oil, as if the exporting producers were located outside of the territory of Argentina.

43. In subsequently calculating the dumping margin, the EU compared this "non-domestic" or "international" normal value of biodiesel with an export price that was fully "domestic", i.e. without the substitution or the adjustment of the cost of soybean out of which the "oil share" was calculated. By proceeding in that way, the EU acted as if it were calculating dumping margins of the finished product based on differences between the domestic price and the export price not of the product under consideration, but of its primary input. Therefore, the EU generated an artificial imbalance between the export price and the normal value.

44. As a consequence, Argentina has claimed that a difference exists between normal value and export price[26] and that this difference affects price comparability.[27] It consequently claims that the comparison between normal value and export price, absent an adjustment to account for this difference, is not a fair comparison and consequently it is inconsistent with Article 2.4 of the ADA.

The EU acted inconsistently with Article 9.3 of the ADA and Article VI:2 of the GATT 1994 in imposing and levying anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA

[24] Argentina's first written submission, paras. 245-254.
[25] Argentina's opening statement at the first meeting of the Panel, paras. 18-22.
[26] Argentina's first written submission, paras. 298-299.
[27] Argentina's first written submission, para. 300; Argentina's opening statement at the first meeting of the Panel, para. 85.

45. Argentina's claim is that the EU has imposed and levied anti-dumping duties in excess of the margin of dumping that it should have calculated in conformity with Article 2 of the ADA and that, consequently, it acted inconsistently with Article 9.3 of the ADA and Article VI:2 of the GATT 1994.[28]

46. The defense of the EU appears to suggest that the terms "margin of dumping" have a meaning under Article 9.3 that is different from the meaning assigned to those terms under Article 2 and that, therefore, the level of the duties imposed or levied on the dumped imports may be tested against a margin of dumping which is not the margin of dumping established in conformity with Article 2 of the ADA. In line with the EU's contention, under Article 9.3, the "margins of dumping" against which the duties are to be tested would be those that are found by the investigating authority, regardless of their consistency with Article 2. This line of thought runs counter to Article 2.1 of the ADA, which defines dumping "for the purpose of this agreement" and thus shows that the meaning is uniform throughout the agreement.[29] It is also inconsistent with the text of Article 9.3, which explicitly states "as established under Article 2" and not "as determined by the investigating authority".

The EU acted inconsistently with Articles 3.1 and 3.4 of the ADA in its evaluation of the production capacity, the utilization of capacity and the return on investment of the EU industry

47. Argentina first submits that **the EU's definition of capacity and capacity utilization is inconsistent with Article 3.4**. Article 3.4 contains no basis for excluding capacity that is "idle" or "not available for use" from the assessment of capacity utilization.[30] Moreover, the EU not only has not pointed to any textual or contextual basis that would support the exclusion of part of the production capacity from the analysis of the utilization of capacity, but has not offered any explanation of what this exactly means. Therefore, the EU acted inconsistently with Article 3.4 of the ADA in excluding part of the production capacity, namely the "idle" capacity, from the assessment of the utilization of capacity.

48. Second, Argentina submits that **the EU's assessment of production capacity and capacity utilization is not based on positive evidence**. Argentina notes that the domestic industry intended to exclude "idle" capacity from its production capacity from the beginning of the investigation, as indicated by the statement that idle capacity had *already* been excluded from the capacity figures of EBB members.[31] Against this background, the fact that the production capacity figures for non-EBB members included both their idle capacity and that of EBB members appears to have been a mistake.[32] The data, on which the evaluation of capacity utilization is based, appear not to be reliable because they are contradicted by a multiplicity of available public sources, including EBB itself.[33] In view of the foregoing, it must be concluded that the EU's evaluation of production capacity and capacity utilization was not based on positive evidence and was therefore inconsistent with Articles 3.1 and 3.4 of the ADA**.**

49. Third, **the EU did not conduct an objective examination of the domestic industry's production capacity and utilization of capacity**. The EU attempts to contradict Argentina's claims by stating that it selected a sample of EU companies and subjected their data to detailed examination and verification.[34] However, all the sampled producers were EBB members, whose production capacity figures excluded "idle capacity" from the beginning. Therefore, the verification of those *EBB* companies does not guarantee the accuracy of the figures relating to *non-EBB* members and to the industry as a whole, which concerns the figures that were adjusted.

[28] Argentina's first written submission, para. 309.
[29] See also, Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96.
[30] Argentina's first written submission, paras. 354-356.
[31] Submission by EBB of 17 September 2013, section 1.1 (Exhibit ARG-47).
[32] The fact that this is a mistake is also apparent from EBB's letter of 17 November 2013 which cautions that "… any calculation of non-EBB member production capacity would (…) still include idle capacity from EBB and non-EBB member and would lead to a false calculation". See Submission by EBB of 17 September 2013, section 1.3, Exhibit ARG-47.
[33] See Argentina's first written submission, para. 370.
[34] EU's response to Panel question No. 62, para. 91.

50. Fourth, **the EU did not consistently evaluate the utilization of capacity and return on investment**. In its answer to Panel question No. 63(b) and in its opening statement[35], Argentina has addressed the EU's argument that there were no sampled companies with so-called "idle" capacity.[36] As explained by Argentina, at least one of the sampled companies, Diester, appeared to have what would fall within the EU's vague definition of "idle" capacity, that is, capacity that was installed but which was not available for use. Therefore, Argentina maintains its claim that the EU acted inconsistently with Article 3.4 of the ADA in failing to evaluate the return on investments and the utilization of capacity in a consistent manner.

The EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to ensure that the injury caused by certain factors was not attributed to the allegedly dumped imports

51. Regarding **overcapacity**, Argentina has demonstrated that the EU failed to make an appropriate assessment of the injury caused to the EU industry by its overcapacity. The EU's defense is entirely unconvincing for a number of reasons.

52. First of all, the EU confuses utilization of capacity as an injury indicator (under Article 3.4 of the ADA) and the overcapacity of its domestic industry as a cause of injury (under Article 3.5 of the ADA). Second, the confusion prevented the EU from ascertaining the impact of this cause of injury on capacity utilization as an injury indicator, thus understating the controlling importance of overcapacity as a source of injury. Third, there is a correlation between the increase in overcapacity and the decrease in profitability which, together with the decline in market share are the main injury indicators on which the EU has relied to come to the conclusion that the domestic industry was materially injured.[37] Therefore, contrary to the EU's assertions, the overcapacity *is* the cause of the declining profit and consequently, of the injury suffered by the domestic industry. Fourth, the profit of 3.5% of the domestic industry in 2009 to which the EU refers was, in fact, extremely low by the EU's own standards, namely a 15% injury elimination level set by the EU for the period April 2007 to March 2008.[38] This level which is well below the injury elimination level set by the EU itself disproves the EU's contention that the industry could be healthy with high overcapacity. In any case, Argentina recalls that between 2009 and the IP overcapacity did not remain constant but instead increased by 1,561,322MT. Fifth, even if no increase in imports would have taken place at all during the IP, the overcapacity would still be enormous.

53. To summarize, the continued overcapacity and its significant increase between 2009 and the IP was the main factor injuring the domestic industry and not the imports originating in Argentina and Indonesia. The above shows that the EU's decision to attribute controlling importance to the allegedly dumped imports as a source of injury instead of to the overcapacity of the domestic industry amounts to a failure to appropriately separate and distinguish the injurious effects of the overcapacity from those of the allegedly dumped imports. Therefore, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

54. Turning to the **long-term commercial strategy of the EU industry**, Argentina noted that the EU's arguments are unconvincing for various reasons. First, the EU's statement that the domestic industry was *compelled* to buy biodiesel from Argentina is not believable given that the imports from Argentina and Indonesia were not a marginal phenomenon in comparison to total imports. This argument also overlooks the fact that biodiesel production facilities in Argentina are either directly affiliated to the domestic industry or related through common ownership.

55. Second, the EU has not provided evidence that had the domestic industry not made those imports, traders would have made those imports. Finally, the argument about the maintenance of a customer base is unconvincing and contradicted by the fact that the EU itself added the imports made by the Union industry to the market share of the allegedly dumped imports, instead of adding it to the market share of the domestic industry.[39]

56. In view of the above, Argentina submits that the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA in failing to separate and distinguish the injurious effects of the domestic

[35] Argentina's opening statement at the first meeting of the Panel, paras. 100 and 101.
[36] EU's first written submission, para. 318.
[37] Provisional Regulation, Recital 118 (Exhibit ARG-30) and Definitive Regulation, Recitals 142 and 143 (Exhibit ARG-22).
[38] See Exhibit EU-14, recitals 181 and 182.
[39] Definitive Regulation, Recital 156 (Exhibit ARG-22).

industry's own commercial strategy, in qualifying it as "self-defense" and in incorrectly attributing its effects to the allegedly dumped imports.

57. With regard to **double-counting**, Argentina has claimed that the EU failed to appropriately assess the injurious effects of the double-counting regimes and that it failed to separate and distinguish its effects from those of the allegedly dumped imports. In responding to this claim, the EU has stated that, double-counting shifts demand within the Union industry and does not generate demand for imports and that Union producers of double-counting biodiesel experienced negative performance, suggesting that the decline of non-double counting producers cannot be attributed to the performance of the double-counting producers.[40]

58. Argentina disagrees with these arguments for the following reasons. First of all, the fact that the financial situation of the producers declined only after double-counting had been repealed in France is irrelevant, as the effects of double-counting materialized during the IP. Consequently, the injurious effects of that scheme should have, but were not distinguished and separated from the injury caused by the allegedly dumped imports as mandated by Article 3.5 of the ADA. Second, Argentina notes that the EU failed to examine double-counting regimes other than the French regime[41], despite the fact that their existence was brought to the attention of the investigating authority.

59. In view of the above, Argentina submits that the EU violated Articles 3.1 and 3.5 of the ADA in failing to examine double-counting and to distinguish and separate the injurious effects of double-counting from those of the allegedly dumped imports.

60. Finally, Argentina has claimed that the EU's industry is at a disadvantage because of a **lack of vertical integration and lack of access to raw materials**. The disadvantage results from the introduction of additional phase of transport into the production chain, which does not exist when the raw materials are processed on site. The significance of this disadvantage cannot be understated, especially in view of the fact that transport of the raw material is not only an additional phase, but occupies a much larger volume of cargo space.

61. In consequence, in failing to separate and distinguish the effects of the lack of vertical integration and the lack of access to raw materials from the injury caused by the allegedly dumped imports, the EU acted inconsistently with Articles 3.1 and 3.5 of the ADA.

62. For the reasons set out in this submission and in previous submissions, Argentina respectfully requests that this Panel find that:

I.- Article 2(5) of the Basic Regulation is inconsistent as such, with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data of the exporters as included in its records when those costs reflect prices which are "abnormally or artificially low", because the costs do not reflect market prices or because they are allegedly affected by a distortion; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by providing that the costs shall be adjusted or established in certain cases "on any other reasonable basis, including information from other representative markets", even though neither provision allows for an establishment of the costs on this basis. As a result, the EU acted inconsistently with Article XVI:4 of the Marrakesh Agreement Establishing the WTO and Article 18.4 of the ADA, and

II.- The anti-dumping measures imposed by the EU on imports of biodiesel originating in Argentina are inconsistent with the following provisions of the ADA and the GATT 1994: (A) Articles 2.2.1.1 and 2.2 of the ADA and with Article VI:1(b)(ii) of the GATT 1994 because the EU failed to calculate the cost of production on the basis of the records kept by the producers under investigation; (B) Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 because the EU failed to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin; (C) Article 2.2.1.1 of the ADA because the EU included costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (D) As a result of the inconsistencies mentioned in points (A) to (C) above, the dumping margin determinations are inconsistent with Article 2.1 of the ADA and with Article VI:1 of the GATT 1994; (E) Articles 2.2

[40] EU's first written submission, para. 339 and EU's response to Panel question No. 79.
[41] EU's response to Panel question No. 73.

and 2.2.2(iii) of the ADA because the EU failed to base the profit margin as a component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii) of the ADA; (F) Article 2.4 of the ADA because the EU failed to make due allowance for differences affecting price comparability, including differences in taxation, thereby precluding a fair comparison between the export price and normal value; (G) Article 9.3 of the ADA and VI:2 of the GATT 1994 because the EU imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the ADA; (H) Articles 3.1 and 3.4 of the ADA because the EU's injury determination is not based on positive evidence and does not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product in relation to capacity, utilization of production capacity and return on investment of the EU industry; (I) Articles 3.1 and 3.5 of the ADA since the EU failed to conduct an objective examination, based on positive evidence, of known factors other than the allegedly dumped imports in its non-attribution analysis; hence, the EU failed to ensure that the injury suffered by the domestic industry of the EU resulting from other factors was not attributed to the allegedly dumped imports. Argentina considers that the measures at issue should be withdrawn.

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

ANNEX B-3

EXECUTIVE SUMMARY OF THE STATEMENT OF ARGENTINA
AT THE FIRST MEETING OF THE PANEL

1. Opening Remarks

1. Argentina asserts that we are not here because export taxes are the source of unfair advantages for producers in countries where exports are taxed, as the narrative of the EU suggests. We are here because of structural problems and lack of competitiveness in the EU industry of biodiesel. These structural problems are unfortunate in light of the huge subsidies granted to the biodiesel industry in Europe.

2. Argentina believes that the investigating authorities in the EU have a mandate to challenge export taxes at any cost. And it is what they did, even knowing that Argentina and Indonesia would bring a case before the WTO. However, export taxes are not only legal (there are no disciplines for export taxes under WTO law) but also legitimate instruments broadly used by developing countries and mainly for fiscal purposes.

2. Introduction

3. Despite being based on an intensely litigated agreement – the Anti-Dumping Agreement - this dispute is still unique on at least two counts: a) The first aspect is the fact that while dumping reflects the conduct of individual companies that export at prices below those in their own domestic market, in the case at hand, the European Union has targeted a series of practices that are very different from such price discrimination and are completely beyond the control of the exporting producers b) the second distinctive feature of this case which is derived from the first one, is the overt attempt by the European Union to expand the scope of application of the Anti-Dumping Agreement. According to the European Union, dumping would no longer be confined to the well-known practice of pricing the same product differently for different markets. Instead, it would also encompass differences in costs at which producers in different countries obtain inputs. Hence, as of the moment there is a difference in the price at which a producer can have access to a given input, and provided that such difference is reflected in the price of the final product, then, according to the European Union, that product is being dumped.

4. According to the above said, Argentina first challenges "as such" Article 2(5), second subparagraph, of the Basic Regulation, which provides that where the costs of the inputs in the records reflect prices that are found to be artificially or abnormally low in comparison with the prices on other markets, the costs have to be adjusted or established on another basis, including on the basis of information from other representative markets. This measure is manifestly inconsistent with the provisions of the Anti-Dumping Agreement and, in particular, with its Article 2 which precisely lays down the rules that must be followed for the determination of the normal value. This measure is of significant concern to Argentina given that the investigating authority endows itself with a margin of discretion that goes well beyond what is allowed under the Anti-Dumping Agreement. The European Union is, in fact, trying to create a new category of "dumping" which does not exist under the Anti-Dumping Agreement.

5. Argentina also challenges the anti-dumping measures imposed by the European Union on imports of biodiesel from, Argentina. These measures are based on manifestly flawed determinations of dumping since the European Union erroneously rejected the Argentinean producers' cost data for soybean and replaced them by the average of the FOB reference price, thereby finding dumping or artificially inflating the margins of dumping of the Argentinean producers. Furthermore, these measures are also based on manifestly flawed determinations relating to both injury and causality.

3. Request for a Preliminary Ruling and Preliminary Issues raised by the European Union

6. In Argentina's view, to the extent that the European Union cannot demonstrate that resolving these Article 6.2 claims would make any practical differences, these issues appear to be moot and, in Argentina's view, the Panel therefore does not need to examine them any further.[1]

7. The same comment applies to the European Union's claim about Argentina's alleged failure to identify the "specific measures at issue" in which it argued that the references to the terms "implementing measures and related instruments or practices" and to "related measures and implementing measures" in Argentina's Panel Request were too vague.[2] Argentina noted that these words were not on their face inconsistent with the requirement to identify the specific measures at issue and that, in any case, this objection appeared to be premature and unnecessary.

8. The European Union first asserts that the Panel must reject Argentina's claims pursuant to Article 2.1 of the Anti-Dumping Agreement and VI:1 of the GATT 1994 because they are definitional provisions that do not impose independent obligations[3] and is not applicable to situations where there are no sales in the ordinary course of trade.[4] However, Argentina remembers that in subparagraph 470 of its first written submission has explained that the European Union's violations of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 result from the numerous violations of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

9. The European Union erroneously argues that Argentina claims that a violation of Article 2.2 automatically constitutes a failure to comply with Article 9.3.[5] This is not correct. Argentina is not taking issue with the calculation of the normal value under its Article 9.3 claim. What Argentina has submitted is that the European Union has imposed definitive anti-dumping duties which exceed the margins of dumping as established under Article 2 of the Anti-Dumping Agreement.

4. Claims against Article 2(5), second subparagraph, of the Basic Regulation

10. Argentina is not challenging "two separate "measures""[6], as claimed by the European Union, but only one measure, namely Article 2(5), second subparagraph.

4.1 Claim under Article 2.2.1.1 of the Anti-Dumping Agreement

11. Argentina claims first that Article 2(5), second subparagraph, violates Article 2.2.1.1. In this sense, Argentina asserts that the introduction of the second subparagraph in Article 2(5) by Regulation No 1972/2002 gave a specific meaning and content to the condition that the "costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned". Under and pursuant to the new second subparagraph of Article 2(5), the authorities have to conclude that the records do not reasonably reflect costs associated with the production and sale of the product under consideration where they find that the costs of the inputs reflect prices that are "abnormally or artificially low" in comparison to prices on other markets.

12. Thus, it clearly flows from Regulation No 1972/2002 that, with the introduction of the second subparagraph of Article 2(5), a condition has been imposed on the authorities which must examine whether the costs of the inputs are not "abnormally or artificially low" in comparison to prices on other markets. This is actually supported by the wording of the second part of Article 2(5), second subparagraph, which refers to the adjustment or establishment of costs on any other reasonable basis including from other representative markets. The requirement to use information from other representative markets is rendered necessary precisely because the data on the domestic market are to be considered non-usable when they are found to be "artificially or abnormally low" in comparison with prices on other markets.

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[1] Panel Report, *US – Countervailing and Antidumping Measures from China*, paras. 3.9 – 3.10.
[2] European Union's request for a preliminary ruling, paras. 8 – 9.
[3] European Union's first written submission, paras. 48 and 53.
[4] European Union's first written submission, para. 49.
[5] European Union first written submission, para. 56.
[6] European Union's first written submission, para. 63.

13. This is further supported by the consistent practice of the authorities, because it has been found that there is an automatic link between, on the one hand, prices that are found to be "abnormally or artificially low" in comparison to prices on other markets and, on the other hand, the finding that the costs are not reasonably reflected in the records. There is no discretion, and the practice confirms that.

14. Contrary to what European Union affirms, Argentina is not required to demonstrate that the "abnormally or artificially low" prices of the inputs is the only reason justifying the conclusion that the company records do not reasonably reflect the costs. Argentina is only required to demonstrate that the measure at issue necessarily requires the authorities to conclude that the records do not reasonably reflect the costs when the costs reflect prices that are found to be abnormally or artificially low.

15. The European Union claims that under the second condition of Article 2.2.1.1, the authorities can examine whether the records reflect costs that would normally be associated with the production and sale of the goods in normal circumstances.[7]

16. To defend its position, the European Union is thus obliged to distort the ordinary meaning of the terms of Article 2.2.1.1, adding words that are not there, such as "would normally be" and "in normal circumstances". As emphasized in Argentina's first written submission, such an interpretation is not only contrary to the ordinary meaning of the words, but also to the structure of the sentence and the context of this provision.

17. There is nothing in Article 2.2.1.1 or other provisions of the Anti-Dumping Agreement suggesting that the cost data of producers can be disregarded because they are lower than what they would be in other markets. Argentina underlined earlier, rejecting the costs of a producer on the ground that there are not "normal" in comparison to the prices in another country is fundamentally contrary to the concept of "dumping" in the Anti-Dumping Agreement.

4.2 Claim under Article 2.2 of the Anti-Dumping Agreement

18. Argentina asserts that the wording of Article 2(5) second subparagraph is clearly WTO inconsistent: it "mandates" the authorities to adjust or establish the costs "where such information is not available or cannot be used", "on any other reasonable basis, including information from other representative markets".

19. Furthermore, the European Union errs when it argues that it would be necessary to demonstrate that this provision requires "the investigating authority to use such information "in all cases"."[8] However, as the Appellate Body noted in an earlier case, in order to succeed with an "as such" claim,[9] Argentina is not required to demonstrate that in each and every case where Article 2(5) second subparagraph will be used, it will end in a result which is inconsistent with WTO rules. It is sufficient for Argentina to demonstrate that this rule will necessarily lead to violations of WTO rules in certain specified circumstances.

20. The European Union's interpretation that "[t]he possibility of using "any other reasonable method" in Article 2.2.2(iii) implies that Article 2.2, as a whole, does not impose an absolute prohibition on the use of data on the cost of production from countries other the country of origin, where the conditions of production and sale are not in the ordinary course of trade"[10] is untenable.

[7] European Union's first written submission, paras. 133, 139 and 144.
[8] European Union's first written submission, para. 186.
[9] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 172.
[10] European Union's first written submission, para. 198.

5. Claims regarding the Anti-Dumping Measures on imports of biodiesel originating in Argentina

5.1 Claims under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

5.1.1 The European Union misinterprets Article 2.2.1.1 of the Anti-Dumping Agreement

21. Argentina does not dispute that the costs against which the records must be tested are those that are "associated with the production and sale of the product under consideration". However, as Argentina has emphasized, the fact that the test refers to the "costs associated with the production and sale of the product under consideration" means that the determination must establish whether the costs in question effectively "pertain to the production and sale of the product in question", irrespective of whether the costs are lower than international prices or prices in other markets. In stating that it is entitled to consider "which costs would pertain to the production and sale of biodiesel in normal circumstances", the European Union is adding words which are not there, namely "would" and "in normal circumstances", and is thereby modifying the scope and meaning of this provision.

22. In the biodiesel anti-dumping investigation, the European Union did not examine whether the costs of soybeans in the producers' records reasonably related to the cost of producing and selling biodiesel in Argentina. Rather, it examined those costs against a hypothetical benchmark price and concluded that "the domestic prices of the main raw material used by the biodiesel producers in Argentina were […] artificially lower than the international prices due to the distortion created by the Argentine export tax system".[11]

23. Furthermore, the panel report in *EC – Salmon* confirmed that "the test for determining whether a cost can be used in the calculation of "cost of production" is whether it is "associated with the production and sale" of the like product", the costs being those of the "investigated party." The fact that the Panel in *EC – Salmon* defines the expression "cost of production" as "the price to be paid for the act of producing" does not in any way mean that the word "costs" could be understood as hypothetical prices.

5.1.2 The European Union acted inconsistently with Article 2.2.1.1 in using costs that are not associated with the production and sale of biodiesel for the construction of normal value

24. Argentina has shown that for the exporting producers, the FOB reference price is not a price that is associated with the production and sale of biodiesel. In fact, the reference FOB price is a statistical tool which is calculated by averaging FOB prices of the previous day.

5.1.3 The European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 in failing to construct normal value on the basis of the cost of production in the country of origin

25. In calculating the cost of production, the European Union did not use the domestic price of soybeans, but the reference FOB price of soybeans, net of fobbing costs. By using the reference FOB price of soybeans, the European Union failed to construct normal value on the basis of the cost of production in the country of origin, thereby, acting inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

5.2 Claim under Article 2.4 of the Anti-Dumping Agreement: failure to make a fair comparison

26. Argentina argues that the difference between normal value and export price results from the use of the reference FOB price of soybean, which includes the export tax on soybeans in the construction of the normal value while the export price does not include any export tax at all. Consequently, it affects price comparability and also has a huge impact on the dumping margins.

[11] Definitive Regulation, recital (38), Exhibit ARG-22.

5.3 Claims under Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement in relation to production capacity and utilization of capacity

5.3.1 The European Union's definition of production capacity and utilization of capacity is inconsistent with Article 3.4 of the Anti-Dumping Agreement

27. At the outset, and as also noted by China[12], since Article 3.4 of the Anti-Dumping Agreement contains no reference to availability for use or idleness when providing that the injury assessment includes an evaluation of the utilization of capacity, the European Union's failure to include idle capacity in its evaluation of the utilization of capacity is therefore inconsistent with Article 3.4 of the Anti-Dumping Agreement. Argentina specifically notes that Article 3.4 of the Anti-Dumping Agreement mandates that all relevant economic factors and indices having a bearing on the state of the industry must be evaluated in the context of an injury assessment. The exclusion of capacity, which is a relevant economic factor, from the calculation of the utilization of capacity is thus inconsistent with this provision.[13]

5.3.2 The evaluation of production capacity and utilization of capacity is not based on positive evidence

28. Argentina maintains that the analysis of production capacity and utilization of capacity is not based on positive evidence, contrary to the requirements of Article 3.1 of the Anti-Dumping Agreement, for two reasons: a) the attribution of the "idle" capacity of EBB members and non-EBB members to the capacity of non-EBB Members is implausible due to the magnitude of the mistake, which amounts to almost six million tons and b) the new evidence submitted by the European Union in Exhibit EU-10 does not appear to directly relate to production capacity. Indeed, it only points to the fact that plants have stopped producing or have commenced insolvency proceedings. It does not demonstrate, however, that production capacity has ceased to exist.

5.3.3 The European Union's evaluation of production capacity and utilization of capacity does not involve an objective assessment

29. Contrary to the general obligation assumed under WTO, the European Union favoured evidence produced by one party but which is contradicted by publicly available and reliable information over the evidence on the record until that point.

5.3.4 The inconsistent evaluation of utilization of capacity and return on investment

30. Argentina objects to the inconsistent evaluation of both factors, since the so-called "idle" capacity was excluded from the evaluation of capacity utilization while it was included in the calculation of return on investment.[14]

5.3.5 Causation: overcapacity was a source of injury

31. Argentina maintains that the improper evaluation of the production capacity of the European Union industry under Article 3.4 of the Anti-Dumping Agreement prevented it from properly assessing overcapacity as a source of injury pursuant to Article 3.5. Indeed, an objective evaluation of production capacity and capacity utilization based on positive evidence would not have allowed the European Union to find that capacity utilization was increasing.

32. Furthermore, it is illogical to assert that because the utilization rate was consistently low, it could not be the cause of the decline in profitability or of the poor performance of the European Union industry, considering, especially in this case the gross level of the overcapacity.

33. To sum up, overcapacity was a factor known to the authorities, different from the dumped imports and also a source of injury, the effects of which the European Union was obliged to distinguish and separate from those caused by the allegedly dumped imports.

[12] China's third party submission, para. 151.
[13] Argentina's first written submission, para. 355.
[14] Argentina's first written submission, paras. 387-391.

5.3.6 Causation: long-term commercial strategy of importing biodiesel originating in Argentina as a source of injury

34. The facts show that rather than being forced to import biodiesel originating in Argentina, imports by the EU producers appear to have been a deliberate commercial strategy on their side. First of all, there is ample evidence on the record showing close relations, or even affiliation, to the same corporate groups of European and Argentinean producers, and secondly, the facts on the record show that 60% of total imports from Indonesia and Argentina during the IP were made by the EU industry itself.[15]

35. In conclusion, Argentina submits that the European Union was under the obligation to ensure that the injury resulting from the industry's long term commercial policy was not attributed to the domestic industry. Its failure to do so is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

[15] Provisional Regulation, recitals 132 to 136, Exhibit ARG-30 and Definitive Regulation, recital 151, Exhibit ARG-22.

ANNEX B-4

EXECUTIVE SUMMARY OF THE STATEMENT OF ARGENTINA
AT THE SECOND MEETING OF THE PANEL

1. Preliminary Issues

1. Regarding **Argentina's claim under Article 2.4**, Argentina has demonstrated that a difference exists between normal value and export price[1],that this difference affects price comparability[2] and therefore that, absent an adjustment to account for this difference, the comparison is not fair. In this regard, the *EC – Tube or Pipe Fittings* an the *EU – Footwear (China)* cases referred to by the European Union[3] are not relevant and must be rejected. Therefore, the European Union errs when arguing that Argentina's claim is outside the scope of Article 2.4.

2. Argentina's Claims against Article 2(5), second subparagraph, of the Basic Regulation

2.1 The scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation

2. Argentina argues that the European Union makes an effort to purport an over-simplistic reading of Article 2(5), second subparagraph, in complete isolation from its context when stating that it only "describes what the authorities are authorized to do in order to calculate the costs, when the company records cannot be used".[4] The fact that the determination that the records do not reasonably reflect the costs when they reflect prices that are "abnormally or artificially low" in comparison to prices on other markets because of an alleged distortion is made pursuant to Article 2(5), second subparagraph, of the Basic Regulation, does not only flow from the text of the provision and its background.[5] It has been also expressly confirmed by the practice and the General Court in the second *Acron case*.[6]

3. With regard to the **meaning and content** of Article 2(5), second subparagraph, the European Union had argued that the text of Article 2(5), second subparagraph, did not include the terms used by Argentina to describe the content and meaning of that measure.[7] Argentina has emphasized that, pursuant to Article 11 of the DSU the Panel should undertake a holistic assessment of all relevant elements, not only the text of the law, but also the consistent practice and the judgments of the General Court.

4. The European Union has also raised a new argument, namely that Argentina did not "establish the "scope, meaning and content" of the second subparagraph of Article 2(5) *in general*".[8] According *Argentina – Import Measures* in which the Appellate Body found that "in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, ***to the extent that such content is the object of the claims raised***"[9] this argument must be rejected.

5. On the other hand, the *US – Carbon Steel (India)* case[10] does not support the European Union's position. Indeed, the statement quoted by the European Union that "it is not clear why a number of instances of the application of the measure should in this case *conclusively establish the meaning of the measure at issue in general*, which in this case is confined to [the

[1] Argentina's first written submission, paras. 298-299; Argentina's second written submission, para. 103.
[2] Argentina's first written submission, para. 300, Argentina's opening statement at the first meeting of the Panel, para. 85 and Argentina's second written submission, para. 203.
[3] European Union's second written submission, paras. 25-27.
[4] European Union's opening statement, para. 50.
[5] Argentina's second written submission, paras. 16-33.
[6] Argentina's second written submission, paras. 34-41, 42.
[7] European Union's first written submission, paras. 85-86.
[8] European Union's second written submission, para. 50.
[9] Appellate Body Report, *Argentina – Import Measures*, para. 5.104.
[10] European Union's second written submission, paras. 51-52.

defending party's legislation]"[11], must be read in its context, since this statement[12] does not have the meaning that the European Union *pretends to read in it*.

2.2 Argentina has made a prima facie case on its claims against Article 2(5), second subparagraph, of the Basic Regulation

6. Argentina would like to emphasize that, in order to succeed with its "as such" claims, it is not necessary to demonstrate that the challenged measures requires the authorities to apply it in a manner inconsistent with the covered agreements "*in all cases*" as claimed by the European Union.[13]

7. Argentina has explained why, in its view, the discretionary/mandatory distinction is not relevant for the purposes of its claims and noted that, in any case, the measure at issue does not afford to the authorities the alleged "broad discretion" claimed by the European Union.

8. Firstly, and regarding as the discretionary/mandatory as an irrelevant distinction Argentina has noted that, if the relevant WTO provision prohibits a certain conduct, the fact that the measure being challenged provides for the possibility to adopt such a conduct, should lead to the conclusion that there is a violation of the said WTO provision.[14] Since Article 2.2.1.1 does not permit determinations that the records do not reasonably reflect costs in case of "artificially low" or "abnormally low" prices in comparison to prices on other markets because of an alleged distortion, and Article 2.2 does not permit the use of information other than information in the country of origin, Article 2(5), second subparagraph, must be found to be inconsistent with this specific provision as Argentina has argued.

9. Secondly, in order to make a *prima facie* case, Argentina has demonstrated that the assertion that Article 2(5), second subparagraph, affords broad discretion to the authorities is simply not true. It flows from the various elements presented by Argentina that the authorities do not have the discretion alleged by the European Union. The use of the term "shall" indicates the clear mandatory nature of the rule, and flies on the face of the assertion that second subparagraph of Article 2(5) of the Basic Regulation is framed in "permissive terms".[15] Moreover, the absence of discretion is supported by the consistent practice referred to by Argentina contrary to that of *US – Carbon Steel (India)*[16], and confirmed by the General Court.

10. In relation to Argentina's claims under Article 2.2, the cases referred to by the European Union showing that the EU authorities sometimes make adjustments based on domestic sources are totally irrelevant as well since Argentina is not taking issue with that type of adjustment.

3. Argentina's claims under Article 2.2.1.1 of the Anti-Dumping Agreement

3.1 Legal Interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

11. Argentina in the first place address an important preliminary issue, that is, the European Union claims that what the Panel has to do is to examine Argentina's interpretation and determine whether "this is indeed the proper interpretation of Article 2.2.1.1".[17] This is, however, an erroneous description of the Panel's task. The Panel has to determine whether Argentina has established that Article 2(5), second subparagraph, is inconsistent with Article 2.2.1.1. It is on the basis of all evidence and legal argumentation that the Panel has to determine whether Argentina has indeed demonstrated that Article 2(5), second subparagraph, is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

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[11] European Union's second written submission, para. 51.

[12] See the Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480, first sentence.

[13] European Union's second written submission, para. 38.

[14] Argentina's opening statement at the first meeting of the Panel, para. 74; Argentina's second written submission, paras. 95 – 96.

[15] European Union's second written submission, para. 83.

[16] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480 in which the Appellate Body noted that "the United States placed a number of cases on the Panel records where the "worst possible inference" was not applied in instances of non-cooperation".

[17] European Union's second written submission, para. 90.

12. Argentina notes that, regarding the interpretation of Article 2.2.1.1, the European Union, in its second written submission, has focused on certain specific aspects such as the negotiating history, the findings of the panel in *US – Softwood Lumber V*, among others, which do not appear to be central to the interpretative exercise which must focus on the ordinary meaning of the terms, their context and the object and purpose of the Agreement.

13. First, the findings in *US – Softwood Lumber V*. The European Union attempts, by selectively quoting the Panel Report in that case, to create parallelisms between the situations in that case and the measure we are discussing in the present case. The situations at issue in *US – Softwood Lumber V* were, however, different from what we are discussing in this case.

14. Second, the reference to Note 2 Ad Article VI paragraphs 2 and 3 concerning the "multiple currency practices." The European Union´s reference to this Note has simply nothing to do with what we are discussing here. Therefore, this argument should be rejected. The definition of "dumping" in Article VI is contained in paragraph 1. The Ad Note, however, specifically refers to paragraphs 2 and 3. In fact, this Ad Note does not seek to change or have any influence on the definition of "dumping" which is included in Article VI:1, but only to authorize the levy of anti-dumping duties in the very specific circumstances identified therein. Lastly, Argentina's interpretation is confirmed by the negotiating history. The negotiating history makes clear that the drafters agreed that "only price dumping" as defined in Article VI would be allowed to justify the defensive duties which were an exception to GATT rules. For all the aforesaid, the attempt of the European Union to draw parallelisms between "multiple currency practices" and the characteristics of Argentina's export tax on soya beans[18] is manifestly inappropriate and unsupported by the proper interpretation of that provision.

15. Third, the definition of "cost" as provided by the Panel in *EC – Salmon (Norway)*, Argentina does not see much difference between a price that is "paid" and a price that is "incurred", since the word "cost" refers to a concrete amount and not to a hypothetical value.

3.2 Argentina's claim under Article 2.2.1.1 concerning anti-dumping measures on imports of biodiesel from Argentina

16. In its second written submission, the European Union fails to rebut the claims raised by Argentina. Instead, the European Union has focused on some factual issues which are manifestly incorrect.

17. First, the European Union argues that the export tax on soybeans "constitutes a mechanism for distorting the price of soya beans".[19] This is not so. Argentina has already explained.[20] Second, the European Union continues to wrongly argue that the FOB reference price is the "price to be paid" by the Argentinean producers for domestic purchases of soybeans in Argentina.[21] As emphasized several times, the FOB reference price is not a price that is payable on domestic transactions. Rather, it is a taxable basis for levying the corresponding export tax.

4. Claims under Article 2.2 of the Anti-Dumping Agreement

18. On the basis of the definition provided by the Panel in *EC – Salmon (Norway)*, the "cost of production" means "the price to be paid for the act of producing". Therefore, the "cost of production in the country of origin" refers to the price to be paid for the act of producing biodiesel in the country of origin, that is, in Argentina.

19. The EU authorities have used - and this is not disputed - an average of the FOB reference prices minus fobbing costs as the cost for soybeans when constructing normal value. The European Union in fact acknowledges that it is not the price at which soybean is purchased domestically, since it keeps on stating that the FOB reference prices reflect "the cost of soya beans that Argentine producers of biodiesel would have to incur, in the absence of the export tax".[22]

[18] European Union's second written submission, para. 124.
[19] European Union's second written submission, para. 127.
[20] Argentina's first written submission, Section 5.2.4, paras. 209 and 210.
[21] European Union's second written submission, para. 126.
[22] European Union's second written submission, para. 142.

20. By not using the "cost of production in the country of origin" the European Union violated Article 2.2 of the Anti-Dumping Agreement.

5. Background and Economic Context of the Antidumping Investigation Concerning Imports of Biodiesel.

21. The background to this dispute shows that the first full year of production of biodiesel in the European Union is 2005. By the end of 2007 EU's total consumption had slightly more than doubled. Interestingly the capacity utilization figures determined by the Commission for the sampled EU producers was 84%. There were imports from some countries but not from Argentina which, at that time, had no biodiesel industry.

22. Between 2007 and 2009, Community consumption literally exploded according to the Commission's own figures[23], but not as overwhelmingly as production capacity, which sky-rocketed in the same period and thereby creating huge overcapacity.[24]

23. The European Union has argued that this did not prevent the EU industry from still being profitable in 2009, suggesting that excess capacity is not a cause of injury such as to break the causal link. Interestingly enough however, the figures of profitability in the investigation concerning imports from the United States, show that in 2005 when overcapacity was not excessive yet, the profitability rate of the sampled producers was at 18.3% while by 2009, coinciding with an overcapacity of the Union industry of more than 11 million tons, profitability had dropped further by more than a third, to only 3.5%.

6. Claims under Article 3 of the Anti-Dumping Agreement

24. The European Union acted inconsistently with Articles 3.1 and 3.4 because its definition of capacity and capacity utilization is inconsistent with Article 3.4 and its assessment of these factors is neither based on positive evidence nor include an objective examination. Additionally to these inconsistencies, the EU also failed to properly evaluate the effects of the enormous overcapacity on the EU industry, thereby violating Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

25. Article 3.4 does not contain any rule allowing the exclusion of capacity that would be "idle" or "not immediately available for use". Argentina prefers to draw the Panel's attention to the fact that in the proceeding on photovoltaic modules from China as well as in the US biodiesel case the so-called "idle capacity" was not excluded from production capacity.[25]

26. In relation to this point Argentina explained in previous submissions that the European Union could simply not exclude part of the capacity from the assessment of the production capacity and utilization of capacity on the grounds that it was "idle" without violating Article 3.4 of the Anti-dumping Agreement.

27. The European Union's assessment of production capacity and the utilization of capacity is not based on positive evidence and does involve an objective examination as Argentina has shown. With respect to the "desk analysis and checking against publicly available sources", the European Union has not yet been able to produce the alleged "publicly available data" that would support these new figures and that they are contradicted by all publicly available data on record that appeared in the public file of the investigation. With respect to the verification of the data Argentina would like to highlight that, although the European Union did select a sample of Union producers and carried out a detailed examination of their data including on-the-spot verifications, this was done before the imposition of provisional duties. In any event, that early examination and verification actually confirmed the accuracy of the production capacity figures that were reported in the Provisional Regulation.

28. Finally, Argentina has demonstrated that the conclusions reached by the Commission as to why the effects of overcapacity did not break the causal link between dumped imports and injury, are not conclusions which could be reached by an unbiased and objective decision maker taking

[23] Provisional Regulation, Table 1 (Exhibit ARG-30).

[24] Provisional Regulation, Tables 1 and 4 (Exhibit ARG-30).

[25] Council Regulation 193/2009, recitals 125 – 128 (Exhibit EU-13) and Council Regulation 599/2009, recitals 148 – 152 (Exhibit EU-14).

into account the facts that were before the investigating authority, and in light of the explanations given[26] as explained in detail in Argentina's previous submissions.

29. The European Union thus failed to appropriately assess overcapacity and its effects on the situation of the domestic industry, leading to an erroneous conclusion about the causality between alleged dumped imports and the injury suffered by the EU industry.

30. Regarding the long-term commercial strategy of the European Union industry, the figures are undisputed and are self-explanatory. As a matter of fact, if the three producers whose imports reached 63%, 85% and 71% of their own production had not been excluded from the definition of the "Union industry", the proportion of imports made by the European Union producers would have exceeded the overall 60% ratio determined for the Union industry.

31. The sole justification given by the European Union to the massive imports from the countries concerned was that if the domestic industry had not imported biodiesel from Argentina, "that role would have been filled by independent traders". However, the European Union fails to offer a logical explanation as to why there was no increase in imports by such independent traders during the IP. Surely if the European Union producers found an advantage in importing from Argentina – so much so that they actually managed to increase their market share in the Union if their own production is added to their imports, then one would also have expected independent traders to equally find it attractive to import into the European Union. The European Union does not offer a logical explanation that would explain in which way the European Union producers were hoping to prevent independent traders from importing to the EU by doing it themselves.

[26] Panel Report, *EU – Footwear (China)*, para 7.484.

ANNEX B-5

EXECUTIVE SUMMARY OF THE RESPONSE OF ARGENTINA TO THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

1. Introduction

1. The request for a preliminary ruling filed by the European Union is based on arguments that are formalistic in nature, that are based on a selective reading of fragments of Argentina's panel and consultations requests out of context, or on arguments that are obscure or inaccurate. Therefore, preliminary objections by the European Union should all be rejected by the Panel. Argentina considers that (i) it has identified the specific measures at issue in its panel request, (ii) that it has presented the problem clearly in its panel request and (iii) that its panel request does not expand the scope of the dispute. Argentina will address each issue in turn.

2. Argentina has identified the specific measures at issue

2. The European Union takes issue with an alleged lack of clarity in the identification of the "specific measures at issue." In particular, the European Union takes issue with the references to "implementing measures and related instruments or practices" and to "related measures and implementing measures" in Section 1 of Argentina's panel request.[1]

2.1 The European Union's objection is unclear and inaccurate

3. The objection raised by the European Union falls short of accuracy and clarity.

4. Indeed, first, in relation to paragraph 1(A) of Argentina's panel request, the European Union notes that this paragraph refers to "any subsequent amendments, replacements, implementing measures and related instruments or practices". At paragraph 8 of its request for preliminary ruling, the European Union argues that the reference to "*implementing measures and related instrument or practices*" is too vague. However, in paragraph 9, the European Union argues that "Argentina's claims against "implementing measures and other related measures" in paragraph 1(A) and footnote 7 of its Panel Request fall outside the Panel's terms of reference; that reference to "other related measures" is unclear since the panel request refers to "implementing measures and related instruments or practices".

5. Second, in relation to paragraph 1(B), the European Union states that "[f]ootnote 3 mentions Commission Regulation 490/2013, while footnote 2 mentions Council Implementing Regulation 1194/2013."[2] However, this is manifestly incorrect. In fact, footnote 3 refers to both Commission Regulation (EU) No 490/2013 and Council Implementing Regulation (EU) No 1194/2013, while footnote 5 refers to Council Regulation (EU) No 490/2013 and footnote 6 refers to Council Implementing Regulation (EU) No 1194/2013.

2.2 The European Union's objection should be rejected entirely

6. The European Union contends that, by referring to "implementing measures and related instrument or practices" and "related measures and implementing measures" when describing the measures at issue, Argentina's panel request fails to comply with the provisions of Article 6.2, because it fails to "identify the specific measures at issue."[3] The requirements under Article 6.2 of the DSU to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly are central to the establishment of the jurisdiction of the Panel.[4]

7. As emphasized by the Appellate Body "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[5] The panel must therefore "scrutinize carefully the panel

[1] European Union's request for preliminary ruling, section 2, paras. 3-9.
[2] European Union's request for preliminary ruling, para. 6.
[3] European Union's request for preliminary ruling, para. 7.
[4] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.
[5] Appellate Body Report, *US – Carbon Steel*, para. 127.

request, read as a whole, and on the basis of the language used, in order to determine whether it is "sufficiently precise" to comply with Article 6.2 of the DSU."[6]

8. The European Union's suggestion that there is something vague in the references to "implementing measures and related instruments or practices" and to "related measures and implementing measures" lacks merits.

9. First of all, Argentina notes that these types of references are not uncommon in panel requests. As the Panel noted in *Australia – Tobacco Plain Packaging (Indonesia)*, the rulings in previous disputes in which this type of references has been challenged "suggest to us that a reference to unnamed measures such as those discussed above is not per se inconsistent with the specificity requirement in Article 6.2."[7] Argentina notes that the European Union fails to substantiate why, in the present case, the references concerned would be inconsistent with the specificity requirement in Article 6.2 of the DSU.

10. Argentina notes that "the obligation to identify the specific measure at issue does not oblige the complainant to set forth the "precise content" of the measure in its panel request."[8] As the Appellate Body emphasized, "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 needs be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[9]

11. Section 1, point A) of Argentina's panel request, refers to "Article 2(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community as well as any subsequent amendments, replacements, implementing measures and related instruments or practices." Reading the sentence in its entirety, it is clear that the words "implementing measures and related instruments or practices" which are being challenged by the European Union necessarily refer to "Article 2(5) of Council Regulation (EC) No 1225/2009." Therefore, only measures relating to, that is having a sufficiently close nexus to, Article 2(5) of Council Regulation (EC) No 1225/2009 could fall within the scope of the "implementing measures and related instruments or practices." Therefore, this is not a "vague" reference as the European Union claims.

12. This is further supported by the narrative description of the substantive content and operation of the measures at issue in Section 2, point A), the heading and first two paragraphs which provide the following description:

> **Article 2(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries of the European Community (the "Basic Regulation)[7]**
>
> *Article 2(5) of the Basic Regulation inter alia provides that if costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.*
>
> *Pursuant to this provision, when the European Union considers that the costs of manufacturing the product under consideration actually incurred by the producer under investigation are artificially low or are otherwise distorted, it does not calculate the costs on the basis of the records of the producer under investigation although those records are in accordance with the generally accepted accounting principles of the exporting countries and reasonably reflect the costs associated with the production and sale of the product under consideration but adjusts those costs or*

[6] Appellate Body Report, *EC – Fasteners*, para.562, referring to Appellate Body Reports, *US - Carbon Steel*, para.127; *US – Oil Country Tubular Goods Sunset Reviews*, paras.164 and 169, *US – Continued Zeroing*, para. 161 and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

[7] Preliminary Ruling of the Panel in *Australia – Tobacco Plain Packaging (Indonesia)*, para. 5.14.

[8] Panel Report, *China – Raw Materials*, Annex F-1, para. 8.

[9] Appellate Body Report, *US – Continued Zeroing*, para. 169.

establishes them on the basis of other data, including data pertaining to markets other than those of the exporting country.

[7] As well as any subsequent amendments, replacements, implementing measures and related instruments or practices

13. Thus, the above constitutes the description of the substantive content and operation of the challenged measures. It makes clear that the measures being challenged relate to Article 2(5) of the Basic Regulation. Thus, the only way to read "implementing measures and related instruments or practices" is in close connection to Article 2(5) of the Basic Regulation.

14. As to the reference to "related measures and implementing measures" in Section 1, point B), these terms are placed at the end of point B) which identifies the primary measures being challenged as "the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, inter alia, Argentina, as well as the underlying investigation.". Point B) then precisely identifies the anti-dumping measures, both in footnote 3 as well as in the next paragraphs of point B as covering (i) the provisional anti-dumping duties on imports of biodiesel originating in, inter alia, Argentina, pursuant to Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia and (ii) the definitive measures imposed pursuant to Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia. The last paragraph then concludes that the measures at issue include the anti-dumping measures identified above "as well as any subsequent amendments, replacements, related measures and implementing measures." It is clear that only measures relating to the anti-dumping measures imposed by the European Union on imports of biodiesel originating in Argentina could fall within the scope of the terms "related measures and implementing measures.

15. Argentina notes that the situation in the present case is similar to the one addressed by panels in recent cases, namely *India – Agricultural Products and Australia – Tobacco Plain Packaging (Indonesia)*. In that case, the Panel rejected the objection that "the panel request is not sufficiently precise to meet the requirements of Article 6.2 simply by virtue of the inclusion of the terms "related measures, or implementing measures."[10] In particular, the Panel emphasized that the "primary measures" were not broadly defined, but rather limited in view of their context.[11]

16. The references which the European Union takes issues with were necessary to protect the interests of Argentina as complaining party in order to avoid that a closely connected measure adopted after the establishment of the panel could be claimed not to be within the panel's terms of reference merely because not mentioned in the panel request. The Appellate Body has recognized that this constitutes a legitimate objective and serves the due process objective of preventing the complaining party from having to "adjust its pleading throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target"."[12] Hence, the aim of such references is to address the potential situation arising if the European Union were to adopt measures that are closely connected to, or change the legal nature of the existing measures during the course of the Panel proceedings. This situation arose in *EC – Chicken Cuts (Brazil)* in which, since the complainants' panel requests were not worded sufficiently broadly, they could not be interpreted as containing the new measures.[13]

17. In *EC – IT Products*, the Panel also noted that:

While we do not consider that the mere incantation of the phrase "any amendments or extensions and any related or implementing measures" in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as

[10] Preliminary Ruling of the Panel in *India – Agricultural Products*, para. 3.51.
[11] Preliminary Ruling of the Panel in *India – Agricultural Products*, para. 3.48.
[12] Appellate Body Report, *Chile – Price Band System*, para. 144.
[13] Panel Report, *EC – Chicken Cuts (Brazil)*, paras. 7.28-7.29.

> *the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review.*[14]

18. In conclusion, Argentina requests the Panel to reject the European Union's objection that "Argentina's claims against "implementing measures and other related measures" in Paragraph 1(A) and footnote 7 of its Panel Request, as well as Argentina's claims against "related measures and implementing measures" in Paragraph 1(B) of its Panel Request, fall outside the Panel's terms of reference".[15] First of all, the European Union failed to substantiate its objection. Second, this claim is premature and unnecessary. Third, when interpreted in their context, the words challenged by the European Union cannot be found to be vague and therefore are not "on their face" inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.

3. Argentina's panel request provides a brief summary of the legal bases of the complaint sufficient to present the problem clearly

19. The European Union argues that Argentina's panel request fails to meet the requirement to "present the problem clearly" in two aspects: by failing to identify the "legal basis" of the complaint and by failing to "plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed."[16]

20. Argentina notes that the requirement to "present the problem clearly" is not a standalone requirement. Article 6.2 of the DSU contains two requirements: (i) the obligation to identify the specific measure(s) at issue and (ii) the obligation to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3.1 The "inter alia" legal basis

21. The European Union first takes issues with the use of the word "inter alia" in sub-section 2(A). It argues that because of the words "inter alia", "[n]either the European Union, nor the Panel has any idea of what claims or legal bases Argentina will finally present in this case: the words "*inter alia*" make the list of claims in Argentina's panel request completely open-ended."[17]

22. Sub-section 2(a) of Argentina's panel request provides that:

> *A) Article 2(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (the "Basic Regulation")*
>
> [...]
>
> *Argentina considers that Article 2(5) of the Basic Regulation is inconsistent as such with, inter alia, the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"):*
>
> *[...]*

23. In the first place, Argentina notes that the scope of the European Union's objection is unclear. Indeed, the European Union claims that "[t]his is inconsistent with Article 6.2 of the DSU and places the relevant claims outside the Panel's terms of reference."[18] It is, however, unclear which "relevant claims" would, according to the European Union, be placed outside the Panel's terms of reference.

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[14] Panel Report, *EC – IT Products*, para. 7.140.
[15] European Union's request for preliminary ruling, para. 9.
[16] European Union's request for preliminary ruling, para. 10.
[17] European Union's request for preliminary ruling, para. 12.
[18] European Union's request for preliminary ruling, para. 13.

24. To the extent that the European Union were to argue that all the claims made by Argentina in Section 2, point A) would fall outside the Panel's terms of reference, this objection does not make any sense.

25. In fact, the European Union is focusing on the words "inter alia" in the introductory paragraph in isolation, without examining the context in which these words are used and in particular the list of legal claims included thereafter. As is clear from the panel request, the introductory paragraph in which the words "inter alia" are included is nothing else but the introductory clause to a detailed description of the specific legal bases of the different "as such" claims, as indicated by the colon that is written right after the parenthesis and before the list of items 1 to 4.

26. Furthermore, the claims made by Argentina and which are listed under points 1 to 4 of Section 2, point A) of Argentina's panel request, all precisely identify the provisions of the covered agreements that Argentina claims are being violated. For each claim, Argentina provides an explanation of the content of the claim so that the European Union knows the case it has to answer.

3.2 Paragraph 2 (B) of Argentina's Panel Request

27. The European Union also takes issue with the following paragraph in Sub-section 2, B) of Argentina's panel request:

> *Argentina considers that the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, inter alia, Argentina and the underlying investigation are inconsistent with the following provisions of the Anti-Dumping Agreement and of the GATT 1994:*
>
> *6. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because the European Union imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement.*

28. The European Union claims that "[t]his paragraph fails to meet the requirements of Article 6.2 of the DSU"[19] for four reasons which must all be rejected.

29. First, the European Union claims that "Argentina's Panel Request fails to mention the specific sub-paragraph of Article 9.3, with which the challenged measures are supposed to be inconsistent."[20] There is, however, no such kind of general requirement "to refer to the specific sub-paragraph of the WTO treaty provision that is supposed to be infringed by the challenged measure".[21] The Appellate Body Report to which the European Union refers, found that:

> *There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint*[22]

30. Argentina's panel request indicates that the measures at issue are inconsistent with Article 9.3 and Article VI:2 of the GATT 1994 "because the European Union imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement." While Article 9.3 indeed includes a chapeau and three sub-paragraphs, it is clear from the description of the claim (just quoted) that Argentina is taking issue with the chapeau. This interpretation is in accordance with the Report of the Appellate Body in *Thailand – H-Beams* which held that "a general reference to Article 3 of the Anti-Dumping Agreement without identifying the relevant paragraphs, was sufficient to fulfill the

[19] European Union's request for preliminary ruling, para. 15.
[20] European Union's request for preliminary ruling, para. 16.
[21] European Union's request for preliminary ruling, para. 16.
[22] Appellate Body Report, *Korea – Dairy*, para. 124.

requirements of Article 6.2 of the DSU, considering that the panel request "referred explicitly to the specific language of Article 3."[23]

31. Second, the European Union argues that "Argentina fails to articulate the exact claims it advances."[24] According to the European Union, it is not clear whether Argentina actually challenges (a) the comparison between the anti-dumping duty and the margin of dumping or (b) the method of calculation of the margin of dumping itself.[25]

32. However, there is no ambiguity about the claim of Argentina. In fact, as is clear from the structure of the panel request, Argentina first takes issue with the dumping margin determination under points 1, 2, 3, 4 and 5 of its panel request which all refer to specific obligations under Article 2 of the Anti-Dumping Agreement. Under point 6 of the panel request, as a next logical step, Argentina then claims that the European Union violated Article 9.3 by imposing and levying anti-dumping duties in excess of the margin of dumping to be established pursuant to Article 2 of the Anti-Dumping Agreement.

33. Argentina further notes that its first written submission confirms the meaning of the words used in the panel request.[26] Indeed, it is clear from paragraphs 307 to 309 of Argentina's first written submission that Argentina's claim under Article 9.3 focuses on the imposition and levying of anti-dumping duties in excess of the dumping margin, had the dumping margin been determined in conformity with Article 2 of the Anti-Dumping Agreement contrary to what the European Union did in this case as demonstrated in its previous claims

34. The third and fourth reasons submitted by the European Union are inapposite since they are based on the hypothetical assumption that "Argentina actually challenges the method of determining the dumping margin."[27] As Argentina has explained above, it is clear from both the wording of the panel request and the legal provision being challenged, namely Article 9.3, that Argentina's claim focuses on the fact that the duties have been imposed and levied "in excess" of the margin of dumping established in accordance with Article 2 of the Anti-Dumping Agreement.

4. The European Union's allegations concerning the expansion of the scope of the dispute

4.1 Arguments of the European Union

35. In section 4 of its request for a preliminary ruling, European Union alleges that Argentina has expanded the scope of the dispute in its panel request either as a result of the inclusion of new measures or as the result of the inclusion of new legal bases. The European Union notes that consultations circumscribe panel requests and, that, as a result, a panel request cannot include claims that were not included in the consultations request where these new claims expand the scope of the dispute or have the effect of changing the essence of the complaint.[28]

4.2 The applicable legal standard

36. Although Article 6.2 requires the complainant to indicate in its panel request "whether consultations were held", it does not require the measures and claims identified in the panel request as basis for the complaint to be *identical* to those identified in the consultations request.[29]

37. In *Brazil – Aircraft*, the Appellate Body emphasized that Articles 4 and 6 of the DSU do not "require a precise and exact identity between the specific measures that were the subject of

[23] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.24 referring to Appellate Body Report, *Thailand – H-Beams*, para. 90.
[24] European Union's request for preliminary ruling, para. 17.
[25] European Union's request for preliminary ruling, para. 17.
[26] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9 referring to Appellate Body Report, *US – Carbon Steel*, para. 127.
[27] European Union's request for preliminary ruling, para. 19.
[28] European Union's request for a preliminary ruling, para. 23, referring to Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice* and *US – Upland Cotton*.
[29] Preliminary Ruling of the Panel in *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 3.35.

consultations and the specific measures identified in the request for the establishment of a panel"[30]

38. In relation to the "legal basis" of the complaint in particular, the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "[i]t does not follow from the use of the same term [in Articles 4.4 and 6.2] […] that the claims made at the time of the panel request must be identical to those indicated in the request for consultations."[31]

39. It is important to underline that it is the panel request, not the consultations request, which determines the panel's terms of reference pursuant to Article 7 of the DSU. Moreover, as panels and the Appellate Body have consistently emphasized in past cases, the relevant provisions of the DSU do not require a "precise and exact" identity between the measures and claims identified in the request for consultations and those identified in the panel request.

40. Argentina will show why, taking into account the above legal standard, all the claims made in the panel request fall within this Panel's terms of reference and neither expand the scope of the dispute nor change the essence of the complaint.

4.3 The European Union's objection against the alleged inclusion of a new measure in the panel request

41. The European Union claims that Argentina's panel request challenges for the first time "*related practices*", in addition to Article 2(5) of Council Regulation 1225/2009 since the terms "related practices" were not included in Argentina's consultations request, thus expanding the scope of the dispute and changes the essence of Argentina's complaint.[32]

42. Argentina submits that this objection of the European Union was unnecessary and is clearly moot. Argentina is not challenging the European Union's practice as a distinct measure. In other words, Argentina is not challenging ""*related practices*", in addition to Article 2(5) of Council Regulation 1225/2009."[33] The measure being challenged is Article 2(5) of the Basic Regulation. Argentina refers to the practice of the European Union only to illustrate the content and scope of Article 2(5) of the Basic Regulation in view of its consistent application.[34] Accordingly, Argentina is not challenging a "new measure" since it is not asking that this Panel rule on "related practices", as shown in paragraph 468 of its first written submission.

4.4 The European Union's objections against the alleged inclusion of new legal bases in the panel request

4.4.1 The allegedly new and unclear "as applied" claim against Article 2(5) of the Basic Regulation

43. The European Union argues that Argentina brings a new and unclear claim against Article 2(5) of the Basic Regulation in a "not-numbered" paragraph. The European Union appears to refer to the unnumbered paragraph between paragraphs 3 and 4 of section B of the panel request.

44. This paragraph is not a "new claim" that Argentina is bringing, as this claim is not different from the claims raised under points 1, 2 and 3. This paragraph merely emphasizes that the European Union's violations of the provisions cited in points 1, 2 and 3 occurred as a result of the application of Article 2(5) of the Basic Regulation in the imposition of the measures on imports of biodiesel of Argentina. Argentina notes in this respect that the European Union itself points out that Commission Regulation and the Council Implementing Regulation imposing the provisional and definitive duties are based on Article 2(5) of the Basic Regulation.[35]

[30] Appellate Body Report, *Brazil – Aircraft*, para. 132.
[31] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 136.
[32] European Union's request for a preliminary ruling, paras.27 and 29.
[33] European Union's request for preliminary ruling, para. 27.
[34] Argentina's first written submission, section 4.2.2.
[35] European Union's request for a preliminary ruling, para. 38.

4.4.2 The allegedly new claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-Dumping Agreement

45. The European Union argues that Argentina's claim under Article 9.3 of the Anti-Dumping Agreement in section 2(A)(3) of the panel request falls outside of the Panel's terms of reference. It bases its argument on the fact that the request for consultations did not make any reference to Article 9.3 under section (b) and on the fact that section (b) of the consultations request did not refer to an alleged excess of the anti-dumping duty compared to the margin of dumping. The European Union thus considers that Argentina's claim under paragraph 2(A)(3) cannot be said to reasonably have evolved from the consultations.[36] Again, this objection lacks merit.

46. Argentina strongly disagrees with the European Union's contention that Argentina's as such claim under paragraph 2(A)(3) cannot reasonably be said to have evolved reasonably from the consultations request. First, as the European Union itself points out in paragraph 38 of its request for a preliminary ruling, Argentina raised a claim based on Article 9.3 in its as applied claims concerning the provisional and definitive anti-dumping measures.[37] Therefore, the imposition of anti-dumping duties in excess of the margin of dumping as a result of the application of Article 2(5) of the Basic Regulation has been the object of consultations.

47. In any case, as shown by its first written submission, Argentina is not bringing an as such claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-Dumping Agreement.[38] Indeed, Argentina considers that findings of inconsistency under Articles 2.2, 2.2.1.1 and 18.4 of the Anti-Dumping Agreement, Article VI:1(b)(ii) of the GATT 1994 and Article XVI:4 of the Marrakesh Agreement Establishing the WTO with respect to Article 2(5) of the Basic Regulation would be sufficient to secure an effective resolution of this dispute.

4.4.3 The allegedly new claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994

48. The European Union argues that the claims based on Article VI:1 of the GATT 1994 in sections 2(A)1 and 2(A)2 of the panel request fall outside of the terms of reference of the Panel because this provision was not mentioned in the request for consultations. At the outset, Argentina notes that the claims it bring in this section are based Article VI:1(b)(ii) only.[39] Accordingly, Argentina limits its arguments to this specific provision. The objection raised by the European Union does not stand.

49. The European Union states that it cannot be argued that "adding new claims under Article VI:1 of the GATT does not change the "essence" of the complaint."[40] It bases this on the allegation that if Article VI:1 of the GATT 1994 is identical to the provisions of the Anti-Dumping Agreement that have already been cited, the addition of Article VI:1 would be redundant and the Panel would exercise judicial economy.[41]

50. This argument does not stand to reason. Nothing prevents Argentina from adding provisions that are identical in scope to an existing claim on which consultations were held.

51. Moreover, if the European Union intends to argue that Article VI:1(b)(ii) of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement are different in scope and that the "essence" of both provisions is different, then this is directly contradicted by the text and context of both provisions. The European Union has failed to point out what the difference in scope between both provisions is.

52. Article VI:1 of the GATT 1994 had been cited in the context of sections a.1 and a.2 of the consultations request in as *applied* claims that are similar to the as *such* claims at issue. Moreover, as already pointed out by Argentina, the content of Article VI:1(b)(ii) of the GATT 1994 is identical to Article 2.2 of the Anti-Dumping Agreement, which was cited in Argentina's consultations request in the section concerning the *as such claims*.

[36] European Union's request for a preliminary ruling, paras. 36-40.
[37] See section (a)(6) of the Request for consultations by Argentina, WT/DS/473/1.
[38] Argentina's first written submission, para. 468.
[39] Argentina's first written submission, paras. 133, 141 and 468.
[40] European Union's request for preliminary ruling, para. 43.
[41] European Union's request for a preliminary ruling, para. 43.

53. Argentina submits Article VI:1 of the GATT 1994 had been cited in the context of sections a.1 and a.2 of the consultations request in *as applied* claims that are similar to the *as such* claims at issue. Moreover, as already pointed out, the content of Article VI:1(b)(ii) of the GATT 1994 is identical to Article 2.2 of the Anti-Dumping Agreement, which was cited in Argentina's consultations request in the section concerning the *as such* claims. Argentina therefore respectfully requests that the Panel reject the European Union's purely formalistic objection and confirm that Argentina's claims under Article VI;1 of the GATT 1994 in relation to Section 2(A) are within the Panel's terms of reference.

4.4.4 The allegedly new claims against Article 2(5) of the Basic Regulation based on Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement

54. The European Union argues that the paragraph of the consultations request corresponding to section 2(A)(2) of the panel request only includes a claim based on Article 2.2.1.1 of the Anti-Dumping Agreement. It also argues that the corresponding claim in the consultations request refers only to the obligation that costs be calculated on the basis of the records kept by the exporters. The European Union thus argues that section 2(A)(2) of the panel request expands the scope of the dispute because they introduce a new legal basis (i.e., Article 2.2 of the Anti-Dumping Agreement) and because they introduce "a new type of complaint", that is, the use of costs not associated with the production and sale of the product under consideration.[42]

55. Argentina submits that the European Union carries out an unduly narrow reading when it reads section 2(A)2 of the panel request with reference to section b.2 of the consultations request only. The issue of the calculation of costs for the purpose of the construction of normal value is also addressed in section b.1 of Argentina's request for consultations, which refers to Article 2.2 of the Anti-Dumping Agreement. The assertion that Argentina added a provision in the panel request is therefore incorrect.

56. Moreover, there is a clear and logical connection between Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement. Indeed, Article 2.2.1.1 is a specific provision governing the calculation of costs for the construction of normal value. Article 2.2 concerns, among other matters, the construction of normal value and its components, including the cost of production. Argentina submits that consultations on the calculation of costs for the construction of normal value pursuant to Article 2.2.1.1 logically also cover the construction of normal value pursuant to Article 2.2, when such costs are being included in the construction of normal value.

57. Argentina also opposes the European Union's claim that it would have introduced in its panel request a "new type of complaint" when it refers to the use of costs not associated with the production and sale of the product under consideration. First of all, Argentina submits that this reference does not constitute a claim but an argument which is not required to be included in a panel request. Indeed, the Appellate Body emphasized that "Article 6.2 requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly."[43]

58. Furthermore, even if it is part of the claim, the European Union's claim is premised on an incorrect reading of Argentina's request for consultations. Indeed, the request for consultations refers in relevant part to Article 2.2.1.1 of the Anti-Dumping Agreement "which requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation." The request for consultations does not limit in any way Argentina's claim to certain aspects or parts of Article 2.2.1.1, first sentence. By referring to Article 2.2.1.1 "which requires that costs normally be calculated on the basis of records kept by the exporter or producer under investigation", Argentina refers to the first sentence of Article 2.2.1.1. Therefore, the reference in the panel request to the use of costs not associated with the production and sale of the product under consideration cannot be said to be a "new claim".

59. In view of the above, the European Union's objections under section 4.2.4 of its request for a preliminary ruling must fail.

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[42] European Union's request for a preliminary ruling, paras 45 and 46.
[43] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

4.4.5 The allegedly new claim against the anti-dumping measures imposed by the European Union based on Article 2.1 of the Anti-Dumping Agreement

60. Finally, Argentina turns to the European Union's objection against the inclusion of Article 2.1 of the Anti-Dumping Agreement in section 2(B)4 of the panel request.

61. Argentina notes that it is a well-established principle of law that the burden of proof rests upon the party asserting the affirmative of a particular claim or defense. However, Argentina fails to see any substantiation by the European Union of why the addition of Article 2.1 of the Anti-Dumping Agreement results in an expansion of the scope of this dispute or why it cannot reasonably be said that the inclusion of this provision evolved from the consultations. In this respect, Argentina refers to paragraphs 51 to 53 of the European Union's request for a preliminary ruling, which contains only mere assertions but no substantiation. Consequently, the European Union's objection fails.

62. In any case, Argentina notes that it is not basing its claim concerning the profit determination on Article 2.1 of the Anti-Dumping Agreement.[44] As already highlighted in section 4.4.2 above, it would therefore appear not to be necessary for the panel to rule on this issue.

5. Conclusion

63. In light of the above, Argentina submits that the European Union's request for preliminary ruling should be rejected entirely.

64. First, the objection made by the European Union about the references to "implementing measures and related instruments or practices" and "related measures and implementing measures" should be rejected: first, because the European Union failed to substantiate its objection; second, since this claim is premature and unnecessary; and third, since these references comply with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.

65. Second, Argentina provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly in relation to the "as such" claims in section 2(A), as well as in relation to Argentina's claim under Article 9.3 of the Anti-Dumping Agreement in section 2(B)6.

66. Third, Argentina did not expand the scope of the dispute. Indeed, the "related practices" do not constitute a "new measure" that cannot be said to have "evolved" from the consultations and which, in any case, are not challenged by Argentina as a distinct measure. Furthermore, all the claims listed in the panel request were either included in the consultations request or can reasonably be said to have evolved from the claims listed in consultations request.

67. Accordingly, Argentina requests the Panel to find that the request for establishment of a Panel submitted by Argentina fully complies with the requirements of Article 6.2 of the DSU and that, consequently, all the measures and claims concerned fall within the Panel's terms of reference.

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[44] Argentina's first written submission, para. 470.

ANNEX C

ARGUMENTS OF THE EUROPEAN UNION

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INTRODUCTION

1. The EU demonstrates that both Argentina's claims with respect to the Basic Regulation and its claims with respect to the Provisional and the Definitive Regulations should be rejected as no inconsistency with the Anti-Dumping Agreement has been proved.

2. TERMS OF REFERENCE

2.1. CLAIMS ABANDONED BY ARGENTINA

2. Argentina has abandoned the following claims mentioned in its Panel Request: (1) any claim against "*related practices*"; (2) any claim under an "*inter alia*" legal basis; (3) the claim against Article 2(5) of the Basic Regulation based on Article 9.3 of the Anti-dumping Agreement; (4) any distinct "*as applied*" claim against Article 2(5) of the Basic Regulation; (5) the claim against Article 2(5) of the Basic Regulation because the costs used are allegedly not "associated with the production and sale of the product under consideration"; and (6) the claim against the "profit determination" based on Article 2.1. The EU understands that, as Argentina has abandoned and does not pursue these claims, it cannot establish a *prima facie* case on them and that the Panel cannot make any findings on these claims.

2.2. OTHER ARGENTINE CLAIMS CHALLENGED BY THE EU

2.2.1. Argentina's failure to identify the "specific measure at issue"

3. First, Argentina appears to have abandoned the claim. Second, Argentina's assertions must be rejected. The EU's Request for a Preliminary Ruling was timely and in full compliance with the Panel's Working Procedures. "Objections to jurisdiction" of a Panel "*must be raised as early as possible*". On the substance of its Request, the EU has noted the Appellate Body's consistent case law, according to which references to "implementing measures and other related measures" do not identify the specific measures at issue. Accepting that all "measures" that "implement", or are "related" to Article 2(5) of the Basic Regulation fall within the Panel's Terms of Reference would have the perverse effect of bringing within the jurisdiction of this Panel all provisional and definitive Regulations of the EU based on Article 2(5).

4. The inclusion of the terms "implementing measures" and "related measures or instruments" in Argentina's Panel Request (a) creates an open-ended list of challenged "measures", (b) confuses the limits between the jurisdiction of this Panel and the jurisdiction of other panels, and (c) is not necessary in order to protect any legitimate interest of the complaining party; such legitimate interests are protected by other terms in the Panel Request, which are not challenged by the EU. Therefore, the challenged terms fail to meet the requirements of Article 6.2 of the DSU and fall outside the Panel's terms of reference.

2.2.2. Argentina's other claims

2.2.2.1 The claim against the Provisional and the Definitive Regulations based on Article 9.3 of the Anti-Dumping Agreement

5. The EU has argued that Argentina's Panel Request fails to articulate clearly the exact claim that it advances, because it is not clear whether Argentina's challenge is directed against (a) the comparison between the anti-dumping duty and the dumping margin, or (b) against the method of calculation of the dumping margin itself. The question of whether the claim under Article 9.3 is within the Panel's terms of reference is of limited value for the present dispute.

2.2.2.2 The claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994

6. Argentina's Panel Request includes claims against Article 2(5) of the Basic Regulation based on Article VI:1 of the GATT 1994, which were not included in Argentina's Request for Consultations. However, Argentina's first written submission does not develop these claims. The question of whether the claims against Article 2(5) based on Article VI:1 of the GATT 1994 are within the Panel's terms of reference is of very limited value for the present dispute.

3. PRELIMINARY ISSUES

3.1. THE CLAIM UNDER ARTICLE 2.1 OF THE ANTI-DUMPING AGREEMENT

7. Given that Article 2.1 does not impose any independent obligation on WTO Members, it cannot serve as a legal basis for a distinct claim in WTO dispute settlement proceedings. Furthermore, Article 2.1 does not cover the situations where there are no domestic sales "in the ordinary course of trade". Therefore, the facts of this case fall outside the scope of Article 2.1 of the Anti-Dumping Agreement.

3.2. THE CLAIMS UNDER ARTICLE VI:1 OF THE GATT 1994

8. Since Article VI:1 of the GATT 1994 does not impose any independent obligation on WTO Members, it cannot serve as a legal basis for a distinct claim in WTO dispute settlement proceedings. Therefore, Argentina cannot base any claim on Article VI:1 of the GATT 1994.

3.3. THE CLAIM UNDER ARTICLE 9:3 OF THE ANTI-DUMPING AGREEMENT

9. Article 9.3 of the Anti-Dumping Agreement addresses the *comparison* between (a) the anti-dumping duties and (b) the dumping margins. It does not address the *calculation* of *normal value*. As a result, the complaining party must show something more than a simple erroneous calculation of normal value. The EU's interpretation is supported by the relevant case law. For example, in *EC – Salmon*, the Panel found that, in determining the dumping margin, the defending Member had acted inconsistently with a number of obligations imposed by Article 2 of the Anti-dumping Agreement. However, the Panel rejected the complaining Member's claims under Article 9.3 of the Anti-Dumping Agreement. Argentina's claim under Article 9.3 is conditioned upon the success of Argentina's claims under Article 2 of the Anti-Dumping Agreement. In these circumstances, Argentina's claims fall outside the scope of Article 9.3 of the Anti-Dumping Agreement and must be rejected.

4. ARGENTINA'S "AS SUCH" CLAIMS AGAINST THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

4.1. THE "AS SUCH" CLAIM UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

4.1.1. The reasons for rejecting Argentina's claim

4.1.1.1 Argentina is challenging "as such" a "measure" which does not exist

4.1.1.1.1 The scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation are clear on its face

10. Article 2(5) gives the anti-dumping authorities certain alternative options for establishing or adjusting the "costs associated with the production and sale of the product under investigation" when one of the provisos defined in the first subparagraph of Article 2(5) applies. The second subparagraph of Article 2(5) of the Basic Regulation describes what the authorities can do after it has been determined that the records do not "reasonably reflect" costs, pursuant to the first subparagraph of Article 2(5) of the Basic Regulation.

11. Given that the scope, meaning and content of the second subparagraph of Article 2(5) are clear "on its face", the consistency of the measure with the covered agreements must be assessed on the basis of the text of the legal instrument "alone".

4.1.1.1.2 Argentina distorts the scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation

12. The "measure" invented by Argentina simply does not exist. This conclusion is supported by a number of considerations. First, the conditions that must be met in order to determine whether the company records "reasonably reflect" costs are outside the scope of the second subparagraph of Article 2(5) of the Basic Regulation. Second, the terms "reflect market values", "regulated market", "abnormally low", or "artificially distorted", which Argentina uses to describe the "measure" that it challenges, do not even exist in the text of the second subparagraph of Article 2(5).

4.1.1.1.3 The "various elements examined" by Argentina do not give to the second subparagraph of Article 2(5) the scope, meaning and content asserted by Argentina

13. The first "element" identified by Argentina is the "historical perspective" of the second subparagraph of Article 2(5) of the Basic Regulation. However, the introduction of the second subparagraph of Article 2(5) in 2002 had no impact on the scope, the meaning or the content of the terms "reasonably reflect costs" in Article 2(5), which already existed in the first subparagraph of Article 2(5). The second "element" identified by Argentina is the "EU's practice". Nevertheless, the examples presented by Argentina in its first written submission do not suffice to establish a purported "practice" of the EU in the application of the second subparagraph of Article 2(5). The third element presented by Argentina consists of four judgments of the General Court of the EU. However, these judgments do not support Argentina's assertions since none of these judgments provides that the determination of whether company records "reasonably reflect costs" is made pursuant to the second subparagraph of Article 2(5).

4.1.1.2 Argentina has failed to establish that the purported "measure" that it challenges is "as such" inconsistent with the covered agreements

14. Argentina has asserted that it presents this "practice" only to illustrate the scope and content of the purported "measure" that it challenges. However, in order to achieve this result, Argentina would need to establish (a) that the "practice" is not "distinct from the measure itself", but, on the contrary, forms an "integral part of the measure itself" and is "necessarily applied in all instances"; and (b) that this "practice" is "required" by the measure, which must be "mandatory" and constitute a "binding requirement" to apply the measure in the same way in all cases. In the present case, Argentina has failed to establish any of these two requirements for either the first, or the second subparagraph of Article 2(5).

15. With regard to the first requirement, the plain text of the first subparagraph of Article 2(5) confirms that the provision affords broad discretion to the authorities to determine whether the records of a particular company "reasonably reflect costs", on the basis of their analysis of the facts in each individual case. With regard to the second, the evidence confirms the discretionary nature of Article 2(5). The use of the word "*entitled*" by the General Court confirms that, as a matter of municipal EU law, Article 2(5) is discretionary: it allows the authorities to take certain actions, but does not require them to do so in all cases.

4.1.1.3 Argentina advances an erroneous legal interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

4.1.1.3.1 The text of Article 2.2.1.1 of the Anti-Dumping Agreement

16. First, Argentina's thesis is based on the assertion that the costs reflected in the company records do not need to be "reasonable". Argentina is wrong. It is counterintuitive to assert that Article 2.2.1.1 of the Anti-Dumping Agreement mandates the investigating authorities to base their calculations on costs that are "unreasonable". In any event, the Panel Report in *Egypt – Steel Rebar* actually contradicts Argentina's thesis. The fact that the Panel required the relevant item to be *"reasonably related to the cost* of producing and selling rebar" shows that the word "reasonably" is also attached to the word "costs" in Article 2.2.1.1.

17. Second, Argentina seeks to dissociate the term "costs" in Article 2.2.1.1 from the word "prices". However, the Panel Report in *EC – Salmon* interpreted "costs of production" as "the *price*

to be paid for the act of producing". This shows that the "cost of production" is linked to the prices *to be paid* for the act of producing. If the panel considered that the required costs are the expenses that have actually already been incurred by the producer, it would have used the past tense of the verb "be" in its Report. By using the terms "to be paid", this panel finding confirms that the "reasonable costs" required by Article 2.2.1.1 are not necessarily only the expenses that have already been incurred by the producer.

18. Third, Argentina interprets the term "associated" in Article 2.2.1.1 as "actually incurred". It is submitted that the word "associated" has a broader meaning which captures a broader range of relations between the "costs" and the "production". Fourth, these terms "associated with the *production and sale*" are broad enough to capture the costs that *would normally be* associated with the production and sale of the goods. Fifth, Article 2.2.1.1 refers to the "costs associated with the production". It is uncontroversial that the cost of production depends on the cost of the raw material and other inputs used for the production and, hence to the prices of the raw material normally used for the production. Sixth, the use of the word "reflect" reinforces the conclusion that reasonableness in Article 2.2.1.1 is not limited only to the "expenses that have actually been incurred by the producer".

4.1.1.3.2 The context of Article 2.2.1.1 of the Anti-Dumping Agreement

19. Argentina's main thesis finds no support in the analysis of the context of the provision. First, where the Anti-Dumping Agreement wishes to refer to the expenses actually incurred by the producer, it expressly states so. Second, if Article 2.2.1.1 intended to have the records include only the "expenses actually incurred", then Article 2.2.1.1 would have included only the condition that records should be kept in accordance with the GAAP.

20. Third, Argentina is wrong when it asserts that the first sentence of Article 2.2.1.1 "refers to a cost allocation issue" and that "the second sentence provides what authorities have to do if they use an alternative cost allocation methodology". The first sentence of Article 2.2.1.1 uses the word "calculated" and not the word "allocation". Moreover, the first sentence of Article 2.2.1.1 refers to the records of the company as "data sources", while the second sentence refers to information that is *not* found in the records of the company, but that has been provided by the investigated companies in the course of the investigation. Finally, the second sentence of Article 2.2.1.1 allows the authorities to take into consideration "all available evidence on the proper allocation of costs, including that which is made available by respondents in the context of an anti-dumping investigation". This implies that the second sentence allows authorities to take into consideration cost information which is not found in the companies' records, but which has been provided later.

4.1.1.3.3 The object and purpose of the anti-dumping rules

21. Article VI:1 of the GATT 1994 shows that the object and purpose of the WTO anti-dumping rules is to prevent the industries of the exporting country from damaging the industries of the importing country through the use of prices that are artificially low, because of some abnormal condition (hence the reference to "normal" value). A cost of the raw materials used to produce the dumped goods which is not "normal" and which causes the "normal value" of the goods not to be "normal", falls squarely within the type of conditions that the WTO anti-dumping rules aim to address.

4.1.1.3.4 The case law of the WTO dispute settlement system

22. The Panel Report in *Egypt – Steel Rebar* confirms that the word "reasonably" is also linked to the word "costs" and, therefore, Argentina is wrong when it asserts that the costs reflected in the records do not need to be "reasonable". Likewise, the Panel Report in *EC – Salmon* establishes that "costs of production" means "prices to be paid for the act of producing" and not "expenses that have already been incurred by the producer". Most importantly, the Reports of the Appellate Body and the Panel in *US – Softwood Lumber V* clearly establish that Argentina's thesis is wrong. The Panel found that Article 2.2.1.1 does not impose on the investigating authorities any particular methodology in their assessing whether the records reasonably reflect costs. On appeal, the Appellate Body did not take issue with this interpretation of Article 2.2.1.1.

4.2. The "As Such" Claim under Article 2.2 of the Anti-Dumping Agreement

4.2.1. The second subparagraph of Article 2(5) of the Basic Regulation is not "as such" inconsistent with the covered agreements

4.2.1.1 The meaning and content of the provision

23. This broad discretion of Article 2.2 is established, *inter alia*, by the provision which allows investigating authorities to use "any other reasonable basis" in order to establish or adjust costs. At the same time, this provision does not "mandate" the authorities to use information from other representative markets. It only allows them to do so, if this is "reasonable".

24. Such discretion is also to be found in the second paragraph of Article 2(5). This is confirmed by the authorities' practice in cases such as *White phosphorus originating in Kazakhstan* or *Okoumé* plywood originating in China, which prove that the second subparagraph of Article 2(5) does not oblige the EU to seek production cost information outside the country of origin in all cases. This discretion is also confirmed by the judgments of the courts of the EU, where the use of the words "*may*" and "*entitled*" shows that the second subparagraph of Article 2(5) allows the investigating authorities a broad discretion in the choice of "reasonable sources of information".

4.2.1.2 The second subparagraph of Article 2(5) is not "as such" inconsistent with the covered agreements

25. A fundamental characteristic of an "as such" challenge against a "measure" is that the complaining party must establish that the measure is "necessarily inconsistent" with the covered agreements. Irrespective of whether using "information from other representative markets" is consistent with Article 2.2 of the Anti-Dumping Agreement, the second subparagraph of Article 2(5) does not "*require*" the investigating authority to use such information "*in all cases*".

4.2.2. Argentina suggests an erroneous interpretation of Article 2.2 of the Anti-Dumping Agreement

26. Neither Article 2.2.1.1 nor any other part of the Anti-Dumping Agreement provides a rule that explicitly deals with how costs should be determined when this proviso applies. Article 2(5) of the Basic Regulation properly deals with this issue in a manner which is fully consistent with the requirements of Article 2.2 of the Anti-Dumping Agreement.

27. First, the notion of "cost of production in the country of origin" is a legal one, but establishing the cost of production in a particular case involves determinations of fact. Such determinations are made with the aid of evidence. It cannot be excluded that evidence relating to that determination might originate in other countries. Second, the possibility of using "any other reasonable method" in Article 2.2.2(iii) implies that Article 2.2, as a whole, does not impose an absolute prohibition on the use of data on the cost of production from countries other than the country of origin, where the conditions of production and sale are not in the "ordinary course of trade".

5. ARGENTINA'S CLAIMS REGARDING THE ANTI-DUMPING MEASURES ON BIODIESEL

5.1. Argentina's Claim in Relation to the Use of the Records of the Investigated Companies

5.1.1. The application of a measure that is found to be "as such" inconsistent with the covered agreements.

28. Argentina asserts that a finding that a provision is "as such" inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement would necessarily lead to a finding that the application of that provision in a particular situation is also inconsistent with Article 2.2.1.1. Given that the second subparagraph of Article 2(5) of the Basic Regulation is not "as such" inconsistent with Article 2.2.1.1, the issue raised by Argentina is moot in the present case.

5.1.2. The alleged "improper establishment of facts"

29. In regard to trade, the notion of "distortion" implies an interference with the normal operation of the market. The distortion identified in the Definitive Regulation is that caused by the existence of an export tax on soya beans and oil. This tax had the consequence that the prices of these products in the domestic market were lowered, and that effect in its turn had consequences for those companies that used these products.

30. The fact that, within the limits set by the state, market forces continue to operate, does not diminish or cancel the distortive effect on trade of an export tax. Likewise, the fact that domestic prices follow the trends in international prices is irrelevant in so far as the distortion accounts for the difference between those prices.

31. As far as Argentina's assertions in relation to the "main raw material" for biodiesel are concerned, the EU notes that it based its calculation of the biodiesel's cost of production and normal value on the cost of soya bean already at the provisional stage and that the Argentine companies under investigation had not expressed any concern or other comment, following disclosure.

5.1.3. The interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement

5.1.3.1 The text of Article 2.2.1.1 of the Anti-Dumping Agreement

32. Argentina repeats its main thesis that Article 2.2.1.1 allegedly refers to the "expenses actually incurred by the producer". First, Article 2.2.1.1 does not include the words "expenses actually incurred by the producer". Second, Article 2.2.1.1 uses the terms "costs associated with the production and sale of the product". The word "associated" has a broader meaning than the words "actually incurred" and captures a broader range of relations between the "costs" and the "production".

33. Third, Argentina is wrong when it asserts that there is no relation between the word "costs" and the notion of "prices", for purposes of Article 2.2.1.1. The Panel in *EC – Salmon* has confirmed that the ordinary meaning of the terms "cost of production" may be considered to be the "prices to be paid for the act of producing".

34. Fourth, the Panel Report in *EC – Salmon* confirms that the "cost of production" is linked to the prices *to be paid* for the act of producing. By using the terms "to be paid", this Panel finding confirms that the costs captured by Article 2.2.1.1 are not the expenses that have actually been incurred by the producer. Fifth, Article 2.2.1.1 uses the terms "costs associated to the production", which the Panel in *EC – Salmon* has interpreted as the prices to be paid *for the act of producing*. The provision does not include the terms "incurred by the producer". Sixth, in *US – Softwood Lumber V,* both the Panel and Appellate Body accepted that an investigating authority is entitled to find that the company records do not "reasonably reflect costs", where they do not reflect prices charged at "arms-length" transactions.

5.1.3.2 The context of Article 2.2.1.1

35. Argentina asserts that Article 2.2.1.1 does not require the costs to be "reasonable", but that it requires, instead, that "unreasonable" costs be "reasonably" reflected in the company records. The EU has already shown that the Panel Report in *Egypt – Steel Rebar*, to which we refer, contradicts Argentina's assertion.

36. Article 2.2.1.1 does not impose any obligations on companies in relation to their accounting methods. It simply allows investigating authorities not to base their cost calculation on the companies' records, where either of the two conditions is not met. Argentina repeats the assertion that Article 2.2.1.1 deals with a "cost allocation issue". The EU has already exposed the fallacy of Argentina's assertion in the relevant section of this submission on the "as such" claim, to which we refer.

37. Argentina also seeks to use as "context" the provisions of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994. The EU has already dealt with Argentina's

interpretation of Article 2.2 of the Anti-Dumping Agreement and the issue of "country of origin" in the relevant section of this submission on the "as such" claim under Article 2.2 of the Anti-Dumping Agreement and we refer to that section.

38. Article 2.2.2 conditions the use of the "actual data pertaining to production" costs on the existence of *ordinary course of trade*. This supports the EU's thesis that it was not obliged to use the "actual data pertaining to production and sales" of biodiesel as recorded in the investigated companies' accounts, because the production and sale of biodiesel were not in the ordinary course of trade. Moreover, where the amounts cannot be determined "on this basis", then Article 2.2.2(iii) allows the investigating authorities to use "*any other reasonable method*". It is noted that Article 2.2.2(iii) does *not* impose any requirement that, in these circumstances, the data on the cost of production must be those prevailing in the country of origin.

5.1.3.3 The object and purpose of the Anti-Dumping Agreement

39. Argentina asserts that the EU's interpretation "subverts the fundamental purpose of the Anti-Dumping Agreement and uses the Agreement to address differences in price between the export price of the product concerned and international prices, instead of comparable prices on the domestic market". Argentina's assertion is wrong for a number of reasons.

40. First, the Definitive Regulation's dumping determination is not based on the difference between the export price of *biodiesel* and the international price of *biodiesel* but on the comparison between the export price of the Argentine biodiesel and the normal value of the Argentine biodiesel. Second, the Definitive Regulation found that Argentine biodiesel was dumped into the EU and, as a result of that dumping, the EU's industry suffered material injury. This is precisely the object and purpose of the WTO anti-dumping rules, as expressed in Article VI:1 of the GATT 1994.

5.2. ARGENTINA'S CLAIM IN RELATION TO "COUNTRY OF ORIGIN"

41. On the basis of the observations previously mentioned, the EU considers that Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 entitles the EU's investigating authorities to use the data that they used in order to calculate the normal value of Argentine biodiesel.

5.3. ARGENTINA'S CLAIM IN RELATION TO THE USE OF COSTS ALLEGEDLY "NOT ASSOCIATED WITH THE PRODUCTION AND SALE" OF BIODIESEL

42. The EU has already shown above that the term "associated" has a broader meaning than the words "actually incurred", or "actually paid" and that the Panel Report in *Egypt – Steel Rebar* uses the term "*pertain* to the production". Moreover, Article 2.2.1.1 mentions the costs associated *with the production*, as opposed to the expenses incurred by the *producer*. As the Panel in *EC – Salmon* has confirmed, the "costs of production" should be understood as the prices to be paid "for the *act of producing*".

5.4. ARTICLES 2.2 AND 2.2.2(III) OF THE ANTI-DUMPING AGREEMENT AND AMOUNTS FOR PROFITS

43. In setting the 15% margin of profit that the EU applied in constructing the normal value of biodiesel for Argentinian exporters, the EU was applying Article 2(3), first subparagraph, of the Basic Regulation, which follows the rule in Article 2.2 of the Anti-Dumping Agreement by specifying that a constructed normal value "shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits".

44. The EU submits that the method on the basis of which it determined the level of profits was reasonable and that the resulting margin was itself reasonable for the reasons stated below. Firstly, the figure is appropriate "on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve". Secondly, each situation must be assessed on its own merits taking into account the specific circumstances of the case. Thirdly, the figure was not out of line with that adopted in other investigations, for example that concerning biodiesel originating in the United States. Fourthly, the short and medium term borrowing rate in Argentina was around 14%, and it was reasonable to expect biodiesel producing companies to obtain a profit margin that

exceeded this level. Fifthly, biodiesel companies enjoyed a level of profit higher than 15% during the investigation period, albeit that they benefited from distorted costs. Sixthly, comparison with the target profit for the domestic industry in the absence of dumped imports is not relevant because it has a different purpose than the construction of the normal value.

5.5. ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT AND ALLOWANCES FOR PRICE COMPARABILITY

45. The EU does not argue that a constructed price can never be the subject of adjustment in order to secure a fair comparison. Furthermore, the whole of Argentina's case with regard to Article 2.4 amounts to no more than an assertion that the method adopted by the EU for constructing the normal value could not, without adjustment, result in a fair comparison. There is no attempt to set the claim in a context, or to find guidance in the factors listed in Article 2.4 as appropriate for consideration as justifying allowances for differences. Such neglect is not surprising since none of them lends any support to the argument that Argentina presents.

5.5.1. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 vis-à-vis the level of anti-dumping duties imposed

46. Argentina's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are entirely consequential on the claims that the EU has answered in the preceding paragraphs. Since Argentina has failed to establish the earlier claims these consequential claims must also fail.

5.6. ARTICLES 3.1, 3.4, 3.5 OF THE ANTI-DUMPING AGREEMENT VIS-À-VIS PRODUCTION CAPACITY, UTILIZATION OF CAPACITY AND RETURN ON INVESTMENT

5.6.1. Legal arguments and claims

47. Argentina claims that the EU's treatment of "idle" plant in the context of capacity does not accord with the meaning of that word in the phrase "utilization of capacity" in Article 3.4 of the Anti-Dumping Agreement.

48. There is no definition of "capacity" in the Agreement. In its Definitive Regulation the EU excluded "idle" plant, that is to say plant that "was not in such a state that it would have been available for use during the IP". Such plant would make no contribution to the "maximum amount or number that can be … produced", and its exclusion therefore accords with the ordinary meaning of the term "capacity".

49. The EU submits costs of relevant undertaking are taken into account when considering other factors in the list in Article 3.4, notably the factor of "actual and potential decline in … profits". "Utilization of capacity" is a factor distinct from costs and should be treated as such.

50. Whether the "idle" plants are included in the production capacity, or are excluded, the implications regarding injury are the same. In the first case the low capacity utilization is an indication of injury, in the second the closing or mothballing of plants is an indication of injury.

51. Argentina accuses the EU of not making available the "publicly available material" relating to idle capacity. There is no such obligation in any of the provisions of the Agreement invoked by Argentina in its Panel Request, and it is therefore outside of the Panel's terms of reference.

52. Argentina alleges that the presentation of data in the Definitive Regulation obstructed the arguments that the exporters wished to make about the causes of the EU's injury. However, all the data, concerning both "idle" and non-idle capacity were available to the exporters, and they were in no way inhibited from presenting arguments to the effect that the idle plants were a cause of injury. The factors listed in Article 3.4 are not exclusive.

53. Argentina also raises the issue of proper "evaluation" in regard to the issue of return on investment which it alleges was based on a different dataset to that used for production capacity. The EU has already shown that this issue is outside the terms of reference of the Panel.

54. Argentina argues that an assessment of "utilization of capacity" for the purposes of Article 3.4 that is based on a definition of capacity that is inconsistent with that provision, and was

not based on positive evidence, etc., in some way disqualifies that assessment from contributing to a finding of causation vis-à-vis the utilization of capacity. However, Argentina cannot shortcut the requirements of Article 3.5, which addresses the issue of causation, by invoking similar concepts in Article 3.4.

55. Argentina also alleges that the EU gave inadequate consideration to the issues of low capacity utilization and overcapacity. The data shows that the EU industry installed more capacity than there was demand in the EU, and possibly more capacity than EU demand plus export demand. However, the data available for the Definitive Regulation showed that capacity utilization, although low, was actually increasing and consequently could not have been a cause of injury in the sense of Article 3.5.

56. Argentina also alleges that the capital intensive nature of the biodiesel industry aggravates its sensitivity to overcapacity as the cause of injury. However, this capital intensive nature is a constant feature of the industry, whereas the injury to the EU industry has not been constant but has developed over the period of investigation.

5.7. Articles 3.1 and 3.5 of the Anti-Dumping Agreement vis-à-vis long-term commercial strategy

57. Argentina argues that the mere fact that imports by the EU industry from Argentina and Indonesia aggravated the low capacity utilization rate invalidates the conclusion that these imports did not break the causal link between the dumped imports and the injury to the EU industry. The fact that the chain of causation was indirect does not mean that it did not exist. Consequently, this was not an injury caused by an "other factor" which, under Article 3.5, need to be separated and distinguished.

5.8. Articles 3.1 and 3.5 of the Anti-Dumping Agreement vis-à-vis double counting

58. The evidence in question (Exhibit ARG-37, p. 35) concerned only one country, France, and came from only one producer, Diester. The evidence presented by Argentina itself indicates that the fall in production attributed to the French scheme in year 2011 was expected to be more than cancelled in 2012. The Definitive Regulation notes the financial performance of the sampled EU producers, which included Diester, declined only after the ending of the scheme.

59. Argentina presents no evidence of detrimental consequences of double counting in other EU Member States, and, as it explains in the Definitive Regulation, the EU could find none.

5.9. Articles 3.1 and 3.5 of the Anti-Dumping Agreement Vis-à-vis Vertical Integration, etc.

60. Almost all of the features identified by Argentina are constant in their nature and effects and therefore do not qualify as "causes" of injury within the meaning of Article 3.5. They cannot therefore be responsible for the deterioration in the condition of the industry which the EU has determined constitutes "injury" within the meaning of Article 3.4.

61. Even if consideration is given to these factors Argentina never explains why vertical integration is a more efficient way of operating in this industry. Nor is it clear whether the advantage is claimed because of common ownership (which in any case does not extend to growers of beans) or geographic proximity.

6. Conclusion

62. Argentina has failed to make a *prima facie* case on any of its claims. The EU has shown that all of the claims pursued and developed in Argentina's first written submission are unfounded and based on erroneous interpretations of the covered agreements. The EU respectfully requests the Panel to reject all of Argentina's claims.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INTRODUCTION

1. The European Union's second written submission focuses on the issues raised by Argentina in its Opening Statement and in its Replies to the Panel's Questions during the first substantive meeting with the Panel.

2. TERMS OF REFERENCE

2. During the First Hearing, Argentina confirmed that it has abandoned the claims challenged by the EU as being outside the Panel's terms of reference. Argentina has also abandoned the claims against "implementing measures and related instruments" and "related measures and implementing measures". This confirms the consequences described in paragraph 13 of the European Union's first written submission.

3. PRELIMINARY ISSUES

3.1. THE CLAIMS UNDER ARTICLE 2.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1 OF THE GATT

3. Argentina accepts in essence that Article 2.1 of the Anti-Dumping Agreement (ADA) and Article VI:1 of the GATT cannot serve as a legal basis for "distinct" claims in WTO dispute settlement proceedings. Both parties agree on this point. However, Argentina asserts that its claims under these two provisions are "consequential" and dependant on its claims under Articles 2.2 and 2.2.1.1 of the ADA.

4. First, the EU considers that the reasoning of the Panel in *EU – Footwear* supports the rejection of Argentina's corresponding claims in the present case. In that case the Panel argued that "under China's approach all dumping related claims could be brought under Article 2.1 alone, supported by the assertion that the obligations asserted are 'created' elsewhere". Importantly, the Panel also rejected China's claims under Article VI:1 of the GATT, stating that its analysis on the claims under Article 2.1 of the ADA also applied.

5. Second, Argentina's assertion that its claims under these two Articles are "consequential" and dependant on other claims under different legal provisions essentially constitutes a request to the Panel to exercise judicial economy on these claims. Since Argentina recognizes that these claims do not aim at protecting some specific and distinct legal right or interest, the EU doubts whether raising them is compatible with the Members' obligations under Article 3.10 of the DSU.

6. Third, there is nothing in Argentina's Panel Request that would indicate that Argentina was making some claims as "distinct" and others as "consequential". Indeed, the references to Article 2.1 of the ADA and Article VI:1 of the GATT seem to be on an equal footing with the references to other Articles in Argentina's Panel Request.

7. The conclusion is that Argentina's new assertions on the "consequential" nature of its claims under Article 2.1 of the ADA and Article VI:1 of the GATT must be rejected for lack of proper legal basis.

8. Moreover, in the present case both parties agree that there were no sales of biodiesel in Argentina in the ordinary course of trade. However, in its response Argentina fails to discuss the importance of the terms "in the ordinary course of trade" in Article 2.1 and the terms "when there are no sales of the like product in the ordinary course of trade" in the first line of the chapeau of Article 2.2. As a result, Argentina's statement fails to rebut the EU's objection that the facts of this case fall outside the scope of Article 2.1.

9. The conclusion is that Argentina's claims under Article 2.1 of the ADA and Article VI:1 of the GATT are manifestly unfounded in law and must be summarily rejected by the Panel.

3.2. THE CLAIMS UNDER ARTICLE 2.4 AND ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

3.2.1. Argentina's claims fall outside the scope of these provisions

10. The EU argues that Article 2.4 does not apply to the investigating authority's establishment of normal value and supports its interpretation with the Panel Report in *Egypt – Steel Rebar*. In that case, the Panel found that Article 2.4 "refers to the comparison of export price and normal value; i.e., the calculation of the dumping margin" and has to do "not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the *nature of the comparison* of export price and normal value".

11. In the case at hand, Argentina considers that investigating authorities have failed to calculate properly the product's normal value, resulting in a comparison between the normal value and the export price that was not "fair" (hence the alleged violation of Article 2.4) and a calculation of the "wrong" dumping margin. According to Argentina, the "wrong" dumping duty calculated was higher than the "correct" dumping margin (hence the alleged violation of Article 9.3).

12. Therefore, Argentina is challenging the *calculation* of the normal value itself (which falls within the scope of Article 2.2) and not the "*nature of the comparison*" between normal value and export price, which is the subject matter of Article 2.4, or the comparison of the anti-dumping duties with the dumping margin, which is the subject matter of Article 9.3. Argentina's claims consequently fall outside the scope of these articles.

13. The EU draws further support for this view from the Panel Report in *EC – Tube or pipe fittings*. In that case, Brazil argued that the EU had used some "wrong" data when constructing normal value and, consequently, had calculated the "wrong" normal value in breach of Articles 2.2 and 2.2.2 of the ADA. Brazil also argued that the EU had "breached the requirement to make a fair comparison between normal value and export price", in violation of Article 2.4. Given the similarity of these claims with the present case, the EU respectfully submits that the Panel should reject Argentina's claims under Article 2.4.

14. In the specific circumstances of the present case, the rejection of Argentina's claims under Article 2.4 necessarily leads to the rejection of Argentina's claims under Article 9.3 because Argentina's case lies solely on the alleged "incorrect" calculation of the dumping margin.

3.2.2. Argentina has failed to make a prima facie case

15. First, Argentina should have shown that the definitive anti-dumping duties are higher than the definitive dumping margins. Instead of that, Argentina compares the *definitive* anti-dumping duties with the *provisional* dumping margins.

16. Second, in a Reply to a Panel's Question, Argentina reproduces an excerpt from the Panel Report in *EU – Footwear (China)* which is not relevant for the present case, because it addressed a very different situation and a very different claim. Indeed, China had only argued that Article 2.4 imposed obligations on the investigating authority when it was constructing normal value whereas Argentina asserts that its Article 2.4 claim does not relate to the construction of normal value.

17. Moreover, Argentina refers to that excerpt out of context. The sentence in the Panel Report immediately following Argentina's excerpt states that "these allowances can only be made *after* the normal value and the export price have been established".

18. Third, the Panel Report in *EU-Footwear (China)* actually supports the EU's position in the present case. That Panel Report confirms that Article 2.4 allows investigating authorities the discretion to make any "due allowances" that they consider necessary and to follow any "methodology" that they consider appropriate.

19. These Panel findings are in line with the Panel Report in *EC – Tube or Pipe Fittings* which noted "the absence of any precise textual guidance in the Agreement concerning how adjustments

are to be calculated", as well as the "absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison".

20. In the present case, Argentina has failed to show that the EU's investigating authorities have exercised their discretion in an arbitrary manner when comparing the normal value with the export price and establishing the dumping margin. This is an additional reason for which Argentina's claims under Article 2.4 must be rejected.

4. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS "AS SUCH" CLAIMS

4.1. INTRODUCTION

21. The EU has argued that, in order to make a prima facie case on its "as such" claim under Article 2.2.1.1 and Article 2.2 of the ADA, Argentina had to establish *inter alia* (a) the "precise content" of the measure that it challenges; and (b) that the challenged "measure" constitutes a binding requirement that requires the investigating authorities to apply it in all cases in a manner which is inconsistent with the covered agreements.

4.2. THE REQUIREMENT TO ESTABLISH THE "PRECISE CONTENT" OF THE WRITTEN "RULE OR NORM"

22. In its recent Report in *Argentina-Import Measures*, the Appellate Body found that when bringing an "as such" challenge against a "rule or norm", the complaining party must clearly establish, *inter alia*, the "precise content of the challenged measure, to the extent that such content is the object of the claims raised".

23. In the present case, Argentina has confirmed that it challenges "as such" a written piece of legislation, namely the second sub-paragraph of Article 2(5) of the Basic Regulation. However, Argentina has failed to establish the "precise content" of that written piece of legislation.

24. First, the EU showed that Argentina has confused the scope of the first sub-paragraph of Article 2(5) with the scope of the second sub-paragraph of Article 2(5) of the Basic Regulation. This is confirmed by the evidence that Argentina itself has put on the record of the case such as the judgment of the General Court in *Acron*. The judgments of the EU's courts clearly show that the second subparagraph of Article 2(5) does *not* have the "precise content" asserted by Argentina.

25. Moreover, the EU's authorities were already making the same determinations with respect to company records on the basis of the first subparagraph of Article 2(5) at a time when the second subparagraph of Article 2(5) did not even exist. A good example of this is the Regulation concerning *Aluminium foil originating in China and Russia* which included the legal test found in the first sentence of Article 2.2.1.1 of the ADA and the first subparagraph of Article 2(5) of the Basic Regulation. Additionally, this regulation also included the term "reliable", used by the Panel in *US – Softwood Lumber V* to describe the meaning of the terms "reasonably reflect costs" in Article 2.2.1.1 of the ADA.

26. Second, Argentina itself has acknowledged that the "measure" it challenges is not found in the text of the second subparagraph of Article 2(5). Instead, it challenges the EU's application of Article 2(5) of the Basic Regulation only in certain specific circumstances, namely where "the prices of the inputs have been found to be artificially low or abnormally low because of an alleged distortion". Therefore, Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation.

27. In *US – Carbon Steel (India)*, India presented similar claims. However, the Appellate Body rejected India's claims and found that "it is not clear why a number of instances of the application of the measure should in this case conclusively *establish the meaning of the measure at issue in general*, which in this case is confined to [the defending party's legislation]". In the present case Argentina has also failed to establish the meaning of the second subparagraph of Article 2(5) *in general*. Consequently, this prevents Argentina from making a *prima facie* case on any of its "as such" claims, including under both Article 2.2.1.1 and 2.2 of the ADA.

28. Third, Argentina has offered a number of different and inconsistent descriptions of the "content" of the measure that it is challenging both under Article 2.2.1.1 and under Article 2.2 of the ADA. For example, in paragraph 25 of its Opening Statement, Argentina asserts that the second subparagraph of Article 2(5) offers the authorities *discretion* and does not oblige them to act in any specific way. In contrast, in paragraphs 54, 68, 70 and 72 of this statement, Argentina asserts that "there is *no discretion*" and that the provision is mandatory.

29. The consequence is that Argentina fails to establish the "precise content" of the second subparagraph of Article 2(5). In these circumstances, it is impossible for the Panel to understand precisely what is the "matter" before it.

30. When the Panel prompted Argentina to show the source of these varying descriptions in the text of the second subparagraph of Article 2(5), Argentina failed to do so. Indeed, its reliance on Recital 4 of Regulation 1972/2002 is misplaced. This Recital cannot be used as a source of interpretation of *all* the situations covered by Article 2(5) of the Basic Regulation because it refers to "particular market situation" and makes no reference to situations where there are "no sales in the ordinary course of trade", which is the situation of the present case. Also, the first sentence of Recital 4 clearly shows that the determinations of whether the records "reasonably reflect costs" were already being made under the first subparagraph of Article 2(5), which already existed at the time of the introduction of Recital 4.

31. Lastly, the European Union has provided examples of investigations to demonstrate that the second subparagraph of Article 2(5) does not oblige the investigating authorities to seek the cost-information outside the country of origin in all cases. In its response, Argentina argues that these examples are not relevant, because they do not "concern a situation in which the prices were found to be abnormally low or artificially low because of a distortion". This response confirms that Argentina does not challenge "as such" the second subparagraph of Article 2(5), but the purported application of that provision in certain specific examples.

32. The conclusion is that Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation (or in the words of the Appellate Body the "meaning" of the second subparagraph of Article 2(5) "*in general*") for purposes of its "as such" claims under either Article 2.2.1.1, or Article 2.2 of the ADA.

4.3. THE REQUIREMENT TO ESTABLISH THAT THE CHALLENGED MEASURE MANDATES CONDUCT THAT IS NECESSARILY INCONSISTENT WITH THE COVERED AGREEMENTS

33. In *US – Carbon Steel (India)*, India had put forward two alternative claims. First, that the covered agreement did not allow the defending party's investigating authorities to take certain actions. Second, that although the measure at issue provided that a specific administrative action may be taken (i.e. "an inference may be drawn"), it more accurately meant that in all cases the defending party's investigating authorities *necessarily* took that action. In support of its claims, India relied on the practice developed by the defending party's authorities but did not challenge "as such" that practice.

34. In relation to India's first claim, the Appellate Body rejected it, noting that the measure was framed in "permissive terms". In relation to India's second claim, the Appellate Body found that the challenged measure was "a discretionary measure rather than a binding requirement" to act in a certain way. The Appellate Body also found that the "practice" identified by India was not required by the measure, but was rather developed pursuant to the discretion afforded by the measure. This meant that the "practice appeared to be distinct and separate from the measure at issue" and was not necessarily applied in all instances.

35. In the present case, Argentina originally claimed that the second subparagraph of Article 2(5) "establishes a rule which is mandatory". However, according to its Opening Statement Argentina appears to have changed its claim. It now advances a new theory, pursuant to which "even if" the second subparagraph of Article 2(5) is discretionary and not mandatory, "the fact that the measure provides for the possibility" to act in a certain way "will necessarily be inconsistent with Article 2.2.1.1" of the ADA. Argentina has not provided further explanation about this new theory. Dealing with a similar situation in the case *EC – Fasteners*, the Appellate Body found that belated modifications of the nature of the complaining party's claims give rise to due process issues.

36. In any event, this modification confirms that Argentina has failed to establish the "precise content" of the second subparagraph of Article 2(5) of the Basic Regulation and, in contrast, offers two contradictory theories of that "content". The EU respectfully submits that the Panel should reject the "as such" claims of Argentina in the present case, just like the Appellate Body rejected India's "as such" claims in *US – Carbon Steel (India)*.

37. Argentina's first theory is that "the use of the verb 'shall' in Article 2(5), second subparagraph is evidence of the mandatory nature of the measure". Like India *US – Carbon Steel (India)*, Argentina relies on the EU's purported "practice" but does not make a claim that the "practice" itself constitutes a WTO-inconsistent measure.

38. The Panel should apply the Appellate Body's legal test in *US – Carbon Steel (India)*, namely to assess whether the second subparagraph of Article 2(5) of the Basic Regulation is "a discretionary measure", or "a binding requirement" to act in the same way in all cases.

39. Moreover, the Panel should also take into consideration the General Court judgments put on the record by Argentina and showing that, just like in *US – Carbon Steel (India)*, the exercise of the investing authorities' discretion is subject to "rules and disciplines separate from" the second subparagraph of Article 2(5), namely the general principles of the EU administrative law.

40. The Panel should conclude that Argentina has failed to show that the second subparagraph of Article 2(5) "mandates" the investigating authorities to act inconsistently with Article 2.2.1.1, or Article 2.2 of the ADA. Consequently, Argentina's "as such" claims must be rejected.

41. Argentina's new second theory is that the "mere fact that Article 2(5), second subparagraph, provides for the possibility [to find that records do not reasonably reflect costs because they are artificially low or abnormally low] would necessarily render the measure inconsistent with Article 2.2.1.1. The same reasoning applies to Argentina's claim under Article 2.2".

42. If the Panel decides that it has the authority to assess this new belated theory, then the Panel should apply the legal test of *US – Carbon Steel (India)*, namely to "assess whether, pursuant to the authorisation contained in the text of the measure, the investigating authority is *required* to act inconsistently" with the covered agreements.

43. In addition, the Panel should also take into consideration the fact that there have been examples where the authorities have used domestic sources from the country of origin (like in the case of *Okoume Plywood Originating in China*), or the accounts of the parent company (like in the case of *White Phosphorus Originating in Kazakhstan*) in order to establish the "reasonable" costs. This evidence shows that the authorities' use of some "other reasonable basis" depends on the particular circumstances of each case. This means that the second subparagraph of Article 2(5) does not *require* the investigating authority to act inconsistently with the covered agreements.

44. The Panel shall conclude that Argentina's "as such" claims must be rejected.

5. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1

5.1. ARGENTINA'S MAIN THESIS

45. Argentina's claim is premised on the theory that the terms "reasonably reflect the costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 of the ADA mean that the records should include the expenses actually incurred by the company under investigation. Argentina's theory is that the costs do not need to be "reasonable" themselves, but that the records need to reflect "reasonably" the expenses actually incurred.

46. Argentina has confirmed its claims and the fact that the first sentence of Article 2.2.1.1 relates exclusively to a cost allocation issue, in its Replies to the Panel's Questions. Argentina also provided a list of the types of situations that, in its view, would allow an investigating authority to disregard the recorded costs; all of them relate to the allocation of costs that have actually been incurred.

47. It is important to note that contrary to the view of certain Third Parties, Argentina's claim does not entertain the possibility of disregarding the recorded costs in situations where there have been intra-group transactions on a non-arms' length basis.

48. Therefore, Argentina has confirmed that its claim is premised on a specific legal interpretation of Article 2.2.1.1: (a) that the proviso on "reasonably reflect the costs" relates exclusively to the records and not the costs, i.e., that the costs themselves do not need to be reasonable; (b) that the records meet the condition of the proviso where they report the costs that have actually been incurred by the investigated company; (c) that the proviso of Article 2.2.1.1 relates exclusively to issues of proper allocation of the costs that have actually been incurred by the investigated company; and (d) that investigating authorities can *never* disregard or adjust the costs that have actually been incurred by the investigated company for other reasons, even where these costs are distorted.

49. This means that, in order to make a *prima facie* case on its "as such" claim, Argentina must establish that this is indeed the proper interpretation of Article 2.2.1.1. This also means that the Panel is not required to assess whether the second subparagraph of Article 2(5) of the Basic Regulation is consistent with some other interpretation of Article 2.2.1.1 of the ADA.

5.2. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

50. First, the EU notes that the "legislative history" leading to the adoption of Article 2.2.1.1 actually contradicts: (a) Argentina's assertion that the proviso relates only to cost allocation issues; and (b) Argentina's excessively restrictive interpretation of the terms "reasonably reflect the costs". Therefore, Argentina fails to substantiate its interpretation of Article 2.2.1.1.

51. Second, Argentina's discussion of the Panel Report in *US – Softwood Lumber V* is not convincing because Argentina focuses on a statement of the Panel which it reads out of context. A more detailed analysis of the Panel's findings shows that they actually contradict Argentina's claims in the present case. Indeed, the Panel's finding was that Article 2.2.1.1 does not *mandate*, or *require* investigating authorities to reject the recorded costs. In contrast, the Panel did *not* find that Article 2.2.1.1 does not *allow* investigating authorities to disregard the recorded costs, where they consider that they are not "reasonable" because they do not reflect market values. Therefore, the statement of the Panel, to which Argentina refers, has limited scope: the Panel finds that the investigating authorities are not *obliged* to treat the recorded costs in a certain way; but the Panel does *not* find that the authorities are not *allowed* to disregard the recorded costs as "unreasonable", where these costs do not reflect market values.

52. Quite to the contrary, the analysis of the entire reasoning of the Panel confirms that Article 2.2.1.1 *allows* authorities to disregard the recorded costs, where they do not reflect market values. The Panel expressly acknowledged that the recorded costs would be "reasonable" for purposes of Article 2.2.1.1, only if it could be shown that they corresponded to market prices.

53. In the case of Tembec, the investigating authority followed a methodology which used the "market values" as "benchmark" and compared the values recorded in the books with market values in order to determine whether the recorded values were "reasonable" for purposes of Article 2.2.1.1. The Panel's treatment of this methodology it important for the present case because it confirms that the notion of "reasonably" in the first sentence of Article 2.2.1.1 is not limited only to the records, but also covers the recorded costs and values. It also confirms that investigating authorities can use market prices as "benchmarks" in order to confirm the "reasonableness" of the recorded costs and values. The same conclusions are drawn from the Panel's assessment of the West Fraser investigation which accepted that "an arm's length test" may be carried out in order to determine whether these costs are "reliable", and that the recorded costs may be adjusted accordingly. The Panel's approach was confirmed by the Appellate Body on appeal.

54. The conclusion is that the Panel Report in *US – Softwood Lumber V* directly contradicts the main thesis of Argentina's challenge and leads to the rejection of Argentina's claims under Article 2.2.1.1 of the ADA.

55. Third, Argentina's argumentation is based on the theory that a dumping determination cannot rest on "external factors unrelated to the exporter or producer". However, Article VI of the GATT does not limit the notion of dumping only to situations that arise out of the exporters' "voluntary" pricing behaviour. Quite to the contrary, the notion of dumping also covers situations that are created by the action of governments and are, in that sense, "exogenous" or "external" to the "intention" of the exporters.

56. This interpretation is supported by considering the Note 2 *Ad* Article 6 paragraphs 2 and 3 (i.e. "Multiple currency practices can in certain circumstances constitute a subsidy to exports […] or *can constitute a form of dumping* […] which may be met by action under paragraph 2 [of the Article VI of the GATT]. By "multiple currency practices" is meant practices by governments or sanctioned by governments"), with due regard to the negotiating history of the Note and the context in which it appears. Its purpose is filling out the definitions contained in those provisions.

57. This has two important implications. Firstly, the text of the GATT expressly provides that government action can lead to a situation of dumping and that importing countries may impose anti-dumping duties. The consequence is that Argentina's legal interpretation of Article 2.2.1.1 fails. Given that this erroneous legal interpretation of Article 2.2.1.1 is the basis for both (a) the "as such" claim against the second subparagraph of Article 2(5) of the Basic Regulation; and (b) the claim against the specific anti-dumping measure on biodiesel, Argentina cannot make a *prima facie* case on either of these claims.

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

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

60. Fourth, Argentina makes certain inconclusive statements in relation to the Panel Report in *EC – Salmon*. Firstly, Argentina fails to address the Panel's choice of words, contradicting its theory that Article 2.2.1.1 restricts the notion of "reasonably reflect costs" only to those that have actually already been incurred by the investigated company.

61. Secondly, Argentina asserts that the price used by the EU's investigating authorities "is clearly not the price to be paid by the Argentinean producers for domestic purchases of soybeans in Argentina". This contradicts Argentina's previous acknowledgements regarding the "price to be paid" by the Argentinian producers for domestic purchases of soya beans, in the absence of the government measure that distorts the price of soya beans.

62. It is noted that the information provided by Argentina in its Replies to the Panel's Questions confirms that the export tax on soya beans indeed constitutes a mechanism for distorting the price of soya beans. Argentina has also confirmed that the reason for which it determines this "reference FOB price" is to "monitor possible pricing *divergences* in the local market. The effect of that mechanism is to ensure that the resulting domestic price for soya beans is below the domestic price that would have prevailed in the absence of the export tax.

63. Therefore, the way Argentina implements the export tax on soya beans constitutes, is in essence, a mechanism of intervention on the domestic price of soya beans.

64. Fifth, Argentina makes some statements in relation to the terms "associated with the costs" in Article 2.2.1.1 of the ADA, which are not convincing. Indeed, Argentina qualifies the "reference FOB price" as a "hypothetical benchmark price" and asserts that the FOB reference price is "not a 'real' price in the sense that it is an average that is used for the calculation of the export tax.

Argentina thus contradicts its previous acknowledgement that in the absence of the export tax, the domestic price of soya beans would have been the "reference FOB price" less the transaction and fobbing costs.

65. In the present case, the investigating authorities took as a basis the FOB reference price (which the Government of Argentina itself had determined) and followed exactly the methodology that Argentina itself acknowledges would lead to the calculation of the domestic soya bean prices in the absence of the export tax.

66. The conclusion is that Argentina's interpretation of Article 2.2.1.1 of the ADA is erroneous. Consequently, Argentina fails to make a *prima facie* case on the claims that it bases on Article 2.2.1.1.

6. ARGENTINA SUGGESTS AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

67. First, Argentina's main assertion is that the distinction between costs and evidence pertaining to the determination of costs suggested by the EU is "artificial" and has no basis in the text or the context of Article 2.2. However, the ADA itself makes such a distinction, when it contains a specific Article entitled "Evidence"(i.e., Article 6). Therefore, Argentina's assertion is unfounded.

68. Second, Argentina advances various arguments on the interpretation of Article 2.2.2(iii) of the ADA. Its main argument is that "the use of data other than that of the country of origin must explicitly be provided for" and that Article 2.2.2 of the ADA supposedly "does not provide for a similar exception or authorisation for the determination of the cost of production". Argentina also asserts that "Article 2.2.2 lays down the criteria for determining the reasonable amounts of SG&A and for profits only and not for the cost of production". As well as "the fact that Article 2.2.2(iii) refers to any other reasonable method for the determination of SG&A and profits can certainly not be applied to the determination of the cost of production".

69. Argentina's arguments are not convincing because the chapeau of Article 2.2.2 and Article 2.2.1.1 use the same terms to refer to the same production and sales costs. There is no reason for which the "any other reasonable method" of Article 2.2.2(iii) would relate only to the production and sales costs of the chapeau of Article 2.2.2, but not the same production and sales costs mentioned in Article 2.2.1.1.

70. Third, despites questions from the Panel, Argentina has failed to explain how an investigating authority could determine costs in a situation where there are no usable data from the country of origin.

71. Consequently, Argentina has failed to substantiate its interpretation of Article 2.2 and has failed to make a *prima facie* case on the claims that it bases on this provision.

7. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS CLAIMS UNDER ARTICLE 2.2.1.1 AND ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AGAINST THE ANTI-DUMPING MEASURE ON BIODIESEL

72. Argentina has failed to show that the prices used by the EU's investigating authorities were from "outside the country of origin". Argentina has simply asserted that "the EU did not use the domestic price of soybeans" and that "the EU failed to construct normal value on the basis of the cost of production in the country of origin".

73. The EU considers that, the prices used by the investigating authorities were from the country of origin and reflected the cost of soya beans that Argentine producers of biodiesel would have to incur, in the absence of the export tax.

74. Consequently, Argentina fails to make a *prima facie* case on its claims against the anti-dumping measure on biodiesel under Article 2.2 of the ADA, irrespective of whether that provision allows the use of evidence from outside the country of origin, or not.

8. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS CLAIMS IN RELATION TO PROFITS

75. In its Replies to the Panel's Questions, Argentina appears to draw a distinction between the "reasonable method" of Article 2.2.2(iii) and the figure of profits to be established. Argentina notes that Article 2.2.2(iii) does not "use the terms 'any reasonable amount'" and, on that basis, Argentina appears to assert that the profit figure does not need to be "reasonable", but that the methodology must be "reasonable". This assertion that is clearly wrong. The chapeau of Article 2.2 refers to a "reasonable amount for administrative, selling and general expenses and for profits".

76. In any event, the methodology followed by the investigating authorities in the present case closely resembles the methodology followed by the US authorities and approved by the Panel in *US – Softwood Lumber V*, albeit in order to calculate a different cost item. This is clearly a "method" for the calculation of the profits that is "reasonable".

77. In these circumstances, the EU submits that the Panel should reject Argentina's claim, just as the Panel rejected Canada's "*post hoc* rationalisation" objections in *US – Softwood Lumber V*.

9. ARTICLE 3 CLAIMS

78. Argentina persists in accusing the EU of having adopted the wrong definition of capacity. In the provisional and definitive Regulations the EU described the state of the various EU biodiesel producing facilities, and gave a clear explanation of the criterion it applied in assessing utilisation of capacity. While rejecting the EU's explanation Argentina has quietly abandoned its own criterion of capacity based on the notion of what a plant was "designed to produce". Instead, it proposes a new criterion of "potential" for production. Its suggestion that the negotiating history contributes to the interpretation of the text lacks all conviction, and trails off into platitude.

79. Argentina's only interest in the data on "capacity utilisation" is to proceed to the further step of identifying it as an "other factor" cause of injury. During the investigation the exporters suggested that the injury was caused through over-expansion. However, the evidence obtained by the EU and Argentina itself acknowledges that what it calls the "enormous overcapacity" is "continuous" and "existed in 2009", i.e. throughout the period considered. To the contrary, the EU believes that capacity utilisation is an indicator of the level of efficiency at which an industry is operating.

80. Argentina again accuses the EU of failing to make an objective assessment in its evaluation of production capacity and utilisation of capacity. The best answer that the EU can give is to ask the Panel to examine the careful justification for its conclusions that was provided by the EU, in particular in the Definitive Regulation at Recitals 130 to 133, and 161 to 171. These passages speak for themselves.

81. On the issue of causation, Argentina's argument hypothesises the "total elimination of imports originating in Argentina and Indonesia" as compared to the EU volume of production. The EU does not see what would be learnt from such an exercise. Indeed, the aim of the causation analysis, in situations where there are said to be "other factors", is to separate and distinguish the various causes.

82. Argentina suggests that these imports and the anti-dumping proceedings are being choreographed by multinational companies for ends of their own. It means that corporate groups "might have decided that their interests were better served by activating trade defence mechanisms in the European Union". Firms producing in the EU are, regardless of ownership, in principle entitled to the remedies provided by the anti-dumping legislation if the conditions set out there are satisfied. The idea that a firm might see an advantage in having its own goods subjected to anti-dumping duties seems somewhat far-fetched. Furthermore, the EU (consistent with Article 4.1(i) of the ADA) has already excluded three producers from the definition of the EU industry because the high level of their imports from Argentina.

83. The EU maintains that Argentina's claim that the EU, when examining injury in accordance with Article 3.4 of the ADA, failed to properly consider the factor 'return on investment' is outside the Panel's terms of reference because it was not mentioned in the Panel Request. The EU supports its contention referring to the Appellate Body Report *China – Raw Materials* in which the

claimants "failed to present the legal basis for their complaints with sufficient clarity to comply with Article 6.2 of the DSU".

84. The importance of examining each of the factors listed in Article 3.4 of the ADA has been stressed by the Appellate Body in *Thailand-H-Beams*. There are fifteen of these factors. Clearly it would not be sufficient for the panel request to merely state that they had not been properly examined without indicating which factors in particular the failure lay.

85. Argentina's reference to the Appellate Body's report in the *Wheat Gluten* case on the issue of "continuing" conditions has no bearing on the point that the EU has made. Rather it addresses the timing of injury caused by various factors. The EU makes provision for such issues of timing to be taken into account by tracking developments in the condition of the domestic industry, and the potential causes of injury, over a "period considered" of three and a half years, ending in the dumping "investigation period" of one year. It is just this approach that enables the EU to respect the obligation to separate and distinguish the various factors that may be causing injury. In particular, it permits the EU to distinguish those factors that are changing from those that are constant.

10. CONCLUSION

86. Argentina has failed to make a *prima facie* case on any of its claims. The European Union respectfully requests the Panel to reject all of Argentina's claims.

ANNEX C-3

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN UNION
AT THE FIRST MEETING OF THE PANEL

1. INTRODUCTION

1. The opening statement of the EU will focus on some of the issues raised by certain Third Parties in their submissions.

2. THIRD-PARTY SUBMISSIONS REVEAL BROADER CONSENSUS ON CERTAIN ISSUES

2. A number of Third Parties, in particular the United States, Australia and Turkey, have expressed views that are very close to the legal interpretations and arguments put forward by the EU in its First Written Submission. This is also partially the case for Third Parties that have generally supported Argentina's claims like China. The conclusion that the EU draws from the submissions of the Third Parties is that there is broad consensus that, in principle and in certain circumstances, Article 2.2.1.1 allows investigating authorities to disregard company records, where the costs recorded are not reasonable. There is also broad consensus that, in principle and in certain circumstances, Article 2.2 allows the authorities to use evidence from outside the country of origin in order to calculate the cost of production in the country of origin.

3. However, there seems to be a disagreement on which are the "certain conditions" that must be met, for these principles to apply. On that regard, the EU stresses that Article 2(5) of the Basic Regulation does not allow "unfettered discretion" to its authorities, which are required to act reasonably and are subject to judicial control. In any case, the EU argues that the present panel is not required to come up with any exhaustive lists of conditions.

4. More importantly, the panel only needs to determine whether Argentina has made a prima facie case on its claims. To do so, the Panel only needs to decide whether Argentina has met its burden of showing (a) that the specific provisions of Article 2(5) of the Basic Regulation, which it challenges "as such", fall within the category of what is not permissible under Article 2.2.1.1 and (b) that it is never permissible to use evidence from outside the country of origin in order to calculate the costs of production. Since Article 2(5) of the Basic Regulation does not define the terms "reasonably reflects costs" nor define the conditions that would allow the investigating authorities to seek outside the country of origin the evidences for the costs, the EU does not see how it is possible for Argentina to succeed in its "as such" claims.

3. BROADER LEGAL POINTS RAISED BY SOME THIRD PARTIES

5. The EU considers that some broader legal interpretations advanced by certain third parties, which Argentina has not put forward, are outside the Panel's terms of reference, or fall outside the scope of the present dispute. In any case, these interpretations are also legally erroneous, as further explained.

4. EXPORT TAXES OR DUTIES

6. Regarding the impact of export taxes and export duties on anti-dumping investigations, some Third Parties have expressed the view that anti-dumping rules cannot be used to address the distortive effects of export duties, asserting that Article XI:1 of the GATT allows the imposition of export duties. This view is legally incorrect because there is nothing in the GATT that would prevent an investigating authority from taking into consideration the distortive effects of export duties and export taxes when constructing the normal value of the product under consideration.

7. More precisely, Article XI:1 does not allow anything, but only contains a prohibition. The definition of quantitative restrictions does not include export duties and export taxes. But, this does not mean that Article XI:1 authorises WTO Members to introduce export duties or export taxes.

8. The fact that export duties and export taxes fall outside the scope of Article XI:1 of the GATT does not mean that the effects of such export taxes and export duties fall outside the scope of Article VI of the GATT. Using a similar reasoning to that of Appellate Body in the case *Argentina – Import Measures,* the EU notes that Article XI:1 does not contain any "express language identifying its relationship" with Article VI of the GATT. Moreover, there is no language in Article XI:1 or Article VI of the GATT stating that the anti-dumping authorities of WTO Members cannot take into account the distortive effects of export duties or export taxes in anti-dumping investigations. Lastly, there is no specific obligation or language in Article XI:1 that could be said to conflict with the provisions of Article VI of the GATT. The use of the forceful term "condemn" in Article VI provides further support for the conclusion that export duties and export taxes and their distortive effects do not fall outside the scope of Article VI of the GATT and of anti-dumping investigations.

9. The Panel's rejection of Argentina's claims in the present dispute will not have the effect of indirectly declaring all export taxes or export duties as WTO-inconsistent because the investigation will still be subject to the strict procedural requirements of the Anti-Dumping Agreement and not necessarily always lead to a finding of dumping.

10. The distortive effects of export taxes and export duties are well known and well documented. They are the result of government intervention and of the protection afforded to the exporting country's downstream industry.

5. THE NOTION OF DUMPING

11. It has been argued by certain third parties that the anti-dumping rules are "only concerned with examining the private pricing behaviour of producers". As a consequence of this purported "nature" of dumping, "the investigation authority cannot reject the costs recorded in the producer/exporter's accounts on grounds exogenous to that producer/exporter", such as the "full range of governmental policy interventions that are entirely outside the control of the producer/exporter themselves". The EU believes that the panel should reject these erroneous assertions for a number of reasons.

12. There is no textual basis in Article VI of the GATT or in the Anti-Dumping Agreement for such a "subjective element" in the anti-dumping rules that would consider dumping as an intentional "price discrimination". To the contrary, both Article VI:1 of the GATT and Article 2 of the Anti-Dumping Agreement define dumping in objective terms: introduction of products "into the commerce of another country at less than the normal value of the products".

13. Dumping is not defined by reference to the domestic prices in the exporting country but by reference to the "normal value" of the products. Article VI:1 of the GATT lists certain types of evidence that could be used as proxy to identify the "normal value". This article confirms that dumping is not related to exporters' purported "intention" but only to the value that the products should have in normal circumstances. Also, the calculation of dumping would be deprived of practical effects if "exogenous" costs elements beyond the exporters own control would be excluded. Anti-dumping rules would thus be rendered ineffective.

14. Article VI:5 of the GATT acknowledges that there can be situations which could be subject of both a countervailing duty and an anti-dumping duty. Therefore, the text of this article acknowledges that government actions may be at the source of dumping and material injury. To further support this conclusion, the EU relies on the Appellate Body report in the case *United States – Anti-dumping and Countervailing duties (China)* in which it was established that "exogenous factors", such as the actions of the government of the exporting country, may very well be the source of dumping.

15. The reliance of certain Third Parties on the Appellate Body Reports in the zeroing cases is misguided. Indeed, in this case the Appellate Body was not dealing with the construction of the normal value, but only whether the investigating authority should look at individual transactions separately, or whether it should look at the "aggregation of all export transactions". The Appellate Body discussed the export price part of the comparison and not the normal value.

6. THE SITUATION UNDER THE ANTI-DUMPING CODE IN THE 1980S

16. Another Third Party referred to the situation that prevailed under the anti-dumping Code and especially views and documents from 1982 and 1984. The EU considers that the passages cited by Indonesia do not support its interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement since the Code was very different from the current version of the Anti-Dumping Agreement and did not include any provision like Article 2.1.1.1.

17. In the alternative, should those statements still have some relevance today, they would contradict Indonesia's and Argentina's interpretation of Article 2.2.1.1. Indeed, in its Article 1(4) the anti-dumping Code did not provide that the costs should normally be calculated on the basis of the records kept by the investigated companies, or that these records should reasonably reflect the costs associated with the production and sale of the relevant goods. To remedy this omission, WTO members have included the first sentence of Article 2.2.1.1 in the Anti-Dumping Agreement: costs reflected in companies' records must be reasonable.

18. In any event, paragraph 5 of the draft recommendation on the implementation of the anti-dumping Code, to which Indonesia refers, expressly limits the scope of the recommendation to situations where the inputs are purchased "in the ordinary course of trade". However, Article 2.2.1.1 of the Anti-Dumping Agreement applies to situations where there are no sales in the ordinary course of trade such as in the present dispute.

7. ARGENTINA HAS FAILED TO MAKE A PRIMA FACIE CASE ON ITS "AS SUCH" CHALLENGE UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

19. The EU considers Argentina's "as such" challenge against the second subparagraph of Article 2(5) of the EU's Basic Regulation is a more relevant point for the Panel's analysis. In the light of certain comments made by Third Parties in their submissions, the EU will submit the following: first, Argentina's failure to establish, as a matter of fact, the content and scope of the second subparagraph of Article 2(5); second, Argentina's failure to articulate properly, let alone establish, the "precise content" of the "norm or rule" that it purports to challenge "as such" and third, Argentina's failure to establish that the "norm or rule" that it purports to challenge "as such" is the type of measure that can be the subject of an "as such" challenge.

8. THE SCOPE OF THE SECOND SUBPARAGRAPH OF ARTICLE 2(5)

20. It is by now clear to all participants in these proceedings that Argentina's challenge against the *second* subparagraph of Article 2(5) of the Basic Regulation under Article 2.2.1.1 of the Anti-Dumping Agreement is factually wrong. In its First Written Submission, Argentina has simply confused the scope of the second subparagraph of Article 2(5) with the scope of the first subparagraph of Article 2(5). Any other theory advanced by China and Indonesia is factually untenable. This is made clear by the text of the two subparagraphs of the Article 2(5) of the Basic Regulation. It is also made clear by the fact that the EU had already made determinations similar to the ones challenged by Argentina in the present case, on the basis solely of the first subparagraph of Article 2(5), before the second subparagraph of Article 2(5) was even introduced. Indonesia even acknowledges this latter fact in footnote 27 of its Third Party Submission.

21. While the first subparagraph of Article 2(5) is repeating "verbatim the conditions on the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement", the second subparagraph does not relate to Article 2.2.1.1, but simply fills a gap, describing what actions authorities are authorised to take in order to calculate the costs when the company records cannot be used. In the Anti-Dumping Agreement, the closest provision to this second paragraph is subparagraph (iii) of Article 2.2.2, which refers to "any reasonable method" and to "any reasonable basis". This article was the inspiration for the drafting of the second subparagraph of Article 2(5). Therefore, the EU concludes that Argentina has simply directed its "as such" challenge under Article 2.2.1.1 of the Anti-Dumping Agreement against the wrong provision of the Basic Regulation.

9. ARGENTINA HAS FAILED TO ESTABLISH THE "PRECISE CONTENT" OF THE "NORM OR RULE" THAT IT CHALLENGES

22. The Appellate Body has confirmed that, in order to substantiate an "as such" claim, the complaining party must first establish, *inter alia*, the "precise content" of the "rule or norm" that it challenges. In the present case, Argentina has failed to articulate properly, let alone establish, the "precise content" of the norm that it challenges "as such" under Article 2.2.1.1 of the Anti-Dumping Agreement.

23. If Argentina is challenging "as such" Article 2(5) of the Basic Regulation "and more specifically its second paragraph", this challenge must fail. Indeed, there is broader consensus that this subparagraph allows EU authorities to act in a certain manner but does not oblige them, or mandate them to do so. If Argentina does not challenge this provision, its position is inconsistent. It challenges the "condition" that "refers in particular to situations where the prices are 'artificially low' or 'affected by a distortion'", the purported "continuous and established practice" of the EU, and Article 2(5) second paragraph of the Basic Regulation" which purportedly "refers to situations where the prices of an input are 'abnormally or artificially low' because they are set in a 'regulated market' or because of the existence of some alleged 'distortion' on the domestic market".

24. Since Argentina has already acknowledged that it does not challenge "as such" any "practice" and consequently that any such challenge against a "practice" would be outside the Panel's terms of reference, it could assumed that Argentina challenges a written "norm or rule", i.e the second subparagraph of Article 2(5). Nonetheless, Argentina still does not offer consistency even in the description of the content of that "norm or rule" it is "as such" challenging. The EU understands that Argentina considers that the challenged "measure" is to be found beyond the actual text of Article 2(5) of the Basic Regulation. However, the EU submits that Argentina has failed to articulate properly and to establish with the requisite evidence the "precise content" of its claims.

10. ARTICLE 2(5) OF THE BASIC REGULATION ALLOWS THE INVESTIGATING AUTHORITIES DISCRETION

25. The EU believes that it by now clear that Art 2(5) does not mandates the investigating authorities to act in a particular manner and allows the authorities' discretion. In light of the recent Appellate Body Report in *US – Carbon Steel (India)*, the discretionary nature of Article 2(5) of the Basic Regulation is fatal to Argentina's "as such" claims against Article 2(5).

26. The EU finds problematic assertions like one made by China, which considers that in order to challenge "as such" a "rule or norm", it is "not necessary to show that it 'mandates' a WTO-inconsistent outcome in every case". First, China does not offer any textual basis. Second, China's reference to the paragraph 172 of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews* contradicts its position. Indeed, this paragraph does not refer to the "particular circumstances" asserted by China. Also China fails to explain how its assertion can be compatible with the nature of an "as such" claim, which according to the Appellate Body is directed against "laws and regulations". To the contrary, China's assertion transforms in essence every "as applied" claim to an "as such" claim, by renaming the application of the law in a specific case to an application in "particular", or "defined", or "at least certain" circumstances. Therefore, China's assertions must be rejected.

11. THE MEANING OF THE TERM "ASSOCIATED" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

27. The EU in its First Written Submission noted that the ordinary meaning of the term "associated" is broader than the meaning of the words "actually incurred". It also noted that the Panel Report in *Egypt-Steel Rebar* supports its understanding of the ordinary meaning of the term "associated", because it uses the term "pertain", instead of the words "actually incurred".

28. Indonesia disagreed with EU interpretation and noted that the chapeau of Article 2.2.2 of the Anti-Dumping Agreement also uses the term "pertain" to "refer to the actual data" of the company under investigation. The EU believes that its interpretation is the preferable one for several reasons.

29. The ordinary meaning of the term "pertain" is "be appropriate" or "related". These terms are broader than the words "actually incurred". Therefore that ordinary meaning does not limit Article 2.2.1.1 to only those costs that have "actually been incurred" by the specific company under investigation.

30. The EU's interpretation is confirmed by the context in which these terms are used. Indeed, Article 2.2.1.1, which is the subject of the present analysis, does not use the words "actual data" contained in the chapeau of Article 2.2.2 and referred by Indonesia, but the word "reasonably".

31. The chapeau of Article 2.2.2 of the Anti-Dumping Agreement uses the term "pertaining to" in the context of the "ordinary course of trade". In contrast, the words "ordinary course of trade" are not found in Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, the term "pertaining to" in the chapeau of Article 2.2.2 is used in order to convey a different meaning form the term "associated" in Article 2.2.1.1 of the Anti-Dumping Agreement.

32. The EU notes that the chapeau of Article 2.2.2, in combination with subparagraph (iii) of Article 2.2.2, provides that, in the absence of "ordinary course of trade", the investigating authority may use "any other reasonable method".

12. ISSUES RELATING TO ARGENTINA'S "AS APPLIED" CLAIMS

33. The EU disagrees with the argument made by China that it has used "an average of the FOB reference prices" without making any "adjustment to this evidence". The EU's position was acknowledged by Argentina.

34. The EU also disagrees with certain Third Parties taking the view that the prices used by the investigating authority were not from the "country of origin" for a number of reasons: the investigation revealed that the prices used were actually fixed by the government of Argentina, the prices were applied in Argentina, paid in Argentina and ensured that Argentinian producers of soya bean and soya bean oil received the same net price irrespective of the destination of their goods. This is not a case of application of the proviso on "information from other representative markets", but a case of application of the proviso on "any other reasonable basis", authorised by Article 2(5).

35. Consequently, Argentina's "as applied" claim against the Definitive Regulation, based on Article 2.2 of the Anti-Dumping Agreement, must fail. And this, irrespective of whether Article 2.2 allows investigating authorities to seek evidence from outside the country of origin in order to calculate the costs of production in the country of origin.

ANNEX C-4

EXECUTIVE SUMMARY OF THE STATEMENT OF THE EUROPEAN UNION AT THE SECOND MEETING OF THE PANEL

1. INTRODUCTION

1. The European Union's Opening Statement will address the points raised by Argentina in its Second Written Submission.

2. TERMS OF REFERENCE / PANEL'S FINDINGS

2. In relation to Argentina's "as such" claim, the only measure before the Panel is the second subparagraph of Article 2(5) of the Basic Regulation, as well as any subsequent amendments or replacements to that specific subparagraph. In relation to Argentina's "as applied" claims, the only measures before the Panel are the Provisional Regulation and the Definitive Regulation, as well as any subsequent amendments or replacements to these specific Regulations.

3. ARGENTINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE ON ITS "AS SUCH" CLAIMS

3.1. ARGENTINA HAS FAILED TO ESTABLISH THE PRECISE CONTENT OF THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

3.1.1. Argentina misrepresents the scope of the second subparagraph of Article 2(5) of the Basic Regulation

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

3. In paragraph 26 of its Second Written Submission, Argentina acknowledges that the first subparagraph of Article 2(5) "implements the particular obligations laid down by Article 2.2.1.1 of the Anti-Dumping Agreement" and "closely mirrors the wording of Article 2.2.1.1". Paradoxically, Argentina continues to insist that it is the second subparagraph of Article 2(5) that provides the legal basis for the decision not to rely on the records of the investigated companies.

4. In paragraphs 12 and 18 of its Second Written Submission, Argentina draws a distinction between what it calls the "first part of Article 2(5) second subparagraph [and] the second part of that provision". Argentina also asserts that the options given to the investigating authorities under "the second part of Article 2(5) second subparagraph" "imply" that they also constitute the "reasons why information of the domestic market cannot be used". However, there is nothing in the text of either the first or the second subparagraph of Article 2(5) that could support Argentina's assertion.

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

5. In paragraph 15 of its Second Written Submission, Argentina compares the present dispute with the situation faced by the Panel in *EC – Fasteners*. In that case, the Appellate Body found that in the absence of a specific provision, Article 9(5) of the Basic Regulation also concerned the calculation of dumping margins.

6. In the present situation, the first subparagraph of Article 2(5) addresses precisely the question of the conditions that must be met in order to base the cost calculation on the company records.

3.1.1.3 Recital 4 of Regulation 1972/2002

7. Argentina has repeatedly referred to Recital 4 of Regulation 1972/2002, with which the second subparagraph was added to Article 2(5). However, the text of that Recital does not support Argentina's arguments.

8. First, the text of Recital 4 shows that Article 2(5) had already been the legal basis for the authorities' determination of whether the records reasonably reflected costs, before the introduction of the second subparagraph of Article 2(5). Second, in paragraph 69 of its Second Written Submission, Argentina confuses the *sales* of the like product [governed by Article 2(3)] with the "records that do not reasonably reflect the costs" associated with the production and sale of the relevant product. Third, in paragraph 70 of its Second Written Submission, Argentina asserts that Recital 4 "emphasises that the records *must* be found not to reasonably reflect the costs". However, Recital 4 expressly refers to guidance as to what has to be done after it has already been determined that the records do not reasonably reflect the costs. Fourth, Recital 4 does not have any impact on the interpretation of "reasonably reflect costs".

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

9. Argentina continues to insist that the "purpose" of the introduction of the second subparagraph of Article 2(5) "was to provide a legal basis for the authorities to achieve effects similar to those applied under NME treatment to Russia, although it was being granted full MES".

10. In support of its assertions, Argentina refers to several comments of scholars listed in paragraph 43 of its First Written Submission. However, at the time of the publications, all the scholars referred to were actively involved in defending Russian companies in anti-dumping investigations relating to the application of Article 2(5) of the Basic Regulation. In these circumstances, it is doubtful whether their statements can be used as a source of interpretation of Article 2(5).

3.1.1.5 The judgments of the General Court

11. Argentina has submitted as Exhibits certain judgments of the General Court which actually contradict its description of the scope of the second subparagraph of Article 2(5).

12. The General Court's judgments in Cases T-235/08 and T-118/10 confirm three points. First, that the first subparagraph of Article 2(5) is the legal basis that authorises the investigating authorities to determine whether the records "reasonably reflect costs". Second, that the second subparagraph of Article 2(5) only provides the alternative sources of data that the investigating authorities may use when it has already been determined that the company records cannot be used, pursuant to the first subparagraph of Article 2(5). Third, that the first and the second subparagraphs of Article 2(5) *authorise* the investigating authorities to take certain actions, but do *not mandate* them to do so.

3.1.1.6 Examples of application of the first subparagraph of Article 2(5) of the Basic Regulation by the European Union's investigating authorities before 2002

13. Argentina insists that the EU's investigating authorities had never determined that company records do not "reasonably reflect costs" before 2002.

14. First, the EU's investigating authorities routinely used the provision which today is the first subparagraph of Article 2(5) in order to determine whether the company records "reasonably reflect" the relevant costs between 1995 and 2002, at a period when the second subparagraph of Article 2(5) did not exist. Example are the 2000 investigation on *Urea and Ammonium Nitrate originating in Algeria et al*., the 2001 investigation on certain *Iron or steel ropes and cables originating in the Czech Republic, Russia, Thailand, et al., the* 1996 investigation on *Polyester textured filament yarn originating in Indonesia and Thailand*, and the 2000 investigation on *Tube or pipe fittings originating in Brazil, the Czech Republic, et al*.

15. Second, Argentina errs when it asserts that the investigations involving an application of Article 18 of the Basic Regulation are not relevant for purposes of Article 2(5). Even where they apply Article 18, the EU's investigating authorities still use the information supplied by the companies to the extent possible. Examples are the 2000 investigation on *Synthetic staple fibres of polyester originating in Australia, Indonesia and Thailand* and the investigation on *Aluminium foil originating in China and Russia*.

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

16. To sum up, Argentina purports to challenge "as such" the second subparagraph of Article 2(5) of the Basic Regulation under Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement. Argentina's challenge under Article 2.2.1.1 of the Anti-Dumping Agreement must be rejected for the simple reason that the scope of the second subparagraph of Article 2(5) has nothing to do with the content of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

3.1.2.1 The text of the second subparagraph of Article 2(5) of the Basic Regulation is clear

17. In its Second Written Submission, Argentina refers to the Appellate Body Report in *US – Corrosion Resistant Steel* and acknowledges that when a measure is challenged "as such" the starting point for the analysis "must be the measure on its face". Argentina also refers to the Appellate Body Report in *US – Hot Rolled Steel* and acknowledges that "further examination is required", only if the "meaning or content of the measure is *not* evident on its face".

18. The EU has explained the reasons for which the scope, meaning and content of the second subparagraph of Article 2(5) are clear and evident on the basis of the provision's text. Argentina has actually acknowledged this fact in paragraph 50 of its Second Written Submission when it took issue with the EU's "exclusively focusing on the terms of Article 2(5), second subparagraph".

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

19. The text of Argentina's Second Written Submission in essence confirms the EU's objection: there is still no concise and uniform description of the meaning and content of the second subparagraph of Article 2(5), despite the clarity of the provision's text.

20. Argentina has also failed to identify the "precise content" of the second subparagraph of Article 2(5). Therefore, Argentina cannot make a *prima facie* case on an "as such" claim against the second subparagraph of Article 2(5) either under Article 2.2.1.1, or under Article 2.2 of the ADA.

3.2. ARGENTINA HAS FAILED TO SHOW THAT THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION IS "AS SUCH" INCONSISTENT WITH THE COVERED AGREEMENTS

3.2.1. Argentina ignores the Appellate Body Report in *US – Carbon Steel (India)*

21. In its Second Written Submission, Argentina asserts that "there is no provision" in the covered agreements which "establishes a mandatory/discretionary standard that the Panel would have to apply". However, Argentina omits to mention that the Appellate Body has used the "discretionary" nature of particular measures as a ground for rejecting "as such" claims against them. The most recent example is the Appellate Body's Report in *US – Carbon Steel (India)*.

22. In its Second Written Submission, Argentina states that providing for the possibility of "the use of a basis other than the cost of production in the country of origin renders the measure inconsistent with Article 2.2 of the ADA". However, Argentina is not consistent in its description of the content of the second subparagraph of Article 2(5) and has failed to establish that this provision mandates any particular conduct which is necessarily inconsistent with the covered agreements.

3.2.2. Argentina's refusal of the discretion afforded to the investigating authorities by the second subparagraph of Article 2(5) of the Basic Regulation

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

23. The text of the second subparagraph of Article 2(5) says nothing about the determination of whether the company records can be used or not. Therefore, Argentina cannot assert that the text of the second subparagraph of Article 2(5) "mandates" any conduct in relation to the determination of whether company records reasonably reflect costs.

24. Argentina's arguments are based on the use of the word "shall" in the text of the second subparagraph of Article 2(5). However, the word "shall" in the text of the second subparagraph of Article 2(5) addresses the obligation of the investigating authorities to proceed with the construction of the normal value so that they can complete the anti-dumping investigation. It does not relate to any single method that the investigating authorities may use in order to establish or adjust the costs.

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

25. In paragraphs 102 to 104 of its Second Written Submission, Argentina states that "in all cases which involved a situation of 'abnormally low' or 'artificially low' prices caused by an alleged 'distortion', information on the domestic market could not be used and the authorities used information from other representative markets".

26. As already noted, the investigations of the EU's authorities do not support Argentina's arguments on the purported "absence of discretion" afforded by the second subparagraph of Article 2(5).

3.2.2.3 The judgments of the General Court

27. In paragraph 105 of its Second Written Submission, Argentina states that the "use of the word 'entitled'" in the judgments of the General Court "does not confirm that Article 2(5) is discretionary". However, the ordinary meaning of the word "entitle" is "to grant someone a right". The use of the word "entitled" means that the General Court considers that the second subparagraph of Article 2(5) grants to the investigating authorities the right to act in a certain way, without obliging them.

28. Moreover, Argentina omits to mention that the relevant paragraph of the General Court's judgment, to which it refers, reads as follows: "The institutions were therefore fully **entitled** to conclude that …". This makes clear that the General Court was actually examining whether the investigating authorities had gone beyond the discretion that both the first and the second subparagraphs of Article 2(5) affords them.

3.3. CONCLUSION

29. To sum up, Argentina has failed to make a *prima facie* case on its "as such" claims against the second subparagraph of Article 2(5) under Article 2.2.1.1 and Article 2.2 of the ADA.

4. ARGENTINA ADVANCES AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ADA

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

30. Argentina reiterates that this provision requires the "records to reasonably reflect" the relevant costs and that there is no "reasonableness test of the cost elements themselves". In support of its assertions, Argentina inaccurately refers to paragraph 7.393 of the Panel Report in *Egypt – Steel Rebar*. The real text contradicts Argentina's understanding and confirms the EU's interpretation.

31. In paragraph 113 of its Second Written Submission, Argentina asserts "the term 'costs' as 'charges or expenses' refers to a concrete amount by opposition to a hypothetical value". However, the use of these "hypothetical" amounts is allowed by Article 2.2 of the ADA in constructing the normal value.

32. In paragraphs 115 to 117 Argentina states that the relevant costs "are necessarily the costs of the specific exporter/producer" who is involved in the anti-dumping investigation. However, the ADA allows the investigating authority to use costs from outside the specific company.

33. In paragraph 116 Argentina misrepresents the Panel's Report in *Egypt – Steel Rebar*. In reality, the Panel's findings are the opposite of what is asserted by Argentina, showing that the determination of whether company records "reasonably reflect costs" depends on the facts of each case.

34. In paragraph 117, Argentina misquotes paragraph 7.483 of the Panel Report in *EC – Salmon*. The Panel does not "note" that the costs "necessarily refer to the costs actually incurred" but referred to costs associated with the production and sale "of the *like* product".

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

35. In paragraph 119 of its Second Written Submission, Argentina asserts that the second and third sentences of Article 2.2.1.1 "illustrate the types of issues that may arise under the second condition of Article 2.2.1.1, first sentence". However Argentina fails to take into consideration the important textual differences between these sentences.

36. In paragraphs 122 to 126, Argentina asserts that "the costs associated with the production and sale' do not need to be reasonable. This argument fails on the basis of the texts of the chapeau of Article 2.2, Article 2.2.1.1 and Article 2.2.2(iii).

37. In paragraphs 127 to 133, Argentina seeks to build certain arguments on the purported definition of dumping. However, in paragraph 127 Argentina omits to mention that the condition for the application of Article 2.1 is the existence of domestic sales in the ordinary course of trade. Also, in paragraphs 128 to 134, Argentina refers to the zeroing cases without mentioning that they did not involve the construction of normal value.

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

38. Argentina discusses two points: (a) the ad hoc group on the implementation of the anti-dumping code of the Tokyo Round; and (b) the negotiating history of the Anti-Dumping Agreement in the Uruguay Round. However, none of them supports Argentina's position.

39. In relation to the first point, the documents discussed by Argentina in paragraphs 142 to 144 of its Second Written Submission are irrelevant for the present dispute. In relation to the second point, the negotiating history of Article 2.2.1.1 actually supports the European Union's interpretation.

5. ARGENTINA ADVANCES AN ERRONEOUS INTERPRETATION OF ARTICLE 2.2 OF THE ADA

40. Argentina's Second Written Submission does not provide any convincing factual evidence or legal arguments to support its excessively restrictive interpretation of the chapeau of Article 2.2 of the Anti-Dumping Agreement. For example, in paragraph 152, Argentina's argument is circular. In paragraphs 153 and 156 Argentina contradicts itself with respect to paragraph 154.

6. FACTUAL ELEMENTS RELATING TO THE BIODIESEL INVESTIGATION

41. There are no "factual inconsistencies" in the EU's submissions and statements in the present dispute.

42. Indeed, in paragraph 169 of its Second Written Submission, Argentina actually confirms that prices were "published by the government of Argentina". In paragraph 174, Argentina makes reference to the use of the term "particular market situation" in the Definitive Regulation. However, this notion is not relevant in the present dispute. In this paragraph, Argentina also makes reference to the "DET system" and the "export tax on soybean and soybean oil" whereas there is no real difference between the two terms. In paragraph 172, Argentina asserts that there is a contradiction regarding the levels of imports between the figures in the Regulations and those presented in the Reply to the Panel's Question 78. However, there is non since Recital 133 of the Provisional Regulation refers to imports by EU's "producers" rather than to the "industry".

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

43. In paragraphs 185 to 187, Argentina is relying on the wrong legal authority since the relevant findings of the Panel in *Egypt – Steel Rebar*, do not relate to the issue of "benchmarking". In paragraphs 188 and 189, Argentina contradicts its Reply to Question 43. In paragraphs 191 and 193 although the FOB reference prices "reflected" international prices, Argentine-determined FOB reference prices cannot themselves be "international prices". Finally, in paragraph 192 Argentina's

theory is incorrect because the third sentence of Article 2.2.1.1 expressly provides that costs can be adjusted in certain circumstances.

8. ARGENTINA'S OTHER CLAIMS

8.1. THE ISSUE OF PROFITS

44. Argentina has failed to make a *prima facie* case on its claims against the amount of profits established by the investigating authorities. For example, in paragraph 145 Argentina appears to assert that it is the methodology that needs to be "reasonable" and not the profit figure that needs to be "reasonable'. However Article 2.2 of the ADA expressly refers to a "reasonable amount for [...] profits".

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

45. First, if Argentina refers to the concept of "differences affecting price comparability", in the sense of Article 2.4 of the ADA, the EU confirms that it denies that such differences exist in the present case.

46. Second, Argentina has admitted during the First Hearing that it does not claim that the investigating authorities should have added the value of the export tax to the export price of biodiesel.

47. Third, Argentina reverses the order of the analysis by stating that the investigating authorities could have acted consistently with Article 2.4, while acting inconsistently with Article 2.2 of the ADA.

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

48. In paragraph 209, Argentina statement confirms that it is in reality challenging the construction of normal value. Such a challenge may fall within the scope of Article 2, but falls outside the scope of Article 9.3 of the Anti-Dumping Agreement.

49. In paragraph 213, Argentina states that the EU's interpretation could lead to a situation, which is not the type of situations that Article 9.3 covers.

50. Finally, in paragraph 213, Argentina refers to paragraph 132 of the Appellate Body Report in *US – Zeroing (EC)*. However these findings have no relation to the construction of normal value, or to a claim under Article 9.3 of the Anti-Dumping Agreement which is based on an allegedly erroneous construction of normal value, similar to the claims put forward by Argentina in the present case.

9. ARTICLE 3 CLAIMS

51. In paragraph 216, Argentina continues to treat the issue of "utilisation of capacity" as a stand-alone issue, divorced from its context.

52. Recital 131 of the Definitive Regulation sets out the findings of the investigation. Since Argentina accepted the investigating authorities' provisional judgment on the matter, Argentina should also accept the authorities' final judgment.

53. Argentina refers to the case of Diester. The verification of Diester took place before the Provisional Regulation had been adopted and when the issue of "idle" plants had not emerged as a serious factor.

54. As regards causation and the role of overcapacity, the investigating authorities had made clear that the production figures presented in the Provisional Regulation could no longer be relied upon.

55. Argentina argues that the EU was in effect a trader in biodiesel. This contradicts Argentina's previous allegation that the industry vastly overextended its production capacity.

56. Argentina wrongly accuses the investigating authorities of failing to examine double-counting regimes other than the French regime.

57. The investigating authorities' findings did not dispute that other factors had contributed to the situation of the EU industry. However, having analysed and distinguished those factors, they found that they did not undermine the conclusion that the dumped imports were a cause of the material injury that had been identified.

ANNEX C-5

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

1. INTRODUCTION

1. Article 6.2 of the *Dispute Settlement Understanding* (DSU) requires that a request for the establishment of a panel (Panel Request) must, *inter alia*, (a) identify the specific measures at issue; (b) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly; and (c) indicate whether consultations were held. Argentina's Panel Request in the present case fails to meet these requirements. For this reason, the European Union requests the Panel to issue a preliminary ruling, confirming that the claims identified in the present submission are outside the Panel's terms of reference.

2. The Panel's Working Procedures provide, in paragraph 7, that a party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The Working Procedures also provide that, if the European Union requests such a ruling, Argentina shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel. Therefore, the European Union's request for a preliminary ruling is submitted timely and properly, in accordance with the Panel's Working Procedures.

2. ARGENTINA'S FAILURE TO IDENTIFY THE "SPECIFIC MEASURES AT ISSUE"

3. The need for precision in panel requests flows from the two essential purposes of the terms of reference: (a) to define the scope of the dispute and (b) to serve the due process objective of notifying the parties and third parties of the nature of the complainants' case.[1] To meet this need of precision, a Panel Request must specify the measures challenged with sufficient particularity, so as to indicate the nature of the measure and the gist of what is at issue.[2]

4. Argentina's Panel Request contains a section entitled "1. The Measures at issue." This section purports to "enumerate" the "measures" which Argentina is challenging. The section contains two paragraphs.

5. Paragraph 1(A) of Argentina's Panel Request starts by mentioning Article 2(5) of Council Regulation (EC) 1225/2009 and continues by referring to "any subsequent amendments, replacements, *implementing measures and related instruments or practices*." This phrase also appears in footnote 7 of Argentina's Panel Request, which compliments Argentina's definition of what Argentina calls the "Basic Regulation."

6. Paragraph 1(B) of Argentina's Panel Request lists certain "anti-dumping measures imposed by the European Union." Footnote 3 mentions Commission Regulation 490/2013, while footnote 2 mentions Council Implementing Regulation 1194/2013. Paragraph 1(B) concludes by asserting that the "measures at issue" also include "any subsequent amendments, replacements, *related measures and implementing measures*."

7. These elements in Argentina's Panel Request fail to comply with the provisions of Article 6.2 of the DSU, because they fail to "identify the specific measures at issue."

8. In particular, the references to "*implementing measures and related instruments or practices*" and to "*related measures and implementing measures*" are too vague and do not allow the identification of the specific instruments that the references aim to cover. The Appellate Body has already found that references to "*implementing measures and other related measures*" do not

[1] For example, Appellate Body Report, *EC-Chicken Cuts*, para. 155, where there are further references to other Appellate Body Reports.

[2] Appellate Body Report, *US-Continued Zeroing*, para. 169.

"identify the specific measures at issue, as required in Article 6.2 of the DSU and, therefore, fall outside the panels' terms of references.[3]

9. Consequently, Argentina's claims against "implementing measures and other related measures" in Paragraph 1(A) and footnote 7 of its Panel Request, as well as Argentina's claims against "related measures and implementing measures" in Paragraph 1(B) of its Panel Request, fall outside the Panel's terms of reference.

3. ARGENTINA'S FAILURE TO "PRESENT THE PROBLEM CLEARLY"

10. The requirement to "present the problem clearly" aims at enabling the Panel, the defending party and third parties to know *which* obligations are allegedly violated, as well as *how* the challenged measures are allegedly inconsistent with these obligations. The general requirement to "present the problem clearly" has two aspects. First, the panel request must identify the "legal basis" of the complaint. In order to meet the requisite standard of clarity, the panel request may be required to specify particular sub-paragraphs of a treaty provision.[4] Second, the panel request must "plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed."[5] Argentina's Panel Request fails to meet both these requirements.

3.1. THE "INTER ALIA" LEGAL BASIS

11. Argentina's Panel Request has a Section "2", entitled "Legal Basis for Claims." Sub-section 2(A) includes a paragraph that reads: "Argentina considers that [name of measure] is inconsistent as such with, *inter alia*, the following provisions of the [names of covered agreements]."

12. The use of the words "*inter alia*" indicates that the list of provisions of the covered agreements expressly listed in Sub-section 2(A) of Argentina's Panel Request is not exhaustive. Argentina retains for itself the possibility to add more, unspecified provisions of the covered agreements, as "legal bases" for its claims *after* the circulation of the Panel Request. Neither the European Union, nor the Panel has any idea of what claims or legal bases Argentina will finally present in this case: the words "*inter alia*" make the list of claims in Argentina's Panel Request completely open-ended.

13. Consequently, Argentina's Panel Request fails to identify properly the legal basis of the complaint and fails to "present the problem clearly." This is inconsistent with Article 6.2 of the DSU and places the relevant claims outside the Panel's terms of reference.

3.2. PARAGRAPH 2(B)6 OF ARGENTINA'S PANEL REQUEST

14. Sub-section 2(B) of the Panel Request purports to present Argentina's views on the "anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia,* Argentina." The introduction of Sub-section 2(B) includes a footnote 8, which refers the reader to footnote 3. Footnote 3 refers to Commission Regulation 490/2013 and to Council Implementing Regulation 1194/2013.

15. Paragraph 2(B)6 of Argentina's Panel Request states that these two legal instruments are inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT, because "the European Union imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-dumping Agreement." This paragraph fails to meet the requirements of Article 6.2 of the DSU, for a number of reasons.

16. First, Paragraph 2(B)6 alleges that the challenged measures are inconsistent with "Article 9.3 of the Anti-Dumping Agreement." However, Article 9.3 of the Anti-Dumping Agreement is composed of a *chapeau* and three sub-paragraphs. Each of these deals with a different set of conditions. Argentina's Panel Request fails to mention the specific sub-paragraph of Article 9.3, with which the challenged measures are supposed to be inconsistent. This runs against Article 6.2 of the DSU, which requires Panel Requests to refer to the specific sub-paragraph of the WTO treaty

[3] Appellate Body Report, *EC-Selected Customs Matters*, para. 152, footnote 369. See also, Panel Report, *China-Raw Materials*, Annex F-1, para. 17.

[4] For example, Appellate Body Report, *Korea-Dairy*, para. 124.

[5] For example, Appellate Body Report, *China-Raw Materials*, para. 220.

provision that is supposed to be infringed by the challenged measure, where there are such sub-paragraphs containing different sets of obligations.[6]

17. Second, Argentina fails to articulate clearly the exact claim it advances. Paragraph 2(B)6 alleges that the European Union "imposed and levied anti-dumping duties in excess of the margin of dumping that should have been established." From this wording it is not clear whether Argentina actually challenges (a) the comparison between the anti-dumping duty and the margin of dumping (e.g., that there was some numerical mistake in the text of the Regulation resulting in the mentioned amount of the duty being higher than the mentioned amount of the dumping margin); or (b) the method of calculation of the margin of dumping itself. In other words, it is not clear whether Argentina's challenge should be understood as being directed against the "*in excess*", or against the "*should have been established*."

18. In that context, it is noted that the calculation of the anti-dumping duty is discussed in paragraphs 214 to 219 and in Article 1 of the Council Implementing Regulation. In contrast, the calculation of the margin of dumping is discussed in paragraphs 59 to 65 of the Council Implementing Regulation. Paragraph 2(B)6 of Argentina's Panel Request fails to explain plainly which of these two different sections of the Council Implementing Regulation it challenges. The result is that the European Union does not understand the scope of the challenge against which it must defend itself and the Panel does not understand the scope of the challenge facing it.

19. Third, even if we assume *arguendo* that Argentina actually challenges the method of determining the dumping margin, then again Paragraph 2(B)6 fails to comply with the requirements of Article 6.2 of the DSU. The determination of the dumping margin was based on (a) the calculation of the "normal value"; (b) the calculation of the "export price"; (c) the comparison between them; and (d) the analysis of certain requests presented by Argentinean exporters. Both the Commission Regulation and the Council Implementing Regulation discuss each of these issues separately, in four different sections with four different titles.[7] Paragraph 2(B)6 fails to explain plainly which of these issues (and which of the corresponding sections of the Regulations) it challenges. Again, the European Union and the Panel cannot understand the scope of the challenge facing them.

20. Fourth, even if we further assume *arguendo* that Argentina actually challenges only the fourth relevant section of the Regulations, i.e., the one entitled "Dumping Margins", then again Paragraph 2(B)6 fails to comply with the requirements of Article 6.2 of the DSU.

21. The relevant section 2.4 of the Council Implementing Regulation discusses two different and distinct issues. First, in paragraphs 59 to 60, the Regulation discusses a request advanced by "all cooperating Argentine exporting producers" in relation to the imposition of a "single duty for all cooperating exporting producers." Second, in paragraphs 61 to 64, the Regulation discusses a completely different request submitted by another three companies. These companies requested to "be included in the list of cooperating exporting producers." Their request was rejected because, either they were not exporting themselves to the European Union, or because they were not producing biodiesel during the investigation period. Paragraph 2(B)6 of the Panel Request does not provide the faintest indication of which of these two issues Argentina is actually challenging. Again, the European Union and the Panel cannot understand the scope of the challenge facing them.

22. Consequently, Paragraph 2(B)6 of Argentina's Panel Request falls outside the Panel's terms of reference.

4. ARGENTINA'S PANEL REQUEST EXPANDS THE SCOPE OF THE DISPUTE

23. Consultations requests constitute a prerequisite for panel requests and, as a result, they "circumscribe the scope of panel requests."[8] The Appellate Body has held that a panel request cannot include claims (either in relation to "challenged measures", or in relation to "legal bases"), which were not included in the corresponding consultations request, where these "new" claims

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[6] Appellate Body Report, *Korea-Dairy*, para. 124.

[7] The Commission Regulation in paras. 40 to 46; paras. 47 to 49; paras. 50 to 55 and paras. 56 to 59 respectively. The Council Implementing Regulation in paras. 35 to 48; paras. 49 to 54; paras. 55 to 58; and paras. 59 to 65, respectively.

[8] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, para. 137. See also Panel Report, *China-Broiler Products*, para. 7.219.

"expand the scope of the dispute",[9] or have the effect of "changing the essence of the complaint."[10]

24. In the present case, Argentina's Panel Request includes a great number of such new claims, which expand the scope of the dispute and change the essence of the complaint set out in Argentina's request for consultations (Consultations Request).

25. These new claims include the following: (1) a new claim against a new "measure", which Argentina calls "*practices"* related to Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 1(A)**); (2) an unclear "as applied" claim against Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 2(B)3**); (3) a new claim under Article 9.3 of the Anti-dumping Agreement against Article 2(5) of Council Regulation 1225/2009 (**Panel Request Paragraph 2(A)3**); (4) a new claim under GATT Article VI:1 against Article 2(5) of Council Regulation 1225/2009, alleging use of information other than that in the country of origin (**Panel Request Paragraph 2(A)1**); (5) a new claim under GATT Article VI:1 against Article 2(5) of Council Regulation 1225/2009, alleging not using the records kept by the producers and, further alleging, using costs not associated with the production and sale of the product under consideration (**Panel Request Paragraph 2(A)2**); (6) new claims under Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement against Article 2(5) of Council Regulation 1225/2009, alleging using costs not associated with the production and sale of the product under consideration (**Panel Request Paragraph 2(A)2**); (7) a new claim under Article 2.1 of the Anti-dumping Agreement against the Commission Regulation and the Council Implementing Regulation, alleging "unreasonable" determination of the amounts of profits (**Panel Request Paragraph 2(B)4**).

26. The sheer number and breadth of these new claims suffices to illustrate that Argentina's Panel Request seeks to expand the scope of the dispute. The individual analysis of each of these new claims further establishes that Argentina's Panel Request changes the "essence" of the complaint.

4.1. NEW "MEASURES" PRESENTED BY ARGENTINA FOR THE FIRST TIME IN THE PANEL REQUEST

27. Paragraph 1(A) of Argentina's Panel Request challenges for the first time "*related practices"*, in addition to Article 2(5) of Council Regulation 1225/2009. In contrast, Argentina's Consultations Request did not include any such reference. Argentina's Consultations Request, in its Paragraph b., refers solely to Article 2(5) of Council Regulation 1225/2009, i.e., a specific, written legal provision. The claim against "*related practices*" is a new claim, which expands the scope of the dispute and changes the essence of Argentina's complaint.

28. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009. Therefore, Argentina's decision to add the new claim against "*related practices*" in its Panel Request cannot be said to have "evolved" from the consultations.

29. It is also noted that the Consultations Request expressly stated that Argentina challenges Article 2(5) of Council Regulation 1225/2009 "*as such*." The reference to an "*as such*" claim further shows that Argentina was challenging a specific, written legal provision and not the application of that legal provision. Argentina's attempt to add a claim on the application of Article 2(5) of Council Regulation 1225/2009 changes the essence of the original complaint.

30. Consequently, the claim against "related practices" in Paragraph 1(A) of Argentina's Panel Request expands the scope of the dispute and changes the essence of the complaint and, therefore, falls outside the Panel's terms of reference.[11]

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[9] Appellate Body Report, *US-Upland Cotton*, para. 293.

[10] Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, paras. 137 and 138.

[11] As mentioned above, this new claim is also too vague and imprecise and fails to identify properly the specific measure at issue. Therefore, this new claim fails to comply with the requirements of Article 6.2 of the DSU for a number of different reasons.

4.2. NEW "LEGAL BASES" RAISED BY ARGENTINA FOR THE FIRST TIME IN THE PANEL REQUEST

4.2.1. The new and unclear "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009

31. Between Paragraph 2(B)3 and Paragraph 2(B)4 of the Panel Request, Argentina has inserted a new, not-numbered paragraph which seems to introduces an "*as applied*" challenge against Article 2(5) of Council Regulation 1225/2009. The role of this not-numbered paragraph is ambiguous. The Consultations Request expressly stated in Paragraph b. that Argentina was challenging Article 2(5) of Council Regulation 1225/2009 only "*as such*", without any reference to an "*as applied*" claim. The Panel Request repeats the reference to the "*as such*" claim in the last sub-paragraph of the *chapeau* of Paragraph 2(A).

32. On its face, it is not clear whether this not-numbered paragraph is intended to introduce an "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009. In any event, if we assume *arguendo* that Argentina is introducing an "*as applied*" claim against Article 2(5) of Council Regulation 1225/2009, then such claim is new and expands the scope of the original dispute, as presented in Argentina's Consultations Request. In addition, it seems to be misplaced in section B, which rather deals with the provisional and the definitive regulations.

33. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009.

34. Therefore, all the elements that would have allowed Argentina to include the "*as applied*" challenge against Article 2(5) of Council Regulation 1225/2009 were at the disposal of Argentina already at the time it submitted its Consultations Request. However, Argentina did not advance these claims in its Consultations Request. Allowing Argentina to ignore the consequences of its own decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

35. Consequently, this claim of Argentina falls outside the Panel's terms of reference.

4.2.2. The new claim against Article 2(5) of Council Regulation 1225/2009 based on Article 9.3 of the Anti-dumping Agreement

36. Paragraph 2(A)3 of Argentina's Panel Request introduces a new claim against Article 2(5) of Council Regulation 1225/2009, based on Article 9.3 of the Anti-dumping Agreement. Argentina claims for the first time that Article 2(5) of Council Regulation 1225/2009 is "*as such*" inconsistent with Article 9.3 of the Anti-dumping Agreement, because, allegedly, the "amount of the anti-dumping duty to be imposed exceeds the margin of dumping."

37. This claim did not exist in Argentina's Consultations Request. Paragraph b. of the Consultations Request (which dealt with Article 2(5) of Council Regulation 1225/2009) did not make any reference to Article 9.3 of the Anti-dumping Agreement. Moreover, Paragraph b. of the Consultation Request did not make any reference to an alleged "excess" of the anti-dumping duty, if compared with the margin of dumping. Therefore, there is no doubt that the claim in Paragraph 2(A)3 of the Panel Request is a new claim, which expands the scope of the dispute and changes the essence of Argentina's original complaint.

38. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. Argentina was also aware of all the facts that would have allowed Argentina to allege that the anti-dumping duty was in excess of the dumping margin. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims under

Article 9.3 of the Anti-dumping Agreement against the Commission Regulation and the Council Implementing Regulation, which were based on Article 2(5) of Council Regulation 1225/2009.[12]

39. Therefore, all the elements that would have allowed Argentina to challenge Article 2(5) of Council Regulation 1225/2009 under Article 9.3 of the Anti-dumping Agreement were at the disposal of Argentina already at the time it submitted its Consultations Request. However, Argentina did not advance these claims in its Consultations Request. Allowing Argentina to ignore the consequences of its own decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

40. Consequently, Argentina's new claim against Article 2(5) of Council Regulation 1225/2009, alleging an inconsistency with Article 9.3 of the Anti-dumping Agreement, as well as that the anti-dumping duty allegedly "exceeds" the dumping margin, falls outside the Panel's terms of reference.

4.2.3. New claims against Article 2(5) of Council Regulation 1225/2009 based on Article VI:1 of the GATT 1994

41. Paragraph 2(A)1 and Paragraph 2(A)2 of Argentina's Panel Request include new claims against Article 2(5) of Council Regulation 1225/2009 that are based on Article VI:1 of the GATT 1994. Argentina's Consultations Request did not include any claim based on Article VI:1 of the GATT. It also did not include any claims against Article 2(5) of Council Regulation 1225/2009 based on the GATT 1994.[13] Therefore, these claims are new and they expand the original scope of the dispute.

42. There are no facts that could support a finding that this new claim might "reasonably be said to have evolved" from the consultations. Already at the time of its Consultations Request, Argentina was fully aware that Article 2(5) of Council Regulation 1225/2009 is part of the European Union's anti-dumping legislation. Therefore, there was nothing preventing Argentina from challenging Article 2(5) of Council Regulation 1225/2009 under Article VI:1 of the GATT, which is part of the GATT Article dealing with anti-dumping. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request already included claims against Article 2(5) of Council Regulation 1225/2009 that were based on the Anti-dumping Agreement.

43. Moreover, Argentina cannot argue that adding new claims under Article VI:1 of the GATT does not change the "essence" of the complaint, alleging that the original complaint was already based on the Anti-dumping Agreement and further alleging that its scope is the same with the scope of Article VI of the GATT. If Article VI:1 of the GATT and the provisions of the Anti-dumping Agreement included in Argentina's Consultations Request had identical scope, then the addition of a claim based on GATT Article VI:1 in the Panel Request would have been redundant and the Panel would simply exercise judicial economy on it. The fact that Argentina chose to add the new GATT Article VI:1 claim in its Panel Request shows that Argentina considers that the two sets of provisions have different scope and that the "essence" of GATT Article VI:1 is different from the "essence" of the provisions of the Anti-dumping Agreement included in the Consultations Request. Therefore, by adding the GATT Article VI:1 claim in its Panel Request, Argentina confirms that it changes the "essence" of its original complaint.

44. Consequently, Argentina's new claims under Article VI:1 of the GATT fall outside the Panel's terms of reference.

4.2.4. New claims against Article 2(5) of Council Regulation 1225/2009 based on Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement

45. In Paragraph 2(A)2 of its Panel Request, Argentina alleges the violation of Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement "for two reasons." As "second reason", Argentina asserts that Article 2.2 and 2.2.1.1 of the Anti-dumping Agreement "require that the costs used be associated with the production and sale of the product under consideration."

[12] See Paragraph a.6 of Argentina's Consultations Request.

[13] The Consultations Request included claims against Article 2(5) of Council Regulation 1225/2009 only based on the Anti-dumping Agreement and the Marrakesh Agreement; see Paragraph b. of Argentina's Consultations Request.

46. These are new claims against Article 2(5) of Council Regulation 1225/2009, which were not included in Argentina's Consultations Request; the corresponding paragraph in Argentina's Consultations Request appears to be Paragraph b.2, which (a) includes only a claim based on Article 2.2.1.1 of the Anti-dumping Agreement and (b) refers to the calculation of costs "on the basis of records kept by the exporter." The new claims in Argentina's Panel Request expand the scope of the dispute and change the essence of the complaint because (a) they introduce a new legal basis (i.e., Article 2.2 of the Anti-dumping Agreement); and (b) they introduce a new type of complaint (i.e., the alleged use of costs not "associated with the production and sale of the product under consideration").

47. There are no facts that could support a finding that these new claims might "reasonably be said to have evolved" from the consultations. Argentina was fully aware of the European Union's interpretation and application of Article 2(5) of Council Regulation 1225/2009 already at the time of its Consultations Request. Argentina was also aware of all the facts that would have allowed Argentina to articulate this claim in its Consultations Request. This is evidenced, *inter alia*, by the fact that Argentina's Consultations Request included claims against the Commission Regulation and the Council Implementing Regulation alleging a violation of Articles 2.2 and 2.2.1.1 of the Anti-dumping Agreement and referring to the alleged inclusion of "costs not associated with the production and sale of the product under consideration."[14]

48. Therefore, Argentina could have made this claim against Article 2(5) of Council Regulation 1225/2009 in its Consultations Request, but did not do so. Allowing Argentina to ignore the consequences of its decision and put forward a completely new list of claims in its Panel Request would dilute the role of the Consultations Request.

49. Consequently, Argentina's new claims against Article 2(5) of Council Regulation 1225/2009, based on Article 2.2 and Article 2.2.1.1 of the Antidumping Agreement and alleging the use of costs not associated with the production and sale of the product under consideration, are outside the Panel's terms of reference.

4.2.5. The new claim against the Commission Regulation and the Council Implementing Regulation based on Article 2.1 of the Anti-dumping Agreement

50. In paragraph 2(B)4 of its Panel Request, Argentina alleges that the European Union acted inconsistently with "Articles 2.1, 2.2 and 2.2.2(iii) of the Anti-dumping Agreement", because it failed to determine the "amounts of profit" on the "basis of a reasonable method." The corresponding paragraph in Argentina's Consultations Request is Paragraph a.5, where Argentina alleges that the European Union failed to determine the "amounts of profit" in "accordance with the rules established under" Articles 2.2 and 2.2.2 of the Anti-dumping Agreement.

51. These two paragraphs provide a good example of the difference between (a) "refining the contours" of a claim and (b) expanding the scope of the dispute. The Panel Request relies on Article 2.2.2(iii) of the Anti-dumping Agreement, while the Consultations Request referred to Article 2.2.2 in general. This development can probably "reasonably be said" to have "evolved from the consultations." The same can be said for the description of the claim: the Panel Request alleges a determination not "on the basis of a reasonable method", while the Consultations Request mentioned more generally a determination not "in accordance with the rules established under" Articles 2.2 and 2.2.2. The text of the Panel Request is a more precise version of the more general text used in the Consultations Request.

52. In contrast, Argentina's addition of a new claim under Article 2.1 of the Anti-dumping Agreement cannot "reasonably be said" to have "evolved from the consultations." Argentina was in possession of all the elements that would have allowed it to advance a claim under Article 2.1 of the Anti-dumping Agreement already at the time of the Consultations Request. The potential "refining of the contours" of Argentina's claims, brought about by the consultations, was the clarification of the precise sub-paragraph of Article 2.2.2 that would serve as legal basis for its claim. Argentina went farther than that in its Panel Request: it added a new legal basis for its claim.

[14] Argentina's Consultations Request, Paragraph a.3.

53. At the time of the Consultations Request, Argentina decided not to challenge the European Union's determination of profits under Article 2.1 of the Anti-dumping Agreement, although it could have done so. Article 6.2 of the DSU requires that Argentina be now held to the consequences of that decision.

54. Consequently, Argentina's new claim under Article 2.1 of the Anti-dumping Agreement in paragraph 2(B)4 of its Panel Request is outside the Panel's terms of reference.

5. CONCLUSION

55. The European Union requests the Panel to issue a preliminary ruling confirming that the claims of Argentina's Panel Request that are discussed in the present submission are outside the Panel's terms of reference.

56. The European Union also requests that this preliminary ruling be issued before the date on which the European Union's first written submission is due. This will allow the European Union to identify the precise claims to which it will need to defend itself in its first written submission.

ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF AUSTRALIA

I. THE MEANING OF THE LANGUAGE "RECORDS [THAT] REASONABLY REFLECT THE COSTS ASSOCIATED WITH THE PRODUCTION AND SALE OF THE PRODUCT UNDER CONSIDERATION" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

1. A material issue in this matter is the interpretation of the language "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 of the *Anti-Dumping Agreement*. This language derives from the first sentence of Article 2.2.1.1, which reads:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

2. Two questions are of critical importance to this analysis: what it means for records to reasonably reflect the costs associated with production and sale of the product under consideration; and, whether records that accurately detail the actual expenses of the exporter or producer automatically constitute records that must be used in the calculation of costs (provided they also accord with generally accepted accounting principles (GAAP) – in this submission Australia assumes that the GAAP proviso is met). Relevantly, the Panel in *China – Broiler Products (US)*[1] noted that:

> … although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with [generally accepted accounting principles - GAAP] or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration.

3. Argentina argues that records that detail the actual expenses of the exporter or producer would reasonably reflect the costs associated with production and sale of the product under consideration, and so must be used in the production cost calculation under Article 2.2.1.1. In Australia's view, this may not always be the case. Rather, Article 2.2.1.1 permits investigating authorities to look beyond the records to consider whether the costs reflected therein are reasonably related to the cost of producing and selling the product. The reasonableness of costs of inputs or raw materials would be relevant to this analysis.

4. In this respect, Australia recalls the Panel's approach to analysing the calculation of cost of production in *Egypt – Rebar (Turkey)*[2], where the Panel considered that it must:

> … reach a conclusion as to whether…there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation.

5. This supports a reading of Article 2.2.1.1 whereby any element that "reasonably" relates to the cost associated with production and sale should be taken into account, including in relation to inputs or raw materials, and might lead to the adjustment or replacement of certain costs. Indeed, this appears to be the situation in *US – Softwood Lumber*, where the Panel did not take issue with

[1] Report of the Panel, *China – Broiler Products (US)*, para. 7.164.
[2] Report of the Panel, *Egypt – Rebar (Turkey)*, para. 7.393.

respect to testing for arm's length prices.[3] In such cases, where the investigating authority has established that the records do not reasonably reflect the costs, there is no obligation under Article 2.2.1.1 to calculate costs using the records.[4]

6. This interpretation is consistent with the ordinary meaning of Article 2.2.1.1 and is the only sensible reading when considered in context, which is Article 2 on the determination of dumping. First, Article 2.1 of the *Anti-Dumping Agreement* sets down the usual basis for the determination of dumping: namely, the proper comparison between the normal value of the imported product in the ordinary course of trade in the country of origin or export, and the export price of the product in the country of import. Such a comparison must be a fair comparison by virtue of Article 2.4 of the *Anti-Dumping Agreement*.

7. Second, Article 2.2 of the *Anti-Dumping Agreement* provides for situations where there are no sales in the ordinary course of trade, or where such sales do not permit a proper comparison because of the low volume of sales or a particular market situation. Pursuant to Article 2.2, the authorities in these circumstances are required to disregard these sales and use a comparable price of the like product when exported to an appropriate third country, or to construct normal value.

8. Given that the application of an anti-dumping methodology should be assessed on a case by case basis, and the situations in which cost construction is required are determined by Article 2.2, Article 2.2 is central to this analysis.

9. As such, in situations where costs are being constructed under Articles 2.2 and 2.2.1.1, a holistic analysis of costs is warranted in order to arrive at a proper cost calculation that provides a point of comparison that is closest to a "normal" value.[5] All costs that would be reasonably related to the production of the goods, or at least those that are significant enough to affect the overall production costs, are relevant to such an analysis.

10. To suggest that the meaning of the first sentence of Article 2.2.1.1 prevents or limits investigating authorities from examining whether records reasonably reflect costs, having established that there are no sales in the ordinary course of trade or that such sales do not permit a proper comparison, would render this provision inutile. It would be circuitous in preventing authorities to address not being able to make a proper comparison in determining the margin of dumping.

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

11. In Australia's view, such a reading of Article 2.2.1.1 is not contrary to the object and purpose of the *Anti-Dumping Agreement*, to the extent that one can be established.

12. The Panel in *US – Zeroing (EC)* observed with respect to the *Anti-Dumping Agreement* that "specific objectives are difficult to discern with any facility or compelling force due to the lack of anything that could properly be described as constituting a clear statement of the objectives of the *AD Agreement*".[6]

13. Nevertheless, to the extent that guidance can be drawn from Article VI.1 of the GATT 1994, Australia notes that the practice condemned therein hinges on the introduction of a product into the commerce of an importing country at "less than its normal value" – that is, at less than the comparable price, "in the ordinary course of trade". While Article VI:1 establishes the point of comparison within the ordinary course of trade, this does not preclude other points of comparison when normal value must be constructed because there are no sales within the ordinary course of trade. In Australia's view, an interpretation of Article 2.2.1.1 that allowed an investigating authority to consider, in a holistic way, the reasonableness of costs, and to adjust them if appropriate, would not run counter to Article VI.1 of the *Anti-Dumping Agreement*.

[3] Report of the Panel, *US – Softwood Lumber V*, para. 7.332.
[4] Report of the Panel, *US – Softwood Lumber V*, para. 7.236.
[5] *Anti-Dumping Agreement*, Article 2.1.
[6] Report of the Panel, *US – Zeroing (EC)*, footnote 292.

III. THE MANDATORY/DISCRETIONARY DISTINCTION IN "AS SUCH" CLAIMS

14. In Australia's view, a Panel should be guided by the mandatory/discretionary distinction in assessing whether a Member's legal instrument is inconsistent with its WTO obligations "as such".

15. The Appellate Body in *US – 1916 Act* found that the mandatory/discretionary distinction was a threshold consideration in determining whether legislation could be challenged 'as such', endorsing the approach of GATT panels that only legislation which *mandated* inconsistent action could be challenged 'as such'.[7] This approach appears to have been recently followed by the Appellate Body in *US – Carbon Steel (India)*, where it found that a US regulation was not inconsistent 'as such' with Article 12.7 of the *Agreement on Subsidies and Countervailing Measures* because the regulation did not *require* inconsistent conduct but was of a 'discretionary nature'.[8] While other rulings have left open the question of whether a discretionary measure could be challenged 'as such'[9], in *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body maintained that the mandatory/discretionary nature of a measure remained relevant to an assessment of whether a measure was 'as such' inconsistent with a Member's obligations, even if it did not have to be considered as a 'preliminary jurisdictional matter'.[10] As the Appellate Body held in *US – Section 211*, 'where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations'.[11]

[7] Appellate Body Report, *US – 1916 Act*, paras. 88-89.

[8] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483.

[9] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 89, 93; Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, footnote 334 to para. 159; Appellate Body Report, *US – Zeroing (EC)*, paras. 211, 214; Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54.

[10] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. See also Panel Report, *US – Section 301 Trade Act*, para. 7.53, where the panel stated that 'The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited'.

[11] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259.

ANNEX D-2

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF CHINA

I. Introduction

1. The People's Republic of China ("China") intervenes in this case because of its systemic interest in the correct interpretation of GATT 1994 and the Anti-Dumping Agreement ("ADA"). Through its written submission, oral statement and responses to the Panel's questions, China has discussed the request of the European Union ("EU") for a preliminary ruling ("PRR"), presented its views on the interpretation of Articles 2.2.1.1 and 2.2 of the ADA, made observations on the meaning of Article 2(5) of the EU Basic Regulation and its consistency with Articles 2.2.1.1 and 2.2, and made observations on certain claims with respect to elements of the EU determination in the Biodiesel investigation, including the EU approach to cost adjustments, profit determination, price comparability, and injury and causation issues.

II. The Request for a Preliminary Ruling

2. First, as to the EU's objections in Section 2 of the PRR, China considers that the references to "implementing measures and related instrument or practices" and "related measures and implementing measures" in the Panel Request are not *per se* inconsistent with the specificity requirement in Article 6.2. The Panel must consider the Panel Request as a whole, and, in particular, to examine whether the measures that are implemented or related were precisely identified in that Request. Second, as to the EU's objections in Section 3.2 of the PRR, China submits that there is no mandatory requirement to refer to a specific sub-paragraph of a treaty provision. A panel should examine whether a general reference to a treaty provision meets Article 6.2 on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue. China also recalls that a "brief summary" of the legal basis should be distinguished from arguments in support of a particular claim, which are not required to be included in a panel request. Third, as to the EU's objection in Section 4.2.4 of the PRR, China notes that both provisions concerned have been invoked to challenge Article 2(5) of the Basic Regulation in both the request for consultations and the Panel Request. It thus appears that Argentina has not added new legal basis in the Panel Request, but just clarified the connection between the challenged measure and the legal basis. Finally, China considers that PRR is not the only way to address preliminary issues. Parties may present views on many of these issues in their submissions and/or statements and expect panels to make findings in final reports. Unnecessary or premature requests should not be encouraged.

III. Interpretation of Articles 2.2.1.1 and 2.2 of the ADA

A. "Dumping" Reflects Pricing Behaviours of Individual Producers/Exporters

3. To properly interpret Articles 2.2.1.1 and 2.2, it is appropriate to begin with the foundational concept of "dumping". Dumping is the result of the "pricing behaviour of individual exporters or foreign producers". Thus, anti-dumping measures can be applied only to remedy injury caused by the pricing behaviour of an individual producer/exporter, which results in price discrimination between the producer's home market and the export market.

4. In line with this foundational concept of dumping, an authority cannot reject the costs recorded in the individual producer/exporter's records on grounds exogenous to that producer/exporter. Exogenous factors, such as the regulatory environment in which a producer operates, or the way in which duties or taxes affect market conditions for goods or services upstream to production of the product under consideration are, by definition, entirely outside the control of a producer/exporter. The market outcomes of government policy measures have nothing to do with the commercial conduct of the producer/exporter. They cannot therefore be the grounds to reject the accurately recorded costs. Otherwise, anti-dumping proceedings cease to be a remedy for the pricing behaviour of producers or exporters, and instead become a tool for authorities to penalize imports for cost advantages that foreign producers may enjoy.

B. Article 2.2.1.1 Does Not Permit Rejection of Recorded Costs on the Ground that They Are "Artificially Lower" than Hypothetical Costs

5. Article 2.2.1.1 does not permit authorities to reject recorded costs on the ground that they are lower than they would be if sourced in a market that, unlike the country of origin, remains unaffected by governmental policy interventions that affect costs.

6. First, a "reasonably reflect" assessment must be focused on the costs associated with production and sale of the product under consideration by the specific producer/exporter, and not the costs of a hypothetical producer or exporter.

7. This is made clear by the privileged status given to "records kept by the exporter or producer under investigation" under Article 2.2.1.1. It is also reflected in the explicit reference to the costs "associated with" the production and sale of "the product under consideration". To be "associated with" the production of the product under consideration, the costs must be connected with the product that is produced by the producer under investigation and exported to the importing Member. A cost taken from a hypothetical market does not in any way pertain to the production of the product by the investigated producer, and thus is not "associated with" the production of the product under consideration.

8. Furthermore, the circumstances identified in the second and third sentences of Article 2.2.1.1, in which a producer's records might not be a reasonable reflection of the costs, confirm that the determination of reasonableness does not extend to factors exogenous to the producer/exporter. Specifically, the issues of "proper allocation" of costs, "amortization", "depreciation" and "capital expenditure" all concern cost accounting choices made by the specific producer/exporter and any related companies with which it shares costs.

9. Article 2.2.2 provides further context. It also reflects the producer/exporter-specific focus when prescribing the basis for determination of administrative, selling and general (or "AS&G") costs, which are other cost components to be used in constructing normal value.

10. Second, if a benchmark is used to assess whether records reasonably reflect costs, such a benchmark must relate to costs in the country of origin and not costs in some hypothetical market where the market and regulatory conditions of the country of origin do not exist. Since Article 2.2.1.1 begins with the phrase "[f]or the purpose of paragraph 2", the scope of the costs considered under both Articles 2.2.1.1 and 2.2 is the same, i.e. "costs of production in the country of origin". In addition, Article 2.2.2, another provision within "paragraph 2" of Article 2, also requires that AS&G costs be determined on the basis of costs in the country of origin. In short, whether records reasonably reflect costs must be assessed within the boundaries of the country of origin. It is impermissible, as a matter of law, to benchmark a producer or exporter's recorded costs against an international market price or prices from other countries.

11. Third, the object and purpose of the ADA is to discipline the rules governing anti-dumping investigations and measures, for which the foundation stone is the existence of dumping by exporters or producers. A determination of the existence of dumping requires analysis of the pricing behaviours of the individual producers/exporters. Government measures affecting the costs of a producer or exporter may be relevant for the application of other covered agreements if they are specific subsidies, or if they take the form of impermissible export restrictions. However, since dumping is a producer/exporter-specific concept, it is not consistent with the object and purpose of the ADA to seek to remove the impact of governmental policy interventions that are entirely exogenous to the producer/exporter under consideration.

C. Article 2.2 Does Not Allow Use of Non-Country of Origin Costs

12. Article 2.2 is clear and explicit in requiring that the "cost of production" used to construct normal value must be the cost "in the country of origin". The language of Article 2.2 is less flexible than the language of Article 14(d) of the SCM Agreement. Thus, while the use of out of country benchmarks may sometimes be permissible under the SCM Agreement, a producer's costs under the ADA are, quite simply, the "costs of production in the country of origin".

13. The EU does not take issue with the requirement that "costs" under Article 2.2 reflect the "cost of production in the country of origin", but argues that the evidence required to establish

such costs may originate in other countries. First, the issue regarding the appropriate source of evidence only arises when the costs recorded by a specific producer or exporter need to be adjusted. Since authorities are not permitted to disregard recorded costs on the ground that they are "artificially low" because of governmental policy intervention, there is no need to refer to any sources of evidence other than the producer's records themselves in these circumstances. Second, in cases where cost records of a specific producer/exporter need to be adjusted because of issues pertaining to that producer or exporter, an authority shall consider evidence from *within* the country of origin, which might include evidence regarding costs from other producers/exporters of the investigated product, or from a related sector or industry. Third, only in very exceptional cases where there is a complete lack of evidence available in the country of origin, might an authority consider evidence of costs from third countries. In such a scenario, an authority could not simply deem out-of-country evidence to reflect the cost of production in the country of origin. Rather, such evidence could only be used as a starting point upon which to determine costs of production in the country of origin. In other words, if third country evidence is used, the specific market conditions in the country of origin must be factored in and the final costs of production must reflect the costs in the country of origin. Relevant market conditions that should be considered by an investigating authority include how policy or regulatory factors, including taxes and duties, impact on the price and availability of inputs and other factors of production.

IV. "As Such" Claims in Relation to Article 2(5) of the Basic Regulation

14. At the outset, China recalls that in order for a rule or norm of general and prospective application to be found to be, as such, WTO-inconsistent, it is not necessary to show that a rule or norm "mandates" a WTO-inconsistent outcome in *every* case. Rather, the complainant must provide evidence demonstrating that the application of the challenged rule will necessarily be inconsistent with that Member's WTO obligations *in defined circumstances*. China also recalls that the Appellate Body has provided guidance on how to examine the meaning of municipal law, requiring panels to undertake a holistic assessment of all relevant elements. China concurs with Argentina that the meaning of Article 2(5), second sub-paragraph, should be examined in a way taking into account elements other than the text, including: (i) its context and "logic", (ii) its consistent application by the EU authority, and (iii) the judgment of EU courts on its meaning.

15. As an immediate context, the first sub-paragraph of Article 2(5) includes the same "reasonably reflect" clause. There exists a special logical link between the two sub-paragraphs, i.e. the first sub-paragraph requires the authority to use the records of the parties concerned as the basis to calculate costs if this condition, together with another condition, is fulfilled, while the second sub-paragraph requires the authority not to use the records if the same condition is not met. Thus, the EU's argument that the conditions that must be met in order to determine whether the company records "reasonably reflect" costs are *outside of the scope* of the second subparagraph fails by disregarding this special link.

16. The context that should be taken into account also covers Recitals 3 and 4 of Council Regulation (EC) No 2972/2002, and Article 2(3), second sub-paragraph, of the Basic Regulation. Recital 4 clarifies that the circumstances in which records do not reasonably reflect costs cover the situations where "because of a particular market situation sales of the like product do not permit a proper comparison". According to Article 2(3), second sub-paragraph, a particular market situation may be deemed to exist when "prices are artificially low". Recital 3 of the Council Regulation (EC) No 2972/2002 further clarifies that particular market situations cover "market impediments", which may result in domestic prices being out of line with world-market prices or prices in other representative markets. Reading these provisions together, Article 2(5), second sub-paragraph, appears to require the investigating authority to reject the records of the parties concerned on the ground that "prices are artificially low" or for reasons relating to the situation of the *entire* market caused by governmental policy interventions, instead of a situation relating to or caused by conducts of a *specific* producer/exporter.

17. The above reading is confirmed by the application of Article 2(5). The practice of the EU authority indicates that it will disregard the costs correctly recorded by the specific producer/exporter under investigation if it determines that such costs are "artificially" lower than the "hypothetical" costs that would be borne in a theoretical market where the prices of relevant inputs were not affected by governmental policy interventions. In the investigation concerning imports of biodiesel from, *inter alia*, Argentina, the EU authority disregarded the actual cost of soya beans as recorded by the companies concerned on the ground that such cost (domestic

prices of soya beans) was "artificially lower" than a "hypothetical" cost (international prices). It is clearly indicated by the authority that this determination is not unique, but falls well "[with]in the meaning of Article 2(5)". In *Seamless Pipes and Tubes of Iron or Steel from Croatia, Romania, Russia and Ukraine*, the EU determined that the correctly accounted gas prices "could not reasonably reflect the costs associated with the production and distribution of gas" because that price "was much lower than the average export prices from Russia to both Western and Eastern parts of Europe". The authority also indicated that it reached this determination "as provided for in Article 2(5) of the basic Regulation", which implies that the above practice appears to be an automatic application of Article 2(5).

18. In summary, Article 2(5), second sub-paragraph, appears necessarily to require the EU authority to reject records of a producer/exporter under investigation that accurately account for the costs incurred by that producer/exporter, for the sole reason that the recorded costs are "artificially low" compared to the hypothetical costs that would be incurred in a market unaffected by governmental policy interventions; and appears to require, in the above situations, that the costs be "adjusted or established" on the basis of information from "other representative markets", when the costs of other producers/exporters in the same country are also "artificially low" compared to the hypothetical costs and other "reasonable" bases are not available.

19. Therefore, Article 2(5), second sub-paragraph appears to be, as such, inconsistent with Article 2.2.1.1 of the ADA, under which an authority is not entitled to reject the producer's recorded costs simply because the costs incurred by the producer are lower than hypothetical costs unaffected by circumstances such as governmental policy interventions. It also appears to be, as such, inconsistent with Article 2.2 of the ADA, which requires that the costs of production used to construct normal value must be those "in the country of origin".

V. Claims with Respect to the Anti-Dumping Measures on Argentine Biodiesel

A. Claims with Respect to the Adjustment of Costs

20. As to Argentina's claims in relation to the EU's rejection of the producers/exporters' records, China notes that the Definitive Determination clearly stated that the *sole* reason for the EU authority to conclude that the costs of soya beans were not reasonably reflected in the records and to disregard the actual costs as recorded was that the domestic prices of soya beans used by biodiesel producers in Argentina were found to be artificially lower than international prices due to the "distortion" created by the Argentine export tax system. The EU thus violates Article 2.2.1.1 because under this provision an authority is not permitted to depart from accurately accounted costs, for the sole reason that such costs are "artificially low" compared to the hypothetical costs unaffected by governmental policy interventions.

21. As to Argentina's second claim with respect to the adjustment of costs, China notes that the EU, having disregarded the recorded costs of soya beans, replaced this element of cost of production with an average FOB reference price. By definition, a FOB export price is not a price that is available to domestic Argentine producers, but a price available to buyers in the export market. It is not reflective of the cost of soya beans "in the country of origin", but reflects market conditions in markets outside of Argentina. Thus, even if the EU authority had no other evidence regarding such costs in Argentina, and, instead, were justified in referencing evidence relating to market conditions in export markets, it would have been necessary to adjust this "raw" evidence to ensure that it elucidated, in a sufficiently probative way, the "costs of production in the country of origin". By simply replacing the recorded cost of soya beans with an average FOB reference price, without taking account of the significantly different conditions affecting the price for exported soya beans, the EU acted inconsistently with Article 2.2.

22. Argentina also claims that the EU acted inconsistently with Article 2.2.1.1 by including, in its calculation of the cost of production of biodiesel, a cost not associated with the cost of production and sale of biodiesel. As explained by the panel in *EC – Salmon (Norway)*, Article 2.2.1.1 requires costs of production used for purposes of constructing normal value to be the "costs associated with production and sale of the product under consideration". Self-evidently, the price of soya beans exported from Argentina is *not* a cost associated with production and sale of biodiesel in Argentina, because exported soya beans are necessarily *not* available to producers of biodiesel in Argentina and the Argentine producers did not pay that price minus fobbing costs for soybeans. By including

a cost that was not associated with the cost of production and sale of biodiesel, the EU acted inconsistently with Article 2.2.1.1.

B. Claims with Respect to the Determination of Profits

23. China anticipates that the Panel, as required under Article 17.6(i) of the ADA, will examine whether the EU authority's establishment and evaluation of the relevant facts was unbiased and objective. In addition, it appears that the authority failed to indicate the method it used to determine the profit margin. At most, it just gave a general rationale, which does not describe a "method". Finally, amounts of profit determined on the basis of a method under Article 2.2.2(iii) are subject to further a reasonability test. An authority that adopts such a method is required to explain why it considers the method adopted to be reasonable.

C. Claims with Respect to Fair Comparison

24. China recalls that an authority bears a general obligation to ensure fair comparison and *no* differences that "affect price comparability" are precluded from being the object of an allowance. These requirements apply generally to the calculation of a dumping margin, and specifically, the construction of normal value does not preclude consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared.

25. There appears to be no disagreement between the parties with respect to the fact that the normal value and the export price that are used by the EU incorporated different prices of soya beans, i.e. the former includes an average of the reference FOB prices (minus fobbing costs) while the latter incorporates domestic prices. The different prices of soya beans, or the difference in the cost of inputs, fall within the scope of "other differences" affecting price comparability. Therefore, even assuming that the EU was entitled to disregard the domestic costs of soya beans and use international prices for the construction of normal value, it should have made due allowance for the above difference in order to ensure a fair comparison.

D. Claims in Relation to Injury and Causation

26. First, China wishes to draw the Panel's attention to some of the arguments and facts submitted by Argentina, particularly paragraphs 368, 376, 377, 378 and 390 of its first written submission. This material raises a question as to whether the EU based its determination on "affirmative, objective, verifiable, and credible" evidence, and whether the EU conducted the relevant examination in an unbiased manner, as required under Article 3.1 of the ADA.

27. Second, China notes that the terms "utilization of capacity" in Article 3.4 of the ADA contain no reference to a concept such as "availability for use" or "idleness". There is no legal basis to overlook such capacity in the injury determination.

28. Third, the key question for examining Argentina's Article 3.5 claims is whether the factors "other than dumped imports" identified by Argentina were injuring the EU industry at the same time as the dumped imports. To the extent that Argentina successfully establishes the facts of its case, the EU authority failed to undertake a proper non-attribution analysis.

ANNEX D-3

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF COLOMBIA

I. INTRODUCTION

1. Members of the Panel and distinguished delegates, Colombia has a systemic interest in the application of several provisions of the WTO's Covered Agreements discussed by the parties to this dispute, and while not taking a final position on the specific merits of this case, Colombia will provide its views on some of the legal claims advanced by them.

1. "As such" Claim's legal standard

2. According to Argentina's first written submission, there is a continued and consistent practice by the European Union, when applying Article 2(5) second paragraph of the EU Basic Regulation. In this respect, when the prices of raw materials included in the records of the producers, are considered to be "abnormally or artificially low", due to a regulated, or distorted, market, the European Communities have been adjusting these prices in accordance with the costs of other producers in the same country, or any other reasonable basis, including information from other representative markets. This continued practice, in Argentina's view, constitutes an "as such" violation to certain articles of the Antidumping Agreement.

3. Whenever a Member presents an "as such" claim, it must establish, through arguments and supporting evidence, at least that [1] the alleged measure - rule or norm- is attributable to the responding Member; [2] its precise content; and indeed, [3] that it does have a general and prospective application".[1] The AB further states that the "evidence [presented] may include proof of the systematic application of the challenged measure. According to the AB in *US – Carbon Steel*, "Such evidence, will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinion of legal experts and the writings of recognized scholars".[2] Furthermore, when a complaining party substantiates an "as such" challenge against laws, regulations, or other instruments of a Member that have general and prospective application, a complainant may submit evidence of the application of such legislation.[3]

4. Even though Colombia will not take a final position on the issue, it is of the opinion that in the present case, the Panel has to take into account all evidence submitted by the Parties, in order to determine if Article 2(5) is "as such" contrary to Article 2.2.1.1 of the ADA. Hence, Colombia respectfully suggests the Panel to review this matter, bearing in mind the considerations above mentioned.

2. Construction of the term "reasonably reflects the costs" in Article 2(5)'s second paragraph

5. For the EU, the costs presented by the Argentinian producers of biodiesel, do not "reasonably" reflect the cost of production, given that soybeans have an export tax in Argentina, which makes the internal price lower than the international price. In the EU's view, since the records presented by the producers do not reflect what the cost would "normally be" they do not reasonably reflect the cost of production. Hence, the EU proceeds to calculate the biodiesel's "normal costs of production" by using the soybeans' international prices. On the other hand, Argentina argues that Article 2.2.1.1 of the ADA's scope does not allow an investigating authority to reject the records on the basis of input price distortions.

6. Argentina, in its first written submission, interprets the terms "costs" "reasonably" and "reflect", to determine that the combined phrase "reasonably reflects the costs" refers to the charges or expenses that have actually been incurred in by the producer. The term "reasonably"

[1] Appellate Body Report, *US — Zeroing (EC)*, para. 198.
[2] Appellate Body Report on *US – Carbon Steel*, para. 157 (emphasis added); see also Panel Report on *Mexico – Rice*, para. 6.26.
[3] Panel Report *EC — IT Products*, para. 7.108.

acts as an adverb to the verb reflect. Thus, since the word "reasonably", which means "at a reasonable rate; to a reasonable extent", operates on the verb reflect and not on the noun "costs". Therefore, it is reasonable to construe such provision, interpreting that it refers to "the way the costs are reflected in the records", rather than to "the costs reflected in the records", as the EU submits.

7. Taking into account the submissions of both parties, it is Colombia's opinion that the interpretation based on the ordinary meaning of the term "reasonably reflects the costs" should be more similar to the one presented by Argentina, inasmuch as the ordinary meaning of this term refers to the actual cost of production a producer should reflect in its records, given the syntax of the phrase. Additionally, Article 2.2.1.1 refers to a situation in which the Member that imposes an antidumping measure is actually investigating the costs of production of producers of the exporting Member. Even if the text of Article 2.2.1.1 does not explicitly provide that the costs are actually the same that those charges incurred by the producer, from the ordinary meaning of the terms, it is not possible to draw that the "costs" have to be the ones "normally associated with the production and sale of goods".[4]

8. Furthermore, it is relevant to consider that one of the purposes of the Antidumping Agreement is to provide a multilaterally agreed framework of rules governing actions against injurious dumping practices.[5] In Colombia's opinion, the issue that raised the investigating authority's concern i.e. products whose inputs have regulated markets, where the price of the input is affected by a government's measure, does not seem to fall under the scope of the Antidumping Agreement. Under this premise, the antidumping measures imposed by the EU to biodiesel from Argentina might be contrary to the object and purpose of the ADA. In any case, the Panel should address this matter carefully when ruling on this issue.

9. Colombia recognizes that the object and purpose of the WTO is to liberalize trade and to eliminate distortions that provide unfair advantages to some goods over others. It also acknowledges the EU's power to conduct investigations on products that are imported under unfair conditions that favour them, causing damages to the national industry. However, Colombia is also aware that the WTO provides Members with different tools, under different Agreements, designed to address different barriers to trade; thus Members should apply these tools accordingly. Consequently, in Colombia's opinion, the Panel should take into account the availability of these other tools, when determining if the EU acted consistently when applying an antidumping measure.

3. Is the interpretation of the scope of Article 3.4 of the ADA, presented by the Parties, consistent with WTO law?

10. Article 3.4 of the ADA plays an important role in setting out how an investigating authority must determine injury, listing the relevant economic factors that must be evaluated in the determination of injury.[6] However, it is important to highlight that Article 3.4 explicitly establishes that "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance".

11. Colombia considers that the standard set above, must guide the analysis of the Panel to assess the impact of the dumped imported products in the domestic industry, regarding: i) whether the exclusion of "idle" plants contributes to a satisfactory evaluation of the state of the industry, and; ii) whether the October 1st 2013 Definitive Disclosure's resubmitted data obeys to the obligation, set forth in article 3.4 of the ADA, to carry out an "objective examination" on the basis of "positive evidence".

12. Thus, Colombia considers that the Panel must take into account all relevant factors at issue when evaluating the state of the industry in light of the last sentence of Article 3.4, rather than relying its analysis solely on the breach of Article 3.4, in accordance to the "production capacity and utilization capacity" factors.

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[4] EU's First Written Submission. Para 139.

[5] Panel Report, *US — Zeroing (EC)*, footnote 292.

[6] Van den Bossche, Zdouc, The Law and Policy of the World Trade Organization, Cambridge University Press, (2013), pag. 705.

13. Colombia submits that the terms "objective examination" and "positive evidence" included in Article 3.1 of the ADA serve as relevant context in the interpretation of the last sentence of Article 3.4, due to the fact that "objective examination" puts an obligation on Investigating Authorities to conduct an objective analysis, without favouring the interests of any interested party, but always based on "positive evidence".

14. In light of the above mentioned arguments, the sentence "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance", when interpreted in accordance with its ordinary meaning, in its context and in light of the object and purpose of the ADA, does not allow the authorities to: i) base their decisions taking into account "one or several of these factors as decisive guidance" and; ii) to base their decision on unclear economic factors or to favour the interests of any interested party.

4. The Non Attribution Test obligations under Article 3.5 of Antidumping Agreement

15. Colombia notes that if, as stated by Argentina, "… even in the total absence of imports, the utilization of the EU's productive capacity would only have reached around 50% and the EU did not rebut or contradict that information …", it is necessary to question what motivated the EU's industry to increase its capacity of production, despite the allegedly dumped imports during the investigation period. In that sense, Colombia considers that the Panel's analysis should take into account the possibility that the EU misread the biodiesel sector or had high expectations about future changes in the prices conditions, which in the end never materialized.

16. The decision to expand the capacity of production, despite the real level of production that a market may absorb, results in an inadequate decision and generates undesirable consequences, such as reductions in the utilization of that capacity. When facing these particular conditions, damage to the national industry becomes an expected result. This damage cannot be attributable to imports.

5. CONCLUSION

17. Colombia considers that this case raises important questions on the application of certain provisions of the ADA Agreement and the GATT of 1994. While not taking a final position on all aspects of the merits of the case, Colombia requests the Panel to carefully review the scope of the claims in light of the remarks made in this hearing.

18. Mr. Chairman, distinguished members of Panel, and representatives of the Parties and Third Parties, with these comments Colombia hopes to contribute to the legal discussion of this case and would like to thank this opportunity to express its views on the present dispute. Thank you for your kind attention and we remain at your disposal to answer any questions.

ANNEX D-4

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF INDONESIA

1. "AS SUCH" CLAIM CONCERNING ARTICLE 2(5) OF THE EUROPEAN UNION'S BASIC ANTI-DUMPING REGULATION

1.1 Scope and content of Article 2(5) of the Basic Anti-Dumping Regulation

1. The construction of the contested measure in the present dispute has been supported by Argentina with evidence beyond its text. In line with the approach prescribed by the Appellate Body[1], the legislative background, administrative practice and domestic court rulings put forward by Argentina should be reviewed by the Panel.

2. As regards the scope and content of the measure at issue, Indonesia sees the second subparagraph of Article 2(5) as introducing a WTO-inconsistent condition or requirement - not provided for in the Anti-Dumping Agreement or any WTO-covered Agreements - which has to be met in order for the GAAP-consistent records of an exporter or producer which reflect the recorded costs associated with the production and sales of the product under consideration in the country of origin, to be used to calculate the cost of production. Failing the satisfaction of this condition, the European Union determines that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, and adjusts the costs of production of the investigated exporter or producer in a WTO-inconsistent manner.

3. The contested provision obliges the European Union investigating authority to use input costs unaffected by "distortions" for establishing the cost of production, which is a requirement not provided for in the WTO-covered Agreements. In this pursuit, it requires the investigating authority to undertake the 'distortion test' and replace/adjust, in a WTO-inconsistent manner, the actual-recorded input costs of exporters or producers in case those costs are found to be distorted on the basis of out-of-country of origin prices of the inputs. These additional requirements have been woven into the reasonable reflection of costs criterion. The above scope and content is evident from the clear explanation in recital 4 of Council Regulation (EC) No. 1972/2002, as well as a string of anti-dumping cases in which the contested provision was applied. In fact this practice has been applied consistently where the European Union was presented with allegations by the complainants or was aware of a causal factor that could lead to a distortion of input costs in the investigated country.

4. Contrary to the European Union's claim of the discretionary nature of the provision[2], the use of costs not affected by distortions is a norm set by the second subparagraph of Article 2(5) of the Basic Anti-Dumping Regulation and is necessarily WTO-inconsistent. Indeed, this is supported by the European Union's vehement justification of the WTO-consistency of the assessment of reasonableness of costs *per se* and of the use of reasonable costs in constructing the normal value[3], as well as the adjustment/rejection of raw material costs that are "*not "normal"*".[4]

1.2 Violation of Article 2.2.1.1 of the Anti-Dumping Agreement

5. If an investigating authority decides to construct the normal value, Article 2.2.1.1 comes into play.

6. First, previous Panel reports[5] have established that the first sentence of Article 2.2.1.1 sets out a rule and imposes a positive obligation on investigating authorities to calculate costs of

[1] Appellate Body Report, *US – Carbon Steel* (*India*), paras. 4.446, 4.451, 4.454; Appellate Body Report, *US – Carbon Steel*, para. 157*;* Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 168.

[2] European Union, first Written Submission, paras. 113-114, 119-124.

[3] European Union, first Written Submission, paras. 131-133.

[4] European Union, first Written Submission, para. 157.

[5] Panel Report, *China – Broiler Products*, paras. 7.160, 7.161; Panel Report, *EC – Salmon (Norway)*, para. 7.483; Panel Report, *US – Softwood Lumber V*, paras. 7.237, 7.310, 7.316.

production on the basis of the records kept by the exporter or producer under investigation[6], *provided* that two cumulative conditions are met, namely that the records of the investigated exporter or producer are consistent with the GAAP of the exporting country, and they reasonably reflect the costs associated with the production and sale of the product under consideration. Therefore, the second subparagraph of Article 2(5) of the European Union's Basic Anti-Dumping Regulation is WTO-inconsistent in so far as it imposes an additional condition to use undistorted input costs.

7. Second, a literal reading of the first sentence of Article 2.2.1.1 indicates that both the conditions apply to the *records*. The negotiating history of the provision supports such interpretation. Moreover, the drafters while modifying the various pre-Uruguay round texts of the Anti-Dumping Agreement starting from the Carlisle I text, did not insert the word "costs" after the conjunction "and" in the first sentence of Article 2.2.1.1 or indicate in any other manner that the reasonable reflection criterion is related to the costs. Therefore, the interpretation of the European Union that the word "reasonably" is attached to the word "costs" is untenable and is based on reading words into the text of the provision that do not exist.[7]

8. Third, the two conditions enumerated in the first sentence of Article 2.2.1.1 are aimed at assessing the reliability of the records *tout court* and as indicated by the structure of Article 2.2.1.1 were not meant to be mutually exclusive. The GAAP-consistency criterion is concerned with the reliability of the records of the investigated exporter/producer (or group) from an overall accounting perspective and costs are a part of the whole set of financial accounting data. If a company does not satisfy this condition, the investigating authority is not obliged to use the records of the investigated exporter or producer and it would not even test whether the records reasonably reflect costs associated with the production of the product under consideration. The next condition that records reasonably reflect the costs associated with the production and sale of the product under consideration is not linked to the issue of reasonability of costs but to the fact that from the perspective of product-specific costs involving allocations, the cost of production of the product under consideration should be reasonably reflected in the records. This is indicated by the specific reference to the words "product under consideration" in the context of the reasonable reflection of costs criterion. In fact such an interpretation is also supported by the second and third sentences of Article 2.2.1.1 which function within the ambit of the requirement set forth by the first sentence that records reasonably reflect the costs associated with the production of the product under consideration. Indeed, from a practical perspective, allocations would be necessary or relevant only in the context of product-specific cost accounting, since otherwise, the full/unallocated/aggregated company-wide costs would anyway exist in the GAAP-consistent records pertaining to the whole company.

9. Fourth, Article 2.2.1.1 and Article 2.2 do not require an assessment of the reasonableness of the costs of inputs recorded in the accounting records of the investigated exporter or producer *per se*, nor do these articles mandate that costs of inputs should be "reasonable" in comparison to any benchmark. This is attested by the fact that a reasonability condition is only specified with regard to SG&A costs and profits in Article 2.2 of the Anti-Dumping Agreement. Moreover, the concept of individual dumping margins as a means to address the individual pricing behaviour of exporters or producers[8] would lose meaning if the reasonability of each exporter or producer's cost of production were to be assessed on the basis of a standard cost of production or a standard cost for inputs as done by the European Union in the *Biodiesel* investigation.

10. Fifth, the text of Article 2.2.1.1 read in light of footnote 6 and the last sentence of Article 2.2.1 sets a parameter that the reasonable reflection of costs is to be assessed on the basis of the actual costs incurred by an exporter or producer in the investigation period. The enquiry under the first sentence of Article 2.2.1.1 does not allow the inclusion of costs that have not been incurred (in the investigation period) by the investigated exporter or producer, and that cannot be linked in any manner to the actual act of production by the exporter or producer concerned since such costs would never be recorded in the exporter or producer's records at the company-wide level or product-specific level. Moreover, it would be illogical to talk of allocation of costs that have not been incurred but should have been incurred. Indeed, the reference to start-up costs in

[6] Panel Report, *US – Softwood Lumber V*, para. 7.236.

[7] European Union, First Written Submission, para. 133. The United States also seems to hold a similar view as the European Union. United States, First Written Submission, paras. 18, 21.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 111.

footnote 6 and the recovery of costs in the last sentence of Article 2.2.1[9] leaves no room for doubt that the costs concerned by these provisions are those that would have already been incurred by the exporter or producer/group.

11. Last, investigating authorities need to assess individually in every case to the extent individual exporters or producers are investigated, as to whether or not their records reasonably reflect the costs associated with the production of the product under consideration by them. However, the parameters that are to be applied as regards the assessment of the reasonable reflection of the costs in the records cannot be determined by authorities on a case-by-case basis. This is because the clear parameters as identified above have been set out in the covered agreements in an unambiguous manner. Moreover, if investigating authorities were permitted to determine the parameters on a case-by-case basis, it would induce legal uncertainty as regards the application of Article 2.2.1.1 and could easily result in the same situation being treated differently by different WTO Members or different situations being treated in the same manner which is contrary to the fundamental principle of non-discrimination that is a pillar of the WTO Agreements.

1.3 Violation of Article 2.2 of the Anti-Dumping Agreement

12. In US – Softwood Lumber V, the Panel considered that Article 2.2 "concerns the establishment of an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used".[10] Thus, the purpose of the constructed normal value is to create a "comparable price" for the like product if it were sold on the domestic market of the country of origin in the ordinary course of trade to comply with the definition of dumping within the meaning of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. The definition of dumping will lose meaning if the normal value is constructed using out-of-country of origin input costs as it will not yield a "comparable price" and a finding of dumping will in most cases be a foregone conclusion, particularly where low cost countries are targeted.

13. If an investigating authority decides to construct the normal value on the basis of the cost of production *in the country of origin* plus SG&A costs and profits, it does not have the discretion to use third country prices or cost data for any purpose including for the sort of 'non-distortion test' as done by the European Union or the calculation of the costs of production if it deems that these are not reasonable/undistorted. The text and context of Article 2.2 do not permit any exceptions to this rule. Thus, an investigating authority cannot directly or indirectly - by means of using evidence as suggested by the European Union - adopt international prices or third country prices to adjust the costs of an exporter or producer if it considers that the records of that investigated party do not reflect "reasonable" costs associated with the production of the product under consideration.

14. Moreover, if the European Union's interpretation and practice were to be upheld, legally it implies that in each case that an investigating authority would resort to out-of-country of origin input costs, it would be working on the basis of an assumption that an exporter or producer would have different input costs if there were sales of the like product in the ordinary course of trade in the domestic market. Such assumption cannot be justified on the basis of any provision in the WTO-covered agreements and flies in the face of the requirement for an investigating authority to base its determination on a proper establishment of facts. In fact the European Union itself admits that it aimed at determining a cost of production in the country of origin in the *Biodiesel* case in the absence of distortion and thus calculated a figure which was a "*hypothetical one*".[11]

[9] The final sentence of Article 2.2.1 states that sales below costs in the country of export may be considered as not being in the ordinary course of trade and may be disregarded in determining the normal value provided that they are made within an extended period of time, in substantial quantities and are at "*prices which do not provide for the recovery of all costs within a reasonable period of time*". The reference to "*recovery of all costs*" can only be intended when such costs have been incurred in the first place.

[10] Panel Report, *US – Softwood Lumber V*, para. 7.278.

[11] European Union, First Written Submission, para. 205.

2. CLAIM UNDER ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT – DEFINITION OF "UTILIZATION OF CAPACITY"

15. In the Shorter Oxford English Dictionary, the meaning of the term "capacity" is "*ability to receive, contain, hold, produce or carry*".[12] This is the generic definition that should be considered. According to this definition, the reference is to the ability to produce *tout court* regardless of the fact that the ability to produce is immediate or is useable subject to some investments/upgrading/overhauling etc. In any event, as long as the production capacity remains installed, it cannot be excluded that it can be put back into production.

16. Additionally, the term used in Article 3.4 of the Anti-Dumping Agreement is "utilization of capacity" and not utilization of 'productive' capacity or 'useable' capacity or 'operative' capacity. Therefore, the clear reference is to all capacity, including capacity that may not be used or be useable at a particular point in time. If the drafters had intended that only the utilization of 'productive' or 'useable' or on-line 'operative' capacity be assessed, implying in other words the exclusion of "idle capacity", this would have been specified in Article 3.4 through the use of any of the terms noted above.

17. Indonesia also notes that there is no definition of "idle capacity" in the Anti-Dumping Agreement. Thus, if the Panel were to agree with the European Union's theory, and consider that "idle capacity" be excluded from the definition of the term "utilization of capacity", there would be extreme ambiguity in the interpretation of this indicator. Per the Shorter Oxford English Dictionary, the meaning of the word "idle" is "*inactive, unoccupied, not moving or in operation*".[13] Thus the term "idle capacity" can be interpreted very widely.

18. To summarize, the full installed capacity of the domestic industry should be considered for the assessment of "utilization of capacity" and this was also supposedly the intention of the drafters of the Anti-Dumping Agreement. A contrary interpretation would make the assessment of this injury indicator un-objective and discriminatory as authorities or complainants could apply different definitions of "idle capacity" in different contexts.

[12] Shorter Oxford English Dictionary, Sixth Edition, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 341.

[13] Shorter Oxford English Dictionary, Sixth Edition, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 3487.

ANNEX D-5

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF MEXICO[1]

MEXICO'S THIRD-PARTY SUBMISSION ON THE EUROPEAN UNION'S REQUEST FOR A PRELIMINARY RULING

I. INTRODUCTION

1. Mexico thanks the Panel for this opportunity to submit comments regarding the preliminary objections and the parties to the dispute for giving access to their respective submissions.

2. The foregoing is very important for third-party Members, as it enables them to gain a better understanding of the dispute and, where appropriate, to submit comments prompted by systemic interest.

II. RELATED MEASURES AND IMPLEMENTING MEASURES

3. In its request for a preliminary ruling dated 24 November 2014, the European Union observes that the references made by Argentina in its request for the establishment of a panel to "implementing measures and related instruments or practices" and "related measures and implementing measures" should be considered as falling outside the Panel's terms of reference, since, in the opinion of the European Union, these terms do not comply with the provisions of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in that they fail to specifically identify the measures at issue.[2]

4. Mexico does not share the European Union's view. The phrase that includes related and implementing measures is a common phrase that complainants usually include in panel requests – precisely to avoid respondents from subsequently issuing a measure related to or deriving from the original measure at issue that is also non-compliant and goes beyond the panel's terms of reference. In previous disputes, complainants have incorporated this type of phrase and the panels have considered within their terms of reference future measures issued in relation to those being challenged.[3]

5. In this case, as regards "related measures and implementing measures", Argentina explains that the terms "related measures and implementing measures" are at the end of Section 1, point (B), which identifies the primary measures being challenged. It is therefore clear that only the measures related to the imposition of anti-dumping measures ("*medidas compensatorias*") by the European Union with respect to imports of biodiesel originating in Argentina could fall within the scope of the terms "related measures and implementing measures".[4]

6. Argentina further points out that the purpose of including such terms is to prevent the potential situation of the European Union issuing new measures related to those challenged by Argentina that would fall outside the Panel's terms of reference because they have not been expressly and individually identified by the complaining party. Consequently, the terms used by Argentina are necessary to protect its interests as complaining party, in order to avoid that a measure that is adopted after the establishment of the panel and is closely connected to the measure at issue may be excluded from the panel's terms of reference.[5]

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[1] Mexico indicated that its two submissions to the Panel (third-party submission on the European Union's request for a preliminary ruling and response to Panel question No. 2) should serve as the executive summary of its third-party arguments.

[2] Request for a preliminary ruling by the European Union, paras. 8-9.

[3] Appellate Body Report, *China - Raw Materials*, paras. 245 and 246. See also the Panel's ruling in *India - Agricultural Products* (DS430), which specifically analyses the question of whether the "related measures" and the "implementing measures" mentioned in the panel request are included within the Panel's terms of reference, preliminary ruling by the Panel, *India - Agricultural Products* (DS430) (document WT/DS430/5), paras. 3.40 and 3.51.

[4] Response of Argentina to the request for a preliminary ruling by the European Union, para. 21.

[5] Response of Argentina to the request for a preliminary ruling by the European Union, para. 29.

7. Mexico considers that the Panel should recognize these measures as falling within its terms of reference.

III. CLAIMS THAT EXPAND THE SCOPE OF THE DISPUTE

8. The European Union observes that Argentina's request for the establishment of a panel expands the scope of the dispute as presented in Argentina's request for consultations. According to the European Union, the panel request includes a great number of new claims, which changes the essence of the complaint raised in the consultations. The European Union requests that the following claims be considered as falling outside the Panel's terms of reference:[6]

a. The inclusion of "*related practices*" in the claim relating to Article 2(5) of Council Regulation (EC) No. 1225/2009, in paragraph 1(A) of the panel request. The European Union adds that the request for consultations expressly stated that what was being challenged was the above provision "*as such*", which means that what is being referred to is a specific, written legal provision and not the application of that provision.[7]

b. It is not clear whether the insertion of a paragraph between paragraphs 2(B)3 and 2(B)4 of the panel request is intended to introduce an "*as applied*" claim against Article 2(5) of Council Regulation (EC) No. 1225/2009.[8]

c. Argentina claims for the first time that Article 2(5) of Council Regulation (EC) No. 1225/2009 is "*as such*" inconsistent with Article 9.3 of the Anti-Dumping Agreement, because, allegedly, the amount of the anti-dumping duty ("*cuota compensatoria*") to be imposed exceeds the margin of dumping.[9]

d. Paragraphs 2(A)1 and 2(A)2 of the panel request include new claims against Article 2(5) of Council Regulation (EC) No. 1225/2009 that are based on Article VI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Argentina's request for consultations did not include any claim based on Article VI:1.[10]

e. A new claim is introduced in relation to the scope of Article 2(5) of Council Regulation (EC) No. 1225/2009, based on Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and referring to the inclusion as "costs not associated with the production and sale of the product under consideration".[11]

f. Argentina's claim regarding the European Union's determination of profits under Article 2.1 of the Anti-Dumping Agreement.[12]

9. Mexico recalls that the Appellate Body has noted that Articles 4 and 6 of the DSU do not require a "precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel, provided that the 'essence' of the challenged measures had not changed".[13] In *US - Upland Cotton*, the Appellate Body made clear that it did not intend to impose too rigid a standard for the "precise and exact identity" between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the request for the establishment of a panel, which according to Article 7 of the DSU is that which governs the panel's terms of reference.[14]

[6] Request for a preliminary ruling by the European Union, paras. 23-26.
[7] Request for a preliminary ruling by the European Union, paras. 27-30.
[8] Request for a preliminary ruling by the European Union, paras. 31-35.
[9] Request for a preliminary ruling by the European Union, paras. 36-40.
[10] Request for a preliminary ruling by the European Union, paras. 41-44.
[11] Request for a preliminary ruling by the European Union, paras. 45-49.
[12] Request for a preliminary ruling by the European Union, paras. 50-54.
[13] Appellate Body Report, *Brazil - Aircraft*, para. 131. In this case, the Appellate Body considered that the measures at issue (export subsidies for regional aircraft) were the subject of consultations and were referred to the DSB for consideration. The regulatory instruments that came into effect in 1997 and 1998 (following the consultations held on 18 June 1996) did not change the essence of the export subsidies at issue. The Appellate Body accordingly concluded that the export subsidies for regional aircraft, including the instruments that came into effect after consultations were held between Canada and Brazil, were properly before the Panel (Appellate Body Report, *Brazil - Aircraft*, paras. 132 and 133).
[14] Appellate Body Report, *US - Upland Cotton*, para. 293.

10. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body established that the same standard concerning the degree of identity that must exist between the request for consultations and the panel request applies with respect to the "legal basis" of the complaint. A complaining party may learn of additional information during consultations that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. It is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the addition of provisions (in the panel request) does not have the effect of changing the essence of the complaint.[15]

11. Argentina's conclusion in each particular case is that each of the assumptions contested by the European Union concerns claims that evolved out of those raised in the request for consultations but that "some connection" exists between the two.[16] Hence, the Panel should look at whether the allegedly "new claims" noted by the European Union actually derive from claims previously identified by Argentina in the request for consultations. In any event, the Panel should consider an analysis such as that referred to by the Panel in *India - Agricultural Products* in order to determine whether "some connection" exists:

> [W]e recall the words of the Appellate Body in *US - Carbon Steel* that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[17]

[15] Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice,* para. 138. The Appellate Body stated the following:

> "In our view, the same logic applies with respect to the legal basis of the complaint. A complaining party may learn of additional information during consultations - for example, a better understanding of the operation of a challenged measure - that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations - namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the 'legal basis' in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint."

[16] Response of Argentina to the request for a preliminary ruling by the European Union, para. 66.

[17] Preliminary ruling by the Panel, *India - Agricultural Products* (DS430) (document WT/DS430/5), para. 3.48.

MEXICO'S THIRD-PARTY RESPONSE TO PANEL QUESTION NO. 2

CLAIMS UNDER ARTICLE 2.2.1.1 AND 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994

Interpretation of the provisions of the covered agreements invoked by Argentina

(…)

2. (to all third parties) What are the parameters or criteria under Article 2.2.1.1 or any other provision of the covered agreements governing the manner in which an investigating authority shall determine whether the records reasonably reflect the costs associated with the production and sale of the product concerned? Or are the investigating authorities free to make this determination on case-by-case basis?

Mexico's response:

Mexico sees nothing in Article 2.2.1.1 of the Anti-Dumping Agreement that would enable it to conclude that there are any fixed parameters for making such a determination. Nor does it see any contextual elements that would enable it to conclude that such parameters exist. Consequently, Mexico considers that the investigating authorities have a measure of discretion to reach this determination on a case-by-case basis.

ANNEX D-6

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF NORWAY

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. We will not comment upon all the issues raised by the Parties. Rather, we will confine ourselves to offer some views on the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

2. As we know, the first sentence provides that:

> *[f]or the purposes of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.*

3. The parties disagree, amongst others, on whether Article 2.2.1.1 allows the "investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be 'abnormally or artificially low'".[1]

4. A legal analysis of a WTO provision starts, of course, with an inquiry into the ordinary meaning of the terms. Article 2.2.1.1 uses the word "shall", which indicates that it establishes an obligation of some sort. In this case, the word "shall" is qualified by the terms "normally" and "provided that". We understand "normally" in this context to point to the existence of conditions, rather than to "alter the characterization of [the] obligation as constituting a 'rule'".[2]

5. The obligation on the investigating authorities according to Article 2.2.1.1, is subject to two cumulative conditions:

i) that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

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

6. If these two conditions are fulfilled, the investigating authorities "shall normally" calculate the costs on the basis of records kept by the exporter or producer under investigation.

7. In light of the ordinary meaning of the terms in Article 2.2.1.1, Norway notes that both conditions seem to relate to the quality of the records as such. It is the records that must be in accordance with the GAAP, and the records that must "reasonably reflect the costs associated with the production and sale of the product under consideration". The European Union, however, argues that the second condition should be interpreted to mean that the costs themselves need to be reasonable. The European Union submits, amongst others, that "it would be counterintuitive to assert that Article 2.2.1.1 […] mandates the investigating authorities to base their calculations on costs that are 'unreasonable'".[3]

8. In our view, by asserting this, the European Union is reading into Article 2.2.1.1 words that are simply not there. The structure of the first sentence of Article 2.2.1.1 does not suggest an interpretation that the records must reflect costs that are reasonable – or not "abnormally or artificially low". Rather, the structure and the ordinary meaning of the terms suggest that the second condition only concerns whether the records in a reasonable way reflects the costs associated with the production and sale of the product under consideration.

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[1] Argentina' First Written Submission, paras. 87 and 88. See also Argentina's First Written Submission para. 195. European Union's First Written Submission, for instance, paras. 154 and 254.

[2] See Appellate Body Report, *United States – Clove Cigarettes,* para. 273.

[3] European Union's First Written Submission, para. 131.

9. Accordingly, Norway is of the opinion that Article 2.2.1.1 does not allow investigation authorities to disregard the records in situations where the authorities find that the costs reflected in the records are "abnormally or artificially low", as long as the two explicitly mentioned conditions are met.

10. This concludes Norway's statement. I thank you for your attention.

ANNEX D-7

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS
OF THE RUSSIAN FEDERATION

Introduction

1. The Russian Federation intervened in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, in particular the Anti-Dumping Agreement. The Russian Federation would like to provide its views on: a) the input cost adjustment practice used by the European Union in its anti-dumping investigations; b) the legal interpretation of the words "reasonably reflect" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement; c) Article 2.2 of the Anti-Dumping Agreement that requires construction of normal value on the basis of costs in the country of origin of the product under consideration; and d) the concept of "dumping" in the context of the Anti-Dumping Agreement.

A. The Input Cost Adjustment Practice Used by the European Union in Its Anti-Dumping Investigations

2. The Russian Federation strongly condemns the practice of input cost adjustment and considers it to be inconsistent with both the provisions of the WTO agreements and the spirit of the WTO in general.

3. This practice, based on Articles 2(3) and 2(5) of the Basic Regulation[1], is very similar to the treatment of non-market economies that the European Union applied in its antidumping procedures to imports from the Russian Federation when it had non-market economy status. As Argentina concludes in section 4.1 of its First written submission, the amendments introduced to the Basic Regulation in 2002 allow the investigating authorities of the European Union to continue using non-market economy techniques with respect to countries that have been granted full market economy status and even to countries that have always been recognized as market economies and have been WTO members. Thus, the European Union has widely expanded the application of the cost adjustment practice, and uses it for protectionist purposes. The present case clearly demonstrates this.

4. It is worth noting that the General Court of the European Union has found that the non-market economy techniques which, as it was mentioned, create the same consequences for the exporters as the practice of input cost adjustment violate Article 2 of the Anti-Dumping Agreement.[2]

B. The Legal Interpretation of the Words "Reasonably Reflect" in Article 2.2.1.1 of the Anti-Dumping Agreement

5. Based on the ordinary meaning of the words "reflect" and "reasonably", the Russian Federation is of the position that the proper reading of the phrase "reasonably reflect" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement is that records reasonably depict expenses incurred by the producer for the production and sale of the product under consideration.

6. In Article 2.2.1.1, the word "reasonably" is attached to the verb "reflect" and not to the word "costs". As Argentina correctly concluded, "this sentence does not provide that the records must reflect 'reasonable costs' or 'costs which are reasonable in light of prices on other markets'.

[1] Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, p. 51 and corrigendum to Council Regulation (EC) No 1225/2009, OJ L 7, 12.1.2010, p. 22 as amended by Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 (OJ L 237, 3.9.2012, p. 1), Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012 (OJ L 344, 14.12.2012, p. 1) and Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 (OJ L 18, 21.1.2014, p. 1).

[2] Case *T-512/09, Rusal Armenal ZAO* v *Council of the European Union,* Judgment of the General Court of the European Union of 5 November 2013.

Rather, the issue is only whether the records reflect the costs associated with the production and sale of the product under consideration in a reasonable manner".[3]

7. Moreover, the plain meaning of the term "cost" focuses on what is actually paid, rather than on the value or *reasonableness* of what is paid. Taking into account that Article 2.2.1.1 of the Anti-Dumping Agreement refers to GAAP, the term "cost" is used in an accounting sense. The focus of the inquiry is on whether the costs are *reasonably reflected in the records*, and *not* whether the costs *per se* were reasonable having regard to some extraneous economic considerations.

8. Article 2.2.1.1 of the Anti-Dumping Agreement does not provide that investigating authorities can reject or adjust the costs reasonably reflected in exporter's records on the basis that prices for the product under consideration or its inputs are lower in comparison with international prices or prices in other markets. If negotiators had agreed on the inclusion of such an option, they would have explicitly described it in the text of this provision. However, the drafters have neither mentioned it, nor set any criteria, or defined the circumstances in which costs associated with the production and sale of the product concerned accurately reflected in the records of the producer may be considered as not being "reasonable".

9. The interpretation advocated by the European Union when the prices of certain raw materials are considered to be "abnormally or artificially low" in comparison with prices in third countries or international prices not only erodes the comparative advantage of a Member, but is discriminatory towards countries which enjoy comparative advantages in different areas. The European Union's approach undermines the concept of comparative advantage, which is recognized to be the basis for international trade. Countries should not be discriminated against for having a comparative advantage, whether it is the cost of raw materials or labor etc.

10. It should be stressed that the Anti-Dumping Agreement does not envisage the use of "international prices" in anti-dumping investigations. Prices for inputs are determined in national markets depending on local market conditions and may vary considerably. With this in view, the question arises as to in which market prices for inputs are supposed to be chosen as benchmarks (to be considered "at the world level") for comparison with the costs actually incurred by the producer/exporter under investigation in order to conclude that they are "reasonable" or not. Even prices of commodities that are set at exchanges (for example, the London Metal Exchange) cannot be viewed as international prices in the context of anti-dumping investigations. The use of abstract "international prices" as a basis for determination of normal value or export price contradicts both the letter and the spirit of the Anti-Dumping Agreement.

11. Thus, the European Union's interpretation of the term "reasonably reflect" is neither supported by the text of Article 2.2.1.1 of the Anti-Dumping Agreement, nor does it reflect the intention of the drafters.

C. Article 2.2 of the Anti-Dumping Agreement Requires Construction of Normal Value on the Basis of Costs in the Country of Origin of the Product under Consideration

12. The Russian Federation considers that Article 2.2 of the Anti-Dumping Agreement, including Article 2.2.1.1, expressly and unambiguously requires that the margin of dumping must be determined by comparison with the cost of production *in the country of origin*. By providing the possibility to determine the cost of production to construct normal value on "information from other representative markets", Article 2(5) of the Basic Regulation is in sharp contrast with the requirement of Article 2.2.1.1 of the Anti-Dumping Agreement.

13. Article 2.2 of the Anti-Dumping Agreement contains a chapeau and several paragraphs. The chapeau provides a general rule, and paragraphs describe more specific rules related to the construction of normal value. The connection between the chapeau and other paragraphs is explicit, in particular through the numbering and the opening phrases "[f]or the purpose of paragraph 2" that appear in Articles 2.2.1.1 and 2.2.2. This fundamental structure and logic of Article 2.2 as a whole indicates that interpretation of its paragraphs should remain within the parameters of the chapeau and therefore the source of information for calculation of normal value is the domestic market of the exporting country.

[3] Argentina's First Written Submission, para. 104.

14. The support for this interpretation is found, in particular, in Article 2.2.2 of the Anti-Dumping Agreement that describes several ways to determine "the amounts for administrative, selling and general costs and for profits", all of which relate to data *in the country of origin*.

D. The Concept of "dumping" in the Context of the Anti-Dumping Agreement

15. The Panel should interpret provisions of the Anti-Dumping Agreement in their context, including the definition of "dumping" reflected in Article 2.1 of the Anti-Dumping Agreement.[4]

16. The Appellate Body has confirmed in several cases that the opening phrase of this Article – "For the purpose of this Agreement" – means that this definition of 'dumping' applies to the entire Anti-Dumping Agreement, and is central to the interpretation of other provisions of the Agreement.[5] They "relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country".[6]

17. It follows from the interpretation of the Appellate body that: (1) the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement must be applied in a coherent fashion, and cannot be of variable content or application;[7] (2) the term "dumping" relates to a *product*, meaning the product under consideration as a whole. Moreover, it is the exporter's pricing behaviour that may result in dumping. Thus, the concept of "dumping" in the context of the Anti-Dumping Agreement does not deal with the price of the product's inputs.

18. Finally, the Russian Federation supports Argentina's understanding that Article 2.2.1.1 refers to the "costs" which are "associated with the production and sale of the product under consideration". Argentina states, *inter alia,* that "it shows that this condition deals with the costs relating to 'the *product* under consideration' and *not with the costs of the inputs*".[8]

19. As Argentina, the Russian Federation is deeply concerned that the European Union's erroneous interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, reflected in the measure at issue, results in broadening the circumstances under which WTO Members may apply anti-dumping duties and thus undermines the concept of "dumping" provided for in Article 2.1 of the Anti-Dumping Agreement.

Conclusion

20. In sum, the legal analysis of Article 2.2 of the Anti-Dumping Agreement as a whole reveals that Article 2.2, including Article 2.2.1.1, does not permit the use of the data of a third country for the purpose of calculation of constructed normal value. The European Union's interpretation of the term "reasonably reflect" is neither supported by the text of Article 2.2.1.1 of the Anti-Dumping Agreement, nor does it reflect the intention of the drafters. The European Union's interpretation broadens the circumstances under which the WTO Members may apply anti-dumping duties and thus undermines the concept of "dumping" provided in Article 2.1 of the Anti-Dumping Agreement. In its legal interpretation of Article 2.2.1.1, the Panel should examine the text of this provision in the context of Articles 2.2, 2.2.2 and 2.1 of the Anti-Dumping Agreement.

[4] Argentina's First Written Submission, paras. 125-126.

[5] Appellate Body Reports, *US – Softwood Lumber V*, para. 93; *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 126; *US – Zeroing (Japan)*, para. 109; *US – Zeroing (Japan)*, para. 140.

[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 109 (emphasis original).

[7] Appellate Body Report, *US – Continued Zeroing*, para. 280.

[8] Argentina's First Written Submission, para. 103 (emphasis added).

ANNEX D-8

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS
OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia focuses its comments on a number of important systemic issues that are central to the dispute relating to (A) the requirement to base the determination of costs on the records of the investigated foreign exporter or producers, (B) the requirement to base the normal value on the costs in the country of origin rather than on an out-of-country benchmark, (C) the WTO consistency of export duties as a legitimate policy instrument and (D) the need for a proper injury and causation analysis.

II. ANALYSIS

2. Saudi Arabia considers that the anti-dumping instrument requires Members to examine private pricing behaviour of foreign producers in a given set of circumstances. It does not concern the comparison of a foreign producer or exporter's export price against an undefined international reference price or "normal" value that does not reflect the prices or conditions in the producer or exporter's country of origin. There is no textual basis in the Anti-Dumping Agreement for an investigating authority to question the reasonableness of input costs simply because these may be lower in the country of origin than in a third country or world market.

A. Recorded Cost Data Reasonably Associated With The Production And Sale Of The Product Concerned Cannot Be Rejected Based On An Allegation That They Are "Artificially Low" or "Distorted"

3. Article 2.1 of the Anti-Dumping Agreement reflects the fundamental principle that a dumping determination must be made on the basis of the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Domestic prices can only be disregarded when there are no sales of the like product in the ordinary course of trade or when the sales do not permit a proper comparison because of the particular market situation or the low volume of sales in the domestic market of the exporting country. Article 2.2 dictates the alternative bases for determining the normal value in such situations and offers only two options: either the comparable price of the like product when exported to an appropriate third country, provided that this price is representative or "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[1] In terms of "the cost of production in the country of origin", Article 2.2.1.1 of the Anti-Dumping Agreement imposes an obligation to calculate the costs on the basis of the records kept by the exporter or producer under investigation. The only conditions for using such records are that the records are kept "in accordance with the generally accepted accounting principles of the exporting country" and that the records "reasonably reflect the costs associated with the production and sale of the product under consideration". If that is the case, the records of the producer under investigation must be used.[2]

4. Article 2.2.1.1, first sentence, thus reflects the producer-specific and country-specific nature of the anti-dumping instrument which is only concerned with examining the private pricing behaviour of producers based on their recorded costs actually incurred in association with the production and sale of the product under consideration. The second part of the first sentence of Article 2.2.1.1 provides the exceptional circumstances under which the general rule does not apply. First, if the records are not kept in accordance with the generally accepted accounting principles of the exporting country, there is no requirement to use them. This is another reflection of the country-specific nature of the anti-dumping instrument. Second, if the records in question do not "reasonably reflect" the costs "associated with the production and sale of the product under consideration," the recorded costs do not have to be used either. This condition goes to the relationship between the recorded costs and the production and sale of the product under consideration, and not of a different or larger group of products.

[1] See Article 2.2 of the Anti-Dumping Agreement.
[2] See Article 2.2.1.1 of the Anti-Dumping Agreement.

5. The analysis may consider which costs are sufficiently associated with the production and sale of the product under consideration. So, the "reasonableness" test in Article 2.2.1.1 does not allow an investigating authority to question the general "reasonableness" of the costs recorded, such as by comparing them to costs of producers in other countries or to an international reference price. It merely concerns the association of the recorded costs with the product under consideration as compared with other products of the exporter to which certain costs may also be associated.

6. Saudi Arabia is of the view that the text of Article 2.2.1.1, when read in its ordinary meaning and in the context of Articles 2.1 and 2.2 of the Anti-Dumping Agreement, confirms that an investigating authority is not allowed to adjust, let alone reject, the cost data of foreign producers and exporters merely because it considers those costs to be "artificially low" when compared to an international benchmark or otherwise "distorted". In *EC – Salmon (Norway),* the panel noted that "the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product".[3] Similarly, in *US – Softwood Lumber V*, the panel noted that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the market value of those [costs]," and that to accept the "argument that Article 2.2.1.1 requires an investigating authority to ensure that the [cost] reasonably reflects the market value 'would require us to read into the text words which are simply not there'".[4] This interpretation is also supported by the object and purpose of the Anti-Dumping Agreement which, among others, is to introduce disciplines on WTO Members when conducting anti-dumping investigations. It allows Members to protect their producers from material injury caused by the private pricing behaviour of foreign producers. It is not aimed at preventing Members from adopting WTO consistent measures or undoing Members' comparative advantages by correcting the reported costs of production in light of international reference prices and costs different from those actually incurred by the producer that are reasonably associated with the product under consideration. Other multilateral or unilateral instruments are available to address measures that are alleged to distort the market environment and trade.

7. In sum, the exporter or producer's recorded costs are to be used when constructing the normal value as long as the records are kept in accordance with the generally accepted accounting principles of the exporting country and as long as the records reflect costs that are reasonably associated with the production and sale of the product concerned. There is no legal basis in the Anti-Dumping Agreement that would allow an investigating authority to question the reasonableness of the level of the recorded costs or to examine these costs in the light of an international reference price.

B. An Investigating Authority Is Not Permitted To Construct Normal Value On The Basis Of A Cost That Is Not The Cost In The Country Of Origin

8. Article 2.2 of the Anti-Dumping Agreement imposes an obligation to calculate the normal value on the basis of the costs of production in the country of origin. Saudi Arabia considers that the text of this provision when read in its context is clear and does not allow the imposition of an artificial cost of production that reflects an international reference price. This provision reflects the country-specific nature of an anti-dumping investigation that is limited to examining whether the export price is lower than the normal value of the product concerned of the in the country of origin from the exporter under investigation. The immediate context of Article 2.2 of the Anti-Dumping Agreement confirms this reading that requires "normal value" to be constructed based on in-country data. First, Article 2.2.1.1 requires the use of the recorded costs of the foreign exporter for constructing normal value. Second, Article 2.2.2 concerning construction of administrative, selling and general costs and profits provides that such amounts shall be linked to the country of origin. Therefore, both elements of the constructed normal value need to be based on information from the country under investigation and cannot be established by way of reference to out-of-country benchmarks such as international reference prices. Given that the producer's cost of production will be the same whether it exports or sells domestically, the level of the costs compared to other markets is simply irrelevant for purposes of the price discrimination question in a dumping investigation.

[3] Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[4] Panel Report *US – Softwood Lumber V*, para. 7.321 and footnote 446.

9. Finally, the obligation to consider and accept cost data of exporting producers is also relevant for the comparison of the normal value and the export price under Article 2.4, which sets out the general obligation that any comparison has to be "fair" thus connoting "impartiality, even-handedness, or lack of bias".[5] Article 2.4 thus requires that "due allowances" shall be made "for differences which affect price comparability". This means that "allowances should not be made for differences that do not affect price comparability".[6] Accordingly, no adjustments should be made when there are no differences in terms of costs of production of the goods whether destined for domestic or export sale. In addition, allowances for factors affecting price comparability should reflect costs actually incurred by exporting producers. Adjustments that do not reflect actual costs but are rather imposed to adjust the actual costs in the light of some abstract and theoretical "normal cost" benchmark are not appropriate under Article 2.4 and would skew the comparison and violate the important obligation of making a "fair comparison".

10. In sum, the text of Article 2.2 of the Anti-Dumping Agreement, when read in its context and in the light of the object and purpose of the Anti-Dumping Agreement, is unequivocal and requires that the costs used for constructing normal value are those of the country of origin. An investigating authority is not to impose international reference prices of what they consider the costs ought to be in the country of origin and cannot "adjust" costs to reflect such an international reference price.

C. Export Duties Are Permitted Under GATT Article XI And Cannot Be Contravened By Anti-Dumping Measures

11. Saudi Arabia recalls that it is clear from the text of the WTO Agreements, Article XI:1 of the GATT 1994, and from the relevant WTO jurisprudence that Members are permitted to maintain export duties. In *China – Raw Materials,* there was consensus among the panel, the Appellate Body and the disputing parties that WTO Members have the right under the GATT 1994 to impose export duties.[7] In the past, proposals were made to ban or strictly discipline the use of export duties. However, these proposals did not receive the support of the Membership. In the context of accession negotiations, the question of limiting the use of export duties is also frequently raised, and sometimes clear commitments have been made. Absent such commitments, however, export duties remain a permitted policy instrument, just like import duties. Import tariffs, export taxes, and other tariff and non-tariff related regulatory measure together constitute the market environment in which the producer operates. In an anti-dumping investigation, they are to be taken as a given. There is no basis for effectively seeking to prevent Members from employing a WTO consistent instrument like export duties through the imposition of dumping duties. The only "adjustments" that can be made under Article 2.4 relate to the differences affecting price comparability. Export duties do not affect this comparison. The anti-dumping instrument shall not be used to prevent Governments from adopting WTO-consistent measures (such as export taxes) or to undo Members' comparative advantages, simply because it is more difficult or impossible to do so under other instruments like the Agreement on Subsidies and Countervailing Measures. The anti-dumping instrument permits Members to protect domestic industries from the injurious effects of discriminatory pricing practices of foreign exporters and not from differences in market environments.

D. The Requirement To Conduct An Objective Examination Based On Positive Evidence Of Injury And Causation

12. Saudi Arabia wishes to underline the importance of a proper injury analysis in preventing abuse of the anti-dumping instrument. If there is no positive evidence of material injury resulting from the dumped imports and if the authority has failed to separate and distinguish the injury caused by other factors so as to make sure that it did not attribute such injury to the dumped imports, there is no basis for the imposition of anti-dumping measures. The injury analysis in an anti-dumping investigation is not a "tick-the-box exercise" where the authorities merely look at the injury factors in Article 3 and make a simple non-attribution analysis. The investigating authorities must engage in a critical and searching analysis of the facts on the record and conduct an

[5]Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada),* para. 138 (quoting the relevant dictionary meaning of "fair" as "just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards", and "offering an equal chance of success". (*Shorter Oxford English Dictionary*, 5th Ed., W. R. Trumble and A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 915)).

[6] Appellate Body Report, *US – Zeroing (EC)*, para. 156.

[7] Appellate Body Reports, *China – Raw Materials,* para. 293.

unbiased and proper evaluation of the facts. It must make sure to address and analyze "all relevant economic factors" and to engage with interested parties on the other factors that are affecting the domestic industry at the same time. If the injury is caused by other factors, there is no basis for imposing anti-dumping duties. It would not be permitted by the text of the Agreement and it would not make sense to impose a trade restriction on foreign producers to address a problem not caused by these producers. Consumers would pay the price for an unlawful and ineffective measure. The causation analysis is thus a particularly important part of the investigating authority's injury determination.

III. CONCLUSION

13. First, Saudi Arabia considers that a cost determination has to be made on the basis of the producer's cost data as reflected in the records of the exporting producer, if such records are kept in accordance with generally accepted accounting principles in the exporting country and have not been demonstrated to be a manifestly inaccurate reflection of the costs borne by the producer in question with respect to the production and sale of the product under consideration. The proviso in Article 2.2.1.1 of the Anti-Dumping Agreement that recorded cost data "reasonably reflect costs" does not permit the rejection of the producer's recorded costs simply because the investigation authority considers those costs to be "artificially low". Second, Article 2.2 of the Anti-Dumping Agreement imposes a clear obligation to base the normal value on the costs in the country of origin rather than on an out-of-country benchmark such as an international reference price. This is in line with the country-specific and producer-specific nature of the anti-dumping investigation. Third, export duties are a legitimate policy instrument that is expressly permitted by Article XI:1 of the GATT 1994. This must be taken into consideration when examining the disciplines imposed on Members under the Anti-Dumping Agreement. Fourth, if there is no positive evidence of material injury resulting from the dumped imports and if the authority has failed to separate and distinguish the injury caused by other factors so as to make sure that it did not attribute such injury to the dumped imports, there is no basis for the imposition of anti-dumping measures.

ANNEX D-9

EXECUTIVE SUMMARY OF THIRD-PARTY ARGUMENTS OF TURKEY

I. RECORDS KEPT BY PRODUCER/EXPORTERS UNDER ARTICLE 2.2.1.1 OF THE ADA

1. Article 2 is considered to be as one of the cornerstone articles of the ADA which sets comprehensive and detailed rules concerning the components of dumping and how the dumping margin should be calculated.

2. As dumping is determined through a fair comparison between the normal value and export price, the source and calculation methodology of these two sets of data is at the heart of an ADA-consistent determination of the dumping margin.

3. At this point, Article 2.2.1.1 of the ADA elevates itself to critical level which designates the source of the primary element of the normal value, namely the costs of production and sales of the product under consideration.

4. The Article reads as:

> 2.2.1.1 For the purpose of paragraph 2, costs shall *normally* be calculated on the basis of records kept by the exporter or producer under investigation, *provided that* such records are in accordance with the generally accepted accounting principles of the exporting country and *reasonably* reflect the costs associated with the production and sale of the product under consideration. *(emphasis added)*

5. As discussed in the rulings of *EC – Salmon*[1] and *China – Broiler*[2], Article 2.2.1.1 necessitates that, for the purpose of establishing normal value, the investigating authority is normally obliged to use the records kept by the producer or exporter if these records are in accordance with the generally accepted accounting principles, and reasonably reflect the costs associated with the production and sale of the product under consideration (POC). Turkey understands that the drafters of the article presume that the records found in the books of the company should "normally" mirror costs associated with the production and sales of POC. The word "normally", in this context, indicates that the investigating authority has less room to maneuver if the conditions, indicated in the second half of the sentence, are met. The article displays a comprehensible mechanics and necessitates the investigating authority to provide reasoned and adequate explanation to deviate from the "rule" and opt into work with the "derogation"[3] if it decides to do so.

6. Confirmed by the latest rulings in the WTO case law, the investigating authority has the discretion not to take legal path stipulated in the first part of the sentence and use alternative sources if the records are either inconsistent with the generally accepted accounting principles (GAAP) of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration. As pointed out in the case law the conditions of GAAP-consistency and reasonableness do not overlap in every case and that GAAP-consistency *per se* does not necessarily lead to the conclusion that the records reasonably reflect costs of production and sales.[4] To our understanding even if the records of the producers or exporters are in line with the GAAP, the investigating authority may still examine whether the records of the exporter or producer reasonably reflect the costs associated with the production and sale POC.

7. The point to be clarified in Article 2.2.1.1 is the definition of the word "*reasonably*". The ordinary meaning of "*reasonably*" encompasses, *inter alia,* "*sufficiently*", "*legitimately*", "*justly*", "*suitably*" and "*fairly*".[5] In Turkey's view "*reasonableness*" is established if there is no implausible

[1] Panel Report *EC – Salmon*, para. 7.483.
[2] Panel Report *China – Broiler*, para. 7.164.
[3] Panel Report *China – Broiler*, paras. 7.161-164.
[4] Panel Report *China – Broiler*, para. 7.166.
[5] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 9 January 2015, <http://www.oed.com/view/Entry/159074>

discrepancy between records and costs associated with the production and sales of the POC and as long as these costs and records reflect sufficiently reliable price levels. Under this legal interpretation, Turkey underlines that every case involving the "*reasonableness*" test should be handled on its own merits through the assessment of the peculiarities of the exporting country's market.

8. In regard to the discussion concerning the contextual margin of the phrase "... [c]osts associated with the production and sale of product under consideration", Turkey would like to note that, Turkey does not share the approach that an expense can only be considered as a "cost", if this expense is incurred by the producer/exporter.[6] Depending on the cost recording methodology and characteristics of the production and sale of the POC, certain expenses may become subject to realization at the end of the financial year. For coherency in their records, companies often set benchmark figures reflecting actual realizations of last financial year. Any figure that is above or below of this benchmark is recorded accordingly. Turkey understands that, disregarding expenses that are not incurred may lead to an asymmetry in a comprehensive evaluation of the costs.

9. In connection with these discussions, Turkey would also like to briefly comment on the second sentence of Article 2.2.1.1. In Turkey's view, this provision does not necessarily compel the investigating authority to use cost allocation method of the producer/exporters. The sentence reads as:

> [A]uthorities shall consider all available evidence on the proper allocation of costs, *including* that which is made available by the exporter or producer in the course of investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. *(emphasis added)*

10. The word "*including*" indicates that the cost allocation methodology of producer or exporter is one of the available evidences that the investigating authority may resort. There is no indication that the investigating authority has to start its evaluation by considering the cost allocation system of producer or exporter. From a different point of view, the drafters of the article formulated a step by step approach stipulating that the cost allocation methods of producer or exporter can be used if such allocations have been historically utilized by the producer or exporter particularly concerning amortization, depreciation, capital expenditures and development costs. Therefore, the rule does not require the investigating authority to use the cost allocation methodology of the producer or exporter unless the mentioned conditions are met.

[6] Argentina's first written submission, para. 102.

ANNEX D-10

EXECUTIVE SUMMARY OF THIRD-PARTY
ARGUMENTS OF THE UNITED STATES

I. ARGENTINA'S CLAIMS REGARDING THE INTERPRETATION OF ARTICLE 2 OF THE AD AGREEMENT

A. "As Such" Inconsistency Requires Examination of Whether the Measure Necessarily Requires WTO-Inconsistent Action or Precludes WTO-Consistent Action

1. The United States agrees that a complainant may allege that another Member's legislation or regulation is inconsistent with a covered agreement "as such" or "independently from the application of that legislation in specific instances". To prove an "as such" claim, the complainant must demonstrate that the identified measure requires the responding party to act in a WTO-inconsistent manner or precludes that party from acting in a WTO consistent manner. In this context, the EU emphasizes the express *discretion* of the investigating authorities under Article 2(5) of the Basic Regulation to adjust costs. In particular, the European Union observes that: (i) text of paragraph one of Article 2(5) *does not require* that investigating authorities depart from exporter or producer cost data, and (ii) the "rest of the evidence" (*e.g.*, judgments of the General Court of the European Union and determinations in other investigations) does not demonstrate that the investigating authorities are *mandated* to act in a particular manner.

2. The United States considers the Appellate Body's recent analysis in *US – Carbon Steel (India)* informative. The Appellate Body report in *US – Carbon Steel (India)* reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements requiring an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement. The Appellate Body ultimately concluded that these materials did not "establish conclusively that the measure requires an investigating authority to consistently" act contrary to the relevant WTO obligation.

B. The Panel's Analysis of Article 2.2.1.1 of the AD Agreement Should Be Informed by the Text and Context of the AD Agreement

3. Both Argentina's "as such" and "as applied" claims are dependent on the interpretation and meaning of Article 2.2.1.1 of the AD Agreement. As explained below, the United States considers that Article 2.2.1.1 requires an investigating authority to "normally" rely on producers' or exporters' books and records, but, as permitted by the text of the provision, the authority may look beyond these records in limited circumstances.

1. Investigating Authorities Shall Normally Calculate Costs on the Basis of Records Kept by Producers or Exporters

4. As a preliminary matter, the United States considers that Article 2.2.1.1 requires an investigating authority to normally calculate costs on the basis of records kept by an exporter's or producer's books, provided that (i) the books and records are in accordance with the GAAP of the exporting country, and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. This view was adopted by panel in *China – Broiler Products*. Thus, in situations where books and records are kept in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration, the investigating authority is normally obligated to use those records pursuant to Article 2.2.1.1.

5. The qualification to the obligation in Article 2.2.1.1 is reinforced by the use of the term "normally," which is defined as "in the usual way" or "as a rule". Thus, the term "normally" in conjunction with the two conditions ("provided that") in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances. To that end, as the *China – Broiler Products* panel report noted, if the investigating authority finds that the books and records do not meet the stated conditions, the authority is "bound to explain why it departed from the norm and declined to use a respondent's books and records".

2. Article 2.2.1.1: "Costs"

6. With respect to the interpretation of the second condition, "reasonably reflect the costs associated with the production and sale of the product under consideration," the parties attribute a number of differing meanings to these terms. Argentina fails to explain how the use of "costs" over an analogous term, like "prices," implies that "costs" must then refer exclusively to the "charges or expenses that have been actually incurred by producer". Moreover, the panel in *EC – Salmon (Norway)* did not find any meaningful distinction between "costs" and "prices" when it defined "cost of production" as the "price to be paid for the act of producing". In the context of Article 2, the United States considers the difference between "cost" and "price" to be a matter of perspective, and not one of substance.

7. Argentina's argument that "costs" relates only to expenses "actually" incurred by producers is undermined by adjacent text in Article 2. The drafters of the AD Agreement chose to utilize an express limitation – to amounts actually incurred by the producer – elsewhere in Article 2. For instance, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Further, Articles 2.2.2(i) and 2.2.2(ii) both pertain to the determination of "general costs". According to Argentina, the term "costs" is inherently specific to expenses "actually incurred by the producer". Argentina's interpretation would therefore render superfluous the "actually incurred and realized" by the "exporter or producer" language utilized in Articles 2.2.2(i) and 2.2.2(ii).

8. For these reasons, the United States does not consider the use of the term "costs" in the context of Article 2.2.1.1 to be indicative of a limitation with respect to the "actual amount incurred" as reflected by the producer's own books and records.

3. Article 2.2.1.1: "Reasonably" in Relation to "Costs"

9. In Argentina's view, Article 2.2.1.1 requires the use of an exporter's or producer's records whenever that exporter or producer transposes, within reason, its actual expenses to its records. Argentina's argument is contrary to the ordinary meaning of Article 2.2.1.1. The plain language provides that the "costs" used for the calculating normal value shall "normally" be based on the exporter's or producer's records, but that the costs need not be used if they do not reasonably reflect the costs associated with the production and sale of the product under consideration. The panel report in *Egypt – Rebar* supports this interpretation.

10. Argentina's argument also would seem to render redundant the first and second conditions in Article 2.2.1.1. Specifically, the first condition of Article 2.2.1.1 permits costs to be rejected based on books and records not in accordance with GAAP. However, under Argentina's interpretation, the second condition would establish yet another requirement that producer records faithfully reflect the costs incurred by producers. Although GAAP may serve as an indicia that costs are reasonable, because accounting principles typically ensure costs are properly sourced and recorded, this may not in all instances be sufficient. Further, the United States does not understand Article 2.2.1.1 to solely refer to "cost allocation" issues. The first sentence of Article 2.2.1.1 refers to costs "calculated", rather than "allocated". That "allocated" is explicitly mentioned elsewhere in the text, but not in the first sentence of 2.2.1.1, contradicts Argentina's argument.

11. When read together with other terms in Article 2.2.1.1 – and in particular "reflect the costs associated with" – the term "reasonably" can be understood to establish a substantive reasonableness standard for the costs reflected in the producer's or exporter's records. The United States notes that the language of Article 2.2.1.1 leaves open what costs may be "unreasonable" such that the records do not reasonably reflect the costs associated with the production and sale of the product. The panel reports in *China – Broiler Products* and *US – Softwood Lumber V* do not provide further guidance on this issue. Further, in *US – Softwood Lumber V* the panel found that Article 2.2.1.1 did not *obligate* the investigating authority to reject unreasonable costs, or to use producer cost data, as reflected in their books and records, if demonstrated to be unreasonable. In fact, the panel noted that "Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records 'reasonably reflect the costs associated with the production and sale of the product under consideration'".

12. As demonstrated by *US - Softwood Lumber V*, it is clear that, on an individual-respondent basis, adjustments are permitted to account for "unreasonable" costs, the recordation of which nonetheless complies with GAAP. For instance, inputs purchased from a related or affiliated supplier that do not reasonably reflect a respondent's costs may require an adjustment to the cost as recorded in the exporter or producer's books and records. This adjustment – to ensure that the data reasonably reflect the costs associated with production or sale of the product – is typically based on record evidence including sales to the first non-affiliated party, costs incurred by other exporters or producers, or other evidence of the appropriate costs.

13. The United States further notes that the context provided by the language of Article 2.2 supports the understanding that market conditions may lead to records reflecting "unreasonable" costs. Article 2.2 provides that where there exists a "low volume of the sales in the domestic market of the exporting country" or a "particular market situation," sales in the domestic market do not permit a proper comparison. The text of Article 2.2 therefore contemplates circumstances where some peculiarity, structure, distortion, or other occurrence of the domestic market makes a direct comparison to home market prices impossible.

14. The United States understands Article 2.2.1.1 to permit investigating authorities to consider whether a particular cost is unreasonable, and whether it may be adjusted, so long as the investigating authority sufficiently explains its determination.

4. Article 2.2.1.1: "Associated with the Production and Sale of the Product Under Consideration"

15. Finally, it is revealing that, rather than modify "reasonably reflects costs" with the phrases "actually incurred" or "by the exporter or producer in question," Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration". The term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product. Further, the use of the term "associated with" conveys a conception of costs more general than just those borne by the specific respondent.

16. Prior panel reports support this view. For instance in *Egypt – Rebar*, the panel described the analysis of "costs associated with the production and sale of the product under consideration" as "hing[ing] on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question *in that case*". The second condition of the first sentence of Article 2.2.1.1 is not simply a reformulation of the requirement that records be GAAP compliant. Specifically, the United States understands that Article 2.2.1.1 does not require the use of a particular respondent's records where the costs documented in those records are determined to be "unreasonable" or otherwise unrelated to the production of the product under review. While the United States takes no position on the facts underlying this dispute, it does consider there to be a range of reasons related to individual respondents, as well as larger market conditions, which may render particular costs to be unreasonable. Pursuant to Article 2 of the AD Agreement, with adequate supporting record evidence and explanation regarding its departure from the exporter or producer's records, an investigating authority may address that cost when determining a reasonable normal value.

C. Article 2.4 of the AD Agreement Addresses Issues of Price Comparability and Not the Proper Determination of Normal Value

17. Argentina argues that the EU did not establish the existence of a margin of dumping for the respondents on the basis of a fair comparison between the export price and the normal value. Argentina's claim under Article 2.4 is intended to address the "clear difference between normal value and export price". The United States considers the issue of the calculation of a proper normal value a matter for claims under Article 2.2.1.1, while issues related to the comparison between normal value and export prices should be considered under Article 2.4.

18. It is clear that Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. However, the text of Article 2.4 presupposes that the appropriate normal value has been identified. The United States in this context agrees in principle with both complainant and respondent, that the use of constructed normal value does not preclude the need for due allowances or adjustments where necessary. However, the United States submits that the

Panel should consider: first, whether there is a relevant difference between the constructed value and the export value, and second, whether such a difference has an effect on "price comparability".

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. DISCUSSION OF EXAMINATION OF ARTICLE 2.2.1.1 OF THE AD AGREEMENT

A. Interpretive Approach to the "Reasonably Reflects the Costs" Analysis

19. The United States would like to highlight its concerns with the interpretive approach to Article 2.2.1.1's "reasonably reflect" clause suggested by Argentina and some of the third parties. Nothing in the text of Article 2.2.1.1 limits the various possible rationales or reasons why, in exceptional circumstances and when warranted by record evidence, an investigating authority may find that the costs set out in a producer's or exporter's records do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the United States understands that the proper way to apply the "reasonably reflect" clause – and indeed the only way consistent with the text of the provision – is to examine, on a case-by-case basis, the rationale provided by an administering authority when it makes a determination that the costs set out in the records of the producer or exporter do not reasonably reflect the costs associated with production and sale.

20. In contrast, Argentina and some of the third parties to this dispute are advocating the position that Article 2.2.1.1 must be interpreted to include various proposed *a priori* limitations. That is, regardless of any record evidence that may demonstrate that a producer's records do not reflect costs associated with production and sale, and prior to any finding by an investigating authority, Argentina suggests Article 2.2.1.1 imposes certain limitations on the investigating authority's analysis. In the following paragraphs, the United States will examine some of these proposed *a priori* limitations, and explain how they cannot be supported under the rules of interpretation applicable to the WTO Agreement.

21. First, Argentina argues that the text of Article 2.2.1.1 restricts the investigating authority's "reasonably reflect" analysis to the books of the exporter or producer directly involved in the anti-dumping investigation. That is, the analysis is limited to expenses that have been "actually incurred by the producer". This argument, however, has no basis in the text of Article 2.2.1.1. The language "associated with" in the "reasonably reflects" clause similarly implies a less rigid connection between the relevant costs and the parties to the investigation than suggested by Argentina and several third parties.

22. Further, the AD Agreement also refutes the proposed interpretation that a "reasonably reflect" determination must be based only on information related to the specific producer or exporter responding to the anti-dumping investigation. For instance, the GAAP of each WTO Member is a factual matter, to be determined based on information that is necessarily exogenous to a producer's or exporter's records.

23. In addition to the context provided by Article 2.2.1.1, other text in Article 2 is contrary to Argentina's proposed interpretation. Given the express directions as to "actual data" in Article 2.2.2 and its proximity to Article 2.2.1.1, it is difficult to conclude that the drafters intended to include the *a priori* limitation in Article 2.2.1.1 that Argentina suggests. The United States also notes that although, in this particular dispute, the exporting Member is arguing against the use of the "reasonably reflect" clause, this may not be the case in every dispute. As was the case in *US – Softwood Lumber V*, there may well be circumstances in which an exporter or producer would argue against the use of its own books and records and in favour of an alternative source of cost information.

24. For all these reasons, a proposal to limit the information examined in a "reasonably reflect" determination cannot be supported. Neither the text of Article 2.2.1.1, nor context provided by other provisions of the AD Agreement, require an investigating authority to ignore any type of potentially relevant evidence.

25. Second and more broadly, it has been suggested that "dumping" relates exclusively to the behaviour of the exporter or producer, and it is *a priori* inappropriate to consider information not

directly related to the exporter's or producer's conduct. However, Article 2.2 of the AD Agreement refers to the existence of a "particular market situation" where sales in the domestic market do not permit a proper comparison. That a factor external to a specific exporter or producer – the particular market situation – governs normal value directly refutes the proposition that, as a number of third parties contends, dumping relates exclusively to the behaviour of the exporter or producer. Additionally, recorded costs related to inputs purchased from related corporate enterprises are regularly viewed as potentially unreasonable.

B. Relation to other WTO Agreements

26. It has been suggested in this dispute that because the issue of recorded costs that do not "reasonably reflect" the cost of producing the product under investigation might also be addressable under other covered agreements (such as the Agreement on Subsidies and Countervailing Measures), the AD Agreement therefore does not permit departure from such recorded costs when calculating normal value. However, the fact that one covered agreement could, in theory, address a given practice does not mean that the other covered agreements cannot do so as well. Indeed, the WTO Agreement contains many instances of overlapping obligations. To the extent this argument is intended as a reference to the "double-counting" issue addressed in *US – Anti-Dumping and Countervailing Duties (China)*, the reference in fact undercuts the argument for an *a priori* limitation with respect to finding recorded costs to be unreasonable.

C. Relevance of "Input Dumping" Discussions

27. Finally, the United States does not agree that certain pre-Uruguay Round discussions of "input dumping" – a term never used in the AD Agreement – is in any way relevant to the factors that may be examined in making a "reasonably reflect" determination under Article 2.2.1.1. "Input dumping" pertains to the narrow issue of whether materials or components used in manufacturing an exported product are purchased at dumped or below cost prices. Conversely, this dispute centers on the broader issue of whether investigating authorities must *a priori* limit the factors examined in deciding whether recorded costs reasonably reflect the associated cost of production and sale of the product.