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

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

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

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

6.288. Argentina submits that, because it has demonstrated that the Panel erred in finding that the second subparagraph of Article 2(5) of the Basic Regulation is not inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, it necessarily follows that the European Union has not ensured the conformity of its laws, regulations, and administrative procedures with the provisions of the Anti-Dumping Agreement and the GATT 1994 and, as a consequence, has violated Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.[657]

6.289. As discussed above, we have upheld the Panel's findings that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The Panel's finding under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement was consequential. On appeal, Argentina advances no arguments in support of its claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement that are separate from its arguments in support of its claims under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

6.290. Consequently, we uphold the Panel's finding, in paragraphs 7.175 and 8.1.b.iii of its Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

7 FINDINGS AND CONCLUSIONS

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

7.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

[655] Panel Report, para. 7.174.
[656] Panel Report, para. 7.174.
[657] Argentina's other appellant's submission, paras. 291-293.

7.1.1 Determination of dumping

7.1.1.1 Article 2.2.1.1 of the Anti-Dumping Agreement

7.2. We consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement – that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration – relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration. The Panel's interpretation, which is more nuanced than the European Union's arguments on appeal suggest, does not conflict with our understanding of this provision. In our view, the Panel did not err in rejecting the European Union's argument that the second condition in the first sentence of Article 2.2.1.1 includes a general standard of "reasonableness". With respect to the application of Article 2.2.1.1 to the anti-dumping measure on biodiesel, we agree with the Panel that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel. We therefore find that the Panel did not err in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.249 and 8.1.c.i of the Panel Report, 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. Having upheld this Panel's finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.

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

7.3. We consider that the phrases "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and "cost of production … in the country of origin" in Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information or evidence that may be used in establishing the cost of production in the country of origin to sources inside the country of origin. When relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this may require the investigating authority to adapt that information. In this case, like the Panel, we consider that the surrogate price for soybeans used by the EU authorities to calculate the cost of production of biodiesel in Argentina did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel. We therefore find that the Panel did not err in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, and that the European Union has not established that the Panel erred in its application of these provisions to the biodiesel measure at issue.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.260 and 8.1.c.ii of the Panel Report, that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel. Having upheld this finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.

7.1.1.3 Article 2.4 of the Anti-Dumping Agreement

7.4. We have upheld the Panel's findings that the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement in constructing the normal value for the

reasons set out above.[658] Given these findings, and notwithstanding our reservations about certain aspects of the Panel's analysis under Article 2.4 of the Anti-Dumping Agreement, we do not consider it fruitful, in the particular circumstances of this dispute, to examine further whether the EU authorities also failed to conduct a "fair comparison" in comparing the constructed normal value to the export price.

a. We therefore find it unnecessary to rule on Argentina's claim on appeal regarding the Panel's finding under Article 2.4 of the Anti-Dumping Agreement.

7.1.2 Imposition of anti-dumping duties: Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.5. We consider that the Panel correctly interpreted Article 9.3 of the Anti-Dumping Agreement in stating that the "'margin of dumping' referred to in Article 9.3 relates to a margin that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines".[659] Furthermore, in our view, the Panel did not err in considering that, in light of the specific circumstances of this dispute, "Argentina has made a *prima facie* case that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement, which the European Union has failed to rebut."[660] We also agree with the Panel that the same considerations that guided its assessment of Argentina's Article 9.3 claim apply *mutatis mutandis* to its assessment of Argentina's claim under Article VI:2 of the GATT 1994.[661]

a. For these reasons, we uphold the Panel's finding, in paragraphs 7.367 and 8.1.c.vii of the Panel Report, that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively.

7.1.3 Non-attribution analysis in causation determination: Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.6. We consider that the Panel was not expressing, and therefore did not err in, its interpretation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when it stated that the revised data did not have a significant role in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an "other factor" causing injury. Furthermore, the Panel committed no error in its application of these provisions. Specifically, the Panel did not err in: (i) stating that the EU authorities' conclusion in their non-attribution analysis was not based on or affected by the revised data; (ii) rejecting Argentina's argument that the EU authorities improperly focused on capacity utilization as opposed to the increase in overcapacity in absolute terms during the period considered; or (iii) finding no fault in the EU authorities' conclusion that, on the basis of the evidence before them, overcapacity could not be "a major cause of injury". More generally, we agree with the Panel that the EU authorities' conclusion with respect to overcapacity is one that an unbiased and objective investigating authority could have reached in light of the facts before it.[662] For these reasons, we find that Argentina has not established that the Panel erred in finding that the EU authorities' treatment of overcapacity in its non-attribution analysis as an "other factor" causing injury to the EU domestic industry was not inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.472 and 8.1.c.x of the Panel Report, that Argentina had not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

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[658] See *supra*, paras. 6.56-6.57 and 6.82-6.83.
[659] Panel Report, para. 7.359.
[660] Panel Report, para. 7.365.
[661] Panel Report, para. 7.366.
[662] Panel Report, para. 7.472.

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

7.2.1 Article 2.2.1.1 of the Anti-Dumping Agreement

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

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

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

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

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

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

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

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

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

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

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

7.12. We have upheld the Panel's findings that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The Panel's finding under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement was consequential. On appeal, Argentina advances no arguments in support of its claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement that are separate from its arguments in support of its claims under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.175 and 8.1.b.iii of the Panel Report, that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

7.3 Recommendation

7.13. The Appellate Body recommends that the DSB request the European Union to bring its measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994 into conformity with those Agreements.

[665] Panel Report, para. 7.174.
[666] Panel Report, para. 7.174.

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

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Ujal Singh Bhatia
Presiding Member

_____ _____
Peter Van den Bossche
Member

Yuejiao Zhang
Member

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