From: Roger Simpson [mailto:roger@panpac.biz]
Sent: Monday, 30 May 2016 12:05 PM
To: King, Tim
Cc: Maevsky, Roman; Arvind_Gupta@app.co.id; melissa_anggraini@app.co.id
Subject: A4 copy paper - alleged PMS Indonesia

Dear Tim,

Further to my letter of 21 April and email of 27 April concerning the inclusion of a PMS inquiry in the dumping investigation concerning A4 copy paper from Indonesia, I would like to bring to your attention WTO DSB Panel Report *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (WT/DS473/R), which makes it very clear that the use of surrogate input material costs in normal value constructions because of government influence on those recorded in the accounts of domestic manufacturers is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

Attached is an extract from the said Panel Report leading to the conclusion in paras 7.248 and 7.249 that –

> *The investigating authority determined not to use the costs of the main raw material, soybeans, in the production of biodiesel because "the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system". In our view, this does not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel.*[1]*; and*
>
> *Therefore, we find 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]

Regards,
Roger

[1] Panel report WT/DS473/R, para 7.248.
[2] Panel Report WT/DS473/R, para 7.249.

WORLD TRADE ORGANIZATION

WT/DS473/R

29 March 2016

(16-1756)

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EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

REPORT OF THE PANEL

7.4 Argentina's claims concerning whether the EU anti-dumping measures on imports of biodiesel from Argentina are inconsistent with Articles 2.1, 2.2, 2.2.1.1, 2.2.2(iii), 2.4, 3.1, 3.4, 3.5, and 9.3 of the Anti-Dumping Agreement and Articles VI:1, VI:1(b)(ii) and VI:2 of the GATT 1994, "as applied"

7.4.1 Whether the EU anti-dumping measures on imports of biodiesel from Argentina are inconsistent with Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and with Articles VI:1 and VI:1(b)(ii) of the GATT 1994

7.4.1.1 Legal claims

7.176. Argentina claims that the anti-dumping measures applied by the European Union on imports of biodiesel from Argentina are inconsistent with a number of provisions of the Anti-Dumping Agreement and of the GATT 1994. Specifically, Argentina requests us to find that the European Union acted inconsistently with:

a. Article 2.2.1.1 and, as a consequence, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers;

b. 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, namely, Argentina;

c. 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; and

d. Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 as a consequence of the above-mentioned violations under the Anti-Dumping Agreement and the GATT 1994.[243]

7.177. We begin by addressing the first of these claims, which hinges, in large part, on the proper interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.4.1.2 Relevant provisions of the covered agreements

7.178. The texts of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and of Article VI:1 of the GATT 1994 are reproduced above, paragraphs 7.70-7.71. Article 2.1 of the Anti-Dumping Agreement reads:

> 2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

7.4.1.3 Factual background

7.179. On 16 July 2012, the European Biodiesel Board (EBB) submitted a complaint to the EU authorities, requesting the initiation of an anti-dumping investigation concerning imports of biodiesel originating in Argentina and Indonesia.[244] The EU authorities subsequently initiated an anti-dumping investigation on imports of biodiesel from these countries on 29 August 2012.[245] On 28 May 2013, the European Union published a Provisional Regulation imposing provisional anti-dumping duties on imports of biodiesel from Argentina at margins of between 6.8% and 10.6% in the form of specific duties expressed as a fixed amount per tonne.[246] On 1 October 2013,

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[243] Argentina's first written submission, para. 470(a)-(d); second written submission, para. 254(a)-(d).

[244] Consolidated version of the complaint, (Exhibit ARG-31). We will not address the aspects of the investigation pertaining to Indonesia, as these are not material to the claims at hand.

[245] Notice of initiation of the anti-dumping investigation, (Exhibit ARG-32).

[246] Provisional Regulation, (Exhibit ARG-30), Recital 179.

the European Union issued a Definitive Disclosure and proposal for definitive measures to interested parties.[247] Interested parties were allowed to submit comments on this Definitive Disclosure. On 26 November 2013, the Definitive Regulation was published in the Official Journal of the European Union. It confirmed the provisional findings of dumping and injury. It calculated dumping margins ranging from 41.9% to 49.2%. Given that the dumping margins exceeded the injury margins calculated by the EU authorities, which ranged from 22.0 to 25.7%, the European Union applied duties corresponding to the latter, in the form of specific duties on imports of biodiesel from Argentina.[248]

7.180. In the Provisional Regulation, the EU authorities found that, since the Argentine biodiesel market was heavily regulated, domestic sales were not made in the ordinary course of trade, which meant that the normal value would have to be constructed.[249] As part of constructing the normal value, the EU authorities calculated the costs of production of biodiesel on the basis of the costs recorded in the producers' records during the investigation period (IP). While the EBB had claimed that the "Differential Export Tax" (DET) system[250] in Argentina depressed the price of soybeans and soybean oil (the main raw material inputs used in the production of biodiesel) and, therefore, distorted the costs of biodiesel producers, the EU authorities indicated that they did not have enough information at that stage of the investigation to make a decision as to the most appropriate way to address that claim.[251] Hence, they stated, the question as to whether the costs of soybeans in the producers' records reasonably reflect the costs associated with the production of biodiesel would be examined further at the definitive stage, as well as in the parallel countervailing duty investigation.[252]

7.181. In the Definitive Disclosure, the EU authorities confirmed their finding that domestic sales were not made in the ordinary course of trade given that the Argentine market was heavily regulated, such that the normal value had to be constructed.[253] In addition, the EU authorities found that the DET depressed the domestic price of soybeans and soybean oil to an artificially-low level which, as a consequence, affected the costs of the biodiesel producers.[254] The EU authorities further considered that this cost distortion should be taken into account in establishing the normal value.[255] In particular, the EU authorities considered that the investigation demonstrated that the DET in Argentina distorted the costs of production of Argentine biodiesel producers because:

> [E]xport taxes on raw material (35% on soya beans and 32% on soybean oil) were significantly higher than the export taxes on the finished product (nominal rate of 20% on biodiesel, with an effective rate of 14.58% taking into account a tax rebate) ...
>
> ...
>
> On the other hand, domestic prices of soya beans and soya bean oil are determined on the relevant markets under the prevailing conditions. However, the domestic prices follow the trends of the international prices. The investigation established that the difference between the international and the domestic price of soya beans and soya bean oil is the export tax on the product and other expenses incurred for exporting it.

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[247] Definitive Disclosure, (Exhibit ARG-35).
[248] Definitive Regulation, (Exhibit ARG-22).
[249] Provisional Regulation, (Exhibit ARG-30), Recitals 44 and 45.
[250] See below, para. 7.181, for the EU authorities' description of the DET.
[251] Provisional Regulation, (Exhibit ARG-30), Recital 45.
[252] Provisional Regulation, (Exhibit ARG-30), Recital 45. The EU authorities conducted a parallel countervailing duty investigation on imports of biodiesel from Argentina and Indonesia. The investigation was initiated on 10 November 2012, following the submission of a complaint by the EBB on 27 September 2012. (Notice of initiation of the countervailing duty investigation, (Exhibit ARG-33)). The alleged subsidies at issue consisted of the provision of inputs (soybean or soybean oil in the case of Argentina and palm oil in the case of Indonesia) at below market prices by means of government policies implemented and enforced by a policy of export tax (export tax on the inputs at higher rates than on the finished product, biodiesel), and which obliged input producers to sell on the domestic market, creating an excess of supply, depressing prices to a below-market level and artificially reducing the costs of the biodiesel producers.

The countervailing duty investigation was terminated on 25 November 2013, following the EBB's withdrawal of its complaint on 7 October 2013. (Notice of termination of the countervailing duty investigation, (Exhibit ARG-36))

[253] Definitive Disclosure, (Exhibit ARG-35), para. 24.
[254] Definitive Disclosure, (Exhibit ARG-35), para. 26.
[255] Definitive Disclosure, (Exhibit ARG-35), para. 26.

> The domestic reference prices of soya beans and soya bean oil are also published by the Argentine Ministry of Agriculture as the 'FAS theoretical price'. The producers of soya beans and soya bean oil therefore obtain the same net price no matter whether they sell for export or domestically.
>
> In conclusion, the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be lower than the international prices due to the distortion created by the Argentine export tax system and, consequently, the costs of the main raw material were not reasonably reflected in the records kept by the Argentinean producers under investigation in the meaning of Article 2(5) of the basic Regulation as interpreted by the General Court as explained above.[256] (fns omitted)

7.182. In light of the above, the EU authorities decided to disregard the price actually paid by Argentine producers for soybeans – which the EU authorities referred to as "the main raw material purchased and used in the production of biodiesel" – and to replace it with "the price at which those companies would have purchased the soya beans in the absence of such a distortion".[257] The EU authorities thus replaced the actual purchase price of soybeans during the IP, as reflected in the producers' records used in the calculation at the provisional stage, with the average reference price of soybeans published by the Argentine Ministry of Agriculture for export, FOB Argentina, minus fobbing costs, during the IP.[258] This resulted in the EU authorities replacing the costs incurred by the producers as reported in their records by a uniform price of 2,144.60 ARS (Argentine pesos) for soybeans for all producers in establishing their costs of production. This significantly increased the costs of production for each of the Argentine producers.[259] The EU authorities considered that this reference price reflected the level of international prices.[260]

7.183. In its comments on the Definitive Disclosure, the association of Argentine exporting producers (Cámara Argentina de Biocombustibles, CARBIO) argued, *inter alia*, that export taxes on soybeans or soybean oil are not a cost associated with the production of biodiesel in Argentina, and therefore cannot be included in the cost of production and sale of biodiesel.[261]

7.184. In the Definitive Regulation, the EU authorities confirmed their conclusion that domestic prices of soybeans were artificially lower than international prices due to the distortion created by the Argentine export tax system, and also confirmed their use of reference prices published by the Argentine Ministry of Agriculture to establish the cost at which companies would have purchased soybeans in the absence of the distortion.[262] In response to CARBIO's claim that export taxes on soybeans or soybean oil could not be included in the cost of production and sales of biodiesel, the EU authorities stated:

> In the present case it was established that the costs associated with the production of the product concerned are not reasonably reflected in the records of the companies concerned as they are artificially low due to the distortion caused by the Argentine DET system. This holds true regardless of whether or not DET systems in general may be as such contrary to the WTO Agreement ... [W]hen making such a determination to derogate from [the general rule set forth in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement], the investigating authority must set forth its reasons for doing so. Consistent with this interpretation, in view of the distortion created by the DET system, which creates a particular market situation, the Commission replaced the costs recorded by the companies concerned for the purchase of the main raw material in Argentina with the price that would have been paid in the absence of the established distortion.[263]

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[256] Definitive Disclosure, (Exhibit ARG-35), paras. 31-34.
[257] Definitive Disclosure, (Exhibit ARG-35), para. 35.
[258] Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI).
[259] Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI), pp. 2, 5, 8, 11, and 14; Argentina's first written submission, para. 182.
[260] Definitive Disclosure, (Exhibit ARG-35), para. 32.
[261] CARBIO's comments on the Definitive Disclosure, (Exhibit ARG-39), pp. 5 and 6 (discussed in Definitive Disclosure, Annex II, (Exhibit ARG-38) (BCI)).
[262] Definitive Regulation, (Exhibit ARG-22), Recitals 38-40.
[263] Definitive Regulation, (Exhibit ARG-22), Recital 42.

7.4.1.4 Whether the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement, and as a consequence, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers

7.4.1.4.1 Arguments of the parties

7.4.1.4.1.1 Argentina

7.185. Argentina submits that the European Union acted inconsistently with Article 2.2.1.1 and, as a consequence of this inconsistency, with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.[264] In particular, Argentina claims that the European Union erred by determining that the costs of the main raw material in the production of biodiesel, soybean oil and soybeans[265], were not reasonably reflected in the records kept by the Argentine producers under investigation because those costs were artificially lower than international prices due to the distortion created by the Argentine export tax system.[266]

7.186. Argentina submits that Article 2.2.1.1 of the Anti-Dumping Agreement requires an investigating authority to calculate a producer/exporter's costs of production on the basis of the records kept by the producer/exporter under investigation, provided that such records are in accordance with the 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.[267] According to Argentina, the second basis for disregarding the costs reflected in the records kept by the producer/exporter under Article 2.2.1.1 is needed because those records pre-exist and are not necessarily organized in a manner which coincides with what is requested in an anti-dumping investigation, which focuses on a specific product and a specific period of investigation.[268] For instance, this ground might be relied upon where the costs reflected in these records do not correlate to the specific time period or product under investigation, or in instances where the exporter forms part of a group of companies and sources certain inputs from a related company.[269] However, this ground only permits examination of whether the *records* – rather than the *costs* contained therein – are "reasonable".[270] Thus, the reliance on this condition by the EU authorities to remedy what they considered to be "artificially low" prices stemming from the Argentine export tax system was erroneous.[271] Argentina bases its understanding of Article 2.2.1.1

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[264] Argentina's first written submission, paras. 171(1), 244, and 470(a). Argentina also argues, as a first line of argumentation, that Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement, and, therefore, the Panel should likewise find the application of Article 2(5) of the Basic Regulation in the anti-dumping measures at issue to be inconsistent with the same provision. (Argentina's first written submission, para. 196). We have found in the previous section of our report that Argentina has not established that Article 2(5), second subparagraph, of the Basic Regulation, is inconsistent "as such" with the provisions of the Anti-Dumping Agreement and of the GATT 1994 which it invokes. Accordingly, in the present section, we only address the second line of argumentation presented by Argentina in support of its "as applied" claim under Article 2.2.1.1, i.e. that Article 2(5) was applied in a manner inconsistent with Article 2.2.1.1 in the circumstances of the investigation at issue.

[265] We note that Argentina claims that the European Union erred in referring indistinctly in the Definitive Regulation to soybeans and soybean oil as "the main raw material", because soybeans are not a direct input in the production of biodiesel. In particular, Argentina contends that producers must "crush" soybeans to obtain soybean oil (in addition to soybean meal and pellets) before biodiesel can be obtained from the oil by way of transesterification. (Argentina's first written submission, paras. 211 and 212 (referring to Definitive Regulation, (Exhibit ARG-22), Recitals 30, 34, 38, and 39)). We adopt the same terminology as the Definitive Regulation without prejudice to the merits of Argentina's contention in that regard.

[266] Argentina's first written submission, paras. 204-207 (referring to Definitive Regulation, (Exhibit ARG-22), Recital 38).

[267] Argentina's first written submission, paras 92 and 200. Argentina contends that the term "normally" in the first sentence of Article 2.2.1.1 does not render the rule contained therein optional, but rather, indicates that there are exceptions to the rule as expressed by the two conditions referred to in the same sentence (see ibid. paras. 93 and 201).

[268] Argentina's response to Panel question Nos. 90, para. 32 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393), and 7, paras. 17-23.

[269] Argentina's response to Panel question No. 7, paras. 18-23.

[270] Argentina's second written submission, para. 179.

[271] Argentina's first written submission, paras. 99 and 209-211.

in this regard on the ordinary meaning of that provision, in its context and in light of the object and purpose of the Anti-Dumping Agreement.[272]

7.187. In particular, Argentina contends that the ordinary meaning of the term "costs" concerns costs actually incurred by the producer/exporter, regardless of whether the amount actually incurred by the producer/exporter corresponds to prices that they could have hypothetically paid on other markets.[273] Further, Argentina notes that, if the producer/exporter were to include costs in its records that represent the costs that it could have hypothetically incurred instead of the costs that were actually incurred, those records would be inconsistent with the GAAP.[274] Thus, for Argentina, the term "costs" in Article 2.2.1.1 refers to costs actually incurred by the producer/exporter. On that basis, the term "associated" in the phrase "costs associated with the production and sale" cannot be construed in a broad sense to cover hypothetical costs that were not actually incurred by the producer/exporter. Rather, it refers to costs pertaining specifically to the production and sale of the product under investigation.[275]

7.188. Argentina further argues that, in the phrase "provided that such records ... reasonably reflect the costs ...", the term "records" is the subject, the term "costs" is the object, the term "reflect" is the verb, and the term "reasonably" is an adverb.[276] Thus, it follows from the structure of this phrase that the correct inquiry into whether the records reasonably reflect the cost of production involves an assessment of the reasonableness of the *records*, as opposed to the reasonableness of the costs themselves.[277] Thus, while governmental intervention might distort costs, such intervention is not relevant if those costs are reasonably reflected in the records.[278]

7.189. Turning to the context of the phrase "provided that such records ... reasonably reflect the costs ..." in the first sentence of Article 2.2.1.1, Argentina asserts that the second and third sentences in Article 2.2.1.1 are directly concerned with the manner in which costs are apportioned and registered in the records, rather than with the costs themselves.[279] For Argentina, this confirms that the first sentence of Article 2.2.1.1 is not concerned with the reasonableness of the costs, but rather, with whether the costs are reasonably reflected in the records. Argentina also argues that the presence of Article 2.2.2 in the Anti-Dumping Agreement suggests that the drafters of the Agreement would have explicitly provided for using data other than those of the producers in determining the cost of production if they had intended such a meaning.[280] This is because Article 2.2.2 provides an express basis for using data other than those of the producers' records for determining particular costs and profits, in contrast to Article 2.2.1.1.

7.190. Argentina also argues that the textual references to the domestic market of the "country of origin" in Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 suggest that costs reflected in the records kept by the producer/exporter should not be considered "unreasonable" on the basis that they do not reflect international prices.[281] Argentina further argues that the very concept of dumping, as articulated through multiple provisions of the Anti-Dumping Agreement, is clearly exporter-specific.[282] It concerns the costs actually incurred by an exporter, rather than abstract or hypothetical costs pertaining to other exporters in different contexts. This militates against an interpretation that would permit an investigating authority to disregard the actual costs incurred by an exporter on the basis that they were unreasonable or

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[272] Argentina's first written submission, para. 207.

[273] Argentina's first written submission, paras. 101 and 216. In this connection, Argentina refers to a number of panel reports which, it claims, support the view that Article 2.2.1.1 pertains to actual costs incurred by the producer/exporter. See Ibid. paras 128-131 (referring to Panel Reports, *US – Softwood Lumber V*, para. 7.321; *Egypt – Steel Rebar*, para. 7.393; and *EC – Salmon (Norway)*, para. 7.483). Argentina also notes the absence of any reference to terms such as "prices" or "international prices" in Article 2.2.1.1 that connote what the costs could be by reference to undistorted markets (see Ibid. para. 217).

[274] Argentina's first written submission, para. 228.

[275] Argentina's second written submission, paras. 114-115 and 180; comments on the European Union's response to Panel question No. 90, para. 18.

[276] Argentina's first written submission, para. 225.

[277] Argentina's response to Panel question No. 4, para. 3; first written submission, para. 225.

[278] Argentina's response to Panel question No. 4, para. 3.

[279] Argentina's first written submission, para. 111; response to Panel question No. 11, para. 24.

[280] Argentina's first written submission, para. 113; second written submission, paras. 123-125.

[281] Argentina's first written submission, paras. 114, 117, and 232-235; second written submission, paras. 184 and 185.

[282] Argentina's second written submission, paras. 127-131 and 136; opening statement at the first meeting of the Panel, para. 79.

artificially low.[283] Thus, to permit the replacement of costs actually incurred by the producer/exporter in the domestic market with international prices would subvert the object and purpose of the Anti-Dumping Agreement, which is to regulate dumping based on a comparison between the normal value and the export price.[284] Further, addressing the existence of a "distortion" on the domestic market is totally unrelated to the issue of "dumping".[285]

7.191. In Argentina's view, the foregoing considerations make clear that Article 2.2.1.1 does not permit the costs in producers/exporters' records to be disregarded on the basis that those costs are artificially low due to distortions flowing from governmental intervention. Given that the interpretation of the term in light of its ordinary meaning and read in context is not ambiguous, the negotiating history of Article 2.2.1.1 would only be useful insofar as it confirms the meaning of that provision as set out above.[286] In this regard, Argentina argues, *inter alia*, that the negotiating history demonstrates that the costs of production relate to costs in the country of origin, that Article 2.2.1.1 concerns the allocation of costs in the records kept by the producer/exporter rather than the reasonableness of the costs themselves, and that the negotiating parties decided not to regulate "input dumping" in the Anti-Dumping Agreement.[287] Further, Argentina argues that the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 does not establish, contrary to the arguments of the European Union, that dumping is capable of stemming from governmental practices such as Argentina's export tax system.[288] Rather, the second *Ad* Note to Articles VI:2 and VI:3 is limited to the specific case of multiple currency practices.[289]

7.192. Finally, Argentina submits that the European Union's finding that the records do not reasonably reflect the cost of "the main raw material" is based on an improper establishment of the facts. In particular, the finding that domestic prices of soybeans and soybean oil in Argentina are "distorted" is factually incorrect since those prices are freely set.[290] Further, soybeans are not a direct input in the production of biodiesel. Instead, they are used to produce soybean oil, from which biodiesel can in turn be obtained through transesterification.[291] Argentina argues that given that soybeans are not a direct input in the production of biodiesel, it does not flow from the finding that the domestic price of soybeans is "distorted" that the price of the "main raw material" (i.e. soybean oil) is "distorted", or that the records of the Argentinean producers do not reasonably reflect the cost of soybean oil.[292]

7.193. As a result of failing to calculate the costs of production in accordance with Article 2.2.1.1 of the Anti-Dumping Agreement, Argentina claims that the European Union failed to properly construct the normal value, and therefore acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994.[293]

7.4.1.4.1.2 European Union

7.194. The European Union requests the Panel to find that Argentina has failed to make a *prima facie* case that it acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement by disregarding the costs of soybeans and soybean oil in the records kept by the producers because they were "artificially low" as a consequence of Argentina's export tax system.[294] For the European Union, investigating authorities are only required to use the "costs" reflected in such records under Article 2.2.1.1 where they are "reasonable" for the production of the goods in question.[295] Thus, where such costs are not "reasonable", Article

[283] Argentina's first written submission, paras. 125-127 and 240.
[284] Argentina's opening statement at the first meeting of the Panel, paras. 77 and 78.
[285] Argentina's response to Panel question No. 91, para. 40.
[286] Argentina's response to Panel question No. 18, para. 38.
[287] Argentina's response to Panel question No. 18, paras. 37-47; second written submission, paras. 141-145.
[288] Argentina's comments on the European Union's response to Panel question No. 94, paras. 23-26.
[289] Argentina's opening statement at the second meeting of the Panel, paras. 38-40.
[290] Argentina's first written submission, paras. 209 and 210. In addition, Argentina argues that export taxes are legal under WTO law, and the particular export tax in question is not a form of government intervention in the domestic price of soybeans. (Argentina's response to Panel question No. 103, paras. 77-79)
[291] Argentina's first written submission, para. 211.
[292] Argentina's first written submission, para. 212.
[293] Argentina's first written submission, para. 244.
[294] European Union's second written submission, paras. 132 and 143.
[295] European Union's first written submission, paras. 130-133 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393).

2.2.1.1 does not preclude investigating authorities from determining that the producer's records do not reasonably reflect those costs, regardless of the fact that they may record the costs that were actually incurred by the producer under investigation.[296]

7.195. In respect of the ordinary meaning of Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union argues that the term "costs" does not necessarily refer only to the costs actually incurred by a producer, but rather, it connotes the prices "to be paid" by the producer for the production of the product under consideration.[297] In this connection, the European Union contends that the term "associated" in the phrase "costs associated with the production and sale" in Article 2.2.1.1 captures a broader range of relations between the "costs" and the "production" of the goods than the costs actually incurred by the producer/exporter.[298] For instance, it captures the costs that would "normally" be associated with the production and sale of the goods.[299] The European Union notes, in this regard, the absence of a textual link in the first sentence of Article 2.2.1.1 between the "costs associated ..." and the specific "producer" under investigation. The European Union also contends that the term "reflect" suggests that there is no need for "a precise calculation or determination"; therefore, the use of that term in the first sentence of Article 2.2.1.1 does not support Argentina's thesis that the records should be considered as "reasonable" where they simply include the precise costs "actually incurred by the producer". The European Union refers to a number of panel and Appellate Body reports which it considers provide authority for its understanding of Article 2.2.1.1.[300]

7.196. In respect of the context of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union argues that the specific references to the "actual amounts" incurred by the producer/exporter in Article 2 of the Anti-Dumping Agreement, such as those in Articles 2.2.2(i) and 2.2.2(ii), suggest that the choice of the words "costs associated with the production and sale" in Article 2.2.1.1 aims to cover something different from the "actual amounts incurred" or "expenses actually incurred" by a specific producer.[301] Further, the inclusion of the condition in the first sentence of Article 2.2.1.1 for the records to be consistent with GAAP – which, the European Union submits, suffices to ensure that the records include the costs actually incurred by the producer under investigation – suggests that the subsequent condition pertaining to the records reasonably reflecting costs must mean something more than simply "the expenses actually incurred".[302] The European Union also argues that the second and third sentences of Article 2.2.1.1 suggest that adjustments may be made to the costs reported by a company in certain circumstances, and that authorities can take into consideration cost information that does not appear in such records.[303] This, in turn, suggests that Article 2.2.1.1 stands for the principle that authorities may disregard, or adjust, the information in the records of producers under investigation, provided certain conditions are met.[304]

7.197. The European Union submits that the chapeau of Article 2.2.2 also provides context for the interpretation of Article 2.2.1.1, insofar as it states that the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade. In particular, it can be inferred from this that, where sales are *not* in the ordinary course of trade, actual data may potentially be disregarded. Since it is not disputed in the present case that sales of biodiesel were not in the ordinary course of trade in Argentina, the

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[296] European Union's response to Panel question No. 5, para. 10.

[297] European Union's first written submission, para. 136 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.481); second written submission, paras. 125-128.

[298] European Union's first written submission, para. 137 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393).

[299] European Union's first written submission, para. 139.

[300] European Union's first written submission, paras. 140-141, 166-169 (referring to Panel Reports, *EC – Salmon (Norway)*, para. 7.481; *Egypt – Steel Rebar*, para. 7.383; *US – Softwood Lumber V* paras. 7.327-7.329 and 7.347; and Appellate Body Report, *US – Softwood Lumber V*, para. 171); response to Panel question No. 10, para. 18; opening statement at the second meeting of the Panel, paras. 136-138 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393), and 151-152 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.483); comments on Argentina's response to Panel question No. 90, para. 49.

[301] European Union's first written submission, para. 147.

[302] European Union's first written submission, paras. 148 and 149; opening statement at the second meeting of the Panel, para. 142.

[303] European Union's first written submission, paras. 151-153 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.484).

[304] European Union's first written submission, para. 154.

context provided by Article 2.2.2 suggests that Article 2.2.1.1 should not be read to require the investigating authority to use the costs actually incurred by the producers.[305]

7.198. The European Union rejects Argentina's argument that various textual references to the "country of origin" support Argentina's interpretation of Article 2.2.1.1 that costs reflected in the records kept by the producer/exporter may not be considered "unreasonable" where they do not accord with international prices. First, the European Union argues that the reference to the country of origin in Article 2.2 does not mean that evidence from other countries cannot be used in determining the costs of production. The European Union argues in this respect that Article 2.2.1.1 directs an investigating authority to consider "all available evidence", which may include, for instance, invoices issued by exporters in other countries.[306] Second, the European Union argues that the leeway provided for in Article 2.2.2(iii) to use "any other reasonable method" implies that there is no absolute prohibition on the use of data on the cost of production from countries other than the country of origin where the conditions of production and sale are not in the "ordinary course of trade".[307]

7.199. In respect of the object and purpose of the Anti-Dumping Agreement, the European Union contends that it is directed at preventing damage to the industries of an importing country by the producers of an exporting country through the use of prices that are artificially low due to some abnormal condition. For the European Union, therefore, goods that are produced with costs that are not "normal" fall within the type of conditions that the Anti-Dumping Agreement is intended to address.[308] In this connection, the European Union contends that exogenous factors, such as the actions of the government of the exporting country, are capable of being the source of dumping. For instance, the Appellate Body has considered that there can be circumstances where dumping and subsidization arise from the "same situation"[309], and further, the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 states that "multiple currency practices" meant as "practices by governments" can "constitute a form of dumping".[310] Given its similarities to "multiple currency practices" (both involve a government-induced manipulation of the ordinary operation of the market, which substantially affects and distorts pricing), Argentina's export tax falls within the types of government measures that may lead to dumping.[311] More generally, this *Ad* Note demonstrates that the definition of dumping cannot be construed to exclude government practices, but rather, that whether a particular governmental price intervention results in dumping must be considered on a case-by-case basis.[312]

7.200. The European Union argues that the negotiating history of Article 2.2.1.1 contradicts Argentina's interpretation of this provision, given that the terms "the allocation of costs" included in a previous version of the provision were replaced with "costs shall be normally calculated", which suggests that this provision is not limited to cost allocation issues, and given that the requirement for "reasonableness" was severed from the GAAP, which suggests a broader scope for the "reasonableness" obligation in Article 2.2.1.1.[313]

7.201. Finally, the European Union submits that Argentina's contentions that the EU authorities improperly established the facts in determining that a distortion existed and that soybeans are a direct input in the production of biodiesel are unfounded.[314]

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[305] European Union's first written submission, paras. 247 and 248; opening statement at the first meeting of the Panel, paras. 73-75.

[306] European Union's first written submission, paras. 193 and 194; second written submission, paras. 134 and 135.

[307] European Union's first written submission, para. 198; opening statement at the second meeting of the Panel, para. 159.

[308] European Union's first written submission, paras. 157 and 158.

[309] European Union's opening statement at the first meeting of the Panel, paras. 25-36 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568).

[310] European Union's second written submission, paras. 114-124.

[311] European Union's second written submission, paras. 119-124; response to Panel question No. 94, paras. 38-41.

[312] European Union's response to Panel question No. 94, paras. 39-41.

[313] European Union's second written submission, paras. 96-98.

[314] European Union's first written submission, paras. 222-232.

7.4.1.4.2 Arguments of the third parties

7.202. **Australia** submits that an investigating authority should be permitted to consider whether the costs reflected in the records of the producer/exporter are reasonable, and, where they are not, to adjust or replace them in an appropriate manner.[315] Thus, Article 2.2.1.1 permits investigating authorities to look beyond a producer/exporter's actual records and consider whether the costs reflected therein are reasonably related to the costs of producing and selling the product. For Australia, the reasonableness of costs of inputs or raw materials would be relevant to this analysis.[316]

7.203. In Australia's view, to disallow an authority from considering elements that were beyond the direct control of a producer/exporter would render inutile the provision in Article 2.2 of the Anti-Dumping Agreement for cost construction in circumstances of a particular market situation.[317] Further, to limit an investigating authority's scope of analysis to factors that are endogenous to the foreign producers/exporters implies limitations in Article 2.2 that do not exist, and, moreover, contradicts the ordinary meaning of the term "particular market situation".[318]

7.204. **China** submits that the authority to apply anti-dumping measures is limited to circumstances in which the pricing behaviour of an individual producer/exporter under investigation is found to result in price discrimination between the normal value and export price for a product and that price discrimination causes injury to the importing Member's domestic industry.[319] For China, this producer/exporter-specific focus is embodied in the definition of dumping in Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, and is also reflected throughout various provisions of the Anti-Dumping Agreement.[320] Accordingly, an investigating authority cannot reject the costs recorded in the producer/exporter's accounts on grounds exogenous to that producer/exporter, such as governmental interventions beyond its control.[321] While China does not consider that governmental interventions "are outside the remedial scope of the covered agreements", China argues that to ignore this foundational element of the Anti-Dumping Agreement would be to subvert the carefully negotiated balance of rights, disciplines and remedies provided for Members in the WTO Agreement as a whole.[322]

7.205. China thus submits that the European Union's understanding of Article 2.2.1.1 of the Anti-Dumping Agreement goes impermissibly far in suggesting that recorded costs may be benchmarked against hypothetical costs that might be borne by a producer in a theoretical market where the price of relevant inputs is not affected by governmental interventions.[323] For China, a cost in a hypothetical market, incurred by a hypothetical producer, does not pertain to the production of the product by the investigated producer.[324]

7.206. China acknowledges that, in certain cases, there could be evidence suggesting that the actual costs ascribed to a producer/exporter and reflected in its records may not properly reflect the costs associated with production and sale in the country of origin.[325] A comparison with the costs incurred by other producers/exporters of the product in the country of origin could be indicative in that regard.[326] Importantly, however, the context afforded by Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement demonstrates that recorded costs "can only be rejected as not 'reasonably reflect[ing]' costs of production if they fail to reasonably reflect the cost of production

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[315] Australia's third-party submission, para. 12.

[316] Australia's third-party submission, para. 5 (referring to Panel Report, *China – Broiler Products*, para. 7.164).

[317] Australia's third-party response to Panel question No. 5.

[318] Australia's third-party response to Panel question No. 8.

[319] China's third-party submission, paras. 26 (referring to Appellate Body Reports, *US – Zeroing (Japan)*, para. 111; *US – Stainless Steel (Mexico)*, para. 86) and 58-62; third-party statement, para. 4.

[320] China's third-party statement, para. 4; third-party submission, paras. 47-50.

[321] China's third-party submission, para. 27.

[322] China's third-party submission, paras. 29 and 30; third-party statement, para. 5: "Otherwise, anti-dumping proceedings cease to be a remedy for the pricing behavior of producers or exporters, and instead become a tool for investigating authorities to penalize imports for cost advantages that foreign producers may enjoy."

[323] China's third-party submission, para. 36.

[324] China's third-party submission, paras. 37 and 42-45; third-party statement, paras. 9-13.

[325] China's third-party submission, para. 39.

[326] China's third-party submission, para. 51.

of the product in the *country of origin*".[327] Thus, for China, it is never appropriate to substitute out-of-country costs for costs in the country of origin.[328] China does not exclude the possibility that an investigating authority may encounter exceptional circumstances in which there is simply no evidence as to the relevant costs available from within the country of origin.[329] However, any evidence that does not directly pertain to costs of production in the country of origin would need to be dealt with in a manner that reflects the specific market conditions in the country of origin, including any differences in respect of relevant governmental interventions between the two markets, such as taxes and duties.[330]

7.207. **Colombia** submits that the phrase "reasonably reflect the costs" in Article 2.2.1.1 refers to "the actual cost of production a producer has to reflect in its records", in the light of the syntax of the phrase[331], as well as the fact that Article 2.2.1.1 is directed at situations where a Member that imposes an anti-dumping measure "is actually investigating the costs of production of producers of the exporting Member".[332] Colombia notes the absence of any terms in Article 2.2.1.1 suggesting that the "costs" have to be the ones "*normally* associated with the production and sale of goods"[333], as well as the context of the term "allocation", which refers to an amount of a resource assigned for a particular purpose, and the context provided by Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement, which establish that the benchmark for calculating the normal value is the cost of production in the country of origin.[334] Therefore, in Colombia's view, the European Union acted against Article 2.2.1.1 by using international prices of soybeans to calculate the costs of production.

7.208. Colombia submits that it may have been more appropriate for the European Union to have pursued a countervailing duty investigation.[335] For Colombia, the Anti-Dumping Agreement governs actions against exporters that injuriously sell at an abnormally low value, and distorted input prices due to an export tax do not fall within its scope.[336]

7.209. **Indonesia** concurs with Argentina's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.[337] In Indonesia's view, the European Union added an additional dimension to the test governing the reasonable reflection of costs by including an element on the non-distortion and reasonableness of input costs *per se*.[338] For Indonesia, this is not supported by the text or context of Article 2.2.1.1.[339] In this regard, Indonesia notes that a reasonability condition explicitly applies to the "administrative, selling and general costs" under Article 2.2 of the Anti-Dumping Agreement, whereas the two criteria in the first sentence of Article 2.2.1.1 are concerned with cost allocation issues unrelated to the reasonability of those costs.[340] Indonesia also argues that these two criteria call for an assessment of the records of the producer/exporter under investigation, which, in turn, limits an investigating authority from expanding its consideration to any other set of prices outside the costs contained in those records.[341]

7.210. Indonesia submits that the European Union's rejection of the argument that Article 2.2.1.1 refers to costs "actually incurred by the producer" is untenable because the first sentence of that provision clearly refers to the "records kept by the producer/exporter under investigation", and further, because it would be contrary to the requirement to calculate individual dumping margins.[342] Indonesia draws on certain historical materials to support its position. In particular,

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[327] China's third-party submission, para. 52 (emphasis original); third-party statement, paras. 14-16.
[328] China's third-party response to Panel question No. 13, para. 28.
[329] China's third-party response to Panel question No. 13, para. 30.
[330] China's third-party response to Panel question Nos. 13, para. 31; 4, para. 12; and 12, paras. 25-27.
[331] Colombia's third-party statement, para. 7.
[332] Colombia's third-party submission, para. 18.
[333] Colombia's third-party submission, para. 18. (emphasis original)
[334] Colombia's third-party submission, para. 20.
[335] Colombia's third-party submission, para. 24; third-party response to Panel question Nos. 6, paras. 3-6, and 16, para. 7.
[336] Colombia's third-party submission, paras. 23 and 24.
[337] Indonesia's third-party submission, para. 33.
[338] Indonesia's third-party submission, paras. 35 and 36.
[339] Indonesia's third-party submission, para. 35.
[340] Indonesia's third-party submission, paras. 37 and 38 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.484).
[341] Indonesia's third-party submission, para. 39.
[342] Indonesia's third-party submission, para. 40; third-party statement, paras. 10-12 (referring to Panel Report, *Thailand – H-Beams*, para. 7.112); third-party response to Panel question No. 2, para. 12.

Indonesia suggests that the European Union's own view in the *Ad hoc* group on the implementation of the Anti-Dumping Code was that the actual costs of a producer had to be used.[343] Further, Indonesia suggests that the negotiating history on Article 2.2.1.1 demonstrates that the term "reasonably" is not intended to qualify the term "costs".[344]

7.211. In response to questions from the Panel, **Mexico** submits that it did not consider there to be fixed parameters in the text or context of Article 2.2.1.1 of the Anti-Dumping Agreement governing the manner in which an investigating authority is to determine whether the records reasonably reflect the costs associated with the production and sale of the product concerned.[345] Accordingly, Mexico considers that investigating authorities have a margin of discretion to make such a determination on a case-by-case basis.

7.212. **Norway** submits that both of the cumulative conditions in Article 2.2.1.1 seem to relate to the quality of the records as such, and the structure and ordinary meaning of Article 2.2.1.1 suggest that the second condition only concerns whether the records reflect the costs associated with the production and sale of the product under investigation in a reasonable manner.[346]

7.213. The **Russian Federation** considers that the practice of input cost adjustment is inconsistent both with the provisions of the WTO Agreement and the spirit of the WTO.[347] Concerning Article 2.2.1.1 of the Anti-Dumping Agreement, the Russian Federation submits that the records must depict the costs that have been incurred in association with the production and sale of the product under consideration.[348] The plain meaning of the term "costs" focuses on what is paid, rather than on the value or the reasonableness of what is paid, and the core issue under Article 2.2.1.1 is whether the costs are reasonably reflected in the records, as opposed to whether the costs themselves were reasonable in the light of extraneous economic considerations.[349] Indeed, an analysis of the structure of the first sentence of Article 2.2.1.1 reveals that the word "reasonably" immediately precedes the word "reflect", and therefore the inquiry under Article 2.2.1.1 is whether the records reflect the costs associated with the production and sale of the product under consideration "reasonably".[350]

7.214. Further, the Russian Federation contends that the European Union's understanding of the object and purpose of the Anti-Dumping Agreement, which is a holistic, integrative notion, is "manifestly wrong" because it was derived from a single provision of the treaty while ignoring the others, and because the term "normal" in the Anti-Dumping Agreement does not correspond to concepts of "artificially low" and "abnormal condition" as suggested by the European Union.[351] Further, the Russian Federation submits that WTO jurisprudence demonstrates that the concept of "dumping" in the Anti-Dumping Agreement does not deal with the price of the product's inputs.[352]

7.215. **Saudi Arabia** contends that the first sentence of Article 2.2.1.1 imposes a general and mandatory obligation to use, for the purpose of calculating costs of production, the costs in the country of origin as reflected in the records of each individual producer/exporter concerned.[353] For Saudi Arabia, the term "normally" in that sentence confirms that the general rule must be followed unless one of the two exceptional circumstances listed therein applies.[354] In Saudi Arabia's view, these two limited conditions concern the reliability and accuracy of the costs in relation to the product under consideration, and underline the exceptional nature of the circumstances that would allow an investigating authority to reject those costs.[355] For Saudi Arabia, the "reasonableness" referred to in the first sentence of Article 2.2.1.1 does not allow an investigating authority to question the general "reasonableness" of the costs recorded, such as by comparison with

[343] Indonesia's third-party submission, paras. 42 and 47.
[344] Indonesia's third-party statement, para. 7; third-party response to Panel question No. 11, paras. 24-32.
[345] Mexico's third-party response to Panel question No. 2.
[346] Norway's third-party statement, paras. 7 and 8.
[347] Russian Federation's third-party statement, para. 2.
[348] Russian Federation's third-party submission, para. 3.
[349] Russian Federation's third-party submission, para. 5.
[350] Russian Federation's third-party submission, para. 3.
[351] Russian Federation's third-party submission, paras. 17-22.
[352] Russian Federation's third-party submission, paras. 23-31.
[353] Saudi Arabia's third-party submission, para. 12.
[354] Saudi Arabia's third-party submission, para. 13.
[355] Saudi Arabia's third-party submission, paras. 14-16.

international reference prices. Rather, it merely concerns the association of the recorded costs with the product under consideration as compared with other products of the producer/exporter to which certain costs may also be associated.[356] Saudi Arabia also invokes the object and purpose of the Anti-Dumping Agreement in contending that it is not aimed at preventing Members from adopting WTO-consistent measures or undoing Members' comparative advantages by correcting reported costs of production in light of international reference prices.[357] In Saudi Arabia's view, there are other multilateral or unilateral instruments available to address measures alleged to distort the market environment and trade.[358]

7.216. **Turkey** submits that Article 2.2.1.1 of the Anti-Dumping Agreement requires that, for the purpose of establishing normal value, the investigating authority is normally obliged to use the records kept by the producer/exporter if the two conditions in the first sentence of that provision are met.[359] If those conditions are met, the term "normally" in Article 2.2.1.1 indicates that the investigating authority has discretion, and the investigating authority would be required to provide a reasoned and adequate explanation to deviate from the rule.[360] For Turkey, whether a "particular market situation" would justify disregarding the records of producers/exporters requires a case-by-case examination.[361] Turkey submits that the term "reasonably" in Article 2.2.1.1 not only defines the method for how the prices (paid or due to be paid) are recorded in the books of the producer/exporter, but also implies an examination that focuses on whether the recorded prices correspond to a price level that is determined by market forces free from any intervention.[362] For Turkey, therefore, the "reasonableness" assessment displays a two-sided structure. Based on the outcome of this assessment, the investigating authority has discretion to modify the elements of costs in line with in-country or out-of-country benchmarks, so long as the out-of-country data used is associated with the cost of production and sales of the product under consideration.[363]

7.217. The **United States** submits that, in situations where records are kept in accordance with GAAP and reasonably reflect the costs associated with the product under consideration, the investigating authority is normally obligated to use those records pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement.[364] The term "normally" in Article 2.2.1.1 indicates that the use of a producer/exporter's records is not necessary in every case, but if the investigating authority finds that the records meet the conditions and nonetheless departs from them, it is bound to provide an explanation.[365]

7.218. The United States contends that the ordinary meaning of the term "costs" in Article 2.2.1.1 does not necessarily imply costs "actually incurred by the producer".[366] The United States finds support for this understanding by comparing it to the express references to "the actual amounts incurred" elsewhere in Article 2.[367] The United States also notes that Article 2.2.1.1 references costs "associated with" the production and sale of the product under consideration. In that regard, the United States contends that the term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product than just those costs borne by the specific producer.[368]

7.219. The United States rejects Argentina's contention that Article 2.2.1.1 solely concerns cost allocation issues, but rather, contends that Article 2.2.1.1 leaves open what costs may be "unreasonable" such that the records do not reasonably reflect the costs associated with the

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[356] Saudi Arabia's third-party submission, para. 17.
[357] Saudi Arabia's third-party submission, para. 20.
[358] Saudi Arabia's third-party submission, para. 21.
[359] Turkey's third-party submission, para. 7 (referring to Panel Reports, *EC – Salmon (Norway)*, para. 7.483, and *China – Broiler Products*, para. 7.164).
[360] Turkey's third-party submission, para. 7; third-party statement, para. 3.
[361] Turkey's third-party submission, paras. 10-12.
[362] Turkey's third-party response to Panel question No. 7, paras. 7 and 8.
[363] Turkey's third-party response to Panel question Nos. 4, para. 6, and 17, para. 8.
[364] United States' third-party submission, para. 11.
[365] United States' third-party submission, para. 12.
[366] United States' third-party submission, para. 14 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.481).
[367] United States' third-party submission, para. 15; third-party statement, para. 9.
[368] United States' third-party submission, paras. 26 and 27 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393).

production and sale of the product.[369] In that connection, the United States argues that the context provided by Article 2.2, such as the reference to a "low volume of the sales in the domestic market of the exporting country" or "a particular market situation", supports the understanding that market conditions, including some "peculiarity, structure, [or] distortion", may lead to records reflecting "unreasonable" costs.[370] In the United States' view, an investigating authority may, on a case-by-case basis, use a wide range of record evidence, potentially including international prices, to evaluate whether the producer/exporter's records reasonably reflect their costs.[371] However, international prices, if used, must be a proxy for the costs in the country of origin.[372]

7.4.1.4.3 Evaluation by the Panel

7.220. Argentina requests us to find that the European Union acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and with Article VI:1(b)(ii) of the GATT 1994 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.[373]

7.221. We note, at the outset, that the EU authorities disregarded the records kept by the Argentine producers insofar as they pertained to the costs for soybeans and soybean oil because:

> [T]he domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system and, consequently, the costs of the main raw material were not reasonably reflected in the records kept by the Argentinean producers under investigation in the meaning of Article 2(5) of the basic Regulation as interpreted by the General Court as explained above.[374]

7.222. Beyond this statement from the Definitive Regulation, it has not been alleged that the costs pertaining to the main raw material in the records kept by producers do not represent the actual price paid by those producers, nor has it been alleged that the records themselves are improper, flawed, or otherwise inconsistent with the GAAP.

7.223. Argentina's principal allegation is that the European Union acted inconsistently with Article 2.2.1.1 (and, as a consequence, with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994) because the reasons given by the EU authorities for disregarding the records – i.e. because the prices for an input were artificially lower than international prices due to an alleged distortion – are not legally permissible under Article 2.2.1.1.[375]

7.224. Thus, we consider the question before us to be whether, on the basis of the reasoning set out in the Definitive Regulation, the European Union acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, and, consequently, with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

7.225. We begin our analysis by setting out our understanding of Article 2.2.1.1. Before doing so, however, we note that Article 2.2 of the Anti-Dumping Agreement prescribes that the normal value may be constructed on the basis of the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" in one of two situations, namely when there are no sales of the like product in the ordinary course of trade, or

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[369] United States' third-party submission, paras. 20 and 22 (referring to Panel Reports, *China – Broiler Products*, para. 7.172; and *US – Softwood Lumber V*, para. 7.318).

[370] United States' third-party submission, para. 24; third-party response to Panel question No. 3, paras. 10 and 11.

[371] United States' third-party response to Panel question No. 1, para. 2.

[372] United States' third-party response to Panel question No. 12, para. 26.

[373] Argentina's first written submission, paras. 195, 244, and 470(a); second written submission, para. 254(a).

[374] Definitive Regulation, (Exhibit ARG-22), Recital 38.

[375] Argentina's first written submission, paras. 195, 244, and 470(a). Argentina also contests that its export tax system creates a distortion.

where there is a particular market situation or a low volume of sales in the domestic market, such that those sales do not permit a proper comparison.[376]

7.226. Article 2.2.1.1 provides, in relevant part:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.227. The opening phrase "[f]or the purpose of paragraph 2" makes clear that Article 2.2.1.1 elaborates on how the "cost of production in the country of origin" in Article 2.2 is to be determined in constructing the normal value in the circumstances mentioned above. The first sentence of Article 2.2.1.1 also establishes the records of the investigated producer as the preferred source of information for the establishment of the costs of production. The term "shall" in this first sentence of Article 2.2.1.1 indicates that it establishes a mandatory rule in this respect[377], whereas the term "normally" suggests that this rule may be derogated from under certain conditions.[378] In that regard, the first sentence of Article 2.2.1.1 expressly provides for two circumstances in which an investigating authority need not follow the general rule to calculate costs on the basis of the records kept by the producer/exporter under investigation.[379] In the case before us, the investigating authority explicitly relied on the second of these conditions, namely that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.[380] We have therefore to address the proper scope and meaning of only that condition, before turning to whether it was correctly invoked by the investigating authority in the present case.

7.228. We begin our interpretation with the ordinary meaning of the phrase "provided such records ... reasonably reflect the costs associated with the production and sale of the product under consideration". First, we note that for both this condition and the GAAP-related condition in Article 2.2.1.1, the subject is the producer/exporter's "records". It is the "records" of the producer/exporter under investigation that must be in accordance with the generally accepted accounting principles and that must reasonably reflect the costs associated with production and sale of the product under consideration for the conditional obligation set forth under the first sentence to apply. Thus, the focus of the condition is on the specific producer/exporter under investigation, and what is contained in its records.[381]

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[376] Article 2.2 of the Anti-Dumping Agreement provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (fn omitted)

Article 2.2.1.1 is also applicable to determining whether, pursuant to Article 2.2.1, sales in the domestic market of the exporting country are at prices below per-unit costs and therefore not in the ordinary course of trade by reason of price.

[377] Appellate Body Report, *EC – Fasteners (China)*, paras. 316 and 317.

[378] Appellate Body Report, *US – Clove Cigarettes*, para. 273; Panel Report, *China – Broiler Products*, para. 7.161. See also Appellate Body Report, *EC – Fasteners (China)*, para. 317.

[379] See Panel Reports, *China – Broiler Products*, para. 7.164; and *US – Softwood Lumber V*, paras. 7.236 and 7.237.

[380] Definitive Regulation, (Exhibit ARG-22, Recital 38); European Union's response to Panel question No. 82, paras. 10-14. We note, in this regard, that it has not been argued in the proceedings before us that the investigating authority derogated from the rule set out in the first sentence of Article 2.2.1.1 on any other basis, and we therefore consider it unnecessary to express any views in that regard. For the same reason, we consider it unnecessary to the resolution of the present claim to express any views on the arguments presented by the parties and third parties as to whether, in general terms, Article 2.2.1.1 permits derogations on grounds other than those expressly listed in Article 2.2.1.1. (Argentina's first written submission, para. 98; Saudi Arabia's third-party submission, para. 13; United States' third-party submission, para. 12)

[381] This focus is consistent with the general rule in Article 6.10 of the Anti-Dumping Agreement that an individual dumping margin should be calculated for each particular producer/exporter under investigation.

7.229. We turn next to the verb in the phrase "provided such records ... reasonably reflect the costs associated with the production and sale of the product under consideration". The verb is "reflect": the records must reflect the costs. The *Oxford English Dictionary* defines "reflect" as, *inter alia*, "to reproduce, esp. faithfully or accurately; to depict."[382] Therefore, we understand this verb to refer, in the context of the construction of the cost of production under Article 2.2.1.1, to records that capture, or depict, the costs associated with the production and sale of the product under investigation in a faithful or accurate manner.

7.230. We consider next the term "reasonably" in this phrase. It is clear to us that "reasonably" is an adverb that modifies the verb "reflect", and not, as the European Union seems to suggest, the term "costs". Generally speaking, an adverb modifies the meaning of a verb, adjective or another adverb in terms of ideas such as time, place, degree or manner. In the context of the provision of Article 2.2.1.1, where the verb is to "reflect" the costs associated with production and sale of the product under consideration, it seems to us that the modification introduced by the adverb is with respect to the degree or manner of reflection of such costs in the records of the producer or exporter. In other words, the question before us concerns the manner or degree by which the records depict or capture the costs associated with production and sale of the product so to satisfy the condition that they "reasonably reflect" such costs.

7.231. This brings us to the meaning of "reasonably" in the phrase "*reasonably reflect* the costs associated with the production and sale of the product". The adjective underlying the adverb "reasonably" is "reasonable". The word "reasonable" is given several definitions in dictionaries depending on the context in which it is used. In the context of Article 2.2.1.1, where the records must "reasonably reflect" the costs, together with the requirement that the same records must also be in accordance with generally accepted accounting principles, it seems to us that an appropriate ordinary meaning of the word "reasonable" is conveyed here by concepts such as "rational or sensible", "in accordance with reason", and "fair and acceptable in amount".[383] Since it is the "records" that must "reflect reasonably" the costs of production and sale of the product for the purpose of the *construction* of the "normal value", and in the light of our understanding that "reflect" connotes the faithful and accurate depiction of information, we understand the term "reasonably reflect" in Article 2.2.1.1 to mean that the records of a producer/exporter must depict all the costs it has incurred in a manner that is – within acceptable limits – accurate and reliable.

7.232. Turning to the immediate context of this phrase in Article 2.2.1.1, we note that it sits alongside the condition that records be "in accordance with the generally accepted accounting principles of the exporting country". It is undisputed between the parties that the GAAP *generally* encompass a requirement that all the costs that have actually been incurred in the production of the items be truly reported in a company's records.[384] This means that records containing costs that differ from the costs actually incurred by producers would likely not be in accordance with GAAP, and would thus form a basis for derogating from the general rule to use producers' records under Article 2.2.1.1. This suggests to us that the first sentence of Article 2.2.1.1 is concerned with the "reasonable reflect[ion]" of the costs that producers *actually* incur in the production of the product in question. In this regard, we disagree with the European Union that the inclusion of the condition in the first sentence of Article 2.2.1.1 for the records kept to be consistent with GAAP suggests that the subsequent condition pertaining to the records reasonably reflecting costs must mean something more than simply "the expenses actually incurred".[385] Rather, in our view the inclusion of the second condition reflects the fact that, while records might be consistent with GAAP, they may still not adequately report the actual costs incurred by the producer/exporter under investigation. Moreover, while the costs in the records might be consistent with GAAP, they may still not accord with how they would need to be considered in the context of an anti-dumping investigation, such as in respect of the proper allocation of costs for depreciation or amortization or the relevant time periods. As another example, the specific producer/exporter under investigation might be part of a vertically-integrated group of companies in which the actual cost of production of particular inputs is spread across different companies' records, or in which

[382] Oxford English Dictionary, http://www.oed.com/view/Entry/160912?rskey=Ly5uAc&result=3#eid, accessed 23 November 2015.

[383] Oxford English Dictionary, http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid, accessed 23 November 2015.

[384] Argentina's first written submission, para. 228; European Union's first written submission, paras. 148 and 149.

[385] European Union's first written submission, paras. 148 and 149.

transactions between such companies are not at arms-length or indicative of the actual costs involved in the production of the product under consideration.

7.233. We find further support for our understanding that the "costs associated with the production and sale of the product under consideration" refers to the actual costs incurred by the producer/exporter under investigation in other elements of the context of Article 2.2.1.1. First, the basic purpose of calculating the cost of production and constructing the normal value on the basis of that cost under Article 2.2 is to identify an appropriate proxy for the price "of the like product in the ordinary course of trade in the domestic market of the exporting country" when that price cannot be used.[386] To us, it clearly flows from this purpose that the "costs associated with the production and sale of the product under consideration" are those that a producer actually incurred, since these would yield such a proxy more accurately. Conversely, if the actual costs incurred by a producer are not properly taken into account, this would lead to an unreliable proxy for what the price of the like product in the ordinary course of trade in the domestic market of the exporting country would have been. Second, we note that, pursuant to Article 6.10 of the Anti-Dumping Agreement, investigating authorities are required as a general rule to determine an individual margin of dumping for each known producer/exporter concerned of the product under investigation. This, in turn, suggests to us that costs of production will vary from producer to producer and each producer's costs of production should be evaluated separately. In that context, it would seem anomalous to us if the "costs associated with the production and sale" did not refer to the *actual* costs incurred by individual producers, as reflected in their records.

7.234. Our view in this regard is also supported by footnote 6 to Article 2.2.1.1 of the Anti-Dumping Agreement, which provides:

> The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

7.235. In particular, it is implicit in this footnote that costs are to be assessed on the basis of the specific circumstances of each producer/exporter and the costs that they incur, such as those pertaining to start-up operations. Thus, contrary to the arguments of the European Union, we do not understand the term "associated" in the phrase "costs associated with the production and sale" in Article 2.2.1.1 to be capable of denoting costs "normally" associated with the production and sale of the goods in general.[387] Such an approach could lead to a determination that the costs contained in the investigated producer/exporter's records do not "reasonably reflect" the costs of production because of the mere fact that they differ from costs incurred by other producers/exporters. The European Union's interpretation would, in our view, frustrate the purpose of Article 2.2.1.1 to enable investigating authorities to identify an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country for each individual producer.[388]

7.236. We are also not persuaded by the European Union's reliance on Article 2.2.2 as context, namely, that the express reference to the "actual data" of the producer/exporter in that provision relates only to production and sales *in the ordinary course of trade*, and *a contrario*, their actual data need not be used where the like product is not sold in the ordinary course of trade.[389] As we discuss elsewhere[390], the structure of Article 2.2.2 indicates a preference for the actual data of the exporter and like product in question, with an incremental progression away from these principles before reaching "any other reasonable method" in Article 2.2.2(iii), for approximating, as closely as possible, the profit margin and administrative, selling and general costs for the product under consideration. Hence, the reference to "actual costs" in the specific context of Article 2.2.2 does

[386] Panel Reports, *Thailand – H-Beams*, para. 7.112; and *US – Softwood Lumber V*, para. 7.278.

[387] European Union's first written submission, paras. 137-143 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.393) and 258-263; response to Panel question No. 97, para. 51.

[388] We emphasize, however, that our observations in this regard pertain to the invocation of the particular condition in Article 2.2.1.1 of the Anti-Dumping Agreement relied upon by the European Union in the present claim. As we mention above in footnote 380, we consider it unnecessary to express any views on any potential derogations other than that specifically invoked and relied upon by the European Union.

[389] European Union's first written submission, paras. 247 and 248.

[390] See below, para. 7.335, and Panel Report, *Thailand – H-Beams*, para. 7.112.

not in our view support the European Union's reading of the first sentence of Article 2.2.1.1.[391] If anything, the context provided by Article 2.2.2 suggests to us that, as a general principle, the actual data of producers/exporters is to be preferred in constructing the normal value. This accords with our understanding of Article 2.2.1.1 set out above.

7.237. The European Union argues that the omission of the words "of the product" in Article 2.2 of the Anti-Dumping Agreement, in contrast to the corresponding provision in Article VI:1(b)(ii) of the GATT 1994, suggests an intention that in the calculation of the constructed price the focus does not need to be exclusively on the specific company under investigation and the production of its goods.[392] We disagree. In our view, the term "cost of production" in Article 2.2 could not be read as referring to anything other than the cost of production "of the product", particularly as Article 2.2 already refers to the "like product" twice. Thus the inference suggested by the European Union cannot validly be drawn.

7.238. We further note that the parties made a number of arguments pertaining to the object and purpose of the Anti-Dumping Agreement. We recall, in this regard, that Argentina argues that the object and purpose of the Anti-Dumping Agreement is to "counteract dumping, which occurs when the export price is less than the comparable price, in the ordinary course of trade, in the *domestic* market and not on any other markets".[393] The European Union responds that the object and purpose of the Anti-Dumping Agreement is directed at preventing damage incurred by the use of prices that are artificially low "due to some abnormal condition", and, therefore, goods produced with costs that are not "normal" fall within the type of conditions that the Anti-Dumping Agreement is intended to address.[394] The Anti-Dumping Agreement does not contain a preamble or an explicit indication of its object and purpose.[395] Moreover, we do not consider that an interpretation of the text of Article 2.2.1.1 in context leaves its meaning equivocal or ambiguous.[396] We therefore do not consider that arguments pertaining to the object and purpose of the Anti-Dumping Agreement shed light on the meaning of the particular question of interpretation before us, and we therefore do not examine those arguments in detail.

7.239. The European Union draws on the second *Ad* Note to Articles VI:2 and VI:3 of the GATT 1994 to argue that the notion of dumping is not limited to situations that arise out of producers/exporters' "voluntary" pricing behaviour, but rather, it also covers situations that are created by the action of governments.[397] The European Union also argues that the situation addressed in the *Ad* Note, i.e. multiple currency practices, involve a government-induced manipulation of the ordinary operation of the market, which substantially affects and distorts pricing, and that these are precisely the characteristics of Argentina's export tax on soybeans.[398]

7.240. We are not convinced by these arguments. The second *Ad* Note to Articles VI:2 and VI:3 is, on its own terms, limited to "multiple currency practices", and its very existence indicates that it should be treated as an exceptional and specialized provision. We therefore see no reason to extrapolate from this provision that the concept of "dumping" is generally intended to cover any

[391] Along broadly similar lines, Australia and the United States submit that the "particular market situation[s]" referred to in Article 2.2 encompass distortions that could render a producer/exporter's recorded costs unreasonable as to the cost of production and sale, and thereby justify departing from those recorded costs. However, in our view, Article 2.2 of the Anti-Dumping Agreement only states that a "particular market situation" may necessitate the construction of normal value. It does not address how that construction should be undertaken, which is instead set out in detail in the subparagraphs of Article 2.2. (Australia's third-party response to Panel question No. 5; United States' third-party response to Panel question No. 3, para. 11)

[392] European Union's first written submission, para. 196.

[393] Argentina's first written submission, para 240. (emphasis original)

[394] European Union's first written submission, paras. 157 and 158.

[395] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 118.

[396] Appellate Body Report, *US – Shrimp*, para. 114.

[397] The text of the second *Ad* Note provides that:

Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

[398] European Union's second written submission, paras. 113-115.

distortion arising out of government action or circumstances such as those surrounding Argentina's export tax system and its impact on soybean prices as an input material for biodiesel.[399]

7.241. Finally, we note the explicit provisions allowing investigating authorities to disregard domestic prices and costs when determining the normal value that are provided for under the second *Ad* Note to Article VI:1 of the GATT 1994 (which is incorporated by reference into the Anti-Dumping Agreement through Article 2.7 thereof), and in the protocols of accession of certain Members. These provisions lend further support to our understanding of Article 2.2.1.1. At the very least, these provisions suggest to us that their drafters considered explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin.

7.242. On the basis of the foregoing considerations, we understand the ordinary meaning of the phrase "provided such records ... reasonably reflect the costs associated with the production and sale of the product under consideration", in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in –within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer.[400] We emphasize, however, that the object of the comparison is to establish whether the records reasonably reflect the costs *actually* incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred.[401]

7.243. We find support for our understanding of Article 2.2.1.1 in the reports of other panels and the Appellate Body considering claims under this provision. For instance, the panel in *US – Softwood Lumber V* was confronted with a claim that the investigating authority erred under Article 2.2.1.1 by using the records of certain producers to calculate their cost of production of softwood lumber.[402] In particular, the claim concerned whether those records "reasonably

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[399] As we do not see the relevance of the second *Ad* Note to Article VI:2 and VI:3 on its face, we do not consider it necessary to address further the material submitted on its negotiating history.

[400] However, we do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean, as argued by Argentina, that the words "reasonably reflect" are limited only to the "allocation" of costs. The investigating authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated; and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs. But, in our view, the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.

[401] We note that the parties and third parties made a number of submissions concerning the negotiating history of relevant provisions of the Anti-Dumping Agreement and the GATT 1994 pertaining to the interpretation of Article 2.2.1.1. In this connection, we note that Article 32 of the Vienna Convention provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

Our analysis of the interpretation of Article 2.2.1.1 does not, in our view, leave its meaning ambiguous or obscure, nor lead to a result which is manifestly absurd. Thus, our analysis does not, in our view, call for a recourse to the negotiating history referred to by the parties and third parties. In any event, our review of that negotiating history suggests that it is not conclusive on the issues at hand.

[402] We recall that the claim under review in the present section is that the investigating authority erred by *not* using the costs reflected in the producers' records. The panel in *US – Softwood Lumber V* was confronted with a different claim, namely, whether the investigating authority erred *by using* the costs reflected in the producers' records. We note, in this regard, that the nature of the claim faced by the panel in *US – Softwood Lumber V* formed a key part of its evaluation of that claim. This was because, in that panel's view, Article 2.2.1.1 gives rise to a discretion – not a requirement – to decline to use the costs reflected in

reflect[ed]" the level of profit derived from selling woodchips – a by-product generated in the production of softwood lumber – which, in turn, offset the cost of production of softwood lumber. The panel approached this claim by assessing whether the "records do not reasonably reflect *the extent to which the existence of the by-product reduces the costs to the producer*".[403] By assessing the *extent* to which the profits derived from woodchip sales reduced the cost of production of softwood lumber, we understand the panel to have sought to ascertain the *actual* cost of production to the producer in question. In this regard, we note that the panel rejected an argument concerning one of the producers that, because that producer's sales were made through interdivisional transactions within the same company at a discounted rate, the profits reflected in its records should be replaced with a market benchmark price.[404] Instead, the panel found that the investigating authority did not err in using the *actual* profits derived from woodchip sales reflected in that producer's records to offset the cost of production of softwood lumber, notwithstanding that those transactions may have been at prices lower than market prices for woodchips.[405]

7.244. We note that, in respect of another producer, the panel in *US – Softwood Lumber V* took a different approach. For that particular producer, the investigating authority had rejected the profits reported in its records for sales of woodchips to affiliated parties, and instead replaced those profits with other values from that producer's transactions with unaffiliated parties.[406] The panel did not find error with the investigating authority's replacement of profits from affiliated transactions with those from unaffiliated transactions.[407] However, contrary to the arguments of the European Union, we do not understand this finding to represent an acceptance of disregarding recorded costs where they do not reflect market values.[408] Instead, we understand the panel to have been concerned with whether, in the case of this particular producer, the profits from sales to affiliated parties were "reliable", that is, whether they provided an accurate indication of the *actual* extent to which the sales of woodchips reduced the costs of production to the producer.[409] The panel took note, in this connection, of the concerns of the investigating authority about the probity of the evidence on affiliated sales, as well as the late submission by the relevant producer of

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producers' records where the reflection of these is not reasonable. Thus, its observations on whether the investigating authority erred by using the costs reflected in the producers' records were on an *arguendo* basis, assuming that Article 2.2.1.1 imposes a positive obligation on an investigating authority. (Panel Report, *US – Softwood Lumber V*, paras. 7.236-7.237, 7.241, 7.310, 7.316, and 7.317; see also European Union's second written submission, para. 102)

[403] Panel Report, *US – Softwood Lumber V*, para. 7.312. (emphasis added)

[404] Panel Report, *US – Softwood Lumber V*, para. 7.321 and fn 447 thereto.

[405] Panel Report, *US – Softwood Lumber V*, paras. 7.322-7.324. In this regard, we disagree with the European Union that the investigating authority in that case "used market value as a benchmark for determining the reasonableness of prices paid by a company to purchase a by-product from an affiliated company" in order to "confirm whether the final valuation would be as close as possible to market value". (European Union's second written submission, para. 106). Rather, in our reading, the investigating authority in that case sought to ascertain whether the *reflection* of the recorded costs was reasonable. In other words, the investigating authority tested the recorded costs/prices against a market benchmark in order to determine whether those costs/prices were reliable and accurate because the transactions at issue were transactions between divisions of the same company, thus raising questions as to whether the value of the transactions in the producer's records accurately reflected the costs/prices to the producer. In any event, we note that the panel's ultimate finding on this aspect was that "an unbiased and objective investigating authority could have used the actual cost of the input as recorded in Tembec's books as a benchmark for valuing internal transfers of wood chips". (Panel Report, *US – Softwood Lumber V*, para. 7.324). The panel did not, in our view, reach a finding that "confirm[ed] that investigating authorities can use market prices as 'benchmarks' in order to confirm the 'reasonableness' of the recorded costs and values". (European Union's second written submission, para. 109). See also Argentina's opening statement at the first meeting of the Panel, para. 95.

[406] Panel Report, *US – Softwood Lumber V*, para. 7.327.

[407] Panel Report, *US – Softwood Lumber V*, para. 7.332.

[408] European Union's first written submission, paras. 167-169; second written submission, para. 105.

[409] Panel Report, *US – Softwood Lumber V*, para. 7.329. In this regard, we do not agree with the European Union that, by assuming that investigating authorities are not precluded from carrying out an arm's length test in order to ensure prices charged to affiliated parties are "reliable", the panel in *US – Softwood Lumber V* accepted that investigating authorities may reject the data in the companies' records where they do not reflect market prices, and that they may adjust costs on the basis of market prices. (European Union's first written submission, para 167). Rather, we understand the panel to have assumed that such a test is permissible in order to establish the veracity of the reflection of the recorded costs, and thus to establish whether those costs are "reliable", or able to be trusted and relied upon. Moreover, in *US – Softwood Lumber V*, the investigating authority had used the producer's *own* transactions in comparing costs and prices between unaffiliated and affiliated parties, as opposed to a market benchmark that was external to the producer.

otherwise pertinent data.[410] Based on the foregoing, our understanding of the panel's analysis in *US – Softwood Lumber V* accords with that of Argentina, insofar as it stands for the proposition that there is no requirement under Article 2.2.1.1 for costs in producers' records to reflect market values.[411]

7.245. We also find support for our understanding of Article 2.2.1.1 in the panel's findings in *Egypt – Steel Rebar*. The European Union argues that the panel in that case interpreted Article 2.2.1.1 to mean that "the costs reflected in the records must be 'reasonable' for the production of the good in question", and to "reflect the broader notion of 'associated', instead of the narrow notion of 'actually incurred'".[412] Our reading of the panel's findings, however, does not accord with this understanding. In particular, the panel in that case was faced with the question whether certain short-term interest income was related to the production and sale of rebar, such that it could be used to offset the cost of production of rebar.[413] In undertaking this inquiry, the panel focused on evidence as to whether each company under investigation had demonstrated that the interest income at issue was sufficiently closely related to their costs of production of rebar.[414] Since none of these companies had provided sufficient factual evidence during the investigation that the interest income was related to their cost of production of rebar, the panel found that Turkey had not established a *prima facie* case that the investigating authority violated Article 2.2.1.1 in deciding not to factor this income as an offset in its calculation of the cost of production of rebar.[415] In our reading, this approach reveals that the panel understood that Article 2.2.1.1 calls for a factual assessment of each producer/exporter's actual costs of production, and whether the evidence on record demonstrates that those costs were offset by certain income.

7.246. The European Union argues that the panel's findings in *EC – Salmon (Norway)* "confirms that Article 2.2.1.1 creates an association with the costs that would normally be required for the *act of producing*" and that the "notion of 'reasonable costs' is not limited to the expenses that the specific company under investigation has incurred".[416] We do not share the European Union's view of the panel's analysis in that case. Rather, a close reading of that case suggests to us that the panel was concerned to ensure the accuracy of the calculation of the actual cost of production to the producers concerned. In particular, the panel faulted the investigating authority for calculating certain non-recurring costs on the basis of a three year average, despite three years being the average amount of time to farm a salmon, because those non-recurring costs did not relate exclusively to the farming-related activities for a given salmon generation.[417] Instead, the panel stated that "in order to comply with Article 2.2.1.1, the allocation methodology that is applied by an investigating authority to determine cost of production *must reflect the relationship that exists between the costs being allocated and the production activities to which they are 'associated'*".[418] This statement does not suggest to us that Article 2.2.1.1 is concerned with what might "normally" be the cost of production. Rather, it suggests to us that the panel was focused on the *actual* costs of production incurred by the producers in assessing alleged violations of Article 2.2.1.1. This is because the panel tested whether there existed, in actuality, a rational relationship between the costs allocated and the production activities, in order to yield an accurate outcome. Our understanding in this regard is strengthened by the panel's subsequent finding that the investigating authority erred in adding costs of purchasing salmon from domestic sources to a producer's cost of production, without taking account of the revenue received from the same domestic sources for slaughtering services by that producer in respect of the same purchased salmon.[419] Again, this reveals an approach focused on the *actual* costs of production incurred by producers in assessing alleged violations of Article 2.2.1.1, including any appropriate offset revenue, rather than the costs that might be "normally" incurred.

7.247. In sum, we consider that the proper interpretation of "provided such records ... reasonably reflect the costs associated with the production and sale of the product under consideration" under

[410] Panel Report, *US – Softwood Lumber V*, paras. 7.331-7.333.
[411] Argentina's response to Panel question No. 19, para. 54.
[412] European Union's first written submission, paras. 133 and 138.
[413] Panel Report, *Egypt – Steel Rebar*, para. 7.422.
[414] Panel Report, *Egypt – Steel Rebar*, paras. 7.423-7.426.
[415] Panel Report, *Egypt – Steel Rebar*, para. 7.426.
[416] European Union's first written submission, paras. 141 and 163. (emphasis original)
[417] Panel Report, *EC – Salmon (Norway)*, paras. 7.506-7.507.
[418] Panel Report, *EC – Salmon (Norway)*, para. 7.514.
[419] Panel Report, *EC – Salmon (Norway)*, paras. 7.606 and 7.609.

Article 2.2.1.1 calls for an assessment of whether the costs set out in a producer's records correspond – within acceptable limits – in an accurate and reliable manner, to all the actual costs incurred by the particular producer or exporter for the product under consideration.

7.248. With the foregoing considerations in mind, we now turn to whether, in the case before us, the investigating authority derogated from using the costs reflected in the records kept by producers in a manner consistent with Article 2.2.1.1. The investigating authority determined not to use the costs of the main raw material, soybeans, in the production of biodiesel because "the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system".[420] In our view, this does not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel.

7.249. Therefore, we find 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.[421]

7.250. Argentina also requests that we find that, as a consequence of failing to calculate the costs of production consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, the European Union failed to properly construct the normal value and thus acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[422] Argentina's claims under these provisions are purely consequential to its claim under Article 2.2.1.1, and we do not consider findings under those provisions to be necessary for the effective resolution of this dispute.

7.4.1.5 Whether 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 failing to construct the normal value on the basis of the cost of production in the country of origin

7.4.1.5.1 Arguments of the parties

7.4.1.5.1.1 Argentina

7.251. Argentina requests that we find 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 failing to construct the normal value on the basis of the cost of production in the country of origin.[423]

7.252. In addition to its arguments concerning the interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994[424], Argentina submits that the

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[420] Definitive Regulation, (Exhibit ARG-22), Recital 38.

[421] In the light of this finding, we do not consider it necessary to address the arguments set out in paragraphs 208-213 of Argentina's first written submission concerning the alleged improper establishment of certain facts. We note, however, that the Argentine government does not set the price of soybeans in Argentina.

We also note the argument of the European Union that Argentina's *prima facie* case rests on the Panel upholding Argentina's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement, and consequently, if the Panel "replac[es] Argentina's legal interpretation of Article 2.2.1.1 with a different legal interpretation that Argentina has not proffered", this "would be tantamount to the Panel's making the case for the complaining party". (European Union's second written submission, paras. 90-91, 118, 132, and 139). We disagree with the suggestion that panels are not entitled to develop their own legal reasoning in a context in which it is clear that the complaining party has made a claim on a matter before the panel. (Appellate Body Reports, *EC – Hormones*, para. 156; *US – Certain EC Products*, para. 123). In any event, our understanding of Article 2.2.1.1 of the Anti-Dumping Agreement bears close similarity to the interpretation advocated by Argentina.

[422] Argentina's first written submission, para. 244.

[423] Argentina's first written submission, paras. 254 and 470(b). Argentina also argues, as a first line of argumentation, that Article 2(5), second subparagraph, of the Basic Regulation being inconsistent "as such" with Articles 2.2 of the Anti-Dumping Agreement and VI:1(b)(ii) of the GATT 1994, its application in the anti-dumping measures at issue is necessarily inconsistent with the same provisions. (Argentina's first written submission, paras. 248-249). As we have rejected Argentina's "as such" claims under Articles 2.2 and VI:1, in the present section we only consider Argentina's second line of argumentation, i.e. that Article 2(5), second subparagraph, of the Basic Regulation was applied in a manner inconsistent with those provisions in the circumstances of the present investigation.

[424] See above, paras. 7.82, 7.86.