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

AB-2016-4

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS473/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A**

NOTICES OF APPEAL AND OTHER APPEAL

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**ANNEX A-1****EUROPEAN UNION'S NOTICE OF APPEAL\***

Pursuant to Article 16.4 of the DSU the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (WT/DS473). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

- a. the Panel erred when finding that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by "failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers". As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.247, 7.248, 7.249 and 8.1(c)(i) of its Report, which are based on its legally erroneous reasoning in paragraphs 7.220-7.246;<sup>2</sup>
- b. the Panel erred when finding that the European Union violated Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by "using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value". As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.260 and 8.1(c)(ii) of its Report, which are based on its legally erroneous reasoning in paragraphs 7.255-7.259;
- c. the Panel erred when finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by "imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement". In view of those errors, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.367 and 8.1(c)(vii) of its Report, which are based on its legally erroneous reasoning in paragraphs 7.357-7.366.

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\* This Notice, dated 20 May 2016, was circulated to Members as document WT/DS473/10.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Only for the avoidance of doubt, we clarify that we include in the scope of our appeal the statement in the second sentence of paragraph 7.296 of the Panel Report, to the effect that, supposedly, nothing in Article 2.4 provides guidance when it comes to considering how normal value and export price should be determined, including the question of whether or not a standard of reasonableness informs not just the term reflect but also the determination of the costs associated with production and sale. We provide this clarification without prejudice to our right to refer to and disagree with other aspects of the Panel's reasoning in our submissions.

**ANNEX A-2****ARGENTINA'S NOTICE OF OTHER APPEAL\***

1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures"), Argentina hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law covered in the Panel Report in *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (WT/DS473/R) ("Panel Report") and certain legal interpretations developed by the Panel in that Report.

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Argentina simultaneously files this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat. Argentina is providing as well an Executive Summary of the Other Appellant Submission, in accordance with the Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice of Argentina's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

4. Argentina requests the Appellate Body to reverse various findings and conclusions of the Panel as a result of the errors of law and of legal interpretation contained in the Panel Report as identified below.

**1 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIM UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT CONCERNING ARTICLE 2(5) OF THE BASIC REGULATION**

5. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that Article 2(5), second subparagraph, of Council Regulation No. 1225/2009 ("the Basic Regulation") is inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement. The Panel erred in its application of Article 2.2.1.1 of the Anti-Dumping Agreement and failed to make an objective assessment, as required by Article 11 of the DSU, when it concluded that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article 2.2.1.1.<sup>1</sup> In particular, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation only deals with what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that Article 2(5), second subparagraph, is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement;
- the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation does not require the European Union to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when these records reflect prices that are considered to be artificially low or abnormally low as a result of a distortion. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that Article 2(5),

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\* This Notice, dated 25 May 2016, was circulated to Members as document WT/DS473/11.

<sup>1</sup> Panel Report, paras. 7.127–7.154 and 8.1(b)(i).

second subparagraph, is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement;

- the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, contrary to Article 11 of the DSU.

6. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to complete the analysis by finding that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement.

7. Consequently, the Appellate Body should also reverse the Panel's findings and conclusions that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.<sup>2</sup>

## **2 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIM UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994 CONCERNING ARTICLE 2(5) OF THE BASIC REGULATION**

8. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The Panel erred in its interpretation and application of Article 2.2 and of Article VI:1(b)(ii) and acted inconsistently with Article 11 of the DSU when it concluded that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with these provisions.<sup>3</sup> In that respect, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994 when finding that these provisions "do not limit the sources of information that may be used in establishing the costs of production", that they do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" but would "require that the costs of production established by the authorities reflect conditions prevailing in the country of origin"<sup>4</sup>;
- the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 when finding that Article 2(5), second subparagraph, "is formulated in permissive terms" and only lays out a series of options for the EU authorities in establishing the costs and when finding that this measure concerns "the sources of information" as opposed to the costs themselves. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that the measure at issue is not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994;
- the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, contrary to Article 11 of the DSU;
- the Panel applied an erroneous legal standard for the establishment of the "as such" claim when it found that Argentina was required to demonstrate that Article 2(5), second subparagraph "cannot be applied in a WTO-consistent manner".<sup>5</sup>

9. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that Article 2(5), second subparagraph, of the Basic Regulation is, as such, inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

<sup>2</sup> Panel Report, paras. 7.175 and 8.1(b)(iii).

<sup>3</sup> Panel Report, paras. 7.155–7.174 and 8.1(b)(ii).

<sup>4</sup> Panel Report, para. 7.171.

<sup>5</sup> Panel Report, para. 7.174.

10. Consequently, the Appellate Body should also reverse the Panel's findings that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18:4 of the Anti-Dumping Agreement.<sup>6</sup>

### **3 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL FROM ARGENTINA**

#### **3.1 Review of the Panel's findings with respect to Argentina's claim under Article 2.4 of the Anti-Dumping Agreement**

11. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that the European Union violated Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between normal value and export price, and in particular, by failing to make due allowances for differences affecting price comparability.<sup>7</sup> The Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement, amongst others, in the following respects:

- the Panel erred in finding that the difference at issue is not a difference affecting price comparability, in particular because it is one that arose from the methodology used to construct the normal value;
- the Panel erred when finding that its conclusion is consistent with the views of the Appellate Body in *EC – Fasteners (China)* (Article 21.5 – China).

12. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that the European Union violated Article 2.4 of the Anti-Dumping Agreement because by failing to make adjustment for differences affecting price comparability, including differences in taxation, it failed to make a fair comparison between the normal value and the export price.

#### **3.2 Review of the Panel's findings with respect to Argentina's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

13. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that the European Union violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement in failing to ensure that the injury caused by the overcapacity of the European Union industry was not attributed to the allegedly dumped imports.<sup>8</sup> The Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when it concluded that the European Union did not act inconsistently with Articles 3.1 and 3.5 with respect to the treatment of overcapacity as an "other factor" of injury to the EU domestic industry. In that respect, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in its interpretation and application of the obligation to make an "objective examination" based on "positive evidence" of the overcapacity of the EU industry pursuant to Articles 3.1 and 3.5 of the Anti-Dumping Agreement;
- the Panel erred in its application of Articles 3.1 and 3.5 when it failed to distinguish overcapacity from capacity utilization and when it failed to note the inconsistency of the EU authorities' conclusion in light of the evidence before it.

14. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions with respect to Argentina's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the issue of overcapacity, and to find that the European Union violated these provisions with respect to overcapacity as an "other factor" of injury to the EU domestic industry.

<sup>6</sup> Panel Report, paras. 7.175 and 8.1(b)(iii).

<sup>7</sup> Panel Report, paras. 7.292–7.306 and 8.1(c)(v).

<sup>8</sup> Panel Report, paras. 7.462–7.472 and 8.1(c)(x).

**3.3 Review of the Panel's findings with respect to Argentina's claim under Article 2.2.1.1 of the Anti-Dumping Agreement**

15. If the Appellate Body reverses the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement concerning the European Union's failure to calculate the cost of production of the product under investigation on the basis of the records kept by Argentinean producers, Argentina requests the Appellate Body to complete the analysis of Argentina's second claim under Article 2.2.1.1 of the Anti-Dumping Agreement for which the Panel did not make findings.<sup>9</sup>

16. In that regard, Argentina requests the Appellate Body to find that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production of that product.

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<sup>9</sup> Panel Report, paras. 7.268–7.269 and 8.1(c)(iii).



**ANNEX B**

**ARGUMENTS OF THE PARTICIPANTS**

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## ANNEX B-1

## EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION

## 1 EXECUTIVE SUMMARY

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

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

1. The condition at issue is the phrase "records ... reasonably reflect the costs ..." in Article 2.2.1.1. The **specific and narrow** issue that is before the Appellate Body is how the **condition at issue** should have been interpreted and applied **to the specific factual and evidential pattern in this case**. The Appellate Body should not adjudicate on other issues that might arise under the Anti-Dumping Agreement or Article VI of the GATT 1994.
2. Article 2 sets out a **definition** which contains **the most fundamental elements** of the determination of dumping, including **normal value** and **price comparability**. Article 2.2.1.1 is framed as a provision to be applied "for the **purpose of paragraph 2**", namely **for the purpose of establishing a normal value**.
3. It is important to note that an investigating authority may need to apply Article 2.2.1.1 **more than once** in the same dumping margin calculation: for example, in determining whether or not domestic sales are in the ordinary course of trade by reason of price; and then again in determining normal value based on costs of production, SG&A and profit.
4. The interpretation and application of Article 2.2 should be systematic and coherent with reference to several issues: in particular, the consistent references to **all costs**, and the consistent references to **reasonableness**.
5. **There are no costs excluded from Article 2.2.1**, which refers to "**all costs**". By definition, when Article 2.2.1 refers to "selling ... costs" it is also referring to the cost of sales. The first sentence of Article 2.2.1.1 refers to **all costs**. It is with respect to **all costs** that the records kept by the investigated firm must be in accordance with the local GAAP. And it is with respect to **all costs** that the records kept by the investigated firm must reasonably reflect the costs associated with the production and sale of the product under consideration.
6. A standard of reasonableness is referenced in several parts of Article 2.2 as a whole and throughout that provision, and, in the condition at issue, informs not only the term reflect, but also the determination of the costs of production and sale. Any unreasonable costs cannot be reasonably reflected in the records of an investigated firm.
7. The first sentence of Article 2.2.1.1 contains two **conditions**. The first relates to GAAP, whilst the second is the condition at issue ("records ... reasonably reflect the costs ..."). This is not an obligation, but a condition. Such a condition – consequence structure is **not the same**, as a matter of law, to a general rule – exception structure.
8. If the relevant conditions are fulfilled, then, according to Article 2.2.1.1, a particular **consequence** follows: **normally** the costs shall be calculated on the basis of the records of the investigated firm. The meaning of this part of the provision is not before the Appellate Body in this appeal.

9. Article 2.2.1.1 indicates some of the circumstances in which it may be justified to replace or adjust specific cost items in the records of the investigated firm, although **these issues are not before the Appellate Body in this appeal** (cost allocations "historically utilized", non-recurring items of cost and start-up operations, and the existence of an "association or compensatory arrangement").
10. Articles 2.2.1.1 and Article 2.2.2 are not mutually exclusive. The phrase at issue cannot be properly interpreted as meaning that a standard of reasonableness informs the term "reflect", but not the determination of the costs associated with production and sale.
11. There are several indicators supporting the EU's view in the overall context. *First*, the repeated use of the term "**normal**" throughout the relevant provisions, including in Articles 2 of the Anti-Dumping Agreement and VI of the GATT 1994. *Second*, the repeated references to the concept of a "**proper comparison**" or "comparable prices" or a "fair comparison" throughout the relevant provisions. *Third*, the references to the concept of something that is "**representative**" throughout the relevant provisions. *Fourth*, the repeated use of the term "reasonable" throughout the relevant provisions. **How could it be that, in the condition at issue, a standard of reasonableness informs the determination of the costs associated with sales, but not production?**
12. *Fifth*, it may be reasonable/necessary in certain circumstances to refer to an external proxy for the purposes of applying the two conditions in the first sentence of Article 2.2.1.1. This is exactly what the first condition foresees, by reference to local GAAP, which is an **external** element to the records kept by the investigated firm.
13. *Sixth*, the phrase "**associated** with the production and sale" is drafted in relatively general and abstract terms and should govern the matter, not the term "actual", which does not appear in the text.
14. *Seventh*, Article 2.2.1.1 provides that the investigating authority must consider **all available evidence** on the proper allocation of costs, **not limited** to the evidence coming from the investigated firm.
15. *Eighth*, if one of the conditions provided for in Article 2.2.1.1 is not satisfied, then the obligation to normally use the records kept by the investigated firm does not apply. The provision is silent as to what method is to be used to establish the costs of production and sale in such circumstances, which should be **informed by a standard of reasonableness**.
16. *Ninth*, an investigating authority could either replace or **adjust** specific costs in the records kept by the investigated firm. The reference to taxation in Article 2.4 confirms that an adjustment pursuant to the first sentence of Article 2.2.1.1 is an appropriate and objective response to a de jure discriminatory export tax designed precisely to have the effect of masking the dumping. **As a matter of law**, dumping is also **defined** as arising when the export price is less than the normal value calculated on the basis the **costs** associated with production and sale, **properly and reasonably determined**.
17. *Tenth*, it is precisely because export taxes are not covered by Article XI of the GATT 1994 that one must be careful to make sure that other disciplines are correctly understood so as to permit a reasonable and appropriately calibrated response to the existence of such de jure discriminatory and trade-distorting measures.

#### 1.1.2 Legal errors in the Panel's reasoning, findings and conclusions

18. Even before embarking on its analysis, the Panel appears to have pre-judged the issue by framing the question using tendentious language.
19. The Panel opined that the **purpose** of paragraph 2 is to elaborate rules for determining the cost of production in the country of origin. Rather, the purpose of paragraph 2 is to elaborate rules for determining a value that is normal, or a normal value.

20. The Panel opined that the first sentence of Article 2.2.1.1 consists of a "**general rule**" and two "**derogations**". None of the three previous cases invoked supports the Panel's statement.
21. The Panel considered that the focus of the condition at issue is on the specific producer/exporter under investigation, and what is contained in its records. Instead, the focus of the condition is **equally** on **both** the **records** kept by the investigated firm and the costs associated with the production and sale of the product under consideration.
22. The Panel's reference to **Article 6.10** is misplaced. Article 2 provides that, in certain circumstances, the same data from the same source may be used in order to determine, in part, the dumping margins of several exporters.
23. The Panel opines that GAAP generally encompass a requirement that all costs have actually been incurred, concluding then that the second condition must also be referring to the "actual" costs. The Panel fails to explain how its observation relates to its line of reasoning. The Panel's reference to an **association or compensatory arrangement** between the investigated firm and one of its suppliers sheds contextual light on what situations might justify replacing or adjusting the records kept by the investigated firm.
24. The Panel makes a series of statements that confirm that one should search for a "proxy" that is "appropriate", "accurate" and "reliable".
25. The Panel erroneously finds support in **footnote 6**, which it construes as suggesting that the cost data must in all circumstances be specific to each individual exporter or producer.
26. The Panel fails to look properly at the context in Article 2.2.2, as it refers to actual data pertaining to production and sales **in the ordinary course of trade**.
27. The Panel makes three erroneous statements about object and purpose, relating to the lack of a preamble of the Anti-Dumping Agreement, a confusion with the supplementary means of interpretation and the very language of Article 2.2.1.1. The Panel rejects the EU's submission that the second Ad note to Articles VI:2 and VI:3 of the GATT 1994 (on multiple currency practices) supports its arguments in this case.
28. The Panel makes certain assertions about provisions in the protocols of accession of certain Members.
29. Having concluded this part of its analysis, the Panel then reviews three other panel reports. In fact, each of them (*US – Softwood Lumber V*, *Egypt – Steel Rebar* and *EC – Salmon (Norway)*) lends support to EU's position. Investigating authorities may at least test the recorded costs against market values, in order to determine whether the records reasonably reflect the costs. Taken together, those findings confirm that previous panels did not foreclose the possibility that an investigating authority may disregard or adjust costs which do not reflect market values.

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

30. The Panel failed to conduct a holistic analysis of the ordinary meaning, context and object and purpose of Article 2.2.1.1.
31. With respect to its **ordinary meaning**, the Panel understood the first sentence of Article 2.2.1.1 to relate exclusively to a cost allocation issue. This is contradicted by the panel's findings in *US – Softwood Lumber V*.
32. The phrase "costs associated with" refers to the costs related to, which cannot be equated to "costs actually incurred". Article 2.2.1.1 does not include the words "expenses actually incurred by the producer".

33. The immediate **context of the phrase** at issue suggests that to "reasonably reflect costs associated with production and sale", records must reflect something more than simply the "expenses actually incurred".
34. The Panel's reliance on Article 6.10 fails for several reasons, related to the calculation of the normal value or the export price.
35. The **object and purpose** of the WTO anti-dumping rules can be discerned from Article VI:1 of the GATT 1994, as to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low, because of some abnormal condition (hence the reference to "normal" value), within reasonable limits. The second Ad Note to Articles VI:2 and VI:3 of the GATT 1994 confirms that in certain *circumstances price distortion caused by governmental action can also cause dumping*.

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

### 1.2.1 Legal standard under Article 2.2 of the AD Agreement

36. A distinction must be made between "cost...in the country of origin" and the evidence pertaining to such cost. Indeed, Article 2.2, as a whole, does not forbid outright the use of data on the cost of production from countries other than the country of origin. Article 2.2.2(iii) expressly refers to the use of "any other reasonable method".
37. The Anti-Dumping Agreement contains no rule that precludes securing evidence from outside the country of origin in order to identify the costs in the country of origin. Article 6 does not impose any limits on the countries from which evidence may be obtained.
38. Article 2.5 is instructive: normal value is based on the comparable price either in the country of export or in the country of origin, according to the circumstances.

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

39. The Panel stated that certain claims of Argentina under Article 2.2 were consequential, and it did not make findings in that respect. However, the Panel opined that the measure at issue is inconsistent with Article 2.2 because the normal value was not constructed on the basis of the "actual" costs "in the country of origin".
40. A price derived from a price at the border can by definition be simultaneously characterised as both an international price and a price in Argentina. The Panel fails to recognise that the subtraction of the fobbing costs renders the result a reasonable proxy for the normal price of soya in Argentina.
41. During the first substantive meeting, Argentina confirmed that the prices used by the European Union's investigating authority were indeed "constructed" by the Government of Argentina on the basis of various sources, including information from **Argentinean** ports. Accordingly, they were prices "in the country of origin" as per Article 2.2.
42. Costs and evidence pertaining to those costs are separate elements. First, the notion of "the cost of production in the country of origin" set out in Article 2.2 is a legal one, while establishing the cost in a particular case involves determinations of fact, made with the aid of evidence. Second, the possibility of using "any other reasonable method" in Article 2.2.2(iii) implies that Article 2.2, as a whole, does not impose an absolute prohibition on the use of data on the cost of production from countries other than the country of origin (when sales are not in the "ordinary course of trade").

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

**1.3.1 Legal standard under Article 9.3 of the Anti-Dumping Agreement**

43. It is undisputed that the ordinary meaning of the phrase "the margin of dumping as established under Article 2" is that of a margin of dumping established *in accordance with the provisions of Article 2*.
44. A Member's failure to comply with the provisions of Article 2 does not automatically constitute a failure to comply with Article 9.3.

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

45. The Panel made several errors in interpreting and applying Article 9.3 to the facts of the present case.
46. *First*, the European Union submits that Article 9.3 addresses the comparison between the anti-dumping duties and the dumping margins, as opposed to addressing the calculation of the normal value
47. *Second*, the Panel erred when it inferred from its previous findings with regard to Articles 2.2.1.1 and 2.2 that the European Union also breached Article 9.3.
48. *Third*, the Panel erred by seeking to rely on the dumping margins calculated in the Provisional Regulation, effectively implying that this is what the determination should have been, thus exceeding the authority vested in it pursuant to the DSU and the rules in the Anti-Dumping Agreement, which is to determine whether or not the measure at issue is WTO consistent. The Panel should have limited itself to determining if the investigating authority's evaluation of the facts was unbiased and objective, as provided for in Article 17(6)(i).

**1.4 CONCLUSIONS**

49. As a consequence, the European Union requests the Appellate Body to find that the Panel erred when finding that the European Union acted inconsistently with Articles 2.2.1.1, 2.2 and 9.3, reverse the Panel's findings and conclusions in paragraphs 7.247, 7.248, 7.249, 7.260, 7.367 and 8.1 (c)(i),(ii) and (vii) of its Report.
50. Having reversed the Panel's respective findings and conclusions the Appellate Body is not in a position to complete the legal analysis, and should not do so.

**ANNEX B-2****EXECUTIVE SUMMARY OF ARGENTINA'S OTHER APPELLANT'S SUBMISSION****1 INTRODUCTION**

1. The Report issued by the Panel in the case *European Union – Anti-Dumping Measures on Biodiesel from Argentina* contains several legal errors of interpretation and application of the provisions of the Anti-Dumping Agreement and the GATT 1994, which led the Panel to erroneous findings and conclusions with respect to Argentina's claims against Article 2(5), second subparagraph, of the Basic Regulation and the anti-dumping measures imposed by the European Union on imports of biodiesel originating in Argentina. The Panel also acted inconsistently with Article 11 of the DSU. More specifically, in this submission, Argentina presents six claims of errors, including one conditional appeal, with respect to the Panel's findings regarding Argentina's claims under Articles 2.2, 2.2.1.1, 2.4, 3.1, 3.5 and 18.4 of the Anti-Dumping Agreement, Article VI:1(b)(ii) of the GATT 1994 and Article XVI:4 of the WTO Agreement.

**2 THE PANEL ERRED WHEN FINDING THAT ARTICLE 2(5), SECOND SUBPARAGRAPH, OF THE BASIC REGULATION IS NOT "AS SUCH" WTO INCONSISTENT****2.1 The Measure at Issue**

2. The measure at issue is Article 2(5), second subparagraph, of Council Regulation (EC) No 1225/2009 ("the Basic Regulation"), laying down the rules governing the determination of costs *inter alia* for the purpose of constructing normal value. It is crucial to note that the second subparagraph of Article 2(5) was not included in the original version of Article 2(5), as adopted in 1994 to implement the Anti-Dumping Agreement. Instead, the second subparagraph was only added in 2002 by Council Regulation (EC) No 1972/2002. The latter instrument, provided for two other modifications: (i) Article 2(3) of the Basic Regulation was amended in order to clarify what circumstances could be considered as constituting a "particular market situation" in which sales of the like product do not permit a proper comparison, and (ii) the Russian Federation was granted full market economy status. Both of these modifications are highly relevant for understanding the scope of the second subparagraph of Article 2(5).

**2.2 The Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement**

3. Argentina submits that the Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.

4. First, Argentina submits that the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation only deals with what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph. Such a conclusion is based on an erroneous assessment of the meaning of the text of the measure and of its context, as well as of the understanding flowing from the practice of the EU authorities and the General Court's judgments.

5. The Panel erred in its assessment of the meaning of the text of Article 2(5), second subparagraph, in particular because the Panel wrongly based its analysis on the consideration that the second subparagraph of Article 2(5) begins with a condition, and thus, only takes effect following a determination under the first subparagraph that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under investigation. The Panel also erred when reading the two parts of Article 2(5), second subparagraph, in isolation from each other. Argentina submits that the fact that the authorities must adjust or establish the costs on any other reasonable basis, including information

from other representative markets where costs of other domestic producers or exporters "cannot be used" implies that the very reason why such information cannot be used is also relevant when examining the records of the producers/exporters subject to the investigation. Furthermore, the Panel erred when reading a sequential order between the two sub-paragraphs of Article 2(5). The Panel also erred when it ignored the fact that the terms or concepts used by Argentina to describe the measure at issue, such as "distortion", "abnormally low" and "artificially low", can be found in the contextual elements referred to by Argentina and are reflected in the consistent practice of the EU authorities as well as the judgments of the General Court of the European Union.

6. The Panel further erred in its analysis of the different contextual elements submitted by Argentina, namely the legislative history of Article 2(5), second subparagraph, Recital 4 of Regulation No 1972/2002, Article 2(3) of the Basic Regulation and the writings of scholars. All these elements support Argentina's interpretation of Article 2(5), second subparagraph.

7. The Panel also erred in its analysis of the consistent practice of the EU authorities in applying Article 2(5), second subparagraph, of the Basic Regulation. In particular, the Panel erred in concluding that the decisions cited by Argentina do not establish that Article 2(5), second subparagraph, is the provision pursuant to which the determinations that the costs were not reasonably reflected in the records were made. The Panel also erred in finding that the decisions cited by Argentina cannot be regarded as establishing a "consistent practice". Absent any case on the record in which, although costs were found to be artificially or abnormally low as a result of a distortion, the EU authorities considered that the records reasonably reflected the costs of the product under consideration, the Panel should have concluded that the cases referred to by Argentina established a consistent practice.

8. The Panel erred in its analysis of the judgments of the General Court of the European Union. Indeed, contrary to the Panel's assessment, the judgments of the General Court confirm that where the records contain costs which are artificially or abnormally low due to a distortion, they do not reasonably reflect the costs associated with the production of a product. These judgments also confirm that such determination is made pursuant to the second subparagraph of Article 2(5), and not pursuant to the first subparagraph.

9. The Panel erred in its assessment of the meaning of Article 2(5) because its analysis is based on two erroneous premises: (i) that the first and the second subparagraphs necessarily concern different steps and (ii) that the determination that the records do not reasonably reflect the costs is necessarily distinct from the determination as to which data to use when the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.

10. Second, the Panel committed a legal error to the extent that it concluded that Article 2(5), second subparagraph, of the Basic Regulation does not "require" the European Union to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when these records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. Argentina submits that the text of Article 2(5), second subparagraph, its context, the consistent practice of the EU authorities and the judgments of the General Court of the European Union clearly indicate the mandatory nature of Article 2(5), second subparagraph.

11. Third, the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, thereby acting inconsistently with Article 11 of the DSU. More specifically, the Panel failed to make a thorough examination of all the elements put forward by Argentina beyond the text of the measure. The Panel also failed to make a holistic assessment of all these elements taken together in order to determine the real meaning of Article 2(5), second subparagraph. The Panel first erred in that it reached its conclusion as to the scope, meaning and content of the measure at issue mainly on the basis of the text, only examining the context, consistent practice of the EU authorities and the judgments of the General Court to confirm the conclusion already reached on the basis of the text. Secondly, the Panel erred in examining each of the other elements submitted by Argentina in isolation. Indeed, the Panel examined individual pieces of evidence, finding that they failed to contradict its prior conclusion reached on the basis of the text of Article 2(5), rather than examining the evidence as a whole and assessing the interplay of each element with the others. By failing to evaluate each element in relation to the others and all of the elements together, the



Panel made a fragmented analysis which did not reveal the actual scope, meaning and content of the second subparagraph of Article 2(5) of the Basic Regulation.

12. If the Appellate Body reverses the Panel's finding that Article 2(5), second subparagraph, only deals with "what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph" and confirms that this measure covers the determination that the records do not reasonably reflect the costs where costs are found to be artificially low or abnormally low as a result of a distortion, Argentina requests the Appellate Body to complete the analysis determining that Article 2(5), second subparagraph, of the Basic Regulation violates Article 2.2.1.1 of the Anti-Dumping Agreement.

13. Argentina considers that Article 2(5), second subparagraph, of the Basic Regulation *requires* the EU authorities to determine that a producer's records do not reasonably reflect the costs of production in situations in which the records reflect prices which are artificially or abnormally low, by reference to prices prevailing in other markets. However, even if Article 2(5), second subparagraph, were to be found as only providing for the possibility (and not requiring) to make such a determination, *quod non*, it should still be found to be inconsistent with Article 2.2.1.1. Indeed, to the extent that Article 2.2.1.1 prohibits the rejection of data in the exporter/producer's 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 such rejection falls within the category of what is prohibited under Article 2.2.1.1 of the Anti-Dumping Agreement.

**2.3 The Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994**

14. Argentina submits that the Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.

15. First, the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994, when finding that these provisions "do not limit the sources of information that may be used in establishing the costs of production", that they do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" but "would [...] require that the costs of production established by the authority reflect conditions prevailing in the country of origin". The Panel reached its conclusion without making any analysis of the ordinary meaning of the terms included in Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, nor of their context or the object and purpose of the relevant agreements, as required by the general rules of treaty interpretation. It is clear that the ordinary meaning of the terms "cost of production in the country of origin" refers to the costs, i.e. the charges or expenses incurred, for producing the product concerned in the country of origin. This understanding is further supported by the immediate context, in particular Articles 2.1, 2.2, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement, the *Ad Note* to Article VI:1 of the GATT 1994, as well as by the object and purpose of the Anti-Dumping Agreement. Having reversed the Panel's findings, the Appellate Body should conclude that Article 2(5), second subparagraph, is inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

16. Second, the Panel erred in its determination of the meaning, scope and content of Article 2(5), second subparagraph of the Basic Regulation. In particular, the Panel erred in finding that the phrase at issue is formulated in "permissive terms" and that the provision "lays out a series of options for the EU authorities in establishing the costs of production once it has been determined that the producers' records do not reasonably reflect the costs associated with the production and sale of the product being investigated". The analysis of the text of Article 2(5), second subparagraph, demonstrates that this provision imposes an obligation on the EU investigating authorities to use "any other reasonable basis, including information from other representative markets", every time information of other domestic producers/exporters "is not available or cannot be used". This is further confirmed by the legislative history of this provision, the consistent practice of the EU authorities and the judgments of the General Court. Furthermore, the Panel also erred in considering that the language of Article 2(5), second subparagraph,

"pertains to the *sources of information*", "as opposed to the *costs themselves*". Article 2(5), second subparagraph, expressly describes the "costs of other producers or exporters" as being "information". Thus "costs" constitute "information". This understanding is supported by the legislative history and the consistent practice of the EU authorities. Argentina further notes that given that information from other representative markets is used in order to correct ("adjust") or replace ("establish") the costs of the producer/exporter concerned, the information that is used will inevitably reflect the conditions prevailing in such other market. Thus, even if the Appellate Body were to uphold the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 (namely that these provisions do not prohibit an authority resorting to sources of information other than producers' costs in the country of origin but only require that the costs of production reflect conditions prevailing in the country of origin), Argentina submits that the Appellate Body should still conclude that Article 2(5), second subparagraph, violates those provisions.

17. The Panel also failed to make an objective assessment of the matter as required by Article 11 of the DSU. In particular, the Panel failed to make a thorough examination of the elements submitted by Argentina, in particular in relation to the legislative history and the consistent practice of the EU authorities and failed to make a true "holistic assessment" of these different elements. Given that the Panel failed to make a thorough analysis of these different elements and because it examined all of them separately, it failed to see that, together, they show how Article 2(5), second subparagraph, operates in practice. Indeed, once the text of Article 2(5), second subparagraph, is seen in the context of its legislative history and in light of the manner in which it has been consistently applied by the EU authorities since its adoption, it leaves no doubt that it requires the use of information from other representative markets which is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

18. Third, the Panel applied an erroneous legal standard for the establishment of the "as such" claim when it found that Argentina was required to demonstrate that Article 2(5), second subparagraph "cannot be applied in a WTO-consistent manner" and erroneously found, as a consequence, that Argentina has not established that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994. Argentina submits that in order to succeed with a claim of "as such" violation, the complainant is not required to demonstrate that the measure will be applied in a WTO-inconsistent manner *in all instances* in which that measure is applied. The Panel also erred to the extent that its findings imply that the measure being challenged must "require" the authorities to act in a WTO-inconsistent manner and that the authorities cannot have any discretion. Argentina submits that even though the authorities may have discretion whether or not to use information which reflects costs prevailing in countries other than the country of origin, every time they do so, this will necessarily be inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

#### **2.4 The Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement**

19. Argentina submits that the Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

20. Argentina requests the Appellate Body to reverse the Panel's findings and to find instead that given that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the European Union failed to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement and the GATT 1994 thereby violating Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

### **3 THE PANEL'S LEGAL ERRORS WITH REGARD TO ARGENTINA'S CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL FROM ARGENTINA**

#### **3.1 The Panel erred when finding that the European Union did not violate Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between the normal value and the export price**

21. Argentina claims that the Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement when finding that the European Union did not violate Article 2.4 by failing to make a fair comparison between the normal value and the export price.

22. First, the Panel erred in finding that the difference identified by Argentina was not a difference which affects price comparability within the meaning of Article 2.4. The Panel specifically erred when finding that this difference does not represent "a tax" or "some other identifiable characteristic". The difference at issue results from the use in the normal value of the reference FOB price, minus FOB costs, for soybeans, which includes the export tax, while the export price is based on the domestic cost for soybeans and does not include any export tax at all. To the extent that this difference "more or less amounted to the level of the export tax", it is in fact equivalent to a difference in taxation. In any case, even if the difference was not regarded as being a difference in "taxation", it nonetheless constitutes an identifiable characteristic.

23. The Panel is also wrong when stating that "[i]t was a methodological approach that affected the *price* of biodiesel, but it did not affect the *price comparability* of the normal value and the export price. Argentina fails to see how the methodological approach, leading to such a difference, can be held to affect the *price* of biodiesel but not the *price comparability* of the normal value and the export price.

24. The Panel also erred when concluding that there is a "general proposition" that differences arising from the methodology used to construct the normal value are not "differences affecting price comparability" within the meaning of Article 2.4. There is nothing in Article 2.4 or any other provision of the Anti-Dumping Agreement which would support such a proposition. This implies that the fact that a difference is the result of a particular methodology does not render it irrelevant for the purpose of Article 2.4 of the Anti-Dumping Agreement.

25. Based on a proper interpretation of Article 2.4, correctly applied to the difference at issue, the Appellate Body should conclude that the difference at issue is a "difference affecting price comparability" within the meaning of Article 2.4.

26. Second, the Panel erred when concluding that its conclusion is consistent with the Appellate Body's findings in *EC – Fasteners (China)* (Article 21.5 – *China*). In fact, contrary to what has been argued by the Panel, the Appellate Body in that case held that the fact that certain differences affecting price comparability may be the result of a methodology used for establishing the normal value does not disqualify such differences from being subject to adjustment under Article 2.4 of the Anti-Dumping Agreement.

27. In light of the foregoing, Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that the European Union violated Article 2.4 because, by failing to make adjustments for differences affecting price comparability, it failed to make a fair comparison as required by that provision.

#### **3.2 The Panel erred in finding that the European Union's non-attribution analysis did not violate Article 3.1 and Article 3.5 of the Anti-Dumping Agreement**

28. Argentina claims that the Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when assessing Argentina's claim concerning the European Union's treatment of overcapacity in the non-attribution analysis.

29. First, the Panel erred in its interpretation and application of the obligation to make an "objective examination" based on "positive evidence" of the overcapacity of the EU industry pursuant to Articles 3.1 and 3.5 of the Anti-Dumping Agreement. More specifically, the Panel erred

in considering that it was relevant to examine whether "the revised data [did or] did not have a *significant role* in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an 'other factor' causing injury". Argentina submits that to the extent the EU authorities relied on the revised data, which do not constitute "positive evidence" and did not involve an objective examination, this should lead to the conclusion that the analysis made by the European Union regarding "overcapacity" is not consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In any event, even if the Appellate Body were to conclude that the Panel was right in examining the role played by the revised data in the determination of the EU authorities, *quod non*, the Panel did not correctly apply Article 3.1 when concluding that "the issue of overcapacity was [not] based on, or affected by, the revised data".

30. Second, the Panel erred in its application of Articles 3.1 and 3.5 as it relates to the EU authorities' conclusions regarding "capacity" as another "known factor" in its causation analysis. In particular, the Panel failed to distinguish overcapacity from capacity utilization. Argentina submits that, although related, overcapacity and capacity utilization are two distinct concepts that should not be equated. In the present case, in order to act "in an unbiased manner", the EU authorities should have examined "overcapacity", as this was the factor identified by the interested parties during the investigation as causing injury. In addition to the fact that the EU authorities failed to address the substantial increase in overcapacity, Argentina notes that the Panel further failed to note the inconsistency of the EU authorities' conclusion that this factor could not be "a major cause of injury" on the basis of the evidence before it.

31. On the basis of the above, Argentina requests that the Appellate Body reverse the Panel's findings and find that the European Union acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the issue of overcapacity.

### **3.3 Review of the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement**

32. Argentina submits that if the Appellate Body were to reverse the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement concerning the European Union's failure to calculate the cost of production of the product under investigation on the basis of the records kept by Argentinean producers, the Appellate Body should complete the analysis with regard to Argentina's second claim under Article 2.2.1.1 that the European Union acted inconsistently with that provision by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production, for which the Panel did not make any findings.

33. Argentina requests the Appellate Body to find that the European Union violated Article 2.2.1.1 of the Anti-Dumping Agreement because by using the FOB reference price of soybean instead of the actual price of soybean incurred by Argentinean producers, it included costs not associated with the production and sale of biodiesel in the calculation of the cost of production of the product under consideration pursuant to Article 2.2.1.1.

## **4 CONCLUSION**

34. For the reasons set out in this submission, Argentina respectfully requests the Appellate Body to reverse the Panel's findings and conclusions,

- a. with regard to Argentina's "as such" claims concerning Article 2(5), second subparagraph, of the Basic Regulation 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 WTO Agreement. Argentina also request that the Appellate Body complete the analysis with regard to Argentina's "as such" claim under Article 2.2.1.1.
- b. with regard to Argentina's claims concerning the anti-dumping measures on imports of biodiesel under Articles 2.4, 3.1 and 3.5 of the Anti-Dumping Agreement, and to complete the analysis with regard to Argentina's claim under Article 2.2.1.1 of the Anti-Dumping Agreement if the Appellate Body reverses the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement concerning the European Union's failure to calculate the cost of production of the product under investigation on the basis of the records kept by Argentinean producers.

**ANNEX B-3****EXECUTIVE SUMMARY OF ARGENTINA'S APPELLEE'S SUBMISSION****1 INTRODUCTION**

1. Argentina requests the Appellate Body to reject all European Union's claims of error presented in its Appellant Submission, which are all without merit. Argentina is concerned about what it considers as an attempt by the European Union to seek to disregard an entire set of rules (mainly those contained in Article 2 of the Anti-Dumping Agreement), a well-established jurisprudence and a common understanding amongst Members about a given set of principles.

**2 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION ACTED INCONSISTENTLY WITH ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT "BY FAILING TO CALCULATE THE COST OF PRODUCTION OF THE PRODUCT UNDER INVESTIGATION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS"**

2. Argentina submits that the Panel correctly interpreted and applied Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, the Appellate Body should reject the European Union's arguments and uphold the Panel's findings in paragraphs 7.247, 7.248, 7.249 and 8.1(c)(i) of its Report.

3. Although each party is free to determine how it presents its arguments, in Argentina's view, the European Union has followed an incorrect approach when starting to examine the "broad" context and object and purpose in the first place. The interpretation of the provisions of the covered agreements must be based on the customary rules of interpretation as included in the Vienna Convention. Consequently, the interpretation of Article 2.2.1.1, first sentence, should start by the ordinary meaning of the relevant terms of that provision in their context and in the light of the object and purpose of the relevant agreement.

**2.1 Interpretation of Article 2.2.1.1, first sentence, and, in particular, of the part of that sentence which provides that the records "reasonably reflect the costs associated with the production and sale of the product under consideration"**

4. The analysis of the first sentence of Article 2.2.1.1, pursuant to the customary rules of interpretation set out in the Vienna Convention, does not support the European Union's position that a standard of reasonableness informs the determination of the costs associated with the production and sale of the product under consideration.

5. First, the analysis of the structure and the ordinary meaning of the terms used in the first sentence of Article 2.2.1.1 demonstrates that the condition that the records "reasonably reflect the costs associated with the production and sale of the product under consideration" does not permit a test as to whether the costs included in the records are "reasonable" including by reference to international prices or hypothetical costs, which, the investigating authorities consider as more "reasonable", as argued by the European Union.

6. Second, the context provided by Article 2.2.1.1, Article 2.2.2, Article 2.2 and the definition of dumping confirms that the second condition in the first sentence of Article 2.2.1.1 is concerned with the costs that have actually been incurred by the exporter/producer at issue and whether such costs are reasonably reflected in the records kept by this exporter/producer. The contextual arguments put forward by the European Union in the first section of its Appellant Submission are either distorted or taken out of their context and should therefore all be rejected.

7. Third, the object and purpose of the Anti-Dumping Agreement also does not support the interpretation put forward by the European Union. The purpose of the Anti-Dumping Agreement can be described as being to increase and improve GATT disciplines relating to the use of anti-dumping measures and not, as argued by the European Union, "to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low, because of some abnormal condition".



## 2.2 The alleged legal errors in the Panel's reasoning, findings and conclusions

8. The European Union addresses a number of "legal errors" that the Panel would have allegedly committed when finding that the European Union acted inconsistently with Article 2.2.1.1. These claims of error must all be rejected.

9. First, the Panel did not make any error when addressing the purpose of paragraph 2. Second, the Panel correctly noted that the records of the investigated producer are the preferred source of information for the establishment of the costs of production. Third, the Panel correctly emphasised that there is a "general rule" in Article 2.2.1.1, first sentence, expressed by the use of the verb "shall" and that the word "normally" indicates that this rule is not "absolute", namely that there may be situations in which the general rule does not need to be followed. Fourth, the Panel's statement that the focus of the condition at issue is on the specific exporter/producer under investigation is not "inaccurate and tendentious". In fact, it merely reflects the fact that the subject of both conditions in Article 2.2.1.1, first sentence, is the producer/exporter's records. Fifth, the Panel's analysis of the immediate context in Article 2.2.1.1 is correct and coherent. Sixth, the Panel did not err when examining Article 2.2.2. There is simply no legal basis to claim that "a standard of reasonableness does inform Article 2.2.2 as a whole" and even less with respect to the costs of production. Seventh, while the Panel could have addressed in more detail the arguments with regard to the object and purpose of the Anti-Dumping Agreement, it would ultimately have to reach the same conclusion and therefore, the European Union's arguments on that issue are without merit. Eighth, contrary to what is claimed by the European Union, all the cases referred to by the Panel provide support to the Panel's understanding of Article 2.2.1.1. Indeed, the reports of the panels in *US – Softwood Lumber V, Egypt – Steel Rebar* and *EC – Salmon (Norway)* confirm that the second condition in Article 2.2.1.1, first sentence, focuses on the records of the exporter/producer concerned, the purpose of the test being to determine whether such records appropriately reflect the costs that are associated with the production and sale of the product under consideration for that exporter/producer in that case.

## 3 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION VIOLATED ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994 BY FAILING TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE "COST OF PRODUCTION IN THE COUNTRY OF ORIGIN"

10. Argentina submits that all aspects of the European Union's appeal with regard to Argentina's claims under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 are without merit and should be dismissed in their entirety. The Panel correctly concluded that the costs of production used by the EU investigating authority when constructing the normal value were not costs "in the country of origin" and that therefore the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. It follows that the Appellate Body should uphold the Panel's findings in paragraphs 7.260 and 8.1(c)(ii) of its Report.

11. With regard to the legal standard under Article 2.2 of the Anti-Dumping Agreement, Argentina notes that the distinction made by the European Union between the "cost" and the "evidence" is artificial. Even if one were to make a distinction between the "cost" and the evidence pertaining to such cost, the terms "cost of production in the country of origin" mean "domestic costs" or charges or expenses incurred for the production in the country of origin. Consequently, the "evidence pertaining to such costs" is the evidence pertaining to the domestic costs. Therefore, it necessarily prevents the use of data relating to or pertaining to costs other than the "domestic costs", such as costs in markets other than the domestic market of the country of origin.

12. Argentina submits that the Panel correctly found that the European Union violated Article 2.2 of the Anti-Dumping Agreement by not using the costs "in the country of origin" when constructing the normal value and that all arguments to the contrary as raised by the European Union should be rejected. Indeed, the reference price (reflecting the level of international prices) used by the European Union is not consistent with the requirement in Article 2.2 to construct normal value on the basis of the "cost of production in the country of origin". The "cost of production in the country of origin" is not a hypothetical cost, but the domestic cost actually incurred in that country.

**4 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION VIOLATED ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994 BY IMPOSING ANTI-DUMPING DUTIES IN EXCESS OF THE MARGIN OF DUMPING THAT SHOULD HAVE BEEN ESTABLISHED UNDER ARTICLE 2**

13. Argentina submits that the Panel correctly interpreted and applied Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Therefore, the Appellate Body should uphold the Panel's findings regarding Argentina's claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in paragraphs 7.367 and 8.1(c)(vii) of the Report. All three aspects of the European Union's appeal with regard to Article 9.3 are without merit and should, consequently, be dismissed in their entirety.

14. First, the Panel correctly found that Article 9.3 requires a comparison between the anti-dumping duties actually imposed and the dumping margin that should have been calculated by the investigating authority, in the absence of any errors or inconsistencies with Article 2 of the Anti-Dumping Agreement.

15. Second, the Panel did not err when inferring from its previous findings with regard to Articles 2.2.1.1 and 2.2 that the European Union also breached Article 9.3. To the extent that the European Union violated Articles 2.2.1.1 and 2.2, this violation leading to the determination of margins of dumping that are higher than what should have been if the margins had been calculated in accordance with Article 2, the Panel appropriately relied on its previous findings when examining Argentina's claim under Article 9.3. However, even if the Appellate Body were to reverse some of the Panel's findings with regard to Argentina's claims under Article 2.2.1.1 or 2.2, this should not automatically result in the reversal of the Panel's findings with respect to Article 9.3.

16. Third, the Panel did not violate Article 17.6(i) of the Anti-Dumping Agreement by seeking to rely on the dumping margins as calculated in the Provisional Regulation. Since the European Union did not include a claim of violation of Article 17.6(i) of the Anti-Dumping Agreement in its Notice of Appeal, this claim of error is not properly before the Appellate Body in this appeal. In any event, this claim should be rejected as the Panel used the findings from the Provisional Regulation only as a "reasonable approximation" and did not suggest that the same results should have been reached had the dumping margins determination been done in accordance with Article 2, as erroneously argued by the European Union.

**5 CONCLUSIONS**

17. The claims raised by the European Union in its Appellant Submission are without merit. Argentina therefore respectfully requests the Appellate Body to reject the European Union's appeal in its entirety.

18. Argentina notes, however, that if the Appellate Body decides to reverse some of the Panel's findings, given that the Panel record contains sufficient factual findings and undisputed facts, the Appellate Body should complete the analysis, contrary to what has been suggested by the European Union.

**ANNEX B-4****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION****1 EXECUTIVE SUMMARY****1.1 ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT AND THE SECOND SUB-PARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION "AS SUCH"**

1. The **first** sub-paragraph of Article 2(5) is concerned with the application of the **first** sentence of Article 2.2.1.1 as a matter of EU law. If a simple comparison is made between the two provisions it is clear that there is no "as such" inconsistency.
2. By contrast, the **second** sub-paragraph of Article 2(5) is concerned to set out what is to be done, as a matter of EU law, if one of the two conditions is not met: in effect, it partially completes the **silence**, for the purposes of EU law.
3. With regard to **the text of the second sub-paragraph** of Article 2(5), *first*, a provision can govern a particular question even if it does not elaborate further detailed criteria. *Second*, just because one provision might be context for another does not mean that the determination provided for in the first is in fact made pursuant to the second. *Third*, the European Union does not understand how the second sub-paragraph can be applied before the first.
4. With regard to **the context of the second sub-paragraph** of Article 2(5), *first*, Argentina confuses the alleged preparatory work (supplementary means of interpretation) with the context. None of Argentina's assertions lends support to its interpretation. *Second*, in EU law recitals do not "establish rules", they provide **reasons**. The relevant EU law rule is in the first sub-paragraph. *Third*, the sequence of determinations mooted by Argentina does not demonstrate that the second sub-paragraph does anything other than partially complete the silence, for the purposes of EU law. *Fourth*, none of the quoted authors suggests that the second sub-paragraph of Article 2(5) governs the question at issue.
5. With regard to the **alleged consistent EU practice**, Argentina did not seek its review "as such" before the Panel. An analysis of all cases invoked reveals that, conceptually, each of them has a two-step structure.
6. With regard to the **judgments of the General Court of the European Union**, they clearly reflect the two-step structure. The Court found that the second sub-paragraph partially completes the silence as a matter of EU law.
7. Argentina asserts that the **Panel's analysis is vitiated by two erroneous premises**. However, the rule in the first sub-paragraph of Article 2(5) provides for the relevant criteria, and no further criteria are supplied by the second sub-paragraph.
8. With regard to the **so-called mandatory/discretionary analytical tool**, the language that concerns the determination of whether or not the records of the firm reasonably reflect the costs associated with production and sale is contained in the first sub-paragraph.
9. With regard to **Article 11 of the DSU**, the Panel made an objective assessment of the matter before it, including an objective assessment of the facts.
10. The Appellate Body does not need to reach the stage of **completing the legal analysis**, because Argentina's submission does not disclose any basis on which to reverse the Panel's findings.



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

11. With regard to the **interpretation of Article 2.2**, the Panel did not err by finding that it does not limit the sources of information that may be used in establishing the costs of production. Argentina ignores the possibility that there may be situations where information from the country of origin is deficient or absent.
12. The Panel did not err in its determination of the scope, meaning and content of Article 2(5), second sub-paragraph.
13. With regard to the **text of Article 2(5), second sub-paragraph**, *first*, resort to "any other reasonable basis" is part of several options that the authorities have at their disposal. There is no obligation to use information from "other representative markets". *Second*, there may be other reasonable "bases" in the country of origin. *Third*, "other representative markets" may include other relevant product markets in the country of origin. *Fourth*, Article 2(5), second sub-paragraph, refers to the **sources of information** that may be used to establish an investigated producer's costs, as opposed to the **costs** themselves.
14. With regard to the **legislative history**, neither the second sub-paragraph of Article 2(3) nor Recital 4 of Regulation 1972/2002 suggest that the EU authorities must systematically resort to information not in the country of origin. They both inform only the case of a "particular market situation".
15. With regard to the **alleged consistent practice of the EU authorities**, Argentina did not challenge the alleged practice itself. The practice, as a (potential) measure, should be distinguished from the instrument. Several examples confirm that the authorities enjoy a broad discretion.
16. With regard to the **judgments of the General Court of the European Union**, they show that the EU authorities are *entitled* to establish the producer's costs on the basis of sources that are unaffected by that distortion.
17. Finally, the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU.
18. **The Panel did not apply an erroneous legal standard for the establishment of the "as such" claim.** Argentina has not demonstrated that the provision at issue cannot be applied in a WTO-consistent manner and that it *will necessarily be inconsistent with the EU's WTO obligations*. The second sub-paragraph does not *require* the investigating authority to use information from outside the country *in all cases*, as confirmed by the practice.

## 1.3 ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT AND THE EU ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

19. The claims and arguments under Article 2.2.1.1 and Article 2.4 are closely related. Fundamentally, the EU is arguing that an adjustment was justified, because a standard of **reasonableness** informs the interpretation and application of the entirety of the second condition in the first sentence of Article 2.2.1.1.
20. Article 2.4 is important context for understanding the circumstances in which it is justified to make an adjustment under Article 2.2.1.1. Article 2.4 expressly mentions taxation, which is an action done by the State. Furthermore, Article VI of the GATT 1994 relates to both dumping and subsidisation.
21. It is not disputed in this case that there is an approximate **correlation** between the rate of the export tax and the consequent reduction in the price of soya in Argentina. The **difference** in Article 2.4 is not the **result** of the comparison. The "difference" pertains to what has to be adjusted **before** the comparison is made.

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

#### **1.4 THE PANEL'S FINDINGS UNDER ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT**

23. The EU authorities concluded that (i) during the period considered the state of the domestic industry deteriorated, while (ii) low capacity utilization was a constant or permanent feature of the EU biodiesel industry.
24. The conclusion of the EU authorities on the issue of overcapacity is unchanged from the Provisional to the Definitive Regulation. The Panel did not err when finding that the revised data in the Definitive Regulation did not have a role in the EU authorities' conclusion on overcapacity as an "other factor" causing injury. The EU authorities relied on what Argentina accepts as the correct data (Provisional Regulation), determining that overcapacity was a constant during the investigation period and therefore could not be a relevant factor.
25. A finding of inconsistency with Articles 3.1 and 3.4 does not automatically render the non-attribution analysis with respect to overcapacity inconsistent with Articles 3.1 and 3.5.
26. The absolute figures revealed nothing about the significance of the increase. An objective and unbiased investigating authority may examine the issue of overcapacity on the basis of capacity utilization.

#### **1.5 REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2.1.1**

27. *First*, Argentina has not requested the Appellate Body to reverse the Panel's exercise of judicial economy with respect to Argentina's second claim under Article 2.2.1.1.
28. *Second*, the first sentence of Article 2.2.1.1 does not create an obligation on importing Members to only use, in the construction of normal value, costs associated with the production and sale of the product under consideration.
29. *Third*, Argentina merely repeats its prior claims and arguments.
30. *Fourth*, the process to which Argentina is referring is not governed by the first sentence of Article 2.2.1.1, but by the second sub-paragraph of Article 2(5), which partially completes the silence for the purposes of EU law.
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**ANNEX C****ARGUMENTS OF THE THIRD PARTICIPANTS**

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## **ANNEX C-1**

### **EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Australia addresses the standard of review under the Anti-Dumping Agreement, the interpretation of Article 2.2.1.1, and the flexibility drafted into the Agreement.
2. Taking into account the appropriate principles of standard of review and interpretation under the Anti-Dumping Agreement, the phrase "reasonably reflects the costs" does not have to require only a reasonable reflection, or reasonable costs. The word "reasonable" relates to both the reasonableness of the reflection, as well as the reasonableness of the costs, depending on the circumstances.
3. Specifically, in determining what it means for records to "reasonably reflect the costs" for the purposes of Article 2.2.1.1 of that Agreement, Australia maintains that a holistic analysis of costs may be warranted in order to arrive at a proper cost calculation. All costs, not merely "actual costs", that would be reasonably related to the production of the goods may be relevant to such an analysis.
4. In addition, while the first sentence of Article 2.2.1.1 provides a rule which "shall normally" be followed in constructing the costs of production, panels have found that there could be situations which are not "normal", where the records of a producer or exporter's costs should not determine what constitutes costs under Articles 2.2.1.1 and 2.2.
5. The flexibility highlighted by these interpretations is important and ought to be maintained to ensure investigating authorities can respond appropriately to different circumstances which could arise in anti-dumping investigations.

**ANNEX C-2****EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION****I. INTRODUCTION: THE CONCEPT OF "DUMPING"**

1. This dispute raises an important interpretive issue regarding the foundational concept of "dumping" that applies throughout the *Anti-Dumping Agreement*. "Dumping" involves *international price discrimination by individual producers and/or exporters*. Anti-dumping measures may counteract such discriminatory pricing practices when they cause injury to domestic competitors. Anti-dumping measures are not a tool for importing countries to counteract the *regulatory policies of exporting countries*, such as WTO-consistent export duties. These government actions may be the subject of specifically negotiated commitments, or they may be disciplined under the *SCM Agreement*, as specific subsidies. However, it would subvert the carefully negotiated balance of rights and obligations to allow importing countries to impose anti-dumping measures to counteract the effects of another government's regulatory policies, by permitting an upward adjustment to an individual producer/exporter's normal value in anti-dumping proceedings.

**II. APPEALS REGARDING THE INTERPRETATION AND APPLICATION OF ARTICLE 2.2.1.1**

2. Under Article 2.2.1.1, an authority must calculate the producer's costs on the basis of its records, provided that they: (i) are in accordance with the generally accepted accounting principles ("GAAP") of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under investigation.

3. The issue is whether an investigating authority is entitled to reject specific items of the production costs in a producer's GAAP-compliant records because it considers that the costs are lower than *hypothetical* costs that might prevail in a *hypothetical* market in which governmental policies do not "distort" costs.

4. The ordinary meaning of the first sentence of Article 2.2.1.1, in light of its context, and the object and purpose of the *Anti-Dumping Agreement*, means that an authority can reject a producer's GAAP-compliant records only if those records do not reflect the true costs – what the Panel calls "actual" costs – incurred by a producer to produce the product under consideration.

5. Article 2.2.1.1, first sentence, states that "costs shall normally be calculated on the basis of records kept by the export or producer under investigation". As noted by the Panel, the subject of this clause is the *records* kept by the *exporter or producer* under investigation. This indicates that this requirement is focused on the costs incurred by that *specific producer* to make the product. As such, Article 2.2.1.1 is focussed on the economic costs borne by the producer when producing the investigated product.

6. Article 2.2.1.1, first sentence, also requires that records of costs are compliant with the exporting country's GAAP. The reference to GAAP is relevant in two respects. *First*, GAAP clarifies that Article 2.2.1.1 deals with a producer's accounting records and the amounts recorded therein, which by their nature are specific to that producer. These costs, therefore, cannot be judged against a hypothetical benchmark that does not reflect that producer's economic reality. *Second*, the reference is to the GAAP of the *exporting country*, thereby confirming the focus of the provision is on the exporter under investigation and their true costs.

7. Article 2.2.1.1, first sentence, also requires that producers' records "reasonably reflect the costs associated with... production". This element of the first sentence of Article 2.2.1.1 forms the heart of the dispute before the Appellate Body. To China, the treaty text does not ask an abstract question about generic costs of producing the product under consideration. Rather, it asks a much more specific question about whether the investigated producer is engaged in discriminatory pricing practices and about the true costs incurred by the producer when producing the product under investigation. As such, the recorded costs should be measured against the true costs incurred, and not a hypothetical benchmark that does not reflect a producer's economic reality.

8. The ordinary meaning of the first sentence of Article 2.2.1.1 is confirmed by the context provided, *inter alia*, by the second and third sentences of that same Article, which provide examples of where recorded GAAP-compliant records may not "reasonably reflect" a producer's costs of production. Each of the factors listed is an accounting consideration that reflects the particular accounting choices made by a specific producer or exporter. This supports China's understanding that "reasonably reflect" in Article 2.2.1.1 requires an assessment of whether recorded costs are a true account of a producer's economic reality.

9. China's understanding is supported by the object and purpose of the *Anti-Dumping Agreement*, which addresses the discriminatory pricing practices of exporters/producers and is, thereby, exporter-focussed. Consequently, a determination of whether a producer's records "reasonably reflect" the costs of production requires an assessment of whether these costs reflect the true costs to the producer and not factors exogenous to the producer.

### III. APPEALS REGARDING THE INTERPRETATION AND APPLICATION OF ARTICLE 2.2

10. Article 2.2 requires that domestic prices normally be used to establish normal value. In some circumstances, however, an authority may construct normal value on the basis of the "cost of production in the country of origin" plus administrative, selling and general costs and profit.

11. There are two broad issues before the Appellate Body. *First*, whether the "cost of production" under Article 2.2 refers to the costs incurred by producers to produce the product, or whether it refers to hypothetical costs that producers "would have" borne, had they sourced inputs from a market other than the country of origin. *Second*, whether information used by an authority to establish the costs of production in the country of origin must *necessarily* be limited to the country of origin.

12. With respect to the *first* issue, the ordinary meaning of "cost of production in the country of origin" in light of the context surrounding Article 2.2 and the object and purpose of the *Anti-Dumping Agreement*, demonstrates that the costs of production must be those of the exporter in their domestic market. Article 2.2 does not refer to *hypothetical* costs that producers "would have" borne.

13. With respect to the *second* issue, the task of establishing "costs of production in the country of origin" begins with the producer's records, which, by definition, reveal costs "in the country of origin". Where a producer's true costs are not reflected in its records, the "cost of production in the country of origin" need to be determined through evidence other than the producer's own accounts. In such a case, the authority must clearly look for evidence *in the country of origin* because this evidence is the *best* evidence of the true cost to the producer "in the country of origin". China does not exclude that in exceptional circumstances – i.e. when there is no evidence in the country of origin – an investigating authority may need to turn to evidence outside of the country of origin. However, the investigating authority is not permitted to *substitute* the costs prevailing in another market for the "cost of production in the country of origin". This means that any evidence used must be revealing of the *producer's* true costs (which, by definition, are incurred "in the country of origin"). This, in turn, means that any such evidence must be adjusted so that it is representative of the costs of production within the country of origin. An investigating authority must take full account of specific market conditions in the exporter's domestic market, including any government intervention in the market that may affect the price of the inputs, for example, trade policy measure such as an export tax on certain commodities.

### IV. APPEAL REGARDING THE LEGAL CHARACTERIZATION OF ARTICLE 2(5), SECOND SUBPARAGRAPH, BASIC REGULATION AND ARGENTINA'S "AS SUCH" CLAIMS

14. The issues before the Appellate Body are: (i) whether, due to errors in its legal characterization of the second sub-paragraph of Article 2(5) of the Basic Regulation, the Panel erred in its application, as such, of Articles 2.2.1.1 and 2.2 to this provision and (ii) the Panel violated DSU Article 11 when considering the Basic Regulation.

15. To show that a legislative measure is, as such, inconsistent with a WTO obligation, a complainant need not show that the measure leads to a WTO-inconsistent outcome in every

instance. Argentina demonstrated, in China's view, that the relevant provision of the Basic Regulation leads to WTO-inconsistent conduct in certain circumstances.

16. Specifically, China agrees with Argentina that the relevant provision leads the EU authority to reject a producer's GAAP-compliant records as not "reasonably reflect[ing]" costs when there is a finding by the authority that the costs are lower than they would have been if the producer had incurred hypothetical costs from a different market. This flows from the text of the relevant provision, read together with the first sub-paragraph of Article 2(5), and read in light of its context. This is also demonstrated by the manner in which the authority, in practice, consistently applies the relevant provision to reject producer's records in anti-dumping proceedings. Court decisions concerning this practice support the same view.

17. When assessing whether the Panel erred in its legal characterization of the Basic Regulation, the Appellate Body should also consider whether the Panel undertook a sufficiently holistic analysis of all of the relevant elements of the Basic Regulation, starting with the text of the law and moving to, *inter alia*, relevant practice and General Court decisions.

#### **V. APPEAL REGARDING THE INTERPRETATION AND APPLICATION OF ARTICLE 2.4**

18. The question whether, under Article 2.4, an allowance was required to ensure fair comparison should not have arisen in connection with the Biodiesel case, since the producers' records "reasonably reflect[ed]" the "costs of production" and the relevant cost adjustments should never have been made. Nevertheless, assuming (*quod non*) that the adjustments made by the EU authority in the Biodiesel investigation were permissible, China considers that, under Article 2.4, the EU authority bore an obligation to make a *fair comparison* and, therefore, to make due allowance for differences affecting price comparability introduced by adding the amount of export tax to the producers' costs when constructing normal value. The addition of the amount for export tax introduced an asymmetry between the components reflected in the normal value and export price sides of the comparison.

**ANNEX C-3****EXECUTIVE SUMMARY OF COLOMBIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Colombia will provide its views on: 1. Whether the Panel erred in its assessment of the meaning of the text and context of Article 2(5), second subparagraph, of the Basic Regulation and; 2. Whether the Panel erred in finding that the European Union's non-attribution analysis did not violate Article 3.5 of the Anti-Dumping Agreement.
2. First, Colombia notes that there was not an in depth analysis of the text of Article 2(5) of Council Regulation and other domestic law and regulations as context<sup>1</sup>, in order to provide an objective assessment of Argentina's "as such claim". In spite of the fact that the Panel underlined "the need to conduct a 'holistic assessment' of the evidence put forward by the parties"<sup>2</sup>, it examined Article 2(5) alone and it isolated most of its elements from relevant legal texts found in EU's municipal law. In view of this, Colombia notes with concern the fact that the Panel seems to be doing a superficial analysis of Article 2(5); hence, taking a stance that completely supports one Party over the other, with no trace of an objective assessment of the facts. Consequently, Colombia respectfully requests the Appellate Body to determine whether the Panel erred when analyzing and interpreting the scope of article 2(5) and whether it disregarded its obligation under Article 11 of the DSU.
3. In Colombia's opinion, the Panel's analysis is primarily based on the fact that the second subparagraph of Article 2(5) begins with a condition; which is why it "strongly suggests that this provision takes effect *following* a determination under the first subparagraph that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under investigation."<sup>3</sup> In hope of rectifying this, Colombia calls upon the Appellate Body to determine whether the analysis and interpretation of Article 2(5) made by the Panel is pursuant to the obligations acquired under Article 11 of the DSU.
4. Second, Colombia is of the opinion that the magnitude of the margin of dumping included in ADA Article 3.4, after being re-calculated, might have been a determinant cause of injury, along with the rest of factors listed in such Article.
5. Colombia also agrees with Argentina when stating that Article 3 contemplates a "logical progression" for the IA's examination, leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry. This process entails a consideration of the volume of dumped imports and their price effects, and requires an examination of the impact of such imports on the state of the domestic industry as revealed by a number of economic factors. These elements are linked through a causation and non-attribution analysis between the dumped imports and the injury to the domestic industry, taking into account all factors that must be considered and evaluated."<sup>4</sup>
6. Finally, Colombia recognizes that the object and purpose of the WTO Agreement is to liberalize trade and eliminate distortions that provide unfair advantages to products. It also acknowledges that the EU's power to conduct investigations of products that are imported under conditions that favor the imported product or causes damages to the national industry. However, Colombia also recognizes that the WTO provides Members with tools designed to address different barriers to trade under different Agreements, and that Members should use these tools accordingly.

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<sup>1</sup> Panel Report, para. 7.127 -7-144.

<sup>2</sup> Ibid, para. 7.126.

<sup>3</sup> Ibid, para. 7.132.

<sup>4</sup> AB Report, China – HP-SSST, para. 5.140.



**ANNEX C-4****EXECUTIVE SUMMARY OF INDONESIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Indonesia agrees with the Panel's interpretation of Article 2.2.1.1. Rather than first examining the "*ordinary meaning*" and, as a second step, examining the context and the object and purpose, the European Union's holistic interpretation is focused on an examination of the broad context and the object and purpose of the provision and not its ordinary meaning.
2. Indonesia submits that neither the ordinary meaning nor the context, object and purpose of Article 2.2.1.1 support the presence of a reasonableness standard linked to costs. By linking the word "*reasonable*" to costs, the European Union is reading words into that provision that are simply not there.
3. That the focus in the first sentence of Article 2.2.1.1 is on the records and not on whether costs are reasonable is supported by the context and the object and purpose. The first sentence of Article 2.2.1.1 confirms that, in its analysis of the two conditions in that sentence, an authority must limit itself to the universe of the records.
4. Indonesia considers it particularly instructive that, to the extent Article 2.2.2 contains a "reasonableness test", such a separate "reasonableness test" is absent from Article 2.2.1.1 and that while Article 2.2 refers to "*a reasonable amount for administrative, selling and general costs*", the qualifier "reasonable" is absent before the words "*cost of production*".
5. Indonesia is therefore concerned that were the Appellate Body to side with the interpretation of the European Union, this will have far-reaching repercussions resulting in significant uncertainty and unpredictability in anti-dumping proceedings. Such an interpretation would also result in findings of dumping no longer being the result of the pricing behaviour of individual entities, but the result of any perceived government intervention in a market.
6. On the interpretation of Article 2.2, by creating a distinction between the costs and the evidence pertaining to such costs, the European Union is attempting to invent a distinction which is not supported by the text, context, object and purpose of Article 2.2.
7. Indonesia is also not persuaded by the European Union's reference to (1) Article 2.2.1.1 – that provision addressing cost allocations and not the costs themselves – and (2) the possibility of using "*any other reasonable method*" under Article 2.2.2 (iii) as that provision addresses the determination of administrative, selling and general costs only.

**ANNEX C-5****EXECUTIVE SUMMARY OF MEXICO'S THIRD PARTICIPANT'S SUBMISSION\***

1. In Mexico's view, the Panel's interpretation of the expression "reasonably reflect the costs associated with the production and sale of the product under consideration" is inappropriate because: (1) it is not consistent with Article 2.2, 2.2.1.1, 2.2.2 and 2.7 of the Anti-Dumping Agreement (ADA); and (2) does not take into account the fact that the preference of the ADA for the actual data is only that, a predilection which never seeks to limit the methodological options to use secondary sources different from the actual data.
2. Mexico considers that a proper interpretation of ADA Article 2.2 and 2.2.1.1 and of the meaning of the word "normally" contained in the latter subparagraph allows it to be concluded that calculation of the costs does not have to be based exclusively on the costs incurred by the specific producer/exporter.
3. Moreover, Mexico believes that certain problems might arise from the Panel's interpretation on this point. As part of its reasoning in arriving at this determination, the Panel qualifies the second condition in Article 2.2.1.1 as exceptional and subsidiary to the first requirement, which, in Mexico's opinion, is contrary to the text of the provision. Likewise, Mexico considers that some of the Panel's reasoning in fact supports the EU's position.
4. Mexico disagrees with the Panel's interpretation in *US — Softwood Lumber V*, as, in this dispute, data from the accounting records were indeed disregarded, despite the fact that they reflected actual data.
5. Mexico further considers that the preference of the ADA for the actual information does not justify limiting the methodological options to replace it. This is evidenced by the fact that Article 2.2.2 of the ADA, which also refers to the construction of normal value, provides the flexibility of replacing the actual data by "any other reasonable method". In addition, Mexico considers that some of the Panel's determinations contradict the basic premises on which it relies.
6. Along those same lines, Mexico considers that the Panel's interpretations, taken to the extreme, would imply that the "facts available" provisions may not be used either, although these are set out in the ADA itself, because they imply an option other than that of the costs incurred.
7. Lastly, Mexico considers that, on account of the distortions, the prices of soya in Argentina might not be "accord with how they would need to be considered in the context of an anti-dumping investigation", and since the Panel itself recognizes that this might be a reason to use a source other than the actual data, Mexico's opinion is that this aspect should have been examined.

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\* This text was originally submitted in Spanish by Mexico.

**ANNEX C-6****EXECUTIVE SUMMARY OF RUSSIA'S THIRD PARTICIPANT'S SUBMISSION**

1. The Russian Federation agrees with Argentina that the Panel's approach towards the analysis of contextual elements of the contested measure, characterized as *fragmentation technique*, interfered with its obligation to make an objective assessment of the matters before it regarding "as such" claims. Contrary to the requirements of Article 11 of the DSU, the Panel held a fragmented analysis of contextual elements of the text of Article 2(5) of the Basic Regulation, as if they existed autonomously from the contested measure.

2. Furthermore, the Russian Federation shares Argentina's view that the Panel has improperly shifted the European Union's burden of proof to Argentina, in fact suggesting that the Complaining Party needs to demonstrate the facts supporting the European Union's position on "as such" claims. This approach is inconsistent with due process principles as established in the WTO jurisprudence.

3. Finally, the Russian Federation believes that the Panel in its analysis of Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994 has neither established the ordinary meaning of the term "costs of production in the country of origin", nor examined this term in its context. Thus, the Panel's findings that Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994 "require that the costs of production established by the authority reflect conditions prevailing in the country of origin" but do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" appear to be legally flawed.

**ANNEX C-7****EXECUTIVE SUMMARY OF SAUDI ARABIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Saudi Arabia's comments concern two important systemic issues that are central to this appeal. Saudi Arabia refrains from expressing a view on the underlying facts or the Panel's application of the law to the facts of the dispute.

2. First, Saudi Arabia submits that Article 2.2.1.1 of the Anti-Dumping Agreement does not permit the rejection of the producers' recorded costs simply because the investigating authority considers those to be "artificially low" or distorted by virtue of some regulatory or tax measure in operation in the country of export. The rule set forth in Article 2.2.1.1 is simple. It provides that "costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation". The term "reasonably" is an adverb that qualifies the reflection of the costs in the records. It does not qualify the costs. The adverb is used to ensure that the records are a reliable source of relevant cost information. This requirement is the substantive counterpart to the first condition that the records must be kept in accordance with the generally accepted accounting principles of the exporting country. Both conditions seek to ensure that the records in question form a reliable basis for the actual costs related to the production and sale of the product under consideration. This provision concerns the records and their reliability to accurately present the actual costs incurred for the production of the product under consideration. This provision does not relate to the amount of the costs and does not require that the costs be reasonable.

3. The aim of the anti-dumping instrument is to discipline the response of Members to private pricing behavior of foreign producers causing material injury to domestic producers of the importing country. 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. The allegedly "low" level of the input costs does not affect the comparison between normal value and export price.

4. Saudi Arabia has systemic concerns with a contrary reading. The Anti-Dumping Agreement cannot be used to circumvent the disciplines on countervailing measures imposed by the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). In addition, the anti-dumping instrument cannot be used to counteract what otherwise could not be obtained through multilateral, bilateral or accession negotiations such as the elimination of export taxes.

5. Second, Article 2.2 of the Anti-Dumping Agreement imposes a clear obligation on investigating authorities to base the normal value on costs in the country of origin. Article 2.2 requires a direct "comparison with" the cost of production in the country of origin and does not permit constructing costs based on international reference prices or even a proxy that merely "relates to" the country of origin but that is not the cost of production "in" the country of origin. Articles 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement elaborate "for the purpose of paragraph 2" on the basis for constructing normal value. Both reflect a producer-specific and a country-specific focus. Article 2.2 allows the construction of the normal value but not the construction of the costs, irrespective of whether these costs are considered to have been "affected" or "distorted" by government measures in the country of exportation.

**ANNEX C-8****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION**

1. In this submission, the United States addresses a number of issues related to the Panel's interpretation of Article 2 of the AD Agreement and the consideration of "as such" claims.

2. First, the United States agrees with the EU that the Panel's interpretation of the second condition of Article 2.2.1.1 of the AD Agreement is in error. The United States first recalls that where records are kept in accordance with generally accepted accounting principles ("GAAP") of the exporting country 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. However, when considering the meaning of the second condition in Article 2.2.1.1, whether the records "reasonably reflect" costs associated with production and sale, the Panel erred by failing to properly evaluate the text of Article 2.2.1.1. In particular, the Panel's analysis of "costs associated with production and sale" relied on a misunderstanding of the purpose of Article 2.2, and the text of Article 6.10, rather than the ordinary meaning of the text of Article 2.2.1.1. An appropriate reading of this provision would result in a finding that it is not restricted to consideration of costs *actually* incurred. Further, with respect to the second condition of Article 2.2.1.1, the Panel also erred in its analysis of the phrase "reasonably reflects." In total the second condition of Article 2.2.1.1 should be interpreted in a manner that does not render the condition superfluous when considering the meaning of other elements of Article 2.2.1.1.

3. Second, as raised by the EU's appeal, the Panel erred in its interpretation of Article 2.2 of the AD Agreement. In particular, the text of Article 2.2 does not contain the evidentiary limitations suggested by the Panel. Third, contrary to the claims of Argentina, the Panel did not err with respect to its interpretation of Article 2.4 of the AD Agreement.

4. Fourth, with respect to the "as such" claims raised by Argentina, the United States notes that the arguments made by Argentina are appropriately considered under Article 11 of the DSU. The arguments presented by Argentina regarding the Panel's analysis of context, legislative history, consistent practice, and judgments of EU's General Court are issues of a factual nature, and thus, the Appellate Body may resolve the issue by examining whether the Panel failed to make an objective assessment of the meaning of Article 2(5) of the Basic Regulation within the EU legal system under DSU Article 11. Finally, the United States views the legal standard applied by the Panel to the "as such" claims as appropriate. The Panel correctly based its conclusion upon whether Article 2(5), subparagraph two, requires WTO-inconsistent conduct, and not whether, if the investigating authority exercises its discretion to take a particular action, that action would be WTO-inconsistent.

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**ANNEX D**

**PROCEDURAL RULINGS**

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**ANNEX D-1****PROCEDURAL RULING OF 9 JULY 2016**

1. On 30 June 2016, we received a letter from the European Union requesting a period of fifty minutes to deliver its oral statement at the hearing. The European Union expressed the view that there is an "unusual volume of third participant submissions in this appeal", that these "refer to a number of points that have not been raised by Argentina", and asserted that it needs to have a full opportunity to address these additional points on "its own motion" and in "an appropriately structured way".

2. After requesting and receiving comments from Argentina and the third participants, and pursuant to Rule 28(1) of the Working Procedures for Appellate Review, on 6 July 2016 we invited the European Union to submit an additional memorandum by 11 July 2016 to identify the precise points referred to by the third participants that allegedly have not been raised by Argentina, and to explain the reasons for its concerns with these points. In the same communication, and pursuant to Rule 28(2) and (3) of the Working Procedures, we also invited Argentina and the third participants to respond, if they so wish, in writing to the European Union's additional memorandum by 14 July 2016.

3. In the afternoon of 8 July 2016, we received a letter from the European Union, requesting us to extend the deadline for filing the additional memorandum by 4 days, to 15 July, due to the exceptional circumstance that all of the lawyers representing the European Commission in this appeal are currently unavailable. Earlier the same day, we had received a letter from China requesting that we extend the deadline to respond to the European Union's additional memorandum by 1 day, to 15 July. China expressed the view that the amount of time granted to third participants is "disproportionately brief compared to the amount of time allowed to the European Union to prepare its additional memorandum", and noted in this regard that third participants cannot begin to prepare their responses until after they have received the European Union's additional memorandum.

4. In view of the timing of the above requests, the short time-frame between now and the oral hearing, the need to strike an appropriate balance between the respective time periods for the European Union to prepare its written memorandum and for Argentina and the third participants to prepare any memoranda in response, and taking account of the need for the Division to have sufficient time to consider the requested memoranda before the oral hearing, we decline the requests by the European Union and China to extend the time-periods for filing additional memoranda. Accordingly, and as indicated in our letter of 6 July 2016, the Division invites the European Union to submit its additional memorandum by 5 p.m. on Monday, 11 July 2016, and further invites Argentina and the third participants in this appeal, should they wish to respond to such memorandum, to do so by 5 p.m. on Thursday, 14 July 2016. Such additional memoranda should be submitted in writing to the Appellate Body Secretariat, and served on the participants and the third participants.



**ANNEX D-2****PROCEDURAL RULING OF 11 JULY 2016**

1. On 30 June 2016, we received a letter from the European Union requesting that we adopt additional procedures concerning: (i) public observation of the oral hearing; and (ii) viewing of a recording of the oral hearing by third participants. On 1 July 2016, we invited Argentina and any third participant that wished to comment on these requests to do so by 12 noon on Tuesday, 5 July 2016. In response, Argentina, China, Mexico, and the United States submitted comments.<sup>1</sup>

**1 REQUEST TO OPEN THE ORAL HEARING TO PUBLIC OBSERVATION**

2. With respect to the oral hearing in this appeal, the European Union requests that we allow public observation of the statements and answers to questions of the participants, as well as those of third participants who agree to make their statements and responses to questions public. The European Union proposes that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off when issues involving confidential information are discussed, or if a third participant indicates that it wishes to keep its oral statements and responses to questions confidential.

3. Argentina expresses regret that the European Union chose to make this request on a unilateral basis rather than approaching Argentina and seeking to proceed on a joint basis. Argentina states that it is not aware of any valid reason for opening the hearing to public observation at the appellate stage when this was not done at the panel stage and notes, in this regard, that the European Union did not make such a request to the Panel in this dispute. While stating that it is not opposed to increasing the transparency of dispute settlement proceedings, Argentina expresses reservations about the timing of the request, and questions the extent of the benefit that the public could derive from observing a highly technical discussion of an anti-dumping measure without having had the opportunity to be informed, as well, of the underlying facts. For these reasons, Argentina indicates that it would prefer not to have the oral hearing opened to public observation in the present case.

4. China states that, without prejudice to its systemic position on issues concerned by the European Union's request, should the oral hearing be open to public observation, it wishes to keep its oral statements and responses to questions confidential. Mexico submits that it does not object to allowing the oral hearing to be opened to public observation in these appellate proceedings, but maintains that its position in these proceedings is without prejudice to its systemic opinions on this issue. The United States suggests that we grant the request by the European Union for public observation of the oral hearing, and confirms its intent to make its oral statements and answers to questions open to public observation.

5. We recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in 12 previous appeals.<sup>2</sup> In its rulings, the Appellate Body has held that it has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. We take note of the reasons previously expressed by the Appellate Body and its interpretation of Article 17.10 of the DSU, and consider that such interpretation also applies in these appellate proceedings.

6. We note that the request to open the oral hearing in these proceedings was made by only one of the participants, the European Union. According to Argentina, the European Union did not consult with Argentina or seek to persuade Argentina to make a joint request to allow public

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<sup>1</sup> Australia indicated by email that it would not be making written comments with respect to these requests by the European Union.

<sup>2</sup> The first time the Appellate Body authorized, at the request of the participants, public observation of the oral hearing was in 2008 in *United States / Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R / WT/DS321/AB/R); most recently the Appellate Body authorized public observation of the oral hearing in *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 by Canada and Mexico* (WT/DS384/AB/RW/ WT/DS386/AB/RW).

observation of the oral hearing. We also take note of the concerns expressed by Argentina regarding the European Union's request, and its preference not to have the oral hearing open to public observation. Moreover, we observe that the request was made merely three weeks prior to the oral hearing.

7. In the light of the above, we decline the European Union's request to allow public observation of the oral hearing in these appellate proceedings.

## **2 REQUEST TO ALLOW THIRD PARTICIPANTS TO VIEW A VIDEO RECORDING OF THE ORAL HEARING**

8. The European Union further requests that we adopt additional procedures to enable third participants to view a video recording of the oral hearing, including from a location other than Geneva. Specifically, the European Union proposes that a password protected, electronic version of the video recording be made available as soon as practicable upon conclusion of the oral hearing, to which third participants would have access during a limited period of one week. The European Union further proposes that the video recording could be viewable by each third participant once, without pausing, re-winding or fast-forwarding, and that only persons who would be entitled to be members of that third participant's delegation at the oral hearing would be authorized to be present during the viewing. The European Union also suggests procedures to prevent recording, reproduction, or dissemination of the video recording of the oral hearing, and to protect the confidentiality of business information.

9. Argentina states that it does not oppose the European Union's request in principle, although it is uncertain what transparency requirement or purpose would be served by the adoption of the proposed procedures. Argentina observes that those Members allowed to view the recording of the oral hearing would be the same Members allowed to take part in the oral hearing, and that none of the third participants in this dispute are least-developed country Members. Argentina also wonders about the extra administrative burden that this request might entail if granted, in particular in view of the already scarce WTO resources available for the dispute settlement system. Mexico maintains that we should not allow the hearing to be recorded, considering that this request should be reviewed carefully and that the possible benefits or downsides of recording an oral hearing should be discussed openly by the entire WTO Membership. The United States submits that it sees neither the purpose of the additional procedures proposed by the European Union, nor the value that such procedures would add. The United States considers that the proposed additional procedures would be complex and burdensome for third participants while not giving the participants significant confidence in the control maintained on the recording, and adds that it is not clear that such procedures would be technically feasible.

10. We note that, to date, procedures such as those proposed by the European Union have not been adopted in WTO dispute settlement proceedings. Moreover, although the proposed procedures appear complex, both technically and administratively, the request was made only three weeks before the oral hearing in these proceedings. We further note that, while the European Union indicates that its proposed procedures are for the benefit of third participants, its request has not been expressly supported by any of the third participants in these appellate proceedings.

11. For these reasons, we decline the European Union's request to adopt additional procedures to enable third participants to view a video recording of the oral hearing.

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