EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

(AB-2016-4 / DS473)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by the European Union ("EU") and Argentina in *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (DS473). In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement"); the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") as are relevant to matters at issue in this dispute.

II. EXECUTIVE SUMMARY

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

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

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

5. Fourth, with respect to the "as such" claims raised by Argentina, the United States notes that the arguments made by Argentina are appropriately considered under Article 11 of the DSU. The arguments presented by Argentina regarding the Panel's analysis of context, legislative history, consistent practice, and judgments of EU's General Court are issues of a factual nature, and thus, the Appellate Body may resolve the issue by examining whether the Panel failed to make an objective assessment of the meaning of Article 2(5) of the Basic Regulation within the EU legal system under DSU Article 11. Finally, the United States views the legal standard applied by the Panel to the "as such" claims as appropriate. The Panel correctly based its conclusion upon whether Article 2(5), subparagraph two, requires WTO-inconsistent conduct,

and not whether, if the investigating authority exercises its discretion to take a particular action, that action would be WTO-inconsistent.

III. LEGAL ARGUMENTS

A. EU's Claims of Error With Regard to the Interpretation of Article 2 of the AD Agreement

6. The EU argues that the panel report is in error because the Panel misinterpreted Article 2.2.1.1 of the AD Agreement, and in particular, the phrase "records . . . reasonably reflect the costs associated with the production and sale of the product under consideration" in the first sentence of Article 2.2.1.1.[1] For the reasons set out below, the United States agrees with the EU that the Panel's interpretation of this phrase was erroneous. As discussed in Section 2 below, the Panel's interpretations of the ordinary meaning and context of the phrases "costs associated with the production and sale," and "reasonably reflect" are in error and do not reflect the appropriate substantive review entailed by this second condition in the first sentence of Article 2.2.1.1.

7. In Section 3, the United States explains why it agrees with the EU that the Panel's interpretation of Article 2.2 was erroneous. In Section 4, the United States also explains why it rejects Argentina's claim of error and understands that the Panel made an appropriate finding with respect to the meaning of "fair comparison" pursuant to Article 2.4. Before turning to these legal issues regarding Articles 2.2.1.1, 2.2, and 2.4, Section 1 below summarizes the basic analytical framework set out in the first sentence of Article 2.2.1.1.

1. The Framework Provided by the First Sentence of Article 2.2.1.1

8. To recall, the first sentence of Article 2.2.1.1 of the AD Agreement provides in full:

> 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.

9. As explained by the panel in *China – Broiler Products*:

> Although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall normally be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination

[1] EU Appellant Submission, para. 65.

> to derogate from the norm, the investigating authority must set forth its reasons for doing so.[2]

10. Therefore, in situations where records are kept in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration, the investigating authority is normally obligated to use those records pursuant to Article 2.2.1.1. On the other hand, the investigating authority may consider other available evidence in at least two situations: (i) if it finds that the records are not in accordance with GAAP, or (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. When the investigating authority does not use information contained in the records of the exporter or producer, the authority is "bound to explain why it departed from the norm and declined to use a respondent's books and records."[3]

2. The Panel's Interpretation of the Term "Costs Associated with the Production and Sale" Was Incorrect

11. The key error in the panel report was the Panel's interpretation of the phrase "costs associated with the production and sale of the product under consideration."[4] In particular, the Panel found that this phrase must **always** refer "to the *actual* costs incurred by the producer/exporter under investigation." This interpretation, however, is not consistent with the plain text of Article 2.2.1.1, nor is it supported by relevant context or the object and purpose of the AD Agreement.[5]

12. The Panel did not even attempt to conduct a textual analysis of the language "costs associated with the production and sale of the product under consideration." The Panel's legal interpretation is written as if the text of Article 2.2.1.1 uses terms such as "costs actually incurred" or "costs of the exporter or producer in question." However, that is **not** the language contained in the actual text of Article 2.2.1.1. Rather, the AD Agreement uses the phrase "costs *associated with* the production and sale of *the product under consideration*." This is in contrast to other provisions in Article 2.2, such as Article 2.2.2, which refers to "actual data."[6]

13. This difference in the terminology used must be given meaning. The term "associated with" does not suggest that the investigating authority is limited to "actual" costs in every instance, but rather suggests that an investigating authority may engage in a review to ensure that the costs associated with the product under consideration are captured in a representative manner. "Associate" or "associated" is typically defined as being "placed or found in conjunctions with another."[7] The use of the term "associated with" thus conveys a conception of

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[2] *China – Broiler Products* (Panel), para. 7.164.
[3] *China – Broiler Products* (Panel), para. 7.161.
[4] Panel Report, paras. 7.233-35.
[5] Panel Report, para. 7.233 (noting that "it would seem anomalous to us if the 'costs associated with the production and sale' did not refer to the *actual* costs incurred by the individual producers, as reflected in their records.")
[6] The United States notes that elsewhere in the AD Agreement authorities are directed to consider "actual amounts incurred." *See e.g.,* Article 2.2.2(i) of the AD Agreement.
[7] "Associate" means "[j]oined in companionship, function, or dignity; allied; concomitant," "[s]haring in responsibility, function, membership, but with a secondary or subordinate status," "[a] thing placed or found in conjunctions with another," or "[j]oin, combine, (things together; one thing with, to another or others)." The NEW SHORTER OXFORD ENGLISH DICTIONARY, vol. 1 (1993 ed.).

costs that is not limited to those contained in a specific respondent's records and does not otherwise suggest the notion that something must be strictly identical, indistinguishable, or interchangeable. Therefore, the language of Article 2.2.1.1 does not restrict evaluation to a consideration of an exporter's or producer's records, as suggested by the Panel.

14. The Panel's stated rationale for inserting the term "actual" into Article 2.2.1.1[8] is that, according to the Panel, this non-textual reading would comport with the purpose of Article 2.2. This rationale, however, is not persuasive. In particular, the Panel states that the purpose of 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,'" and, as such, the applicable exporter's or producer's actually incurred costs logically yield the most accurate proxy.[9] This reasoning is ultimately circular, and thus unconvincing. Article 2.2 sets out the overall rules for determining normal value. Sales in the domestic market shall **not** be used as the basis for normal value if those sales are, *inter alia*, outside the ordinary course of trade because they are made at prices below the cost of production. In turn, the rules for calculating cost of production are also set out in Article 2.2 – most relevantly, in this situation, the rules are set out in Article 2.2.1.1, including that the costs set out in a exporter's or producer's records need not be used if those costs do not reasonably reflect the costs associated with the production and sale of the product under consideration. The Panel essentially assumed the conclusion by stating that domestic sales are always the appropriate basis for normal value, and then using this assumption to determine the meaning of Article 2.2.1.1. This reasoning is backwards. **Only if** (among other considerations) domestic sales are made at prices above the cost of production – as defined in Article 2.2 – are those sales an appropriate basis for normal value. In short, the Panel erred by assuming that the search for an appropriate proxy for normal value always dictates the reliance on actual costs incurred by the producers or exporters under investigation.

15. A second rationale offered by the Panel for reading the term "costs associated with the production and sale of the product under consideration" as those costs "actually incurred" was based on the language in Article 6.10 of the AD Agreement. This rationale for the Panel's non-textual reading is also unconvincing. Article 6.10 requires authorities to "as a rule, determine an individual dumping margin for each known exporter or producer." The Panel asserted that as costs vary amongst producers, it would be "anomalous" to not view "costs associated with the production and sale" as "the actual costs incurred by individual producers, as reflected in their records."[10] The Panel's reasoning, however, does not explain why an examination of whether costs are associated with the production and sale of the product under consideration precludes individual examination of particular producers. To the contrary, in the biodiesel investigation at issue in this dispute, the United States understands that the EU did examine the individual operations of the examined producers. The EU found that certain input costs did not reasonably reflect the costs associated with the production and sale of biodiesel, and adjusted those costs accordingly, while as a whole the EU did in fact base normal value on individualized examinations of Argentine producers. Thus, contrary to the Panel's analysis, nothing in the

[8] Panel Report, paras. 7.228, 7.232, and 7.233.
[9] Panel Report, para. 7.233. It is the U.S. position that the purpose of Article 2.2 is to identify an appropriate basis for normal value whenever sales of the like product in the domestic market do not permit a proper comparison for the reasons outlined in Article 2.2.
[10] Panel Report, para. 7.232.

condition that costs should be associated with the production and sale of the product under consideration suggests that the evaluation will not be individualized.[11]

16. In addition to these specific errors in the Panel's reasoning, the United States notes that the broader structure and context of Article 2.2.1.1 supports the understanding that the second condition does not merely reiterate the requirement that the records, as the Panel concluded, should reflect the "costs that producers actually incurred in production of the product in question."[12] The reliance on actual costs is already addressed elsewhere in Article 2, and thus the Panel had no basis for also imputing this concept into the second condition – for the Panel to do so in effect renders the second condition redundant. Indeed, the first clause of the first sentence of Article 2.2.1.1 states that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation." In addition, the first condition identified in the first sentence of Article 2.2.1.1 specifies that records to be kept in accordance with GAAP, which in addition to specifying other accounting standards necessarily requires the accurate recordation of actual costs. For the Panel to find that the second condition of Article 2.2.1.1 reiterates what is already stated elsewhere in the sentence reduces this condition to a superfluity. Accordingly, the Panel's interpretation is inconsistent with the general principle of treaty interpretation requiring that each term in a provision be given effect.[13]

17. For similar reasons, the Panel's interpretation of the second condition as essentially a requirement that records accurately reflect actual costs incurred also does not comport with the evidentiary provisions of Article 6 of the AD Agreement. Article 6.6 provides that investigating authorities "shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."[14] Article 6.7 further provides investigating authorities with the ability to "verify information provided or to obtain further details" by carrying out "investigation in the territory of other Members as required."[15] Article 6.8 provides that the absence of necessary information, which assuredly includes accurate and actual data, may leave investigating authorities to make a determination "on the basis of facts available." Finally, Annex I provides details with respect to verification of information and gathering of further details.[16] In sum, the AD Agreement fully provides in Article 6 and Annex I for the type of investigative and verification process that the Panel imputes into the second condition of Article 2.2.1.1. Accordingly, it is not a plausible reading that Article 2.2.1.1, which addresses a specific aspect of the "*Determination of Dumping*" under Article 2, is nothing more than a reiteration of the same evaluation of the accuracy of certain information set forth in Article 6, which addresses the collection and evaluation of the "*Evidence*" related to that determination.

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[11] The United States would suggest that a correction or adjustment to address, for instance, a particular local capital cost allocation methodology, applicable across all respondent parties, does not suggest that the evaluation of their costs and construction of normal value was not done on an individual basis.
[12] Panel Report, para. 7.232.
[13] *See e.g., US – Gasoline (AB)*, page 23 (noting that "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that the interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."); *see also Japan – Alcoholic Beverages I (GATT)*, page 12; *Canada – Dairy (AB)*, para. 133.
[14] Article 6.6, AD Agreement.
[15] Article 6.7, AD Agreement.
[16] Annex I, AD Agreement.

18. Finally, even the examples cited by the Panel of instances where "actual" recorded costs may not reflect reasonable costs for the purposes of constructing normal value suggest that the second condition is not limited to an evaluation of whether recorded costs reflect those actually incurred by a specific producer or exporter. The Panel cites "proper allocation of costs for depreciation or amortization or the relevant time period," or the effects of a "vertically-integrated group of companies in which actual cost of production of particular inputs is spread across different companies' records, or in which transactions between such companies are not at arms-length or indicative of the actual costs involved in the production of the product under consideration."[17] The United States would add that there may be other market circumstances that could require additional scrutiny. That scrutiny would call for much more than an analysis of whether an exporter's or producer's records reflect actual costs, but rather a substantive review of whether the recorded costs "reasonably reflect" the costs associated with the production and sale of the product under consideration.

19. In sum, the Panel erred as a matter of law when it found that the second condition of Article 2.2.1.1 is limited to an examination of whether recorded costs reflect the respondent's "actual" costs. Although the United States takes no position on the facts underlying this dispute, it notes that there may be a range of fact-specific reasons related to individual respondents or larger market conditions, which may support a finding that particular recorded costs do not reasonably reflect the costs associated with the production and sale of the product under consideration. Pursuant to Article 2 of the AD Agreement and with adequate explanation regarding its departure from the exporter or producer's records, an investigating authority may take into account such considerations when determining normal value.

3. The Panel's Analysis of the Text and Context of "Reasonably Reflects" Leads to a Misunderstanding of the Condition's Meaning and Purpose within Article 2.2.1.1

20. The Panel's analysis is also in error because the Panel somehow relies on the term "reasonably reflects" as supporting the Panel's interpretation that the second condition in Article 2.2.1.1 only involves an examination of costs actually incurred by a producer or exporter. The Panel states that "reasonably' is an adverb that modifies the verb 'reflect'" and thus describes the "degree or manner of reflection of such costs in the records of the producer or exporter."[18] Based on these definitions, the Panel "understands the term 'reasonably reflect' in Article 2.2.1.1 to mean that the records of a producer/export must depict all the costs *it has incurred* in a manner that is – within acceptable limits – accurate and reliable."[19] The fundamental problem here is that the Panel has assumed –without any textual or logical basis – that what must be "reasonably reflected" are the actual costs incurred, rather than the costs actually identified in the AD Agreement – namely, those associated with the production and sale of the product under investigation.

21. The second condition's "reasonably reflects" term must be read together with other terms in Article 2.2.1.1 – and in particular "the costs associated with."[20] As noted by the Panel, the

[17] Panel Report, para. 7.232.
[18] Panel Report, para. 7.230.
[19] Panel Report, para. 7.231 (emphasis added).
[20] EU Appellant Submission, para. 157-160.

term "reasonably" means "rational or sensible," "in accordance with reason," or "fair and acceptable in amount."[21] That said, the text does not merely call for a rational, sensible, or fair *reflection*,[22] rather it establishes a substantive reasonableness standard for the "costs" reflected in the producer's or exporter's records. The word "costs" is also used twice in the first sentence of Article 2.2.1.1, and the "reasonably reflect" language links the "costs" reflected in the exporter's or producer's records, which are typically used for constructing normal value, with the "costs" associated with the production and sale of the product under consideration.

4. The Panel Incorrectly Interpreted Article 2.2 of the Antidumping Agreement

22. In addition to concluding that the constructed normal value used by the EU in this case is inconsistent with Article 2.2.1.1, the Panel evaluated whether the challenged measures are also inconsistent with Article 2.2, in particular, whether the investigating authority must base normal value upon the cost of production in the country of origin. The Panel agreed with Argentina, interpreting references to "cost of production" in "the country of origin" as necessarily confining investigating authorities to cost information from the country of origin.[23] Accordingly, the Panel considered this simply a matter of whether the EU used cost data external to Argentina.[24] The EU appeals this finding stating that a "distinction must be made between 'cost . . . in the country of origin' and the evidence pertaining to such cost."[25]

23. Leaving aside the facts of the underlying dispute, the United States seeks to emphasize that the text of Article 2.2 does not proscribe the use of out-of-country information to evaluate recorded costs or to adjust or replace recorded costs when formulating the appropriate cost for the individual producer. Furthermore, the Panel identifies no language in Article 2.2.1.1 that restricts the investigating authority from considering evidence beyond the country of origin.

24. The United States submits that such an extra-textual proscription would effectively prevent the investigating authority from effectively conducting its investigation. Such a restriction limits the ability of an investigating authority to discern whether recorded costs "reasonably reflect the costs associated with the production and sale of the product under consideration," as explained above. Similarly, the Panel's interpretation conflicts with the requirement under Article 6.6 of the AD Agreement that authorities "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." If an authority cannot adjust for distortions that render costs unreasonable – or even in the first instance evaluate whether such distortions exist – it is difficult to envision how it might nonetheless satisfy Article 6.6.

5. The Panel Correctly Interpreted Article 2.4 in Concluding that Argentina Failed to Establish that the EU Acted Inconsistently with that Provision

[21] Panel Report, para. 7.231.
[22] Panel Report, para. 7.231 (noting that "reasonably reflects" "connotes the faithful and accurate depiction of information" – namely, "the costs incurred").
[23] Panel Report, para. 7.256.
[24] Panel Report, para. 7.257.
[25] EU Appellant Submission, para. 222.

25. Argentina argued before the Panel that the EU acted inconsistently with Article 2.4 of the AD Agreement by failing to establish the existence of a margin of dumping for the respondents based on a fair comparison between export price and normal value. Argentina attributed this alleged inconsistency to the comparison of a constructed normal value that included an average of the reference price of soya, minus fobbing costs, to an export price that used the domestic price of soya.[26] Argentina objected to the EU's decision to disregard the domestic cost of soya for the purposes of calculating the cost of production, but inclusion of the domestic cost of soya in the export price.

26. The Panel found that the difference identified by Argentina does not constitute a difference that affects price comparability within the meaning of Article 2.4.[27] Argentina appeals this finding.[28] Argentina specifies that the Panel erred when it concluded that there is a "general proposition that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as 'differences affecting price comparability.'"[29]

27. The United States notes that Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The text of Article 2.4 thus presupposes that the appropriate normal value has been identified. Once normal value and export price have been established, the investigating authority is required to select the proper sales for comparison and make appropriate adjustments to those sales, including due allowances for differences which affect price comparability.[30]

28. The essential requirement for any adjustment under Article 2.4 is that a factor for which adjustment is requested must affect *price* comparability. The use of constructed normal value does not preclude the need for due allowances or adjustments *between* the export price and the normal value.[31] However, the construction of normal value through the selection of costs pursuant to Article 2.2.1.1, and profit pursuant to Article 2.2.2, is not a relevant difference *between* the export value and the normal value, because those selections do not relate to a difference between the export and domestic values being compared.

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[26] Panel Report, para. 7.277.
[27] Panel Report, para. 7.301.
[28] Argentina Other Appellant Submission, paras. 294-325; EU Appellee Submission, paras. 123-142.
[29] Argentina Other Appellant Submission, para. 300 (quoting Panel Report, para. 7.304).
[30] For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price. *See EC –Tube or Pipe Fittings* (Panel), para. 7.157. The panel in *Egypt – Steel Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (para. 7.335).
[31] *EC – Fasteners (Article 21.5 – China) (AB),* para. 5.205 ("The fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, irrespective of the methodology used to determine normal value"); *Egypt – Rebar* (Panel), para. 7.352 ("Article 2.4 . . . explicitly require[s] a fact-based, case-by-case analysis of differences that affect price comparability").

29. Contrary to the exemplars listed in Article 2.4 (*e.g.*, conditions and terms of sale, taxation, and levels of trade), Argentina's distortive export duty is not "some other identifiable characteristic . . . incorporated into the constructed normal value by the EU authorities."[32] A methodological approach, like that used by the EU to account for this export duty, thus is properly considered under Article 2.2. As a consequence, notwithstanding the Panel's errors in interpreting Articles 2.2.1.1 and 2.2, the Panel correctly concluded that the EU's construction of normal value and resulting comparison with export prices was not inconsistent with Article 2.4.

B. Argentina's Claims of Error With Regard To the Panel's Evaluation of "As Such" Claims

30. The Panel in this dispute found that Basic Regulation Article 2(5), subparagraph two, is not inconsistent "as such" with Article 2 of the AD Agreement, because the EU's provision "only lays out what the authorities can do" after they have arrived at a determination that the records in question do not reasonably reflect costs.[33] The Panel determined that the challenged measure does not require that the investigating authority take a particular course of action, such as rejecting recorded costs on the basis of artificially low costs.[34] In making this finding, the Panel analyzed the text of the provision, its context, relevant legislative history, administrative practice by the investigating authority, and judicial review by the European courts. The Panel found that these additional sources, in conjunction with the text of Article 2(5), did not demonstrate that the EU investigating authority is required under Article 2(5) to adjust costs in the manner challenged by Argentina.[35]

31. Argentina submits that the Panel erred with respect to the "as such" claim by misapplying Articles 2.2 and 2.2.1.1 of the AD Agreement, and Article VI:1(b)(ii) of GATT 1994.[36] Argentina also argues that the Panel acted inconsistently with Article 11 of the DSU when it found Article 2(5), second subparagraph, of the Basic Regulation to not be "as such" inconsistent with these Articles.[37] Argentina further asserts that the Panel applied an erroneous legal standard with respect to the establishment of "as such claims."[38]

32. The United States takes no position as to the ultimate conclusion reached by the Panel, but makes two observations. First, with respect to the Panel's alleged error in the application of Articles 2.2.1.1 and 2.2, the United States suggests that Argentina's appeal should be decided on the basis of its second claim of error, that is, the Panel's alleged failure to make an objective assessment of the meaning of Article 2(5) under Article 11 of the DSU. Second, with respect to the appropriate legal standard for an "as such" claim, GATT and WTO reports have consistently reasoned that a measure may be found WTO-inconsistent, even absent any application, if the measure necessarily will result in WTO-inconsistent action. On the other hand, the mere possibility that a Member could choose to breach (or not to breach) its obligations in the future does not mean there is a current breach of an obligation.

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[32] Panel Report, para. 7.301.
[33] Panel Report, para. 7.134.
[34] Panel Report, para. 7.134.
[35] Panel Report, paras. 7.142-44, 7.147-48, 7.150-52, 7.169-174.
[36] Argentina Other Appellant Submission, paras. 28, 30, 194-197.
[37] Argentina Other Appellant Submission, paras 135, 175, 267, and 275.
[38] Argentina Other Appellant Submission, paras. 276-290.

1. An Examination of Argentina's Appeal Suggests Its Claim that the Panel Erred in Its Appreciation of the Meaning of Article 2(5) Is Properly Evaluated Pursuant to Article 11 of the DSU

33. Argentina appeals the Panel's conclusion that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent "as such" with Articles 2.2 and 2.2.1.1 of the AD Agreement. Argentina argues that the Panel has misunderstood the "scope and meaning" of Article 2(5) and that this constitutes legal error under Articles 2.2 and 2.2.1.1 and a failure to make an objective assessment under Article 11 of the DSU. With respect to the first set of claims, Argentina notes that the Appellate Body "has clarified that the assessment by a panel of the municipal law of a WTO Member for the purposes of determining whether that Member has complied with its obligations under the WTO Agreement is a 'legal characterization by a panel' and thus subject to review by the Appellate Body."[39]

34. The United States suggests, however, that based on Argentina's own arguments and past statements by the Appellate Body, Argentina's claims of error are appropriately understood as arising under Article 11 of the DSU.[40] The Appellate Body has repeatedly communicated to parties that they should not plead an error in the interpretation or application of a provision of the covered agreements and a failure to make an objective assessment in the alternative, as an issue will normally be a legal error *or* a factual error but not both (though mixed issues of fact and law can arise).[41] In this appeal, the United States suggests that Argentina's appeal of the Panel's alleged misunderstanding of Article 2(5), second subparagraph, be understood as a challenge to the Panel's "objective assessment" of the municipal law at issue.

35. As elaborated below, this is so for at least two reasons. *First*, an examination of Argentina's submission reveals that its arguments go primarily to elements in discerning the meaning of municipal law that the Appellate Body has previously recognized are *factual* in nature. An assessment of the Panel's examination of those elements must proceed under Article 11. It follows that an overall conclusion on whether the Panel has erred in its assessment of municipal law in this dispute should also be subject to the standard under which the Appellate Body will examine a Panel's objectivity, and not the *de novo* standard under which it reviews issues of law. *Second*, while this appeal highlights some concerns that arise under the approach of treating the examination of the meaning and scope of municipal law as an issue of WTO law

[39] Argentina Other Appellant Submission, para. 35 (quoting Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105).

[40] Article 11 of the DSU provides that the "function of panels is to assist the DSB in discharging its responsibility," and accordingly "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements."

[41] *See, e.g., EC – Fasteners (China) (AB)*, para. 442 ("It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. Finally, a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."); *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238 ("We also recall that a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements.").

(rather than as an issue of fact to be decided with reference to the municipal law system), the Appellate Body in this appeal may avoid reviewing that issue and instead, in an appropriate appeal, could further examine the issue and its previous statements in order to provide greater clarification.

36. As to the first issue, Argentina tries to bring its claim of error within the ambit of past statements by the Appellate Body that the assessment of the meaning of a measure under municipal law is a "legal characterization" by a panel and therefore can be an issue of law appealed under Article 17.6 of the DSU. The most recent articulation by the Appellate Body, reproduced by Argentina, noted that "an examination of whether the elements cited by the Appellate Body in *US – Carbon Steel* are legal characterizations, or involve also factual elements, depends on the circumstances of each case."[42] In *China – Auto Parts*, the Appellate Body elaborated that it "recognize[d] that there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements. *With respect to such elements, the Appellate Body will not lightly interfere with a panel's finding on appeal*."[43] And in *China – Publications and Audiovisual Products*, the Appellate Body further observed that "[w]here, for instance, a panel resorts to evidence of how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts, the panel's findings on such elements are more likely to be factual in nature, and *the Appellate Body will not lightly interfere with such findings*."[44]

37. This appeal presents such an instance where the evidence examined by the Panel, and the basis for the error alleged by Argentina, go beyond the text of the legal instrument. The heart of Argentina's "as such" argument is that the Panel made significant errors with respect to evidence *other than* the text of Article 2(5), second subparagraph. For example, to establish what it views as the proper meaning of this provision, Argentina examines at length the context,[45] legislative history,[46] administrative practice,[47] and judicial decisions[48] bearing on this provision. But these are precisely the elements that the Appellate Body has identified as "more likely to be factual in nature" – that is, "evidence of how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts".[49] Accordingly, the establishment of those elements and the weight to be accorded to them should be considered under Article 11 of the DSU.

38. Because Argentina has also challenged pursuant to Article 11 whether the Panel has made an objective assessment of the meaning of Article 2(5), second subparagraph, the Appellate Body can review Argentina's appeal and the Panel's assessment on that basis. It would be for Argentina to establish that the Panel has "exceeded the bounds of its discretion, as

[42] *US – Countervailing and Anti-dumping Measures (China) (AB)*, para. 4.101.
[43] *China – Auto Parts (AB)*, para. 225 (italics added) (footnote omitted).
[44] *China – Publications and Audiovisual Products (AB)*, para. 177 (italics added).
[45] Argentina Other Appellant Submission, paras. 52-60.
[46] Argentina Other Appellant Submission, paras.61-70.
[47] Argentina Other Appellant Submission, paras. 77-92.
[48] Argentina Other Appellant Submission, paras. 93-113.
[49] *China – Publications and Audiovisual Products (AB)*, para. 177.

the trier of facts,"[50] in a manner that singly or taken together "undermine the objectivity of the panel's assessment of the matter before it."[51]

39. Further, the Appellate Body's *overall* conclusion on whether the Panel has erred in its assessment of Article 2(5), second subparagraph, should be subject to review pursuant to the Article 11 standard applicable to the elements comprising the Panel's analysis. It is Argentina's argument that "the measure at issue was not clear on its face"[52] and its meaning could only be discerned through a "holistic analysis of all these elements taken together in order to determine the real meaning of the challenged measure."[53] As the Appellate Body has remarked, noting that "where a party alleges that the meaning of a challenged measure diverges in practice from the understanding that might appear warranted when its plain text is read in isolation, a holistic assessment of the measure calls for consideration of *all relevant elements of evidence* submitted by the parties".[54] In this light, Argentina's claim of error must be understood as taking all of the relevant evidence together and should be assessed in relation to the objectivity of the Panel's assessment, and not the *de novo* standard under which the Appellate Body reviews issues of law.

40. Second, by reviewing Argentina's claim of error under the standard for review of the objectivity of a panel's assessment, the Appellate Body need not in this appeal treat the examination of the meaning and scope of municipal law as an issue of law for purposes of WTO dispute settlement. The Appellate Body could then examine the issue and its previous statements on this issue in a future appeal in order to provide greater clarification on this issue.

41. In brief, this appeal brings to light some of the difficulties with previous statements by the Appellate Body that "[w]hen a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU."[55] The statement, repeated in other reports, contains certain unexplained elisions in concepts and logic.[56] The reports repeating this statement appear to cite back to *India – Patents*, but that report does not assert or explain how the meaning of municipal law for purposes of a WTO dispute is an issue of law.[57] Moreover, that report does not examine

[50] *US – Carbon Steel (India) (AB)*, para. 4.79.
[51] *US – Carbon Steel (India) (AB)*, para. 4.79.
[52] Argentina Other Appellant Submission, para. 148.
[53] *See, e.g.*, Argentina Other Appellant Submission, paras. 138, 142, 143, and 166.
[54] *US – Carbon Steel (India) (AB)*, para. 4.437 (italics added).
[55] *See, e.g., China – Auto Parts (AB)*, para. 225
[56] For example, the first clause identifies two actions or concepts: (1) examining municipal law and (2) determining compliance. The second clause states that "that determination is a legal characterization by a panel" but does not explain which "determination" is at issue. That is, "examining" what effects municipal law is alleged to have is distinct from "determining" whether those effects are consistent with WTO rules. The second clause ("this determination is a legal characterization") elides the two actions and does not explain why examining what effects municipal law has is a "legal characterization" for purposes of WTO dispute settlement.
[57] There, the claim of error was that the panel had shifted the burden of proof and that, by not placing the burden fully on the complaining party to establish the meaning of municipal law as an issue of fact, the panel had in effect treated the meaning of Indian law as an issue of law. *India – Patents (AB)*, paras. 8-9. The United States as complaining party and the EC as a third party argued no shift in burden had occurred and that the panel correctly treated the issue of the meaning of Indian law as an issue of fact. *Id.*, paras. 16-17, 23.

any pertinent DSU provision or text[58] and appears to cite a source that stands for a different proposition than that for which it was cited.[59] But, setting aside these difficulties, consider the alleged error as expressed by Argentina in seeking to bring its claim as an error of law.

42. For example, Argentina expresses its argument that the Panel erred as a matter of law under Article 2.2.1.1 as follows: "Argentina submits that the Panel *erred in the application of Article 2.2.1.1* of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, is not, as such, inconsistent with that provision." But Argentina alleges no error in the application of 2.2.1.1 – that is, no erroneous application of any element of Article 2.2.1.1 to the facts. Instead, in the immediately following sentence, Argentina explains: "The Panel's finding is based on *an erroneous understanding of the scope, meaning and content of Article 2(5), second subparagraph*."[60] But this is not an erroneous "application of Article 2.2.1.1 of the Anti-Dumping Agreement"; it is an alleged error in understanding the measure at issue. That is, the error is not in the application *of WTO law* (Article 2.2.1.1); it is an error in the Panel's appreciation *of EU law* (Article 2(5)).

43. The appreciation of the "scope, meaning, and content" of Article 2(5) is an issue of EU law, not WTO law. The answer to that inquiry is what *action* the measure does or does not compel EU authorities to take within its legal system.[61] Indeed, the Appellate Body has observed that an "as such" challenge to the "laws, regulations, or other instruments of a Member … assert[s] that a Member's *conduct* – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations.

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[58] *India – Patents (AB)*, paras. 65-67. For example, the report could have examined, among others, DSU Article 6.2 (distinguishing, for purposes of the panel request, identification of the specific measures at issue from providing the legal basis of the complaint), Article 11 (distinguishing a panel's function to make an objective assessment of the facts of the case from its function to make an objective assessment of the "applicability of and conformity with" the relevant covered agreements), Article 12.7 (distinguishing in a panel's report the "findings of fact" from "the applicability of relevant provisions"), and Article 17.13 (identifying the panel's "legal findings and conclusions" as subject to AB action but not its factual findings). These texts would support the commonsense notion that the issues of law for WTO dispute settlement are issues *of WTO law* – that is, the "applicability of and conformity with the relevant covered agreements".

[59] The report in *India – Patents (AB)*, para. 65 and n. 52, cites Brownlie for the proposition that "an international tribunal may treat municipal law in several ways", including "[h]owever, … *evidence of compliance or non-compliance with international obligations*" (italics added). This latter proposition, however, is described by Brownlie as falling squarely within the ambit of the PCIJ's comment that "municipal laws are merely facts which express the will and constitute the activities of States." As Brownlie notes: "This statement is to the effect that municipal law may be simply evidence of conduct attributable to the state concerned which creates international responsibility. Thus a decision of a court or *a legislative measure may constitute evidence of a breach of a treaty* or a rule of customary international law. In its context the principle stated is clear." Brownlie, Principles of Public International Law, at 39 (italics added) (5th ed. 1998).

[60] Argentina Other Appellant Submission, para.34 (italics added).

[61] For example, Argentina argues that "The Panel erred when finding that Article 2(5), second subparagraph, of the Basic Regulation *only deals with what has to be done* after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph." Argentina Other Appellant Submission, Sec. 2.2.2 (italics added). Similarly, Argentina argues that "The Panel erred in finding that Article 2(5), second subparagraph, of the Basic Regulation *does not "require" the European Union to determine* that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when these records reflect prices that are considered to be artificially or abnormally low as a result of a distortion." Argentina Other Appellant Submission, Sec. 2.2.3 (italics added).

In essence, complaining parties bringing 'as such' challenges seek to prevent Members ex ante *from engaging in certain conduct*."[62]

44. The issue whether a legal instrument of a Member would lead that Member to "engag[e] in certain conduct" or action is resolved by reference to that Member's internal law. It is not controversial that whether a Member has engaged in certain conduct or action (for example, that a duty was collected at a certain level) is an issue of fact resolved with reference to that Member's legal system. Likewise, whether a Member's measure will lead to that Member to engage in certain conduct "in future situations as well" (for example, that a duty will be collected at a certain level) is an issue to be resolved with reference to that Member's legal system. When Argentina or any other Member speaks of a determination of the meaning of another Member's measure, they simply mean assessing whether that Member will engage in certain conduct in future situations.

45. Once it has been assessed that a domestic measure will lead to "certain conduct" or action, the next logical step is to examine whether that conduct or action is inconsistent with a Member's WTO obligations under the covered agreements. It is this step of examining the applicability of and conformity with the covered agreements that is the issue of law for purposes of WTO dispute settlement.

46. As noted above, for purposes of this appeal it is not necessary for the Appellate Body to re-examine this issue to resolve the dispute between the parties. Given Argentina's framing of the alleged error by the Panel and the evidence to which it points, and given the EU's engagement with that evidence on appeal, the Appellate Body may resolve the issue by examining whether the Panel failed to make an objective assessment under DSU Article 11 of the meaning of Article 2(5) of the Basic Law within the EU legal system.

2. The Panel Appropriately Evaluated Whether The Measure In Question Necessarily Requires WTO-Inconsistent Action or Precludes WTO-Consistent Action

47. The United States considers that the Panel's evaluation of Argentina's "as such" claims were appropriate, contrary to Argentina's claims that an erroneous legal standard was applied.[63] First, the United States understands that a complainant may allege that another Member's legislation or regulation is inconsistent with a covered agreement "as such" or "independently from the application of that legislation in specific instances."[64] To prove an "as such" claim, the complainant must demonstrate that the identified measure requires the responding party to act in a WTO-inconsistent manner or precludes that party from acting in a WTO consistent manner.[65]

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[62] *US – OCTG Sunset Reviews (AB)*, para. 172 (italics added).

[63] Argentina alleges that the Panel's findings suggest that "in order to prevail with an 'as such' claim, the complaining party must establish that the measure at issue can never be applied in a WTO-consistent manner," and that "it is necessary that the measure being challenged is mandatory." Argentina's Other Appellant Submission, para. 277.

[64] *US – 1916 Act* (AB), para. 60.

[65] *See e.g, Korea – Commercial Vessels*, para. 7.63 (noting that the Appellate Body continues to use the mandatory/discretionary distinction); *China – Raw Materials* (Panel), paras. 7.776, 7.783, 7.786, 7.796; *EC – IT Products* (Panel), paras. 7.113-7.115; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* (AB), para. 121; *US – Carbon Steel (India)* (AB), para. 4.483.

Where a Member may apply a measure in a WTO-consistent manner, there is no basis to find that the Member has through that measure *already* breached its WTO obligations because of the potential for a *future* WTO-inconsistent application. Of course, once a Member chooses to apply the measure, that application (for example, the imposition of an antidumping duty) may itself be challenged. But any breach in the latter case would stem from the Member's *decision* in that specific case on how to apply the underlying measure, not from the underlying measure itself. Here, the Panel appropriately evaluated whether the alleged breaches by the EU investigating authority stemmed from the underlying measure, subparagraph two of Article 2(5), or from a decision in a specific case as to how to apply that underlying measure.[66]

48. Second, with respect to whether only a "mandatory" measure may be found to be "as such" inconsistent, the United States also considers that the Panel appropriately looked for guidance to the Appellate Body's analytical framework in *US – Carbon Steel (India)*.[67] As described by the Appellate Body report in *US – Carbon Steel (India)*, the complaining party bears the "burden of introducing evidence as to the scope and meaning of such law to substantiate [its] assertion."[68] The Appellate Body subsequently reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements requiring an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement.[69] In that dispute, the Appellate Body also reviewed additional evidence, including judicial decisions, legislative history, and quantitative and qualitative materials on the application of the measure,[70] and considered whether the investigating authorities were "subject to rules and disciplines separate from the measure itself."[71] The Appellate Body ultimately concluded that these materials did not "establish conclusively that the measure *requires* an investigating authority to consistently" act contrary to the relevant WTO obligation.[72] Thus, the consideration was of the text of measure, not whether it purported to be permissive or mandatory.

49. In its appellant submission, Argentina disputes the relevance of the Appellate Body's report in *US – Carbon Steel*, to which the Panel cited in performing its analysis. In particular, Argentina argues that where the measures at issue in *US – Carbon Steel* were not necessarily WTO-inconsistent because the adverse inference at issue could be permissible depending on the circumstances of the case, *by contrast* the action permitted by Article 2(5), subparagraph two, is in every application inconsistent with Article 2 of the AD Agreement.[73] The United States submits that Argentina has identified a distinction without meaning. In *US – Carbon Steel*, the Appellate Body reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements *requiring* an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement.[74] The Appellate Body ultimately concluded that the text, in addition to the legislative history, application of the measure, and judicial decisions, did not "establish conclusively that the measure requires an investigating authority to consistently" act

[66] Panel Report, fn 241.
[67] Panel Report, para. 7.121, fn 241.
[68] *US – Carbon Steel (India)* (AB), para. 4.450 (*quoting US – Carbon Steel* (Panel), para. 157).
[69] *US – Carbon Steel (India)* (AB), para. 4.483.
[70] *US – Carbon Steel (India)* (AB), para. 4.483; *see also id*., para. 4.477.
[71] *US – Carbon Steel (India)* (AB), para. 4.476.
[72] *US – Carbon Steel (India)* (AB), para. 4.483 (emphasis added).
[73] Argentina's Other Appellant Submission, paras. 285-290.
[74] *US – Carbon Steel (India)* (AB), para. 4.483 (emphasis added).

contrary to the relevant WTO obligation.[75] The Appellate Body did not, as Argentina suggests, limit its analysis to measures that are not necessarily on application inconsistent with the WTO agreements.[76] The Panel thus correctly based its conclusion upon whether Article 2(5), subparagraph two, requires WTO-inconsistent conduct, and not whether, if the investigating authority exercises its discretion to take a particular action, that action would be WTO-inconsistent.

IV. CONCLUSION

50. The United States notes that there are numerous issues involved in this appeal. This submission has focused on key issues of interpretation which raise systemic issues for Members concerning the operation of antidumping investigations and the legal analysis of "as such" challenges to Member's measures. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.

[75] *US – Carbon Steel (India)* (AB), para. 4.483.
[76] *See US – Carbon Steel (India)* (AB), para. 4.483.