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UNITED STATES – ANTI-DUMPING ADMINISTRATIVE REVIEWS AND OTHER MEASURES RELATED TO IMPORTS OF CERTAIN ORANGE JUICE FROM BRAZIL

Report of the Panel

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US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521
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US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, 97
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009

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Short Title	Full Case Title and Citation
US – Zeroing (Japan) (Article 21.5 – Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW, adopted 31 August 2009, as upheld by Appellate Body Report WT/DS322/AB/RW

GATT PANEL REPORTS

European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil ("EEC – Cotton Yarn"), ADP/137, adopted 30 October 1995, BISD 42S/17

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I. INTRODUCTION

1.1 On 27 November 2008, the Government of Brazil ("Brazil") requested consultations with the Government of the United States of America (the "United States") under Articles 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade of 1994 (the "GATT 1994") and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (the "AD Agreement"), with regard to certain laws, regulations, administrative procedures, practices and methodologies for calculating dumping margins in administrative reviews, involving the alleged use of so-called "zeroing", and their application in anti-dumping duty administrative reviews regarding imports of certain orange juice from Brazil (case No A-351-840).[1] On 22 May 2009, Brazil requested further consultations with the United States with regard to the alleged use of "zeroing" in the anti-dumping duty investigation and in the second administrative review related to case No A-351-840 as well as to the continued use of the United States "zeroing procedures" in successive anti-dumping proceedings regarding imports of certain orange juice from Brazil.[2] The consultations were held on 16 January and 18 June 2009, respectively. The consultations failed to resolve the dispute.

1.2 On 20 August 2009, Brazil requested, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the AD Agreement, that the Dispute Settlement Body ("DSB") establish a Panel with regard to the following measures:

(a) The anti-dumping duty investigation on certain orange juice from Brazil (the "Original Investigation").

(b) The 2005-2007 anti-dumping duty administrative review on certain orange juice from Brazil (the "First Administrative Review").

(c) The 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the "Second Administrative Review").

(d) The continued use of the US "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil.[3]

1.3 At its meeting on 25 September 2009, the DSB established a panel pursuant to the request of Brazil in document WT/DS382/4, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Brazil in document WT/DS382/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 29 April 2010, Brazil requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

[1] WT/DS382/1.
[2] WT/DS382/1/Add.1.
[3] WT/DS382/4.

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> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 10 May 2010, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Miguel Rodriguez Mendoza

Members: Mr. Pierre S. Pettigrew
Mr. Reuben Pessah

1.7 Argentina; the European Union; Japan; Korea; Mexico; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"); and Thailand reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties on 15-16 July and 12 October 2010. It met with the third parties on 16 July 2010. The Panel issued its interim report to the parties on 20 December 2010. The Panel issued its final report to the parties on 21 February 2011.

II. FACTUAL ASPECTS

2.1 Brazil's complaint is focused on the alleged use by the United States Department of Commerce ("USDOC") of a particular methodology, known as "zeroing", when calculating the margin of dumping of investigated exporters in the anti-dumping proceedings conducted against certain orange juice products from Brazil (case No. A-351.840). In particular, Brazil challenges the alleged use of "simple zeroing" for the purpose of calculating the margins of dumping, cash deposit rates and relevant importer-specific assessment rates for two respondents, Sucocítrico Cutrale S.A. ("Cutrale") and Fischer S.A. Comércio, Indústria e Agricultura ("Fischer") in the First and Second Administrative Reviews.[4] In addition, Brazil challenges the USDOC's alleged "continued use of zeroing" as "ongoing conduct" in successive anti-dumping proceedings, including in the original investigation resulting in the imposition of the anti-dumping duty order on certain orange juice products from Brazil[5], and each of the first three administrative reviews related to that order.[6]

2.2 Brazil alleges two types of "zeroing" in this dispute, which it describes as constituting different aspects of the same methodology: "model zeroing" and "simple zeroing". According to Brazil, "model zeroing" involves a number of steps: First, the product under consideration is sub-divided into a series of "averaging groups" or "models", and an annual weighted-average normal value and export price is calculated for the transactions falling within each group or model. A

[4] Final Results of the First Administrative Review, 11 August 2008, 73 Fed. Reg. 46584. Exhibit BRA-21 ("First Administrative Review"); and Final Results of the Second Administrative Review, 11 August 2009, 74 Fed. Reg. 40167. Exhibit BRA-22 ("Second Administrative Review").

[5] Anti-Dumping Duty Order: Certain Orange Juice from Brazil, 9 March 2006, 71 Fed. Reg. 12183 ("Anti-Dumping Duty Order"). Exhibit BRA-3.

[6] First Administrative Review; Second Administrative Review; and Final Results of the Third Administrative Review, 18 August 2010, 75 Fed. Reg. 50999. Exhibit BRA-49.

comparison is then made between the annual weighted-average price of all export transactions and the annual weighted-average price of all domestic market transactions in the same group or model. Next, the multiple comparison results are aggregated and divided by the total value of all comparable export transactions for all groups or models to arrive at a weighted-average margin of dumping. In summing the comparison results by group or model, positive differences (i.e., where the weighted average price of export transactions is less than the weighted-average normal value of the model or group) are added to determine the total amount of dumping, but all comparison results showing negative results are disregarded or given a value of zero in the aggregation exercise. This practice of disregarding or counting as zero the negative results of weighted-average normal value to weighted-average export price comparisons ("W-W") is what Brazil describes as "model zeroing". Brazil notes that the USDOC ceased to apply "model zeroing" in February 2007[7], after the results of the original investigation into exports of orange juice products from Brazil were issued.

2.3 Brazil describes "simple zeroing" as very similar to "model zeroing", with the key difference stemming from the fact that the latter takes place when using the W-W comparison methodology, whereas the former arises when comparing the weighted-average normal value by model or group to the price of individual export transactions ("W-T"). As with W-W comparisons, results of W-T comparisons are aggregated and divided by the total value of all comparable export transactions to arrive at a weighted average margin of dumping. Again, in making this calculation, only the positive comparison results are aggregated, with all negative results (i.e., where the export price is higher than weighted average normal value) disregarded or given a value of zero. This practice of disregarding or counting as zero the negative comparison results when using the W-T comparison methodology is what Brazil describes as "simple zeroing".

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. BRAZIL

3.1 Brazil requests that the Panel find:

(i) the United States' two administrative reviews concerning imports of certain orange juice from Brazil inconsistent with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 due to the above-mentioned alleged use of "zeroing"; and

(ii) the continued use by the United States of "zeroing" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil, including the original investigation and subsequent administrative reviews, by which duties are applied and maintained over a period of time, inconsistent with Articles 2.4, 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

3.2 Pursuant to Article 19.1 of the DSU, Brazil requests that the Panel recommend that the United States bring its measures, found to be inconsistent with the AD Agreement and the GATT 1994, into conformity with its obligations under the covered agreements.

[7] In particular, Brazil explains that on "December 27, 2006, the USDOC published a notice in the Federal Register announcing that it would no longer make W-to-W comparisons in investigations without providing offsets for non-dumped comparisons (71 Fed. Reg. 77722). The effective date of entry into force of this modification was February 22, 2007 (72 Fed. Reg. 3783)". Brazil, First Written Submission ("FWS"), footnote 31, citing Exhibits BRA-10 and BRA-11.

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B. THE UNITED STATES

3.3 The United States asks the Panel to reject the entirety of Brazil's claims concerning the First and Second Administrative Reviews as well as Brazil's claim regarding the alleged "continued use" of "zeroing". The United States also asks the Panel to make two preliminary rulings concerning Brazil's claims with respect to the Second Administrative Review and the alleged "continued use" of "zeroing" in the orange juice anti-dumping proceedings.[8]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions, oral statements to the Panel and their answers to questions. Executive summaries of the parties' written submissions, and where provided oral statements[9], are attached to this Report as annexes (see List of Annexes, pages iv and v).[10]

V. ARGUMENTS OF THE THIRD PARTIES

5.1 Argentina; the European Union; Japan; Korea; Mexico; Chinese Taipei; and Thailand reserved their rights to participate in the Panel proceedings as third parties. Thailand and Chinese Taipei did not submit third party written submissions; and Argentina, Mexico, Chinese Taipei and Thailand did not submit third party oral statements. The arguments of Argentina and Mexico are set out in their written submissions and answers to questions, and the arguments of the European Union, Japan and Korea are set out in their written submissions, oral statements and their answers to questions. Third parties' written submissions and oral statements, or executive summaries thereof, are attached to this Report as annexes (see List of Annexes, pages iv and v).

VI. INTERIM REVIEW

6.1 On 20 December 2010, we submitted our Interim Report to the parties. On 12 January 2011, Brazil and the United States submitted written requests for review of precise aspects of the Interim Report. On 7 February 2011, Brazil and the United States submitted written comments on each other's requests for interim review. Neither party requested an additional meeting with the Panel.

6.2 Due to changes as a result of the interim review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the paragraph and footnote numbers in the Interim Report. Where we have made changes, a reference to the corresponding paragraph or footnote number in the Final Report is included in parentheses for ease of reference. In addition to the modifications mentioned below, we have corrected a number of typographical and other non-substantive errors throughout the report.

A. REVIEW REQUESTED BY BRAZIL

6.3 Brazil requests review of paragraphs 7.25, 7.51-7.54, 7.65, 7.69, 7.72, 7.73, 7.77-7.81, 7.86, 7.115, 7.119, 7.125-7.127, 7.135, 7.136, 7.174, 7.180-7.182, 7.185 and 8.1, and footnotes 119-121, 124, 125, 135, 229, 271, 275-278. In addition, Brazil asks for the insertion a new paragraph after paragraph 7.86.

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[8] United States, First Written Submission ("FWS"), paras. 37-52.

[9] The parties' closing oral statements from the first substantive meeting with the Panel are attached in full.

[10] In accordance with the Working Procedures, executive summaries of the parties' answers to the Panel's questions were not provided. The arguments made in the parties' answers are therefore not reflected in the annexes to this Report.

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6.4 In the absence of any objections from the United States, we have decided to accept the changes requested to paragraphs 7.25, 7.53 (paragraph 7.59 in the Final Report), 7.54 (7.60), 7.65 (7.71), 7.69 (7.75), 7.72 (7.78), 7.73 (7.79), 7.78 (7.84), 7.79 (7.85), 7.80 (7.86), 7.81 (7.87), 7.86 (7.92), 7.115 (7.122), 7.119 (7.126), 7.125 (7.132), 7.127 (7.134), 7.135 (7.142), 7.136 (7.143), 7.174 (7.181), 7.180 (7.187), 7.181 (7.188), 7.182 (7.189), 7.185 (7.192), 8.1 and footnotes 119-121 (127-129), 124 (132), 125 (133), 219 (229), 229 (241), 271 (284), 277 (290) and 278 (291), albeit not always on the exact terms proposed by Brazil. For the reasons explained below, we have also agreed to inserting a new paragraph after paragraph 7.86 (7.92), and to modify the language used in paragraphs 7.126, 7.127 and 8.1. However, we have declined Brazil's requests to amend paragraphs 7.51, 7.52 and 7.77.

Paragraphs 7.51 and 7.52

6.5 Brazil considers that paragraphs 7.51 and 7.52 of the Interim Report failed to accurately convey its arguments concerning the impact of "zeroing" in response to what it characterizes as the United States submission that, in certain of the instances challenged by Brazil, the USDOC's recourse to "zeroing" had no impact, and therefore did not violate Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Brazil recalls that it had argued that the United States' use of "zeroing" under the orange juice anti-dumping duty order had three impacts: First, it resulted in the exclusion of a large number of negative comparison results from the determination of the margin; second, it resulted in the determination of positive margins of dumping higher than would have been the case without the use of "zeroing"; and third, it resulted in the determination of cash deposit rates ("CDRs") and importer-specific assessment rates ("ISARs") that were above *de minimis* levels. Brazil argues that paragraphs 7.51 and 7.52 failed to convey the first two arguments and did not convey accurately the gist of Brazil's third argument. Thus, Brazil requests that these paragraphs be modified to ensure that they set out a more complete and accurate description of Brazil's arguments. The United States did not comment on Brazil's request.

6.6 We note that the section of the Interim Report Brazil refers to sets out Brazil's arguments in support of its claim that "simple zeroing" in the First and Second Administrative Reviews was inconsistent with Article 9.3 of the AD Agreement and Article VI:1 of the GATT 1994. Brazil presented essentially two lines of argument in support of this claim: First, that the use of "simple zerong" irrespective of its impact on the amount of anti-dumping duty collected is inconsistent with these provisions; and second, that even if "simple zeroing" were required to impact the amount of anti-dumping duty collected in order to violate these provisions (which is what is argued by the United States), the facts of the First and Second Administraive Reviews confirm that there was such an impact for both respondents. Paragraphs 7.51 and 7.52 sought to describe this latter argument, that is, what Brazil considered to be the impact of "simple zeroing" on the amount of anti-dumping duty collected that caused the United States to be in breach of its obligations under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

6.7 While it is true that Brazil identified the three impacts of "simple zeroing" described above, it did not claim that all three impacts resulted in a violation of Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, which is the focus of paragraphs 7.51 and 7.52. Therefore, we see no need to include Brazil's additional arguments in the relevant paragraphs, and consequently decline Brazil's request.

Paragraph 7.77

6.8 Brazil notes that the description of United States Administrative Reviews found in paragraph 7.77 of the Interim Report characterized a cash deposit as "an estimate of an importer's final amount of anti-dumping duty". Brazil recalls, however, that the parties disagree on the legal characterization of cash deposits as a matter of WTO law, and that the Panel has not ruled on the

matter. Thus, Brazil suggests that the Panel reformulate its characterization by noting that a CDR is determined by reference to each exporter's margin of dumping, and that the description of a cash deposit as an estimate of future liability, reflects the position of the United States. The United States disagrees with Brazil's proposed revision, arguing that the Interim Report text reflects more clearly and accurately the way in which the United States sets cash deposits.

6.9 Brazil's requested modification suggests that it is of the view that by describing a cash deposit as "an estimate of an importer's final amount of anti-dumping duty liability", the Panel has effectively prejudged one of the matters in dispute, namely, the question whether cash deposits amount to anti-dumping duties or whether they are securities. However, in our view, the mere description of cash deposits as "an estimate of an importer's final amount of anti-dumping duty liability" does not express any view or conclusion on whether that "estimate" amounts to a duty or a security. Indeed, the very sentence Brazil focuses upon in paragraph 7.77 makes clear that it is the United States that considers cash deposits to represent a "security", not the Panel. Thus, we consider the proposed modification to be unnecessary and therefore decline Brazil's request.

Paragraph 7.86

6.10 Brazil considers that paragraph 7.86 does not fully reflect the contextual arguments it made regarding the correct interpretation of the concept of "dumping". In order to do so, Brazil proposes specific text for an additional paragraph it suggests could be inserted after paragraph 7.86. The United States does not agree with Brazil's proposed insertion as written, stating that it does not make clear that the suggested language reflects only Brazil's view of the interpretation of "dumping". The United States therefore asks the Panel to revise Brazil's proposed text to make clear that the proposed statements are Brazil's assertions. We have decided to accept Brazil's requested modification to paragraph 7.86 (7.92), but slightly edited it to address the United States' concern.

Paragraphs 7.126, 7.127 and 8.1

6.11 Brazil finds certain views expressed by the Panel in paragraphs 7.126, 7.127 and 8.1 of the Interim Report on the impact of "zeroing" disputes on the WTO dispute settlement system unnacceptable. According to Brazil, these views: "call into question the wisdom" of Brazil and other Members in bringing "zeroing" disputes; extend beyond the Panel's mandate; and do not serve to advance the interests of the dispute settlement system. Thus, Brazil requests the Panel to delete certain portions of these paragraphs and suggests revisions to this effect.

6.12 The United States considers that there is no basis to accept Brazil's request. The United States recalls that Article 11.7 of the DSU provides that "the report of the panel shall set out ... the basic rationale behind any findings and recommendations that it makes", and notes that the passages at issue explain why the Panel concludes as a legal matter that "dumping" cannot have a transaction-specific meaning. The United States argues that Brazil's disagreement with some elements of the Panel's reasoning provides no basis for its deletion. To the contrary, according to the United States, the language challenged by Brazil is part of the Panel's discussion of the systemic issues related to the Panel's conclusions, and therefore should not be deleted.

6.13 We note that the passages of text that Brazil objects to were not intended, as Brazil puts it, to "question the wisdom" of Members in bringing "zeroing" disputes. We fully recognize that Members are entitled to bring challenges where they believe that their rights under the WTO Agreement have been nullified or impaired. The relevant passages were simply intended to draw attention to the continuing difficulties of interpretation arising in respect of this issue, which we believe reflect the lack of clarity in how the AD Agreement defines "dumping". The views expressed in the Interim Report that Brazil takes issue with were intended to highlight this interpretative problem, its effects and potential consequences. In the light of the parties' comments, we have decided to revise the

relevant passages of paragraphs 7.126 (7.133), 7.127 (7.134) and 8.1 in order to avoid any misunderstanding.

B. REVIEW REQUESTED BY THE UNITED STATES

6.14 The United States requests review of paragraphs 2.1, 7.3, 7.12-7.14, 7.22, 7.25, 7.26, 7.28, 7.38, 7.58, 7.63, 7.66, 7.74, 7.80, 7.86, 7.87, 7.102, 7.106, 7.184, 7.185 and footnotes 126 and 147.

6.15 In the absence of any objections from Brazil, we have decided to accept the United States' requests to make changes to paragraphs 2.1, 7.3, 7.12-7.14, 7.22, 7.25, 7.58 (7.64), 7.63 (7.69), 7.66 (7.72), 7.74 (7.80), 7.86 (7.92), 7.87 (7.94), 7.102 (7.109), and footnote 147 (155), albeit not always on the exact terms proposed by the United States. In addition, for the reasons expressed below, we have decided to accept the modifications the United States requests to paragraphs 7.26, 7.28, 7.81 (7.87) and 7.106 (7.113) and, in part, the change requested to paragraph 7.80 (7.86). However, we have declined the United States request concerning paragraphs 7.184 (7.191) and 7.185 (7.192), but have decided to modify the language used in these paragraphs in order to avoid confusion and to clarify our conclusions.

Paragraphs 7.26 and 7.28

6.16 The United States argues that the Panel's findings in the Interim Report concerning its request for a preliminary ruling in respect of Brazil's challenge to the "continued zeroing" measure addressed only two of the three arguments it made in support of its request. In particular, the United States notes that the Panel's ruling did not take into account its argument that "continued zeroing" should not fall within the Panel's terms of reference because of Article 17.4 of the AD Agreement. The United States asks the Panel to reflect this argument in the Final Report and, in addition, calls upon the Panel to evaluate its merits as a separate jurisdictional basis for finding the alleged "continued zeroing" measure outside of its terms of reference.

6.17 Brazil suggests two edits to the changes sought by the United States to paragraphs 7.26 and 7.28 in order to reflect the fact that the particular argument the United States now asks the Panel to refer to was made for the first time in its Opening Statement at the Panel's First Substantive Meeting. In addition, in the light of the United States' request, Brazil asks the Panel to insert one additional paragraph into the Final Report in order to capture an argument it advanced in response to the United States. Brazil objects to the United States' request to have the Panel evaluate the merits of the argument it made concerning Article 17.4 of the AD Agreement, recalling that Panels are not specifically required to address all of the arguments advanced by parties. In any case, Brazil considers that the United States' argument should be rejected on its substance.

6.18 We have decided to decline Brazil's suggested modifications to paragraphs 7.26 and 7.28, but have accepted its request to refer to the additional argument it made in response to the United States' request for a preliminary ruling. Paragraph 7.30 has been modified accordingly. We have also accepted the United States' request to describe the argument it advanced in respect of Article 17.4 of the AD Agreement in paragraphs 7.26 and 7.28, and have evaluated its merits in our findings at paragraphs 7.43-7.49 of the Final Report.

Paragraph 7.80

6.19 The United States submits that paragraph 7.80 inaccurately describes its position with regard to the margin of dumping for Fischer in the Second Administrative Review. The United States does not agree that the bracketed number referred to in this paragraph is a weighted-average margin ("WAM") for Fischer, and explains that the USDOC publishes exporters' WAMs in the Federal Register. The United States argues that the computer programme output from which the bracketed

number is drawn is not the same as the official final WAM published in the Federal Register. The United States asks the Panel to modify the langauge in the penultimate sentence and delete the entirety of the last sentence of paragraph 7.80 in order to clarify this distinction. Brazil objects to the United States' request to delete the last sentence, arguing that it cannot be justified.

6.20 We note that the last sentence of paragraph 7.80 was not intended to be understood to suggest that the United States believes that Fischer's *official* WAM, published in the Federal Register, was the same as the output from the computer programme run by the USDOC. Rather, the last sentence was intended to convey the fact that the United States does not contest that the WAM published in the Federal Register for Fischer was 0%, precisely because a WAM of [[XX]] was determined for Fischer through the computer programme. Thus, we do not consider the changes the United States has requested to this paragraph to be necessary. Nevertheless, we have redrafted the last sentence of paragraph 7.80 (7.86) in order to avoid any misunderstanding.

Paragraph 7.81

6.21 The United States suggests that footnote 126, which appears in paragraph 7.81, be revised to reflect the fact that all transactions, including transactions where export price was not below normal value, were taken into account in the denominator of the calculation of Fischer's ISAR in the Second Administrative Review. To this end, the United States proposes that certain specific textual changes be made to the footnote. Brazil objects to the United States' proposed modification, arguing that it is premised on a definition of "dumping" that is disputed between the parties and rejected by the Panel. Brazil advances its own textual modifications to footnote 126, which it considers would address the United States' concern while avoiding any confusion about the correct interpretation of the notion of "dumping".

6.22 Footnote 126 explains and refers to evidence of the United States' use of "simple zeroing" in the calculation of Fischer's ISAR in the Second Administrative Review. The description of how the United States determined this ISAR is consistent with how the "simple zeroing" methodology is described elsewhere in the Report (e.g. paragraph 7.79). In our view, it does not prejudge our views on the correct interpretation of the definition of "dumping". Thus, we fail to see the problem that Brazil raises with the language proposed by the United States and therefore accept the United States requested modifications to this footnote.

Paragraph 7.106

6.23 The United States considers that paragraph 7.106 contains an incomplete summary of its position regarding what it asserts is Brazil's use of "zeroing" under its prospective normal value system. In particular, whereas the Interim Report indicated that the United States had pointed to only "one particular instance" of Brazil's alleged recourse to "zeroing" when collecting duties on the basis of a prospective normal value, the United States recalls that it had in fact identified the collection of duties by Brazil in this manner with respect to products from "at least seven countries". The United States asks that this submission be fully reflected in the Final Report. Brazil objects to the United States' request, stating that the United States' allegations are factually wrong. According to Brazil, and contrary to the United States' assertions, the Brazilian investigating authority did not treat the amount of duties imposed in relation to a single entry as a margin of dumping in the instances identified by the United States. Rather, Brazil argues that the relevant exhibits show that the amount of duties was capped at the level of a margin of dumping previously established.

6.24 We note that the relevant passage at issue in paragraph 7.106 does not represent a factual finding on our part, but merely a description of an assertion made by the United States concerning how Brazil has allegedly collected anti-dumping duties in a number of cases. To this extent, we have decided to grant the United States' request and have consequently modified the language of this

paragraph in order to fully reflect the United States' factual assertions. Although Brazil did not immediately respond to the United States' assertions when they were made during the Second Substantive Meeting of the Panel with the parties, we have decided to reflect the position it has now communicated with respect to the United States' allegations in the Final Report. We have modified footnote 177 (187) for this purpose.

Paragraph 7.184 and 7.185

6.25 The United States considers that the inferences drawn in paragraphs 7.184 and 7.185 from the Issues and Decision Memoranda Brazil submitted to substantiate its claim in respect of "continued zeroing" are inherently speculative. According to the United States, it is "incorrect" to read these Decision Memoranda as stating what approach the USDOC would take in a future proceeding because they pertain to the particular determinations at issue. In this regard, the United States also notes that in *US – Continued Zeroing*, the Appellate Body did not take a position as to what the USDOC would do in the future, relying only on what had been done to date. Thus, the United States requests the deletion of the relevant statements from paragraphs 7.184 and 7.185.

6.26 Brazil objects to the United States' request on two grounds. First, Brazil considers that the United States is, in essence, stating that the Panel's factual findings concerning the Issues and Decision Memoranda are "incorrect" on the ground that it disagrees with the Panel's assessment. Brazil recalls, however, that it is a Panel's task to examine and weigh evidence as the trier of facts in WTO dispute settlement. Thus, the fact that the United States disagrees with the Panel's assessment does not render it "incorrect". Secondly, Brazil considers that the Panel correctly concluded that the Issues and Decision Memoranda support Brazil's claims concerning "continued zeroing", submitting that in the absence of any change to the United States' "zeroing" policy, the Memoranda show that the use of "zeroing" is part of the USDOC's calculation methodology.

6.27 We note that the statements in paragraphs 7.184 and 7.185 that are the focus of the United States' request do not conclude that the USDOC will continue to use the "zerong procedures" in future administrative reviews under the orange juice anti-dumping duty order. Rather, the statements indicate only that the Issues and Decision Memoranda "strongly suggest" or "leave little doubt" that this would be the case. Moreover, we do not agree with the United States view that the Appellate Body in *US – Continued Zeroing* did not take a position on whether the USDOC would continue to use the "zeroing procedures" in the administrative reviews at issue in that dispute. On the contrary, the Appellate Body expressly concluded in that dispute that the evidence before it provided a sufficient basis to find that "the zeroing methodology would likely continue to be applied in successive proceedings".[11] Thus, we see no reason to delete the relevant statements made in paragraphs 7.184 and 7.185, and therefore decline the United States' request. Nevertheless, we have decided to amend the language in these paragraphs in order to clarify that the Panel's evaluation of the contents of the Issues and Decision Memoranda reflects an assessment of the intention held by the USDOC at the time those documents were published. A modification to this end has been made in the Final Report at paragraphs 7.191 and 7.192.

[11] Appellate Body Report, *US – Continued Zeroing*, para. 191 (emphasis added).

BCI deleted, as indicated [[XX]]

VII. FINDINGS

A. UNITED STATES' REQUESTS FOR PRELIMINARY RULINGS

1. Second Administrative Review

(a) Arguments of the United States

7.1 The United States asserts that Brazil's request for the establishment of a panel ("panel request"), which it submits defines this Panel's terms of reference, identified the "2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')" as one of the measures at issue. However, the United States points out that the final results in Second Administrative Review were issued on 11 August 2009, well after the date of Brazil's request for consultations, dated 27 May 2009. Thus, according to the United States, the measure that Brazil challenges in its panel request did not exist at the time of its consultations request, and therefore could not have been subject to consultations.[12]

7.2 The United States recognizes that the preliminary results of the Second Administrative Review had been issued by the time of Brazil's request for consultations. However, the United States explains that preliminary results are not final, and their publication simply affords interested parties an opportunity to provide comments, which the United States Department of Commerce ("USDOC") considers before making a final determination. The United States submits that prior to the issuance of the final results of the Second Administrative Review, it was entirely possible that no definitive duties would have been levied at all. The United States asserts that this is exactly what happened for one of the two respondents (Fischer) in the Second Administrative Review.[13]

7.3 The United States recalls that a panel's terms of reference are determined by the complaining party's panel request, and that pursuant to Article 4.7 of the DSU, a complaining party may request establishment of a panel only if "consultations fail to settle a dispute".[14] The United States argues that Articles 17.3 through 17.5 of the AD Agreement contain requirements that parallel those of the DSU, and the AD Agreement clarifies further the relationship between consultations and panel requests under that Agreement. The United States notes that Article 17.4 provides that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreed solution, and final action by the administering authorities to levy definitive antidumping duties or accept price undertakings. The United States submits further that, in *Guatemala – Cement*, the Appellate Body found that the term "matter" has the same meaning in Article 17.3, relating to the request for consultations, and in Articles 17.4 and 17.5, relating to the referral of a matter to the DSB and the request for the establishment of a panel. Thus, the United States submits that a Member may only file a panel request with respect to a measure upon which the consultations process has run its course; and the United States considers that no such consultations were held in respect of the "2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')". In this light, the United States asks the Panel to make a preliminary ruling that Brazil's claims against this measure are outside of its terms of reference.

(b) Arguments of Brazil

7.4 Brazil notes that although Article 6.2 of the DSU requires that consultations be held between parties in dispute, it does not require that the measures identified in the panel request be identical to the measures identified in the consultations request. Brazil recalls that the Appellate Body has on

[12] United States, FWS, paras. 37, 46 and 48.
[13] US, FWS, para. 47.
[14] US, FWS, para. 39.

several occasions explained that "Articles 4 and 6 of the DSU [do not] ... require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[15] Rather, Brazil argues that panels and the Appellate Body have consistently held that a panel's terms of reference may include a measure properly identified in the panel request, even if that measure was not included in the consultations request, provided that doing so does not change the "essence" of the dispute.[16]

7.5 Brazil submits that its consultations and panel requests both identified the Second Administrative Review, which was ongoing when the consultations request was filed.[17] According to Brazil, the consultations request also included a reference to "any on-going or future antidumping administrative reviews ... related to the imports of certain orange juice from Brazil (case no. A-351-840)", as well as the "continued use of zeroing procedures" by the United States in successive anti-dumping proceedings under the orange juice anti-dumping duty order. Thus, Brazil argues that the relevant measures were identified with sufficient clarity for the United States to comprehend that the Second Administrative Review was part of the dispute.

7.6 Brazil also submits that the Second Administrative Review has very close substantive connections to, and the same essence as, the First Administrative Review. Brazil explains that the Second Administrative Review followed the First Administrative Review adopted under the same anti-dumping duty order. The Second Administrative Review also involved the same type of determinations as the First Administrative Review, made by the same United States administering authority, concerning the same products, the same exporters, and the same exporting country. Brazil also highlights that the First and Second Administrative Reviews provide succeeding bases for the continued imposition of anti-dumping duties under the orange juice anti-dumping duty order. Brazil submits that these connections are confirmed by the fact that, under the USDOC's Regulations, all administrative (and other) reviews occurring under a single order are mere "segments" of a single "proceeding" that continues until revocation.[18]

7.7 Finally, Brazil argues that, if the Second Administrative Review were excluded from the panel's terms of reference, it would be difficult, if not impossible, to pursue WTO dispute settlement with respect to United States' administrative reviews. Because the United States conducts

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[15] Brazil, Comments on US Preliminary Rulings Request ("Brazil, Preliminary Rulings"), para. 7, referring to Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 132. *See also, e.g.*, Panel Report, *United States – Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing*"), WT/DS350/R, adopted 19 February 2009, as modified by Appellate Body Report WT/DS350/AB/R, para. 7.23; Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing*"), WT/DS350/AB/R, adopted 19 February 2009, para. 222; and Appellate Body Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3, para. 285.

[16] Brazil, Preliminary Rulings, paras. 9-22, referring *inter alia* to Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/R, adopted 20 August 1999, as upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443, para. 9.14; Appellate Body Report, *Brazil – Aircraft*, para. 132; Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*"), WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473), para. 139; Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("*Dominican Republic – Import and Sale of Cigarettes*"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425, para. 7.21; Appellate Body Report, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts* ("*EC – Chicken Cuts*"), WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157, para. 157; Appellate Body Report, *US – Continued Zeroing*, in particular paras. 222 and 228.

[17] Brazil, Preliminary Rulings, paras. 3-4 and 23.

[18] Brazil, Preliminary Rulings, para. 25, referring to 19 C.F.R. § 351.102. Exhibit BRA-44.

administrative reviews on an annual basis, Brazil argues that if a complainant were required to file a new consultations request for every administrative review, WTO dispute settlement would become a "moving target", and the recommendations and rulings of the DSB could not address the latest measure. According to Brazil, this would needlessly prevent the prompt settlement of disputes.[19]

7.8 Thus, Brazil asks the Panel to reject the United States' request for the exclusion of the Second Administrative Review from its terms of reference, and instead find that it properly falls within the scope of this dispute.

(c) Arguments of the Third Parties

(i) European Union

7.9 The European Union considers that Brazil's consultations and panel requests adequately identified the Second Administrative Review as one of the challenged measures.[20] Moreover, the European Union argues that since the Second Administrative Review is part of the "continued zeroing" measure, which the European Union considers is within the panel's terms of reference, the fact that the final results were published only after consultations were held is irrelevant.[21] Thus, the European Union urges the Panel to reject the United States' request for preliminary ruling.

(ii) Japan

7.10 Japan recalls that the Appellate Body has found that Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[22] Moreover, Japan also notes that the Appellate Body has held that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them"[23]; and that Articles 4 and 6 do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[24] Rather, "[a]s long as the complaining party does not expand the scope of the dispute", the Appellate Body has said it would "hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request".[25]

7.11 Japan notes that the Second Administrative Review was subject to consultations and is included in the Panel's terms of reference. Japan recognizes that the final results of the Second Administrative Review had not been issued at the time of Brazil's request for consultations. However, it asserts that the Review had been initiated and a final result was expected to be issued within a certain period. Japan observes that Brazil's panel request mentioned the date and contents of the final result of the Second Administrative Review. Thus, Japan argues that, in the light of the description in the request for consultations, Brazil's consultations provided the parties with an opportunity to define and delimit the scope of the dispute between them. After reviewing Brazil's consultations request and

[19] Brazil, Preliminary Rulings, para. 27.
[20] EU, Third Party Written Submission ("TPWS"), para. 5.
[21] EU, TPWS, para. 8.
[22] Appellate Body Report, *Brazil – Aircraft*, para. 131.
[23] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 54.
[24] Appellate Body, *Brazil – Aircraft*, para. 132 (Emphasis original).
[25] Appellate Body Report, *US – Upland Cotton*, para. 293.

panel request, Japan concludes that it is sure that Brazil's panel request has not broadened the scope of the dispute. Thus, Japan submits that the Panel should dismiss the United States' request.[26]

(iii) Korea

7.12 Korea submits that there is no basis to support the United States' request for a preliminary ruling because a combined reading of Articles 17.3 and 17.4 of the AD Agreement indicate that consultations may be requested before "final action" is taken by the administering authorities, while the establishment of a panel may not be requested until after that "final action" has occurred. In particular, Korea notes that Article 17.3 of the AD Agreement, which authorizes WTO Members to request consultations, does not contain any language that might be read to suggest that a Member must wait to request consultations until a final determination has been issued. By contrast, the first sentence of Article 17.4, which authorizes WTO Members to refer matters to the DSB for establishment of a panel, does specifically require complaining Members to wait until (1) consultations under Article 17.3 "have failed to achieve a mutually agreed solution", *and* (2) "final action has been taken by the administering authorities of the importing Member to levy anti-dumping duties ….". Korea argues that if the administrative authorities have not yet taken "final action", the matter may not be referred to the DSB for establishment of a panel (except to the extent permitted by the second sentence of Article 17.4, concerning panel review of "provisional measures").

7.13 According to Korea, the clear implication of this combined reading of the two provisions is that consultations may be requested before "final action has been taken by the administering authorities". Korea submits that if this were not the case, there would be no need to include a requirement of "final action" in the first sentence of Article 17.4. If consultations could be requested only after "final action" by the administering authorities, Korea argues that the provisions of the first sentence of Article 17.4 requiring that consultations be held (and "have failed") would embody a requirement of "final action" as well. Under such an interpretation, Korea considers that the language requiring "final action" in the first sentence of Article 17.4 would be redundant.

7.14 Thus, Korea argues that, consistent with the principle of effective treaty interpretation, Article 17.3 of the AD Agreement must be read to allow for the possibility of holding consultations on measures before "final action" has been taken. Accordingly, Korea asks the Panel to reject the United States' request for a preliminary ruling.[27]

(iv) Mexico

7.15 Mexico considers that the United States' arguments for seeking the exclusion from the Panel's terms of reference of Brazil claims against the Second Administrative Review are factually incorrect and misstate the role of consultations in defining the Panel's terms of reference. Mexico asserts that, as a factual matter, Brazil did specifically seek consultations, and in fact did consult with the United States, in respect of the Second Administrative Review. Moreover, Mexico argues that Brazil was not required to request consultations precisely with respect to the Second Administrative Review in order to properly include it in its panel request, recalling that neither Articles 4 and 6 of the DSU "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[28] Thus, according to Mexico, as long as Brazil made clear that it was challenging the application of zeroing in recent and ongoing administrative reviews, sufficient notice was provided to the United States, and the Second Administrative Review could properly be challenged in the panel

[26] Japan, Third Party Written Submission ("TPWS"), paras. 13-17.
[27] Korea, Third Party Written Submission ("TPWS"), paras. 8-10.
[28] Mexico, Third Party Written Submission ("TPWS"), para. 15, quoting from Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis original).

request as a measure subject to the Panel's terms of reference. In this regard, Mexico recalls that the panel was confronted with, and dismissed, a similar request for a preliminary ruling in *US – Continued Zeroing*. Mexico invites the Panel to do the same in the present dispute.[29]

(d) Evaluation by the Panel

7.16 In general, a panel's terms of reference are found in the panel request[30], where pursuant to Article 6.2 of the DSU, a complaining Member must "indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The United States' request for a preliminary ruling concerning Brazil's complaint against the Second Administrative Review does not take issue with whether the measure being challenged, or the claims being made, are properly described in the Panel's terms of reference. Rather, the United States asks that we rule that Brazil's claims are outside of the terms of reference of this dispute because it alleges that the *final results* of the "2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')" did not exist at the time of Brazil's consultations request, and therefore they could not have been the subject of consultations.

7.17 It is well established that in order to bring a matter before a WTO dispute settlement panel, a Member must first make a request for consultations and consultations must take place in respect of that matter. In *Brazil – Aircraft*, the Appellate Body observed that:

> "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[31]

Article 4.4 of the DSU prescribes that a consultations request must "be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint". Moreover, for the purpose of dispute settlement, the scope of consultations are defined by what is expressed in the consultations request (and not by any record of what was actually discussed).[32] A Member cannot, therefore, challenge a measure in panel proceedings unless it has been identified in its request for consultations. However, it is not necessary for there to be "a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel" in order for the latter to properly fall within a panel's terms of reference.[33] In this regard, the Appellate Body in *US – Upland Cotton* explained that:

> "As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the DSU, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise."[34]

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[29] Mexico, TPWS, paras. 11-20.
[30] Article 7.1 DSU.
[31] Appellate Body Report, *Brazil – Aircraft*, para. 131. A parallel process is envisaged under Articles 17.3 to 17.5 of the AD Agreement. See Appellate Body Report, *Guatemala – Cement I*, paras. 57-80.
[32] Appellate Body Report, *US – Upland Cotton*, paras. 286-287.
[33] Appellate Body Report, *Brazil – Aircraft*, para. 132.
[34] Appellate Body Report, *US – Upland Cotton*, para. 293 (footnotes omitted).

BCI deleted, as indicated [[XX]]

7.18 Thus, in evaluating the merits of the United States' request for a preliminary ruling, we see the main question to be resolved to be whether Brazil's reference to the *final results* of Second Administrative Review in its panel request has expanded the scope of the dispute beyond the contours of what the United States could have reasonably understood from Brazil's request for consultations. We start by reviewing Brazil's request for consultations.

7.19 Brazil's request for consultations is constituted by two documents: an original request for consultations and an addendum. Brazil's original request is dated 27 November 2008 (circulated on 1 December 2008). This request identified the First Administrative Review under the orange juice anti-dumping duty order and "any on-going or future antidumping administrative reviews, and the final results thereof, related to the imports of certain orange juice from Brazil (case no. A-351-840)" as the USDOC "determinations" raising concern.[35] As regards the First Administrative Review, the original consultations request reveals that Brazil took issue with the USDOC's alleged application of "zeroing".

7.20 The addendum to Brazil's original request for consultations is dated 22 May 2009 (circulated on 27 May 2009). This document states that Brazil and the United States held consultations on 16 January 2009 covering the First and Second Administrative Reviews "pursuant to the original request for consultations, which included among others: the First Administrative Review ... and, any on-going or future antidumping administrative reviews" under the orange juice anti-dumping duty order.[36] In other words, although not expressly mentioned in Brazil's original request for consultations, the Second Administrative Review appears to have been discussed during the 16 January 2009 consultations between the two parties. In this regard, we note that the Second Administrative Review was in progress at the time of the January 2009 consultations, with preliminary results being issued on 6 April 2009.[37] Reflecting this state of affairs, the addendum to Brazil's original consultations request explicitly identified the Second Administrative Review as one of the measures Brazil wished to consult about with the United States.[38]

7.21 Brazil's request for establishment of a panel is dated 20 August 2009 (circulated 21 August 2009). This document recalls that by virtue of the addendum to its original request for consultations, Brazil had requested further consultations with the United States concerning "the use of 'zeroing' in the anti-dumping duty investigation and in the second administrative review related to case No A-351-840 ...".[39] The same document explains that a second round of consultations was held on 18 June 2009. It also identifies the *final results* of the Second Administrative Review, which had been issued on 11 August 2009[40], as one of the measures at issue in the following terms:

> "(c) The 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')
>
> This anti-dumping proceeding concerns the administrative review of anti-dumping duties on certain orange juice from Brazil (case No A-351-840) for the period 1 March 2007 through 29 February 2008. The final results of this

[35] Request for Consultations by Brazil, 1 December 2008, WT/DS382/1, p. 1

[36] Request for Consultations by Brazil (Addendum), 27 May 2009, WT/DS382/1/Add.1, p. 1

[37] Second Administrative Review, Final Results, Exhibit BRA-22.

[38] Request for Consultations by Brazil (Addendum), 27 May 2009, WT/DS382/1/Add.1, p. 2 ("The Antidumping Duty Administrative Review from 1 March 2007 to 29 February 2008 (the 'Second Administrative Review'), related to the imports of certain orange juice from Brazil (case n° A-351-840)").

[39] Request for the Establishment of a Panel by Brazil, 21 August 2009, p. 1.

[40] Second Administrative Review, Final Results, Exhibit BRA-22.

> Second Administrative Review were published in 74 Fed. Reg. 40167 on 11 August 2009. ..."[41]

7.22 In our view, Brazil's reference to the final results of the Second Administrative Review in its panel request does not expand the scope of the complaint presented in its request for consultations. Not only do Brazil's original consultations request and addendum respectively identify a concern with "any on-going or future antidumping administrative reviews, and the final results thereof, related to the imports of certain orange juice from Brazil (case no. A-351-840)" and the "Second Administrative Review", but it appears that the USDOC's conduct during the Second Administrative Review was discussed in both consultations that were actually held. While it is true that the *final results* of the Second Administrative Review were not yet issued at the time of those consultations, we do not consider this to mean that Brazil's focus on these results in its panel request expanded the scope of its complaint beyond what the United States could have reasonably understood the dispute to be about. On the contrary, we see the explicit reference to the final results of the Second Administrative Review as merely confirming the content of the complaint Brazil appears to have always been making.

7.23 In support of its objection to Brazil's inclusion of the final results of the Second Administrative Review in the panel request, the United States refers to *US – Certain EC Products* dispute. In that controversy, the European Communities sought to challenge two measures taken by the United States in retaliation to the EC's alleged failure to implement the recommendations and rulings of the DSB in the *EC – Bananas* dispute. The first measure, taken by the US Customs Service, imposed increased bonding requirements on imports of certain EC products, which subject to the decision of the arbitrator in the *EC – Bananas* dispute, could potentially result in the payment of additional duties of 100%. This measure was effective as of 3 March 1999, and was identified in both the consultations and panel requests. The second measure was adopted by the USTR and imposed 100% duties on some, but not all, of the designated products that were previously subject to the increased bonding requirements, in the light of the arbitrator's ruling in *EC – Bananas*. This second measure was adopted on 19 April 1999 and was identified only in the panel request. Thus, at the time of the consultations request, dated 4 March 1999, the second measure did not exist.

7.24 The panel and Appellate Body found that the 19 April 1999 measure was outside of the panel's terms of reference, not only because it did not exist at the time of consultations (and therefore could not have been subject to consultations), but also because they found it to be "legally distinct" from the 3 March 1999 measure. Among the factors considered by the Appellate Body to indicate that the two measures were "legally distinct" included the fact that the substance of the two measures was not entirely the same; that different legal bases and different United States government agencies were responsible for each measure; and the fact that the first measure was not in any way a prerequisite for the second measure.[42]

7.25 In our view, the circumstances surrounding the United States' request for a preliminary ruling in the present dispute are clearly different to the particular facts of *US – Certain EC Products*. For instance, as we have already noted, although the *final results* of the Second Administrative Review were not mentioned in Brazil's original consultations request and addendum, the *Second Administrative Review and its preliminary results* were in fact identified. The *final results* of the same Second Administrative Review are part of the same proceeding undertaken by the same United States' agency in relation to the same product. The final results of the Second Administrative Review represent the USDOC's final determination of the issues at stake in the Second Administrative Review under the orange juice anti-dumping duty order; issues which included those Brazil had identified in

[41] Request for the Establishment of a Panel by Brazil, 21 August 2009, p. 1.

[42] Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, paras. 74-77.

its original consultations request and addendum. It is also important to note that Brazil's claims in respect of the final results of the Second Administrative Review are identical to those raised in its original consultations request and addendum concerning the Second Administrative Review and its preliminary results. Thus, we cannot see how Brazil's focus on the *final results* of the Second Administrative Review in its panel request expands the scope of its complaint beyond what the United States could have reasonably understood through Brazil's consultations request. Indeed, as we have already observed, the explicit reference to the final results of the Second Administrative Review merely confirms the content of the complaint Brazil appears to have always been making. We therefore reject the United States request for a preliminary ruling and find that the final results of the Second Administrative Review fall within our terms of reference.

2. "Continued Zeroing"

(a) Arguments of the United States

7.26 The United States requests the Panel to make a preliminary ruling that Brazil's claims against the "continued use" of "zeroing" do not fall within its terms of reference because: (i) Brazil's panel request lacks specificity as regards the alleged measure; (ii) Brazil's challenge purports to include future measures that were not in existence at the time of the establishment of this Panel; and (iii) the alleged measure did not involve a final action to levy definitive anti-dumping duties or accept price undertakings as required by Article 17.4 of the AD Agreement.

7.27 The United States argues that Brazil's focus on "continued zeroing" is nothing more than a challenge to "an indeterminate number of potential measures". The United States recalls that in order to satisfy the requirements of Article 6.2, a panel request must identify the "specific" measures at issue. According to the United States, in challenging "continued zeroing" Brazil is speculating as to what may happen in the future, and such speculation is not an identification of a "specific" measure.[43]

7.28 Referring to previous terms of reference rulings by the panels in the *US – Upland Cotton* and *Indonesia – Autos* disputes, the United States also submits that future measures that are not yet in existence at the time of panel establishment are not within a panel's term of reference under the DSU. The United States asserts that the alleged "continued zeroing" measure is focused on "indeterminate future measures that did not exist at the time of Brazil's panel request (and may never exist)". The United States submits that such measures cannot be "impairing any benefits accruing to Brazil", within the meaning of Article 3.3 of the DSU, and therefore they cannot be within the Panel's terms of reference.[44] Furthermore, the United States argues that including "continued zeroing" within the Panel's terms of reference would be contrary to Article 17.4 of the AD Agreement because it would ignore the fact that, for any given importation, the imposition of anti-dumping duties is grounded in a specific final action, and no such final action has been taken in the case of "continued zeroing".

(b) Arguments of Brazil

7.29 Brazil recalls that the Appellate Body has observed that the specificity requirement in Article 6.2 of the DSU means that "the measures at issue must be identified *with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request*".[45] Brazil notes that in *US – Continued Zeroing*, the Appellate Body found that the European Communities had satisfied this standard when it identified a "specific measure" that the Appellate Body described as "the use of the zeroing methodology in successive proceedings, in each of the 18 [anti-dumping]

[43] US, FWS, para. 51.
[44] US, FWS, para. 52.
[45] Brazil, Preliminary Rulings, para. 33, quoting Appellate Body Report, *US – Continued Zeroing*, para. 168.

cases, by which the anti-dumping duties are maintained".[46] Brazil submits that the measure it has described in its panel request uses very similar language, noting that the only material difference between Brazil's description and the measure at issue in *US – Continued Zeroing* is that in Brazil's case, the measure addresses continued conduct under a different anti-dumping duty order from the orders implicated by the European Communities.[47] Indeed, given the Appellate Body's own formulation of the "continued use" measure in *US – Continued Zeroing*, Brazil argues that the formulation used in the panel request is more than sufficient for the Panel, the United States, and the third parties to "identify[] with sufficient precision … what is referred to adjudication". In particular, according to Brazil, the panel request specifies that: (1) the measure involves the use of "zeroing" in successive anti-dumping proceedings; (2) the relevant proceedings in which "zeroing" is used are those conducted pursuant to a named anti-dumping duty order; (3) the particular types of anti-dumping proceedings in which "zeroing" is used include original investigations and administrative reviews; and (4) the determinations made in these proceedings using "zeroing" provide the basis for the application and maintenance of anti-dumping duties under the order over a period of time.[48]

7.30 Brazil rejects the United States allegations to the effect that the measure at issue is of a type that cannot be challenged in WTO dispute settlement and that it does not exist, recalling that faced with similar arguments in *US – Continued Zeroing*, the Appellate Body explained that "... the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures"; and that "an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement".[49] In addition, Brazil considers that the United States' characterization of its complaint as a challenge to potential future measures misses the point. According to Brazil, the United States' position fails to appreciate the difference between a "continued use" measure and challenges to individual determinations. Brazil argues that the "continued use" measure involves ongoing conduct in the form of use of the "zeroing" methodology under a particular anti-dumping order. In its view, this is not a "potential future measure[]",[50] but an actual measure that exists today.[51]

7.31 Thus, Brazil asks the Panel to reject the United States' request for the exclusion of the "continued use" measure from its terms of reference, and find instead that it falls within the scope of this dispute.[52]

(c) Arguments of the Third Parties

(i) European Union

7.32 The European Union recalls that the Appellate Body in *US – Continued Zeroing* was faced with essentially the same issue that is before the Panel in the present dispute, namely, whether the European Union's complaint against the United States' alleged "continued zeroing" as "ongoing conduct" was within the panel's terms of reference. The European Union recalls that in *US – Continued Zeroing*, the Appellate Body ruled that "the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures", rejecting "the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must

[46] Brazil, Preliminary Rulings, para. 34, quoting Appellate Body Report, *US – Continued Zeroing*, para. 166.
[47] Brazil, Preliminary Rulings, para. 39.
[48] Brazil, Preliminary Rulings, paras. 40-41.
[49] Brazil, Preliminary Rulings, paras. 43-45, quoting from Appellate Body Report, para. 169.
[50] US, FWS, para. 52.
[51] Brazil, Preliminary Rulings, para. 54.
[52] Brazil, Preliminary Rulings, paras. 29-56.

involve a substantive inquiry as to the existence and precise content of the measure".[53] As regards the proper identification of the alleged measure in its panel request, the European Union notes that the Appellate Body saw "no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement".[54] The European Union asks the Panel to come to the same result in respect of Brazil's challenge to the United States' "continued zeroing" in the orange juice anti-dumping proceedings.[55]

(ii) Japan

7.33 Japan finds no substantial difference between the "continued zeroing" measure Brazil challenges in this dispute and the "continued zeroing" measures at issue in *US – Continued Zeroing*. In response to the United States argument that the alleged measure includes an indeterminate number of potential future measures and is not properly within the Panel's terms of reference, Japan argues that the United States overlooks Brazil's description of the alleged measure that "[i]n particular, the use of zeroing continues in the 'most recent administrative review' … by which duties are 'currently' applied and maintained".[56] In this light, Japan urges the panel to reject the United States' request for a preliminary ruling and find that the "continued use" of the zeroing methodology in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil, constitutes a "measure" that falls within the Panel's terms of reference under Article 6.2 of the DSU.

(iii) Korea

7.34 Korea recalls that the specificity requirement under Article 6.2 of the DSU is designed to ensure that a panel request "present[s] the problem clearly" and that "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[57] According to Korea, it is clear from item (d) of Brazil's panel request that its complaint relates to "a string of connected and sequential determinations" in which the United States uses the zeroing methodology by which duties are maintained over a period of time under the anti-dumping duty order. Thus, Korea argues that Brazil has satisfied the standard under Article 6.2 of the DSU. Moreover, Korea agrees with Brazil that the "continued zeroing" measure it is challenging in this dispute is virtually the same "ongoing conduct" that was at issue in *US – Continued Zeroing*. However, Korea notes that it would be inappropriate to address the existence of the measure for the purpose of responding to the United States' request for a preliminary ruling, recalling that the Appellate Body in *US – Continued Zeroing* stated that "the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures".[58]

(iv) Mexico

7.35 Mexico argues that the United States' request for a preliminary ruling confuses the specificity requirement under Article 6.2 of the DSU with the susceptibility of ongoing conduct to WTO dispute settlement. Mexico recalls that the Appellate Body has observed that "the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures"; and that "the specificity requirement under Article 6.2 is intended to ensure the

[53] EU, TPWS, para. 6, quoting from Appellate Body Report, *US – Continued Zeroing*, para. 169.
[54] EU, TPWS, para. 7, quoting from Appellate Body Report, *US – Continued Zeroing*, para. 181.
[55] EU, TPWS, para. 8.
[56] Request for the Establishment of a Panel by Brazil, WT/DS382/4, p. 3.
[57] Korea, TPWS, para. 12, quoting Appellate Body Report, *US – Continued Zeroing*, paras. 168 and 169.
[58] Korea, TPWS, paras. 14-16.

sufficiency of a panel request in presenting the problem clearly".[59] According to Mexico, the problem at issue in this dispute – the United States' continued application of zeroing in successive anti-dumping proceedings – is clear and easy to discern. Accordingly, Mexico contends that Brazil's panel request satisfies the specificity requirement of Article 6.2 of the DSU.

7.36 In addition, Mexico argues that the United States' reliance on *US – Upland Cotton* in support of its view that future measures not yet in existence at the time of panel establishment are not within a panel's term of reference is misplaced. According to Mexico, the facts in *US – Upland Cotton* can be distinguished from the facts at issue in the present dispute. In particular, Mexico notes that in *US – Upland Cotton*, the panel found that payments under the Agricultural Assistance Act of 2003 (the "Act") were not within its terms of reference because the Act was not enacted until *after* the panel request. As a result, consultations were not sought or held on the payments under the Act. In making its finding, Mexico recalls that the panel specifically "noted[d] that the cottonseed payments for each year were ad hoc appropriations, each with a separate legal basis, which did not follow a single model". Moreover, Mexico recalls that the panel found that the relevant section "did not amend or modify any existing or previous programme". Mexico also notes that the panel concluded that the evidence before it disclosed "the existence of separate and legally distinct cottonseed payment programmes for crops in different years rather than a single cottonseed payment programme".[60]

7.37 Mexico observes that, in contrast, in the present dispute Brazil challenges the continued application of zeroing in periodic reviews conducted as stages of a continuous proceeding involving the imposition, assessment, and collection of duties under the same anti-dumping duty order. With respect to the proceeding on certain orange juice from Brazil, Mexico argues that the USDOC has applied zeroing at every stage of the proceeding and has given no indication that it will change its approach in the future. Mexico submits that it is this recurring and ongoing conduct under the single anti-dumping duty order that Brazil challenges. After recalling that the Appellate Body in *US – Continued Zeroing* found a series of similar "ongoing conduct" measures to be susceptible to WTO dispute settlement proceedings, Mexico asks the Panel to deny the United States' request for a preliminary ruling to exclude Brazil's claims from its terms of reference.[61]

(d) Evaluation by the Panel

7.38 The United States' request for a preliminary ruling in respect of Brazil's "continued zeroing" claim is based on three lines of argument. First, the United States submits that in seeking to describe the alleged "continued zeroing" measure, Brazil's panel request provides only a "general reference to an indeterminate number of potential measures" based on "speculation" as to what may happen in the future. According to the United States, such "speculation" cannot satisfy the Article 6.2 requirement that a panel request "identify the *specific* measures at issue".[62] Secondly, the United States argues that by challenging "continued zeroing", Brazil appears to challenge "an indeterminate number of potential future measures", which were not in existence at the time of panel establishment and may never exist, and therefore cannot fall within the Panel's terms of reference.[63] Thirdly, the United States argues that the inclusion of "continued zeroing" in the Panel's terms of reference is inconsistent with Article 17.4 of the AD Agreement, because no "final action" within the meaning of that provision has been taken in the case of "continued zeroing".

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[59] Mexico, TPWS, para. 23, quoting from Appellate Body Report, *US – Continued Zeroing*, paras. 168 and 169.

[60] Mexico, TPWS, para 25, quoting from Panel Report, *US – Upland Cotton*, paras. 7.162, 7.165 and 167.

[61] Mexico, TPWS, paras. 26-28.

[62] US, FWS, paras. 49-51 (United States' emphasis).

[63] US, FWS, para. 52.

BCI deleted, as indicated [[XX]]

7.39 Before turning to examine Brazil's panel request, we note that the first two of the arguments described above served as the basis for a similar request for a preliminary ruling made by the United States in *US – Continued Zeroing*. Although the panel in that dispute agreed with the United States[64], the Appellate Body reversed the panel's findings. In particular, the Appellate Body held that the United States could reasonably have been expected to understand, from reading the panel request as a whole, that the European Communities was challenging the use of "zeroing" in successive proceedings, as "ongoing conduct", in each of 18 separate anti-dumping cases. The Appellate Body saw confirmation of this in the fact that the European Communities was seeking a prospective remedy.[65] The Appellate Body also rejected the panel's view that "in order to successfully raise claims against a measure, the complaining Member must in the first place demonstrate the existence and the precise content of such measure, consistently with the requirements of Article 6.2 of the DSU".[66] In this regard, the Appellate Body made the following observation:

> "... the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms.{} Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, we reject the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure."[67]

7.40 In the present dispute, Brazil's panel request describes the alleged measure at issue in the following terms:

> "Measures and claims
>
> The measures at issue are the following:
>
> ...
>
> (d) The continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil
>
> This measure concerns the continued use by the United States of "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil (case No A-351-840), including the original investigation and any subsequent

[64] Panel Report, *US – Continued Zeroing*, para. 7.61.
[65] Appellate Body Report, *US – Continued Zeroing*, para. 171.
[66] Panel Report, *US – Continued Zeroing*, para. 7.50.
[67] Appellate Body Report, para. 169.

> administrative reviews, by which duties are applied and maintained over a period of time. In particular, the use of zeroing continues in the most recent administrative review, identified under item (c) above, by which duties are currently applied and maintained."

7.41 The language in Brazil's panel request explicitly identifies the measure at issue as "the continued use by the United States of 'zeroing procedures' in successive anti-dumping proceedings" under the orange juice anti-dumping duty order, "including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time". We note that this language reveals that Brazil's concern is focused on the "continued use" of "zeroing procedures" in "successive" proceedings "including the original investigation and any subsequent reviews". In other words, Brazil objects to the United States' alleged "continued use" of "zeroing procedures" over time, starting from the original investigation that resulted in the imposition of the orange juice anti-dumping duty order to any subsequent proceeding under the same order. In our view, it is reasonably clear from this description, when read in the light of the panel request as a whole[68], that the alleged measure Brazil challenges is the United States' "continued use" of "zeroing procedures" as "ongoing conduct".

7.42 We see no need, for the purpose of responding to the United States request for a preliminary ruling, to pronounce on whether such "ongoing conduct" is susceptible to challenge in WTO dispute settlement. As the Appellate Body observed in the above-quoted passage from *US – Continued Zeroing*, "an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement".[69] Likewise, we do not see that it is our task, when considering the United States' preliminary ruling request, to decide whether the "ongoing conduct" measure Brazil objects to actually exists, even assuming that it can be challenged in WTO dispute settlement. Again, as the Appellate Body explained in *US – Continued Zeroing*, "the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures".[70]

7.43 The third argument the United States advances to support its request for a preliminary ruling is related to Article 17.4 of the AD Agreement. This provision reads:

> "If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."

7.44 The United States notes that Article 17.4 provides that a member may only refer a matter to the DSB following a failure of consultations to achieve a mutually agreed solution, and "final action" has been taken by the administering authorities to levy definitive anti-dumping duties or accept price undertakings. According to the United States, "continued zeroing" does not amount to "final action" within the meaning of Article 17.4 of the AD Agreement and, therefore, it cannot fall within our terms of reference. Although the Appellate Body in *US – Continued Zeroing* did not directly address this

[68] For instance, we note that in addition to making claims against the "continued use" of "zeroing procedures" in "successive anti-dumping proceedings", Brazil's panel request challenges the original investigation and First and Second Administrative Reviews *individually*, as three *separate* measures.

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

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

argument, it did appear to take this provision (as well as Article 17.3 of the AD Agreement) into account in the process of overturning the panel's findings on the merit of the European Communties' "continued zeroing" claims. In particular, in examining the question whether "continued zeroing" is a measure susceptible to WTO dispute settlement, and after recalling its observation from a previous case where it stated that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[71], the Appellate Body noted that:

> "Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* are also relevant to the question of the types of measures that can be submitted to dispute settlement under the *Anti-Dumping Agreement*. Closely resembling Article 3.3 of the DSU, Article 17.3 provides that, '[i]f any Member considers that any benefit accruing to it, directly or indirectly, under [the *Anti-Dumping Agreement*] is being nullified or impaired ... by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question.'{} Article 17.4 of the *Anti-Dumping Agreement* further specifies that a Member may refer a matter to the DSB if it considers that the consultations have failed to achieve a mutually agreed solution 'and if final action has been taken by the administering authorities of the importing Member to', *inter alia*, 'levy definitive anti-dumping duties'.[72]"

7.45 In the very next paragraph, the Appellate Body agreed with the panel that "measures examined by WTO panels and the Appellate Body include 'not only measures consisting of acts that apply to particular situations, but also those consisting of acts setting forth rules or norms that have general and prospective application'." The Appellate Body then went on to observe that "[i]n order to be susceptible to challenge, a measure need not fit squarely within [the "as such" or "as applied"] categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm". Finally, the Appellate Body described the "continued zeroing" measure challenged by the European Communities using terms that are very similar to those used by Brazil in the present dispute, and concluded that it saw "no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement"[73].

7.46 In our view, the clear implication to draw from the Appellate Body's reasoning and findings in *US – Continued Zeroing* is that Article 17.4 of the AD Agreement does not limit Brazil's right in the present dispute to challenge "continued zeroing" under the AD Agreement. This conclusion finds support in the Appellate Body's observations in *US – 1916 Act*, where in allowing the European Communities and Japan to challenge certain United States' anti-dumping legislation, the Appellate Body explained *inter alia* that:

> "Important considerations underlie the restriction contained in Article 17.4. In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted.{} In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation to cases in which a

[71] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.
[72] Appellate Body Report, *US – Continued Zeroing*, para. 177.
[73] Appellate Body Report, *US – Continued Zeroing*, paras. 180-181.

BCI deleted, as indicated [[XX]]

> Member's request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure{}, Article 17.4 strikes a balance between these competing considerations.
>
> Therefore, Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect a Member's right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such.
>
> Moreover, as we have seen above, the GATT and WTO case law firmly establishes that dispute settlement proceedings may be brought based on the alleged inconsistency of a Member's legislation as such with that Member's obligations. We find nothing, and the United States has identified nothing, inherent in the nature of anti-dumping legislation that would rationally distinguish such legislation from other types of legislation for purposes of dispute settlement, or that would remove anti-dumping legislation from the ambit of the generally-accepted practice that a panel may examine legislation as such.[74]"

7.47 Thus, in the *US – 1916 Act* dispute, the Appellate Body found that the European Communities and Japan were entitled to bring a complaint against legislation they considered to be inconsistent with the AD Agreement before a panel, even though that legislation did not amount to a "final action" or a provisional measure within the meaning of Article 17.4 of the AD Agreement. In doing so, the Appellate Body described the relevance of Article 17.4 as being limited to complaints related to the conduct of investigating authorities in an anti-dumping investigation. However, in the present dispute, Brazil's challenge to the United States' alleged "continued use" of "zeroing" does not pertain to the conduct of the USDOC in one particular anti-dumping investigation. Rather, as we more fully explain below[75], Brazil's complaint is focused on the USDOC's alleged "use of zeroing" in multiple proceedings, under the orange juice anti-dumping duty order, as a single "*ongoing conduct*" measure. In our view, an "ongoing conduct" measure is broader than the type of conduct envisaged under Article 17.4 of the AD Agreement, and as such, falls outside of its scope of operation.

7.48 In any case, we note that the evidence Brazil has advanced in support of the existence of the alleged "continued zeroing" measure includes instances where the United States authorities have, in fact, levied definitive anti-dumping duties.[76] Thus, Brazil does not challenge the alleged "continued zeroing" measure in the absence of any connection between this alleged measure and "final action". On the contrary, the evidence of United States' "final action" lies at the heart of Brazil's complaint.

7.49 In conclusion, we find that Brazil's panel request is sufficiently precise to satisfy the standards of Article 6.2 of the DSU in that it reasonably identifies "the nature of the measure and the gist of what is at issue". Furthermore, we also find that the inclusion of Brazil's claim against the alleged "continued zeroing" measure in our terms of reference is not inconsistent with the requirements of Article 17.4 of the AD Agreement. We therefore dismiss the United States' request for a preliminary ruling.

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[74] Appellate Body Report, *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793, at paras. 73-75 (footnote omitted).

[75] See below, paras. 7.171-7.176.

[76] The evidence Brazil has advanced to establish the existence of the alleged "continued zeroing" measure is set out and evaluated below, at paras. 7.177-7.192.

BCI deleted, as indicated [[XX]]

B. BRAZIL'S CLAIMS CONCERNING THE ALLEGED USE OF "SIMPLE ZEROING" IN ADMINISTRATIVE REVIEWS

1. Arguments of Brazil

7.50 Brazil claims that by allegedly calculating the margins of dumping, relied upon for the purpose of establishing the cash-deposit rates ("CDRs"), and the importer-specific assessment rates ("ISARs") for Cutrale and Fischer in the First and Second Administrative Reviews through the use of "simple zeroing", the USDOC acted inconsistently with its obligations under Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[77]

(a) Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

7.51 Brazil argues that Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 establish an obligation on Members not to impose an anti-dumping duty on any dumped product in an amount that is greater than the "margin of dumping" determined in respect of that product. Relying upon the findings of the Appellate Body in a series of disputes involving the USDOC's application of "simple zeroing" in administrative reviews[78], Brazil submits that a "margin of dumping" can only be calculated with respect to the product under consideration "as a whole", encompassing all export transactions of the product under consideration; and that it cannot be found to exist only for a type, model or category of that product. Brazil recalls that the Appellate Body has repeatedly found that Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 define "dumping" as a concept related to the product "as a whole". In addition, Brazil notes that the Appellate Body has previously indicated that "dumping" and "margin of dumping" relate to the pricing practices of individual exporters or foreign producers; and that this interpretation is supported by several other provisions of the AD Agreement, including Articles 2.2, 2.3, 5.8, 6.10, 8.1, 9.4 and 9.5. Furthermore, Brazil recalls that the Appellate Body has found that the AD Agreement and the GATT 1994 are not concerned with dumping *per se*, but with dumping that causes or threatens to cause material injury to the domestic industry, a condition that by the terms of Article 3.1 of the AD Agreement cannot be found to exist in relation to individual transactions, but only for the product as a whole.[79]

7.52 Brazil argues that the fact that Article 9.4(ii) of the AD Agreement recognizes that variable anti-dumping duties may be collected on a transaction-specific basis does not mean that Article 2 of the AD Agreement authorizes a determination of dumping on the same basis. Brazil emphasizes that Article 9 of the AD Agreement governs the imposition and collection of duties, noting that these rules are "distinct and separate" from the rules governing the determination of dumping under Article 2. Thus, while Article 9 permits collection of variable anti-dumping duties on a transaction-specific

[77] Brazil, FWS, paras. 97 and 118; Brazil, Second Written Submission ("SWS"), para. 47; Brazil, Answers to Panel Questions 2 and 3.

[78] In particular, Brazil refers to the following Appellate Body Reports: Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* ("*US – Zeroing (Japan) (Article 21.5 – Japan)*"), WT/DS322/AB/RW, adopted 31 August 2009; Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/AB/R, adopted 20 May 2008; and *US – Continued Zeroing*.

[79] Brazil, FWS, paras. 6, 49-76; Brazil, First Confidential Opening Oral Statement ("FCOOS"), paras. 12-37.

basis, Brazil argues that "dumping" must be determined for the "product as a whole" in accordance with Article 2.[80]

7.53 In addition, Brazil submits that the possibility that a general prohibition on "zeroing" may result in "mathematical equivalence" between the result obtained when calculating a margin of dumping, for the purpose of Article 2.4.2, through the use of the W-W and W-T methodologies, does not undermine its legal argument, because "mathematical equivalence" may arise only "under a specific set of assumptions" that do not always apply. Furthermore, Brazil argues that the interpretation of the exceptional comparison methodology in Article 2.4.2 (i.e., "W-T") – and whether it permits "zeroing" – cannot govern the interpretation of the general rule regarding the definition of "dumping". In any case, Brazil recalls that the Appellate Body has noted that some Members have argued that the second sentence of Article 2.4.2 does not permit "zeroing".[81]

7.54 Brazil observes that the Appellate Body has repeatedly confirmed that the interpretation of the concepts of "dumping" and "margin of dumping" that it is advancing in the present dispute is the only "permissible" interpretation under the terms of Article 17.6(ii) of the AD Agreement, noting that the application of customary rules of treaty interpretation cannot result in a rival transaction-specific definition of these concepts.[82]

7.55 Thus, on the basis of essentially the same line of reasoning expounded by the Appellate Body in previous disputes involving "simple zeroing", Brazil argues that if a Member determines a margin of dumping for a particular exporter in an administrative review that exceeds the overall margin of dumping for that exporter's "product as a whole" because of the systematic exclusion of certain export transactions, that determination must be inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Brazil urges the Panel to come to the same conclusion, emphasizing the importance of resolving the same legal questions in the same way in subsequent disputes for the "security and predictability" and "consistency and stability" of the WTO dispute settlement system.[83]

7.56 Brazil argues that the facts show that the USDOC calculated the margins of dumping for Cutrale and Fischer in the First and Second Administrative Reviews through the use of "simple zeroing", and that in the absence of "simple zeroing", both respondents would have had no margins of dumping at all.[84] According to Brazil, the mere *use* of "simple zeroing" by the USDOC to calculate these margins, irrespective of any impact they may have had on the amount of anti-dumping duties actually collected, is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. In particular, Brazil argues that pursuant to these provisions, a Member must establish a margin of dumping for the "product as a whole" in accordance with Article 2 of the AD Agreement. Referring to a statement made by the panel in *US – Zeroing (Japan)(Article 21.5 – Japan)*, Brazil submits that a failure to comply with this requirement vitiates a determination made under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, irrespective of the amount of duties that is ultimately collected.[85]

7.57 In any case, Brazil notes that the margins of dumping determined for Cutrale and Fischer did have an impact on the amount of anti-dumping duties collected. Brazil notes that the margins of dumping were in fact relied upon by the USDOC to set the CDR for Cutrale in the Second

[80] Brazil, FCOOS, paras. 47-51; Brazil, SWS, para. 5.
[81] Brazil, FCOOS, paras. 52-58; Brazil, SWS, para. 5.
[82] Brazil, FCOOS, paras. 2-4, 8-11.
[83] Brazil, FCOOS, para. 2; Brazil, SWS, para. 4.
[84] Brazil, FWS, para. 5; Brazil, FCOOS, paras. 66-75; Brazil, SWS, paras. 19, 35; Brazil, Answer to Panel Question 2.
[85] Brazil, Answer to Panel Question 2; Brazil, SWS, paras. 11-13, citing Panel Report, *US – Zeroing (Japan)(Article 21.5 – Japan)*, para. 7.162.

Administrative Review and Fischer in the First Administrative Review.[86] According to Brazil, CDRs amount to anti-dumping duties and are subject to the disciplines of Article 9.3, as is well established in WTO case-law.[87] Therefore, if the impact of the use of "zeroing" is relevant to establish a violation of Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, the USDOC's reliance upon margins of dumping calculated using "simple zeroing" for the purpose of the CDRs collected on imports of the respondents' products in the periods subsequent to the relevant administrative reviews must be inconsistent with those provisions.[88]

7.58 Brazil also notes that the facts show that the ISARs determined for Cutrale in the First and Second Administrative Reviews, and for Fischer in the First Administrative Review, were calculated through the use of "simple zeroing".[89] Thus, again, if the *impact* of the use of "zeroing" is relevant to establish a violation of Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, the USDOC's use of "simple zeroing" when establishing the relevant ISARs must be inconsistent with those provisions.[90]

7.59 Brazil rejects the United States' view that CDRs do not amount to anti-dumping duties falling within the scope of Article 9.3 of the AD Agreement. In its view, CDRs have the essential characteristics of anti-dumping duties imposed under Article 9 of the AD Agreement, and not reasonable securities within the meaning of the Ad Note to Article VI:2 and VI:3 of the GATT 1994. Relying on various observations of the Appellate Body in the *US – Shrimp/Bond* dispute[91], Brazil concludes that a reasonable security is "a response to a determination of a risk of non-payment of future anti-dumping duties that is commensurate with that risk"[92] and that a CDR neither reflects nor is commensurate with the likely magnitude of the risk of non-payment by an importer. Indeed, Brazil submits that the characteristics of a CDR match those of an anti-dumping duty because: it is imposed on all imports from exporters found to be engaged in injurious dumping; it is imposed as a specific response to a dumping determination made in connection with a particular exporter; and it is fixed at the level of the individual margin of dumping determined by the USDOC for the exporter in question, and cannot exceed that margin. As such, Brazil argues a CDR is an anti-dumping duty.

7.60 That CDRs are anti-dumping duties subject to Article 9 of the AD Agreement is, Brazil argues, confirmed by the case-law concerning United States' administrative reviews. First, Brazil recalls that in *US – Shrimp/Bond*, the Appellate Body, despite holding that it did not have to rule on the issue, disagreed with the "reasoning" that led the panel in that case to find CDRs to be securities within the meaning of the Ad Note, and not anti-dumping duties subject to Article 9 of the AD Agreement. Moreover, Brazil submits that the Appellate Body in the same dispute emphasized that even under United States' law, the role of cash deposits differs from a security, and that they are fixed at the level of an exporter's margin of dumping. Second, Brazil argues that the Appellate Body has found several times that CDRs calculated through "zeroing" are inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[93]

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[86] Brazil, FWS, paras. 77-96; Brazil, Answer to Panel Question 2.

[87] Brazil, FCOOS, para. 35; Brazil, Answer to Panel Question 3.

[88] Brazil, Answer to Panel Question 2.

[89] Brazil, FWS, paras. 77-96; Brazil, Answer to Panel Question 2.

[90] Brazil, FCOOS, para. 72; Brazil, SWS, paras. 20-21; Brazil, Answer to Panel Question 2.

[91] In particular, Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* ("*US – Shrimp (Thailand) / US – Customs Bond Directive*"), WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008, paras. 221, 256, 258-263.

[92] Brazil, Answer to Panel Question 3.

[93] Brazil, Answer to Panel Question 3, referring to Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/AB/R, adopted 20 May 2008, paras. 133-134 and 156(a), Appellate Body Report, *US – Continued Zeroing*, paras. 315-

7.61 Thus, Brazil argues that the applicability of Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 to CDRs is well established and that security and predictability in the multilateral trading system dictate that the conclusion reached in disputes involving several other Members should also apply to Brazil's claims.[94]

(b) Article 2.4 of the AD Agreement

7.62 Brazil argues that the use of "simple zeroing" to calculate an exporter's margin of dumping in any stage of an anti-dumping proceeding infringes the requirement that a "fair comparison shall be made between export price and normal value" under Article 2.4 of the AD Agreement. According to Brazil, the obligation under Article 2.4 to make a "fair comparison" applies independently of the amount of anti-dumping duties that are collected by an importing Member. Brazil recalls that the Appellate Body has on numerous occasions observed that there is "an inherent bias in a zeroing methodology" and that as a "way of calculating" margins, the "zeroing" methodology "cannot be described as impartial, even-handed, or unbiased".[95] Moreover, Brazil notes that one panel and the Appellate Body have previously found that the maintenance and application of "zeroing" in the context of administrative reviews is inconsistent with Article 2.4 of the AD Agreement.[96] Brazil asks the Panel to come to the same conclusion, and in the light of the evidence it asserts shows the USDOC used "simple zeroing" to calculate the margins of dumping of Cutrale and Fischer in the First and Second Administrative Reviews, find that the United States acted inconsistently with Article 2.4 of the AD Agreement.[97]

2. Arguments of the United States

7.63 The United States rejects Brazil's claims, arguing that they are grounded on an interpretation of Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 that finds no textual basis in the language of these provisions. Moreover, even accepting Brazil's legal arguments, the United States submits that Brazil's claims are at least in part factually flawed.

(a) Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

7.64 The United States submits that, in *US – Softwood Lumber V*, the Appellate Body concluded that "zeroing" is prohibited in the context of weighted-average to weighted-average comparisons in investigations by interpreting the terms "margins of dumping" and "all comparable export

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316 and 395(d), Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities* ("*US – Zeroing (EC) (Article 21.5 – EC)*"), WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, para. 304, and Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* ("*US – Zeroing (Japan) (Article 21.5 – Japan)*"), WT/DS322/AB/RW, adopted 31 August 2009, para. 156.

[94] Brazil, Answer to Panel Question 3.

[95] Brazil, FCOOS, para. 68 and Brazil, SWS, paras. 16-17, quoting Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 135, and Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* ("*US – Softwood Lumber V (Article 21.5 – Canada)*"), WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087, para. 142.

[96] Brazil, SWS, para. 17, referring to Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* ("*US – Zeroing (Japan) (Article 21.5 – Japan)*"), WT/DS322/RW, adopted 31 August 2009, as upheld by Appellate Body Report WT/DS3227AB/RW, paras. 7.168 and 8.1(b); Appellate Body Report, *US – Zeroing (Japan)(Article 21.5 – Japan)*, para. 195, 197 and 213(c); and Appellate Body Report, *US – Zeroing (Japan)*, paras. 169, 176, 190(d) and 190(e).

[97] Brazil, FCOOS, para. 67; Brazil, SWS, para. 47.

transactions" as they are used in Article 2.4.2 in an integrated manner. The United States argues that a general prohibition on "zeroing" cannot be reconciled with this interpretation.. In this regard, the United States recalls that the language of Article 2.4.2 of the AD Agreement explicitly requires that "all comparable export transactions" be taken into account when establishing the margin of dumping through W-W comparisons. The United States notes that this language cannot be found elsewhere in the AD Agreement. Were there a general prohibition on "zeroing" applying in all proceedings and all comparison methodologies, the United States submits that the "all comparable export transactions" language in Article 2.4.2 would be redundant. Thus, according to the United States, the fact that no such language is found elsewhere in the AD Agreement suggests that there is no general prohibition on "zeroing" beyond W-W comparisons in original investigations.[98]

7.65 The United States argues that there is no textual basis in Articles 2.1 and 9.3 of the AD Agreement or Article VI:2 of the GATT 1994 to conclude that the definition of the terms "dumping" and "margin of dumping" must be exclusively understood to mean that dumping and margins of dumping can only exist for the product "as a whole" through the aggregation of comparison results of all transactions. The United States submits that the "product is always 'introduced into the commerce of another country' through individual transactions, and thus 'dumping', as defined in Article 2.1 of the AD Agreement, is most certainly transaction-specific". The United States observes that this "definition describes the real-world commercial conduct by which a product is imported into a country, i.e., transaction by transaction".[99]

7.66 The United States draws support for its interpretation of the concept of "dumping" from the 1960 Report of the Group of Experts, which it asserts indicated that the "ideal method" for applying anti-dumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned". The United States considers that the view expressed by the Group of Experts reflects the rules as they stood under Article VI of the GATT 1947, which was incorporated into the GATT 1994 without any change or revision. The United States finds this transposition significant arguing that the "normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning". Furthermore, the United States submits that if the negotiators intended to make "such a fundamental change" to the meaning of "margin of dumping", they would have done so clearly, and "it would not have come as a surprise to the major users of anti-dumping remedies, such as the EU and the United States, after the fact through dispute settlement".[100]

7.67 The United States rejects the view that the definition of dumping in Article 2.1 of the AD Agreement can only be read to mean that dumping can exist exclusively with respect to the "product as a whole". The United States notes that the expression "product as a whole" does not appear anywhere in the AD Agreement, and that the Appellate Body has not cited any actual text that would support a finding that a margin of dumping must occur at the level of multiple transactions, nor any text that would preclude the calculation of dumping from occurring at a transaction-specific level. Moreover, for the United States, the notion of "product as a whole" denies that the ordinary meaning of the word "product" used in Article 2.1 admits of a meaning that is transaction-specific.[101] According to the United States, the words "product" and "products" in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be interpreted in such an exclusive manner

[98] US, FWS, paras. 53-59; US, First Confidential Opening Oral Statement ("FCOOS"), paras. 23-25.

[99] US, FWS, paras. 61-68; US, FCOOS, para. 29; US, Second Written Submission ("SWS"), paras. 23-27.

[100] US, FWS, paras. 69-72, citing Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

[101] US, FWS, paras. 73-81.

so as to deprive them of one of their ordinary meanings. The United States comes to a similar conclusion with respect to the term "margin of dumping".[102]

7.68 The United States submits that a general prohibition on the use of "zeroing" outside of the limited circumstances of W-W comparison methodology in original investigations under Article 2.4.2 would render the third methodology (W-T) redundant because of "mathematical equivalence". The United States rejects the Appellate Body's explanation of how "mathematical equivalence" might be avoided, arguing that by suggesting that the comparison take place in respect of a *subset* of export transactions, the Appellate Body proposes a methodology that would itself be inconsistent with its view that the margin of dumping can only be established for the "product as a whole". In this regard, the United States recalls that a treaty "interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[103]

7.69 The United States recalls that prospective normal value systems, which are explicitly provided for in Article 9.4(ii) of the AD Agreement, assess anti-dumping duties through a comparison of the import price of a given transaction with the prospective normal value, without considering the prices paid for other import transactions. According to the United States, if the liability for the payment of anti-dumping duties can be determined on a transaction-specific basis in prospective normal value systems, there is no reason why the same cannot be the case in retrospective duty assessment systems. Moreover, the United States submits that requiring, as the Appellate Body has ruled, that any margin of dumping determined for the purpose of Article 9.3 assessment be calculated on the basis of aggregating all comparison results of all transactions would turn prospective normal value systems of duty assessment into retrospective systems. The United States also notes that Articles 9.3, 9.3.1, and 9.3.2 are silent as to the period of review for any such assessment proceeding, and submits that the negotiators of the Antidumping Agreement would not have provided explicitly for a prospective normal value system and at the same time require that such systems conduct retrospective assessment proceedings that aggregate all the transactions occurring over some unspecified period of time.[104]

7.70 Thus, the United States urges the Panel to make its own objective assessment of the matter, as it is required to do under Article 11 of the DSU, and refrain from adopting the interpretations of the AD Agreement advanced by Brazil and developed by the Appellate Body in previous disputes involving "simple zeroing". Instead, the United States asks the Panel to find, consistent with the objective assessment made by previous panels, that the United States' approach rests on a permissible interpretation of the AD Agreement within the meaning of Article 17.6(ii) of the AD Agreement. In this regard, the United States argues, *inter alia*, that the very inclusion of the special standard of review contained in Article 17.6(ii) confirms that the text of the AD Agreement may be susceptible to more than one interpretation. To find that it is not possible to arrive at conflicting interpretations of the text would, according to the United States, mean depriving the second sentence of Article 17.6(ii) of meaning.[105]

7.71 In any event, the United States emphasizes that the obligation in Article 9.3 of the AD Agreement is about ensuring that the "*amount of the anti-dumping duty* shall not exceed the margin of dumping as established under Article 2". According to the United States, this means that even if "simple zeroing" were used in an administrative review, it cannot result in any violation of the

[102] US, FWS, paras. 82-84; US, FCOOS, paras. 26-28.

[103] US, FWS, paras. 93-98, citing Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, para. 23; US, FCOOS, para. 34; US, SWS, paras. 74-79.

[104] US, FWS, paras. 109-115; US, FCOOS, para. 31; US, Answer to Panel Question 12; US, SWS, paras. 58-69; US, SCOOS, paras. 21-23.

[105] US, FWS, paras. 5, 23-33; US, FCOOS, paras. 3-7; US, Answer to Panel Questions 8 and 9.

obligation contained in this provision if no anti-dumping duties were in fact collected.[106] The United States notes that this is precisely the situation with respect to Fischer in the Second Administrative Review, whose ISAR was [[XX]]. Thus, the United States argues that Brazil has failed to substantiate its claims with respect of Fischer in the Second Administrative Review.

7.72 Similarly, the United States observes that although Cutrale was assessed as having dumped at a rate of 0.45% in the First Administrative Review, no CDR was applied because under United States law, a rate of less than 0.5% is *de minimis*. Thus, the United States argues that regardless of whether "simple zeroing" was applied to determine the CDR for Cutrale in the First Administrative Review, a *de minimis* margin of dumping cannot exceed any "ceiling" provided for in the covered agreements. To this extent, the United States submits that the treatment of Cutrale in the First Administrative Review was not inconsistent with Article 9.3 and Article VI of the GATT 1994, even by Brazil's own interpretation of the obligations contained in those provisions.[107]

7.73 The United States also argues that Brazil errs in characterising CDRs as anti-dumping duties that are subject to the disciplines of Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. In its view, CDRs are a security for the payment of anti-dumping duties and are governed by the AD Note to paragraphs 2 and 3 of the GATT 1994.[108] The United States recalls that the Ad Note allows a Member to "require a reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization". According to the United States, the "determination of the facts" identified in the Ad Note refers to the "determination of final liability for payment of anti-dumping duties" described in Article 9.3.1 of the AD Agreement. Moreover, the United States explains that a CDR is only an estimate of future anti-dumping duties, based on past dumping, that serves as a security pending determination of final liability to pay anti-dumping duties. The United States disagrees with Brazil's characterization of the Appellate Body findings in *US – Stainless Steel (Mexico)* and *US – Continued Zeroing*, submitting that they did not reflect a conclusion that CDRs are anti-dumping duties, but rather a conclusion that the application of "zeroing" in administrative reviews was inconsistent with Article 9.3 of the AD Agreement because it "results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping".[109] Similarly, the United States argues that the other Reports mentioned by Brazil do not stand for the proposition that CDRs amount to anti-dumping duties.[110]

(b) Article 2.4 of the AD Agreement

7.74 The United States submits that Brazil's interpretation of the obligation in Article 2.4 to conduct a "fair comparison" has no textual basis in the language of this provision and is misconceived. In its view, the text of Article 2.4 makes clear that it only addresses the adjustments that must be made to export price and normal value in order to account for "differences which affect price comparability" and render a "fair comparison". Thus, the United States argues that Article 2.4 does not create an obligation with respect to how the results of such comparisons are treated. According to the United States, its interpretation of Article 2.4 is supported by previous panel and Appellate Body Reports as well as the negotiating history of the AD Agreement. Moreover, given the highly subjective nature of the term "fair", the United States argues that its meaning in the context of Article 2.4 must have a principled basis, and not the open-ended and subjective meaning advanced by Brazil. Thus, the United States urges the Panel to reject Brazil's expansive interpretation of

[106] US, SWS, para. 80.
[107] US, FWS, para. 121; US, FCOOS, para. 35.
[108] US, FWS, footnote 8; US, Answer to Panel Question 5.
[109] US, Answer to Panel Question 5, referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para.133 and Appellate Body Report, *US – Continued Zeroing*, para. 315.
[110] US, Answer to Panel Question 5.

Article 2.4, which, in its view, would lead to a flood of anti-dumping disputes that are virtually impossible to resolve in any credible manner.[111]

3. Arguments of the Third Parties

(a) Argentina

7.75 Argentina does not address the merits of Brazil's specific claims, but rather the consistency of "zeroing", in general, under the AD Agreement. Recalling the Appellate Body's findings in *EC – Bed Linen*, Argentina argues that zeroing is inconsistent with Article 2.4.2, regardless of the methodology used.[112] In addition, according to Argentina, the "zeroing" methodology, by not producing a result that takes into account all the variables to be taken into consideration when determining a margin of dumping, ultimately results in the levying of anti-dumping duties in excess of the margin of dumping, and is consequently inconsistent with Articles 9.3 of the AD Agreement and VI:2 of the GATT 1994. However, Argentina emphasizes that the imposition and collection of duties cannot be confused with the calculation of the margin of dumping, which the implementing authority is required to make prior to the imposition phase.[113]

(b) European Union

7.76 The European Union submits that the United States' view that the prohibition on zeroing found in Article 2.4.2 of the AD Agreement is limited to W-W comparisons in the context of original investigations should be rejected in its entirety. According to the European Union, when the language of this provision is correctly interpreted, following the rules of interpretation of the Vienna Convention, there can be no result other than a finding that Article 2.4.2 prohibits "zeroing" in all forms except targeted dumping[114], and in all types of anti-dumping proceedings.[115]

7.77 Drawing on essentially the same line of reasoning developed in previous Appellate Body reports, the European Union argues that the "margin of dumping" referred to in Article 9.3 of the AD Agreement must be interpreted and understood in the context of the definition of "dumping" contained in Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 – i.e., that dumping can only be found in relation to the "product as a whole", as defined by the investigating authority. According to the European Union, "dumping" cannot be found to exist for only a type, model or category of a product, including a "category" in one or more low priced export transactions. Thus, the European Union submits that whatever method is used to calculate the margin of dumping, that margin must be and can only be established for the "product as a whole", subject to targeted dumping provisions.[116]

7.78 The European Union asserts that it is uncontested that the USDOC's use of "zeroing" in administrative reviews "systematically and inevitably inflates the dumping margin and the amount of duty, compared with a computation without zeroing". Thus, it submits that the use of "zeroing" in the administrative reviews at issue constitute a "direct violation of Article 9.3".[117] The European Union argues that the possibility for Members to use prospective normal value systems of duty collection offers no support to the United States' interpretation of the obligations in Article 9.3. In particular, the European Union is of the view that such prospective systems of duty assessment will always remain subject to Article 9.3.2, which calls for duty refunds to be made on request. In other words, the

[111] US, SWS, paras. 4-22; US, Second Confidential Opening Oral Statement ("SCOOS"), paras. 26-28.
[112] Argentina, Third Party Written Submission ("TPWS"), paras. 8-18.
[113] Argentina, TPWS, paras. 21-22.
[114] EU, TPWS, paras. 23-24, 163, 165 and 175.
[115] EU, TPWS, paras. 22-159.
[116] EU, TPWS, paras. 160-163.
[117] EU, TPWS, para. 169.

margin of dumping that should be used to assess the final duty liability must be determined on the basis of all export transactions, even those with a value above the prospective normal value.[118] Similarly, the European Union rejects the United States' reliance on "mathematical equivalence", arguing that there are ways of using the targeted dumping methodology without "zeroing"; and that in any case, permitting "zeroing" in circumstances where the third methodology applies might be acceptable, given that it is an exception to the rule.[119]

(c) Japan

7.79 Japan submits that the legal principles governing the WTO-inconsistency of the "zeroing" procedures at issue in this dispute have been thoroughly canvassed by the Appellate Body in past WTO disputes, and are now well established. Japan recalls that the Appellate Body has, on numerous occasions, determined that Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994, when properly interpreted according to the Vienna Convention, define "dumping" on an exporter-specific basis for the "product as a whole". Japan notes that this definition applies throughout the AD Agreement, and is therefore relevant to all anti-dumping proceedings involving the determination of a margin of dumping, including duty assessment under Article 9.3 of the AD Agreement. Japan argues that the consequences of the USDOC's use of "zeroing" in the administrative reviews at issue in the present dispute are the same as those addressed in previous controversies. Japan asserts that by excluding all negative comparison results, the USDOC makes a "dumping" determination that disregards an entire category of the export transactions making up the "product" – namely, those transactions that generate the negative comparison results. Thus, Japan submits that the USDOC does not determine "dumping" for the "product" as defined by the investigating authority, but for a sub-part of that product. In conclusion, Japan argues that by applying "zeroing" in the measures at issue, the USDOC failed to comply with the definition of "dumping". Japan therefore urges the Panel to find that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[120]

(d) Korea

7.80 Korea recalls that in repeatedly ruling that the USDOC's practice of "zeroing" in administrative reviews is inconsistent with Article 9.3 of the AD Agreement and GATT Article VI:2, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and "margin of dumping" can be found to exist at the level of individual transactions. Korea notes that the Appellate Body has found contextual support for this view in other provisions of the AD Agreement, such as Articles 5.8, 6.10 and 9.5 as well as the concept of injurious dumping. Korea submits that, like the Appellate Body, it too is unable to find "a textual or contextual basis in the GATT 1994 or the Anti-Dumping Agreement for treating transactions that occur above normal value as 'dumped', for purposes of determining the existence and magnitude of dumping in the original investigation, and as 'non-dumped', for purposes of assessing the final liability for payment of anti-dumping duties in a period review".[121]

7.81 Thus, Korea urges the Panel to follow the Appellate Body's reasoning in previous cases, and find that Brazil has established that the United States has acted inconsistently with its obligations under the AD Agreement and the GATT 1994.[122]

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[118] EU, TPWS, paras. 171-174.
[119] EU, TPWS, paras. 175-176.
[120] Japan, TPWS, paras. 4-12, 24-53, 57-69 and 72.
[121] Korea, TPWS, paras. 21-23, referring to and quoting Appellate Body Report, *US – Continued Zeroing (EC)*, paras. 285 and 287.
[122] Korea, TPWS, paras. 23-24.

(e) Mexico

7.82 Mexico asserts that Brazil's claims against the United States' "zeroing" methodology are substantially the same as those brought against the United States in previous disputes. Mexico notes that the WTO-inconsistency of this methodology has now been firmly established with the Appellate Body rulings in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel* and *US – Continued Zeroing*. According to Mexico, in responding to Brazil's claims, the United States has raised no new substantive arguments in defence of "zeroing" that have not already been fully addressed in these cases. Mexico urges the Panel follow the Appellate Body on this matter and find that Brazil has fully made out its claims. Mexico considers that the Panel should do this not only because the prior rulings are correct, but also because there are strong systemic reasons to adhere to the Appellate Body's consistent body of case-law. In this regard, Mexico recalls the point made by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, where it stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[123] Thus, as the United States is, in Mexico's view, unable to identify any new substantive arguments not already rejected in previous WTO disputes, and as the substance of all of Brazil's legal claims have been considered and affirmed in a long line of consistent prior Appellate Body reports, Mexico asks the Panel to adopt the reasoning from those prior rulings and find "(yet again)" that the United States' "zeroing" methodology is inconsistent with the AD Agreement and the GATT 1994.[124]

4. Evaluation by the Panel

(a) Relevant Facts

(i) Administrative Reviews under United States' Law

7.83 The United States operates a retrospective system of duty assessment whereby liability for the payment of anti-dumping duties attaches at the time of entry, yet the final amount of such liability is not actually determined at that moment. Instead, at the time of entry, the United States collects what it characterizes as a "security" in the form of a cash deposit, which represents an estimate of an importer's final amount of anti-dumping duty liability. Once a year (during the anniversary month of the anti-dumping duty orders) interested parties may request an administrative review to determine the final amount of duties that is actually owed on each entry made during the period of review.[125] Thus, an administrative review serves two purposes. First, it establishes an overall dumping margin for each exporter, which becomes the new cash deposit rate ("CDR") for entries made after the publication of the review determination, and continues to apply until the completion of the next administrative review. Second, it establishes the final amount of anti-dumping duty that must be paid by each respective importer on imports that occurred during the relevant period of review – the importer-specific assessment rate ("ISAR"). If the ISAR results in an amount of duties that is less than the total amount of cash deposits that were paid by the importer on importation, the difference is refunded, with interest. Conversely, if the ISAR results in an amount of duties that is greater than the total amount of the cash deposits, the importer is requested to pay the difference, plus interest. If the ISAR results in an amount of duties that is equal to the cash deposits, the importer is notified of assessment

[123] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 188.

[124] Mexico, TPWS, paras. 1-10.

[125] The period of review covered by United States duty assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the original investigation imposing the anti-dumping duty order, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

at that rate. If no review is requested, the duty is assessed at the estimated rate, and the cash deposits made on the entries during the previous year are retained to pay the final duties.

(ii) Measures at Issue

7.84 The measures at issue under this part of Brazil's complaint relate to the anti-dumping duty order issued by the United States on 9 March 2006 covering exports of certain orange juice from Brazil.[126] In particular, Brazil challenges the final results for two respondents, Cutrale and Fischer, in the First and Second Administrative Reviews, which were respectively published in the United States Federal Register on 11 August 2008 and 11 August 2009. The weighted average dumping margins ("WAM"), the cash-deposit rates ("CDR") and the importer-specific assessment rates ("ISAR") determined for Cutrale and Fischer in the two administrative reviews are shown in the following table:

	WAM[127]	***CDR***[127]	***ISAR***[128]
First Administrative Review			
Cutrale	0.45%	0%	[[XX]]
Fischer	4.81%	4.81%	[[XX and XX]]
Second Administrative Review			
Cutrale	2.17%	2.17%	[[XX]]
Fischer	0%	0%	[[XX]]

7.85 In each of the challenged administrative reviews, the USDOC used a computer programme to process the export price and normal value data of each exporter in order to calculate individual WAMs. In essence, this calculation followed three steps: First, the price of each individual export transaction was compared to a weighted-average normal value for a contemporaneous month; second, the results of these comparisons were aggregated; and third, the aggregated comparison results were divided by the total value of all export transactions, and the resulting fraction expressed in percentage terms. When undertaking the second step (aggregation), the programme included language that instructed the computer to disregard or count as zero any comparison results that were negative (i.e., where weighted-average normal value was lower than the relevant individual export price). In other words, the computer programme called for negative comparison results to be disregarded or given a zero value in the process of their aggregation for the purpose of establishing the numerator of the fraction representing the margin of dumping. It is this treatment of negative weighted-average normal value and individual export price comparison results that Brazil describes as "simple zeroing".

7.86 In addition to the support found in certain passages of the Issues and Decision Memoranda from the First and Second Administrative Reviews[129], the computer programme log and output

[126] Anti-Dumping Duty Order: Certain Orange Juice from Brazil, 9 March 2006, 71 Fed. Reg. 12183 ("Anti-Dumping Duty Order"). Exhibit BRA-3.

[127] As published in the Final Results of the First Administrative Review, Exhibit BRA-21, and the Final Results of the Second Administrative Review, Exhibit BRA-22.

[128] Figures drawn from Exhibits BRA-34 (BCI) and BRA-37 (Cutrale's computer programme outputs), penultimate page; and BRA-35 (BCI) and BRA-39 (Fischer's computer programme outputs), penultimate page.

[129] We note that the United States asserts that the Issues and Decision Memorandum from the First Administrative Review submitted by Brazil does not demonstrate that the USDOC applied "simple zeroing" in that administrative review. In particular, the United States does not accept that it demonstrates that "Fischer's or Cutrale's sales presented [USDOC] with instances of non-dumped sales such that any denial of an offset for a non-dumped sale actually occurred" (US Answer to Panel Question 10). However, in our view, various statements made in this Issues and Decision Memorandum strongly suggest that the "simple zeroing" instruction was in fact used. For instance, "In the preliminary results, we followed our standard methodology of not using

BCI deleted, as indicated [[XX]]

evidence advanced by Brazil demonstrates that the "simple zeroing" instruction was in fact executed in the WAM calculations performed for each of the two respondents.[130] Moreover, we note that the WAMs for Fischer in the First Administrative Review (4.81%) and Cutrale in the Second Administrative Review (2.17%) were relied upon to set equivalent CDRs. In the First Administrative Review, the WAM for Cutrale of 0.45% was deemed to be *de minimis* under United States law, and therefore a 0% CDR was applied.[131] Although the WAM (and consequently the CDR) published in the Final Results of the Second Administrative Review for Fischer were 0%[132], the computer programme evidence submitted by Brazil shows that the calculation run by the USDOC resulted in a WAM of [[XX]].[133] Thus, it appears that a WAM of 0%, and an equivalent CDR, were imposed on Fischer in the Second Administrative Review because of the WAM of [[XX]] determined through the application of the USDOC's computer programme. We note that the United States does not argue that a WAM and CDR of 0% were imposed on Fischer for any other reason.

7.87 To determine the ISARs applicable to entries of the respective exporter's products, the computer programme applied by the USDOC followed the same methodology described in paragraph 7.85 but, for a given importer, it included only those transactions imported by that importer in the calculation. In other words, the computer programme sorted and aggregated transactions where the export price was below normal value on an importer-specific basis, thereby applying "simple zeroing".[134] Accordingly, ISARs of [[XX]] and [[XX]] were calculated for Cutrale in, respectively, the First and Second Administrative Reviews; and for Fischer, ISARs of [[XX]] and [[XX]] were determined in the First Administrative Review.[135] Although a [[XX]] ISAR was applied to Fischer's imports in the Second Administrative Review, the evidence demonstrates that

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non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as 'zeroing'). ... We have not changed our calculation of the weighted-average margin of dumping margin as suggested by the respondents in these final results". Exhibit BRA-28, pp. 3 and 5. Similar language can be found in the Issues and Decision Memorandum from the Second Administrative Review, Exhibit BRA-43, pp. 3 and 6.

[130] Regarding Cutrale in the First Administrative Review, see Exhibits BRA-29 (BCI) (Computer programme log); BRA-28 (Issues and Decision Memorandum), pp. 3-6; BRA-34 (BCI) (Computer programme output); and BRA-31 (BCI) (Ferrier Affidavit). Regarding Fischer in the First Administrative Review, see Exhibits BRA-45 (BCI) (Computer programme log); BRA-28 (Issues and Decision Memorandum), pp. 3-6; BRA-35 (BCI) (Computer programme output); and BRA-31 (BCI) (Ferrier Affidavit). Regarding Cutrale in the Second Administrative Review, see Exhibits BRA-36 (BCI) (Computer programme log); BRA-43 (Issues and Decision Memorandum), pp. 3-6; BRA-37 (BCI) (Computer programme output); and BRA-31 (BCI) (Ferrier Affidavit). Regarding Fischer in the Second Administrative Review, see Exhibits BRA-38 (BCI) (Computer programme log); BRA-43 (Issues and Decision Memorandum), pp. 3-6; BRA-39 (BCI) (Computer programme output); and BRA-31 (BCI) (Ferrier Affidavit). Although the United States initially challenged the authenticity of one piece of evidence Brazil relied upon for the purpose of demonstrating that the WAM of Fischer in the First Administrative Review was calculated through the use of "simple zeroing" (Exhibit BRA-30 (BCI) (Computer programme log)), Brazil subsequently introduced a replacement exhibit, the authenticity of which the United States has not challenged. See, US, FWS, para. 122; US, FCOOS, para. 36. Exhibit BRA-45 (BCI). See also the summary of information on the use of "zeroing", submitted as Exhibit BRA-48.

[131] Exhibit BRA-21.

[132] Exhibit BRA-22.

[133] Exhibit BRA-39 (BCI), last page, right-hand column, "Wt avg percent margin".

[134] Regarding Cutrale in the First Administrative Review, see Exhibits BRA-29 (BCI) (Computer programme log); and BRA-31 (BCI) (Ferrier Affidavit). Regarding Fischer in the First Administrative Review, see Exhibits BRA-45 (BCI) (Computer programme log); and BRA-31 (BCI) (Ferrier Affidavit). Regarding Cutrale in the Second Administrative Review, see Exhibits BRA-36 (BCI) (Computer programme log); and BRA-31 (BCI) (Ferrier Affidavit). Regarding Fischer in the Second Administrative Review, see Exhibits BRA-38 (BCI) (Computer programme log); and BRA-31 (BCI) (Ferrier Affidavit). See also the summary of infromation on the use of "zeroing", submitted as Exhibit BRA-48.

[135] See above, footnote 127.

BCI deleted, as indicated [[XX]]

the computer programme used by the USDOC to calculate Fischer's ISAR applied "simple zeroing".[136]

(b) Introduction

7.88 As the parties recognize[137], Brazil's complaint against the United States' alleged use of "simple zeroing" in the relevant administrative reviews is, first and foremost, premised on the view that "dumping" is defined, as a general matter, in the AD Agreement and the GATT 1994 in relation to the "product as a whole". Thus, the fundamental question that lies at the heart of Brazil's claims is the following: how does the AD Agreement define the notion of "dumping"? Is Brazil correct in submitting that "dumping" is a concept that relates to an exporter's overall pricing behaviour that Members are only entitled to measure with respect to the "product as a whole"? Or does the AD Agreement, as the United States argues, permit both this and a transaction-specific conception of "dumping"?

(c) The definition of "dumping"

7.89 We start our assessment of the parties' arguments by reviewing Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement, which respectively read:

> Article VI:1 of the GATT 1994
>
> "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
>
> (*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
>
> (*b*) in the absence of such domestic price, is less than either
>
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
>
> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.
>
> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*"

[136] In particular, the computer programme evidence reveals that the numerator in the calculation of Fischer's ISAR in the Second Administrative Review included only the total amount by which export price of individual transactions was below normal value. These accounted for [[XX]] out of a total of [[XX]] transactions. See Exhibits BRA-38 (BCI), p.76; and BRA-31 (BCI) (Ferrier Affidavit), paras. 53-56. We note that the ISAR determined on this basis ([[XX]]) was considered to be [[XX]]. Exhibit BRA-39 (BCI), p. 105. See also the summary of information on the use of "zeroing", submitted as Exhibit BRA-48.

[137] Brazil, FCOOS, para. 6; US, FWS, paras. 60-61.

BCI deleted, as indicated [[XX]]

Article 2.1 of the AD Agreement

> "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."

7.90 Both Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement describe "dumping" in the same terms, namely, as occurring whenever a product is "introduced into the commerce of another country at less than its normal value" or, more specifically, when 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". There is no disagreement between the parties that this description, as it appears in Article 2.1, defines "dumping" for the purpose of the entire AD Agreement. Moreover, although both parties consider the ordinary meaning of the text of these provisions to support their own interpretations of the notion of "dumping", they do not argue that the text *alone* resolves the question whether "dumping" may be measured on the basis of individual transactions or whether it must necessarily always be determined through aggregation of all transactions relating to the "product as a whole".[138] Previous panels and the Appellate Body have generally come to the same conclusion, and have looked beyond the language of Article 2.1 in order to decipher the meaning of "dumping". When it comes to the issue of "zeroing", the inconclusive nature of the definition of "dumping" contained in Article 2.1 was perhaps most clearly articulated in *US – Continued Zeroing*, where the Appellate Body declared that:

> "Mere scrutiny of the particular terms – such as product and export price – in Article 2.1 does not resolve the issue of whether the concept of dumping is concerned with individual transactions or whether it is necessarily an aggregative concept attributable to an exporter".[139]

Similarly, the Concurring Opinion in the same Appellate Body report observed:

> "... Nothing could be more important than the definition of the concept of 'dumping'. It is foundational and applies throughout the Agreement, as the clear wording of Article 2.1 makes plain. It cannot have variable or contradictory meanings, for that would infect the entire Agreement. Yet the definition is cast at a high level of generality. The definition makes no attribution of agency; it does not say who introduces a product into the commerce of another country. Article 2.1 might so easily have included the words 'by an exporter', but it does not. So too, the definition might have referred to the product as a whole, and not simply a product. The definition is inchoate, and thus it must be interpreted."[140]

7.91 In our view, the language of Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 is drafted in such general terms that render both provisions potentially capable of capturing either of the two conceptions of "dumping" advanced by the parties. We are mindful, however, that this conclusion is only the starting point of our analysis, as pursuant to the customary rules of interpretation of public international law reflected in the Vienna Convention, we must test and

[138] See, for instance, Brazil, FWS, paras. 49-60; and US, FWS, paras. 63-68.

[139] Appellate Body Report, *US – Continued Zeroing*, para. 282. See further, e.g., Panel Report, *US – Zeroing (Japan)*, paras. 7.103-7.112; Panel Report, *US – Stainless Steel (Mexico)*, para. 7.119.

[140] Appellate Body Report, *US – Continued Zeroing*, para. 300.

explore our understanding of the relevant text in the light of its context and the object and purpose of the AD Agreement.

(i) Articles 3, 5.8, 6.10, 8.1, 9.1, 9.3 and 9.5 of the AD Agreement

7.92 Drawing from various findings of the Appellate Body in prior disputes[141], Brazil argues that Articles 3, 5.8, 6.10, 8.1, 9.1, 9.3 and 9.5 of the AD Agreement all support the position that "dumping" must be understood in terms of the pricing behaviour of individual exporters or foreign producers determined through the calculation of a single margin of dumping with respect to the "product as a whole".[142] In particular, Brazil highlights, *inter alia*, that pursuant to Article 5.8, there shall be "immediate termination" of an anti-dumping investigation against an exporter where the margin of dumping determined for that exporter is *de minimis*, recalling that the Appellate Body has said that the term "margin of dumping" in this provision "refers to a single margin established for each exporter by aggregation of its export transactions".[143] Similarly, Brazil points to: (i) Article 6.10, which it emphasizes requires that investigating authorities "shall, as a rule, determine an *individual* margin of dumping for each *known exporter or producer* concerned of *the product* under investigation"[144]: (ii) Articles 6.10.2 and 9.5, which according to Brazil, contain similar language[145]; (iii) Article 8.1, which Brazil submits provides that price undertakings must not be greater than necessary "to eliminate *the* margin of dumping"[146]; and (iv) Articles 9.1 and 9.3, which Brazil notes stipulate that duties imposed and collected must be no greater than "*the* margin of dumping".[147] Brazil also asserts that the injurious effects of "dumped imports" are assessed under Article 3, not on a transaction-by-transaction basis, but rather by examining the effects of all imports of the exporter engaged in dumping. Brazil argues that a uniform interpretation of the term "dumping" ensures that transactions treated as "dumped" for purposes of a dumping determination are also treated as "dumped" for the purpose of injury, and *vice versa*.[148]

7.93 Brazil adds that there is both a consistency and logic to the text of the AD Agreement. According to Brazil, Article 6.10 expressly requires that a single margin of dumping be determined for each exporter of the product. In Brazil's view, the singularity of that determination has a series of important legal consequences that affect the product as a whole: under Article 5.8, the decision to terminate an investigation is based on a single dumping determination made for all transactions relating to the "product"; under Article 3, on the basis of a product-wide dumping determination, all entries of the "product" are treated as dumped for the purposes of an injury determination; under Articles 8 and 9, the extent of permissible remedial action to counter injurious "dumping" is fixed by

[141] Including, Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC – Bed Linen (Article 21.5 – India)*"), WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965, para. 115; Appellate Body Report, *US – Softwood Lumber V*, footnote 158; Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* ("*US – Softwood Lumber V (Article 21.5 – Canada)*"), WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087, para. 108; Appellate Body Report, *US – Zeroing (Japan)*, para. 126; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 86-87, 99, 108; and Appellate Body Report, *US – Continued Zeroing*, paras. 268, 283.

[142] Brazil, FWS, paras. 54-56; Brazil, FCOOS, paras. 20-28.

[143] Brazil, FWS, para. 55; Brazil, FCOOS, para. 20, referring to Appellate Body Report, *US – Continued Zeroing*, para. 283.

[144] Brazil, FWS, para. 56; Brazil, FCOOS, para. 21 (emphasis original).

[145] Brazil, FCOOS, para. 21.

[146] Brazil, FCOOS, para. 25 (emphasis original).

[147] Brazil, FCOOS, para. 25 (emphasis original).

[148] Brazil, FWS, para. 58; Brazil, FCOOS, para. 23.

reference to a single margin of dumping, and that remedy applies to all future imports of the "product".[149]

7.94 The United States considers that Brazil's contextual arguments in support of its legal case are misplaced. Although agreeing with Brazil that the margin of dumping referred to in Article 5.8 of the AD Agreement may refer to an aggregation of multiple transactions, the United States considers that its relevance is limited to original investigations conducted under Article 5 of the AD Agreement, where an investigating authority must determine whether dumping exists above a 2 per cent *de minimis* threshold, and whether such dumping causes injury to the domestic industry. The United States argues that, in contrast, duty assessment under Article 9.3 of the AD Agreement is about the collection of duty, not the determination of the existence of dumping and injury. Thus, according to the United States, the differences between an Article 5 original investigation and duty assessment under Article 9.3 undermine Brazil's reliance on Article 5.8.[150]

7.95 The United States submits that the term "individual" appearing in Article 6.10 does not, as Brazil argues, refer to a "single" margin of dumping calculated on the basis of the "product as a whole". Rather, the United States argues that this term must be read as meaning that any calculated margin must *correspond* to the individual exporter. The United States finds support for this view in the Spanish text, which it notes provides that the investigating authority determine a margin of dumping "que corresponda a cada exportador", i.e., "that corresponds to each exporter". The United States explains that a margin may correspond to an exporter while being based on one transaction – as long as that transaction is the exporter's. According to the United States, Article 6.10 has nothing to do with how many transactions form the basis for any such margin, a fact it argues has been recognized by previous panels.[151]

7.96 The United States also argues that Brazil's interpretation of Articles 6.10, 8.1, 9.1, 9.3 and 9.5, overstates the importance of the term "margin of dumping" in the singular.[152] According to the United States, Brazil has itself admitted that "the use of the singular is not decisive".[153] Thus, drawing on previous panel and Appellate Body findings, the United States submits that a term that is used in the AD Agreement in the singular form may have "both singular and plural meanings".[154] In addition, the United States counters Brazil's reliance on how injury is determined under Article 3 by recalling that no injury determination is required in Article 9.3 assessment proceedings. The United States explains that Article 9 focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin and determination of injury or threat of material injury during the original anti-dumping investigation.[155]

7.97 We agree with the parties that Article 5.8 makes it necessary to determine a "single" overall margin of dumping for an investigated producer or exporter in order to ensure compliance with the *de minimis* dumping rule it prescribes. However, it is equally apparent to us that Article 5.8 says nothing about *how* any such single margin of dumping must be calculated – i.e., whether it should involve an

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[149] Brazil, FCOOS, para. 26.

[150] US, SWS, paras. 30-37.

[151] US, SWS, paras. 38-42, referring to *inter alia* Panel Report, *US – Zeroing (Japan)*, para. 7.111; Panel Report, *US – Stainless Steel (Mexico)*, para. 7.127; and Panel Report, *US - Continued Zeroing*, para. 7.163.

[152] US, SWS, para. 43.

[153] US, SWS, para. 43, citing Brazil, FCOOS, para. 13.

[154] US, SWS, para. 43, referring to Panel Report, *United States – Anti Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, para. 7.149; and Appellate Body Report, *United States –Anti Dumping Measures on Oil Country Tubular Goods (OCTG)* from Mexico, WT/DS282/AB/R, adopted 28 November 2005, para. 147.

[155] US, FWS, paras. 87-92.

aggregation of the results of *all* normal value and export price comparisons or only those where normal value exceeds export price. We note that the question that must be answered when examining the WTO-consistency of "zeroing" is not simply whether there must be aggregation of multiple normal value and export price comparison results, but also whether any such aggregation must *always* necessarily take account of *all* those comparison results.[156] In our view, the fact that Article 5.8 envisages the calculation of a "single" overall margin of dumping clarifies little about *how* that margin of dumping is supposed to be calculated.[157]

7.98 Similarly, the fact that all imports are treated as "dumped" for the purpose of determining injury in an original investigation under Article 3 might also be understood to provide support for the view that "dumping" concerns the "product as a whole".[158] In this regard, Brazil recalls that the Appellate Body has highlighted "the contradiction that arises when the same type of transactions are treated as 'dumped' for purposes of injury determination in the original investigation and as 'non-dumped' in periodic reviews for duty assessment".[159] Brazil argues that such contradictions have no place in a "harmonious and coherent" interpretation of the AD Agreement.[160] However, as we see it, contradiction and incoherence arises only if the qualitative differences in the rules governing original investigations (where authorities must perform an injury analysis) and duty assessment proceedings (where the focus is purely on duty collection) are not considered sufficient to justify the possibility of two conceptions of the notion of "dumping" co-existing in the AD Agreement. Obviously, the Appellate Body believes the differences are not so great.[161]

7.99 We find the language that Brazil has pointed to in the remainder of the above-mentioned provisions relatively weak and consider that it provides no particularly useful guidance for the purpose of determining which of the two conceptions of "dumping" is favoured under the AD Agreement. Again, it is difficult to see what obligations which refer to "the" margin of dumping or "an individual" margin of dumping can tell us about the definition of "dumping" when they do not speak at all to *how* "the" margin of dumping or any "individual" margin of dumping must be calculated – should it be through an aggregation of the results of all normal value and export price comparisons or only those where normal value exceeds export price?[162]

(ii) "Dumping" is an exporter-specific, not importer-specific, concept

7.100 Brazil recalls that the Appellate Body has found that "dumping" is determined with respect to an individual exporter, and not on an importer-specific basis. Relying upon the position articulated by the Appellate Body in *US – Stainless Steel (Mexico)*, Brazil submits that the elements of the definition of "dumping" – namely, that "dumping" occurs when a product is "*introduced* into the commerce of *another country*" at an "*export price*" that is less than the "comparable price for the like product in the *exporting country*" – indicate that Article VI:1 of the GATT 1994 and Article 2.1 of the

[156] See above, para. 7.90.

[157] A similar view was expressed in the Concurring Opinion of one Appellate Body Member in Appellate Body Report, *US – Continued Zeroing*, paras. 309-310.

[158] We note that there is no disagreement between the parties that a margin of dumping determined through the use of the first methodology described in Article 2.4.2 of the AD Agreement must be established on the basis of a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions. See, e.g., Brazil, FWS, para. 114; US, FWS, para. 54.

[159] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 108.

[160] Brazil, FCOOS, para. 23.

[161] See, e.g, Appellate Body Report, *US – Continued Zeroing*, paras. 284-285.

[162] A similar view was expressed with respect to Articles 6.10 and 9.5 of the AD Agreement in the Concurring Opinion of one Appellate Body Member in Appellate Body Report, *US – Continued Zeroing*, paras. 309-310.

AD Agreement address the pricing practices of an exporter.[163] Brazil also refers to Articles 2.2, 2.3, 5.8, 6.10, 8.1, 9.4 and 9.5 of the AD Agreement, drawing support for its position from the language in these provisions which identifies or focuses upon the "*export price*", the "*exporter*", the "*volume of exports*", the "*exporting country*", "any *known exporter*", "*any exporter*", "*exporters or foreign producers*" and the "*selected exporters or producers*".[164] In addition, Brazil cites another series of Appellate Body statements where it is observed that:

> "[d]umping arises from the pricing practices of exporters as both normal value and export prices reflect their pricing strategies in home and foreign markets".[165]
>
> "Indeed, it is the exporter, not the importer that engages in practices that result in situations of dumping".[166]
>
> "The fact that 'dumping' and 'margin of dumping' are exporter-specific concepts under the Anti-Dumping Agreement is not altered by the fact that the export price may be the result of negotiation between the importer and the exporter. Nor is it altered by the fact that it is the importer that incurs the liability to pay anti-dumping duties".[167]

7.101 The United States submits that "dumping" may be both exporter-specific and transaction-specific at the same time. According to the United States, an exporter orientation does not, of itself, require that transactions be aggregated under Article 9.3 of the AD Agreement because a dumping margin determination on the basis of an exporter's actions with respect to an individual transaction is no less exporter-specific than one on the basis of multiple transactions by that exporter. Moreover, the United States argues that a transaction-specific meaning is equally exporter-specific and importer-specific since each transaction has both an exporter and an importer.[168]

7.102 We agree with Brazil and the Appellate Body that "dumping" is a concept that relates to an individual exporter's pricing behaviour. However, in our view, this tells us little about *how* to make a determination of "dumping", and in particular, whether the focus of such a determination should be an individual exporter's overall pricing behaviour in respect of the "product as a whole", or an exporter's pricing behaviour considered on a transaction-specific basis. As the United States has submitted, the question at issue in this dispute is not whether "dumping" is an exporter-specific or importer-specific concept, but rather to what extent individual transactions of a particular exporter must be aggregated when making a determination of "dumping".[169] Brazil's arguments concerning the exporter-specific nature of "dumping" elucidate very little in this regard.

(iii) Article VII:3 and the Ad Note to Article VI:1 of the GATT 1994, and Articles 2.2 and 2.3 of the AD Agreement

7.103 The United States submits that the term "product" used throughout the AD Agreement and the GATT 1994 carries with it a variable meaning, implying that it cannot be presumed that the same term has the exclusive meaning Brazil argues in the context of Article 2.1 of the AD Agreement and Article VI:1 of the GATT. For instance, the United States points to Article 2.6 of the AD Agreement,

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[163] Brazil, FWS, para. 53, referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 86 (emphasis original).

[164] Brazil, FWS, paras. 54-56, referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 86-87 (emphasis original).

[165] Brazil, FWS, para. 57, citing Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95 and Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

[166] Brazil, FWS, para. 57, citing Appellate Body Report, *US – Zeroing (EC)*, para. 129.

[167] Brazil, FWS, para. 57, citing Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95.

[168] US, FWS, paras. 85-86.

[169] US, FWS, para. 85.

which defines the term "like product" in relation to "the product under consideration". According to the United States, this provision plainly uses the term "product" in the collective sense. The United States notes that, by contrast, Article VII:3 of the GATT 1994 – which refers to "[t]he value for customs purposes of any imported product" – plainly uses the term "product" in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a specific quantity of merchandise that matches the criteria for the "product" at a particular price).[170]

7.104 In addition, the United States argues that the term "margin of dumping" found in the Ad Note to Article VI:1 of the GATT 1994 and Article 2.2 of the AD Agreement does not refer exclusively to the aggregated results of comparisons for the "product as a whole". As used in the Ad Note to Article VI:1, the United States submits that the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers. Similarly, according to the United States, were Brazil correct, the term "margin of dumping" as it appears in Article 2.2 of the AD Agreement, would require the use of constructed normal value for the "product as a whole", even if the condition precedent for using constructed normal value under Article 2.2 relates only to a portion of the comparisons. In this regard, the United States recalls that the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2. ... We are not convinced that the Appellate Body could have intended its *US – Softwood Lumber V* findings to be applied in this manner".[171]

7.105 Brazil argues that the United States' reliance on Article VII:3 of the GATT 1994 misunderstands the role of context in treaty interpretation. According to Brazil, the fact that the same word appears in two (or more) proximate treaty provisions does not mean that the word carries the same meaning in each provision. Thus, Brazil submits that a single word used in two provisions may have different meanings in each provision, depending on the context. In its particular context, the word "product" appearing in Article VII:3 has a meaning that is relevant to what is regulated under that provision – customs valuation, which is necessarily undertaken on a transaction-specific basis. This is an entirely different context to Article VI:1, which is about dumping. Therefore, Brazil is of the view that the United States is wrong to assume that the same word, "product", must be given the same meaning in Article VI:1 and Article VII:3 of the GATT 1994.[172]

7.106 Brazil also disputes the United States' interpretation of the Ad Note to Article VI:1, arguing that it does not provide a definition of either "dumping" or "margins of dumping", nor does it state implicitly or otherwise that "margins" may be transaction-specific. Brazil argues that like Article 2.3 of the AD Agreement, the Ad Note to Article VI:1 simply permits an authority to use an importer's resale price to an independent buyer as the starting-point for determining the export price in circumstances where the importer is related to the exporter. In its view, neither Article 2.3 nor the Ad Note to Article VI:1 alters the requirement that an individual margin of dumping be determined for each exporter on the basis of all relevant export transactions.[173]

7.107 Finally, Brazil rejects the United States' reliance on Article 2.2 of the AD Agreement, recalling that the Appellate Body has previously rejected the same argument.[174] In particular, Brazil notes that the Appellate Body has held that an authority may sub-divide the product in conducting

[170] US, FWS, para. 79.

[171] US, FWS, para. 83, referring to Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.62.

[172] Brazil, FCOOS, paras. 39-43.

[173] Brazil, FCOOS, paras. 44-45.

[174] Brazil, FCOOS, para. 46, referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104.

intermediate comparisons on a model-specific basis, and on this basis assess whether the conditions in Article 2.2 for construction of normal value are met. Brazil emphasizes that the results of all intermediate comparisons must be aggregated to determine "dumping" on a product-wide basis to meet the definition in Article 2.1.

7.108 We agree with the United States that the transaction-specific meaning of the word "product" when used in Article VII:3 of the GATT 1994 tends to support the view that it cannot be *presumed* that the same word, when it appears in Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994, must necessarily refer to the "product as a whole", with all the consequences that follow for the definition of "dumping". However, we note that Brazil's arguments are based on more than just the ordinary meaning of the word "product", but also the particular context in which it is found in both the AD Agreement and the GATT 1994. In other words, Brazil does not *presume* that the word "product" in abstract has the meaning it argues. Rather, Brazil submits that this meaning is confirmed from how the notion of "dumping" is described in other provisions it considers form part of the relevant context of Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994. Thus, in our view, the fact that the word "product" in Article VII:3 has a transaction-specific meaning does not detract from Brazil's complaint. It does, however, suggest that the drafters of the GATT understood that the meaning of the word "product" could have a transaction-specific meaning in the particular context of customs valuation, which in turn also suggests that it cannot be categorically excluded that the negotiators may have held the same view about the meaning of "product" when it appears in Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994. As we have said before, the ordinary meaning of the word "product" as it appears in Article 2.1 of the AD Agreement does not resolve which of the two definitions of "dumping" must prevail.

7.109 The United States argues that the Ad Note to Article VI:1 of the GATT 1994 expressly defines a particular form of dumping – "hidden dumping" – in relation to individual transactions and that the text of that provision contemplates that a "margin of dumping" may be calculated for a specific sale by an importer, implying that "dumping" cannot be exclusively defined with respect to the "product as a whole". It is not entirely clear to us that this is the correct reading of the Ad Note. In our view, the plain language of the Ad Note might equally be interpreted as merely identifying one particular situation ("Hidden dumping by associated houses") in which investigating authorities are entitled to construct export price on the basis of an importer's resale price. In any case, because the Ad Note is silent about *how* any comparison results involving normal value and one or more constructed export prices must be aggregated, it does not provide any useful guidance on the question whether "dumping" relates exclusively to the "product as a whole" or whether it can also be transaction-specific. The same can be said about Article 2.2 of the AD Agreement. As Brazil notes, it is possible to sub-divide a product when multiple averaging, and explore whether the conditions in Article 2.2 for constructed normal value are satisfied for each averaging group. However, again, because Article 2.2 (like Article 2.3) says nothing about how comparisons involving constructed normal value must be aggregated, this provision is, in our view, inconclusive about how to interpret the notion of "dumping".

(iv) Duty collection on the basis of a prospective normal value

7.110 The United States argues that the existence of prospective normal value systems of duty collection demonstrates that the notion of "dumping" cannot be exclusively understood to relate to the "product as a whole".[175] Drawing on descriptions found in previous panel reports[176], as well as

[175] US, FWS, paras. 109-115; US, SWS, paras. 59-69.

[176] For example, Panel Report, *US – Zeroing (Japan)*, para. 7.201; and *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.53.

information concerning how Canada administers its own prospective normal value system[177], the United States explains that under such systems, the amount of liability for payment of anti-dumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. Thus, according to the United States, duties will be payable only when the price of an imported product is below the prospective normal value, with the prices of all other transactions playing no part in this determination. The United States recalls that the transaction-specific nature of prospective normal value systems has led previous panels to find that a transaction-specific conception of "dumping" must also be permissible under the AD Agreement. For instance, the United States points to the following observation of the panel in *US – Zeroing (Japan)*:

> "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value".[178]

7.111 Brazil responds to the United States' submissions by recalling that the Appellate Body has considered and rejected the same arguments in previous "zeroing" disputes.[179] In particular, Brazil notes that the Appellate Body has explained "that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping", and that the rules in the AD Agreement regarding duty "imposition and collection" are "distinct and separate" from those governing a determination of "dumping".[180] Moreover, Brazil observes that the Appellate Body has also explained that the amount of duties collected in a prospective normal value system is subject to review under Article 9.3.2 of the AD Agreement to ensure that the total amount of duties does not exceed the margin of dumping for the "product as a whole".[181]

7.112 Previous panels have generally disagreed with the view that duty collection in a prospective normal value system is subject to refund proceedings involving the calculation of a margin of dumping for the "product as a whole" under Article 9.3.2 of the AD Agreement, on the ground that it would be inconsistent with the fundamental nature of how such systems are intended to function.[182] The United States submits that accepting the Appellate Body's position would effectively transform the prospective normal value system into a retrospective system of duty collection.[183] We recognize that the functioning of prospective normal value systems of duty collection, as described by the United States and previous panels, would be fundamentally altered if subjected to the possibility of duty refunds involving the calculation of a margin of dumping on the basis of the "product as a whole". An approach that would permit transaction-specific determinations of a margin of dumping for the purpose of collecting anti-dumping duties, yet *require* "product as a whole" determinations when deciding whether there was over-collection, in our view, seems to be incongruent and not in keeping with how prospective normal value systems have traditionally operated. In this regard, we

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[177] US, Answer to Panel Question 13; and US, SWS, paras. 63-65, referring to Report on the Special Import Measures Act, House of Commons Canada, December 1996, submitted by the United States as Exhibit US-2; and Canada's WTO Trade Policy Review, WT/TPR/S/112, para. 68 and Table III.5.

[178] Panel Report, *US – Zeroing (Japan)*, para. 7.205. The United State refers to a similar statement made by the panel in Panel Report, *US – Zeroing (EC)*, para. 7.206.

[179] Brazil, SCOOS, paras. 14-16.

[180] Brazil, FCOOS, paras. 47-48, referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 160; Appellate Body Report, *US – Continued Zeroing*, para. 294; and Brazil, SWS, para. 5.

[181] Brazil, FCOOS, para. 49; and Brazil, Answer to Panel Question 12.

[182] See for instance, Panel Report, *US – Zeroing (Japan)*, para. 7.204; Panel Report, *US – Stainless Steel (Mexico)*, para. 7.133.

[183] US, FWS, para. 115; US, SWS, para. 64.

note that the United States asserts that Canada, a WTO Member that applies a prospective normal value system, grants refund ("re-determination") requests that are "usually transaction-specific".[184] Moreover, although the Canadian system envisages that, under certain conditions, importers may request a refund with respect to multiple transactions ("blanket request procedure")[185], this possibility is limited to transactions concerning "shipments of goods to the same importer".[186]

7.113 Brazil and a number of third parties that typically collect anti-dumping duties on a prospective basis, but with varying levels of experience in their collection on the basis of a prospective normal value, have stated that they *would* provide refunds of excessive duties collected through application of a prospective normal value on the basis of a margin of dumping determined for the "product as a whole".[187] However, neither Brazil nor any of the relevant third parties have explained how any such refunds would be determined. Thus, we do not know, for instance, what would be the length of the period of review covered by any such "product as a whole" assessment or whether any refund would be based on a calculation involving exports to all importers or only those requesting a refund. Indeed, neither Brazil nor any of the relevant third parties have identified any instance in which refunds for duties collected on the basis of a prospective normal value have actually been requested and/or granted. In this regard, we note that the United States has questioned whether Brazil's system in fact operates as Brazil asserts, pointing to instances involving the collection of duties on the basis of a prospective normal value on products from seven WTO Members, where the United States asserts Brazil's Official Gazette stated that the anti-dumping duty would be calculated on a transaction-specific basis.[188]

7.114 In considering the United States' arguments in respect of prospective normal value systems, we cannot, however, overlook the absence from the AD Agreement of any complete description of how prospective normal value systems are intended to operate. Apart from Article 9.4(ii) of the AD Agreement – a provision explaining how anti-dumping duties may be collected from exporters or producers not included in a limited examination performed under Article 6.10 – the AD Agreement is silent about how such systems must be implemented. In the absence of any more detailed provisions explaining how prospective normal value systems are generally supposed to function, it is difficult to come to any firm conclusion about which of the two views should prevail.

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[184] US, Answer to Panel Question 13, footnote 11 citing Exhibit US-6, Canada Border Services Agency; *Procedures for making a request for a Re-Determination or an Appeal under the Special Import Measures Act*: Memorandum D14-1-3 (1 October 2008) (the "SIMA Memorandum"), paras. 19, 34-44.

[185] The SIMA Memorandum stipulates that "A blanket request is a procedure through which an importer may request re-determinations on more than one transaction under specific conditions provided that both the public and the CBSA receive administrative benefits". A "blanket request" may be refused where *inter alia* it "may result in administrative difficulties or processing delays". Exhibit US-6, paras. 50 and 53(b).

[186] SIMA Memorandum, para. 53(d). Exhibit US-6.

[187] Brazil, Answer to Panel Question 13. See also EU, Answer to Panel Question 2 to the Third Parties; and Mexico, Answer to Panel Question 2 to the Third Parties.

[188] US, SCOOS, paras. 13-19 and Ministry of Development, Industry and Foreign Trade, Office of the Secretary of Foreign Trade, *Circular No. 12 of 7 March 2008*, (imports of polyvinylchloride from the United States and Mexico) Exhibit US-9, para. 3 ("The anti-dumping duty is calculated on the basis of the absolute difference between the reference price and the price at which the transaction by which the product is imported from the USA or Mexico is executed, as the case may be. The anti-dumping duty will be charged only in a case in which the price of the imported product is lower than the proposed reference price.") See also Exhibits US-10 to US-12, containing other determinations with substantially similar language. Brazil submits that the United States' assertions are factually wrong. In its view, the measures at issue laid down a cap on the amount of duties that could be levied on each import entry, providing that this amount could not exceed the relevant margins of dumping previously established by the Brazilian investigating authority. Thus, according to Brazil, its investigating authority did not treat the amount of duties imposed in relation to a single entry as a margin of dumping, and instead, capped the amount of duties at the level of a margin of dumping previously estalished. Brazil, Comments on US Requests for Interim Review, paras. 19-22.

BCI deleted, as indicated [[XX]]

(v) Article 2.4.2 and "mathematical equivalence"

7.115 The United States submits that the prohibition on "model zeroing" found by the Appellate Body to exist in *US – Softwood Lumber V* under Article 2.4.2 of the AD Agreement was based on the textual references to "margins of dumping" and "all comparable export transactions" appearing in the first sentence of this provision, which the Appellate Body stated had to be read in an "integrated manner". According to the United States, it was these textual references, and not any independent obligation found elsewhere in the AD Agreement, that led the Appellate Body to conclude that "product" must mean "product as a whole" and that "margins of dumping" may not be based on individual averaging group comparisons. The United States notes that no similar language appears elsewhere in the AD Agreement, in its view suggesting that the "product as a whole" notion of "dumping" cannot extend, as a general matter, beyond the particular context of W-W comparisons in original investigations. Indeed, the United States submits that if, as Brazil argues, there were a general prohibition on "zeroing" applying to all anti-dumping proceedings and all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in *US – Softwood Lumber V*, would be redundant.[189]

7.116 The United States also argues that any interpretation of the AD Agreement and the GATT 1994 that gives rise to a general prohibition of "zeroing" – i.e., that establishes that "dumping" can only be defined with respect to the "product as a whole" – would render the second sentence of Article 2.4.2 redundant. In particular, the United States submits that the exceptional comparison methodology provided for in this sentence (the W-T methodology) would yield precisely the same result as a W-W comparison if, in both cases, "dumping" was determined for the "product as a whole". According to the United States, such an outcome would contradict a key rule of treaty interpretation, namely, that an "interpretation must give meaning and effect to all the terms of a treaty".[190] The United States recalls that previous panels have found this argument persuasive[191], and urges the Panel in this dispute to do likewise.[192]

7.117 Brazil does not appear to have *directly* responded to the United States' arguments concerning the implications of a general prohibition on "zeroing" in the light of the Appellate Body's findings in *US – Softwood Lumber V* and Article 2.4.2 of the AD Agreement. However, it has repeatedly emphasized that the Appellate Body has consistently found that Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994, when considered in the context of various other provisions and in the light of the object and purpose of the AD Agreement, establish a definition of "dumping" applicable to the *entire* AD Agreement that is focused on the "product as a whole". As regards the United States' "mathematical equivalence" argument, Brazil recalls that the Appellate Body has found there to be "considerable uncertainty as to how precisely the third methodology should be applied", noting that different approaches to its application could generate results that would not be mathematically equivalent. In addition, Brazil argues that the exceptional authority conferred under the second sentence of Article 2.4.2 cannot dictate how the general (non-exceptional) rules for calculating margins of dumping are to be interpreted.[193]

7.118 The United States is correct in recalling that an "integrated" reading of the terms "margins of dumping" and "all comparable export transactions" was central to the Appellate Body's "model

[189] US, FWS, paras. 54-59; US, FCOOS, paras. 23-25.

[190] US, FWS, para. 94, referring to Appellate Body Report, *US – Reformulated Gasoline*, p. 23.

[191] The United States refers to: Panel Report, *US – Zeroing (EC)*, para. 7.266; Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.52; Panel Report, *US – Zeroing (Japan)*, para. 7.127; and Panel Report, *US – Stainless Steel (Mexico)*, para. 7.134.

[192] US, FWS, paras. 93-98; US, FCOOS, para. 34; US, Answer to Panel Question 14.

[193] Brazil, FCOOS, paras. 52-58; Brazil, Answer to Panel Question 14; Brazil, SWS, para. 5; Brazil, SCOOS, paras. 32-36.

zeroing" findings in *US – Softwood Lumber V*. However, there was no disagreement between the parties in that dispute about how the term "all comparable export transactions" should be interpreted. That is, all participants agreed that "all comparable export transactions" had to be taken into account in establishing margins of dumping. The parties' dispute was with respect to how the results of multiple comparisons should be interpreted and aggregated. The Appellate Body described this disagreement as flowing from the respective views on the meaning of "dumping" and "margins of dumping".[194] To resolve this difference of opinion, the Appellate Body turned to the definition of "dumping" found in Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994. The Appellate Body then explained:

> "It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority. Moreover, we note that the opening phrase of Article 2.1—'[f]or the purpose of this Agreement'—indicates that the definition of 'dumping' as contained in Article 2.1 applies to the entire Agreement, which includes, of course, Article 2.4.2. 'Dumping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product."[195]

Thus, it appears to us that the same notion of "dumping" that Brazil advances in the present controversy was also at the heart of the Appellate Body's finding concerning "model zeroing" in *US – Softwood Lumber V*.

7.119 In its answer to Panel Question 14, the United States explained in detail how it considered the third (W-T) methodology described in Article 2.4.2 operates, demonstrating how "mathematical equivalence" would result if "zeroing" was generally prohibited. Brazil, on the other hand, has pointed to various descriptions found in previous panel and Appellate Body reports of how other Members give effect to, or potentially give effect to, the W-T methodology set out in Article 2.4.2 without yielding "mathematical equivalence". It is apparent that Members have different views on how the W-T methodology in Article 2.4.2 should be implemented, and whether it will result in "mathematical equivalence". This is not surprising as when it comes to understanding the modalities for how it should be applied, the text of Article 2.4.2 provides little guidance for those seeking a detailed explanation of what may or may not be permissible. Were the approach advocated by the United States correct, a general prohibition on "zeroing" (i.e., a definition of "dumping" in relation to the "product as a whole") applicable to the entire AD Agreement would render the text describing the W-T methodology in Article 2.4.2 redundant. Obviously, such a result would be inconsistent with the principle of effective treaty interpretation. This would imply that no such general prohibition could exist, unless, as Brazil, two of the third parties[196] and the Appellate Body contend, the W-T methodology can be characterized as an "exception" to the otherwise generally applicable definition of "dumping". However, it could be argued that this point of view also has its weaknesses. First, the word "exception" does not appear in Article 2.4.2. Arguably, the fact that the first sentence of Article 2.4.2 directs Members to "normally" establish margins of dumping through the use of the W-W and T-T methodologies does not render the W-T methodology described in the following sentence an "exceptional" methodology, but rather one whose application is not *expected* to be the "norm".[197] Second, the fact that the definition of dumping contained in Article 2.1 of the AD Agreement is

[194] Appellate Body Report, *US – Softwood Lumber V*, para. 90.
[195] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[196] EU, TPWS, para. 175; and Japan, Answer to Panel Question 3 to the Third Parties.
[197] In our view, there may well be situations where a particular product or market is affected by "targeted" dumping to such an extent that an investigating authority will resort to the W-T methodology more often than the W-W or T-T methodologies. In such circumstances, the W-T methodology could effectively become the "norm" with respect to that particular product or market.

intended to apply "[f]or the purpose of this Agreement" could be viewed as suggesting that it is not subject to any "exception". Thus, on the issue of "mathematical equivalence", we find neither of the positions advanced by the parties' to be conclusive.

(vi) Historical background

7.120 The United States considers that the Second Report of the Group of Expert Report on anti-dumping and countervailing duties, adopted in May 1960, supports the view that the notion of "dumping" may be defined on a transaction-specific basis. The United States explains that the Group of Experts considered that the "ideal method" for applying anti-dumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned".[198] The United States recalls that previous panels have found this evidence persuasive, with the panel in *US – Zeroing (Japan)* observing that it "shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions"[199]; and the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* concluding that it demonstrates that "the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins".[200]

7.121 In addition, the United States notes that two GATT 1947 panels asked to determine whether "zeroing" was prohibited under the provision of the Tokyo Round Anti-Dumping Code concluded that it was not, further reinforcing the validity of the Group of Experts' understanding of Article VI of the GATT 1947.[201] In this light, the United States finds it significant that Article VI of the GATT 1947 was incorporated into the GATT 1994 without revisions, notwithstanding the fact that the Uruguay Round negotiators had actively discussed whether the use of "zeroing" should be restricted. According to the United States, if the Uruguay Round negotiators had intended to make such a fundamental change to the notion of "dumping" they would have been clearer about it, and it would not have come to a surprise to the major users of dumping remedies, such as the EU and the United States, after the fact through dispute settlement.[202] In this regard, the United States advances evidence which it considers demonstrates that apart from the United States and the EU, at least two other major users of the anti-dumping remedy continued to calculate margins of dumping through the use of "zeroing" after the entry into force of the Uruguay Round Agreements.[203]

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[198] US, FWS, para. 69, citing *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/114, adopted on 27 May 1960, BISD 9S/194, para. 7.

[199] Panel Report, *US – Zeroing (Japan)*, para. 7.107.

[200] Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.64.

[201] US, FWS, para. 71, referring to *EC – Audiocassettes*, para. 360 and *EC – Cotton Yarn*, para. 502.

[202] US, FWS, paras. 69-72.

[203] US, Answer to Panel Question 17, referring to Argentina and South Africa, who together with the European Communities and the United States, accounted for the largest number of initiations of anti-dumping investigations in 1995. As regards Argentina, the United States points out that in the *Argentina – Poultry Anti-Dumping Duties* dispute, the panel concluded *inter alia* that "if zeroing is inconsistent with Article 2.4.2, then Argentina's practice of totally disregarding certain export transactions [i.e., transactions with a price that was higher than or equal to normal value] would also be inconsistent with Article 2.4.2 because it does not compare the weighted average normal value with the weighted average of prices of all comparable transactions". In addition, the United States notes that Argentina stated that its methodology was also used by other WTO Members. Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* ("*Argentina – Poultry Anti-Dumping Duties*"), WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727, para. 7.78 and Annex B-4 (Replies of Argentina to Questions of the Panel – First Meeting, reply to question 11(b), at B-94). In respect of South Africa, the United States points to the Board of Tariffs and Trade Report, in the *Investigation into the Alleged Dumping of Meat of Fowls of the Species Gallus Domesticus, Originating in or Imported from the United States of America*, where the following statement was made: "In determining the dumping margin,

7.122 Brazil considers the United States' references to the methodologies allegedly used by other WTO Members to be irrelevant for the purpose of assessing whether the United States' own conduct in the orange juice proceedings was WTO-consistent. In any case, Brazil notes that the European Union has abandoned "zeroing" in order to comply with its WTO obligations; that the panel's findings in *Argentina – Poultry Anti-Dumping Duties*, relied upon by the United States, related in fact to the investigating authority's decision to initiate an investigation, and not to the determination of the margin of dumping in the investigation itself; and that Argentina's position as a third party in the present dispute is that it considers "zeroing" to be inconsistent with the AD Agreement.[204]

7.123 Brazil has not responded to the United States' arguments concerning the Group of Experts Report and the prior GATT panels. However, they have been addressed previously by the Appellate Body in a number of disputes, where it has denied the relevance of the Report and the previous GATT panel reports for various reasons, including because: (i) the Group of Experts' Report itself characterized the "ideal" transaction-specific method of determining injurious dumping as "clearly impracticable"; (ii) today, Article VI of the GATT 1994 has to be interpreted in the light of the relevant AD Agreement framework including provisions such as Articles 2.1, 2.4, 2.4.2 and 9.3; (iii) the AD Agreement entered into force "long after" the 1960 Group of Experts Report; and (iv) the panel reports at issue examined "zeroing" under the Tokyo Round Anti-Dumping Code, which as a plurilateral agreement was legally separate from the GATT 1947, has been terminated, and in any case, contained provisions much less detailed than those found in the current AD Agreement.[205]

7.124 We have sympathy for the view that a transaction-specific notion of "dumping" was traditionally recognized by the Contracting Parties to the GATT 1947 as being at least permissible under Article VI, particularly given that the major users of the anti-dumping remedy were all Signatories to the Tokyo Round Anti-Dumping Code and therefore members of the Committee on Anti-Dumping Practices, which on 30 October 1995 adopted the *EEC – Cotton Yarn* panel report.[206] Indeed, Brazil, which was the complainant in that case, did not argue against the use of "zeroing" *per se*. Rather, "Brazil argued that in this case the large variations in dumping margins found by the EC were due to severe distortions in the Brazilian financial environment. In the circumstances of a volatile financial environment, so-called 'zeroing' produced a distortion which should have been the subject of a due allowance".[207] It is true, however, that the panel in the *EEC – Cotton Yarn* dispute examined Brazil's claims under Article 2.6 of the Tokyo Round Code, a provision which was modified in the WTO AD Agreement. Moreover, there was no equivalent of Article 2.4.2 of the WTO AD Agreement in the Tokyo Round Anti-Dumping Code.

7.125 As regards the Group of Experts Report, we note that the Experts considered that the "ideal method of fulfilling [the principles of Article VI] was to make a determination of <u>both dumping and material injury</u> in respect of each single importation of the product concerned".[208] However, they

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the Board applied the 'zeroing' methodology ... This methodology is applied by a number of jurisdictions including the European Union and the United States". Exhibit US-13.

[204] Brazil, Comments on US Answer to Panel Question 17.

[205] See e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 131-132; Appellate Body Report, *US – Continued Zeroing*, paras. 299-303.

[206] Minutes of the Meeting of the Committee on Anti-Dumping Practices, 21 February 1996, ADP/M/50. As regards the *EC – Audiocassettes* dispute, we note that although having expressed dissatisfaction with the ruling concerning "zeroing", Japan (the complainant) "welcomed the Report and strongly recommended the Committee to adopt it at this first opportunity". It was the EC that opposed the adoption of this report. See, e.g., Minutes of the Meeting of the Committee on Anti-Dumping Practices, 26 September 1995, ADP/M/49; and Minutes of the Meeting of the Committee on Anti-Dumping Practices, 8 April 1997, ADP/M/54.

[207] GATT Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995, BISD 42S/17, para. 486.

[208] Emphasis added.

found that this "was clearly impracticable, particularly as regards injury".[209] In other words, the Group of Experts appear to have tied their acceptance of transaction-specific dumping determinations to transaction-specific injury determinations, which is not exactly what the United States is arguing in the present dispute.

(vii) Permissible Interpretations under Article 17.6(ii) of the AD Agreement

7.126 Brazil has characterized the notion of "dumping" as a "foundational concept" that must be defined uniformly for all Members.[210] Although this language does not appear in the AD Agreement, it goes without saying that the notion of "dumping" is indeed fundamental and of critical importance to the operation of the AD Agreement. However, as our analysis of the parties' arguments and relevant jurisprudence reveals, the express terms of the AD Agreement provide no precise definition of this important concept. Indeed, that the text used in the definition of "dumping" set forth in Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 is, alone, inconclusive has already been recognized by previous panels and the Appellate Body.[211] Furthermore, in our view, even when interpreted in its relevant context and in the light of the object and purpose of the AD Agreement, the definition of "dumping" contained in these provisions does not result in one clear definition that is free from valid criticism, or that does not generate its own set of practical and legal problems. In this regard, we cannot help but agree with the Concurring Opinion in *US – Continued Zeroing* that the arguments the parties have advanced in respect of the definition of "dumping" create, for different reasons, their own interpretative dilemmas.[212] We view this objective lack of clarity in the definition of a concept that is as fundamental to the functioning of the AD Agreement as "dumping" to strongly suggest that Members held, if not accepted, differing views about what "dumping" meant at the time of the closure of the Uruguay Round.

7.127 The Appellate Body has expressed the opinion that the proper application of the rules of treaty interpretation set out in the Vienna Convention cannot result in conflicting interpretations. In particular, the Appellate Body has explained that:

> "... the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty.{} The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the *Vienna Convention* if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions."[213]

7.128 Brazil agrees with the Appellate Body.[214] On the other hand, the United States argues that such a view would render Article 17.6(ii) meaningless. According to the United States, Article 17.6(ii) reflects the Uruguay Round negotiators' recognition that they had left a number of issues unresolved and that customary rules of interpretation would not always yield only one permissible interpretation of a given provision. Thus, the United States submits that to conclude that

[209] Emphasis added.
[210] See, e.g., Brazil, FCOOS, para. 31.
[211] See above discussion concerning Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994, at paras. 7.89-7.91.
[212] Appellate Body Report, *US – Continued Zeroing*, para. 305.
[213] Appellate Body Report, *US – Continued Zeroing*, para. 273 (footnote omitted).
[214] See, e.g,. Brazil, FCOOS, paras. 6-11.

"it is not possible to find that there are conflicting interpretations of the text would mean depriving the second sentence of Article 17.6(ii) of meaning. If the permissible interpretations are all 'harmonious' then it is difficult to see how a measure could be in conformity with only one of the interpretations".[215]

7.129 It is well established that the purpose of treaty interpretation through the use of the Vienna Convention is the identification of the *common intention* of the parties.[216] It follows that where the common intention of the parties to a treaty explicitly provides for two conflicting interpretations of the same term or treaty provision, the Vienna Convention rules on treaty interpretation must necessarily recognize both positions. In other words, where the very words of a treaty expressly provide for the legality of two rival interpretations, the Vienna Convention will respect both interpretations. The same result must also hold where the examination of a term's ordinary meaning, in the light of its context and the object and purpose of the treaty to which it pertains, establishes a *common intention* of the parties to accept two conflicting interpretations. To the extent that both circumstances give effect to the *common intention* of the parties, they are not only consistent with the rules of interpretation contained in the Vienna Convention, but also entirely coherent and representative of the particular order negotiated by the parties. Thus, we see the critical question before us in the present dispute to be the following: does application of the customary rules of interpretation of public international law reflected in the Vienna Convention rules of treaty interpretation lead us to understand the common intention of the Members at the end of the Uruguay Round as allowing for one exclusive ("product as a whole") interpretation of the concept of "dumping"; or does it accept the possibility that "dumping" may also have an additional ("transaction-specific") meaning?

(viii) Conclusion concerning the definition of "dumping"

7.130 The present controversy is the fifth dispute where a panel has been tasked with examining the notion of "dumping" in the context of a complaint against the United States' alleged use of "zeroing" administrative reviews.[217] In all but one of these disputes, panels have taken the view that the AD Agreement does not *exclusively* define "dumping" in relation to the "product as a whole". These panels have found that it is permissible to measure "dumping" in the context of duty assessment proceedings in the United States on a transaction-specific basis.[218] On the other hand, the Appellate Body has consistently found that the *only* permissible interpretation of the notion of "dumping" is that it relates to the "product as a whole". Not surprisingly, the parties' arguments in the present dispute have closely followed the two currents of thought that have evolved in previous cases, with Brazil advocating the position taken by the Appellate Body and the United States the views of most of the previous panels.

7.131 For the reasons we have tried to explain in the above analysis, we find it difficult to accept, on the basis of the arguments and jurisprudence we have reviewed, that the AD Agreement entertains only one exclusive definition of "dumping". However, there is no doubt in our minds that on the question of "zeroing", and more particularly, the definition of "dumping", the string of Appellate Body reports concerning mainly the United States' use of "zeroing" in anti-dumping proceedings read loud and clear.

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[215] US, FCOOS, para. 7; US, FWS, paras. 25-28.

[216] See, e.g, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 84; and Appellate Body Report, *EC – Chicken Cuts*, para. 239.

[217] See Panel and Appellate Body Reports, *US – Zeroing (EC)*; *US – Zeroing (Japan)*; *US – Stainless Steel (Mexico)*; and *US – Continued Zeroing*.

[218] Although the panel in *US – Continued Zeroing* "generally found the reasoning of earlier panels ... persuasive", it concluded that "the multiple goals of the DSU" would be best served by following the Appellate Body's adopted findings. Panel Report, *US – Continued Zeroing*, paras. 7.162-7.183.

BCI deleted, as indicated [[XX]]

7.132 Although adopted panel and Appellate Body reports do not bind WTO Members beyond parties to a particular dispute[219], the Appellate Body has expressed the view that ensuring "'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[220] Indeed, the Appellate Body has held that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[221] The Appellate Body's role in the WTO dispute settlement system is defined in terms of hearing appeals from panel cases and "limited to issues of law covered in the panel report and legal interpretations developed by the panel".[222] Members are entitled to express their views on an Appellate Body report. However, unless the DSB decides not to adopt it, an Appellate Body report "shall be adopted by the DSB and unconditionally accepted by the parties to the dispute".[223] Institutionally, the fact that all Appellate Body reports overturning panel findings on the question of "zeroing" have been adopted by the DSB implies acceptance by all WTO Members of their contents, and bestows upon them systemic legitimacy.

7.133 WTO Members created the WTO dispute settlement system as "a central element in providing security and predictability to the multilateral trading system"[224], emphasizing that "the prompt settlement" of disputes is "essential to the effective functioning of the WTO".[225] Moreover, the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute".[226] We recall that this is the fifth dispute where the United States' use of "simple zeroing" in administrative reviews has been challenged. It is also the tenth dispute that has involved the definition of "dumping" in the context of "zeroing".[227] Furthermore, two additional panels have recently been established to examine complaints that include claims not unlike those presented by Brazil in the present dispute.[228] Inevitably, irrespective of the position taken by those (and any future) panels on the definition of "dumping", the Appellate Body will decide the matter by following its previous rulings. Following this pattern, the "zeroing" question has tested the limits of the WTO dispute settlement system for almost 10 years now. It has occupied the work of Members, panels and the Appellate Body like no other controversy. We have no doubt that this experience has not served to advance the system's efficiency; and we note that Members have not only sought to resolve the issue of "zeroing" through WTO dispute settlement, but they are also trying to address it through negotiations in the Negotiating Group on Rules in the context of the Doha Development Agenda.[229].

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[219] See, e.g., Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 at 106-108; and Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 158.

[220] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

[221] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

[222] Article 17.6, DSU.

[223] Article 17.14, DSU.

[224] Article 3.2, DSU.

[225] Article 3.3, DSU.

[226] Article 3.7, DSU.

[227] See Panel and Appellate Body Reports in *EC – Bed Linen*; *EC – Pipe Fittings*; *US – Zeroing (EC)*; *US – Zeroing (Japan)*; *US – Stainless Steel*; *US – Continued Zeroing*; *US – Softwood Lumber V; US – Shrimp (Ecuador)*; *US – Shrimp (Thailand) / US – Customs Bond Directive*; and *US – Anti-Dumping Measures on PET Bags*.

[228] *United States – Use of Zeroing in Anti-Dumping Measures on Products from Korea*, panel constituted on 16 July 2010, WT/DS402/4; *United States – Anti-Dumping Measures on Shrimp from Viet Nam*, panel constituted on 16 July 2010, WT/DS404/6.

[229] See, e.g, Draft Consolidated Chair Texts of the AD and SCM Agreements, 30 November 2007, TN/RL/W/213; and New Draft Consolidated Chair Texts of the AD And SCM Agreements, 19 December 2008, TN/RL/W/236.

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7.134 Given the objective lack of clarity in the current definition of "dumping" that is set forth in the AD Agreement (a conclusion which we believe is inescapable after almost a decade of unprecedented, and often conflicting, panel and Appellate Body opinions on the matter), we firmly believe that all Members have a strong systemic interest in seeing that a lasting resolution to the "zeroing" controversy is found sooner rather than later[230].

7.135 With all these considerations in mind, and despite sometimes diverse positions existing even amongst ourselves as to different aspects of this debate, we believe that, on balance, our function under Article 11 of the DSU, and the integrity and effectiveness of the WTO dispute settlement system, are best served in the present instance by following the Appellate Body. Thus, we find that the only permissible interpretation of the definition of "dumping" contained in Article 2.1 of the AD Agreement, with relevance for the entire AD Agreement, is one that is based on an understanding that "dumping" can only be determined for the "product as a whole", and not individual transactions.

7.136 Having concluded that "dumping" cannot have a transaction-specific meaning, we now move on to examine the merits of Brazil's claims under Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Because "zeroing" takes place in the process of calculating margins of dumping, we consider it appropriate to commence our evaluation by focusing on Brazil's claim under Article 2.4 of the AD Agreement, the one legal basis for Brazil's complaint that, as the title to Article 2 indicates, is explicitly about the "determination of dumping".

(d) Brazil's claims under Article 2.4 of the AD Agreement

7.137 Brazil claims that the USDOC's use of "simple zeroing" in the First and Second Administrative Reviews to determine the WAMs, relied upon for the purpose of establishing the CDRs, and the ISARs of Cutrale and Fischer was inconsistent with Article 2.4 of the AD Agreement, irrespective of its impact on the amount of duties actually collected by the United States.[231] The United States rejects Brazil's claims, arguing *inter alia* that the obligations set forth in Article 2.4 do not prescribe how the results of multiple comparisons between export price and normal value must be aggregated.

7.138 Brazil submits that the first sentence of Article 2.4 contains an obligation that applies whenever an investigating authority calculates a margin of dumping in any anti-dumping proceeding.[232] According to Brazil, Article 2.4 is not only about "price comparability" but also "the nature of the comparison between export price and normal value", and therefore the "fairness of that comparison".[233] Relying on previous findings of the Appellate Body, and one panel in an Article 21.5 implementation dispute[234], Brazil argues that the calculation of a margin of dumping through the use

[230] We note that Article 3.9 of the DSU states that its provisions are "without prejudice to the right of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement".

[231] Brazil, FCOOS, paras. 67-72 and 74-79, referring to *inter alia*, the explanation provided in the Ferrier Affidavit, Exhibit US-31 (BCI), paras. 35-38 (First Administrative Review - ISARs) and 40-44 (First Administrative Reviews - CDRs) and 48-65 (Second Administrative Review – ISARs and CDRs); Brazil, Answer to Panel Question 2.

[232] Brazil, Answer to Panel Question 2.

[233] Brazil, SCOOS, para. 82, citing from Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* ("*Egypt – Steel Rebar*"), WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667, paras. 7.333-7.335, and referring to Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* ("*Argentina – Poultry Anti-Dumping Duties*"), WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727, para. 7.265; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140.

[234] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 101, 138; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; Appellate Body Report, *US – Zeroing (Japan)*, paras. 146, 169 and 190(d).

of "simple zeroing" results in an unfair comparison between export price and normal value and therefore infringes Article 2.4.[235] On the other hand, the United States argues that the obligation to make a fair comparison under Article 2.4 is limited to adjustments needed to ensure price comparability. The United States finds support for this position not only in the statements made by panels and the Appellate Body in other disputes, but also the alleged negotiating history of the AD Agreement and Member practice. Moreover, the United States counters Brazil's reliance on the alleged panel and Appellate Body findings in previous "zeroing" disputes, arguing that there were either no such findings made in the relevant disputes, or that they related to claims that are factually and legally distinct from those Brazil is making in the present dispute.[236]

7.139 Article 2.4 of the AD Agreement reads:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.{} In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."[237]

7.140 Brazil's claim raises two main questions. The first is whether the obligation in the first (underlined) sentence of Article 2.4 to ensure a "fair comparison" between export price and normal value applies outside of the context of what is described in the remainder of this provision, namely, beyond the selection of transactions and use of adjustments to account for differences between export price and normal value which affect their comparability. Assuming it does, and that it applies to calculations of the margin of dumping in the way Brazil argues, including during duty assessment proceedings, the second question we would have to resolve is whether the use of "simple zeroing" to calculate a margin of dumping is unfair.

7.141 In previous "zeroing" disputes where claims under Article 2.4 have been made in the context of United States' administrative reviews, panels and the Appellate Body appear to have accepted that the first (underlined) sentence in Article 2.4 is applicable beyond the particular context of adjustments or the selection of transactions for purposes of price comparability. For instance, in *US – Zeroing (Japan)*, the panel explained its views on the scope of Article 2.4, first sentence, in the following terms:

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[235] Brazil, FCOOS, para. 68; Brazil, Answer to Panel Question 2.

[236] US, SWS, paras. 4-22, quoting Panel Report, *Egypt – Rebar*, para 7.335; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.265; Panel Report, *US – Softwood Lumber V*, para. 7.356; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 179, to support its position that Article 2.4 governs only adjustments needed to ensure price comparability; and quoting Panel Report, *US – Zeroing (Japan)*, para. 7.155; *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.74; and Panel Report, *US – Zeroing (EC)*, para. 7.260, in support of the view that the notion of "fairness" must be interpreted in a principled fashion, in the context of the activity at issue, and not in the abstract, as it alleges Brazil argues. US, SCOOS, paras. 26-28.

[237] Underline added, footnote omitted.

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> "We consider that the requirement of a fair comparison set out in the first sentence of Article 2.4 is an independent legal obligation that is not defined exhaustively by the specific requirements set out in the remainder of Article 2.4 and is not limited in scope to the issue of adjustments to ensure price comparability. In this regard, we agree with the analysis of the panel in *US – Zeroing (EC)* regarding the scope of the "fair comparison" obligation. *First*, as stated by that panel, not to give independent meaning to the "fair comparison" requirement would render this provision inutile. *Second*, the structure of Article 2.4 suggests that the chapeau of Article 2.4 and its sub-paragraphs must be interpreted as a whole. *Third*, the "comparison" referred to in Articles 2.4.1 and 2.4.2 of the *AD Agreement* is the "comparison" in Article 2.4. *Fourth*, the "fair comparison" requirement explicitly applies also to the subject matter of Article 2.4.2 by virtue of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2. {}"[238]

7.142 We note that the plain language of the first sentence of Article 2.4 implies that it is concerned with the "comparison" made between export price and normal value for the purpose of determining a margin of dumping; with the "fairness" requirement applying precisely to discipline that "comparison". While this requirement can (and should) be understood to inform the rules concerning price comparability issues addressed in the remainder of Article 2.4, we agree with previous panels and the Appellate Body that this does not exhaust its relevance. First, it is significant that the "fair comparison" requirement is stated in a separate sentence at the beginning of the provision. In this light, to read it as simply repeating the requirements that follow would render the first sentence of Article 2.4 redundant.[239] Secondly, unlike Article 2.4.2, which is explicitly limited to the "investigation phase", the application of Article 2.4 is not constrained to any particular anti-dumping proceeding. It follows that the entirety of Article 2.4, including its first sentence, must apply to discipline the "comparison" between export price and normal value whenever undertaken during an anti-dumping proceeding, including during duty assessment.[240]

7.143 One panelist wishes to emphasize that, in his view, the correct interpretation of the "fair comparison" requirement set out in the first sentence of Article 2.4 is not as clear as previous panels and the Appellate Body appear to have suggested. In particular, this panelist considers that the scope of the "fair comparison" requirement must be informed by its immediate context, which includes the last sentence of Article 2.4. This sentence establishes an obligation on investigating authorities to "indicate to the parties what information is necessary to ensure a fair comparison". In the view of this panelist, the "fair comparison" referred to in this last sentence of Article 2.4 is the same that is described in the first sentence. Moreover, the "information ... necessary to ensure a fair comparison" is not information pertaining to *any aspect* of the comparison between export price and normal value. Rather, it is information needed to make appropriate adjustments or transaction selection for the purpose of accounting for differences affecting price comparability. When this view of the operation of Article 2.4 is coupled with the arguments advanced by the United States in support of its view that the "fair comparison" requirement should have limited application, this panelist finds there to be strong grounds to doubt the broad interpretation of the scope of the "fair comparison" requirement made by previous panels and the Appellate Body. Nevertheless, this panelist considers that, on balance, and in the light of the systemic considerations previously mentioned in this report, the view of the Appellate Body should be followed on this issue.

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[238] Panel Report, *US – Zeroing (Japan)*, para. 7.157 (footnote omitted).

[239] Panel Report, *US – Zeroing (EC)*, para. 7.253. On appeal, the Appellate Body agreed with the panel that "the legal rule set out in the first sentence of Article 2.4 is expressed in terms of a general and abstract standard. One implication of this is that this requirement is also applicable to proceedings governed by Article 9.3". Appellate Body Report, *US – Zeroing (EC)*, para. 146 (footnote omitted).

[240] By this conclusion, we do not mean to say that a "comparison" between export price and normal value is *required* in *all* anti-dumping proceedings.

BCI deleted, as indicated [[XX]]

7.144 We recall that "simple zeroing" takes place when aggregating multiple results of comparisons between individual export prices and weighted-average normal values. In our view, the process of *aggregation* is an integral part of the "comparison" that is undertaken between export prices and weighted-average normal values. It therefore falls squarely within the "comparison" that is envisaged and regulated under the first sentence of Article 2.4. Thus, in order to comply with what is prescribed in that sentence, "simple zeroing" must be "fair".

7.145 In terms of whether Article 2.4 prohibits margins of dumping calculated on the basis of "simple zeroing", it is not surprising to find that, in essence, the jurisprudence mirrors the findings of past panels and the Appellate Body with respect to the definition of "dumping". Thus, in *US – Zeroing (Japan)*, the panel rejected Japan's claim that the USDOC's use of "simple zeroing" in 11 administrative reviews was inconsistent with Article 2.4 of the AD Agreement because it considered that a general prohibition on zeroing in any context would: (i) render the W-T methodology described under Article 2.4.2 *inutile*; and (ii) undermine the effectiveness of Article 9, which in the panel's view, permitted duty collection on a transaction basis.[241] In *US – Stainless Steel (Mexico)*, the panel dismissed Mexico's claim that the United States had acted inconsistently with Article 2.4 of the AD Agreement by using "simple zeroing" in five administrative reviews because, in its view, it was permissible under Article 9.3 for the United States to have used "simple zeroing". In other words, what was permissible under one provision of the AD Agreement could not be found to be "unfair" and impermissible under another provision.

7.146 In *US – Zeroing (Japan)*, the Appellate Body reversed the panel's findings under Article 2.4 and found instead that the United States use of "simple zeroing" was, "as such" and "as applied", inconsistent with this provision.[242] The Appellate Body explained its reasoning in the following terms:

> "We turn next to examine whether zeroing in periodic reviews and new shipper reviews is, as such, inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*.
>
> If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a 'fair comparison' within the meaning of the first sentence of Article 2.4.{} <u>This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2,</u> as we have explained previously.{}"[243]

7.147 Although clearly rejecting the view expressed by the panel concerning the inconsistency of "simple zeroing" with Article 2.4, we note that the underlined text in the Appellate Body's reasoning appears to signal that the basis of its findings lay in the *effect* "simple zeroing" had on the amount of duties collected. Similarly, the Appellate Body appeared to express the same view in *US – Zeroing (Article 21.5 – Japan)*, where it upheld the panel's findings that the United States had failed to comply with the recommendations and rulings from the original proceeding when it acted inconsistently with Article 2.4 of the AD Agreement by using "simple zeroing" in a series of subsequent administrative

[241] Panel Report, *US – Zeroing (Japan)*, para. 7.159.

[242] In *US – Stainless Steel (Mexico)*, the Appellate Body reversed the panel's findings, but it refrained from making any findings of its own on the merits of Mexico's claim under Article 2.4 on the basis that it considered it unnecessary for the purpose of resolving the dispute. Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 143-144.

[243] Appellate Body Report, *US – Zeroing (Japan)*, paras. 167-168 (footnotes omitted, underline added).

reviews. In coming to its conclusion, the Appellate Body explained that ""[i]n this case, compliance with the DSB's recommendations and rulings required the cessation of zeroing in the application of anti-dumping duties by the end of the reasonable period of time".[244]

7.148 However, in general, the Appellate Body has on multiple occasions also described its views on "zeroing" in terms that strongly suggest that it is unfair because of its effect on the magnitude of the margin of dumping, whenever determined. For instance, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated:

> "When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing."{} Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[245]

7.149 We are somewhat attracted by the logic underlying the panel's observation in *US – Zeroing (Japan)* that a general prohibition on "zeroing" operating through Article 2.4 of the AD Agreement, would render the W-T methodology described in the second sentence of Article 2.4.2 redundant. However, we see a parallel between this line of reasoning and the conundrum posed by "mathematical equivalence". In the latter context, we noted in our previous discussion that no redundancy would exist if the United States' views about how the W-T methodology actually operates were incorrect. Yet we observed that there appears to be considerable uncertainty as to precisely how the W-T methodology should be given effect. We also concluded that another way to avoid redundancy would be if the W-T methodology, as described by the United States, could be characterized as an "exception" to the otherwise generally applicable definition of "dumping", which operates to otherwise prohibit "zeroing". We did not, however, find this explanation to be convincing.[246] In our view, the same interpretative dilemmas can be found in the particular problem posed by the approach taken by the panel in *US – Zeroing (Japan)* to Article 2.4.

7.150 The United States argues further that if a general prohibition on "zeroing" existed by virtue of the operation of Article 2.4, there would be no need to articulate the same requirement through the use of the "all comparable export transactions" and "margins of dumping" language in Article 2.4.2 of the AD Agreement.[247] However, we note that Article 2.4 operates as the *chapeau* to Article 2.4.2, and therefore logically, it must inform whatever is governed under that provision. Indeed, Article 2.4.2 explicitly provides that it must be read "subject to the provisions governing fair comparison in paragraph 4".

7.151 The United States also submits that Brazil's interpretation of the "fair comparison" requirement is overly broad, unprincipled and, as we understand the United States' argument, would result in the establishment of an obligation to ensure that "any and all anti-dumping calculations are 'impartial, even-handed, or unbiased'".[248] In this regard, the United States refers to the panel in *US –*

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[244] Appellate Body Report, *US – Zeroing (Japan)(Article 21.5 – Japan)*, para. 193 (underline added).
[245] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.
[246] See discussion above, para. 7.119.
[247] US, SCOOS, para. 26.
[248] US, SWS, paras. 16-22; US, SCOOS, para. 28.

BCI deleted, as indicated [[XX]]

Softwood Lumber V (Article 21.5 – Canada), which it argues "cautioned against the overly liberal use of the 'fair comparison' language of Article 2.4" in the following terms:

> "[W]e believe that a claim based on a highly general and subjective test such as 'fair comparison' should be approached with caution by treaty interpreters. For this reason, any conception of 'fairness' should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally. As such, there must be a discernable standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been 'fair' or 'unfair'. Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard.{} If, however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case."[249]

7.152 We agree with the United States and the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* that the meaning of the notion of "fairness" as it is articulated in Article 2.4 will depend upon the particular context in which it is intended to operate. In our view, the search for this context must, first and foremost, start with understanding precisely what it is that must be "fair". This, of course, is the "comparison" between export price and normal value. Thus, contrary to the United States' argument, accepting that the scope of the "fair comparison" requirement extends beyond the subject matter of Article 2.4, does not establish a rule governing "any and all anti-dumping calculations".[250] The very language of the first sentence of Article 2.4 explicitly limits its relevance to situations involving the "comparison" between export price and normal value. For instance, the "fair comparison" requirement does not extend to govern how an investigating authority establishes normal value. It is clear that this is comprehensively disciplined under Article 2.2 of the AD Agreement. Neither does the "fair comparison" requirement regulate how to establish constructed export price, which is addressed in Article 2.3 of the AD Agreement. However, pursuant to the first sentence of Article 2.4, the "comparison" between any export price and normal value, both individually established in accordance with the specific rules set out in Article 2, must be "fair".

7.153 An investigating authority will compare export price with normal value for the purpose of determining the existence of dumping or the magnitude of a margin of dumping. This implies that the comparison between export price and normal value must be informed by the definition of "dumping" that is contained in Article 2.1 of the AD Agreement. Above we have found that, on balance, and taking into account important systemic concerns, it is impermissible to compare export price with normal value in such a way that does not result in a determination of "dumping" for the "product as a whole". In this light, a comparison methodology (such as "simple zeroing") that ignores transactions, which if properly taken into account, would result in a lower margin of dumping, must be considered "unfair" and therefore inconsistent with Article 2.4.

7.154 Thus, for all of the above reasons, we conclude that "simple zeroing" is inconsistent with the "fair comparison" requirement that is prescribed in Article 2.4 of the AD Agreement.

(i) "Simple zeroing" in the First Administrative Review

7.155 We recall that we have found that the WAMs and ISARs determined for both Cutrale and Fischer in the First Administrative Review were calculated through the use of "simple zeroing".[251] In the case of Fischer, the WAM determined by the USDOC was relied upon for the purpose of

[249] Panel Report, *US – Softwood Lumber V*, para. 5.74.
[250] US, SWS, para. 22.
[251] See above, paras. 7.84-7.87.

establishing Fischer's CDR. Likewise, because the WAM determined for Cutrale was considered to be *de minimis* under United State law, a CDR of 0% was applied to entries of Cutrale's products in the subsequent period.

7.156 The United States argues that even under the Appellate Body's own rationale, the determination of Cutrale's *de minimis* margin of dumping, which was converted into a CDR of 0% through the operation of United States law, cannot be considered to infringe Article 2.4 because a *de minimis* margin cannot be said to be "artificially inflated" or "inherently unfair".[252] We disagree. In our view, the obligation under Article 2.4 is focused on the "comparison" between export price and normal value, not its impact. In other words, it is the nature of the "comparison" itself, and not the results of that comparison, that is disciplined under Article 2.4. Thus, a "comparison" between export price and normal value that involves "simple zeroing" will be "unfair" for the purpose of Article 2.4, irrespective of whether the final margin of dumping actually applied is considered to be *de minimis*. Moreover, in the present instance, although Cutrale's WAM was *de minimis*, the fact remains that absent "simple zeroing" it would have been non-existent.[253]

7.157 Thus, we find that by using "simple zeroing" to calculate the WAMs (relied upon for the purpose of setting CDRs) and the ISARs for both Cutrale and Fischer in the First Administrative Review, the United States failed to perform a "fair comparison" between export price and normal value, and thereby acted inconsistently with Article 2.4 of the AD Agreement.

(ii) "Simple zeroing" in the Second Administrative Review

7.158 We recall that we have found that the WAM and ISAR determined for Cutrale in the Second Administrative Review were calculated through the use of "simple zeroing".[254] We also made the same finding with respect to Fischer. In particular, we noted that although the WAM and corresponding CDR for Fischer were both declared to be 0% in the published Final Results, the WAM calculation actually run by the USDOC by means of its computer programme that involved "simple zeroing" determined a WAM of [[XX]].[255] Likewise, we concluded that "simple zeroing" was used in the computer programme applied by the United States for the purpose of calculating Fischer's ISAR, even though the ISAR actually imposed on imports of Fischer's products was [[XX]].[256]

7.159 The United States argues that, even according to the Appellate Body's rationale relied upon by Brazil, the determination of a 0% margin of dumping for Fischer cannot be considered to infringe Article 2.4 because a 0% margin cannot be said to be "artificially inflated" or "inherently unfair".[257] Similarly, the United States argues that even accepting the Appellate Body's line of reasoning with respect to Article 2.4, in order for there to be an infringement of the "fair comparison" requirement in

[252] US, SWS, para. 18, citing from Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 143-144.

[253] The computer programme log for Cutrale indicates that [[XX]] out of [[XX]] export transactions generated negative comparison results, and were therefore excluded from the USDOC's calculation. These transactions represented [[XX]] of Cutrale's transactions. Exhibits BRA-29 (BCI), p. 63; and BRA-31 (BCI) (Ferrier Affidavit), para. 38. Moreover, Cutrale's computer programme output reveals that the *de minimis* margin of 0.45% was determined by taking into account export transactions accounting for [[XX]] of the total volume of transactions, and [[XX]] of their total value. Exhibit BRA-34 (BCI), last page.

[254] See above, paras. 7.84-7.87.

[255] See above, para. 7.86.

[256] See above, para. 7.86.

[257] US, SWS, para. 18, citing from Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 143-144.

the context of administrative reviews, any use of "simple zeroing" must result in excessive collection of duties.[258]

7.160 We are unable to agree with the United States' submissions. As we have already explained[259], the obligation under Article 2.4 is focused on the "comparison" between export price and normal value, not its impact. In other words, it is the nature of the "comparison" itself, and not the results of that comparison, that is disciplined under Article 2.4. Thus, in our view, it follows that a "comparison" between export price and normal value that involves "simple zeroing" will be "unfair" for the purpose of Article 2.4, irrespective of whether the final WAM or final ISAR actually imposed is 0%. Article 2.4 regulates the "comparison" that is made by an investigating authority; and it is this "comparison" (not its outcome) that falls within the scope of Article 2.4 of the AD Agreement.

7.161 Thus, we find that by using "simple zeroing" to calculate the WAMs (relied upon for the purpose of setting CDRs) and the ISARs for both Cutrale and Fischer in the Second Administrative Review, the United States failed to perform a "fair comparison" between export price and normal value, and thereby acted inconsistently with Article 2.4 of the AD Agreement.

(e) Brazil's claims under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

7.162 Having found that the measures challenged by Brazil are inconsistent with Article 2.4 of the AD Agreement, we consider it is not necessary, for the purpose of satisfactorily resolving this dispute, to make additional findings with respect to Brazil's claims that the same measures are also inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. On this basis, we decide to exercise judicial economy and decline to make any findings in respect of these claims.

C. BRAZIL'S CLAIMS CONCERNING "CONTINUED ZEROING"

1. Arguments of Brazil

7.163 Brazil challenges the alleged "continued use by the United States of zeroing procedures in successive anti-dumping proceedings under the Orange Juice Order, including the original investigation and any subsequent administrative reviews by which duties are applied and maintained over a period of time".[260]

7.164 Brazil characterizes the USDOC's alleged "continued use" of "zeroing" as "ongoing conduct" of virtually the same kind found to be inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by the Appellate Body in *US – Continued Zeroing*. Relying entirely upon the Appellate Body's reasoning in that dispute, and various pieces of evidence allegedly demonstrating the USDOC's use of "zeroing procedures" in the original investigation and First, Second and Third Administrative Reviews, Brazil asks the Panel to find that the USDOC's "continued use" of "zeroing" in successive proceedings under of the orange juice anti-dumping duty order, by which duties are applied to imports of orange juice from Brazil, amounts to "ongoing conduct" that is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[261]

[258] US, SWS, para. 17, citing from Appellate Body Report, *US – Zeroing (Japan)*, para. 168.
[259] See above, para. 7.156.
[260] Brazil, FWS, para. 48.
[261] Brazil, FWS, paras. 98-117; Brazil, FCOOS, paras. 80-96; Brazil, SWS, paras. 27-46; Brazil, SCOOS, paras. 86-93.

BCI deleted, as indicated [[XX]]

2. Arguments of the United States

7.165 The United States argues that "continued zeroing" as "ongoing conduct" does not exist as a "measure" susceptible to challenge in WTO dispute settlement proceedings. In particular, the United States asserts that the alleged measure is focused on "indeterminate future measures that did not exist at the time of Brazil's panel request (and may never exist)". According to the United States, "measures that do not and may never exist are not within a dispute settlement panel's terms of reference", and for this reason, they cannot be challenged in WTO dispute settlement. Thus, the United States asks the Panel to find that "continued zeroing" as "ongoing conduct" is not a measure that can be challenged in this dispute.[262]

7.166 In any case, the United States submits that Brazil has failed to establish that the USDOC actually "zeroed", as a matter of fact, in "successive proceedings". The United States asserts that the computer programme evidence submitted by Brazil in Exhibits BRA-32 (BCI) and BRA-33 (BCI) does not demonstrate that the USDOC used "zeroing" in the original investigation. According to the United States, the various lines of the computer programme that Brazil focuses upon show that the "necessary condition for activating the 'zeroing' operation" was not satisfied, meaning that no comparison of export price and normal value resulted in a negative value. In other words, the United States asserts that Brazil's evidence shows that all comparison results were positive (i.e., all comparison results showed dumping).[263] The United States also argues that the computer programme evidence submitted by Brazil in Exhibit BRA-33 (BCI) was generated by Brazil's consultant, not the USDOC, and only after the USDOC made the relevant final determinations.[264] Moreover, the United States emphasizes that no CDR was applied to imports of Cutrale's products following the First Administrative Review, and no CDRs or ISARs were applied to Fischer's products as a result of the Second Administrative Review. Thus, the United States submits that whatever "zeroing" may have taken place in the calculation of Cutrale's or Fischer's margins of dumping, it did not result in a breach of the United States' obligation under Article 9.3 of the AD Agreement to ensure that any anti-dumping duty applied is not in excess of the margin of dumping established under Article 2.[265]

7.167 The United States submits that, at most, the evidence advanced by Brazil shows that "zeroing" was applied in order to determine the margin of dumping of one company in one proceeding covering a one year period. The United States contrasts this with the facts the Appellate Body found in *US – Continued Zeroing* to demonstrate the existence of "continued zeroing" as "ongoing conduct", namely: the use of "zeroing" in the original investigation; the use of "zeroing" in four successive administrative reviews; and reliance in a sunset review upon rates determined using "zeroing". According to the United States, the facts Brazil relies upon do not constitute "a string of determinations, made sequentially ... over an extended period of time". Thus, the United States argues that there is no basis for the Panel to find that the "zeroing" methodology was used without interruption, that it was used in different proceedings, and that it was used over an extended period of time. The United States therefore asks the Panel to reject Brazil's claim that it has established the USDOC's "continued zeroing" as "ongoing conduct".[266]

7.168 Finally, the United States notes that Brazil challenges "continued zeroing" under Article 2.4.2 of the AD Agreement, in addition to Article 9.3 and Article VI:2 of the GATT 1994. The United States argues that Brazil's reliance on this legal basis is misplaced because Article 2.4.2 is explicitly limited to the "investigation phase", and has therefore no application to duty collection or

[262] US, FWS, paras. 52, 124 and 130-131; US, SWS, paras. 83-84.
[263] US, FWS, para. 128; US, FCOOS, para. 38; US, SWS, para. 87; US, Answer to Panel Question 24.
[264] US, Answer to Panel Question 24.
[265] US, FWS, para. 127; US, FCOOS, para. 39.
[266] US, FWS, paras. 132-133; US, SWS, para. 87; US, SCOOS, paras. 39-40.

other anti-dumping proceedings. In this regard, the United States asks the Panel to follow the finding of the panel in *US – Zeroing (EC)*, and decline to extend the obligations of Article 2.4.2 to "successive proceedings" beyond the original investigation.[267]

3. Arguments of the Third Parties

(a) Japan

7.169 Japan argues that there is no substantial difference between the "continued zeroing" measure that Brazil challenges in the present dispute and the "continued zeroing" measure challenged by the European Communities in *US – Continued Zeroing*. Japan recalls that previous panels and the Appellate Body have found that "zeroing" is inconsistent with Article 2.4.2 (when performed in original investigations) and Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 (when performed for the purpose of duty assessment proceedings). Thus, Japan calls on the Panel to follow these findings and rule that the USDOC's "continued zeroing" in the orange juice anti-dumping proceedings is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[268]

4. Evaluation by the Panel

(a) Introduction

7.170 Brazil's complaint against the USDOC's alleged "continued use" of "zeroing" in the orange juice anti-dumping proceedings raises essentially three main questions: (i) whether it is possible to challenge a Member's "ongoing conduct" as a "measure" in WTO dispute settlement; (ii) if it is possible to challenge such a "measure", whether Brazil has demonstrated that it exists as a matter of fact; and (iii) if it does exist, whether the "measure" is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Below we address each of these questions in turn.

(b) Whether the "continued use" of "zeroing" as "ongoing conduct" is a "measure" susceptible to WTO dispute settlement

7.171 It is well established that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement".[269] Measures that have been examined by panels and the Appellate Body in the past include "not only measures consisting of acts that apply to particular situations, but also those consisting of acts setting forth rules or norms that have general and prospective application".[270] Moreover, in *US – Zeroing (EC)*, the Appellate Body found that the European Communities was entitled to challenge an *unwritten* zeroing "norm" because it found no basis in the DSU and the AD Agreement to "conclude that 'rules or norms' can be challenged, as such, *only* if they are expressed in written form".[271]

7.172 In *US – Continued Zeroing*, the Appellate Body concluded that the USDOC's "continued use" of "zeroing" to calculate the margins of dumping in 18 different anti-dumping proceedings could be challenged as a "measure" it described as "ongoing conduct". The Appellate Body's reasoning included the following observations:

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[267] US, FWS, paras. 134-135.

[268] Japan, TPWS, paras. 18-22 and 72.

[269] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 81.

[270] Panel Report, *US – Continued Zeroing*, para. 7.45, cited with approval in Appellate Body Report, *US – Continued Zeroing*, para. 177.

[271] Appellate Body Report, *US – Zeroing (EC)*, para. 193. The panel in the same case come to the same conclusion on the basis of similar reasoning.

BCI deleted, as indicated [[XX]]

> "Thus, the measures at issue consist of neither the zeroing methodology as a rule or norm of general and prospective application, nor discrete applications of the zeroing methodology in particular determinations; rather, they are the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which duties are maintained over a period of time. We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order.{} The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue.{} It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation. At the oral hearing, the European Communities confirmed that it is not seeking the revocation of the 18 anti-dumping orders but, rather, the cessation of the use of the zeroing methodology by which the duties are calculated and maintained in these 18 cases.{} In our view, the European Communities, in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in these 18 cases, under the scrutiny of WTO dispute settlement."[272]

7.173 Conceptually, the alleged "measure" that Brazil challenges in this dispute appears to be very similar, if not identical, to the measure that was the subject of the European Communities' complaint in *US – Continued Zeroing*. Indeed, Brazil has repeatedly emphasized that it is challenging the same type of "measure" that was at issue in *US – Continued Zeroing*, namely, a "measure" in the form of "ongoing conduct". Moreover, Brazil has explained that by challenging the alleged "measure" it is seeking to obtain a prospective remedy, namely, the "cessation of the use of the zeroing methodology" in the orange juice anti-dumping proceedings.[273]

7.174 According to the United States, the alleged "ongoing conduct" "measure" that Brazil challenges cannot be subject to WTO dispute settlement because it is based on "an indefinite number of future individual measures that do not and may never exist".[274] Moreover, the United States submits that if "continued use" were a "measure", it would "presumably ... cease to exist if at any point 'zeroing' is not used in a particular individual determination". Yet, the United States notes that "Brazil's argument requires the Panel to assume that it will be used".[275] Thus, the United States argues that Brazil's focus on "continued zeroing" as "ongoing conduct" involves "speculating as to what may happen in the future"[276], and for this reason the United States considers that such conduct cannot amount to a "measure" that is susceptible to WTO dispute settlement.

7.175 As we understand it, implicit in the United States' argument is the view that there is a prospective element to the alleged "ongoing conduct" "measure" Brazil challenges which cannot be established with any degree of certainty because it is inherently speculative. We note, however, that although describing the "ongoing conduct" measure in *US – Continued Zeroing* in terms that contemplate its prospective operation, the Appellate Body did not require absolute certainty as to the future conduct it envisaged. In particular, the Appellate Body found that:

> "The density of factual findings in these cases, regarding the continued use of the zeroing methodology in a string of successive proceedings pertaining to the same

[272] Appellate Body Report, *US – Continued Zeroing*, para. 181 (footnotes omitted).
[273] Brazil, Answer to Panel Question 2.
[274] US, FWS, paras. 51 and 131.
[275] US, SWS, para. 84.
[276] US, SWS, para. 84.

> anti-dumping duty order, provides a sufficient basis for us to conclude that the zeroing methodology would likely continue to be applied in successive proceedings whereby the duties in these four cases are maintained."[277]

7.176 Thus, ongoing conduct may be simply described as conduct that is currently taking place and is *likely to continue* in the future. Given that any act or omission attributable to a Member may, in principle, be challenged by a Member in WTO dispute settlement proceedings, we see no reason why "ongoing conduct" cannot also be the subject of a complaint. The particular "ongoing conduct" that Brazil objects to is the USDOC's alleged "continued use" of "zeroing procedures" under the orange juice anti-dumping duty order. Conceptually, we see no practical difference between this form of "ongoing conduct" and the "ongoing conduct" challenged in the *US – Continued Zeroing* dispute. Like the Appellate Body in that controversy, we consider that Brazil is entitled to bring a complaint against such a "measure" to WTO dispute settlement. However, accepting that the "continued use" of "zeroing" may be challenged in WTO dispute settlement as a "measure" in the form of "ongoing conduct" does not amount to accepting that any such "measure" actually exists. It is to this second question that we now turn.

(c) Has Brazil established that the alleged "continued zeroing" as "ongoing conduct" measure exists?

7.177 In *US – Continued Zeroing*, the Appellate Body explained the basis for its conclusion concerning the existence of "continued zeroing" as "ongoing conduct" in the following terms:

> "Thus, in each of the above four cases, the Panel's findings indicate that the zeroing methodology was repeatedly used in a string of determinations, made sequentially in periodic reviews and sunset reviews over an extended period of time. The density of factual findings in these cases, regarding the continued use of the zeroing methodology in a string of successive proceedings pertaining to the same anti-dumping duty order, provides a sufficient basis for us to conclude that the zeroing methodology would likely continue to be applied in successive proceedings whereby the duties in these four cases are maintained."[278]

7.178 Thus, the evidence the Appellate Body considered demonstrated the existence of the "continued zeroing" measure covered the use of "zeroing" in the original investigation; the use of "zeroing" in four successive administrative reviews; and reliance in a sunset review upon rates determined using "zeroing". On the other hand, the Appellate Body found that the "continued zeroing" measure could not be established on the basis of evidence showing the use or reliance upon "zeroing" in only: (i) one anti-dumping proceeding – i.e., either one original investigation, one administrative review or one sunset review; (ii) two (three) administrative reviews in the same proceeding, where there was a lack of evidence showing that the use of "zeroing" in a third (fourth) administrative review related to the same anti-dumping duty order; and (iii) two administrative reviews and one sunset review related to the same anti-dumping duty order, where there was no evidence regarding any other proceedings submitted during the panel process.[279]

7.179 Brazil argues that the evidence it has introduced shows that the USDOC used "zeroing" to calculate the margins of dumping in the original investigation and the First, Second and Third Administrative Reviews. Moreover, according to Brazil, the facts it has presented also demonstrate that the USDOC will continue to apply the same methodology in all future proceedings under the orange juice anti-dumping duty order. On the other hand, the United States submits that Brazil has

[277] Appellate Body Report, *US – Continued Zeroing*, para. 191 (emphasis added).
[278] Appellate Body Report, *US – Continued Zeroing*, para. 191 (emphasis added).
[279] Appellate Body Report, *US – Continued Zeroing*, para. 194.

failed to satisfy the standard applied by the Appellate Body in *US – Continued Zeroing*, noting that in a number of instances, the USDOC did not use "zeroing" at all, or that even when it did, it had no bearing on the WAMs, CDRs or ISARs actually imposed. According to the United States, the facts Brazil relies upon have more in common with the facts the Appellate Body considered did not establish the existence of a "continued zeroing" measure, than those the Appellate Body found to demonstrate its existence.

7.180 We have previously concluded that Brazil has shown that the USDOC determined the WAMs (relied upon for the purpose of setting the CDRs) and the ISARs of Cutrale and Fischer in the First and Second Administrative Reviews through the use of "simple zeroing".[280] Below we examine the extent to which the evidence Brazil has submitted establishes the same with respect to the original investigation and the Third Administrative Review.

(i) Original Investigation

7.181 Brazil asserts that the computer programme the USDOC applied in the original investigation[281] to calculate the respondents' margins of dumping "provided for the exclusion ... of negative comparison results where the weighted-average export price of any model exceeded normal value".[282] To substantiate this assertion, Brazil submits a copy of the relevant programme logs together with an explanation which identifies the "language to zero negative margins" appearing in each log.[283]

7.182 The United States asserts that the computer programme evidence submitted by Brazil demonstrates that no "zeroing" actually took place in the original investigation. According to the United States, there were no negative comparison results to "zero" in that investigation because all of the respondents transactions were dumped. Thus, the United States does not argue that the "zeroing" instruction was not present in the computer programme used in the Original Investigation. Rather, the United States points out that the instruction was not executed during the course of the calculation because of the absence of non-dumped transactions.

7.183 Brazil does not contest the United States' assertion about the absence of transactions sold at an export price above normal value. Indeed, the explanation provided in Exhibit BRA-31 (BCI) appears to confirm this point. However, Brazil does not accept that the "zeroing" instruction did not function in the original investigation. According to Brazil, the "zeroing" line ("WHERE EMARGIN GT 0") always functions to ensure that the total amount of dumping is based exclusively on positive comparison results. For this line not to function, Brazil submits that it must be removed from the computer programme.[284] Moreover, Brazil argues that in the light of the nature of its claim, the fact that the "zeroing procedures" did not exclude any transactions sold at an export price above normal value is irrelevant. Brazil explains the nature of its claim in the following terms:

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[280] See above, paras. 7.84-7.87, 7.155 and 7.158.

[281] Final Results of the Original Investigation, 71 Fed. Reg. 2183 (13 January 2006), Exhibit BRA-18; and Amended Final Results of the Original Investigation, 71 Fed. Reg. 8841 (21 February 2006), Exhibit BRA-19.

[282] Brazil, FWS, para. 102.

[283] Exhibits BRA-32 (BCI) (Programme log for Cutrale); BRA-33 (BCI) (Programme log for Fischer); and BRA-31 (BCI) (Ferrier Affidavit). The United States argues that Exhibit BRA-33 (BCI) was "generated by Brazil's consultant, not by the USDOC, and only after the USDOC made the relevant final determinations" (US, Answer to Panel Question 24). However, Brazil has presented evidence which we are satisfied confirms that Exhibit BRA-33 (BCI) was provided to Fischer's Counsel by the USDOC (See Exhibit BRA-58, and Brazil, Comment on US Answer to Panel Question 24). See also the summary of infromation on the use of "zeroing", submitted as Exhibit BRA-48.

[284] Brazil, Comment on US Answer to Panel Question 24.

BCI deleted, as indicated [[XX]]

> "In Brazil's view, a challenge to the continued use of zeroing under a single anti-dumping order does not fit squarely into either the 'as applied' or the 'as such' category. Indeed, the claim shares elements of both 'as such' and 'as applied' claims.
>
> With respect to similarities to an 'as such' claim, the claim contests the continued use of zeroing in a series of determinations under a specific anti-dumping order that applies prospectively to all subject imports; the claim is, therefore, not confined to 'specific instances in which the zeroing methodology was applied, such as a periodic review or sunset review determination'.{} The evidence, as a whole, shows that, under the Orange Juice Order, the United States systematically uses the zeroing as part of its methodology for determining dumping and margins of dumping. Also similar to an 'as such' claim, the aim of the 'continued use' claim is to obtain 'the cessation of *the use of the zeroing methodology* by which the duties are calculated and maintained'.{} Thus, the 'continued use' claim contests zeroing on a relatively generalized basis, aiming to terminate its use on that basis.
>
> However, the claim is nonetheless different from an 'as such' claim with respect to the degree of generality of the claim. An 'as such' claim against the zeroing procedures as a rule or norm of general and prospective application would address the maintenance of zeroing for use in administrative (or other) reviews, under *all* anti-dumping orders. In contrast, Brazil's 'continued use' claim addresses the use of the zeroing in determinations under *one single* anti-dumping order, namely the Orange Juice Order. The claim is, therefore, 'narrower' than an 'as such' claim.{}"[285]
>
> "With respect to the 'continued use' measure, the conduct comprising this measure is the *use of zeroing* in determinations made under the Orange Juice Order, including in administrative reviews. As with an 'as such' claim against zeroing under all anti-dumping orders, the consistency of this measure, under Article 9.3 and Article VI:2, in the context of the Orange Juice Order, does not turn on the *outcome* of any specific determination resulting from the use of zeroing."[286]

Thus, Brazil argues that its challenge relates to the "continued use" of the USDOC's "zeroing" methodology, not its impact. For this reason, Brazil argues that the fact that the "zeroing" instruction did not function to "zero" any export transactions sold at a price above normal value in the original investigation does not detract from its complaint.

7.184 We agree with Brazil. In our view, the nature of its complaint against "continued zeroing" is akin to a claim that could be made against a measure "as such", in the sense that Brazil challenges the "continued use" of the "zeroing methodology" under the orange juice anti-dumping duty order, *independent of its application*. However, whereas a measure subject to a typical "as such" claim in WTO dispute settlement would be generally applicable to all anti-dumping proceedings conducted under all United States anti-dumping duty orders, the "measure" Brazil objects to exists only in the limited context of the orange juice proceedings.

7.185 By bringing a complaint against such a "measure", Brazil is seeking to redress what it considers to be the root of the problem it has with the United States' conduct of the orange juice proceedings, namely, the USDOC's "continued use" of the "zeroing methodology". Brazil's challenge seeks to achieve a prospective remedy; a solution that would prevent the United States from using the "zeroing methodology" in future proceedings under the orange juice anti-dumping duty order. In this light, the fact that the particular circumstances of the original investigation were such that the

[285] Brazil, Answer to Panel Question 1 (footnotes omitted).
[286] Brazil, Answer to Panel Question 2.

"zeroing" instruction did not function to remove any negative export price to normal value comparisons does not invalidate Brazil's claim, because it is the very existence of the "zeroing" instruction in the computer programmes used to calculate the relevant margins of dumping, *independent of its application*, that is the subject of Brazil's complaint.

7.186 Thus, we conclude that the evidence Brazil has submitted demonstrates that the USDOC used the "zeroing methodology" in the original investigation, even though this conduct had no impact on the relevant margins of dumping determined for the respondents because of the particular set of facts that arose in that investigation.

(ii) Third Administrative Review

7.187 Brazil asserts[287] that the USDOC used "simple zeroing" in the Final Results of the Third Administrative Review to determine the following WAMs, CDRs and ISARs:

	WAM[288]	***CDR***[288]	***ISAR***[289]
Third Administrative Review			
Cutrale	8.13%	8.13%	[[XX]]
Fischer	5.26%	5.26%	[[XX]]

7.188 To substantiate its assertion, Brazil submits the same type of evidence it used to demonstrate the use of "simple zeroing" in the First and Second Administrative Reviews, namely, the relevant computer programme logs and output for each respondent, the Issues and Decision Memorandum, and a second Ferrier Affidavit.[290] We have carefully reviewed this evidence and find that it confirms Brazil's assertions.

7.189 The United States does not contest that the USDOC used "simple zeroing" when determining the above WAMs, CDRs and ISARs[291], but it argues that the Third Administrative Review is not within the Panel's terms of reference.[292] However, apart from referring to a discussion contained in its first written submission where it explains why the Second Administrative Review is outside of the Panel's terms of reference, the United States presents no separate argumentation concerning the Third Administrative Review.

7.190 In our view, the United States' position with respect to Brazil's reliance on the results of the Third Administrative Review is misplaced. Brazil does not *challenge* the results of the Third Administrative Review, but instead uses them as *evidence* of the "continued zeroing" measure. A panel's terms of reference need only contain a sufficiently clear explanation of the legal basis of a complainant's claims and a description of the challenged measures[293]; they are not required to also

[287] Brazil, SWS, paras. 36-41.

[288] Final Results, Third Administrative Review, Exhibit BRA-49.

[289] BRA-54 (BCI) (Programme output for Cutrale), penultimate page; BRA-55 (BCI) (Programme output for Fischer), penultimate page.

[290] Exhibits BRA-50 (Issues and Decision Memorandum), pp. 2-6; BRA-51 (BCI) (Ferrier Affidavit re 3rd Administrative Review); BRA-52 (BCI) (Programme log for Cutrale); BRA-54 (BCI) (Programme output for Cutrale); BRA-56 (BCI) (Programme log for Fischer); BRA-55 (BCI) (Programme output for Fischer). See also the summary of information on the use of "zeroing", submitted as Exhibit BRA-48.

[291] US, Answer to Panel Question 24.

[292] US, FWS, para. 126; US, Answer to Panel Question 24.

[293] See, e.g., Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, para. 72.

identify the evidence. We therefore see no basis for the United States' objection to Brazil's reliance on the results of the Third Administrative Review.

(iii) Conclusion regarding the existence of the "continued zeroing" measure

7.191 Overall, the evidence submitted by Brazil reveals that the USDOC applied a computer programme that included an instruction to "zero" in the original investigation and in the First, Second and Third Administrative Reviews, for the purpose of calculating the WAMs and the ISARs of the relevant respondents. The evidence also shows that this instruction was actually executed in the first three administrative reviews under the orange juice anti-dumping duty order. Moreover, the Issues and Decision Memoranda from the three administrative reviews strongly suggest that, at the time they were issued, the USDOC intended to continue to take the same approach to calculating margins of dumping in the future. In this regard, we find the following USDOC statement, which appears in exactly the same language in all three Issues and Decision Memoranda, to be particularly revealing:

> "Section 771(35)(A) of the Act defines 'dumping margin' as the 'amount by which the normal value exceeds the export price or constructed export price of the subject merchandise'. Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute."[294]

7.192 We recall that in *US – Continued Zeroing*, the evidence the Appellate Body considered was sufficient to establish the existence of the "continued zeroing" measure challenged in that dispute demonstrated that the USDOC: used "zeroing" in the original investigation; used "zeroing" in four successive administrative reviews; and relied in a sunset review upon margins of dumping determined through the use of "zeroing". Although the pattern of use of "zeroing" in the present dispute is not exactly the same, there is nevertheless, in our view, sufficient evidence to establish the existence of the "continued use" measure that Brazil challenges. Apart from the evidence showing the use of "zeroing procedures" in each of the successive proceedings, of particular significance are the statements contained in the Issues and Decision Memoranda, which in our view, leave little doubt about how the USDOC intended to interpret the notion of "dumping" in future proceedings under the orange juice anti-dumping duty order at the time the Memoranda were issued. Thus, we conclude that Brazil has established the existence of the USDOC's "continued use" of "zeroing procedures" as a "measure" in the form of "ongoing conduct" under the orange juice anti-dumping duty order.

(d) Whether the "measure" is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

7.193 We recall that we have already found that the USDOC's use of "simple zeroing" is inconsistent with Article 2.4 of the AD Agreement. In our view, it necessarily follows that the "continued use" of the "zeroing procedures" must also be inconsistent with the same provision. Thus, we find that the United States' "continued use" of "zeroing" under the orange juice anti-dumping duty order is inconsistent with Article 2.4 of the AD Agreement.

7.194 Brazil claims that the USDOC's "continued use" of "zeroing" is also inconsistent with Articles 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. The United States submits that Brazil's reliance on Article 2.4.2 is misplaced because, in its view, the prohibition on

[294] Exhibits BRA-28, p 5; BRA-43, pp 4-5; and BRA-50, p 4.

"zeroing" in this provision is explicitly limited to the "investigation phase", which by definition does not include duty assessment proceedings or any other proceedings. Having found that the "continued zeroing" measure challenged by Brazil is inconsistent with Article 2.4 of the AD Agreement, we consider it is not necessary, for the purpose of satisfactorily resolving this dispute, to make additional findings with respect to the same measure under Articles 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. On this basis, we decide to exercise judicial economy and decline to make any findings in respect of Brazil's claims under Articles 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

8.1 As previously observed, the question at the centre of Brazil's complaint in this dispute has been well litigated in WTO dispute settlement. This core question concerns how the AD Agreement (and Article VI of the GATT 1994) defines the notion of "dumping": is it a concept that relates to an exporter's overall pricing behaviour that can only be measured with respect to the "product as a whole"; or can it also be conceived of and measured on a transaction-specific basis? Although fundamental and of critical importance to the operation of the AD Agreement, our evaluation of the parties' arguments and relevant jurisprudence has led us to conclude that there exists no *single* answer to this question. The objective lack of clarity on this issue, to some extent also recognized by the Appellate Body[295], lends legitimacy to both parties' positions. However, the Appellate Body has consistently only found room for there to be one permissible interpretation of "dumping"; and for the important systemic reasons described above[296], we have decided to follow this interpretation and come to the final conclusions expressed in this report. Nevertheless, we wish to once again emphasize that all Members have a strong systemic interest in seeing that a lasting resolution to the "zeroing" controversy is found sooner rather than later. In this regard, we note that Members have not only sought to resolve the issue of "zeroing" through WTO dispute settlement, but they are also trying to address it through negotiations in the Negotiating Group on Rules in the context of the Doha Development Agenda[297].

8.2 In the light of the findings set out in the foregoing sections of this Report, we conclude that Brazil ***has established*** that:

(a) the United States acted inconsistently with Article 2.4 of the AD Agreement when it used "simple zeroing" to determine the weighted-average margins of dumping (used to set the cash-deposit rates) and the importer-specific assessment rates of Cutrale and Fischer in the First and Second Administrative Reviews under the orange juice anti-dumping duty order; and

(b) the United States' "continued use" of "zeroing" in proceedings under the orange juice anti-dumping duty order is inconsistent with Article 2.4 of the AD Agreement.

8.3 Finally, in the light of the findings we have set out in paragraphs 8.2, we make no findings, based on judicial economy, in respect of Brazil's claims:

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[295] See, in particular, the Concurring Opinion of one Appellate Body Member in Appellate Body Report, *US – Continued Zeroing*, paras. 304-313.

[296] See above, paras. 7.132-7.135.

[297] See, e.g, Draft Consolidated Chair Texts of the AD and SCM Agreements, 30 November 2007, TN/RL/W/213; and New Draft Consolidated Chair Texts of the AD And SCM Agreements, 19 December 2008, TN/RL/W/236. We also note that Article 3.9 of the DSU states that its provisions are "without prejudice to the right of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement".

BCI deleted, as indicated [[XX]]

(a) under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, concerning the United States' alleged use of "simple zeroing" in the First and Second Administrative Reviews under the orange juice anti-dumping duty order; and

(b) under Articles 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, concerning the United States' "continued use" of "zeroing" in proceedings under the orange juice anti-dumping duty order.

B. RECOMMENDATION

8.4 Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with Article 2.4 of the AD Agreement, it has nullified or impaired benefits accruing to Brazil.

8.5 We recommend that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the AD Agreement.

BCI deleted, as indicated [[XX]]

ANNEX A

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

BCI deleted, as indicated [[XX]]

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF BRAZIL

I. THE SUBJECT OF THE DISPUTE

1. This is yet another dispute in a long line of WTO challenges concerning the United States' "zeroing procedures". Including the present one, there have now been eleven disputes brought against the United States regarding zeroing, by eight different WTO Members, and, in each one so far decided, zeroing has been found to be WTO-inconsistent.

2. The current dispute concerns the United States' application of its zeroing procedures in the original anti-dumping investigation and administrative reviews of the anti-dumping duty order on certain orange juice from Brazil ("Orange Juice Order").[1] In the original investigation, in calculating the margin of dumping, the United States Department of Commerce ("USDOC") included its "model zeroing" procedures, under which the amount by which any model's average export price exceeded the average normal value for that model was eliminated or, in effect, set at zero ("zeroed").

3. In two administrative reviews of anti-dumping duties conducted since the issuance of the Orange Juice Order, the USDOC applied its "simple zeroing" procedures, under which the amount by which an individual export price exceeded normal value was ignored or zeroed. Individual export transactions with prices below normal value were treated under US law as having "dumping margins" or, in WTO parlance, "positive comparison results" in the amount of the difference. On the other hand, the zeroing of the transactions with export prices above normal value means that the "negative comparison results" on these export sales are disregarded.

4. This dispute also concerns the USDOC's deliberate and continued use of its zeroing procedures in successive anti-dumping proceedings under the Orange Juice Order, including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time. This "ongoing conduct" continues to this day, as the USDOC is now imposing duties on entries of merchandise covered by the Orange Juice Order pursuant to the results of the second administrative review, and as it is conducting its third administrative review under the Orange Juice Order, again using zeroing.

5. The Appellate Body has, on numerous occasions, found that both model zeroing in investigations and simple zeroing in administrative reviews are inconsistent with the obligations of the GATT 1994 and the *Anti-Dumping Agreement*.

6. In light of the Appellate Body's consistent findings regarding the WTO-inconsistency of zeroing, Brazil's claims in this dispute are simple and straightforward. Brazil asks this Panel to find that (i) the two administrative reviews completed to date in respect of imports subject to the Orange Juice Order are inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* due to the application of the zeroing procedures. Brazil also asks this Panel to rule that (ii) the continued use of the US zeroing procedures in successive anti-dumping proceedings in relation to the Orange Juice Order, including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time, is inconsistent with Article VI:2 of the GATT 1994 and Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*.

[1] 71 Fed. Reg. 12183 (9 March 2006). Exhibit BRA-3.

BCI deleted, as indicated [[XX]]

II. ZEROING IS PROHIBITED UNDER THE GATT 1994 AND THE *ANTI-DUMPING AGREEMENT*

A. The Concepts of Dumping and Margins of Dumping under the GATT 1994 and the *Anti-Dumping Agreement*

7. According to the Appellate Body, there are three key elements to the definition of the concepts of "dumping" and "margin of dumping".[2] First, these linked concepts are defined in terms of a "product"; second, dumping determinations for the "product" are made with respect to an exporter or foreign producer; and, third, the WTO agreements are not concerned with "dumping" *per se*, but with injurious dumping.

8. Addressing these elements in greater detail, first, Article VI:I of the GATT 1994 defines dumping as occurring when "*products*" of one country are sold at less than the normal value of the "*products*". This definition of "dumping" is carried into the *Anti-Dumping Agreement* by Article 2.1, which states that "*a product*" is "dumped" if it is exported at less than the comparable price of the like "*product*". The definition of "dumping" in Article VI:1 of the GATT 1994 is an important element of the context of Article VI:2, which refers to the "margin of dumping", inasmuch as Article VI:2 clarifies that the "margin of dumping" is determined in respect of a dumped "product".

9. Second, the elements of the definition of "dumping" in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* indicate that these provisions address the pricing practice of an exporter or foreign producer. The definition provides that "dumping" occurs when a product is "*introduced* into the commerce of *another country*" at an "*export price*" that is less than the "comparable price for the like product in the *exporting country*". These and other provisions of the GATT 1994 and the *Anti-Dumping Agreement* make clear that a dumping determination focuses on the pricing behavior of individual exporters or foreign producers with a view to calculating a single margin for them with respect to the product as a whole.

10. Third, the *Anti-Dumping Agreement* and the GATT 1994 are not concerned with dumping *per se*, but with dumping that causes or threatens to cause material injury to the domestic industry. Further, it is evident from Article 3.1 that the volume of transactions matters: injury cannot be found to exist in relation to individual transactions, but only for the *product as whole*.

11. On the basis of these three intertwining strands of analysis, the Appellate Body concluded that the concepts of "dumping" and "margin of dumping" are defined in relation to a product under investigation as a whole, encompassing all of the export transactions of the product pertaining to an investigated exporter, and they cannot be found to exist only for a type, model or category of a product. Thus, although an investigating authority may undertake multiple comparisons using averaging groups or models, the results of these comparisons are not "margins of dumping", but rather intermediate comparison results that must be aggregated to establish, for each exporter, a margin of dumping for the product under investigation as a whole.

B. Zeroing Is Prohibited under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994

12. The opening phrase of Article 2.1 of the *Anti-Dumping Agreement* – "[f]or the purpose of this Agreement" – makes clear that the term "dumping" has the same meaning in all provisions of the *Agreement* and for all types of anti-dumping proceedings, including administrative reviews under Article 9.3. This understanding is confirmed by the text of Article 9.3, which provides that the

[2] Appellate Body Report, *US – Zeroing (Japan)*, paras. 108 – 116.

"amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".

13. Pursuant to these provisions, the Appellate Body has held that, "[i]n a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties … does not exceed the total amount of dumping found in all sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter".[3] In other words, "under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter".[4]

14. The United States contravenes this obligation, because it does not calculate a margin of dumping for each exporter based on all the export transactions made by the exporter, and as a result, it does not ensure that the total margin of dumping for each exporter functions as a ceiling on the amount of anti-dumping duties that are levied on entries of that exporter's subject merchandise. Rather, the USDOC includes only those intermediate comparison results for export transactions with prices below normal value. Any export transactions with prices greater than normal value are disregarded, or "zeroed" when calculating the aggregate amount of the price differences.

15. By disregarding or treating as zero those comparison results for export prices that are greater than normal value, the USDOC's use of zeroing necessarily results in dumping margins that are higher than they would be if all export transactions were taken into account. This is because those price comparisons that generate "negative" comparison results – where export prices are higher than normal value – are not considered in the aggregate of the comparison results. They therefore cannot reduce the "positive" comparison results generated by those export transactions below normal value. By systematically excluding transactions with prices above normal value, the USDOC's use of zeroing generates dumping margins that are greater than the margins properly determined for "the product under investigation as a whole". Hence, the USDOC's use of zeroing in administrative reviews violates Article VI:2 of GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

16. This conclusion is confirmed by a consistent series of Appellate Body decisions. The Appellate Body first addressed the USDOC's practice of zeroing in administrative reviews in *US – Zeroing (EC)*. In that instance, the Appellate Body found that, by disregarding, "at the aggregation stage", all comparisons where "the export price exceeded the contemporaneous average normal value", the USDOC's methodology "is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994".[5]

17. In at least four further rulings since *US – Zeroing (EC)*, the Appellate Body has affirmed its ruling that the use of zeroing in administrative reviews is inconsistent with the GATT 1994 and the *Anti-dumping Agreement*.[6] Among these rulings, the Appellate Body, in *US – Stainless Steel (Mexico)*, stated the conclusion succinctly: "We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparison where the export price exceeds the normal value when calculating the margin of dumping for an exporter".[7] In light of this long line of decisions by the Appellate Body, there is no doubt that USDOC's use of

[3] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

[4] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102. Original emphasis. *See* also Appellate Body Report, *US – Zeroing (EC)*, para. 130.

[5] Appellate Body Report, *US – Zeroing (EC)*, para. 133.

[6] In addition to Appellate Body Report, *US – Zeroing (EC)*, para. 135: Appellate Body Reports, *US – Zeroing (Japan)*, para. 176; *US – Stainless Steel (Mexico)*, para. 139; *US – Continued Zeroing (EC)*, para. 316; and *US – Zeroing (Japan) (21.5)*, paras. 195 and 197.

[7] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 103.

zeroing in administrative reviews is inconsistent with the GATT 1994 and the *Anti-dumping Agreement*.

III. THE UNITED STATES VIOLATED ITS OBLIGATIONS BY USING ZEROING IN TWO ADMINISTRATIVE REVIEWS

18. The USDOC has completed two administrative reviews of exports of certain orange juice from Brazil since the anti-dumping duty order on this product was fist issued. The first administrative review covered exports by Cutrale and Fischer, the principal exporters of this product, for the period between 24 August 2005 and 28 February 2007. The second administrative review covered exports by Cutrale and Fischer between 1 March 2007 and 29 February 2008.

19. In the first administrative review the USDOC applied zeroing to exports by both Cutrale and Fischer, despite written objections from both companies that this practice violated the *Anti-Dumping Agreement* and the GATT 1994. In its Issues and Decision Memorandum in that review, the USDOC stated explicitly that "the Department has continued to deny offsets to dumping based on export transactions that exceed NV in this review".[8] Thus, the USDOC admitted that it used zeroing to exclude negative comparison results, derived from export transactions with prices above normal value, in its calculation of the overall dumping margin for each exporter.

20. This conclusion is confirmed by the computer program logs containing the computer programming language used by the USDOC to calculate cash deposit and duty assessment rates for both Cutrale and Fischer[9], and by the computer outputs generated in carrying out this calculation.[10] These documents show that the USDOC's programs excluded all negative comparison results – where export transaction prices were at or above normal value – despite the fact that for both companies these negative comparison results constituted a majority of the transactions under review. The "cash deposit rates" and the "importer-specific assessment rates" applied to both Cutrale and Fischer therefore overstated the dumping margins for both companies by failing to include all export transactions in the calculations.

21. In the second administrative review the Department again applied its policy of zeroing over the protests of both Cutrale and Fischer. In its Issues and Decision Memorandum, the Department stated even more explicitly than it had in the previous review, that it had excluded from its calculations those sales with negative comparison results. The Department said that it applied the policy "by aggregating all individual dumping margins, *each of which is determined by the amount by which NV exceeds EP* or CEP, and dividing this amount by the value of all sales. At no stage of the process is the amount by which EP or CEP exceed the NV permitted to offset or cancel out the dumping margins found on other sales".[11]

22. Responding to Cutrale's and Fischer's claims that this methodology violated the *Anti-Dumping Agreement* and the GATT 1994, the USDOC stated flatly that "Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute". Therefore, the USDOC said that it "has continued to deny offsets to duping based on CEP transactions that exceed NV in this review".

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[8] Exhibit BRA-28.

[9] Exhibits BRA-29 and BRA-30.

[10] Exhibits BRA-34 and BRA-35. *See* also Exhibit BRA-31, an expert affidavit that explains the USDOC's procedures and, in particular, the specific portions of the USDOC's computer program logs and outputs showing the use of zeroing.

[11] Exhibit BRA-43.

BCI deleted, as indicated [[XX]]

23. Again, the computer logs and outputs generated during the second administrative review confirm the USDOC's statements that it applied zeroing to exclude price comparisons where export prices were at or above normal value.[12] They show that the USDOC ignored the comparison results for a significant number of export transactions for Cutrale, and for the vast majority of export transactions for Fischer. The exclusion of these export transactions resulted in higher cash deposit and importer-specific assessment rates than would have been calculated for Cutrale had all export transactions been included in the calculation. For Fischer, the positive comparisons were too small in number to generate a margin of dumping, and the cash deposit rate was zero.

24. Since the USDOC has admitted that it applied zeroing in both administrative reviews to exclude transaction comparisons where the export price was at or above normal value, and since the computer program logs submitted by Brazil in both administrative reviews confirm this result, as do the outputs also submitted by Brazil, there is no doubt that the USDOC applied zeroing in both administrative reviews. Equally, there is no doubt, as the Appellate Body has said repeatedly, that the USDOC's practice of zeroing in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

IV. THE USDOC'S CONTINUED USE OF ZEROING AND ITS APPLICATION OF DUTIES CALCULATED USING ZEROING IS INCONSISTENT WITH THE GATT 1994 AND THE *ANTI-DUMPING AGREEMENT*

25. The USDOC has, to date, used its zeroing procedures in the first three proceedings that have taken place on this product – (1) the original anti-dumping investigation; (2) the first administrative review; and (3) the second administrative review. Moreover, it has used zeroing in reaching its preliminary determination in the third administrative review.[13] Together, these successive determinations constitute an "ongoing conduct" inconsistent with the requirements of the *Anti-Dumping Agreement* and the GATT 1994.

26. In the original anti-dumping investigation, the USDOC calculated the "dumping margin" using a comparison of weighted-average prices of each model sold in the United States to the normal value of that model. At the time when the final determination was made in the original investigation, the USDOC systematically applied this "model" zeroing to its price comparisons. The computer program used in the original investigation, as shown by the computer program logs submitted as Exhibits BRA-32 and BRA-33, provided for the exclusion from the calculation of negative comparison results where the weighted-average export price exceeded normal value.

27. The original investigation has been followed by two completed administrative reviews to date. In both of these reviews, as discussed above, the USDOC applied "simple zeroing" to exclude any US transactions whose price comparisons showed export prices at or above normal value. A third administrative review is currently in progress, and to date it has resulted in a preliminary determination in which the USDOC again applied simple zeroing. Accordingly, use of zeroing is common to all the successive stages of the case at issue, with the USDOC adopting a "string of connected and sequential determinations"[14] in which it disregarded comparison results where the price of the exports exceeded normal value. This string of determinations has provided a continuing basis for the United States to apply and maintain anti-dumping duties on imports of certain orange juice from Brazil since 9 March 2006.

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[12] Exhibits BRA-36, BRA-38 (computer program logs), BRA-37 and BRA-39 (computer program outputs).

[13] *See* Exhibit BRA-20, "Summary of Information on the Use of Zeroing".

[14] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 180.

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28. In *US – Continued Zeroing (EC)*, the Appellate Body found that the use of the zeroing methodology in an original investigation and "successive stages" of administrative reviews constitute an "ongoing conduct" that amount to a "measure" subject to challenge in WTO dispute settlement.[15] The ongoing conduct at issue in that dispute is virtually identical to the ongoing conduct at issue in this dispute. Both disputes concern the continued use of the zeroing methodology in successive phases of an anti-dumping proceeding under a particular anti-dumping order whereby the USDOC applies and maintains anti-dumping duties.

29. The USDOC's zeroing procedures, as used in the original investigation and in the administrative reviews in this case, have repeatedly been found to be inconsistent with Article VI:2 of the GATT 1994 and Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*. Consequently, the continued use of zeroing in these consecutive anti-dumping determinations constitutes an ongoing conduct that violates these provisions of the GATT 1994 and the *Anti-Dumping Agreement*.

[15] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 185.

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ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, Brazil asks this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for the obligation that Brazil proposes. This Panel should make an objective assessment of the matter before it and refrain from adopting Brazil's interpretation.

2. Brazil also challenges two "measures" that are not within the Panel's terms of reference. The United States requests that the Panel grant the requests for preliminary rulings with respect to these "measures".

II. GENERAL PRINCIPLES

3. The burden of proving that an obligation has not been satisfied is on the complaining party. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) of the AD Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.

4. Article 11 of the Dispute Settlement Understanding ("DSU") requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.

5. Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the Dispute Settlement Body ("DSB"), cannot add to or diminish the rights and obligations provided in the covered agreements. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel is not bound to follow the reasoning set forth in any Appellate Body report. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements.

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III. REQUESTS FOR PRELIMINARY RULINGS

A. The Second Administrative Review

6. A Member may only file a panel request with respect to a measure upon which the consultations process has run its course. Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute". Article 4.4 of the DSU, in turn, provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal basis for the complaint". These rules apply with equal force to disputes brought under the AD Agreement, which contains parallel requirements in Articles 17.3 through 17.5.

7. In this dispute, Brazil seeks the establishment of a panel with respect to "[t]he 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')". However, the final results of the second administrative review were issued after Brazil's request for consultations. As such, at the time of Brazil's consultations request, the second administrative review did not constitute a "measure" within the meaning of Article 4.4 of the DSU. As it was not, and could not have been, subject to consultations, the second administrative review is not within the Panel's terms of reference.

B. The "Continued Use of the US 'Zeroing Procedures'"

8. Under Article 6.2 of the DSU, a panel request must identify the "*specific* measure at issue in the dispute", and a panel's terms of reference under Article 7.1 are limited to those specific measures. Brazil's identification of the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil" as a "measure" in its panel request fails to meet this requirement. A general reference to an indeterminate number of potential measures does not satisfy the requirement that a panel request identify the "*specific* measure at issue". Brazil is merely speculating as to what may happen in the future, and such speculation is not identification of a specific measure. There is no basis to conclude, for example, that the results of any future antidumping proceeding with respect to orange juice from Brazil would reflect "zeroing".

9. By including this purported measure in its panel request, Brazil appears to be challenging an indeterminate number of potential measures. However, measures that are not yet in existence at the time of panel establishment are not within a panel's terms of reference under the DSU. It is impossible for Members to consult on a measure that does not exist, and a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement.

10. Article 3.3 of the DSU provides that

> [t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

Accordingly, in *US – Upland Cotton*, the panel found that a measure that had not yet been adopted could not form part of its terms of reference, noting that such a "measure" could not have been impairing any benefits because it was not in existence at the time of the panel request. Similarly, in this case, indeterminate future measures that did not exist at the time of Brazil's panel request, and may in fact never exist, could not be impairing any benefits accruing to Brazil.

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IV. BRAZIL'S CLAIMS REGARDING ASSESSMENT PROCEEDINGS SHOULD BE REJECTED

11. Brazil challenges the first and second administrative reviews as inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement. The U.S. Department of Commerce ("Commerce") reviewed two companies in each of these reviews: Fischer and Cutrale. Aside from the fact that the second administrative review is outside the Panel's terms of reference, Brazil's claims with respect to these reviews should be rejected for the reasons below.

12. The AD Agreement provides no general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body found that the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* ... ". This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2. There is no textual basis for the additional obligations that Brazil would have this Panel impose.

13. Subsequent to *US – Softwood Lumber Dumping (AB)*, several panels examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that context. In making an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation. This Panel should likewise find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber Dumping* is applicable.

14. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body specifically recognized that the issue before it was whether so-called "zeroing" was prohibited under the average-to-average comparison methodology found in Article 2.4.2. Thus, the report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology". The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner". The obligation to provide offsets, therefore, was tied to text of the provision addressing the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices. An assertion by Brazil that there is a general prohibition of "zeroing", or one specifically applicable to the more particular context of assessment proceedings, cannot be reconciled with the interpretation articulated in *US – Softwood Lumber Dumping (AB)*. If there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" in that dispute would be redundant of the general prohibition of zeroing.

15. The need to avoid such redundancy was recognized in *US – Zeroing (Japan)(AB)* when the Appellate Body changed its interpretation of this phrase. In *US – Softwood Lumber Dumping (AB)*, "margins of dumping" and "all comparable export transactions" were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, *i.e.* the product "as a whole". However, in *US – Zeroing (Japan)(AB)*, the Appellate Body reinterpreted "all comparable export

transactions" to relate solely to all transactions within a model, and not across models of the product under investigation. In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber Dumping (AB)*.

16. In addition, a general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations would be inconsistent with the remaining text of Article 2.4.2, which provides for an exceptional methodology that may be used in certain circumstances. This methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. The mathematical implication of a general prohibition of zeroing, however, is that the exceptional clause would be reduced to inutility. That is because the exceptional methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In this respect, a general prohibition of zeroing would render the exception in Article 2.4.2 a nullity. Such an interpretation would be disfavoured under a key tenet of customary rules of treaty interpretation, that an interpretation must give meaning and effect to all the terms of a treaty.

17. In *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the exceptional provision of Article 2.4.2 redundant. Brazil has not offered any explanation as to how this defect is avoided under its interpretation of the AD Agreement.

18. Despite the findings of the panels that the results of the exceptional methodology "will necessarily always yield a result identical to that of an average-to-average comparison," under a general prohibition of zeroing, the Appellate Body has found this concern to be "overstated". The Appellate Body has asserted that mathematical equivalence will occur only in "certain situations" and represents "a non-tested hypothesis". These objections, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement. The exceptional provision is rendered inutile if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement.

19. In *US – Zeroing (Japan)*, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the exceptional methodology to a subset of export transactions. The AD Agreement says nothing about selecting a subset of transactions when conducting an analysis under the second sentence of Article 2.4.2. The exception provides that, when certain conditions are met, Members are permitted to compare average normal values to transaction-specific export prices. If the Appellate Body is correct that dumping may only be determined for the product as a whole (which the United States does not concede), there is no textual basis for inferring that the comparison methodology in the second sentence of Article 2.4.2 is an exception to that provision (which, as Article 2.1 provides, applies throughout the AD Agreement). The second sentence of Article 2.4.2 simply provides an exception to the average-to-average or transaction-to-transaction comparison requirement of the first sentence of Article 2.4.2. Consequently, the use of a subset of export transactions as a means of avoiding mathematical equivalency would also appear to be inconsistent with the AD Agreement. The redundancy of the second sentence of Article 2.4.2 occurs as a consequence of any interpretation that results in a general prohibition of "zeroing".

20. Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that do not impose independent obligations. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define "dumping" and "margins of dumping" so as to require that export transactions be examined at an aggregate level. The definition of "dumping" in these provisions

references "product ... introduced into the commerce of another country at less than its normal value". This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.

21. In addition, the term "less than normal value" is defined as when the "price of the product exported ... is less than the comparable price ...". This definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something". In *US – Zeroing (Japan)*, the panel found that this definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level".

22. There is nothing in the GATT 1994 or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, the foreign producer or exporter itself exclusively enjoys the benefit of the extent to which the price of a non-dumped export transaction exceeds normal value.

23. In *US – Zeroing (Japan)*, the panel noted that "the record of past discussions in the framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions". Well before the recent debate about "zeroing", a Group of Experts convened to consider issues with respect to the application of Article VI of the GATT 1947. The Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned". The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and found to be consistent with the Antidumping Code. In view of these findings, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted. The text of Article VI of the GATT 1947, however, did not change as a result of the Uruguay Round agreements. The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.

24. Brazil's claim ultimately depends on the reasoning set forth in Appellate Body reports that rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term "product" as being solely and exclusively synonymous with the concept of "product as a whole". It denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis ...".

25. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole." Instead, "product" can have either a collective meaning or an individual meaning. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation requiring that margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole".

26. Likewise, examination of the term "margins of dumping" itself provides no support for Brazil's interpretation of the term as solely, and exclusively, relating to the "product as a whole". As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed:

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> [T]here is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".

Thus, the panel saw "no reason why a Member may not ... establish the 'margin of dumping' on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values".

27. Additionally, the term "margin of dumping", as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the "product as a whole". As used in the Note Ad Article VI:1, which provides for importer-specific price comparison, the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers. As used in Article 2.2 of the AD Agreement, the term "margin of dumping" would require the use of constructed value for the "product as a whole", even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US – Softwood Lumber Dumping (21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2".

28. Brazil argues that "'dumping and 'margin of dumping' are exporter-related concepts". However, individual transactions are exporter-specific; dumping may be both exporter-specific and transaction-specific at the same time. And, as explained above, the term "margin of dumping", as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the "product") is "introduced into the commerce of the importing country". Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Thus, the obligation in Article 9.3 to assess no more in antidumping duties than the margin of dumping is similarly applicable at the level of individual transactions.

29. In Brazil's view, a Member breaches Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by failing to provide offsets because Members are required to calculate margins of dumping on an exporter-specific basis for the product "*as a whole*" and, consequently, a Member is required to aggregate the results of "*all*" "*intermediate comparisons*", including those for which the export price exceeds the normal value. The terms upon which Brazil's interpretation rests are conspicuously absent from the text of both Articles 2.1 and 9.3 and Article VI:2. Brazil's interpretation is not mandated by the definition of dumping contained in Article 2.1, as described above.

30. The panel in *US – Zeroing (Japan)* correctly rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value ...". The panel explained that the importer- and import-specific obligation to pay an antidumping duty "lend[s] further support to the view ... that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, ... entails a general prohibition of zeroing".

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31. Although dumping involves differential pricing behavior of exporters or producers between its export market and its normal value, dumping nevertheless occurs at the level of individual transactions. Moreover, the remedy for dumping provided for in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, are applied at the level of individual entries for which importers incur the liability. This way, the importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If, instead, the amount of the duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if Brazil's interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping. If a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports.

32. Brazil's argument that "dumping" must cause or threaten injury does not preclude an interpretation that dumping can occur at the level of individual transactions in assessment proceedings. No Article 3 injury determination is required in Article 9.3 assessment proceedings. Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is distinct from the determination of injury or threat of injury that would have already been addressed in the affirmative in the investigation phrase.

33. Brazil's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole", is also inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value". And, as the panel in *US – Stainless Steel (Mexico)* found, if in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in a retrospective system.

34. The Appellate Body has disagreed, stating that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping within the meaning of Article 9.3 and noting such duty is subject to review under Article 9.3.2. But, to the extent that (as the Appellate Body suggests) Article 9.3 requires consideration of the "product as a whole", an importer seeking a refund in a prospective normal value system would have to provide evidence that relates to the "product as a whole", not just its own entries. This would make it difficult, if not impossible, for an importer to obtain a refund. Further, accepting Brazil's interpretation that a Member must aggregate the results of "*all*" comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account "*all*" of the exporters' transactions. This result is contrary to the very concept of the prospective normal value system.

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35. For all of these reasons, because the conclusion that there is no general prohibition of "zeroing" in assessment proceedings is, at a minimum, a permissible interpretation of the covered agreements, the Panel should reject Brazil's claims.

36. Even under Brazil's interpretation of the scope of a Member's obligations, Brazil has not met its burden of proof as a factual matter. In the first administrative review, Commerce determined a *de minimis* margin of dumping for Cutrale. In the second administrative review, Commerce determined a zero margin of dumping and assessed no antidumping duties for Fischer. A zero or *de minimis* margin of dumping cannot exceed any "ceiling" Brazil argues is provided for in the covered agreements, and, where no duties are assessed, no duties are imposed in excess of the margin of dumping, even under Brazil's interpretation of the obligations of those agreements. Additionally, Brazil has failed to meet its burden of proof to show that "zeroing" was used in the first administrative review with respect to Fischer. Brazil provided a margin program log that was generated after the first administrative review had been completed, which must have been run by someone other than Commerce.

V. BRAZIL'S CLAIMS REGARDING "CONTINUED USE" SHOULD BE REJECTED

37. As noted above, the "continued use of 'zeroing'" is not a measure within the Panel's terms of reference under Article 6.2 of the DSU. Should the Panel conclude otherwise, however, Brazil's claims that such "continued use" violates Article VI:2 of the GATT and Articles 2.4.2 and 9.3 of the AD Agreement should be rejected for multiple reasons.

38. Brazil's claim with respect to this purported "measure" is premised on dumping margins calculated in the original investigation, final results of the first and second administrative review, and preliminary results of the third administrative review. Neither the second nor the third administrative review is within the Panel's terms of reference as they were not consulted upon, and, with respect to the third administrative review, the calculations Brazil references are merely preliminary results and do not constitute a "final action" that can be challenged.

39. Moreover, Brazil's evidence with respect to the investigation indicates that "zeroing" had no impact on the margin calculations in the investigation. In particular, this evidence shows that there were no negative comparison results, meaning that the necessary condition for activating the "zeroing" line of the program was not satisfied, and the "zeroing" operation was not applied. The margins calculated as a result could not and did not exceed the margins contemplated by the covered agreements, even under Brazil's interpretation. With respect to the reviews, as noted above, in the first administrative review, the margin of dumping for Cutrale was *de minimis*. With respect to the second administrative review, the margin of dumping and assessment rate for Fischer was zero. As such, like the investigation, they do not provide a basis for a claim that the United States has continuously acted inconsistently with its obligations by "inflating" the margins via "zeroing".

40. Brazil's assertion that the facts of this case are "virtually identical" to the facts of cases found to be WTO-inconsistent by the Appellate Body in the *US – Zeroing II (EC)* dispute is not accurate. In that dispute, the Appellate Body found that the record supported findings of inconsistency where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time". Here, in contrast, there have been no sunset reviews, and Brazil's own evidence fails to establish that "zeroing" was applied to, or had any impact on, any margin in the investigation or first administrative review, one of the two margins in the second administrative review, or one of the two margins in the preliminary results of the third administrative review. This does not constitute "a string of determinations, made sequentially ... over an extended period of time" and does not provide a basis for concluding that "zeroing" would likely continue to be applied in successive proceedings.

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41. Brazil's argument that the alleged "continued use of zeroing" is even a measure that can be challenged, as well as a violation of the covered agreements, is premised on its assertion that such "continued use" constitutes "ongoing conduct". Even were this a cognizable claim, as detailed above, the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue in the order that is at issue in this dispute.

42. In addition, with respect to Brazil's claim that the "continued use" violates Article 2.4.2 of the AD Agreement, the express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to assessment proceedings, or the amorphous "continued use" of "zeroing" in successive proceedings, would read out of the AD Agreement the express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should generally be given meaning wherever possible.

VI. CONCLUSION

43. The United States requests that the Panel grant the requests for preliminary rulings and reject Brazil's claims.

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ANNEX A-3

EXECUTIVE SUMMARY OF BRAZIL'S RESPONSE TO THE UNITED STATES' REQUESTS FOR PRELIMINARY RULINGS

I. INTRODUCTION

1. The United States has requested a preliminary ruling that the following two measures are not within the Panel's terms of reference: (i) the 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the "Second Administrative Review")[1]; and (ii) the continued use of the US zeroing procedures in successive anti-dumping proceedings in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil.[2]

2. Nearly identical objections were raised by the United States, and rejected, in *US – Continued Zeroing*.[3]

II. THE SECOND ADMINISTRATIVE REVIEW FALLS WITHIN THE PANEL'S TERMS OF REFERENCE

A. FACTUAL BACKGROUND

3. Brazil filed its first request for consultations in the present proceedings on 27 November 2008. The request mentioned, in particular, the 2005-2007 anti-dumping administrative review on certain orange juice from Brazil (the "First Administrative Review"), and "any on-going or future antidumping administrative reviews, and the final results thereof, related to the imports of certain orange juice from Brazil (case no. A-351-840)".[4] On 6 April 2009, the United States adopted preliminary results in the Second Administrative Review. On 22 May 2009, Brazil filed an addendum to its request for consultations. This additional request for consultations indicated, among others, that Brazil wished to consult with the United States on the Second Administrative Review.[5]

4. On 11 August 2009, the United States adopted the final results in the Second Administrative Review. On 20 August 2009, Brazil filed the request for establishment of this Panel, listing the Second Administrative Review among the measures at issue, and specifically referring to the final results in this review.[6]

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[1] US First Written Submission ("FWS"), paras. 37 – 48.

[2] US FWS, paras. 38 and 49 – 52.

[3] Panel Report, *US – Continued Zeroing*, paras. 7.11 – 7.13, 7.16; and Appellate Body Report, *US – Continued Zeroing*, paras. 156 – 157 and 217; and paras. 172 (and the reasoning in paras. 159 – 171) and 236 (and the reasoning in paras. 220 – 235).

[4] Request for Consultations by Brazil, 27 November 2008, WT/DS382/1, p. 1.

[5] Request for Consultations by Brazil, Addendum, 22 May 2009, WT/DS382/1/Add.1, para. 5 (3).

[6] Request for the Establishment of a Panel by Brazil, 20 August 2009, p. 2.

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B. THE UNITED STATES' OBJECTIONS UNDER ARTICLE 6.2 OF THE DSU

5. The United States argues that because final results in the Second Administrative Review had not yet been adopted at the time of consultations, these were not the subject of consultations and, therefore, cannot fall within the Panel's terms of reference under Article 6.2 of the DSU.[7]

C. THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU

6. A panel's terms of reference are determined by the panel request[8], which must be consistent with Article 6.2 of the DSU. Although Article 6.2 requires that consultations be held, it does not require that the measures identified in the panel request be identical to the measures identified in the consultations request. In several disputes, the Appellate Body has held that Article 4 and 6 of the DSU "do not ... require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[9]

7. Panels and the Appellate Body have consistently held that a panel's terms of reference may include a measure properly identified in the panel request, even if that measure was not included in the consultations request, provided that doing so did not change the "essence" of the dispute, or in other words, that it did not "expand the scope" of the dispute.[10]

8. For example, in *US – Continued Zeroing*, the United States took a similar position to its position in this dispute, objecting to the inclusion in the panel's terms of reference of 14 anti-dumping reviews that were included in the European Communities' panel request, but not in its consultations request.[11] These 14 additional reviews were issued under anti-dumping duty orders included in the consultations request. The panel and the Appellate Body recalled that there is no need for strict identity between the consultations and panel requests, and that measures not included in a consultations request may form part of the terms of reference if they do not change the essence of the dispute.[12] The Appellate Body upheld the panel's findings that the 14 reviews fell within the panel's terms of reference.[13] The panel said that:

> … as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the

[7] US FWS, paras. 37 and 39 – 48. These same arguments were made by the United States in *US – Continued Zeroing*, and rejected by both the panel and the Appellate Body. Panel Report, *US – Continued Zeroing*, paras. 7.17 – 7.28; Appellate Body Report, *US – Continued Zeroing*, paras. 220 – 236.

[8] *See, e.g.*, Appellate Body Report, *US – Continued Zeroing*, para. 161 ("... a panel's terms of reference are established by the claims raised in panel requests...").

[9] Appellate Body Report, *Brazil – Aircraft*, para. 132. *See also, e.g.*, Panel Report, *US – Continued Zeroing*, para. 7.23; Appellate Body Report, *US – Continued Zeroing*, para. 222; and Appellate Body Report, *US – Upland Cotton*, para. 285, 293.

[10] Panel Report, *Canada – Aircraft*, para. 9.14; Panel Report, *Brazil – Aircraft*, para. 7.11; Appellate Body Report, *Brazil – Aircraft*, para. 132; Appellate Body Report, *Chile – Price Band System*, para. 139; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.15, 7.21; Appellate Body Report, *EC – Chicken Cuts*, para. 157; Appellate Body Report, *US – Continued Zeroing*, in particular paras. 222 and 228; Appellate Body Report, *US – Upland Cotton*, para. 293.

[11] *See, e.g.*, Appellate Body Report, *US – Continued Zeroing*, para. 223.

[12] Panel Report, *US – Continued Zeroing*, paras. 7.22 – 7.23; Appellate Body Report, *US – Continued Zeroing*, in particular paras. 222 and 228.

[13] Appellate Body Report, *US – Continued Zeroing*, paras. 235 – 236 and Panel Report, *US – Continued Zeroing*, para. 7.28.

> complaining Member's panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request.[14]

9. Thus, Panels and the Appellate Body assess the scope of a panel's jurisdiction on the basis of the *substantive* connections between the measures that were, and the measures that allegedly were not, part of the terms of reference. The Appellate Body has stated that this approach – which properly promotes substance over form – is "supported" by "the object and purpose of the WTO dispute settlement system."[15]

10. Additional support for this approach can be found in the Appellate Body's consideration of the scope of a panel's jurisdiction under Article 21.5 of the DSU.[16]

11. In sum, the case-law shows that a series of closely linked measures adopted over time – starting with measures identified in a consultations request, continuing with measures adopted during consultations[17], the original proceedings[18], and into implementation[19] – may all relate to "fundamentally the same 'dispute'"[20] such that jurisdiction is conferred, provided the measures share the same "essence"[21] or close substantive connections[22], and together manifest a common "problem" that the complaining Member's claims are seeking to "fix".[23]

D. THE SECOND ADMINISTRATIVE REVIEW IS WITHIN THE PANEL'S TERMS OF REFERENCE

12. At the outset, Brazil recalls that its consultations and panel requests both identify the Second Administrative Review, which was ongoing when the consultations request was filed[24], and was adopted before the panel request was filed.

13. The sole issue is whether it is decisive that the Second Administrative Review was adopted after the consultations request was filed. The case law just discussed shows that this factor is not decisive. Panels and the Appellate Body have consistently found that new measures, adopted after a

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[14] Panel Report, *US – Continued Zeroing*, para. 7.22. In *US – Continued Zeroing*, the panel and the Appellate Body also rejected the argument, reiterated by the United States in this dispute, that the Appellate Body's decision in *US – Certain EC Products* supports its position. Appellate Body Report, *US – Continued Zeroing*, para. 60, 230-231; Panel Report, *US – Continued Zeroing*, paras. 7.26 and 7.27; *also*, Appellate Body Report, *US – Certain EC Products*, paras. 76 – 77.

[15] Appellate Body Report, *Chile – Price Band System*, para. 140, 144.

[16] The Appellate Body has concluded that measures with "a *particularly close relationship*", or having "*sufficiently close links*", to measures that are indisputably within the compliance panel's jurisdiction are themselves subject to a compliance panel's jurisdiction. *See, e.g.*, Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77, 79; *see also* Panel Report, *US – Zeroing (Japan) (21.5 – Japan)*, para. 7.114; and Appellate Body Report, *US – Zeroing (Japan) (21.5 – Japan)*, paras. 124 – 130.

[17] Appellate Body Report, *Brazil – Aircraft*.

[18] Appellate Body Report, *Chile – Price Band System*; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*; Panel Report, *Argentina – Footwear (EC)*, para. 8.45; and Appellate Body Report, *EC – Chicken Cuts*.

[19] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 6.5; and Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 7.10.

[20] Panel Report, *Brazil – Aircraft*, para. 7.11.

[21] Appellate Body Report, *Brazil – Aircraft*, para. 132; Appellate Body Report, *Chile – Price Band System*, para. 139; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.21; Appellate Body Report, *EC – Chicken Cuts*, para. 157.

[22] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[23] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 95.

[24] Request for Consultations by Brazil, Addendum, 22 May 2009, WT/DS382/1/Add.1, para. 5(3); and Request for the Establishment of a Panel by Brazil, 20 August 2009, p. 2.

consultations request was filed, may form part of a panel's terms of reference, if the new measures were part and parcel of the same dispute.

14. The Second Administrative Review is properly regarded as part of the same dispute as the other measures at issue. This measure has very close substantive connections to – and, indeed, the same essence as – the First Administrative Review. These are successive annual administrative reviews adopted under the same anti-dumping order regarding certain orange juice from Brazil. They involve the *same type of determinations*, made by the *same US administering authority*, concerning the *same products*, the *same exporters*, and the *same exporting country*, and they provide *succeeding bases* for the continued imposition of anti-dumping duties under that order. These connections are confirmed by the fact that, under the USDOC's Regulations, all administrative (and other) reviews occurring under a single order are mere "*segments*" of a single "*proceeding*" that continues until revocation.[25]

15. In addition to the close substantive similarities between the First and Second Administrative Reviews, the claims made regarding the two measures are also identical. Thus, the nature, or "essence", of the dispute regarding the two measures is exactly the same, and the Second Administrative Review properly falls within the panel's terms of reference.

16. Brazil also notes that, if the Second Administrative Review were excluded from the panel's terms of reference, it would be difficult, if not impossible, to pursue WTO dispute settlement regarding US administrative reviews. As Brazil has explained in its First Written Submission, the United States typically conducts annual administrative reviews under an anti-dumping order.[26] Thus, every year, one administrative review is succeeded by another. If a complainant were required to file a new consultations request for every administrative review, WTO dispute settlement would become a "moving target", and the recommendations and rulings of the Dispute Settlement Body ("DSB") could not address the latest measure. This would needlessly prevent the prompt settlement of disputes. As noted, panels and the Appellate Body have rightly rejected this interpretation.

III. THE CONTINUED USE OF ZEROING IN SUCCESSIVE PROCEEDINGS UNDER THE ORANGE JUICE ORDER FALLS WITHIN THE PANEL'S TERMS OF REFERENCE

A. BACKGROUND

17. In addition to challenging individual reviews in which zeroing was used, Brazil has challenged "[t]he continued use of the US. "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil".[27] Brazil refers to this as the "Continued Use" measure.

B. THE UNITED STATES' OBJECTIONS UNDER ARTICLE 6.2 OF THE DSU

18. Like in *US – Continued Zeroing*, where its arguments were rejected, the United States objects that the continued use of zeroing in successive anti-dumping proceedings relating to the orange juice order does not fall within the panel's terms of reference.[28]

[25] 19 C.F.R. § 351.102. Exhibit BRA-44.
[26] Brazil's FWS, paras. 19 – 21.
[27] Request for the Establishment of a Panel by Brazil, 20 August 2009, p. 3, heading (d).
[28] US FWS, paras. 50-52. This line of argument was rejected in *US – Continued Zeroing*. Appellate Body Report, *US – Continued Zeroing*, paras. 159 – 172.

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C. THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU

19. Article 6.2 of the DSU requires, among others, that a panel request "identify the *specific* measures at issue".[29] If a measure is not specifically identified in the panel request, it does not fall within the panel's terms of reference. In the words of the Appellate Body,

> ... the specificity requirement means that the measures at issue must be identified *with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request*.[30]

20. In *US – Continued Zeroing*, the Appellate Body held that, under Article 6.2 of the DSU, the European Communities had properly identified a "specific measure" that the Appellate Body described as follows: "the use of the zeroing methodology in successive proceedings, in each of the 18 [anti-dumping] cases, by which the anti-dumping duties are maintained".[31]

21. In reaching this conclusion, the Appellate Body dismissed US arguments to the effect that such a measure did not exist. It emphasized that, under Article 6.2, the issue is whether a measure has been properly identified, adding that:

> ... the *identification* of the specific measures at issue, pursuant to Article 6.2, is different from a *demonstration of the existence* of such measures.[32]

22. The Appellate Body also dismissed the US arguments that a measure involving ongoing conduct in a series of anti-dumping determinations was of a type that could not be challenged in WTO dispute settlement.[33] Furthermore, after finding that the panel request sufficiently identified a "continued use" measure, the Appellate Body also held that, in certain instances, this measure violated the *Anti-Dumping Agreement* and the GATT 1994. Thus, the continued use of zeroing is a measure of a type that may be subject to WTO dispute settlement.

D. BRAZIL' CONTINUED USE MEASURE FALLS WITHIN THE PANEL'S TERMS OF REFERENCE

23. Brazil begins by noting that the content of the measure identified in its panel request is defined in very similar terms to the measure that the Appellate Body stated had been challenged by the European Communities in *US – Continued Zeroing*. The two sets of measures were defined as follows:

> [T]he continued use by the United States of "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil (case No A-351-840), including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time.[34]

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[29] Compliance with the requirements of Article 6.2, including the requirement to identify the specific measures at issue, must be examined based "on the face" of the panel request, "read 'as a whole'". Appellate Body Report, *US – Continued Zeroing*, para. 161, quoting Appellate Body Report, *US – Carbon Steel*, para. 127, and Appellate Body Report, *US – OCTG Sunset Reviews*, para. 169.

[30] Appellate Body Report, *US – Continued Zeroing*, para. 168.

[31] Appellate Body Report, *US – Continued Zeroing*, para. 166, 169.

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

[33] Appellate Body Report, *US – Continued Zeroing*, para. 169. *Also*, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 101.

[34] Request for the Establishment of a Panel by Brazil, 20 August 2009, p. 3, heading (d).

> [T]he use of the zeroing methodology in successive proceedings, in each of the 18 [anti-dumping] cases, by which the anti-dumping duties are maintained.[35]

24. Thus, Brazil identified the Continued Use measure at issue in similar terms to the formulation that the Appellate Body used to describe a similar measure. These similarities are not accidental. Brazil intended to bring claims concerning the same ongoing conduct challenged by the European Communities in *US – Continued Zeroing*, that is, the continued use of zeroing in successive anti-dumping proceedings under a particular anti-dumping order. The only material difference is that Brazil's claims address continued conduct under a different anti-dumping order from the orders implicated in *US – Continued Zeroing*.

25. Given the Appellate Body's own formulation of the "continued use" measure in *US – Continued Zeroing*, the formulation of Brazil's panel request is more than sufficient for the Panel, the United States, and the third parties to "identify[] with sufficient precision … what is referred to adjudication".[36] The United States has not argued that the panel request lacks clarity; it merely repeats the arguments made in *US – Continued Zeroing* to the effect that the measure at issue is of a type that cannot be challenged in WTO dispute settlement, and that the measure does not exist. For the same reasons as were given by the Appellate Body in *US – Continued Zeroing*, these arguments of the United States should be rejected.[37]

26. Brazil also notes that, in *US – Continued Zeroing*, the Appellate Body rejected the US argument that the continued use of zeroing in successive anti-dumping proceedings under specific anti-dumping orders is no different to a challenge to past individual determinations, an argument that the United States now repeats.[38] The Appellate Body observed that a challenge to a continued use measure of the type at issue is "narrower than a challenge to the zeroing methodology" as such, and "broader than specific instances in which the zeroing methodology was applied".[39]

27. With respect to the continued use measure, the Appellate Body found that the complaint was directed at:

> … the zeroing methodology as used in the final order and programmed to continue to be used until such time as the United States eliminates zeroing from the particular anti-dumping duty under consideration.[40]

28. The Appellate Body explained that a complainant "is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct [] under the scrutiny of WTO dispute settlement".[41]

29. As in *US – Continued Zeroing*, the conduct at issue in this case is the *continued use of the zeroing methodology in making determinations under a particular anti-dumping order*, and the remedy requires the United States to cease using this methodology to make determinations under the *particular order*. In this regard, Brazil is entitled, as the European Communities was in *US – Continued Zeroing*, to bring claims regarding this measure in order to resolve a disagreement regarding the use of zeroing under the orange juice order.

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[35] Appellate Body Report, *US – Continued Zeroing*, para. 166.
[36] Appellate Body Report, *US – Continued Zeroing*, para. 168.
[37] Appellate Body Report, *US – Continued Zeroing*, paras. 169, 171.
[38] US FWS, para. 50.
[39] Appellate Body Report, *US – Continued Zeroing*, paras. 179 – 181.
[40] Appellate Body Report, *US – Continued Zeroing*, para. 180.
[41] Appellate Body Report, *US – Continued Zeroing*, para. 181, footnotes omitted.

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30. The United States also argues that Brazil is "challenging an indeterminate number of potential future measures", which, it says, is contrary to the DSU.[42] This argument was also dismissed by the Appellate Body in *US – Continued Zeroing*, which stated:

> The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future.[43]

31. Accordingly, Brazil is not precluded from challenging the Continued Use measure simply because it may be applied when future anti-dumping determinations are made under the orange juice order. To the contrary, this is the very reason why Brazil has brought this dispute over the continued use of zeroing under the orange juice order – it wishes to resolve a dispute regarding conduct that will likely "stretch[] into the future".[44] WTO dispute settlement is designed precisely to allow Members to settle such disputes promptly, by permitting Members to challenge the root of the problem. By challenging the root of the problem, Brazil avoids the situation where the United States has adopted new individual determinations using zeroing before the Panel proceedings have been completed, which would turn the US measures into "a 'moving target'".[45]

E. CONCLUSION

32. Thus, Brazil requests that the Panel reject the United States' requests for the Second Administrative Review and the Continued Use measure to be excluded from its terms of reference, and to find that these measures form part of its terms of reference.

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[42] US FWS, para. 52.
[43] Appellate Body Report, *US – Continued Zeroing*, para. 171.
[44] Appellate Body Report, *US – Continued Zeroing*, para. 171.
[45] Appellate Body Report, *Chile – Price Band System*, para. 144.

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ANNEX B

THIRD PARTIES' WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF ARGENTINA

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I. INTRODUCTION

1. Argentina thanks the Panel for this opportunity to present its arguments concerning the correct interpretation of the Anti-Dumping Agreement (hereinafter ADA), to ensure that the Agreement is not interpreted in such a way as to diminish or impair the rights of Members.

2. Argentina will not discuss zeroing as applied in the specific case brought by Brazil. Rather, it will focus on a more systemic aspect, i.e. the inconsistency of zeroing as such.

3. As it has emerged from other cases submitted to the DSB, the practice and methodology applied by the United States Department of Commerce (USDOC), commonly known as "zeroing", is inconsistent with the ADA, since Article 1 of the ADA stipulates that "[a]n anti-dumping measure shall be applied only under circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement".

4. On the contrary, the zeroing methodology for calculating the margin of dumping during the investigation phase, by eliminating certain relevant transactions from the calculation, can lead to two situations: (a) artificial inflation of a margin of dumping; or, in the worst-case scenario, (b) creation of a margin of dumping where there is none.

5. Argentina will now present its arguments concerning the interpretation of the main provisions of the ADA raised in this dispute that may be affected as a result of applying the zeroing methodology to calculate margins of dumping.

6. Firstly, bearing in mind that Brazil referred to the zeroing methodology in original investigations ("model zeroing"), and more specifically to the inconsistency of the methodology with Article 2.4.2 of the ADA[1], we shall examine the consistency of that methodology with the said provision of the ADA.

7. Finally, in the light of Brazil's analysis of the inconsistency of the use of the zeroing methodology in administrative reviews with Article VI.2 of the GATT 1994 and Article 9.3 of the ADA, we shall address that issue.

II. INCONSISTENCY WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

8. Both Panels and the Appellate Body have in several instances found the practice of zeroing to be inconsistent with Article 2.4.2 of the ADA.[2]

9. Article 2.4.2 refers to the various methods available to investigating authorities for calculating the margin of dumping. This provision specifies that "[s]*ubject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of* ***all*** *comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis* [thus providing the possibility of a weighted average/transaction under exceptional circumstances method]".

[1] First Written Submission of Brazil, page 38, paragraph 114.

[2] See the Reports of the Appellate Body in *EC - Bed Linen*, paragraph 66; *US - Softwood Lumber V*, paragraph 117; *US - Zeroing (EC)*, paragraph 222. See also the reports of the Panels in *US - Zeroing (Japan)*, paragraphs 7.86 and 7.179; *US - Stainless Steel (Mexico)*, paragraph 7.63; and *US - Continued Zeroing*, paragraphs 7.109-111.

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10. The above provision explains how domestic authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there is dumping.

11. As can be inferred from this provision, comparison for the purposes of calculating the "margin of dumping" in an investigation, regardless of the method used, must be based on "all" comparable transactions and not on the selection of some models or transactions.

12. Moreover, a methodology that fails to include all transactions in the calculation of the margin of dumping is not "fair", thus contravening the principle established in Article 2.4 of the ADA and the first sentence of Article 2.4.2 of the ADA.

13. In this connection, in *EC - Bed Linen* (paragraph 55) the AB held that:

> … the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value […] despite the fact that it was, in reality, higher than the weighted average normal value." By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. [...] Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions ...

14. Furthermore, Article 2.4.2 of the Anti-Dumping Agreement also states that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions".

15. As regards the term "comparable", in *EC - Bed Linen* (paragraph 56) the AB held that:

> [T]he word "comparable" in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of "a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions. (emphasis added)

16. By "zeroing" the difference between normal value and export price of certain transactions, deliberately setting aside a proportion of the export price, the United States appears to rely on at least two presumptions, that is:

(a) A certain proportion of the price is irrelevant for calculating the margin of dumping, whereas another part is not; and

(b) it prejudges the existence of a margin of dumping before even having made the pertinent determination, since it decides a priori which margin to apply as a parameter, at least for some transactions.

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17. As regards the first presumption, the AB (*EC - Bed Linen*, paragraph 55) noted the inconsistency of this reasoning, in finding that "a comparison between export price and normal value that does not take fully into account the entirety of the prices of all comparable transactions" does not fulfil the fair comparison requirement under Article 2.4 and Article 2.4.2.

18. It should be emphasized that the definition of the term "margin of dumping" is always the same, regardless of the method used for its calculation, in accordance with Article 2.4.2 of the ADA. In *EC - Bed Linen* (paragraph 53), the AB held that "[w]hatever the method used to calculate the margins of dumping, […] these margins must be, and can only be, established for the product under investigation as a whole".

III. INCONSISTENCY WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

19. Article 9.3 of the ADA, read in conjunction with Article VI:2 of the GATT 1994, provides that anti-dumping duties levied in order to offset the effects of dumping may not exceed the margin of dumping in respect of such product.

20. Article 9.3 stipulates that "*[t]he amount of the anti-dumping duty shall be established in accordance with the provisions of Article 2*".

21. The zeroing methodology, by not producing a result that takes into account all the variables to be taken into consideration in a margin-of-dumping determination, ultimately implies the levying of anti-dumping duties in excess of the margin of dumping, and is consequently inconsistent with Articles 9.3 of the ADA and VI:2 of the GATT 1994.

22. Nonetheless, Argentina wishes to make clear that the imposition and collection of duties cannot be confused with the calculation of the margin of dumping, which the implementing authority is required to make prior to the imposition phase.

IV. CONCLUSION

23. In view of the foregoing, Argentina considers that the zeroing methodology for calculating margins of dumping during the investigation phase is inconsistent with Article 2.4.2 of the ADA.

24. Furthermore, the imposition of an anti-dumping duty in excess of the amount of the margin of dumping is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the ADA, except as provided for in paragraph 24.

25. Accordingly, Argentina respectfully requests the Panel to ask the United States to bring its measures into conformity with WTO law.

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ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. PRELIMINARY ISSUES RAISED BY THE US

1. The EU considers that the Panel should reject the US request for preliminary rulings. First, the EU considers that Brazil adequately identified the measure at issue in its Consultations and Panel Requests. Second, as regards the existence of the measures at issue and the requirements under Article 6.2 of the DSU, in *US – Continued Zeroing*, the Appellate Body rejected a similar argument raised by the US. Since the ongoing conduct at issue includes the original determination and any subsequent administrative review with respect to the same anti-dumping order, Brazil has identified with sufficient precision the measures at issue in the present case in accordance with Article 6.2 of the DSU. Since the second administrative review is part of the same measure, the fact that the definitive results were published only after consultations were held is irrelevant. All these measures thus fall within the Panel's terms of reference.

II. BURDEN OF PROOF

2. The EU understands that the programme used to determine the specific dumping margins is provided to each company in a disk so that the results can be verified. In that sense, running the programme later on is a simple operation which does not alter the results contained in the programme log. To the extent that the US disagrees with the documents provided by Brazil, in the EU's view, it is for the US to provide the relevant evidence. In addition, the US argues that Brazil cannot meet its burden of proof merely by alleging that "zeroing" may or will occur in the future. According to the US, there may in fact be no "zeroing" at all where there are no negative comparison results. In this respect, the EU considers that, even where all transactions are below or above the line, zeroing is embedded in the measure at issue. The fact that the zeroing procedures do not alter the dumping margin calculations is something which may be relevant when determining the level of nullification or impairment caused at a later stage (e.g., in Article 22.6 DSU proceedings). However, it does not eliminate the WTO inconsistent methodology which is part of the measure and that, depending on future transactions, may lead to negative comparison results. In essence, what the US seems to argue is that legislation which is not applied cannot be challenged since it does not lead to any results. However, the relevant case law has clarified that legislation can be challenged "as such" even if it has never been enforced. Consequently, the US contention should be dismissed.

III. STANDARD OF REVIEW: THE ROLE OF THE PRECEDENT IN THIS DISPUTE

3. In *US – Stainless Steel from Mexico* the Appellate Body clarified the role of its previous reports and indicated how panels should act in cases where the same legal issues arise (paras 157-162). The EU fully agrees with these statements without reservation. WTO panels are obliged to correctly apply the law; in the context of this dispute this also means that the Panel should follow the rulings of the Appellate Body where the Appellate Body has previously interpreted the same legal questions. Otherwise, the security and predictability enshrined in Article 3.2 of the DSU would be put in serious danger.

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IV. OVERVIEW OF THE CORE PROBLEM

4. The term "zeroing" – which does not appear in the ADA, may be considered something of a misnomer, because it describes only part of the problem: that is, the downward adjustment of the relatively high export transactions; or, in other words, the setting to zero of the negative amounts. The heart of the matter, however, is the selection of the relatively low priced export transactions per se, as a sub-category, as the only or preponderant basis for the dumping margin calculation. This has nothing to do with "offsets" or "credits".

5. This is not a new problem. It is discussed at length in Jacob Viner's Memorandum, and was specifically addressed in the Uruguay Round negotiations, during which the Members were fully informed of the issue and knew exactly what they were talking about. After more than three years of public negotiations, the problem was nicely summarised by the WTO secretariat: it was generally considered that the practice of comparing a weighted average normal value with individual export transactions was obviously unfair to exporters – particularly from developing countries – and required amendment of the Tokyo Round AD Code; the US explained that such a method was necessary to reveal targeted dumping – that is, successive attacks on different parts of an importing market; the consensus was that the Membership should try to find a solution to accommodate the legitimate concerns of both sides. That compromise was the text of Article 2.4.2 of the ADA, as it stands today.

6. Looking at the overall design and architecture of Article 2.4.2, and reading its provisions intelligently, in the light of the underlying economic realities that the legal rules are intended to address and respond to – that is, the real world, it is clear that there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by purchaser, region or time. These categories broadly correspond to typical market definition parameters: they make economic sense.

7. Thus, it is not permissible, and it is not fair, to pick up low priced export transactions clustered by model. The US has acknowledged as much. This is clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the ADA and Article VI:1 of the GATT 1994 in terms of the product; read together with the absence in the targeted dumping provisions of any reference to a sub-category by model. Thus, the relevant provisions, and particularly the normal rule and the exception, are read harmoniously, so as to give meaning – both legal and economic – to all the treaty terms.

8. In exactly the same way, it is not possible to pick up low priced export transactions per se as a sub-category. There is no reference to any such sub-category in the provisions on targeted dumping. To accept such a proposition would be to render the targeted dumping provisions useless; and to negate the compromise, negotiated and agreed by all the WTO Members (in return for other concessions), to which we have just referred. The proof of this is that for some 15 years the US has simply ignored the targeted dumping requirements, content to continue doing exactly what it was doing before, based on its own unilateral interpretation of Article 2.4.2. The further proof of this is that, by its own assertion, the US sought the insertion of the phrase "the existence of margins of dumping during the investigation phase" (the "Phrase") precisely with the intention of side-stepping the compromise and the obligations that we have just outlined. This is a highly significant point that bears repetition: the entire US position is premised on the implied admission that the overall design and architecture of Article 2.4.2 is to be interpreted in the manner advocated by the EU in previous cases.

9. We turn, therefore, to the Phrase "the existence of margins of dumping during the investigation phase", added – behind closed doors – after some three and a half years of public negotiations. According to the US, this means that the obligations in Article 2.4.2 do not apply to the re-calculation of dumping margins in assessment proceedings. Rather, the US is completely free to

choose the methodology to be used for calculating a contemporaneous dumping margin and finally collecting duties. Since the results of the first retrospective assessment proceeding are applied with effect from the date on which duties were first imposed, this would negate entirely the compromise enshrined in Article 2.4.2.

10. In the view of the EU, assuming Members negotiate in full knowledge of the 1969 Vienna Convention on the Law of the Treaties (the "Vienna Convention"), it may reasonably be assumed that they negotiate in good faith, just as they agree that the terms of the ADA are to be interpreted in good faith. In such negotiations, the EU would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (that is, agreement not to use asymmetry absent targeted dumping) would be surreptitiously entirely taken away with the other hand. The US position reflects what might be termed the "last minute" "spanner in the works" theory of international negotiation – a tactic that, in the view of the EU, is hardly suited to a multilateral organisation with 153 Members, including many developing countries.

11. However, assuming for the sake of argument, that such negotiation tactics are permissible, the EU would like to draw the Panel's very close attention to what a Member forfeits when it adopts such an approach. First, most obviously, the Member chooses to leave no trace of its intended unilateral interpretation in the preparatory work. Second, and in similar vein, the Member chooses not to offer any explanation to its negotiating partners – many of whom are developing countries - as to what the object and purpose of such a provision might be. This is particularly problematic when the subsequent unilateral interpretation flies in the face of the overall design and architecture of the ADA. Especially when there is no object and purpose capable of explaining why, on the basis of identical data, the mere act of collection should inflate the dumping margin many times over – a proposition that is "manifestly absurd or unreasonable" within the meaning of the Vienna Convention – both in legal terms and in economic terms. Third, and in similar vein, the Member chooses to forego any attempt to reconcile conflicting context with its intended unilateral interpretation. The Panel may thus note that of the various elements of the interpretive rule in the Vienna Convention, by the US' own choice, there is only one that stands between the US and failure: the supposed ordinary meaning of the Phrase.

12. We believe we have previously amply demonstrated – and we do so again below - that the ordinary meaning of the Phrase is not that advocated by the US. We believe that, for the US, the term "investigation" was key in its intended unilateral interpretation. In fact, we have an express admission of this in the US Statement of Administrative Action (SAA), which accompanied the adoption of the US Uruguay Round Agreements Act, and which contains the words ("not reviews"). Obviously, the drafter of the SAA well appreciated that these words are not contained in Article 2.4.2 of the ADA, and do not result from a proper interpretation of that provision, which is precisely why they were inserted in the SAA in an attempt at ex post rationalisation – an attempt doomed to fail, as subsequent WTO litigation has demonstrated.

13. The discussion could stop here. But there are a multitude of other interpretative points against the US. First, the grammatical structure of the Phrase, in which the term "during … phase" is grammatically linked to a period of time in which margins exist (an investigation period) as opposed to one in which they are established (as the US would have it). This both confirms the EU interpretation and precludes the US interpretation. Second, the defined term "margin of dumping" has the same meaning throughout the ADA, and must inform the meaning of the Phrase – there being no support in the text for the view that the definition should change at the moment of final collection. Third, the overall design and architecture of Article 2.4.2, as outlined above. It is particularly significant in this respect that the EU position reads the normal rule referring to the investigation period in counterpoint to the exceptional rule permitting a response to time based targeted dumping. Thus, once again, the EU advances a harmonious reading of all the treaty terms, which makes legal and economic sense of all of them. Fourth, the numerous references in Article 2 to "investigations",

which are considered, even in US municipal law, to refer to all types of investigations, including assessment proceedings. Fifth, the rule in Article 9.3 that the amount assessed cannot exceed the dumping margin – with an express cross-reference to all of Article 2. Sixth, the absence of any object and purpose argument capable of supporting the US position. Seventh, the preparatory work, as outlined above … And the list goes on.

14. Finally, the US turns to some other general arguments, equally without merit. First, the so-called "mathematical equivalence" argument, which is obviously vitiated by a simple intellectual error: something can perfectly well be fair as a response to targeted dumping, but unfair absent targeted dumping. Second, the argument derived from Article 9(4)(ii) and the so-called "variable duty" or prospective normal value. This provision concerns sampling, and insofar as it implies the possibility that one of the measures that could be imposed pursuant to Article 9.2 ADA could be a variable duty, it equally implies that any such duty is ultimately subject to final assessment or refund under Article 9.3, with dumping margins re-calculated in accordance with all of the provisions of Article 2. This is completely logical. It plugs the gap that would otherwise arise in the refund system under Article 9.3.2, in which final liability cannot, by definition, increase. The only option for Members operating such systems who are fearful of targeted dumping is a variable duty, with refund in the event that the feared targeted dumping does not materialise. The proposition that Article 9(4)(ii) in any way contradicts any of the interpretative points that we have already outlined is thus without merit. Third, the proposition that because, in the US, assessment proceedings are importer driven, this should change the analysis. This practical assertion is without merit. The ADA responds to international price discrimination by exporters; and it is a matter of elementary accounting to calculate final liabilities for importers, whilst respecting the ceiling fixed by the amount of dumping practiced by an exporter.

15. If all of the interpretative elements in the Vienna Convention support the position of the EU and Brazil, and disprove the position of the US, the US interpretation cannot be said to be "permissible" within the meaning of Article 17.6 of the ADA.

V. CONCLUSION

16. The EU submits that the US new attempt to revisit the issue of zeroing should be rejected and trusts that the Panel will comply with its functions under Article 11 of the DSU.

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ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

1. In this dispute, Brazil presents a series of claims against the United States' continued use of the so-called "zeroing" procedures in calculating margins of dumping in a large number of anti-dumping proceedings.

2. To determine the overall amount of "dumping", the USDOC aggregated the multiple comparison results. Under the zeroing procedures, the USDOC disregarded – or treated as "zero" value – the negative comparison results for export transactions which the USDOC itself deemed to be comparable. By excluding all negative comparison results, the USDOC makes a "dumping" determination that disregards an entire category of the export transactions making up the "product" – namely, those transactions that generate the negative comparison results. "Dumping" is, therefore, *not* determined for the "*product*" as defined by the investigating authority, but for a sub-part of it.

3. The Appellate Body repeatedly ruled that a partial determination of this type is inconsistent with the definition of "dumping" in Article 2.1 of the *Anti-Dumping Agreement*, and Article VI of the GATT 1994, because it is *not* made for the "*'product' as a whole*" but for a sub-part of the product.[1] The Appellate Body also ruled that this definition of "dumping" "*applies to the entire [Anti-Dumping] Agreement*", including all the provisions governing reviews.[2] The United States' zeroing procedures, and anti-dumping measures adopted using these procedures, have been found to be incompatible with Articles 2.4 and 2.4.2, 9.3, 9.5 and 11.3 of the *Anti-Dumping Agreement* in a series of previous disputes.[3]

4. In the current dispute, the United States' defense consists entirely of a repetition of arguments that have been made in previous disputes. The purpose of WTO dispute settlement is to allow the Dispute Settlement Body – acting through panels and, ultimately, the Appellate Body – to resolve disputes by clarifying the meaning of the text on a multilateral basis. Japan does not consider that these ends would be served if the Panel were to reject the Appellate Body's previous rulings on zeroing, which are based on the text of the covered agreements, and have been consistently rendered.

I. THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS SHOULD BE REJECTED

5. The United States argues that the Second Administrative Review is not properly within the Panel's terms of reference, because the final results of it had not been issued at the time of Brazil's request for consultations. However, in the present case, the Second Administrative Review was subject to consultations and included in the Panel's terms of reference. Even though the final result of the review had not been issued at the time of the request for consultations, the review had been

[1] Appellate Body Report, *EC – Bed Linen*, para. 53; Appellate Body Report, *US – Softwood Lumber V*, para. 99; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87 and 89; Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 109; Appellate Body Report, *US – Softwood Lumber V*, para. 93; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 126.

[3] Appellate Body Report, *US – Zeroing (Japan)*, para. 190; Appellate Body Report, *US – Zeroing (EC)*, para. 263; Appellate Body Report, *US – Softwood Lumber V*, para. 183.

initiated and a final result had been expected to be issued in a certain period. Japan thinks that, from the description of the request for consultations, Brazil's consultations provided the parties an opportunity to define and delimit the scope of the dispute between them.

6. The United States argues that the "continued use of zeroing" is not a measure with in the Panel's terms of reference under Article 6.2 of the DSU. To see Brazil's panel request, Japan finds no substantial difference between the measure at issue in the present case and the measures at issue in *US – Continued Zeroing (EC)*.[4] Japan thinks that the panel should reject the United States' request for preliminary rulings and find that the continued use of the zeroing methodology in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil, constitute a "measure" that falls within the Panel's terms of reference under Article 6.2.

II. THE ZEROING PROCEDURES USED BY THE USDOC IN THE MEASURES CHALLENGED BY BRAZIL ARE INCONSISTENT WITH THE OBLIGATIONS ESTABLISHED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994

7. As the United States accepts, the analysis of the zeroing issue begins with the concepts of "dumping" and "margins of dumping", as defined in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. Article 2.1 has particular importance among the "agreed disciplines" set out in Article 2 for determining "dumping" and "margins of dumping"[5], because it provides a definition of "dumping". This provision reiterates the definition of "dumping" in Article VI:1 of the GATT 1994. The text of both of these provisions refers to the dumping of "a *product*". In addition, they state that dumping of "*a product*" occurs when "*the* [export] *price of the product*" is less than "*the* comparable *price* … for *the like product*" (Emphasis added). The text, therefore, defines "dumping" in terms of the difference between two prices, each one of which is an *aggregate* price for "the product". The "dumping" determination is, therefore, made by reference to an overall price difference for the product.[6]

8. Whether or not the investigating authority decides initially to make multiple comparisons at the sub-product level, the wording of Article 2.1 and Article VI emphasizes that "dumping is defined in relation to a product".[7] Thus, the Appellate Body further found, "it is only on the basis of aggregating all these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole".[8]

9. For each individually examined producer or exporter, the text of the *Anti-Dumping Agreement* expressly contemplates the determination of only a *single* margin of dumping *for a product*. As stated by Article 2.1, this language underscores that a single, overall dumping determination is made for a product as a whole on the basis of aggregate price comparisons, even if multiple intermediate comparisons are undertaken at a sub-product level. Finally, as noted above, Article 2.1 sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". Therefore, a uniform definition of "dumping" relating to a product as a whole applies throughout the *Anti-Dumping Agreement*, and to different types of anti-dumping proceedings that are conducted pursuant to the *Agreement*.[9]

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[4] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 181
[5] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.
[7] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 122.
[9] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

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10. Then, Japan addresses more specific arguments raised by the United States to support its argument that "dumping" in Article 2.1 and Article VI:1 need not be defined in relation to a "product" as a whole. *First*, the United States argues that the meaning of the treaty terms "dumping" and "margins of dumping" must be based on "real-world commercial conduct" in the marketplace, where prices are often determined for individual transactions. The text of the *Anti-Dumping Agreement* requires that a comparison be made of *aggregate* prices for a "product" to arrive at a *single* margin of dumping for each foreign producer or exporter. The fact that prices may be determined in the marketplace for individual transactions is not the sole consideration that motivated WTO Members.

11. *Second*, the United States relies on certain historical arguments in support of its argument that zeroing is permissible. Although the United States believes that the negotiating history produced an outcome permitting zeroing, nothing in the text shows that the Members agreed to this view. *Third*, the United States argues that the term "product" does not refer exclusively to "product as a whole". The analysis of the zeroing issue begins with the concepts of "dumping" and "margins of dumping" in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. For each individually examined producer or exporter, the text of the *Anti-Dumping Agreement* expressly contemplates the determination of *single* margin of dumping *for a product*.

12. *Fourth*, the United States argues that *Ad* Article VI:1 "provides for importer-specific comparisons" and, as a result, "the term 'margin of dumping' cannot relate to aggregated results of all comparisons for the 'product as a whole'". The *Ad* Article does not purport to alter the requirement in Article 2.1 and Article VI:1 that dumping and margins of dumping are determined for a "product". Instead, consistent with these provisions, the term "margin of dumping" in the *Ad* Article can, and must, be read to refer to a margin for a "product". *Fifth*, the United States relies on Article 2.2 of the *Anti-Dumping Agreement*, arguing that a product-wide definition of dumping "would require the use of constructed [normal] value for the 'product as a whole'". Whether or not normal value is constructed for some or all models under Article 2.2, the results of intermediate comparisons must all be aggregated to determine "dumping" on a product-wide basis to meet the definition in Article 2.1.

13. The United States contends that a "general prohibition of zeroing" would be "inconsistent" with the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, and specifically would "reduce to inutility" the comparison methodology authorized by that sentence. The United States made this argument, without success, in *US – Zeroing (EC), US – Softwood Lumber V (Article 21.5 – Canada), US – Zeroing (Japan), US – Stainless Steel (Mexico) and US – Continued Zeroing (EC).*

14. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body rejected the United States' argument that the prohibition of zeroing would render the second sentence of Article 2.4.2 inutile. *First*, it noted that the United States has never applied the methodology authorized by the second sentence and that the argument as to "mathematical equivalence" between W-to-W and W-to-T comparisons "rests on an untested hypothesis".[10] *Second*, the Appellate Body noted that the methodology authorized in the second sentence of Article 2.4.2 is an "exception" to the methodologies authorized in the first sentence, and as such, the second sentence "alone cannot determine the interpretation of the two methodologies provided in the first sentence …".[11] *Third*, the Appellate Body noted that "there is considerable uncertainty regarding how precisely the third methodology [i.e. the methodology in the second sentence] should be applied", because it has never been invoked and that the United States could not provide details regarding how this never-used methodology would work.

15. The United States indicated to the Appellate Body that its use of W-to-T comparison method would be limited to the export transactions making up the "pricing pattern", and that W-to-W

[10] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[11] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.

comparisons would be conducted for the remaining export transactions. However, "the United States failed to explain how precisely the results of the two comparison methodologies would be combined". *Finally*, applying the proper test for inutility, the Appellate Body found that "[i]t has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results".[12] The Appellate Body, therefore, found that the concerns regarding "mathematical equivalence" were unwarranted.[13]

16. The Appellate Body added that the second sentence of Article 2.4.2 does not provide contextual support for a finding that zeroing is permissible because, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology [under the second sentence] to the prices of export transactions falling within the relevant pattern".[14] On this interpretation, absent zeroing, a comparison based on this sub-set of transactions would not produce the same outcome as a W-to-W comparison under the first sentence. There is, therefore, no need to permit zeroing under the second sentence of Article 2.4.2 in order to avoid the inutility of the sentence.

A. Zeroing as Used by the USDOC in Original Investigations Is Inconsistent with Article 2.4.2 of the Anti-Dumping Agreement

17. After noting that "model zeroing" had already been found to be inconsistent with Article 2.4.2 in *US – Zeroing (EC)* when used in W-to-W comparisons, the Appellate Body in *US – Zeroing (Japan)* went on to explain that (simple) zeroing in T-to-T comparisons is likewise inconsistent.[15]

B. Zeroing as Used by the USDOC in Periodic Reviews Is Inconsistent with Article 9.3 of the Anti-Dumping Agreement

18. The requirement set forth in the *chapeau* of Article 9.3 parallels the language of Article VI:2 of the GATT 1994. It also reflects the rule in Article 9.1 that the amount of duty can be no more than the margin of dumping. As a discipline on the "magnitude" of the duty imposed[16], the rule that the maximum amount of anti-dumping duty cannot exceed the "margin of dumping" reflects the "*overarching principle*" in Article VI of the GATT 1994 and Article 11.1 of the *Anti-Dumping Agreement* that duties may be imposed solely "*to the extent necessary* to counteract *dumping*" during the time period covered by the review.[17]

19. On the basis of this treaty text, the Appellate Body held that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".[18] The express reference to Article 2 in the *chapeau* of Article 9.3 includes, among others, Article 2.1, which, as noted above, sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". In *US – Zeroing (EC)*, relying on these textual cross-references, the Appellate Body made an explicit interpretive connection between a "product as a

[12] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.
[13] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100.
[14] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[15] Appellate Body Report, *US – Zeroing (Japan)*, para. 123.
[16] Appellate Body Report, *US – Carbon Steel*, para. 70.
[17] Appellate Body Report, *US – OCTG Sunset Reviews (Mexico)*, para. 115.
[18] Appellate Body Report, *US – Zeroing (EC)*, para. 130. Original emphasis. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

whole" requirement of Article 2.1 and dumping determinations in periodic reviews under Article 9.3.[19]

20. Accordingly, if, in a periodic review, the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not permitted to take into account the results of only some of the multiple comparisons, while disregarding others. Thus, for purposes of these reviews, the investigating authority must aggregate all multiple comparisons to establish a margin of dumping for the "product" under investigation as a whole. It is required to compare the anti-dumping duties collected on all entries of the subject merchandise from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole, to ensure that the total amount of the former does not exceed the latter.[20]

21. The Appellate Body also rejected the United States' argument that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer- or import-specific basis. In doing so, the Appellate Body relied in part on Article 6.10 as context, which precludes the calculation of a margin of dumping for each individual import transaction, and it also requires that margins be calculated for exporters and foreign producers, not importers.[21] The United States objects to the Appellate Body's interpretation that margins of dumping are determined for foreign producers or exporters. However, as the Appellate Body previously explained, the United States' misgivings are misplaced. Although *margins of dumping* are established for foreign producers or exporters for a product as a whole, Members can assess anti-dumping *duties* on "a transaction- or importer-specific basis", "provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping".[22]

22. The United States argues that Members using a prospective normal value system are entitled to assess duties on the basis of a transaction-specific margin of dumping. And, it says, the same entitlement to make transaction-specific assessments should be afforded to users of retrospective systems. However, Articles 9.1 and 9.2, and Article VI:2 allow duties to be collected in appropriate amounts not exceeding the margin of dumping, determined either during the investigation or a subsequent review. The manner in which a Member chooses to impose and collect duties under Article 9 – retrospectively or prospectively – does not alter the uniform definition of "dumping" in Article 2.1 and Article VI:1.

C. Other Issues on Brazil's Claims

23. The United States argues that with respect to two administrative reviews Brazil has failed to satisfy its burden of proving that zeroing was applied to, or had an impact on, the challenged margins of dumping. Japan would like to note that in *US – Continued Zeroing (EC)*, the Appellate Body stated, "[w]e therefore consider that the Panel disregarded the significance of the submitted evidence when it failed to <u>give consideration to that evidence in its totality</u>, including evidence that, in the Panel's view, did not by itself show that simple zeroing was applied in a particular periodic review".[23]

24. The United States appears to be based on the premise that Brazil would claim that continued use of zeroing is inconsistent solely with Article 2.4.2 of the *Anti-Dumping Agreement*. It is not true, and Japan notes that Brazil claims that the continued use by the United States of its zeroing

[19] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99.

[20] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

[21] Appellate Body Report, *US – Zeroing (EC)*, para. 128. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 112.

[22] Appellate Body Report, *US – Zeroing (EC)*, para. 131.

[23] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 337. Underlining Added.

procedures violates Article 2.4.2 in relation to the original investigations; and Article VI:2 of the GATT 1994 and Article 9.3 in relation to the imposition and collection of anti-dumping duties.

III. CONCLUSION

25. Japan submits the following:

(1) two administrative reviews concerning imports of certain orange juice from Brazil are inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 due to the use of zeroing;

(2) the continued use by the United States of zeroing procedures in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil, including the original investigation and subsequent administrative reviews, by which duties are applied and maintained over a period of time, is inconsistent with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994.

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ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF KOREA

1. Korea addresses in its submission (1) certain issues presented in the request by the United States for a preliminary ruling; and (2) some additional substantive issues raised by the parties in their submissions.

I. THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS SHOULD BE REJECTED

2. In its first written submission, the United States requests preliminary rulings with regard to two issues. First, the United States argues that the USDOC's final determination in the second administrative review of the antidumping order on Certain Orange Juice from Brazil is not within the Panel's terms of reference because that determination was not the subject of consultations between the parties. Second, the United States asks the Panel to find that the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings" lacks the required specificity and is not within the Panel's terms of reference.

3. The United States has contended that the USDOC's determination in the second administrative review was not adequately described in Brazil's request for consultations. Korea notes, however, that Brazil's Addendum to its initial request for consultations dated 22 May 2009 specifically indicated that "[t]he consultations, held on 16 January 2009, covered the … the Antidumping Duty Administrative Review from 1 March 2007 to 29 February 2008 (the "Second Administrative Review")".

4. As a separate matter, it should be noted that it is beyond dispute that Brazil's 20 August 2009 request for establishment of a panel in this dispute did specifically identify the second administrative review as one of "the measures at issue". In describing that measure, Brazils' panel request also specifically referred to the USDOC's 11 August 2009 final determination in that review.

5. The preliminary ruling request by the United States does not address the significance of this statement in Brazil's panel request. This silence suggests that the United States believes that the USDOC's second administrative review can only fall within the Panel's terms of reference if the *final determination* in that review was specifically referenced in the consultation request, as well as in the panel request itself. However, that interpretation is not consistent with the provisions of the relevant agreements.

6. Article 17.3 of the *Anti-Dumping Agreement*, which authorizes WTO Members to request consultations, does not contain any language that might be read to suggest that a Member must wait to request consultations until a final determination has been issued. By contrast, the first sentence Article 17.4 of the *Anti-Dumping Agreement*, which authorizes WTO Members to refer matters to the DSB for establishment of a panel, does specifically require complaining Members to wait until (1) consultations under Article 17.3 "have failed to achieve a mutually agreed solution", *and* (2) "final action has been taken by the administering authorities of the importing Member to levy anti-dumping duties…". If the administrative authorities have not yet taken "final action," the matter may not be referred to the DSB for establishment of a panel (except to the extent permitted by the second sentence of Article 17.4, concerning panel review of "provisional measures").

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7. The clear implication is that consultations may be requested before "final action has been taken by the administering authorities". After all, if consultations could not be requested before such "final action," there would be no need to include a requirement of "final action" in the first sentence Article 17.4. Instead, if consultations could be requested only after "final action" by the administering authorities, then the provisions of the first sentence of Article 17.4 requiring that consultations be held (and "have failed") would embody a requirement of "final action" as well. Under such an interpretation, the language requiring "final action" in the first sentence of Article 17.4 would be redundant.

8. In accordance with the principle that "a treaty interpreter must give meaning and effect to all terms used in a treaty provision and must avoid interpretations which render treaty terms redundant" in WTO jurisprudence, the provisions of Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* must be understood to indicate that consultations may be requested before "final action" by the administering authorities, while the establishment of a panel may not be requested until after that "final action" has occurred. Consequently, there is no basis for the argument by the United States that Brazil's request for consultations with respect to the second administrative review before the USDOC issued its final determination in that review was somehow improper or invalid.

9. The United States also requests that the Panel make a preliminary ruling that Brazil's reference to the "continued use of the US 'zeroing procedures'" does not properly describe a "measure" that can fall within the Panel's terms of reference. In particular, the United States argues that the description of the measure in Brazil's panel request lacks specificity because the alleged measure did not exist at the time of the panel request.

10. Korea notes that a measure may be identified either by the name or number of promulgation, law, regulations, etc. or by a narrative description of the nature of the measure, so that the measure may be discerned by the panel examining the panel request. As the Appellate Body has explained, the specificity requirement under Article 6.2 of the DSU is designed to ensure that a panel request "present[s] the problem clearly". The Appellate Body has also found that "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".

11. In item (d) of its panel request, under the heading "Measures and claims", Brazil has identified the anti-dumping duty order, case No A-350-840 and the original investigation and subsequent administrative reviews under such order. It appears to be sufficiently clear in this dispute that the measure referred to is "a string of connected and sequential determinations" in which the United States uses the zeroing methodology by which duties are maintained over a period of time under the anti-dumping duty order.

12. It should also be noted that the Appellate Body in *US – Continued Zeroing* concluded that a Member's "ongoing conduct" constitutes a measure and is challengeable by another Member. According to the Appellate Body, such a measure would not fall squarely within the "as such" or "as applied" distinction, but that fact would not preclude a Member from bringing a challenge in WTO dispute settlement. As Brazil notes in its first written submission, the ongoing conduct that was at issue in the *US – Continued Zeroing* is virtually identical to the ongoing conduct at issue in this dispute. The zeroing practice by the USDOC maintained and applied in successive phases of the anti-dumping proceeding under the anti-dumping duty order on certain orange juice from Brazil is an ongoing conduct that is inconsistent with the *Anti-Dumping Agreement*.

13. In addition, it should be recalled that the identification of a measure is distinct from the demonstration of the existence of a measure. According to the Appellate Body, the demonstration of the existence of a measure can, if necessary, be made at subsequent stages of the dispute. It would be

inappropriate, therefore, to dismiss Brazil's claims in whole or in part without allowing it a full opportunity to present its case.

II. THE PRACTICE OF "ZEROING" IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

14. In its first written submission, the United States concedes that its zeroing practice utilized in original investigations is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. There no longer appears to be any dispute with respect to this issue.

15. In light of the decisions holding zeroing in investigations to be inconsistent with Article 2.4.2, the USDOC has stated that, effective 22 February 2007 it will no longer utilize the practice of zeroing in new and pending investigations. However, this change in practice was not applied to the anti-dumping investigation that is the subject of this dispute, because the final results and the amended final results of the original investigation of anti-dumping duties on certain orange juice from Brazil were published on 13 January 2006 and 21 February 2006 - more than a year before the effective date of the USDOC's 22 February 2007 change in practice.

16. Because the USDOC has only implemented its change in practice for original investigations that were either pending on or commenced after 22 February 2007, the final results of the original investigation that is the subject of this dispute were calculated using the zeroing methodology that the United States has admitted is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Therefore, the Panel should find the practice of zeroing in the original investigation of anti-dumping duties on certain orange juice from Brazil inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

III. THE PRACTICE OF "ZEROING" IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

17. The Appellate Body has repeatedly ruled that the USDOC's practice of zeroing in periodic administrative reviews is inconsistent with the *Anti-Dumping Agreement* - and it has held that panels considering this issue should follow the Appellate Body's reasoning on this issue. However, the United States contends that, notwithstanding the rulings by the Appellate Body, the practice of zeroing in periodic "administrative reviews" should be found to be consistent with the *Anti-Dumping Agreement*. Korea considers the United States' arguments unconvincing and submits that the Panel should once again find that the United States' practice of zeroing in administrative reviews is inconsistent with the *Anti-Dumping Agreement*.

18. In ruling that the USDOC's practice of zeroing in periodic "administrative reviews" is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and GATT Article VI:2, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and "margin of dumping" can be found to exist at the level of individual transactions.

19. The Appellate Body, in analyzing the concept of "dumping" and "margin of dumping," has examined the context in other provisions of the *Anti-Dumping Agreement*, such as Articles 5.8, 6.10, 9.5, as well as the concept of injurious dumping, and concluded that the *Anti-Dumping Agreement* does not refer to "dumping" and "margin of dumping" as existing at the level of individual transactions. Korea believes that the Appellate Body's analyses are readily available to the Panel and does not see the need to repeat all of the Appellate Body's reasoning. Like the Appellate Body, Korea is unable to find "a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped", for purposes of determining the existence and magnitude of dumping in the original investigation, and as "non-dumped", for purposes

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of assessing the final liability for payment of anti-dumping duties in a period review". It is time that the United States bring its practice in periodic administrative reviews into conformity with requirements of the *Anti-Dumping Agreement* - as it already has with original investigations.

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ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. As a WTO member likewise seeking compliance by the United States with its WTO obligations in relation to the practice of "zeroing" in anti-dumping duty "administrative reviews" conducted by the U.S. Department of Commerce, Mexico has a systemic interest in the proper interpretation and application of the various provisions of the *Antidumping Agreement*, GATT 1994, and the DSU. Also, Mexico, as well as other WTO Members, has been facing the application of zeroing by the United States in antidumping duty "administrative reviews", and has been dealing with the fact that the United States has not eliminated this practice despite several recommendations from the DSB.

2. The substantive core of Brazil's challenge in this dispute is the WTO-consistency of the United States' application of zeroing in anti-dumping administrative reviews. However, given that the principal substantive issue in this proceeding has been decided the same way many times over, Mexico will limit its response to three issues of systemic importance to Mexico and other WTO Members.

3. First, Mexico will address the compelling need for this Panel to follow the consistent body of Appellate Body jurisprudence in this area. Second, Mexico will discuss the United States' request for a preliminary ruling with respect to the inclusion within the Panel's terms of reference of an antidumping administrative review that was not final as of the date Brazil first requested consultations. Finally, Mexico will address the United States' request for a preliminary ruling that Brazil's challenge to "ongoing conduct" is not subject to the scrutiny of WTO dispute settlement.

II. THE PANEL SHOULD FOLLOW THE CONSISTENT LINE OF APPELLATE BODY JURISPRUDENCE IN THIS AREA

4. The United States requests that this Panel reconsider and reject the long line of consistent Appellate Body rulings in this area and instead chart a course of its own. This Panel should reject that suggestion and should adhere to the well-established WTO jurisprudence – not only because the prior Appellate Body decisions were correctly decided, but because there are strong systemic reasons to adhere to this consistent body of law.

5. As recognized both by WTO panels and the Appellate Body, there are important systemic reasons for following the reasoning of the Appellate Body in previous disputes when issues already decided are presented again to a new panel. As one panel succinctly summarized, "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[1]

6. As the United States is unable to identify any new substantive arguments not already rejected in previous proceedings, and as the substance of all of Brazil's legal claims have been considered and affirmed in a long line of consistent prior Appellate Body decisions, this Panel should adopt the

[1] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 188.

reasoning from those prior decisions and hold (yet again) the United States' zeroing methodology in violation of the *Antidumping Agreement* and the GATT 1994.

III. THE SECOND ADMINISTRATIVE REVIEW IS WITHIN THE PANEL'S TERMS OF REFERENCE

7. The United States seeks a preliminary ruling that the Panel's terms of reference do not include the Second Administrative Review on the grounds that this measure was not subject to consultations because the final results of that review were not published until after Brazil first requested consultations. The United is factually incorrect and misstates the role of consultations request in defining the Panel's terms of reference under the DSU.

8. Previous panels and the Appellate Body have specifically highlighted that a WTO panel's terms of reference are governed by the complaining Member's panel request, as opposed to it its consultations request. There is no dispute that the final results of the Second Administrative Review were published prior to Brazil's panel request. It is equally clear that Brazil's panel request identified the Second Administrative Review, and specifically the final results published on 11 August 2009, as a "measure at issue".

9. Moreover, the United States is incorrect in its suggestion that the consultations request sets the matter in stone, thereby limiting what can properly be included in the panel request. As long as Brazil made clear that it was challenging the application of zeroing in recent and ongoing periodic administrative reviews, sufficient notice was provided to the United States, and the Second Administrative Review could properly be challenged in the panel request as a measure subject to the Panel's terms of reference.

10. But even if this was not the case, Brazil's challenge to the United States' application of zeroing in the Second Administrative Review would still properly fall within the Panel's terms of reference because, as a factual matter, Brazil did specifically seek consultations-and, in fact, consulted with the United States-about this particular measure.

11. Accordingly, there is no question that Brazil properly included in its panel request its challenge to the application of zeroing in the Second Administrative Review. Therefore, the United States' request for a preliminary ruling in this respect should be denied.

IV. THE CONTINUED USE OF THE US ZEROING PROCEDURES ARE PROPERLY CHALLENGED AND SUBJECT TO PANEL REVIEW IN THIS DISPUTE

12. The United States is equally misguided in its request for a preliminary ruling *(i)* that Brazil's challenge to the continued use of US zeroing procedures fails to meet the requirement under Article 6.2 of the DSU that panel requests identify specific measures at issue, and *(ii)* that Brazil appears to be challenging an indeterminate number of potential future measures that are outside of the scope of the Panel's terms of reference because the measures are not yet in existence.

13. First, as the Appellate Body has pointed out, the specificity requirement is intended to ensure the sufficiency of a panel request in presenting the problem clearly. The problem here-the United States' continued application of zeroing in successive antidumping proceedings-is clear and easy to discern. Accordingly, the requirement under Article 6.2 has been met.

14. Second, in this dispute Brazil challenges the continued application of zeroing in periodic reviews conducted as stages of a continuous proceeding involving the imposition, assessment, and collection of duties under the same anti-dumping duty order. With respect to the proceeding on certain orange juice from Brazil, the United States Department of Commerce has applied zeroing at

every stage and has given no indication that it will change its approach in future stages. It is this recurring conduct under the single antidumping duty order that Brazil challenges here.

15. It is the ongoing conduct of the United States in continuing to use zeroing in successive determinations by which anti-dumping duties are applied and maintained that Brazil is challenging as "ongoing conduct" here. Brazil is entitled to frame its challenge in way that subjects this ongoing conduct to the scrutiny of WTO dispute settlement. Accordingly, the United States' request for a preliminary ruling in this respect should be denied.

V. CONCLUSION

16. For the foregoing reasons, Mexico respectfully requests that the Panel deny the United States' requests for preliminary rulings. Mexico also submits that the Panel should follow the well-established precedent holding the United States' application of zeroing in violation of the *Antidumping Agreement* and the GATT 1994.

17. Mexico appreciates the opportunity to participate in these proceedings, and to present its views to the Panel.

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ANNEX C

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

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ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF BRAZIL AT THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. Brazil responds, in turn, to the legal and factual arguments in the US First Written Submission ("FWS"). At the outset, Brazil notes that in this dispute, the US consistently encourages the Panel to depart from established precedent in *Zeroing* disputes. Brazil regrets such arguments, noting that "WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports".[1] Contrary to the US suggestions, Article 11 of the DSU does not imply that relevant previous rulings by the Appellate Body should not be followed. On the contrary, respecting previous and repeated rulings – which have been adopted by the WTO Membership in the DSB – is part and parcel of, and even facilitates, a panel's objective assessment under Article 11 of the DSU.[2]

II. THE ANTI-DUMPING AGREEMENT AND THE GATT 1994 DEFINE "DUMPING" IN RELATION TO THE "PRODUCT" AS A WHOLE

2. The US rightly notes that "this dispute is about the definitions of 'dumping' and 'margin of dumping'".[3] Brazil argues that these concepts are defined by reference to the product as a whole. Conversely, the US argues that these concepts are sufficiently "flexible" that they may be defined by individual Members in relation (1) to the "product" as a whole; (2) to each individual transaction relating to the "product"; or even (3) to both conceptions.

3. As a basis for its plea for unilateral discretion, the U.S. relies on Article 17.6(ii) of the *Anti-Dumping Agreement*, but misreads it. Article 17.6(ii) comprises two sentences. The first enjoins a panel to interpret the *Anti-Dumping Agreement* using the customary rules of treaty interpretation. The second provides that, when these rules yield multiple permissible interpretations, a measure is WTO-consistent if it rests on one permissible interpretation. As the Appellate Body said in *US – Continued Zeroing*, "Article 17.6(ii) contemplates a sequential analysis", with a panel first applying the customary rules of interpretation in a "conscientious" manner. "Only *after* engaging in this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies".[4]

4. The Appellate Body has applied the rules of treaty interpretation to the definitions of "dumping" and "margin of dumping" in the past, and found that they lead to a product-wide meaning, and that therefore there is no room for resorting to the second sentence of Article 17.6(ii).[5] It has added that the notion of multiple permissible interpretations cannot be stretched to include *rival* interpretations.[6]

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[1] Appellate Body Report, *US – Stainless Steel*, para. 160.
[2] *See* Appellate Body Report, *US – Stainless Steel*, paras. 157 – 162.
[3] US FWS, para. 60.
[4] Appellate Body Report, *US – Continued Zeroing*, para. 271. Original emphasis. *See also*, Appellate Body Report, *US – Hot-Rolled Steel*, para. 60.
[5] Appellate Body Report, *US – Zeroing (Japan)*, para. 189.
[6] Appellate Body Report, *US – Continued Zeroing*, para. 273 and Concurring Opinion, para. 312.

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5. Brazil has set forth its interpretation of these terms, explaining that they refer to the product as a whole, in its FWS.[7] Brazil recalls that Article 2.1 of the *Anti-Dumping Agreement*, by defining "dumping" "[f]or the purpose of this Agreement", makes plain that "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings".[8] The requirement to give the concept of "dumping" a consistent meaning throughout the *Anti-Dumping Agreement* is crucial because: "Nothing could be more important than the definition of the concept of "dumping". It is foundational and applies throughout the Agreement, as the clear wording of Article 2.1 makes plain. It cannot have variable or contradictory meanings, for that would infect the entire Agreement."[9]

6. The US argues that Brazil is wrong to interpret "dumping" and "margin of dumping" uniformly throughout the *Anti-Dumping Agreement* and Article VI:1 and VI:2 as referring to the product as a whole, and finds support in the use of the singular words "product" and "price" in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. However, the cited provisions use "price" in the singular also when referring to "normal value", which is not defined in relation to a single transaction. Normal value is the "comparable price, *in the ordinary course of trade, for the like product*". "The ordinary course of trade" cannot be ascertained on the basis of one transaction; and the adjective "normal" indicates that the price is the "regular", "usual", "standard" or "common" price for "the like product". Such a "price" cannot be ascertained on the basis of one transaction, but must be based on all relevant transactions contributing to the "normal" price. The French and Spanish language versions of Article 2.1 confirm this view.

7. Numerous contextual provisions of the *Anti-Dumping Agreement* confirm that "dumping" and "margin of dumping" are defined in relation to the product as a whole. For example, *first*, Article 5.8 of the *Anti-Dumping Agreement* requires the termination of an investigation into an exporter if "the margin of dumping" is *de minimis*. The US position would mean that an authority's termination decision would be made for each individual export transaction. This is absurd.[10] *Second*, Article 6.10 requires that an authority determine "an *individual* margin of dumping for *each known exporter or producer* concerned of *the product* under investigation".[11] Similar language appears in Articles 6.10.2 and 9.5. *Third*, under Article 3, an authority must assess the injurious effects of "dumped imports", a term that covers *all* imports from an exporter engaged in "dumping".[12] For purposes of Article 3, and consistent with Article 6.10, a single dumping determination, based on all export transactions, is made for an exporter, and that single determination influences the treatment of all imports from that party.[13] *Fourth*, under Articles 8 and 9 of the *Anti-Dumping Agreement* and the GATT 1994, the extent of permissible remedial action to counter injurious "dumping" is fixed by reference to a single margin of dumping, and that remedy applies to *all* future imports of the "product".[14]

8. In sum, there is both consistency and logic to the text of the *Anti-Dumping Agreement*. By defining "dumping" in relation to the product as a whole, the *Anti-Dumping Agreement* ensures parallelism between the scope of a dumping determination and the scope of the legal consequences this determination entails. This parallelism is important because, under Article II:2(b) of the GATT 1994, anti-dumping duties frequently exceed the level of a Member's bound rates. To justify

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[7] *See* Brazil's FWS, paras. 49 – 61.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[9] Appellate Body Report, *US – Continued Zeroing*, Concurring Opinion, para. 307. *See* also, e.g., Appellate Body Report, *US – Stainless Steel*, para. 107, and Appellate Body Report, *US – Continued Zeroing*, para. 285.

[10] *See* Appellate Body Report, *US – Continued Zeroing*, para. 283.

[11] *See* Appellate Body Report, *US – Softwood Lumber V*, footnote 158, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

[12] Appellate Body Report, *EC – Bed Linen (21.5)*, para. 115. *See also* Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

[13] *See, e.g.*, Appellate Body Report, *US – Stainless Steel*, para. 108.

[14] *See* Articles 8.1, 9.1 and 9.3, and Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 108.

imposing anti-dumping duties on a product-wide basis, a dumping determination must be made on an equivalent product-wide basis.[15]

9. The U.S. also argues that "dumping" may have a transaction-specific meaning because the word "product" in Article VII:3 of the GATT 1994, on customs valuation, refers to individual transactions. The US confuses proximity (of Article VII:3 with Articles VI:1 and VI:2) with context. The purpose and consequences of a customs valuation decision and of anti-dumping proceedings are altogether different.[16]

10. The Note *Ad* Article VI:1, on which the US also relies, does not alter the requirement to determine dumping for the product as a whole, but simply provides for the situation where sales to an importer may not be relied upon directly because the exporter and the importer are related. The US argument that a product-wide definition of "dumping" and a prohibition on zeroing under Article 9.3 prevent anti-dumping duties from being effective is also flawed, because "it is the exporter, not the importer, that engages in" dumping.[17] Other US arguments have been comprehensively dealt with and rejected by the Appellate Body, and in some cases by panels, too.[18]

III. ZEROING AS A MATTER OF FACT IN THE MEASURES AT ISSUE

A. USDOC PROGRAM LOGS

11. For the First Review, Brazil inadvertently submitted as Exhibit BRA-30 a log generated by its expert, Mr. Ferrier, when rerunning the USDOC software earlier this year. In *US – Continued Zeroing*, the Appellate Body has questioned the significance of the fact that logs were replicated using the USDOC programs, rather than being directly generated by the USDOC.[19] In any event, in Exhibit BRA-45, Brazil now submits the log that Fischer received from the USDOC with its final results in the First Review. The US also contests the provenance of the log for Fischer's

[15] Brazil also rejects the argument, in footnotes 8 and 144 of the US FWS, that cash deposits are not subject to the disciplines in Article 9.3 of the *Anti-Dumping Agreement*. In several disputes, the DSB has ruled that cash deposits rates calculated with zeroing are inconsistent with this provision (Appellate Body Reports, *US – Stainless Steel*, paras. 133 – 134 and 156(a); *US – Continued Zeroing*, paras. 315 – 316 and 395(d); *US – Zeroing (EC) (21.5)*, para. 294; and Panel Report, *US – Zeroing (Japan) (21.5)*, paras. 7.166 – 7.168 and 8.1(b). *See* also Appellate Body Report, *US – Zeroing (Japan)*, para. 156). In compliance proceedings in *US – Zeroing (Japan)*, the US itself argued in vain that its implementation obligations under Article 9.3 applied *solely* to cash deposit rates, and not assessment rates (*see* Panel Report, *US – Zeroing (EC) (21.5)*, para. 8.155(b); Appellate Body Report, *US – Zeroing (EC) (21.5)*, para. 6; Panel Report, *US – Zeroing (Japan) (21.5)*, para. 3.3; and Appellate Body Report, *US – Zeroing (Japan) (21.5)*, para. 12). Thus, the applicability of Article 9.3 to cash deposit rates is well-established, and has been accepted by the US.

[16] Under Article 1.1 of the *Customs Valuation Agreement*, the customs value is the price actually paid or payable in a specific import transaction. The authority does not value goods following an investigation into a large number of transactions relating to a "product" that the authority itself has defined. Nor does the act of customs valuation for an individual entry necessarily entail, for example, the imposition of duties in excess of bound rates on all entries of the product.

[17] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

[18] *See*, respectively: (i) on Article 2.2, Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 82, 97 and 104; (ii) on prospective normal value systems and the US confusion between duty collection under prospective normal value systems and the determination of the margin of dumping, Appellate Body Report, *US – Zeroing (Japan)*, paras. 160, 162 – 163 and 166; and Appellate Body Report, *US – Continued Zeroing*, para. 294; Panel Report, *US – Stainless Steel*, para. 7.131; and Appellate Body Report, *US – Stainless Steel*, para. 120; (iii) and on "mathematical equivalence", Appellate Body Report, *US – Zeroing (Japan)*, paras. 133 – 135; Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 97 – 100; Appellate Body Report, *US – Stainless Steel*, paras. 126 – 127; Appellate Body Report, *US – Continued Zeroing*, para. 297.

[19] Appellate Body Report, *US – Continued Zeroing*, para. 340.

Third Administrative Review (Exhibit BRA-25), although without explanation.[20] Fischer received the log in Exhibit BRA-25 directly from the USDOC, as evidenced by USDOC's email that Brazil submits as Exhibit BRA-46.

B. CUTRALE'S FIRST AND FISCHER'S SECOND ADMINISTRATIVE REVIEWS

12. The US argues that Brazil has not met its burden of proving that zeroing was applied to, or had an impact on, the margin of dumping for Cutrale in the First Review, because the USDOC determined a margin of dumping lower than the US *de minimis* threshold. The US makes similar arguments regarding Fischer in the Second Review, because the cash deposit and importer-specific assessment rates were zero. The US is wrong on a number of counts.

13. *First*, as a matter of law, the *use* of zeroing is, in itself, sufficient to establish a violation of the *Anti-Dumping Agreement* and the GATT 1994.[21]

14. In this dispute, the use of zeroing to calculate margins of dumping in administrative reviews violates Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994. Brazil has already presented arguments on Article 9.3 and Article VI:2[22], and now presents arguments based on Article 2.4.[23] The Appellate Body has held that, as a "*way of calculating*" margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased", because it necessarily excludes any negative comparisons results.[24] The Appellate Body has, therefore, ruled that the "maintenance" of zeroing procedures in administrative reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[25] Consequently, by including zeroing in its methodology for determining margins of dumping in the administrative reviews at issue, the US failed to conduct a "fair comparison".

15. Brazil has established that the USDOC *used* zeroing for Cutrale's determination in the First Review, and for Fischer's determination in the Second Review[26], and the US does not contest this. As a result, the US violated Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in its dumping determinations for Cutrale in the First Review, and for Fischer in the Second Review.

16. Moreover, even though it was not required to do so, Brazil has also shown that the use of zeroing had an *impact* on the USDOC's calculation.[27] The logs and outputs for Cutrale and Fischer show that the vast majority of export transactions – in number, volume and value – generated negative comparison results, but were excluded from the calculation of the margins of dumping.[28] These facts provide an illustration of the "inherent bias in a zeroing methodology".[29]

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[20] US FWS, footnote 145.

[21] *See, e.g.*, Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162.

[22] Brazil's FWS, paras. 62 – 76 and 97.

[23] Brazil's panel request, p. 3, includes claims under Article 2.4.

[24] Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 142. *See also* Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 138; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[25] Appellate Body Report, *US – Zeroing (Japan)*, paras. 169 and 190(d).

[26] As explained in detail in Exhibit BRA-31.

[27] This is explained in detail at paras. 35 – 38 and 40 – 44 of the Ferrier Affidavit. Exhibit BRA-31.

[28] For Cutrale, Exhibit BRA-29, p. 63 and Exhibit BRA-34, last page. For Fischer, Exhibit BRA-38, p. 76 and Exhibit BRA-39, last page. *See also* Exhibit BRA-31, paras. 38 and 56.

[29] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

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17. The resulting overall weighted average margin of dumping for Cutrale in the First Review was 0.45 per cent, and not zero.[30] Furthermore, also using zeroing, the USDOC determined an importer-specific assessment rate for Cutrale's goods that above the US *de minimis* threshold, with anti-dumping duties collected at that rate.[31] Thus, zeroing had an impact on the calculation, and also led to the collection of duties where none would have otherwise been collected. For Fischer in the Second Review, the tiny minority of sales with a positive comparison result generated a positive margin, albeit a small one, of 0.002 per cent[32], whereas without zeroing the margin would not have been positive.

C. EXISTENCE OF THE CONTINUED USE MEASURE

18. The US argues that Brazil has not proven the existence of the Continued Use measure to the standard set out in *US – Continued Zeroing*. In that case, the Appellate Body sought to complete the analysis on the continued use measures, which the panel had ruled to be outside the terms of reference. The Appellate Body found that the existence of continued use of zeroing in a specific anti-dumping case was established when it was proven that the zeroing methodology had been used, without interruption, in different types of proceedings over an extended period of time[33], or in other words, when there was a "density of factual findings"[34] showing that zeroing had been used in successive proceedings in the same case.

19. In this dispute, Brazil has shown that zeroing has been used by the USDOC at *every available opportunity* under the Order in proceedings extending over five years from the original investigation, initiated in February 2005, through the First and Second Reviews, to the preliminary determination in the Third Review in April 2010. Furthermore, in its Issues and Decision Memoranda under the Order, the US affirmed its continued use of zeroing in administrative reviews, stating expressly that its zeroing policy in reviews is unchanged despite WTO rulings.[35] These Memoranda show that the use of zeroing continues to be part of the USDOC's calculation methodology. In sum, there is the required "density" of facts.

20. The US also repeats its arguments on the impact of zeroing. However, the conduct at issue is the continued *use* of zeroing over time, and not the continued *impact* of zeroing. It is well-established that, irrespective of the impact of zeroing, it is contrary to WTO law to maintain zeroing procedures to calculate margins, whether for their continued use in proceedings under specific anti-dumping orders[36] or for their continued use in anti-dumping proceedings generally.[37] The Appellate Body reached this conclusion in reply to a similar US argument made in *US – Continued Zeroing*.[38]

21. The US arguments that the Second and Third Review are outside the panel's terms of reference are, in this context, irrelevant, because with regard to the Continued Use measure, these reviews serve as *evidence* of the continued use of zeroing.

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[30] Exhibit BRA-34, p. 93, "wt avg percent margin". *See also* Exhibit BRA-20.
[31] Exhibit BRA-34, p. 92, "percent ad valorem assessment".
[32] Exhibit BRA-39, p. 106, right-most column "Wt avg percent margin".
[33] Appellate Body Report, *US – Continued Zeroing*, para. 195. The Appellate Body also explained that the approach it was taking was "cautious", because the panel had failed to make findings on continued use, and the Appellate Body has no mandate to find facts.
[34] Appellate Body Report, *US – Continued Zeroing*, para. 191.
[35] Exhibit BRA-28, pp. 5 – 6; and Exhibit BRA-43, pp. 4 – 6.
[36] Appellate Body Report, *US – Continued Zeroing*, paras. 199 and 395(a)(v).
[37] Appellate Body Report, *US – Zeroing (Japan)*, paras. 166, 169 – 170, 190(c) and 190(d).
[38] Appellate Body Report, *US – Continued Zeroing*, para. 192.

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ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. The United States would like to focus on a few points concerning Brazil's arguments. First, we will discuss how Brazil is improperly trying to include measures that fall outside of the scope of the Panel's terms of reference. Second, we will refute Brazil's claims that the United States has acted inconsistently with obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). A plain reading of the text of those agreements makes clear that there is no obligation to provide offsets outside of the context of average-to-average comparisons in original investigations. Reading the text to impose such obligations would render certain provisions of the Antidumping Agreement meaningless. In addition, with respect to the challenged "continued use" of "zeroing", Brazil has failed to show any basis for concluding that such alleged "ongoing conduct" exists, or any basis for a dispute settlement panel to make findings based on speculation about what measure may or may not exist in the future.

2. We recognize that this is not the first time a dispute settlement panel has considered the issue of "zeroing," that is, the alleged obligation to provide offsets for non-dumped transactions. On the one hand, the Appellate Body has found in other disputes that "zeroing" in Article 9 assessment proceedings is inconsistent with provisions of the Antidumping Agreement and the GATT 1994. Reliance upon those findings is the basis of Brazil's claims. On the other hand – as panels have found in those disputes, and as discussed fully in the US first written submission – there is no textual basis for imposing the obligations that Brazil suggests. Consistent with the standard of review provided for in Article 17.6 of the Antidumping Agreement, and the responsibilities of panels provided for in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), we ask this Panel to remain faithful to the text of the negotiated agreements and refrain from making the findings that Brazil suggests.

Standard of Review

3. Article 11 of the DSU generally defines a panel's task in reviewing the consistency with the covered agreements of measures taken by a WTO Member. In a dispute involving the Antidumping Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Antidumping Agreement.

4. The question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the Antidumping Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority's action rests upon one such interpretation, a panel is to find that interpretation consistent with the Agreement.

5. Under Article 11 of the DSU, this Panel is charged with making an objective assessment of the matter before it, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements, applying the customary rules of interpretation. The Panel cannot make findings or recommendations that add to or diminish the rights and obligations provided in the covered agreements.

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6. The United States is aware that the Appellate Body has rejected the view that the covered agreements do not impose an obligation to provide offsets in assessment reviews. However, the fact that for the Appellate Body there is an interpretation under which there would be an obligation to provide offsets is not a basis for concluding that no other interpretation is permissible. The very inclusion of Article 17.6(ii) confirms that the text of the Antidumping Agreement may be susceptible to more than one interpretation. To find that it is not possible to find that there are conflicting interpretations of the text would mean depriving the second sentence of Article 17.6(ii) of meaning. If the permissible interpretations are all "harmonious", then it is difficult to see how a measure could be in conformity with only one of the interpretations. And it is not surprising that the Antidumping Agreement could be subject to more than one permissible interpretation. For example, in many instances, the text was drafted to cover varying and complex antidumping systems around the world. A number of previous panels that considered the issue have found that the interpretation that there is no obligation to provide offsets beyond the context of the average-to-average comparison methodology in investigations rests on a permissible interpretation of the Antidumping Agreement. It is difficult to understand how, if these various panels found that this interpretation is permissible, then it is not permissible.

Scope of this Dispute

7. The United States has requested a preliminary ruling that two of the measures identified in Brazil's panel request are outside the Panel's terms of reference.

8. Brazil suggests that the scope of a dispute includes any measure, adopted at any time (from before consultations through implementation), as long as the measures share the same "essence" or "close substantive connections" and together "manifest a common 'problem' that the complaining Member's claims are seeking to 'fix'". Such a sweeping approach is not based in the text of the DSU.

9. The Appellate Body has explained that the identification in a panel request may be considered to include subsequent measures in more limited circumstances, namely where those measures do not change the essence of the measure properly identified in the panel request. However, this is not the case here. Each administrative review is separate and distinct from the reviews that proceed or follow it. The second administrative review is not a measure with the same "essence" as the first administrative review. It is a distinct measure dealing with different entries during a different period of time with different results. The final results of one administrative review do not apply to entries of merchandise for any other review. The fact that the second administrative review is a distinct measure is confirmed by Article 17 of the Antidumping Agreement which requires that there have been "final action" to "levy antidumping duties". The "final action" under the second administrative review is distinct from the "final action" under the first administrative review.

10. In addition, with respect to Brazil's claims concerning the "continued use of the US 'zeroing procedures'", this is not a "measure" that even exists. Brazil purports to include in this "measure" an indefinite number of future proceedings, none of them in existence. Any findings with respect to any such hypothetical future measure would be based only on speculation. It is not possible to have consulted on a measure not in existence or to "identify" a "specific" non-existent measure, and any findings based only on speculation could not comport with an "objective assessment" of the matter.

11. Moreover, the "essence" of a non-existent measure is nothing but speculation. In that vein, it should be noted that, apart from the *US – Zeroing II* dispute, the cases cited by Brazil in support of its broad approach to a panel's jurisdiction address situations in which the challenged "future" measures were in fact in existence, such that there was a measure that the panel could evaluate. This is not the case here with respect to the "continued use of the US 'zeroing procedures'". Rather, Brazil requests the Panel to speculate as to whether any such measure will come into existence, what that measure will consist of, and find inconsistent an indefinite number of measures that do not exist. It is not

known whether any of these hypothetical future measures will even reflect "use of the US 'zeroing procedures'". For example, there may be no negative value comparisons that could be "zeroed", such that neither the margin of dumping nor the duties assessed will reflect "zeroing". (Indeed, as discussed in our first written submission, the facts Brazil itself presents bear this out.) The Panel of course is unable to analyze any such future measure since there are no details or specifics to analyze.

12. Brazil's assertion that such an indeterminate measure could be within a panel's terms of reference is based on the reasoning of the Appellate Body in the *US – Zeroing II (EC)* dispute. As just explained, however, we fail to see how a reference to the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings" can in any way meet the requirement of Article 6.2 of the DSU to identify the specific measures at issue. Whether something is a "measure" goes to the very question of what a Member may challenge under the DSU, and therefore what may fall within a panel's terms of reference. If something is not a "measure", then it is not, and cannot be, a measure "specifically" identified within the meaning of Article 6.2. Brazil may wish to be free of needing to provide evidence as to the existence, content, and relationship of any future measure to the WTO agreements, but that is not consistent with the WTO dispute settlement system.

13. Furthermore, Article 17.4 of the Antidumping Agreement provides that, if consultations have failed, and if "final action" has been taken by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings, a Member may refer "the matter" to dispute settlement. At the time of Brazil's consultations request, neither the second administrative review nor the alleged "continued use of the US 'zeroing procedures'" involved a final action to levy definitive antidumping duties or accept price undertakings. (While provisional measures may also be challenged in certain circumstances, Brazil has made no allegations in this regard.) Including the second administrative review and "continued use" within the terms of reference would ignore the fact that, for any given importation, the imposition of antidumping duties is grounded in a specific final action.

14. The United States first requests a preliminary ruling that the "Second Administrative Review", which appeared in Brazil's panel request but was not the subject of consultations, is outside the Panel's terms of reference. Under Article 7.1 of the DSU, the measures within a panel's terms of reference are determined by the complaining party's request for the establishment of a panel. Article 6.2 in turn provides that a panel request must "identify the specific measures at issue" in a dispute. Under Article 4.7, however, a Member may not request the establishment of a panel with respect to any measure, but only with respect to a measure that was subject to consultations. Article 4.4 requires that the request for consultations state the reasons for the request, "including identification of the measures at issue and an indication of the legal basis for the complaint". As the United States explained in its first written submission, the Antidumping Agreement contains parallel requirements in Articles 17.3 through 17.5.

15. The covered agreements therefore establish a clear progression between the measures that are discussed in consultations conducted pursuant to Article 4.4 of the DSU and the measures identified in a request to establish a panel, which, in turn, form the basis of the panel's terms of reference. This is not a question of form over substance. Under the relevant provisions in the DSU and the Antidumping Agreement just discussed, a panel's terms of reference cannot include measures that were not the subject of a request for consultations.

16. Brazil seeks to include the second administrative review in this dispute. However, the final determination in the second administrative review was issued after Brazil's request for consultations, and even after those consultations were held. It was not, and could not have been, the subject of consultations and is therefore outside this Panel's terms of reference. Brazil's argument to the contrary is based on its assertion that the second administrative review "has the same essence as" the first administrative review. However, as explained earlier, the second administrative review is not

essentially the same measure as the first administrative review, and is not within the scope of this dispute.

17. The United States also asks that the Panel find that Brazil's reference in its panel request to the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings" does not meet the specificity requirement of DSU Article 6.2. As noted above, by including this purported "measure" in its panel request, Brazil is merely speculating as to what might happen in the future, and speculation as to what might happen is not identification of a specific measure.

18. In addition, Article 3.3 of the DSU contemplates the "prompt settlement of situations where a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired*" by another Member's measures. While it appears that Brazil is challenging an indeterminate number of future measures by identifying "the continued use" in its panel request, a non-existent measure cannot be impairing any such benefits and cannot fall within the scope of a dispute.

19. Finally, we note that Brazil makes repeated references to what it suggests is the desired remedy in this dispute as justifying the expansion of the scope of this proceeding. First, there have been no recommendations and rulings yet in this dispute. Moreover, a Member's desired remedy (whatever that may be) does not dictate a panel's jurisdiction and does not provide a basis for departing from the requirements of the DSU. In determining its terms of reference, a panel does not start from what the complaining Member describes as the appropriate relief and work backwards. Rather, the Panel should be guided by the requirements of the DSU, including the requirement to identify the specific measures at issue.

The Claimed Obligation to Provide Offsets

20. We now turn to comments related to Brazil's argument that the Antidumping Agreement contains an obligation to provide offsets for instances of non-dumping in the context of assessment proceedings. Brazil argues that the Antidumping Agreement imposes on Members an obligation to provide an offset to dumping in all types of antidumping proceedings, including assessment proceedings. The key issue here is whether the text of the Antidumping Agreement actually contains such an obligation that applies in assessment proceedings. The starting point must be what the text of the Agreement actually says. It is fundamental that a treaty interpreter must not impute into an agreement words and obligations that are not contained in the text. But, in this dispute, Brazil asks this Panel to read an obligation into the Antidumping Agreement, notwithstanding the fact that there is no textual basis for the obligation that Brazil proposes.

21. In particular, Brazil seeks to infer an obligation to reduce antidumping duties to account for instances of non-dumping. This treats non-dumped imports as though they were a remedy for dumped imports. Brazil does so despite the fact that there is no textual basis for such an obligation and that there is a permissible interpretation of the Antidumping Agreement that does not require such offsets.

22. In the disputes that have addressed this issue, the only textual basis panels have identified for an obligation to provide offsets has been the "all comparable export transactions" language in the text of Article 2.4.2 of the Antidumping Agreement. This is entirely consistent with the approach articulated by the Appellate Body in *US – Softwood Lumber Dumping*. The phrase "all comparable export transactions" in Article 2.4.2 applies only to antidumping investigations and only when authorities use average-to-average comparisons pursuant to Article 2.4.2. Panels have consistently characterized as persuasive the argument that the obligation to provide offsets applies only as a consequence of the text-based obligation to include all comparable export transactions when making weighted-average to weighted-average comparisons in an investigation. With respect to the argument

that there is an obligation to provide offsets outside this context, the panels addressing this question have consistently reasoned that there is no textual basis for such an obligation. The analysis offered by the prior panels is persuasive and correct.

23. Article 2.4.2 provides for three different types of comparisons: two symmetrical comparison types, average-to-average and transaction-to-transaction; and a third asymmetrical comparison type, average-to-transaction, which may be used under certain conditions. With respect to the average-to-average comparisons, the phrase "all comparable export transactions", as interpreted by the Appellate Body in *US – Softwood Lumber Dumping*, addresses whether the relevant comparison may be made at the level of averaging groups (or "models"). Under this reading, the word "all" in "all comparable export transactions" refers to all transactions across all models of the product under investigation. This is the textual basis for the conclusion that margins of dumping based on average-to-average comparisons must relate to the "product as a whole", rather than individual averaging group comparisons. This phrase, "all comparable export transactions", however, applies only to the use of average-to-average comparisons in an investigation. It does not apply to the use of transaction-to-transaction or average-to-transaction comparisons. Such comparisons will necessarily result in multiple comparisons where there are numerous transactions because each export transaction will result in its own separate comparison. The text of Article 2.4.2 does not address whether or how a Member should aggregate the results of such multiple comparisons into a single overall margin of dumping.

24. A general prohibition of zeroing that applies in all proceedings and with respect to all comparison types would negate and contradict the interpretation of the phrase "all comparable export transactions" that was the basis of the obligation to provide offsets in the context of average-to-average comparisons, and for the conclusion that the margin of dumping must be calculated for "the product as a whole".

25. Brazil argues that margins of dumping calculated in assessment proceedings must relate to the "product as a whole", and cannot be calculated for individual transactions. However, "product as a whole" is not a term found in the Antidumping Agreement, nor does it have any defined meaning. Furthermore, to the extent the concept of "product as a whole" has any relevance to the Antidumping Agreement, it is only as a shorthand for the operation of the phrase "all comparable export transactions" in the context of average-to-average comparisons in investigations. Brazil's argument relies entirely on the concept of "product as a whole" being applied in a manner detached from that underlying textual basis.

26. Brazil offers no textual analysis to support its claim that offsets are required by Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994. This is because the text of these provisions defines and describes dumping as occurring in the course of individual commercial transactions. Prices are generally set in individual transactions, and products are "introduced into the commerce" of the importing country in individual transactions. In other words, dumping – as defined under these provisions – may occur in a single transaction. This is entirely consistent with the exporter-specific understanding of dumping because individual transactions are also exporter-specific. There is nothing in either the GATT 1994 or the Antidumping Agreement that suggests that dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this benefits the seller, but does not undo the effects on the domestic industry of other (dumped) transactions made at less than normal value.

27. Nevertheless, Brazil asserts that dumping and margins of dumping "are defined in relation to a product under investigation as a whole, encompassing all of the export transactions of the product pertaining to an investigated exporter, and they cannot be found to exist only for a type, model, or category of that product". The Appellate Body reports relied upon by Brazil for this proposition are

unpersuasive because they cannot alter the simple fact that the relevant text of these provisions, the relevant context for interpreting the meaning of these terms, and the well-established prior understanding of these concepts all confirm that dumping and margins of dumping do have a meaning in relation to individual transactions. Our written submission sets forth the textual, contextual, and other evidence that the concepts of dumping and margins of dumping, as defined in the Antidumping Agreement and GATT 1994, are applicable to individual transactions. That evidence establishes that the terms dumping and margins of dumping as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

28. Brazil has not demonstrated any inconsistency with Article 9.3 of the Antidumping Agreement or Article VI:2 of the GATT. Article 9.3 requires that the amount of the antidumping duty assessed shall not exceed the margin of dumping. The term "margin of dumping" may be applied to individual transactions. Individual transactions are both the means by which less than fair value prices are determined and by which the product is introduced into commerce. Antidumping duties are similarly assessed on individual entries resulting from those individual transactions. The obligation in Article 9.3 to assess no more in antidumping duties than the margin of dumping, just like the term "margin of dumping" itself, may be applied at the level of individual transactions.

29. In this same vein, Brazil attempts to tie an obligation to provide offsets to a determination of injury, arguing that "injury cannot be found to exist in relation to an individual transaction, but only for the *product as a whole*". However, Brazil's argument actually reinforces the interpretation that any such obligation would be limited to the context of investigations because, in contrast to investigations, there is no obligation to address the existence of injury in Article 9.3 duty assessment proceedings.

30. In addition, Brazil's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole", cannot be reconciled with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Under such systems, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. If the margin of dumping must relate exclusively to the "product as a whole", as Brazil argues, the administration of such an assessment system is an impossibility. This is because, among other reasons, future transactions that would need to be taken into account in such a margin of dumping would not yet have occurred. An obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system and, if accepted, would effectively render prospective normal value systems WTO-inconsistent unless they were converted to a retrospective system by adopting periodic retrospective assessment reviews.

31. Antidumping duties are applied at the level of individual entries for which importers incur the liability. An importer's cost of acquiring the entered merchandise is the sum of the dumped price and the antidumping duty. Accordingly, the importer has an incentive to raise resale prices to cover the full normal value of the merchandise, thereby providing an effective remedy for the dumping. The antidumping duty will be insufficient to have this effect if, instead, the amount of the duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer. The importer would remain in a position to profitably resell the exporter's dumped product at a price that continues to be less than normal value. If Brazil's reading of "margin of dumping" is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 will be prevented from fully addressing dumping.

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31. In addition, as the panel in *US – Softwood Lumber Dumping (21.5)* observed, and as described in detail in our written submission, providing offsets creates perverse incentives and "absurd results" that undermine the remedial effect of antidumping duties.

32. Any interpretation that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2 inutile. This is because the exceptional methodology provided for in Article 2.4.2 mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.

Brazil has not satisfied its Burden of Proving that "Zeroing" was applied to, or had an Impact on, the challenged Margins of Dumping

34. As detailed in our first submission, Brazil has also failed to make a *prima facie* case as to the facts for certain of its claims. Brazil has challenged the calculation of dumping margins determined for two respondents, Fischer and Cutrale, in two administrative reviews. However, aside from the fact that the second administrative review is outside the Panel's terms of reference, in each of the reviews, the margin was zero or *de minimis* for one of these two respondents. Consequently, Brazil cannot establish that the margin should have been any lower to be consistent with the covered agreements.

35. Also, with respect to the assessment for Fischer in the first administrative review, the exhibits Brazil submitted in support of its claim with its first written submission are not the actual computer program logs created by Commerce.

The "Continued Use of the US 'Zeroing Procedures'"

36. Brazil's claim with respect to the "continued use of the US 'zeroing procedures'" should also be rejected. Aside from the fact that this alleged "measure" is outside the Panel's terms of reference, as explained in our first written submission, even were there an obligation to provide offsets outside the context of average-to-average comparisons in investigations, there is no basis for concluding that such "continued use" constitutes "ongoing conduct" that violates Article VI:2 of the GATT 1994 or Articles 2.4.2 and 9.3 of the Antidumping Agreement.

37. First, Brazil's own evidence refutes its claim that "zeroing" had any impact on the dumping margins in the original investigation. As such, even applying Brazil's interpretations of the relevant provisions of the covered agreements, there is no basis for finding the margins in the original investigation were inconsistent with any provision of the covered agreements.

38. The evidence with respect to each of the first and second administrative reviews also undermines Brazil's claims regarding the alleged "continued use" of "zeroing." One of the two companies reviewed had a *de minimis* margin in the first administrative review, which Commerce essentially treats as zero. One of the two companies reviewed had a zero margin in the second administrative review.

39. Thus, each of the proceedings concluded to date in the orange juice case – the investigation, the first administrative review, and the second administrative review – include margins that were not impacted (or "inflated") by "zeroing". As explained in our submission, this does not reflect a sequential string of determinations applying "zeroing", contrary to Brazil's assertion. It does not provide a basis for in turn projecting that the United States will act inconsistently in the future with respect to measures that may never come into existence.

40. As noted in our first written submission, our experience in the *US – Zeroing II (EC)* dispute demonstrates further that there is no basis to assume that "zeroing" will be used in any antidumping proceeding. In that dispute, the Dispute Settlement Body adopted recommendations and rulings with

respect to the use of "zeroing" in four original investigations. Commerce then issued new determinations with respect to those four investigations. In doing so, however, Commerce discovered that in three of the four investigations there were no offsets to provide (that is, there was no "zeroing") because all of the comparisons demonstrated dumping, or the rates determined in the original determinations were based upon facts available rates that did not involve "zeroing". As such, the dumping margins did not change in Commerce's new determinations. Accordingly, among the many problems under Brazil's approach would be the fact that any recommendation with respect to a future measure would need to be conditioned on the use of zeroing, but there would be no mechanism to determine if that condition were fulfilled – that is, if zeroing were in fact used in any individual proceeding.

41. As noted in our first written submission, we have serious concerns about the approach taken by the Appellate Body in the *US – Zeroing II (EC)* dispute. However, because Brazil relies heavily upon the Appellate Body's reasoning in that dispute, it bears repeating that, as a factual matter, there is no basis for such an approach in this case. The facts of this case are not "virtually identical" to the cases in that dispute found to be WTO-inconsistent. They are instead more similar to the cases where the evidence was considered insufficient to support such a finding.

42. In summary, even were the alleged "continued use of the US 'zeroing procedures'" within the Panel's terms of reference, Brazil has failed to establish that any such "ongoing conduct" exists or is likely to continue into the future. Brazil has not and cannot demonstrate a basis for concluding that any measures that may come to be with respect to imports of orange juice will involve the application of "zeroing" and be inconsistent with the covered agreements.

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ANNEX C-3

CLOSING STATEMENT OF BRAZIL AT THE FIRST MEETING OF THE PANEL

1. Mr. Chairman, Members of the Panel, Brazil thanks you for the opportunity to appear before you and answer your questions.

2. During the hearing yesterday, we heard opposing interpretations of the foundational terms "dumping" and "margin of dumping" in the *Anti-Dumping Agreement* and Article VI of the GATT 1994. According to Brazil, these concepts are defined by reference to the product as a whole. According to the United States, they are sufficiently "flexible" that they may be defined in relation to: the "product" as a whole; individual transaction; or, even a combination of these different conceptions.

3. Brazil takes the view that the meaning given to these terms must be based on the text, context, object and purpose of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. The treaty interpreter must strive for an interpretation that "is harmonious and coherent and fits comfortably in the treaty as a whole".[1] Brazil also notes that the terms at issue have been interpreted numerous times in previous disputes concerning zeroing. The Appellate Body has now clarified the interpretation of these terms beyond any reasonable doubt. An important part of ensuring "security and predictability"[2] through the dispute settlement system is that panels must, in making an objective assessment under Article 11 of the DSU, follow the Appellate Body's rulings when the same legal questions are presented. Brazil, therefore, urges the Panel to adopt the interpretation of "dumping" and "margin of dumping" that the Appellate Body has given.

4. Yesterday, we also had a discussion on the relevance of the impact of zeroing to Brazil's claims. Brazil argues that the *use* of zeroing is prohibited, irrespective of its particular impact. In previous disputes, the use and maintenance of zeroing has been found to be WTO-inconsistent in original investigations and administrative reviews, irrespective of the impact of zeroing.[3]

5. The Panel has also enquired about the impact, "in the real world", of zeroing in the present case. Brazil therefore briefly summarizes the impact of zeroing under the Orange Juice Order.

6. *First*, the use of zeroing under this Order has resulted in the determination of positive margins in the administrative reviews completed so far under the Orange Juice Order, where there would have been negative margins had zeroing not been used.

7. *Second*, the use of zeroing under the Orange Juice Order has resulted in the imposition of duties, where no duties would have otherwise been imposed. Cutrale and Fischer have so far incurred final anti-dumping duty liabilities of [[XX]] million US dollars, whereas they would have owed zero duties had the United States not used zeroing. Thus, "in the real world", zeroing has enabled the imposition of significant amounts of duties on Brazil's exports.

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[1] Appellate Body Report, *US – Continued Zeroing*, para. 268.

[2] Article 3.2 of the DSU.

[3] *See, e.g.*, Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162 and 8.1(b); Appellate Body Report, *US – Zeroing (Japan)*, paras. 190(b) and (c) ; Appellate Body Report, *US – Continued Zeroing*, para. 395(a)(v), second indent.

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8. *Third*, under US law, the USDOC routinely terminates an anti-dumping order for any exporter that has zero margins in three consecutive administrative reviews.[4] Under the Orange Juice order, Cutrale and Fischer would both have had consecutive zero margins in the first two administrative reviews, with the final results of the third due in August 2010. Had the United States not used zeroing, the Brazilian exporters could now expect termination of the Order. Thus, "in the real world", zeroing perpetuates the duration of the order.

9. To answer the Panel's enquiry, the use of zeroing has a significant "real world" impact on the Brazilian exporters covered by the Order.

10. As regards Brazil's continued use claim, the United States goes not much further than to say that this "ongoing conduct" is based on "speculation". Brazil need only remind the Panel of the latest Issues and Decision Memorandum relative to the Orange Juice Order at issue, where the USDOC restates its position of maintaining the zeroing methodology.[5] That is indeed a new meaning to the word "speculation", especially in light of the facts in this dispute, where the "density" of facts is beyond doubt, not fragmented, and where zeroing is about to be re-used in the Third Administrative Review.

11. Finally, the continued used claim, already accepted by the Appellate Body[6], allows Members to avoid being victims of the "moving target" and "hit and run" scenarios typical of measures that are sequential over time.

12. Mr. Chairman, Members of the Panel, staff of the Secretariat, Brazil once again thanks you for this opportunity and for your hard work in this dispute.

[4] 19 C.F.R. § 351.222(b), available at http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=68qIUf/103/2/0&WAISaction=retrieve.

[5] Exhibit BRA-43, pp. 4 – 6, "Department's Position".

[6] *See* Appellate Body Report, *US – Continued Zeroing*, para. 185.

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ANNEX C-4

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would once again like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with our written responses and our rebuttal submission.

2. As an initial matter, Brazil asserts its claims are not dependent upon whether zeroing had an effect on the calculations. We disagree. It is not sufficient to simply point to the presence of a zeroing line in a computer code. The zeroing line of programming language is itself conditional. It only operates when the requisite condition is satisfied. With respect to the investigation, Brazil has conceded that no comparison results were "zeroed". Thus, these dumping margins were calculated without using zeroing. While Brazil stated yesterday that it is only relying on the investigation as evidence as the "continued use" of zeroing, the investigation provides no such evidence. Because zeroing was not used in the calculation of these margins, Brazil's claim that there is any such "continued use" is not supported by the evidence.

3. With respect to the second administrative review determination, Brazil's position is equally incoherent. Brazil fails to explain how no antidumping duty for Fischer in the second administrative review determination is excessive under Article 9.3, or otherwise inconsistent with any other provision of the covered agreements. Likewise, Brazil did not explain how Commerce's determination to assess no duties on Fischer's entries during the period and to estimate that no antidumping duty would be due on Fischer's entries after the second administrative review determination could be inconsistent.

4. Turning to the issues of interpretation, Brazil argues that the term "margin of dumping" must always relate to the "product as a whole" regardless of the context in which the term is used. At the same time, Brazil also asserts, "The fact that the same word appears in two (or more) proximate treaty provisions does not mean that the word carries the same meaning in each provision ... a single word used in two provisions may have different meanings in each provision, depending upon the context". The United States agrees that context matters. As we have explained, the precise meaning of the term "margin of dumping" may be informed by the context in which the term is used. The terms "dumping" and "margin of dumping" are defined in relation to the term "product". The ordinary meaning of "product" may refer to a single transaction, or multiple transactions, or both. For example, in Article II of the GATT 1994, the term "product" is used, including with respect to the imposition of an antidumping duty on a "product" "at the time of importation". Clearly, Article II is using "product" in the sense of an individual transaction and not in the sense of "product as a whole". No one has argued that tariffs on a product can exceed the bound rate for some transactions as long as they are below the bound rate in enough other transactions such that the average does not exceed the bound rate.

5. In particular, contrary to Brazil's assertion at paragraph 20 of its opening statement, the United States agrees that in the context of Article 5.8 the margin of dumping may refer to an aggregation of multiple transactions. Article 6.10 concerns the question of what information should

be relied upon in calculating margins of dumping for exporters or producers. It ensures that each exporter or producer is assigned an antidumping duty based on its own pricing behavior, and not that of other exporters or producers, unless it is impracticable. In this context, this provision does not address whether the "margin of dumping" only has meaning in relation to the product as a whole (a term nowhere found in the text of the Antidumping Agreement) or individual transactions. With respect to Articles 6.10, 8.1, 9.1, 9.3, and 9.5, Brazil's interpretation relies solely on the use of the term "margin of dumping" in the singular as the basis for its interpretation. We, however, would agree with Brazil's observation in paragraph 13 of its opening statement that "the use of the singular is not decisive ...".

6. As detailed in our first written submission, Brazil's interpretation cannot be reconciled with the ordinary meaning of the terms with which dumping and margins of dumping are defined. Dumping is defined as occurring in the course of ordinary commercial transactions, where products are "introduced into the commerce" of the importing country transaction by transaction, not "as a whole". And, the prices of products are set in individual transactions, not "as a whole". Brazil's interpretation also cannot be reconciled with the Appellate Body's interpretation of the phrase "all comparable export transactions" in *US – Softwood Lumber Dumping*. Nor can it be reconciled with the exceptional provision in the second sentence of Article 2.4.2; or with the effective functioning of antidumping duties as a remedy for dumping.

7. In addition, Brazil's proposed obligation is contrary to the very concept of a prospective normal value system provided for in Article 9. As we explained yesterday, under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. The administration of such an assessment system cannot function as intended if the margin of dumping must relate exclusively to an aggregation of all transactions constituting the "product as a whole". As became apparent from Brazil's answers to the Panel's questions, Brazil's proffered understanding of how the prospective normal value systems should function is radically different from how Members operate these systems.

8. Under Brazil's interpretation, a prospective normal value assessment system necessarily requires retrospective reviews on the basis of the aggregation of transactions because the margin of dumping for the "product as a whole" can never be known at the time of importation. Nothing in the text of Article 9, however, suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. Nor does Brazil attempt to explain why, if refund proceedings under Article 9.3 require aggregation of transactions for the "product as a whole", Article 9.3 fails to provide for any time frame over which the transactions would be aggregated.

9. In contrast, the United States has offered a harmonious and coherent interpretation that gives meaning to all provisions of the Antidumping Agreement and the GATT 1994. This interpretation has been endorsed by prior panels. Brazil would have you believe that none of these panels adopted an interpretation that is coherent, and that none of these panels had the interest of the dispute settlement system or the trading system at heart. But this interpretation, in contrast to Brazil's interpretation, is fully consistent with the text, context, and object and purpose of the covered agreements.

10. In its opening statement, Brazil categorically asserts that "the same legal questions must be resolved in the same way in subsequent disputes". On the contrary, the authority to adopt interpretations of the covered agreements rests exclusively with the Ministerial Conference and the General Council.[1] Therefore, while the dispute settlement system serves to resolve a particular

[1] Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization*. *See also*, United States' First Written Submission, n. 26.

dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute.

11. Brazil would have this Panel merely follow Appellate Body reports without engaging in its own analysis. We disagree. To be clear, the United States is not asking the Panel blindly to follow the numerous panel reports that have found a general requirement to provide offsets does not exist in the Antidumping Agreement. Nor have we asked you to ignore Appellate Body reports finding zeroing to be WTO-inconsistent in certain circumstances.

12. What we have asked you to do, and are confident you will do, is to fulfill your function to make an objective assessment of the matter before you. As part of that, we have asked you to consider whether previous panel reports on this issue are persuasive; we believe they are. We have also asked you to consider whether previous Appellate Body reports on this issue are persuasive; we have explained they are not. Of course, the Panel must undertake its own consideration of these reports and determine their relevance to the issues here and their persuasiveness, as previous panels confronted with claims against "zeroing" have done.

13. Brazil would instead have the Panel abdicate its responsibility of making an objective assessment in the interest of "security and predictability". Security and predictability are provided by a dispute settlement system that does not add to or diminish the rights and obligations to which the Members agreed. This requires the proper application of customary rules of interpretation of public international law to the provisions of the covered agreements. Any obligation to provide offsets must be found in the text of the covered agreements. There is no textual basis for a general prohibition of zeroing. The only textual basis for an obligation to provide offsets arises in the limited context of average-to-average comparisons in investigations.

14. Brazil's proposed obligation to reduce antidumping duty assessments for negative comparison results treats non-dumped imports as a remedy for dumping that replace the application of antidumping duties. However, the application of antidumping duties is the remedy provided for in the covered agreements. The prior panels addressing this issue have consistently recognized the deficiencies inherent in Brazil's proposed interpretation (and in the Appellate Body reports upon which Brazil relies). The panels have found that the relevant text, the relevant context, and the well-established prior understanding of the terms "dumping" and "margin of dumping" demonstrate that these concepts are not devoid of meaning except in relation to the product as a whole.

15. Mr. Chairman, Members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these issues.

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ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX D-1

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION

Mr. Chairman, distinguished Members of the Panel.

1. The European Union appreciates this opportunity to appear before you today. The European Union makes this third party oral statement because of its systemic interest in the *DSU*. This case also raises important substantive issues in relation to Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. However, none of the issues raised in this proceeding relating to anti-dumping are new. Brazil's claims appear to be supported by a consistent body of reasoning and findings, contained in all reports issued by panels and the Appellate Body, lastly in *US – Continued Zeroing*. Further, the United States has not raised anything new in its argumentation to defend its zeroing methodologies and practices.

2. The European Union's oral statement will therefore be brief. In its written submission the European Union set out at length the systemic reasons why in its view, this Panel should follow the findings and conclusions contained in previous panels and Appellate Body reports on zeroing. It is beyond dispute that the practice of zeroing in anti-dumping cases has been contested many times in WTO dispute settlement proceedings. The Appellate Body in particular has adjudicated on the issues raised in this case frequently, including in cases involving different variations of zeroing, both in original anti-dumping investigations and reviews, in different factual circumstances and between different parties.

3. The United States does not contest this, but argues that this Panel should not follow these Appellate Body reports. Further, the United States explicitly invites this Panel to re-apply findings and follow the reasoning contained in panel reports that have been rejected and overturned –in many cases more than once– by the Appellate Body, in reports which have subsequently been adopted by the DSB. The European Union submits that the suggestion by the United States that, according to Article 11 of the *DSU* this Panel should be free to depart from adopted Appellate Body reports on issues of law and legal interpretations relating to the covered agreements, is misguided. It is rather the opposite. The Appellate Body itself has addressed this very question in several cases, notably in *US – Stainless Steel from Mexico*, and thus the US proposition should be rejected.

4. On the substance, the European Union has set out its views in its written submission, and has only a few comments in this oral statement, on two specific aspects of the US written submission.

5. First, zeroing has nothing to do with "offsets" or "credits". The key issue, however, and the fundamental problem raised by this methodology is the selection of the relatively low priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation, regardless of whether or not they are clustered by purchaser, region or time. This was <u>not</u> the compromise achieved in the text of Article 2.4.2 of the *ADA*. It is clear that according to Article 2.4.2 of the *ADA* there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by purchaser, region or time. Thus, it is not permissible, and it is not fair, to pick up low priced export transactions clustered by model or *per se*, as the US zeroing methodology does. This is also clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the *ADA* and Article VI:1 of the *GATT 1994* in terms of the product as a whole; read together with the absence in the targeted

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dumping provisions of any reference to a sub-category by model or *per se*. Thus, the relevant provisions, and particularly the normal rule and the exception, are read harmoniously, so as to give meaning – both legal and economic – to all the treaty terms.

6. Second, the United States continues to rely on the legally erroneous proposition that the disciplines of Article 2.4.2 of the *ADA* are excluded from retrospective assessment proceedings. In this respect, we believe that the Panel does not need to enter into this issue. Confronted with the same argument by the United States, the Appellate Body has repeatedly found that Article VI of the *GATT 1994* and Articles 2.1 and 9.3 of the *ADA* require that the dumping margin must be established on the basis of the product under investigation *as a whole.* In any event, should the Panel enter into this discussion, we invite the Panel to take into account the analysis set out in our written submission.

7. The European Union stands ready to participate further in the discussion and answer any questions that this Panel may have in writing. Thank you for your attention.

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ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF JAPAN

I. THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS SHOULD BE REJECTED

1. The United States argues that the Second Administrative Review is not properly within the Panel's terms of reference, because the final results of it had not been issued at the time of Brazil's request for consultations.[1] However, it is clear that, in reviewing Brazil's requests for consultations and panel establishment, the Second Administrative Review is included in the Panel's terms of reference.

2. Even though the final result of the Second Administrative Review had not been issued at the time of the request for consultations, the review had been initiated at the time and a final result had been expected to be issued in a certain period in light of the United States' anti-dumping system. In previous cases where a certain measure was subject to the dispute, certain amendments to that measure which took effective even after the consultation were also found as falling within the panel's terms of reference, for example, in *Chile – Price Band*, as not "*changing its essence*".[2]

3. In its panel request, Brazil mentioned the date and contents of the final result of the Second Administrative Review. From the description of the request for consultations and panel establishment, the Second Administrative Review shares the essential legal implication – the use of the zeroing methodology, as well as the same underlying antidumping duty order – with the Original Investigation and the First Administrative Review, and this shared point is exactly what Brazil is challenging in this dispute. Brazil does not raise any other issues than zeroing with regard to the review, therefore, the scope of the dispute has not been broadened. In this sense, the Second Administrative Review does not change the essence of the measure at issue. Brazil's requests for consultations and panel establishment thus provided an opportunity for the United States to define and delimit the scope of the dispute between them. With respect to US argument that the second administrative review "was not (and could not have been) subject to consultations"[3], the Appellate Body admitted "additional measures relate to the same duties identified in the consultations request"[4] being within the panel's terms of reference stating:[5]

> The proceedings listed in the consultations request and the panel request are therefore successive stages subsequent to the issuance of the same anti-dumping duty orders. More specifically, as regards the periodic reviews, the subsequent measures assessed actual duty liabilities and updated cash deposit rates that were imposed on the same products from the same countries as those listed in the consultations request. With respect to the sunset reviews, the subsequent measures related to the continued application of duties on the same products from the same countries as those listed in the consultations request. Moreover, in both its consultations request and panel request, the European Communities made clear that

[1] United States' First Written Submission, paras. 39-48.
[2] Appellate Body Report on *Chile – Price Band*, para. 139(emphasis in original).
[3] US First Written Submission, para. 48.
[4] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 228.
[5] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 228. (footnote omitted)

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> it was challenging the specific administrative review and sunset review proceedings because of the use of the zeroing methodology. Specifically, both the consultations request and the panel request allege that the USDOC "systematically" applies the zeroing methodology in all types of review proceedings, which, the European Communities contends, is a methodology found to be inconsistent with the covered agreements.

4. In light of the above, Japan considers that the Panel should reject the United States' request for preliminary rulings with regard to the Second Administrative Review.

5. With respect to US argument that the continued use of the US Zeroing procedures in successive anti-dumping proceedings is not within the Panel's terms of reference, Japan notes that the Appellate Body of *US-Continued Zeroing (EU)* states regarding an ongoing conduct:

> As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. *The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future.* Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments.[6] (emphasis added)
>
> Appellate Body also states:
>
> *We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement.* The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order.The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation.[7] (emphasis added)

6. Therefore, given this conclusion of the Appellate Body, Japan considers that the Panel should reject the United States' request for preliminary rulings with regard to the continued use of the US Zeroing procedures in successive anti-dumping proceedings.

II. ZEROING AS USED BY THE USDOC IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

7. The legal principles governing the WTO-inconsistency of the zeroing procedures have been thoroughly canvassed by the Appellate Body in past WTO disputes, and are well established by now. Japan notes again that, as the result of the interpretation of the *Anti-Dumping Agreement* under the customary rules of interpretation of public international law, the Appellate Body held;

> ... "dumping" and "margins of dumping" can be found to exist only in relation to [the] product as defined by [the] authority. They cannot be found to exist for only a

[6] Appellate Body Report, *US – Continued Zeroing (EC)*, para.171.
[7] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 181(footnote omitted).

> type, model or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction.[8]

8. Then, with regard to Article 9.3 of the *Anti-Dumping Agreement*, the Appellate Body held that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".[9] The express reference to Article 2 in the *chapeau* of Article 9.3 of the *Anti-Dumping Agreement* includes, among others, Article 2.1 of the *Anti-Dumping Agreement*, which, as noted above, sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". In *US – Zeroing (EC)*, relying on these textual cross-references, the Appellate Body made an explicit interpretive connection between a "product as a whole" requirement of Article 2.1 and dumping determinations in periodic reviews under Article 9.3.[10]

9. Accordingly, if, in a periodic review, the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not permitted to take into account the results of only some of the multiple comparisons, while disregarding others. Thus, for purposes of these reviews, the investigating authority must aggregate all multiple comparisons to establish a margin of dumping for the "product" under investigation as a whole. It is required to compare the anti-dumping duties collected on all entries of the subject merchandise from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole, to ensure that the total amount of the former does not exceed the latter.[11]

10. When applying zeroing as used by the USDOC in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. In this way, zeroing as used by the USDOC results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, under Article 9.3 of the *Anti-Dumping Agreement*, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter.

11. The Appellate Body rejected the United States' argument that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer- or import-specific basis. In doing so, the Appellate Body relied in part on Article 6.10 of the *Anti-Dumping Agreement* as context, which precludes the calculation of a margin of dumping for each individual import transaction, and it also requires that margins be calculated for exporters and foreign producers, not importers.[12]

12. The United States objects to the Appellate Body's interpretation that margins of dumping are determined for foreign producers or exporters. However, as the Appellate Body previously explained, the United States' misgivings are misplaced. Although *margins of dumping* are established for foreign producers or exporters for a product as a whole, Members can assess anti-dumping *duties* on "a

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[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 115. (emphasis in original)

[9] Appellate Body Report, *US – Zeroing (EC)*, para. 130 (emphasis in original). *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

[10] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99.

[11] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

[12] Appellate Body Report, *US – Zeroing (EC)*, para. 128. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 112.

transaction- or importer-specific basis", "provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping".[13]

13. In light of the above, Japan submits that two administrative reviews concerning imports of certain orange juice from Brazil are inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 due to the use of zeroing.

14. Additionally, Japan notes the Appellate Body's findings in *US – Continued Zeroing (EC)* to address United States' argument concerning Article 17.6(ii) of the *Anti-dumping Agreement* as follows:

> In our analysis, we have been mindful of the provisions of Article 17.6(ii) of the *Anti-Dumping Agreement*. The analysis offered above, applying the customary rules of interpretation of public international law, does not allow for conflicting interpretations. We have found, by the application of those rules, that zeroing is inconsistent with Article 9.3. A holding that zeroing is also consistent with Article 9.3 would be flatly contradictory. Such contradiction would be repugnant to the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii). Consequently, it is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence.[14]

15. Finally, Japan notes the Appellate Body's findings in *US – Stainless Steel (Mexico)* concerning whether the panels should follow previous adopted Appellate Body reports addressing the same issues as follows:[15]

> The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.

16. To provide the security and predictability to Members, Japan strongly expects the Panel to keep consistency with the Appellate Body's stabled findings regarding zeroing as used by the USDOC in periodic reviews.

III. THE CONTINUED USE OF ZEROING IN SUCCESSIVE ANTI-DUMPING PROCEEDINGS BY WHICH DUTIES ARE APPLIED AND MAINTAINED IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

17. The Appellate Body concluded with respect to the four "cases" for which it was able to complete the analysis in *US – Continued Zeroing (EC)*:

> we conclude that the application and continued application of anti-dumping duties is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the

[13] Appellate Body Report, *US – Zeroing (EC)*, para. 131(footnote omitted).
[14] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 317.
[15] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

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> GATT 1994 to the extent that the duties are maintained at a level calculated through the use of the zeroing methodology in the periodic reviews in the following four cases…[16]

18. Again, Japan strongly expects the Panel to keep consistency with the Appellate Body's finding regarding the continued use of zeroing in the consecutive anti-dumping determinations, including the original investigation and subsequent administrative reviews.

[16] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 199.

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ANNEX D-3

THIRD PARTY ORAL STATEMENT OF KOREA

Mr. Chairman and Members of the Panel,

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party.

2. This dispute involves the practice, commonly referred to as "zeroing", by which the USDOC has treated transactions with negative dumping margins as having margins equal to zero in original investigations and administrative reviews. In Korea's view, this practice is plainly inconsistent with relevant provisions of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. This view has been upheld by the Appellate Body in numerous previous disputes addressing the USDOC's zeroing practice.

3. Absent particular reasons for distinguishing the case at hand, the Panel is obliged to follow the rulings of the Appellate Body. There is no reason for the Panel in the current dispute to disregard the Appellate Body's decisions in the long line of cases involving the zeroing methodology. In this respect, Korea urges this Panel to follow the well-established WTO jurisprudence and requests that the Panel find the United States zeroing methodology inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.

4. As in its Third Party Submission, Korea in this oral statement will present its views with regard to the preliminary ruling request by the United States and on the use of zeroing methodology in the USDOC's original investigations and periodic administrative reviews.

I. THE PANEL SHOULD DISMISS THE PRELIMINARY RULING REQUEST BY THE UNITED STATES

5. The United States has requested preliminary rulings with regard to two issues. The United States argues (1) that the final determination in the second administrative review of the antidumping order on Certain Orange Juice from Brazil is not within the Panel's terms of reference; and (2) that the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings" is not within the Panel's terms of reference due to lack of specificity.

A. THE PANEL SHOULD DISMISS THE UNITED STATES' CLAIM THAT THE SECOND ADMINISTRATIVE REVIEW IS NOT WITHIN THE PANEL'S TERMS OF REFERENCE

6. Contrary to the United States argument, the second administrative review is adequately described in Brazil's request for consultations. In the Addendum to Brazil's initial request for consultations, submitted 22 May 2009, Brazil specifically stated that "[t]he consultations, held on 16 January 2009, covered the … the Antidumping Duty Administrative Review from 1 March 2007 to 29 February 2008 (the "Second Administrative Review")".[1]

[1] WT/DS382/1/Add.1, para. 3.

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7. It should first be noted that it is beyond dispute that Brazil's request for establishment of a panel specifically identified the second administrative review as one of "the measures at issue".[2] However, the preliminary ruling request by the United States does not address the significance of this statement in Brazil's panel request. This silence suggests that the United States believes that the USDOC's second administrative review can only fall within the Panel's terms of reference if the *final determination* in that review was specifically referenced in the consultation request, as well as in the panel request itself. Yet, that interpretation is not consistent with the provisions of the relevant agreements.

8. Article 17.3 of the *Anti-Dumping Agreement* does not contain any language that might be read to suggest that a Member must wait to *request consultations* until a final determination has been issued. By contrast, the first sentence of Article 17.4 of the *Anti-Dumping Agreement*, which authorizes WTO Members to refer matters to the DSB for establishment of a panel, specifically requires complaining Members to wait until (1) consultations under Article 17.3 "have failed to achieve a mutually agreed solution", *and* (2) "final action has been taken by the administering authorities of the importing Member to levy anti-dumping duties…". If the administrative authorities have not yet taken "final action", the matter may not be referred to the DSB for establishment of a panel.

9. The clear implication is that *consultations* may be requested before "final action has been taken by the administering authorities". After all, if consultations could not be requested before such "final action", there would be no need to include a requirement of "final action" in the first sentence Article 17.4. Instead, if consultations could be requested only after "final action" by the administering authorities, then the provisions of the first sentence of Article 17.4 requiring that consultations be held (and "have failed") would embody a requirement of "final action" as well. Under such an interpretation, the language requiring "final action" in the first sentence of Article 17.4 would be redundant.

10. It is well established in WTO jurisprudence that "a treaty interpreter must give meaning and effect to all the terms used in a treaty provision and must avoid interpretations which render treaty terms redundant". In accordance with that principle, the provisions of Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* must be understood to indicate that consultations may be requested before "final action" by the administering authorities, while the establishment of a panel may not be requested until after that "final action" has occurred.

11. Korea is also unable to find the United States' reliance on the decision in *US – Certain EC Products* to be persuasive. In *US – Certain EC Products*, the EC's request for consultations made reference to a notice issued by the US Customs Service withholding liquidation (referred to as the "March 3rd Measure") but did not refer to the separate decision by the US Trade Representative (the "USTR") to impose 100 per cent duties on certain EC products (referred to as the "April 19th action"). The panel and Appellate Body held that the EC's failure to mention the April 19th action during the consultations meant that claims regarding that action were outside the panel's terms of reference.

12. The *US – Certain EC Products* decision can, therefore, be easily distinguished from the situation presented by Brazil's consultation request in this dispute. Unlike *US – Certain EC Products*, this is not a case in which the consultation request fails to mention the particular measure. Instead, as described above, the Addendum to Brazil's consultation request clearly refers to the second administrative review.

13. Moreover, the legal relationship between the March 3rd Measure and the April 19th action at issue in *US – Certain EC Products* is quite different from the legal relationship between the second

[2] WT/DS382/4.

administrative review described in the Addendum to Brazil's consultation request and the final determination mentioned in Brazil's panel request. In *US – Certain EC Products*, the Appellate Body focused on the fact that the March 3rd Measure and April 19th action involved two different government agencies acting separately pursuant to distinct statutory legal authority.[3] In particular, the United States Customs Service took its measure on March 3rd pursuant to Section 113.13 of the Code of Federal Regulations, Volume 19, while the USTR took its action on April 19th pursuant to Section 301 of the Trade Act of 1974.[4] In this case, the second administrative review was conducted by the same agency, the USDOC, that subsequently issued the final results of the review on 11 August 2009. In conducting the review and issuing the final results, the USDOC acted pursuant to the same statutory authority, Title VII of the Tariff Act of 1930, as amended, which establishes the framework for US antidumping proceedings.

14. The Appellate Body in *US – Certain EC Products* also noted that there was no "perceptible correlation" between the March 3rd Measure and the April 19th action. The situation in the present case is clearly different. It is difficult, if not impossible, to maintain that there is no perceptible correlation between the conduct of the second administrative review of the antidumping order on Certain Orange Juice from Brazil and final results of that review.

15. Consequently, there is no basis for the argument by the United States that Brazil's request for consultations with respect to the second administrative review before the USDOC issued its final determination in that review was somehow improper or invalid.

B. THE PANEL SHOULD FIND THAT THE "CONTINUED USE OF THE US 'ZEROING PROCEDURES'" AS IDENTIFIED IN BRAZIL'S PANEL REQUEST FALLS WITHIN THE PANEL'S TERMS OF REFERENCE

16. Korea is also of the view that the "continued use of the US 'zeroing procedures'" is within the Panel's terms of reference. The United States argues that the description of the measure in Brazil's panel request lacks specificity because the alleged measure did not exist at the time of the panel request.

17. As the Appellate Body has explained, the specificity requirement under Article 6.2 of the DSU is designed to ensure that a panel request "present[s] the problem clearly". The Appellate Body has also found that "the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures".

18. Korea notes that item (d) of Brazil's panel request identifies the anti-dumping duty order, case No A-350-840 and the original investigation and subsequent administrative reviews under such order. It appears to be sufficiently clear also in this dispute that the measure referred to is "a string of connected and sequential determinations" in which the United States uses the zeroing methodology by which duties are maintained over a period of time under the anti-dumping duty order.

19. In this regard, the Appellate Body in *US – Continued Zeroing* concluded that a Member's "ongoing conduct" constitutes a measure and is challengeable by another Member.[5] As Brazil notes in its first written submission, the ongoing conduct that was at issue in *US – Continued Zeroing* is virtually identical to the ongoing conduct at issue in this dispute. The zeroing practice by the USDOC maintained and applied in successive phases of the anti-dumping proceeding under the anti-dumping

[3] WT/DS165/AB/R, para. 75.
[4] WT/DS165/AB/R, para. 75.
[5] Appellate Body Report, *US – Continued Zeroing*, para. 180.

duty order on certain orange juice from Brazil is an ongoing conduct that is inconsistent with the *Anti-Dumping Agreement*.[6]

II. THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

20. The USDOC's utilization of its zeroing methodology in original investigations has been found to be inconsistent, as such and as applied, with Article 2.4.2 of the *Anti-Dumping Agreement* in numerous past disputes.[7] There no longer appears to be any dispute with respect to this issue.

21. In fact, the USDOC has stated that, effective 22 February 2007, it will no longer utilize the practice of zeroing in new and pending investigations.[8] However, this change in practice was not applied to the anti-dumping investigation that is the subject of the present dispute, because the final results and the amended final results of the original investigation of anti-dumping duties on certain orange juice from Brazil were published more than a year before the effective date of the USDOC's 22 February 2007 change in practice.

22. Therefore, Korea considers it imperative that the Panel find the practice of zeroing in the original investigation of anti-dumping duties on certain orange juice from Brazil inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

III. AS THE APPELLATE BODY HAS CONSISTENTLY FOUND, THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

23. The Appellate Body has repeatedly ruled that the practice of zeroing in periodic administrative reviews is inconsistent with the *Anti-Dumping Agreement* — and it has held that panels considering this issue should follow the Appellate Body's reasoning on this issue.[9] Nevertheless, the United States contends that, notwithstanding the rulings by the Appellate Body, the practice of zeroing in periodic "administrative reviews" should be found to be consistent with the *Anti-Dumping Agreement*. Korea considers the United States' arguments unconvincing and submits that the Panel should once again find that the United States' practice of zeroing in administrative reviews is inconsistent with the *Anti-Dumping Agreement*.

24. In ruling that the USDOC's practice of zeroing in periodic "administrative reviews" is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and GATT Article VI:2, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and "margin of dumping" can be found to exist at the level of individual transactions.[10] Like the Appellate Body, Korea is unable to find "a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped", for purposes of determining the

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[6] Appellate Body Report, *US – Continued Zeroing*, para. 199.

[7] *See* Panel Report, *US – Anti-Dumping Measures on PET Bags (Thailand)*; Panel Report, *US – Shrimp (Thailand)*; Appellate Body Report, *EC – Bed Linen (India)*; Appellate Body Report, *US – Zeroing (Japan)*; Appellate Body Report, *US – Continued Zeroing (EC)*.

[8] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification*, 71 Fed. Reg. 77722 (27 December 2006); and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations: Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (26 January 2007).

[9] *See, e.g.*, Appellate Body Report, *United States – Mexican Stainless Steel*, para. 161 to 162.

[10] Appellate Body Report, *United States – Continued Zeroing (EC)*, para. 287.

existence and magnitude of dumping in the original investigation, and as "non-dumped", for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review".[11] Korea believes that the United States should bring its practice in periodic administrative reviews into conformity with requirements of the *Anti-Dumping Agreement* — as it already has with original investigations.

IV. CONCLUSION

25. Korea requests that the Panel find the United States' practice of zeroing as used in the original investigation and administrative reviews as well as its continued use in successive anti-dumping proceedings concerning imports from certain orange juice from Brazil to be inconsistent with the *Anti-Dumping Agreement*.

26. Korea appreciates this opportunity to participate in these proceedings and to present its views to the Panel.

[11] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 285.

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ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF BRAZIL

I. INTRODUCTION

1. The areas of disagreement between the two parties in this dispute have already been well canvassed in the respective submissions to this Panel. In its second written submission, therefore, Brazil, does not repeat the details of what has been said before. Instead, Brazil presents a summary of the key interpretive arguments, and select arguments on the three measures at issue: the First and Second Administrative Reviews and the continued use measure.

2. Before doing so, Brazil recalls that, following the First and Second Administrative Reviews, Cutrale and Fischer have so far incurred final anti-dumping duty liabilities of [[XX]] million US dollars under the Orange Juice Order. The payment of these duties is a direct consequence of the USDOC's use of zeroing, because, if zeroing had not been used, the United States would have collected no anti-dumping duties under the Order.

II. SUMMARY OF KEY INTERPRETIVE ARGUMENTS

3. The crucial legal arguments in this dispute relate to the definition of "dumping" and "margin of dumping". Brazil has explained that dumping and margin of dumping may only be defined in relation to the product as a whole. As required by Article 17.6(ii) of the *Anti-Dumping Agreement*, this reading is derived from the relevant text, context, and object and purpose, interpreted in accordance with the *Vienna Convention on the Law of Treaties*. In particular, Brazil's reading, like the Appellate Body's[1], is grounded in the text, context, object and purpose of the following provisions: Articles II:1, VI:1 and VI:2 of the GATT 1994; and Articles 2.1, 2.2, 2.3, 3.1, 3.2, 5.2(ii), 5.8, 6.1.1, 6.7, 6.10, 6.10.2, 7.2, 7.4, 8.1, 9.1, 9.3, 9.5, 10.6 and 11.1 of the *Anti-Dumping Agreement*. The Appellate Body has repeatedly confirmed that this is the sole permissible interpretation of the terms "dumping" and "margin of dumping", overturning numerous panels that held otherwise.[2]

4. Conversely, the United States argues that "dumping" and "margin of dumping" may be defined in diverse ways, at an importing Member's discretion, to encompass both transaction-specific and product-wide definitions of "dumping". In its Opening Statement at the first Panel meeting, Brazil responded to each of the arguments presented by the United States in support of this interpretation. Because the United States has not elaborated further on its position since that meeting, in its Second Written Submission Brazil summarized the arguments presented earlier in this regard.[3]

5. The United States also argues that, assuming the use of zeroing gives rise to an inconsistency with WTO disciplines, to prove such an inconsistency Brazil must demonstrate that the use of zeroing had an impact on the outcome of the authority's determination. As Brazil discusses below, the United States is wrong on the law and the facts.

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[1] *See* Appellate Body Report, *US – Stainless Steel*, paras. 83 – 99.

[2] *See, e.g.*, Brazil's FWS, paras. 49 – 61; and Brazil's Opening Statement, paras. 6 – 37. *See* also Appellate Body Report, *US – Continued Zeroing*, concurring opinion, para. 312.

[3] Brazil's SWS, pp. 3 – 4.

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III. THE FIRST AND SECOND ADMINISTRATIVE REVIEWS VIOLATE ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994

6. Brazil has shown that, for the two Brazilian exporters at issue, Cutrale and Fischer, the USDOC used zeroing in the First Administrative Review under the Orange Juice Order to determine the "weighted average margins of dumping", the cash deposit rates ("CDR") and the importer-specific assessment rates ("ISAR").[4] The United States has not contested this fact. Instead, it argues that Brazil has not proven that the use of zeroing in this review had an *impact* on one of the two exporting companies, Cutrale.

7. With respect to the Second Administrative Review, Brazil has also shown that the USDOC used zeroing, for both Cutrale and Fischer, in determining the margins of dumping, CDRs and ISARs.[5] Again, the United States has not contested the use of zeroing for either Cutrale or Fischer. Instead, it contends that zeroing did not have an impact on the determination for one of the companies, Fischer.

A. AS A MATTER OF LAW, THE USE OF ZEROING VIOLATES ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994, REGARDLESS OF THE IMPACT OF ZEROING[6]

8. As set forth in the *chapeau* of Article 9.3 of the *Anti-Dumping Agreement*, a Member must establish a margin of dumping consistently with Article 2 of the *Anti-Dumping Agreement*. The obligation to comply with Article 2 in determining margins of dumping is not dependent on any other aspect of the anti-dumping proceeding or on the outcome of that proceeding in terms of duty collection. A failure to comply with Article 2 in determining the margin vitiates a determination made under Article 9.3, irrespective of the amount of duties that is ultimately collected.[7]

9. In *US – Zeroing (Japan)(21.5)*, the United States argued that Japan had not proven the impact of zeroing in the challenged administrative reviews, and that therefore Japan's challenge had to fail. The panel rejected the US argument. It noted that "the Appellate Body's findings in the original proceedings were not based on evidence that particular importers had sales with negative margins or that individual importer-specific assessment rates were affected by the application of zeroing procedures". Therefore, the Panel did not consider "that Japan must show that given importers had sales with negative margins" under the reviews at issue, "or the effect of zeroing on the importer-specific assessment rates determined in those Reviews".[8]

10. A showing of impact is also not necessary to prove a violation of Article 2.4 of the *Anti-Dumping Agreement*. Article 2.4 provides that, in the determination of dumping:

> A fair comparison shall be made between the export price and the normal value…

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[4] Brazil's FWS, paras. 77 – 85; and Brazil's Opening Statement, paras. 65 – 72. *See* also Exhibits BRA-31 (Ferrier Affidavit); BRA-28 (Issues and Decision Memorandum); BRA-29 and BRA-30 (computer program logs); and BRA-34 and BRA-35 (computer program outputs).

[5] Brazil's FWS, paras. 86 – 95; and Brazil's Opening Statement, paras. 73 – 79. *See* also Exhibits BRA-31 (Ferrier Affidavit); BRA-43 (Issues and Decision Memorandum); BRA-36 and BRA-38 (computer program logs); and BRA-37 and BRA-39 (computer program outputs).

[6] *See* also Brazil's Opening Statement, paras. 66 – 68 and 74; and Brazil's Answers, paras. 8 – 11 and 18 – 21.

[7] *See*, in particular, Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162.

[8] Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162. The United States did not appeal this aspect of the panel's findings, and the Appellate Body upheld the panel's finding that the application of zeroing in these reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement*, as well as Article 2.4 of the same agreement and Article VI:2 of the GATT 1994. Appellate Body Report, *US – Zeroing (Japan) (21.5)*, paras. 195 and 197.

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11. The focus of Article 2.4 is firmly on the *comparison* between export price and normal value, which must be "fair". In *Egypt – Rebar*, for example, the panel held that the "fair comparison" requirement concerns "the *nature of the comparison* of export price and normal value".[9] In reaching this interpretation, the panel observed that the first sentence of Article 2.4 explicitly focuses on the "the *fairness* of the *comparison*"; the second sentence elaborates on considerations pertaining to the "*comparison*"; the third, fourth and fifth sentence address issues relating to "price *comparability*"; and the final sentence concerns information necessary to make a "fair *comparison*".[10] The panel also considered that the surrounding context in Articles 2.4.1 and 2.4.2 confirmed that Article 2.4 imposes obligations on the nature of the "comparison" itself.[11]

12. Accordingly, in assessing a claim under Article 2.4, a panel must assess "the *nature of the comparison*" made between export price and normal value to determine whether it was "fair". Because the obligation in Article 2.4 to provide a fair comparison concerns "the nature of the comparison" that is made by an anti-dumping authority, it applies independently of the amount of anti-dumping duties that are collected by an importing Member.

13. In terms of ordinary meaning, "[t]he term 'fair" [in Article 2.4] is generally understood to connote impartiality, even-handedness, or lack of bias".[12] The Appellate Body has held that there "is an inherent bias in a zeroing methodology".[13] Focusing on "the nature of the comparison", the Appellate Body has also said that, as a "*way of calculating*" margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased", because the comparison necessarily excludes any negative results.[14] A panel and the Appellate Body have, therefore, ruled that the maintenance and application of zeroing procedures in administrative reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[15]

14. In this dispute, by including zeroing in its methodology for determining margins of dumping in the administrative reviews at issue, the United States failed to conduct a "fair comparison". The United States has not contested Brazil's evidence that the USDOC did not "take fully into account the prices of all comparable export transactions"[16] for both companies in both the First and the Second Administrative Reviews. To recall, by using zeroing in the comparison, the USDOC excluded the vast majority of both companies' export transactions, in number, volume and value.[17] The *nature of the comparison* was, therefore, distorted and unfair, because it favored, very heavily, a positive dumping determination.

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[9] Panel Report, *Egypt – Rebar*, paras. 7.333 – 7.335 (emphasis added). *See also* Panel Report, *Argentina – Poultry*, para. 7.265; and Panel Report, *EC – Pipe Fittings*, para. 7.140.

[10] Panel Report, *Egypt – Rebar*, para. 7.333 (original emphasis).

[11] Panel Report, *Egypt – Rebar*, para. 7.334.

[12] Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 138.

[13] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[14] Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 142.

[15] Panel Report, *US – Zeroing (Japan)(21.5)*, paras. 7.168 and 8.1(b); Appellate Body Report, *US – Zeroing (Japan)(21.5)*, paras. 195, 197 and 213(c); and Appellate Body Report, *US – Zeroing (Japan)*, paras. 169, 176, 190(d) and 190(e).

[16] Appellate Body Report, *EC – Bed Linen*, para. 55.

[17] *See* Exhibits BRA-34, BRA-35, BRA-37 and BRA-39, respective last page, "Percentage of value with AD margins" and "Percentage of quantity with AD margins".

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B. AS A MATTER OF FACT, THE USE OF ZEROING HAD AN IMPACT FOR BOTH COMPANIES IN BOTH THE FIRST AND SECOND ADMINISTRATIVE REVIEWS

15. Even assuming, *arguendo*, that the United States were right in arguing that a showing of impact is necessary to establish a violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994 (*quod non*), the United States' use of zeroing had an impact for both Cutrale and Fischer in the First and Second Administrative Reviews.

16. Brazil notes, first, that as regards Fischer in the First Administrative Review, and Cutrale in the Second Administrative Review, the United States has contested neither the use nor the impact of zeroing. Thus, the disagreement on the facts between Brazil and the United States concerns only Cutrale in the First, and Fischer in the Second Administrative Review.

17. Contrary to the US arguments, zeroing had an impact for Cutrale, too, in the First Administrative Review. *First*, through the use of zeroing, the United States established a positive margin of dumping for Cutrale.[18] Had the United States complied with its WTO obligations, this margin would have been zero. *Second*, through the use of zeroing, the United States established an ISAR for Cutrale which was positive and above the *de minimis* threshold in US law.[19] The United States, therefore, also collected anti-dumping duties on the relevant entries from Cutrale, on the basis of an ISAR determined using zeroing.

18. Finally, also contrary to the US argument, zeroing had an impact for Fischer in the Second Administrative Review. The dumping margin established for Fischer in this review, albeit very small, was a positive one, whereas it would have been zero had the United States not disregarded the overwhelming majority of export transactions.[20]

IV. THE UNITED STATES' CONTINUED USE OF ZEROING VIOLATES ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994

19. In addition to challenging zeroing "as applied" in the First and Second Administrative Reviews, Brazil claims that the continued use of zeroing in a string of determinations under the Orange Juice Order violates Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994. Brazil's earlier arguments can be found in previous written and oral submissions.[21] Also, with regard to Article 2.4 of the *Anti-Dumping Agreement*, Brazil has developed interpretive arguments in this Submission and in its Opening Statement, and has explained why the use of zeroing violates that provision.[22] Those arguments are made also in respect of the United States' continued use of zeroing under the Orange Juice Order.

20. Here, Brazil focuses on U.S. arguments asserting that the evidence does not show the continued use of zeroing under the Orange Juice Order. The United States argues, in particular, that the series of determinations under the Orange Juice Order is not sufficiently long to establish the continued use of zeroing under this Order, and in support of this position, also repeats its arguments that Brazil must show the impact, not the use, of zeroing.

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[18] Exhibit BRA-21, p. 46585, "Percent margin". This plainly contradicts the US Opening Statement, para. 35.

[19] Exhibit BRA-34, penultimate page, "Percent ad valorem assessment".

[20] Exhibit BRA-39, right-most column, "Wt avg percent margin". This too contradicts the US Opening Statement, para. 35.

[21] *See* Brazil's FWS, paras. 98 – 117; Brazil's Opening Statement, paras. 80 – 96; and Brazil's Answers, paras. 3 – 6 and 9 – 20.

[22] *See* paras. 10 - 14 above; and Brazil's Opening Statement, paras. 67 – 72 and 74 – 79.

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21. Brazil disagrees. In *US – Continued Zeroing*, the Appellate Body held that the continued use of zeroing is established if there is a sufficient "*density*" of evidence, that is *not* "*fragmented*" over time, showing that zeroing has been used in a string of successive proceedings under the same order.[23]

22. Under the Orange Juice Order, the USDOC has used zeroing at *every available opportunity* under the Orange Juice Order in proceedings extending over five years from the original investigation, initiated in February 2005, through the First and Second Administrative Reviews, to the preliminary determination in the Third Administrative Review in April 2010 and the final determination in this review in August 2010. Therefore, the evidence of the continued use of zeroing under the Orange Juice Order is perfectly consistent over an extended time, with no "fragmentation".

1. Zeroing was used in the original investigation

23. With respect to the original investigation, the United States contends that zeroing was not used, because there were no negative comparison results. It contends that the "lack of any negative comparison results means that "zeroing" had no impact on the dumping margin calculation".[24] In reply, Brazil has noted that the United States misunderstands the nature of the conduct, and hence measure, at issue, which is the continued *use*, and not impact, of zeroing[25]; in the Appellate Body's words, the measure at issue is "the *use* of the zeroing methodology as an ongoing conduct".[26]

24. The United States unsuccessfully raised a similar objection in *US – Continued Zeroing*. In that case, it argued that the continued use of zeroing under specific orders could not violate the *Anti-Dumping Agreement* because, in a given determination, there may be no negative comparison results. The Appellate Body disagreed. It said:

> ... even if zeroing may not manifest itself as a result of the particular factual circumstances of a case in which all export prices are below the normal value, this does not negate the fact that the repeated action by the USDOC in a string of determinations relating to these four cases confirms the use of the zeroing methodology as an ongoing conduct.[27]

Thus, irrespective of the impact of zeroing in a given determination, the continued use of zeroing is WTO-inconsistent.

2. Zeroing was used in the First and Second Administrative Reviews

25. With respect to the First and Second Administrative Reviews, the United States contends that zeroing did not have an impact for Cutrale in the First Administrative Review, and for Fischer in the Second Administrative Review. Again, for the reasons just elaborated, this argument misapprehends the nature of the measure at issue, which is the continued use of zeroing. The US arguments do not, therefore, show any "fragmentation" in the USDOC's decision to use zeroing as part of its margin calculation methodology. Indeed, in both reviews, the USDOC stated expressly in the respective Issues & Decisions Memoranda that it had decided to continue using zeroing despite objections from Brazil's exporters.[28]

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[23] Appellate Body Report, *US – Continued Zeroing*, paras. 191 and 194. *See* also, *ibid*., paras. 193 and 195.

[24] US FWS, paras. 128 – 129.

[25] Brazil's Opening Statement, paras. 91 – 93.

[26] Appellate Body Report, *US – Continued Zeroing*, para. 193 (emphasis added). *See* also Brazil's Answers, paras. 3 – 6 and 9 – 11.

[27] Appellate Body Report, *US – Continued Zeroing*, para. 193.

[28] Exhibits BRA-28, pp. 5 – 6; and BRA-43, pp. 4 – 6.

26. Also, for the reasons already given[29], the United States is incorrect in asserting that zeroing had no impact on the dumping determinations made for Cutrale in the First Administrative Review, and for Fischer in the Second Administrative Review.

3. Zeroing was used in the Third Administrative Review

27. Since the Panel's first substantive meeting with the parties, the United States has seized yet another opportunity to use zeroing under the Order, in the Third Administrative Review, with predictable results. Although this determination is not itself challenged as a measure at issue in these proceedings, it serves as further evidence to show the continued use of zeroing under the Orange Juice Order.[30]

28. In April of 2009, the USDOC initiated the Third Administrative Review under the Orange Juice Order. On 13 April 2010, the USDOC published its preliminary results in this review, as set out in Brazil's First Written Submission.[31] On 18 August 2010, the USDOC published its final results in this review.[32] In this review, the USDOC again used zeroing. As before, it dismissed the exporters' pleas that it stop using zeroing, and stated, again, that WTO dispute settlement reports do not trump the exercise of the USDOC's discretion under US law.[33]

29. The USDOC's computer logs and outputs, for both Cutrale and Fischer, confirm that the USDOC used zeroing in the Third Administrative Review to determine the margins of dumping, the CDRs, and the ISARs, excluding all negative comparison results, as explained in Mr. Ferrier's second affidavit.[34]

30. Furthermore, in the Issues and Decision Memorandum in the Third Administrative Review, the United States stated expressly that its zeroing policy in reviews remains unchanged despite WTO rulings.[35]

31. Thus, in the midst of these Panel proceedings, which are inquiring into the USDOC's continued use of zeroing under the Orange Juice Order, the United States has expressly confirmed that the use of zeroing continues to be part of the USDOC's calculation methodology for this Order. In these circumstances, the United States' arguments that the evidence before the Panel does not prove the continued use of zeroing ring hollow. Its actions outside these proceedings contradict its words in these proceedings.

32. Indeed, the United States' actions in using zeroing in the Third Administrative Review show precisely why Brazil challenges the continued use of zeroing. Brazil wishes to tackle the root of the problem under the Orange Juice Order, namely the United States' continued use of zeroing. It wishes to do so independent of the application of zeroing in individual determinations because, if Brazil's challenge were confined to such determinations, the challenged measures would be outdated before the Panel proceedings have even ended, with the dispute being prolonged by new measures that are not subject to the Panel's findings.

33. By challenging the continued use measure, Brazil seeks a ruling on a single measure involving the specific ongoing conduct that is the source of the dispute, namely, the continued use of

[29] *See* paras. 17 - 18 and 14 above.
[30] *See* Brazil's Opening Statement, para. 95.
[31] Brazil's FWS, para. 48, 98, 103, footnote 53 and Exhibits BRA-23, BRA-24 and BRA-25. *See* also Brazil's Opening Statement, paras. 88 and 95.
[32] Exhibit BRA-49.
[33] Exhibit BRA-50, pp. 4 – 6. .
[34] Exhibit BRA-51. Brazil's SWS, pp. 13 – 15.
[35] Exhibit BRA-50, pp. 4 – 6.

zeroing under the Order. This measure is manifested by, and evidenced in, the string of individual determinations; yet its existence transcends those measures, and must be subject to a specific recommendation by the Dispute Settlement Body to ensure that the ongoing conduct ceases.

34. In sum, the United States has used zeroing with perfect consistency in every proceeding under the Orange Juice Order. Moreover, in rejecting exporters' requests for it to cease using zeroing, it has repeatedly affirmed its intent to persist in this conduct. The record before the Panel, therefore, shows that the continued use of zeroing as an ongoing conduct under the Orange Juice Order exists. For reasons that Brazil has stated elsewhere[36], the continued use of zeroing is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, and the Panel should find accordingly.

[36] *See* Brazil's FWS, paras. 98 – 117; Brazil's Opening Statement, paras. 80 – 96; and Brazil's Answers, paras. 7 – 20.

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ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. ARTICLE 2.4 DOES NOT IMPOSE OBLIGATIONS WITH RESPECT TO ZEROING

1. The obligation to make a "fair comparison" under Article 2.4 does not create an obligation to provide for offsets. Article 2.4 addresses only the required adjustments that must be made to export price and normal value in order to account for "differences which affect price comparability".

2. First, from the text of Article 2.4, it is clear that Article 2.4 establishes an obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences that affect price comparability. As 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".

3. A number of other Appellate Body and panel reports that have considered the question of price comparability have interpreted Article 2.4 to address pre-comparison price adjustments that affect the comparability of prices between markets. For example, as the Appellate Body stated in *US – Hot-Rolled Steel*, "an examination of whether USDOC acted consistently with Article 2.4 of the *Anti-Dumping Agreement* must focus on ... whether there were 'differences', relevant under Article 2.4, which affected the comparability of export price and normal value". Thus, Brazil's proposed interpretation of Article 2.4 to encompass the *results* of comparisons between export price and normal value is erroneous. In short, there is no obligation in Article 2.4 to offset any negative differences between normal value and export price.

4. Second, the United States urges the Panel to reject Brazil's invitation to convert "fair comparison" into a broad-ranging mandate to determine whether any and all dumping calculations are "fair" or "unfair". As the panel report in *EC – Cotton Yarn*, which was adopted by the Tokyo Round Antidumping Committee, stated regarding the corresponding provision of the Tokyo Round Code: "The Panel was of the view that although the object and purpose of Article 2.6 is to effect a fair comparison, the wording of Article 2.6 '[i]n order to *effect* a fair comparison' made clear that if the requirements of that Article were met, any comparison thus undertaken was deemed to be 'fair'". The *EC – Cotton Yarn* panel rejected Brazil's argument that the term "fair comparison" in Article 2.6 of the Tokyo Round Antidumping Code provided a basis to strike down the EC's zeroing practices. The panel interpreted Article 2.6 as relating solely to the "actual comparison of prices at the same level of trade and in respect of sales made as nearly as possible at the same time".

5. The term "fair comparison" originated in the 1967 Kennedy Round Antidumping Code. Article 2(f) specified that: "In order to effect a fair comparison between the export price and the domestic price in the exporting country ... the two prices shall be compared at the same level of trade, normally at the ex factory level, and in respect of sales made as nearly as possible at the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for other differences affecting price comparability". This language was incorporated practically verbatim into Article 2.6 of the Tokyo Round Antidumping

Code. The Uruguay Round AD Agreement adopted the original Kennedy and Tokyo Round language with minor modifications in Article 2.4.

6. Third, Brazil's claim of inconsistency with Article 2.4 does not rely on the text of Article 2.4. Instead it relies upon isolated statements from the Appellate Body reports in *US – Softwood Lumber (Article 21.5)*, *US – Corrosion-Resistant Steel Sunset Review*, and *US – Zeroing (Japan)*.

7. While the Appellate Body in *US – Zeroing (Japan)* found that the use of "zeroing" in assessment proceedings was inconsistent with Article 2.4, those findings flowed from its finding that the amount of the antidumping duty exceeded the margin of dumping under Article 9.3. Contrary to Brazil's argument, the Appellate Body stated that "[*i*]*f* antidumping *duties are assessed* on the basis of a methodology involving comparisons between the export price and the normal value *in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping* of the exporter or foreign producer, then this methodology cannot be viewed as involving a 'fair comparison' within the meaning of the first sentence of Article 2.4". But in the second administrative review with respect to orange juice (aside from the fact that, as explained in our first written submission, it is outside of the Panel's terms of reference), for example, Commerce determined that the weighted-average dumping margin for Fischer was zero and assessed no antidumping duties on Fischer's entries of orange juice. Under these facts, even under the Appellate Body's rationale relied upon by Brazil, there can be no inconsistency with either Article 9.3 or 2.4 of the AD Agreement.

8. In *US – Softwood Lumber (Article 21.5)*, the Appellate Body stated that "the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination more likely". The Appellate Body limited this statement to margins in investigations that violated Article 2.4.2 of the AD Agreement, while accepting the panel's conclusion that higher margins are "fair" as long as they are otherwise WTO consistent. Article 2.4.2 does not apply in the context of the assessment proceedings. Additionally, where, as here, the United States determined either zero or *de minimis* dumping margins for Cutrale and Fisher in the first and second administrative reviews, respectively, these margins cannot be characterized as "artificially inflate[d]" or "inherently unfair" even under the Appellate Body's rationale.

9. The Appellate Body's report in *US – Corrosion Resistant Steel Sunset Review*, concerned a sunset review, which is not at issue in this dispute. The Appellate Body declined to find an inconsistency with Article 2.4 of the AD Agreement, a salient fact that Brazil neglects to mention.

10. Moreover, any allegation of bias is based upon the assumption that a methodology "artificially" inflates the magnitude of dumping. It may be that a methodology always produces higher margins of dumping, and that exporters or foreign producers may consider that to be biased and "unfair". However, it is then equally true that prohibiting the methodology always produces lower margins of dumping, and the domestic industry – an industry that must have been found to be injured by dumping before the measure is imposed – may consider that to be biased and "unfair". Higher or lower margins are not inherently fair or unfair.

11. As the panel in *US – Zeroing (Japan)* noted, the "precise meaning of" the fair comparison requirement "must be understood in light of the nature of the activity at issue". The panel concluded that "the 'fair comparison' requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context". Other panels have reached the same conclusion. In *US – Softwood Lumber Dumping (Article 21.5)*, the panel cautioned against the overly liberal use of the "fair comparison" language of Article 2.4: "the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison

methodology A unfair if comparison methodology B were the applicable standard. If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case". In *US – Zeroing (EC)*, the panel similarly stated: "[C]aution ... is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the *AD Agreement*".

12. Absent any principled basis for resolving such disputes, the Appellate Body and the panels would be required to apply a vague, subjective, and ill-defined legal standard to factual situations where "fairness" turns on the eye of the beholder. The Panel should reject an expansive interpretation of a "fair comparison" requirement that leads to a flood of antidumping disputes that are virtually impossible to resolve in any credible way.

II. THE TEXT OF ARTICLE VI:1 AND ARTICLE VI:2 OF THE GATT AND ARTICLE 2 OF THE AD AGREEMENT DO NOT PRECLUDE UNDERSTANDING OF THE TERMS "DUMPING" AND "MARGIN OF DUMPING" IN RELATION TO INDIVIDUAL TRANSACTIONS

13. The term "product as a whole" is not found anywhere in the AD Agreement and the GATT 1994, and Brazil's so-called "textual" argument is devoid of any textual analysis of the relevant provisions.

14. First, the precise meaning of the terms "dumping" and "margin of dumping" may be informed by the context in which the term is used. These terms appear in many different provisions of the covered agreements, and, in each case, must be interpreted in light of the text, context, and of the object and purpose, of the provision at issue. The terms "dumping" and "margin of dumping" are defined in relation to the term "product". The ordinary meaning of "product" may refer to a single transaction or multiple transactions. The fundamental problem with Brazil's interpretation is that it effectively denies the fact that the terms "dumping" and "margin of dumping" may apply in different contexts and the context matters.

15. Dumping is defined as occurring in the course of ordinary commercial transactions, where products are "introduced into the commerce" of the importing country transaction by transaction, not "as a whole". The drafters of the AD Agreement and the GATT 1994 wrote a *definition* of dumping and put into the *definition* the essential meaning of this fundamental, foundational concept. It defies logic to then redefine the terms "dumping" and "margin of dumping" by finding new additional components of its meaning hidden in other provisions of the AD Agreement that do not purport to define those terms.

16. Article 2.1 defines "dumping" in relation to the terms "export price" and "normal value". These fundamental concepts have flexible meaning because "normal value" and "export price" could relate to either an individual transaction or multiple transactions depending upon the context. Because the term "dumping" is defined in relation to the terms "normal value" and "export price," it would be illogical to conclude that the derivative term "dumping" may not have a similarly flexible definition.

17. Second, the United States agrees with Brazil that the AD Agreement establishes multilateral disciplines. However, contrary to what Brazil suggests, it does not follow that the terms "dumping" and "margin of dumping" must be construed only in terms of the "product as a whole". To the contrary, the fact that the Agreement expressly allows Members to maintain different systems for the assessment of antidumping duties and that Members assess duties differently demonstrates that the multilateral character of the Agreement does not mandate the definition Brazil seeks to impose.

18. Brazil also appears to suggest that there must always be the same result in determining "dumping" for the same set of export transactions, prices, products, and exporters regardless of the

context. Brazil's interpretation is contrary to the text of the AD Agreement, which expressly recognizes different assessment systems and different ways to make comparisons between the normal value and export price. If the AD Agreement provides for different comparison methodologies that could result in different amounts of dumping for the same set of transactions, there is no reason to assume that calculations must always result in a single invariable number in different contexts – such as assessment proceedings and investigations – particularly when a Member uses different comparison methodologies in these two contexts.

19. Third, Brazil conflates distinct proceedings – investigations and assessment proceedings – which are subject to different requirements and serve different functions. While investigations are conducted to determine the existence and degree of dumping pursuant to Article 5.1 and the existence of material injury, assessment proceedings are conducted to determine the final liability for payment of antidumping duties or whether a refund of excess antidumping duties is owed pursuant to Article 9.3. Prior panels found that this contextual difference is significant. In *US – Zeroing (EC)*, for example, the panel explained: "In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5".

III. BRAZIL'S CONTEXTUAL ARGUMENTS UNDER ARTICLES 3, 5.8, 6.10, 8.1, 9.1, 9.3 AND 9.5 ARE MISPLACED

20. Article 5.8 of the AD Agreement: Brazil argues that in the context of Article 5.8 the margin of dumping must refer to an aggregation of multiple transactions. The fundamental flaw of Brazil's contextual argument is that Brazil seeks to apply that understanding entirely removed from the context of Article 5. Article 9.3 assessment proceedings provide a very different context from Article 5 investigations. Article 2.4.2 sets forth the rules that govern the determination of the "existence" of margins of dumping for purposes of Article 5 investigations. The text of Article 2.4.2 expressly limits itself to an Article 5 investigation in two different ways. First, it expressly provides that it applies only in the "investigation phase." Second, it provides that its purpose is to establish the "existence" of dumping. There is only one investigation phase that requires a determination of the "existence" of dumping: the Article 5 investigation that follows the initiation of an anti-dumping investigation.

21. The Appellate Body and panels have found that the application of Article 2.4.2 is limited to Article 5 investigations. The Appellate Body in *EC – Bed Linen* found that there is no connection between Article 9.3 and Article 2.4.2. The panel in *Argentina – Poultry* found that "[i]f the drafters of the *AD Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that 'the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2'. This is not what Article 9.3 says".

22. Article 6.10 of the AD Agreement: Article 6.10 ensures that each exporter or producer is assigned an antidumping duty based on its own pricing behavior, and not that of other exporters or producers, unless it is impracticable. This provision does not address whether the "margin of dumping" only has meaning in relation to the "product as a whole" (a term nowhere found in the text of the AD Agreement) or individual transactions. This fact has been recognized by prior panels that examined this issue. In *US – Zeroing (Japan)*, for example, the panel explained that Article 6.10 does not mandate any particular methodologies for calculating the margin of dumping.

23. Further, if Article 6.10 is read in the manner suggested by Brazil, then prospective normal value systems cannot function in the manner that Members currently administering such systems are operating. The effect of the Appellate Body's and Brazil's reading of Article 6.10 would be to compel a Member using a prospective normal value system to calculate a margin based on all of the

transactions for some particular period of time, rather than calculating a margin based on a particular transaction.

24. Brazil Overstates the Significance of the Use of the Singular in the Term "Margin of Dumping": With respect to Articles 6.10, 8.1, 9.1, 9.3, and 9.5, Brazil's interpretation relies on the use of the term "margin of dumping" in the singular. However, by Brazil's own admission,"the use of the singular is not decisive ...". A term that is used in the AD Agreement in the singular form may have "both singular and plural meanings".

25. Brazil Misinterprets Article VII:3 of the GATT 1994: Brazil argues that the United States is wrong to assume that the same word, "product", must be given the same meaning in two proximate treaty provisions, namely Article VI:1 and Article VIII:3 of the GATT 1994. Brazil misstates the US argument. The United States argues that the term "product" may have either collective meaning or an individual meaning, depending upon the context. This term, used in a wide variety of contexts throughout the provisions of the GATT 1994 and the AD Agreement, incorporates a flexibility of meaning that derives from the fact that the term "product" ordinarily has a meaning that is either collective or transaction-specific.

26. Brazil attempts to draw contextual distinctions between Article VII:3 of the GATT 1994 and Article 9.3 of the AD Agreement. In describing the context of Article VII:3, for example, Brazil argues that "the customs authorities *assess* the value of particular goods that are listed in an import entry of an individual import transaction and, based on that valuation, impose duties on that specific entry". However, Article 9.3 of the AD Agreement also governs the *assessment* of the amount of the antidumping duty, and the antidumping duties are assessed on individual entries resulting from individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping is similarly applicable at the level of individual transactions. In *US – Stainless Steel (Mexico)*, the panel properly recognized the transaction-specific character of Article 9.3 assessment proceedings: "We note that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability".

27. Brazil Misinterprets AD Article VI:1 of the GATT 1994: Brazil asserts that Ad Article VI:1 does not provide a definition of "dumping" or "margin of dumping" and does not state that margins may be transaction specific. However, contrary to Brazil's assertions, Ad Article VI:1 defines a particular form of dumping – "hidden dumping" – in relation to individual transactions. The use of the term "price invoiced" is particularly significant, because an invoice is normally issued with respect to an individual transaction, and not with respect to *all* transactions covered by the period of review. Thus, the text of Ad Article VI:1 provides that the "margin of dumping" may be calculated on the basis of a specific sale by a particular importer rather than on the basis of the "product as a whole".

28. Brazil Misinterprets Article 2.2 of the AD Agreement: Brazil disagrees that the term "margin of dumping" as used in Article 2.2 of the AD Agreement would require the use of constructed value for the "product as a whole", even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. Brazil argues that the Appellate Body stated that an authority may subdivide the "product as a whole" in conducting "intermediate comparisons" on a model-specific basis and, thus, may assess whether the conditions in Article 2.2 are met on a model-specific basis, and subsequently aggregate all intermediate comparisons to determining dumping for the product as a whole.

29. This interpretation is incorrect. Under Article 2.2, a Member may calculate normal value based on constructed value. Many Members do so on a model- or transaction-specific basis. That is, if the home market sales of a particular model were not in the ordinary course of trade, the importing Member might resort to using a constructed normal value as a basis for normal value for that

particular model; however, normal value for other models might still be based on home market sales. If, however, the "margin of dumping" must refer, regardless of context, to the "product as a whole", then, when the conditions of Article 2.2 have been met, an investigating authority would be required to use constructed value for the "product as a whole", not just for specific models or transactions of the product. This would be inconsistent with the principle that constructed normal value is to be used only in limited circumstances. The panel in *US – Softwood Lumber Dumping (21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2".

30. Brazil's Interpretation Cannot Be Reconciled with the Effective Functioning of Antidumping Duties as a Remedy for Dumping: Brazil gives no answer to the fact that, if offsets must be provided, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports.

IV. BRAZIL'S PROPOSED OBLIGATION IS CONTRARY TO THE CONCEPT OF A PROSPECTIVE NORMAL VALUE SYSTEM PROVIDED FOR IN ARTICLE 9

31. Brazil's proposed obligation to provide offsets is contrary to the very concept of a prospective normal value system provided for in Article 9. The administration of such an assessment system cannot function as intended if the margin of dumping must relate exclusively to an aggregation of all transactions constituting the "product as a whole".

32. Brazil argues that the amount of duties in the prospective normal value system is subject to review under Article 9.3.2 to ensure that the total amount of duties does not exceed the margin of dumping for "the product as a whole". However, nothing in the text of Article 9 suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. The United States is not aware of a single prospective normal value system that conforms with Brazil's assertion that a refund mechanism must recalculate a margin of dumping based on an aggregation of all export transactions. The character of the prospective normal value system has led multiple panels that have examined this issue to conclude that final liability for antidumping duties may be determined with respect to individual transactions rather than the "product as a whole". It is implausible to think that the negotiators would agree to provisions in the AD Agreement providing explicitly for a prospective normal value system while simultaneously, and without making any textual provision whatsoever, requiring that such systems conduct retrospective assessment proceedings that aggregate all the transactions occurring over some unspecified period of time.

33. Another characteristic of the AD Agreement that supports the transaction-specific nature of the term "margin of dumping" in certain contexts, and not the aggregation of all transactions constituting "product as a whole", is the use of the term "importer" in Article 9.3.2. When an exporter or producer makes sales of the product subject to the antidumping duty, it is common for such sales to be made to multiple importers. If Importer A decides to request a refund of duty paid in excess of margin of dumping under Article 9.3.2, it would be concerned with its purchases and not the purchases of Importers B and C (or the "product as a whole"). Further, Importer A would not likely have access to the information relating to purchases by its competitors, Importers B and C. Therefore, Importer A would not be able to provide the necessary evidence to duly support a request for a refund if it was requesting a review for all Importers (i.e., for the "product as a whole").

V. BRAZIL'S ARGUMENTS REGARDING MATHEMATICAL EQUIVALENCY ARE WRONG

34. The United States demonstrated in its first written submission that a general prohibition against the use of zeroing would reduce the second sentence of Article 2.4.2 to inutility because the

result of a comparison under the second sentence would yield the same result as a weighted average to weighted average comparison under the first sentence of that article. Brazil argues that the Appellate Body has noted that a comparison under the second sentence may yield different mathematical results from comparisons under other provisions if only a subset of data is analyzed, *i.e.*, using only those export transactions that make up the pricing pattern envisioned by Article 2.4.2. However, this argument is not supported by the text of Article 2.4.2.

35. The second sentence of Article 2.4.2 describes the situation in which an asymmetrical methodology may be used. It does not establish a set of circumstances under which a Member may select a subset of export transactions. If the drafters had intended for Members to limit its analysis to a subset of export transactions, then presumably Article 2.4.2 would have said so. Instead, the text provides for an asymmetrical comparison methodology, using the same universe of export transactions as the other two methodologies.

36. Brazil's interpretation of the second sentence of Article 2.4.2 essentially requires that the Panel read words into that sentence that do not appear there. Moreover, inferring those words in that provision would allow that provision to be applied in a manner that is similar to other provisions explicitly provided in the AD Agreement, but without any of the safeguards or limitations that the drafters found appropriate when explicitly permitting the kind of analysis contemplated by Brazil. Consequently, Brazil's interpretation would be inconsistent with both the specific text of the second sentence of Article 2.4.2 and with the broader context provided by the AD Agreement.

VI. THERE IS NO VIOLATION WHEN "ZEROING" HAS NO IMPACT

37. At the first substantive hearing, the United States explained that, even if Brazil were able to prove that a denial of offsets for non-dumped transactions was part of a particular dumping margin calculation, there could be no violation in the instances where there was no impact on the calculated dumping margin. Brazil argues that the "use" of zeroing is the violation, regardless of the impact. However, Brazil is wrong because when no duties are assessed, there can be no violation of any obligation not to assess duties in excess of the margin of dumping. Consequently, there can be no violation with respect to Fischer in the second administrative review (in which the dumping margin was zero).

38. It is worth noting in addition that, with respect to the perceived difference between the "use" and the "impact" of "zeroing", Brazil appears to suggest that all that matters for purposes of finding an inconsistency with the covered agreements is that the "zeroing" line appear in the relevant calculation program. However, the "zeroing" line does not operate where there are no non-dumped sales. In those circumstances – as in the orange juice investigation – the calculations and comparisons made are exactly those that would have been made even if the "zeroing" line were not there.

VII. BRAZIL'S CLAIMS WITH RESPECT TO "CONTINUED USE" FAIL

39. The United States explained in its first written submission and in its oral statements at the first meeting with the Panel why Brazil's "continued use" claim is not a measure that may be subject to dispute settlement. Brazil's response to the US request for preliminary rulings, and its statements at the first meeting with the Panel, demonstrate this point further. They underline that Brazil seeks to obtain adverse findings against specific measures that do not exist, based on evidence of past conduct that does not demonstrate a violation of any obligation.

40. It is worth noting in light of Brazil's comparison of its "continued use" measure to an "as such" measure that a challenge to an "as such" measure requires certain evidentiary showings that Brazil has not offered here. Instead, the challenge to this alleged "measure" ignores the fact that any "use" of "zeroing" can only occur in individual "as applied" measures and tries to include an indefinite

number of future individual measures that do not and may never exist. The Panel cannot analyze such measures, because there are no facts about them to analyze. In addition, presumably, if Brazil is challenging the "continued use" as a measure, such measure would cease to exist if at any point "zeroing" is not used in a particular individual determination – but Brazil's argument requires the Panel to assume that it will be used. Any recommendation with respect to a future measure would need to be conditioned on the use of zeroing, but there would be no mechanism to determine if zeroing were in fact used in any individual proceeding. In addition, under Article 4.2 of the Dispute Settlement Understanding ("DSU") a measure must be "affecting" the operation of a covered agreement, and a measure that does not exist cannot be "affecting" the operation of an agreement.

41. Brazil relies heavily upon the Appellate Body's findings in *US – Continued Zeroing (EC) (AB)* in support of its arguments that the "continued use" of "zeroing" is a measure that is subject to dispute settlement and WTO-inconsistent. Even aside from the fact that "continued use" is not properly within the Panel's terms of reference, the reasoning in that report does not support a similar finding in this case because this case is more similar to the cases in which the Appellate Body declined to find a "continued use" violation.

42. Contrary to Brazil's claim, the United States does not suggest that the Appellate Body created a specific standard for finding a "continued use" violation. But in light of Brazil's insistence that the findings in that dispute supported its claim, we noted that the Appellate Body found an inconsistency only in circumstances that included the use of the zeroing methodology in the initial less than fair value investigation, the use of the zeroing methodology in four successive administrative reviews, and reliance in a sunset review upon rates determined using the zeroing methodology. We further explained that the Appellate Body declined to find a violation in 14 other cases that had facts more similar to this case. Brazil claims that the reason the Appellate Body declined to find a violation in most of the cases before it was that the evidence of zeroing was "fragmented" in those cases. However, continuity was only one aspect of the Appellate Body's analysis. In taking a cautious approach, the Appellate Body found a violation only where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time". That is not the case here.

43. Brazil argues that, regardless of whether the zeroing methodology had any impact, its presence in the program is evidence of a violation. However, if the zeroing methodology has no impact, there can be no lesser dumping margin that could have been calculated and there could be no lesser duty assessed. It is not reasonable to find that a measure that is not itself WTO-inconsistent – for example, the original investigation in the orange juice case, in which Brazil's own evidence shows there were no non-dumped sales that could have been "zeroed" – can, nevertheless, be evidence of an ongoing and continuing violation. Even if Brazil's factual allegations were true and the zeroing line was present in each of the calculation programs at issue, Brazil has not shown the application of "zeroing" in "a string of determinations, made sequentially ... over an extended period of time". At most it would have shown that "zeroing" applied to one company in one proceeding that is within this Panel's terms of reference, covering a one year period, *i.e.*, Fischer in the first administrative review.

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ANNEX F

EXECUTIVE SUMMARIES OF THE PARTIES' STATEMENTS AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

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ANNEX F-1

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF BRAZIL

I. INTRODUCTION

1. Zeroing has now been condemned in eight dispute settlement cases. Unfortunately, the United States continues to resist the rulings in these cases, and repeats yet again arguments that have already been rejected by the Appellate Body. Brazil is therefore compelled to address again a large number of interpretive points that should, by now, be accepted by all WTO Members.[1]

II. DEFINITIONS OF THE CONCEPTS OF DUMPING AND MARGIN OF DUMPING

A. DUMPING IS DEFINED IN RELATION TO THE PRODUCT AS A WHOLE

2. Contrary to the United States' assertion, Brazil has explained in great detail[2] that the text of Article 2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") shows that "dumping" and "margin of dumping" are defined in relation to the "product" as a whole, and not in relation to individual export transactions. Dumping, therefore, involves an "exporter's pricing behavior as reflected in all of its transactions over a period of time".[3] Such dumping may cause injury to the domestic industry – not on a transaction-specific basis, but through the exporter's pricing behavior over time. Brazil has shown that its interpretation of the terms "dumping" and "margin of dumping" is confirmed by the context in Articles 2, 3, 5.8, 6.10, 8.1, 9.1, 9.3, and 9.5 of the *Anti-Dumping Agreement*.

3. Given the interconnectedness of all aspects of anti-dumping proceedings, with anti-dumping duties justified only "as long as and to the extent necessary to counteract dumping which is causing injury"[4], the Appellate Body's conclusion that the crucial notion of "dumping" should be defined uniformly throughout the *Agreement* – as Article 2.1 of the *Anti-Dumping Agreement* explicitly provides – is inescapable.

4. The United States disregards the very lucid, text-based, reasoning of the Appellate Body, and replaces it with an *à la carte* interpretation.[5]

B. THE UNITED STATES' ARGUMENTS ARE CONTRARY TO THE BASIC PRINCIPLES CONCERNING THE DETERMINATION OF DUMPING

5. The US argument that "dumping" and "margin of dumping" have different meanings in different proceedings, or even within the same type of proceedings, is unavailing.

6. The different proceedings at issue *all* concern a determination of the margin – or magnitude – of dumping, because anti-dumping duties involve a justified departure from Members' bound tariffs *only so long as and to the extent* necessary to counteract "dumping". The different procedural steps at

[1] *See* Appellate Body Report, *US – Continued Zeroing*, para. 312.
[2] *See* Brazil's First Opening Statement, paras. 12 – 37; Brazil's FWS, paras. 49 – 61.
[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.
[4] *Anti-Dumping Agreement*, Article 11.
[5] *See, e.g.*, Appellate Body Report, *US – Zeroing (Japan)*, paras. 108 – 115; and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 82 – 99.

which such magnitude is measured do not, therefore, justify a change in the definition of what is being measured, *i.e.*, dumping. At all stages, whether the *existence and extent* of the right to counter dumping is being determined in an original investigation; whether the *extent* of that right is being determined in an administrative review; or whether the *duration* of that right is being determined in a sunset review, a Member's right to take countermeasures is determined by reference to the same concept of "dumping". The *existence, extent, and duration*, of the right must be measured in the same way. The Appellate Body has made this point in no uncertain terms.[6]

7. The United States also argues that the existence of different systems for the assessment of duties justifies different interpretations of the concepts of "dumping" and "margin of dumping". At its core, the US argument is wrong because it confuses *duty collection* with the *determination of the margin of dumping*.[7] If the US argument were accepted, then a Member's administrative choices on how to *collect* duties would become the decisive consideration in how "dumping" is defined for each Member.

8. The United States adds that the multilateral character of the *Anti-Dumping Agreement* actually "*undermines*" the conclusion that "dumping" and "margin of dumping" have a single definition for purposes of the *Agreement*, because having multiple, open-ended meanings of terms is better suited to multilateral agreements, so as to "accommodate" the interpretation and practices of a large number of parties.[8]

9. The notion that the more parties there are to an agreement, the more the agreement's terms should be interpreted to accommodate all Members' practices, is absurd. This approach to treaty interpretation would unravel multilateral disciplines, replacing them with unilateralism based on the diverse practices of up to 153 Members.

10. The United States argues that the treaty interpreter should give meaning to "constructive ambiguity".[9] This confuses a negotiating tactic – *i.e.*, employing language that might seem to lend itself to a range of interpretations – with the task of treaty interpretation. Just because certain negotiators might resort to so-called "constructive ambiguity" as a negotiating tactic does not mean that the ordinary meaning of the ensuing agreement is incapable of being ascertained through the customary rules of treaty interpretation.

11. Indeed, this is the very purpose of treaty interpretation; namely, whatever the subjective views of this or that negotiator, the treaty interpreter must discern the common intent of the contracting parties as expressed through the words used.[10] Moreover, as Article 3.2 of the DSU sets forth, the purpose of dispute settlement is to resolve disputes regarding the existing covered agreements using the customary rules of treaty interpretation. The United States would deny this purpose.

12. As already explained, the text, context, and object and purpose of the *Agreement* define "dumping" uniformly "[f]or the purpose of [the] Agreement". The text of a treaty evidences the common intent and consent of the parties[11], leaving no grounds for arguing that the parties' subjective

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[6] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96: "'dumping' and 'margin of dumping' have the same meaning throughout the *Anti-Dumping Agreement*".

[7] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 120; Appellate Body Report, *US – Zeroing (Japan)*, paras. 162 – 163; Appellate Body Report, *US – Continued Zeroing*, paras. 293 – 294.

[8] US SWS, Section III:B and para. 28.

[9] US Answers, para. 34.

[10] *See* Appellate Body Report, *EC – Computer Equipment*, para. 84; and Appellate Body Report, *EC – Chicken Cuts*, para. 239.

[11] *See, e.g.*, Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, 2009, p. 36.

intent was different from that ascertained through an analysis of this text, in light of its context, and of the treaty's object and purpose.

C. THE UNITED STATES' CONTEXTUAL OBJECTIONS LACK MERIT

13. In support of its *à la carte* view of the *Anti-Dumping Agreement*, the United States reiterates several contextual arguments that have already been dismissed by the Appellate Body. Brazil is therefore compelled to address these arguments again, together with some further objections that the United States raises with regard to provisions that Brazil relies upon as context.

14. *Ad* Article VI:1 of the GATT 1994: The United States argues that *Ad* Article VI:1 defines a particular form of dumping in relation to individual transactions, and therefore proves that dumping can be transaction-specific. However, *Ad* Article VI:1 does not set out a definition of "dumping". It is Article 2.1 of the *Anti-Dumping Agreement* that does so, "[f]or the purpose of [the] Agreement".

15. Article VII:3 of the GATT 1994: As already noted, the United States refuses to acknowledge that certain provisions on anti-dumping may provide context for the interpretation of the terms "dumping" and "margin of dumping". At the same time, it argues that the term "product" should have the same meaning in Article VII:3, on customs valuation, and in the WTO provisions on anti-dumping. Yet customs valuation is concerned with the establishment of the customs value of a single transaction, with the aim of levying duties on that single transaction. Anti-dumping, on the other hand, is concerned with establishing the margin of dumping for a product as defined by the investigating authority[12], as a basis for levying duties on all subsequent entries of that product during a particular period. Thus, the US attempts to assimilate the meaning of "product" from the customs valuation context to the anti-dumping context are without basis.

16. Article 2.2 of the *Anti-Dumping Agreement*: The United States also repeats its argument that Article 2.2 supports a transaction-specific interpretation of "dumping". The US argument is without merit. The Appellate Body has clarified that the conditions in Article 2.2 for the construction of normal value may be met on a model-specific basis, and model-specific intermediate comparisons may be made under Article 2.4.2, *provided* that the results of all intermediate comparisons are aggregated to determine "dumping" on a product-wide basis to meet the definition in Article 2.1. It does not exempt Members from the obligation to determine dumping for the product as a whole.[13]

17. Mathematical equivalence under Article 2.4.2 of the *Anti-Dumping Agreement*: The United States argues that the mathematical implication of a "general prohibition on zeroing" is that the second sentence of Article 2.4.2 "would be reduced to inutility", and therefore, there can be no general prohibition on zeroing.[14] But an exception such as that set out in the second sentence of Article 2.4.2, which is, moreover, inapplicable to the facts at issue in this dispute, cannot govern the interpretation of the general rule regarding the determination of dumping.[15] Further, the US argument is premised on the US interpretation of the third methodology set out in the second sentence, whereas "there is considerable uncertainty regarding how precisely the third methodology should be applied".[16]

18. Article 5.8 of the *Anti-Dumping Agreement*: While the United Sates insists that the meaning of "dumping" in Article 5.8 is unrelated to the meaning of "dumping" in other provisions of the *Anti-*

[12] *See, e.g.*, Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 115.

[13] Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 82 and 97. *See* Brazil's First Opening Statement, para. 46; and Brazil's SWS, para. 5.

[14] US SWS, paras. 74 – 79.

[15] Brazil's First Opening Statement, paras. 52 – 58; Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 97; and Appellate Body Report, *US – Continued Zeroing*, para. 297.

[16] Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 98, *cited in* Brazil's Answers, para. 58.

Dumping Agreement, Brazil welcomes the United States' recognition that "in the context of an Article 5 investigation" the term "margin of dumping" "may refer to multiple transactions", by which it seems to mean "product as a whole".[17]

19. Article 6.10 of the *Anti-Dumping Agreement*: The United States' reliance on the Spanish language version of the text of Article 6.10 in support of its contention that Article 6.10 leaves open the possibility of establishing dumping in relation to individual transactions is based on a mistranslation of this language version ("a margin" in lieu of "the margin").[18] Brazil's interpretation gives meaning to the English, French and Spanish versions of Article 6.10.[19]

20. The Use of the Singular: According to the United States, Brazil overstates the significance of the term "margin of dumping" in the singular in Articles 6.10, 8.1, 9.1 and 9.3 of the *Anti-Dumping Agreement*. However, Brazil's interpretation is based on the text and context of the provisions relating to "dumping" and "margin of dumping", and on the object and purpose of the treaties in which these provisions are set out.[20] Brazil relies on the use of the singular as part of the textual choices made by negotiators. The US also refers to *US – OCTG from Mexico*. But in that case, the language at issue was the phrase "*any* anti-dumping duty", and the panel, upheld by Appellate Body, relied on the fact that "any" was different from "an", in that the former has both singular and plural meanings.[21]

21. Prospective Normal Value ("PNV") Systems: The United States repeats that "margin of dumping" must have a transaction-specific meaning because, in PNV systems, a margin of dumping is established for each import entry of the goods subject to measures. As explained by the Appellate Body, this argument is unfounded, because the United States is confusing the method for duty collection with the determination of the margin of dumping.[22] The United States argues that Brazil's interpretation transforms PNV systems into retrospective systems. This is not correct. Under PNV systems, duties on importation are still collected on the basis of a PNV. However, to ensure that the amount of duty collected is not excessive, the *Anti-Dumping Agreement* provides for a refund mechanism based on the product as a whole. The United States also argues that Brazil's view would discourage importers from requesting refund reviews under Article 9.3.2, because they could, as a result, "find out that [their] dumping liability increased".[23] This too is wrong. In a prospective duty assessment, based on the text, the outcome of a refund review is: (i) a refund; or (ii) no action. Even if the authority establishes that "the actual margin of dumping" was higher than that established prospectively, it may not, as a result, retrospectively increase the anti-dumping duty liability, because the treaty refers to a "refund" procedure. Finally, the United States relies on the practice of one Member operating a PNV system, arguing that it gives preference to transaction-specific refunds. Yet, the practice of one – or even some – Members does not establish the proper interpretation of a treaty counting 153 parties.[24]

III. ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT* IMPOSES AN OBLIGATION TO CONDUCT A FAIR COMPARISON, AND IS NOT LIMITED TO ISSUES OF PRICE COMPARABILITY

22. The United States argues that "Article 2.4 addresses only the required adjustments that must be made to export price and normal value in order to account for 'differences which affect price

[17] US SWS, para. 34.
[18] US SWS, para. 41.
[19] *See* Appellate Body Report, *US – Stainless Steel (Mexico)*, footnote 200.
[20] Brazil's FWS, paras. 49 – 69; and Brazil's First Opening Statement, paras. 6 – 34.
[21] Panel Report, *US – OCTG from Mexico*, para. 7.149; and Appellate Body Report, *US – OCTG from Mexico*, paras. 146 – 147.
[22] Brazil's First Opening Statement, paras. 47 – 49; and Brazil's SWS, para. 5.
[23] US SWS, para. 73.
[24] *See, e.g.*, Appellate Body Report, *EC – Chicken Cuts*, paras. 258 ff.

comparability'".[25] This arguments overlooks the text of Article 2.4, as well as the case law setting out the proper interpretation of this provision.

23. Article 2.4 consists of a series of distinct sentences, the first of which states succinctly: "A fair comparison shall be made between the export price and the normal value". Thus, the panel in *Egypt – Steel Rebar*, for example, held that the "fair comparison" requirement in Article 2.4 generally concerns "the *nature of the comparison* of export price and normal value"[26], with the first sentence explicitly focused on the "the *fairness* of the *comparison*". Only the third, fourth and fifth sentences of Article 2.4 address issues relating to "price comparability".[27]

24. The Appellate Body confirmed this understanding in *US – Zeroing (EC)*. It saw "nothing incorrect" in the reasoning of the panel in that case. The Appellate Body "also agree[d] with the Panel that the legal rule set out in the first sentence of Article 2.4 is expressed in terms of a general and abstract standard", noting that "[o]ne implication of this is that this requirement is also applicable to proceedings governed by Article 9.3".[28] Contrary to the US arguments, the Appellate Body has repeatedly held that the use of zeroing in administrative reviews is inconsistent with the fair comparison requirement of Article 2.4.[29]

25. The negotiating history of the *Anti-Dumping Agreement* confirms that Article 2.4 imposes an independent obligation to conduct a fair comparison between export price and normal value. This conclusion is compelled by the fact that the drafters of the *Anti-Dumping Agreement* explicitly modified the text of this provision – as compared to that of the prior Anti-Dumping Codes[30] – to separate the "fair comparison" requirement in the first sentence of Article 2.4 into a stand-alone obligation.

IV. THE USE OF ZEROING IS INCONSISTENT WITH ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994, REGARDLESS OF ITS IMPACT

26. Brazil has demonstrated that the USDOC *used* zeroing in the First and Second Administrative Reviews, and that it *continues to use* zeroing under the Orange Juice Order.[31] The United States has not contested that it used or continues to use zeroing in these instances; rather, it has argued that the use of zeroing had *no impact* on *one* of the exporters in the First Administrative Review (*i.e.*, Cutrale) and on *one* of the exporters in the Second Administrative Review (*i.e.*, Fischer). In all other situations, it has no defence. But even in the two limited situations it identifies, the *use* of zeroing is inconsistent with Articles 2.4 and 9.3, and Article VI:2 of the GATT 1994, *regardless of its impact*.

A. ARTICLE 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994

27. Article 9.3, which parallels Article VI:2, sets forth two requirements: (i) that a margin of dumping be established in accordance with Article 2 of the *Anti-Dumping Agreement*; and (ii) that the amount of the anti-dumping duty not exceed the margin so established.

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[25] US SWS, para. 4 and Section II.A.

[26] Panel Report, *Egypt – Steel Rebar*, paras. 7.333 – 7.335 (emphasis added). *See also* Panel Report, *Argentina – Poultry*, para. 7.265; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140.

[27] Panel Report, *Egypt – Steel Rebar*, para. 7.333 (original emphases).

[28] Appellate Body Report, *US – Zeroing (EC)*, para. 146.

[29] Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 138; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 190(c) and 190(e).

[30] Article 2(f) of the Kennedy Round Anti-Dumping Code and Article 2.6 of the Tokyo Round Anti-Dumping Code.

[31] *See* Brazil's FWS, paras. 62 – 97, 98 – 104, and 114 – 117; and Brazil's First Opening Statement, paras. 66 – 69 and 74 – 75.

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28. With respect to the first requirement, the obligation to comply with Article 2 in determining margins of dumping is *independent* of any other aspect of the anti-dumping proceeding or of the outcome of that proceeding in terms of duty collection. A failure to comply with Article 2 in determining the margin vitiates a determination made under Article 9.3, irrespective of the amount of duties that is ultimately collected.[32]

29. In *US – Zeroing (Japan) (21.5)*, the United States argued that Japan had not proven the impact of zeroing in the challenged administrative reviews, and that therefore Japan's challenge had to fail. The panel rejected the U.S. argument.[33] The United States did not appeal this aspect of the panel's findings, and the Appellate Body upheld the panel's finding that the application of zeroing in these reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement*, as well as Article 2.4, and Article VI:2 of the GATT 1994.[34]

30. Further, in *US – Continued Zeroing*, the United States argued that the EU's "continued use" claim failed because there was no evidence of the impact of zeroing in any specific determinations. In particular, the United States argued that there was no evidence that there would be negative comparison results that would be zeroed in each and every determination. The Appellate Body rejected this argument, finding that the continued use of zeroing under a specific anti-dumping order is inconsistent with, among others, Article 9.3 of the *Anti-Dumping Agreement* irrespective of the outcome of the calculation.[35]

B. ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

31. The United States' use of zeroing in the administrative reviews at issue is also inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, irrespective of its impact. As discussed earlier, the "fair comparison" requirement in the first sentence of Article 2.4 concerns "the *nature of the comparison* of export price and normal value"[36], and is focused on "the *fairness* of the *comparison*".[37] Because the obligation concerns "the nature of the comparison" that is made by an anti-dumping authority, it applies independently of the amount of anti-dumping duties that are collected by an importing Member.

32. In terms of ordinary meaning, "[t]he term 'fair" [in Article 2.4] is generally understood to connote impartiality, even-handedness, or lack of bias".[38] The Appellate Body has held that there "is an inherent bias in a zeroing methodology".[39] It has also said that, as a "*way of calculating*" margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased".[40] A panel and the Appellate Body have, therefore, ruled that *the maintenance and application* of zeroing procedures in administrative reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[41]

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[32] *See*, in particular, Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162. *See* also Mexico's Answers, paras. 21-23; the EU's Answers, para. 9; and Korea's Answers, para. 13.

[33] Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162.

[34] Appellate Body Report, *US – Zeroing (Japan) (21.5)*, paras. 195 and 197.

[35] Appellate Body Report, *US – Continued Zeroing*, para. 192.

[36] Panel Report, *Egypt – Steel Rebar*, paras. 7.333 – 7.335 (emphasis added). *See also* Panel Report, *Argentina – Poultry*, para. 7.265; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140.

[37] Panel Report, *Egypt – Steel Rebar*, para. 7.333 (original emphasis).

[38] Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 138.

[39] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[40] Appellate Body Report, *US – Zeroing (Japan)*, para. 146, *quoting* Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 142.

[41] Panel Report, *US – Zeroing (Japan)(21.5)*, paras. 7.168 and 8.1(b); Appellate Body Report, *US – Zeroing (Japan)(21.5)*, paras. 195, 197 and 213(c); and Appellate Body Report, *US – Zeroing (Japan)*, paras. 169, 176, 190(d) and 190(e).

33. Thus, irrespective of impact, the use of zeroing in making determinations for all of the companies in all of the measures at issue violates Article 2.4 of the *Anti-Dumping Agreement* because it involves an unfair comparison.

V. THE CONTINUED USE OF ZEROING IS INCONSISTENT WITH ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994

34. Brazil claims that the United States has violated Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, also through the continued use of zeroing under the Orange Juice Order.[42]

35. The United States maintains that Brazil's "continued use" claim is not a measure that may be subject to dispute settlement.[43] However, in *US – Continued Zeroing*, the Appellate Body found "no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement".[44] The US argument is also surprising because the United States is challenging a "continued use" measure in *EC – Large Civil Aircraft*, explicitly and extensively relying on the Appellate Body's reasoning in *US – Continued Zeroing*, which it is nonetheless encouraging this Panel to disregard.[45]

36. The United States also argues that Brazil has not made the evidentiary showings required for an "as such" challenge. However, as Brazil has explained[46], a challenge to the "continued use" of zeroing under the Orange Juice Order is narrower than a challenge to zeroing "as such" and, therefore, not subject to the identical evidentiary requirements.

37. Brazil has established that there is a sufficient "density of factual findings", that is not "fragmented" over time, showing that zeroing has been used in successive proceedings under the same order.[47] As Brazil has demonstrated, the USDOC used zeroing in the original investigation; in the First and Second Administrative Reviews; and in the Third Administrative Review. Indeed, with regard to the latter review, Brazil notes that while the United States stated before the Panel that it could not foretell whether it would continue to use zeroing under the Orange Juice Order, it then used zeroing shortly after the first meeting with the Panel, in the Third Administrative Review.[48] Thus, the United States has used zeroing with perfect consistency in *every* proceeding under the Orange Juice Order, including very recently.[49]

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[42] *See* Brazil's FWS, paras. 98 – 117; Brazil's First Opening Statement, paras. 80 – 96; and Brazil's Answers, paras. 7 – 20.

[43] *See* U.S. SWS, paras. 83 – 87.

[44] Appellate Body Report, *US – Continued Zeroing*, para. 181.

[45] US Other Appellant's Submission, *EC – Large Civil Aircraft*, 23 August 2010, paras. 53-58, available at http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/measures-affecting-t-0.

[46] *See* Brazil's Answers, paras. 3 – 6.

[47] *See* Brazil's SWS, paras. 29 – 30 and Appellate Body Report, *US – Continued Zeroing*, paras. 191 and 194.

[48] *See* Brazil's SWS, paras. 31 – 45.

[49] *See* Brazil's SWS, para. 42. It has also repeatedly affirmed its intent to persist in this conduct under the Orange Juice Order, despite WTO rulings. *See* IDM in the First Administrative Review, pp. 5 – 6; IDM in the Second Administrative Review, pp. 4 – 6; and IDM in the Third Administrative Review, pp. 4 – 6. Exhibits BRA-28, BRA-43 and BRA-50. On IDMs, s*ee* Appellate Body Report, *U.S. – Continued Zeroing*, footnote 767.

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ANNEX F-2

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF THE UNITED STATES

1. In our statement today, we would like to focus on rebutting arguments made by Brazil in its second written submission and in response to the Panel's questions. We hope that our oral statement will clarify our views as Brazil's opening statement did not present them accurately. We first will highlight that interpreting the terms "dumping" and "margin of dumping" to have meaning in relation to individual transactions is a permissible and perfectly coherent interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement"). Brazil's proposed interpretation, in contrast, has no textual basis. In addition, Brazil's interpretation is inconsistent with the very concept of a prospective normal value system, both as provided for in the text and as such systems are actually used. Indeed, as we show in the exhibits submitted with this oral statement, and contrary to Brazil's representations, Brazil's own use of prospective normal value is inconsistent with Brazil's insistence that the Antidumping Agreement prohibits a transaction-specific definition of dumping.

2. We will then respond to four other lines of argument in this dispute: First, with respect to mathematical equivalence, as we demonstrated empirically in our response to the Panel's questions, Brazil's proposed interpretation of the Antidumping Agreement would render the second sentence of Article 2.4.2 meaningless. Second, with respect to "fair comparison" under Article 2.4, Brazil's interpretation invites a subjective examination that is not based on the text. Third, Brazil's arguments regarding cash deposits are similarly not based on the text of the Antidumping Agreement, which plainly allows Members to collect a cash deposit as security for payment of antidumping duties. Finally, with respect to its assertion that the "use" of "zeroing" is inconsistent with the covered agreements regardless of whether any duties were collected or whether there even were any negative comparison results to "zero", Brazil's interpretation is completely inconsistent with the text. Brazil has failed to demonstrate any basis for finding an inconsistent "continued use" measure, even were such a measure within the Panel's terms of reference.

I. A TRANSACTION-SPECIFIC INTERPRETATION OF "DUMPING" AND "MARGIN OF DUMPING" IS PERMISSIBLE

3. The text and context of the covered agreements, interpreted in accordance with the customary rules of interpretation of public international law, make clear that the terms "dumping" and "margin of dumping" may have meaning for individual transactions. Brazil's interpretation, in contrast, is not consistent with either the text, or with how prospective normal value systems operate.

A. STANDARD OF REVIEW

4. As we have noted previously, in a dispute involving the Antidumping Agreement, the relevant standard of review includes that set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Agreement.

5. The question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the Antidumping Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority's action rests upon one such interpretation, a panel is to find the action consistent with the Agreement.

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6. The United States has argued – and multiple previous panels have agreed – that an interpretation of the Antidumping Agreement that does not require offsets is permissible. This interpretation is permissible because the text and context of the Antidumping Agreement, interpreted in accordance with customary rules of interpretation of public international law, make clear that the terms "dumping" and "margin of dumping" may have meaning for individual transactions. The mere fact that this interpretation differs from another interpretation is not a basis for finding it impermissible.

7. An interpretation of the provisions of the Antidumping Agreement and the GATT 1994 that not only is consistent with the text, but also reflects how business is conducted, how trade in goods occurs, and the point at which duties are imposed – that is, in individual transactions – is hardly, as Brazil alleges, "incoherent". Multiple previous panels, applying the customary rules of interpretation of international law, have confirmed that this interpretation is permissible.

8. The interpretation by previous panels does not allow a Member to define dumping any which way it wants. As noted earlier, there is a definition of "dumping" in Article 2.1 of the Antidumping Agreement. The question is whether this definition, "the difference between normal value and export price", can apply at the level of individual transactions or must be applied to "the product as a whole", a term that does not even appear in the text. Brazil argues that the term "dumping margin" must relate, solely and exclusively, to the "product as a whole" regardless of the text and context of the provision in which the term is used. The United States argues – and previous panels have confirmed – that "dumping margin" may be understood as relating to the "product" that is the subject of an individual transaction, in accordance with the ordinary meaning of the word "product", and permits the text and context of the relevant provisions to inform the appropriate interpretation of the term as it is used.

B. THERE IS NO TEXTUAL BASIS FOR THE OBLIGATION THAT BRAZIL PROPOSES

9. To require, as Brazil asserts, that a Member calculate a "margin of dumping" only for the "product as a whole" does not reflect a "harmonious" interpretation of the Antidumping Agreement. There is no textual basis for such an obligation in either the Antidumping Agreement or the GATT 1994. Not surprisingly, then, in arguing that an investigating authority must calculate a margin of dumping for the "product as a whole" in assessment proceedings, Brazil does not rely on the text of the GATT 1994 or the Antidumping Agreement.

10. To accept Brazil's argument would mean that the major users of dumping remedies, which were not granting offsets at the time the WTO Agreements were negotiated, agreed to an obligation to provide offsets without including an express provision for such an obligation in the Antidumping Agreement and the GATT 1994. In fact, there were negotiating proposals to restrict "zeroing", but these proposals were not adopted. The major users of dumping remedies continued to use "zeroing" after the agreements came into effect. If the negotiators of the Uruguay Round agreements intended to make such a fundamental change in the meaning of "margin of dumping" as to require offsets, they would have been clear about it. As we noted in our first written submission, in settling disputes among Members, panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

11. A panel should not build an interpretation on terms that do not appear in the covered agreements, such as "product as a whole". Prior panels have found that there is no textual basis in the Antidumping Agreement for the obligation that Brazil proposes today. All these panels made an objective assessment of the matter before them and came to the same conclusion that no offsets are required in assessment proceedings. We respectfully request that this Panel reach the same conclusion in this proceeding.

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C. BRAZIL'S ARGUMENTS ARE INCONSISTENT WITH BOTH THE CONCEPT OF, AND ITS OWN APPLICATION OF, A PROSPECTIVE NORMAL VALUE SYSTEM

12. The United States has demonstrated that the obligation that Brazil seeks to impose on Members is contrary to the very concept of a prospective normal value system provided for in Article 9 of the Antidumping Agreement. Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of an individual export transaction with a prospective normal value and the prices of other transactions have no relevance to this determination. As the panel in *US – Zeroing (Japan)* found, "there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance".

13. The United States has provided evidence that demonstrates how prospective normal value systems operate and that the refund mechanism under a prospective normal value system normally addresses specific individual transactions. In contrast, there is no evidence to support the assertions that a refund mechanism must recalculate a margin of dumping based on an aggregation of all comparisons. Indeed, Brazil acknowledged that it has never granted a single refund when collecting antidumping duties on the basis of a prospective normal value.

14. Brazil nonetheless argues that an obligation to calculate the margin of dumping with respect to "product as a whole" is consistent with prospective normal value systems. In its answers to the Panel's Questions, Brazil asserts that when it has applied prospective normal value, "the collection of the duty was limited to a dumping margin determined in accordance with Article 2 of the *Anti-Dumping Agreement*". A review of the facts, however, raises questions about how this assessment comports with Brazil's proposed interpretation of the Antidumping Agreement.

15. Brazil has used prospective normal value to collect antidumping duties on products from at least seven countries: the United States, Mexico, Romania, Germany, France, Spain, and the United Kingdom. In each case, Brazil calculated the antidumping duty as the absolute difference between the normal value (or reference price) and the adjusted export price of a specific transaction. Brazil assessed the antidumping duty in instances where the price of the imported product (an entry) was lower than the established normal value. However, Brazil assessed no duty if the result of the comparison was less than or equal to zero. And, Brazil has never provided a refund or an offset based on non-dumped transactions.

16. The way that Brazil has collected duties on imports of polyvinylchloride from the United States and Mexico, for example, does not appear consistent with the arguments that Brazil made in this dispute. In that case, Brazil assessed duties on a transaction-specific basis without providing any offsets for non-dumped transactions. In addition, Brazil's Official Gazette specifically states that the antidumping duty is calculated on a transaction-specific basis:

> The anti-dumping duty is calculated on the basis of the absolute difference between the reference price and the *price at which the transaction by which the product is imported from the USA or Mexico is executed,* as the case may be. The anti-dumping duty will be charged only in a case in which the price of the imported product is lower than the proposed reference price.

17. There is no reason why liability for payment of antidumping duties in the retrospective system applied by the United States may not be similarly assessed on the basis of transaction-specific export prices. Accepting the interpretation that a Member must aggregate the results of *"all"*

comparisons on an exporter-specific basis would require that retrospective reviews be conducted even in a prospective normal value system. This result is contrary to the very concept of a prospective normal value system.

18. Despite its arguments that Members have an affirmative and fundamental obligation to determine the antidumping liability for the "product as a whole" regardless of the context, Brazil has never conducted a review under Article 9.3.2. Brazil suggests this is because no importer has ever asked for a review or a refund. As we explained previously, however, it is difficult to see why an importer would request such a review when the importer does not have information for the "product as a whole" and as such does not know if the importer's liability could actually increase. And, when importers do not request refunds, no offsets are provided.

19. It should be noted that Brazil's arguments in this respect are entirely inconsistent with its arguments regarding cash deposits. Under Brazil's argument, the supposed obligation to calculate a margin for the "product as a whole" in a prospective normal value system is apparently only triggered when someone requests a refund. In the meantime, duties are collected on a transaction-specific basis without providing offsets for non-dumped transactions. Of course, in a retrospective system such as that operated by the United States, cash deposits are expressly not a final assessment of duties. Cash deposits are only a security pending the final assessment of duties, which occurs later in a review initiated upon a request. Yet according to Brazil, cash deposits that similarly do not reflect offsets for non-dumped transactions are themselves WTO-inconsistent.

20. Before moving on, we would like to make one final but important point on the topic of prospective normal value systems: It is implausible to think that the negotiators of the Antidumping Agreement would provide explicitly for a prospective normal value system and at the same time, without making any textual provision whatsoever, require that such systems conduct retrospective assessment proceedings that aggregate all the transactions occurring over some unspecified period of time. Articles 9.3, 9.3.1, and 9.3.2 are silent as to the period of review for any such proceeding. These articles include no requirements with respect to whether an assessment proceeding must cover a time period of a certain length or even that assessment proceeding coverage be time-based at all.

21. In its responses to the Panel's questions, Brazil suggested that the period of review for refund proceedings is specified in footnote 4 to Article 2.2.1. Article 2.2.1 specifies certain conditions under which a Member may choose to disregard sales at prices below the per unit cost of production in the domestic market of the home country or a third country if "such sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs". Footnote 4 specifies that "extended period of time" is "normally one year but shall in no case be less than six months". Contrary to Brazil's suggestion, footnote 4 specifies what constitutes an "*extended period of time*". It does not specify the length of a "period of review" or "refund proceeding". Moreover, Article 2.2.1 and footnote 4 only apply in specific circumstances, when a Member decides to disregard certain below-cost sales. They do not apply in any other context.

22. If the drafters of the Antidumping Agreement had intended to adopt an obligation to provide an "offset" for non-dumped transactions, one would have expected the drafters also to agree on an obligation for assessment proceedings to cover some established time period over which transactions must be aggregated. Otherwise a Member's obligations might have differed in a significant, substantive fashion depending solely upon whether it elects to cover more or fewer entries, or more or less time, in conducting its assessment proceedings. Thus, Brazil's assertion that the Antidumping Agreement imposes, with no textual basis, an obligation to grant offsets for non-dumped transactions implies that the drafters neglected to provide for an essential element of the obligation, namely, the time period over which such an offset would be granted. Such an interpretation should not be adopted by the Panel.

BCI deleted, as indicated [[XX]]

II. BRAZIL'S INTERPRETATION RENDERS THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTIDUMPING AGREEMENT A NULLITY

23. The United States would recall that it has demonstrated that Brazil's interpretation of the Antidumping Agreement does not fit with the text of Article 2.4.2 of the Antidumping Agreement. This is because the exceptional methodology provided for in the second sentence of Article 2.4.2 mathematically must yield the same result as an average-to-average comparison as provided for in the first sentence of Article 2.4.2 if, in both cases, non-dumped comparisons are required to offset dumped comparisons. Accordingly, Brazil's interpretation would be disfavored under a key tenet of customary rules of treaty interpretation, namely, as explained by the Appellate Body in *US – Gasoline*, that an "interpretation must give meaning and effect to all the terms of the treaty".

24. The United States demonstrated the mathematical equivalency empirically in its response to the Panel's questions. Brazil's only response to the mathematical equivalency argument is to cite certain Appellate Body reports. These reports are not persuasive because their reasoning is not based upon the text of the Antidumping Agreement and does not adequately resolve the problem of mathematical equivalency. Panels have specifically addressed all of the situations under which it was argued that there would not be mathematical equivalence and found these situations did not represent methodologies consistent with the Antidumping Agreement. The United States has demonstrated that if *all* export transactions are taken into account, and "zeroing" is prohibited, average-to-average and average-to-transaction comparisons produce the *same result*.

III. BRAZIL'S BROAD INTERPRETATION OF ARTICLE 2.4 OF THE ANTIDUMPING AGREEMENT SHOULD BE REJECTED

25. As the United States has explained, Brazil's arguments under Article 2.4 of the Antidumping Agreement – like its other interpretations of the Antidumping Agreement – require reading into the text of the Agreement words that are not there and were never agreed. There is no obligation in Article 2.4 to offset any negative differences between normal value and export price. The United States cannot be found to have violated an obligation that does not exist. Moreover, if Article 2.4 required offsets, there would be no need for such a requirement in Article 2.4.2 (which was the basis for the Appellate Body's finding in *US – Softwood Lumber Dumping*).

26. Brazil's proposed interpretation that Article 2.4 applies to the *results* of comparisons between export price and normal value is erroneous. As the Appellate Body stated in *US – Hot-Rolled Steel*, "an examination of whether USDOC acted consistently with Article 2.4 of the *Anti-Dumping Agreement* must focus on ... whether there were 'differences', relevant under Article 2.4, which affected the comparability of export price and normal value". Contrary to Brazil's assertions, because the "fair comparison" obligation in Article 2.4 refers to the required price adjustments, it does not create an obligation with respect to how the *results* of those comparisons are treated. Assessment of antidumping duties in the amount by which the normal value exceeded the export price on a transaction-specific basis does reflect a "fair comparison" made for each export transaction. The phrase "fair comparison" in Article 2.4 simply has nothing to do with the aggregation of comparison results, and Brazil has not explained how an offset to the dumping found on one export transaction as a result of a distinct export transaction having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under Article 2.4.

27. Instead, Brazil would have the Panel use Article 2.4 to examine any and all antidumping calculations to determine whether they are "impartial, even-handed, or unbiased". However, such an open-ended approach would result in disputes that are nearly impossible to resolve in any principled, text-based way. The Panel should reject an expansive interpretation of a "fair comparison" requirement that requires a subjective evaluation of what is "fair" or "unfair".

BCI deleted, as indicated [[XX]]

IV. CASH DEPOSITS ARE A SECURITY, NOT DUTIES

28. The United States explained in its First Written Submission and in its responses to Panel questions that cash deposits are not duties covered by Article 9 of the Antidumping Agreement, but rather a security governed by separate provisions of the GATT 1994. The Ad Note to paragraphs 2 and 3 of GATT Article VI expressly provides that a Member may collect a "reasonable security (bond or cash deposit) for the payment of anti-dumping duty ... pending final determination of the facts". In the retrospective system used by the United States, cash deposits are held as a security pending determination of the antidumping duty to ensure that funds are available to pay the duties. None of the cash deposit rates at issue in this dispute were applied as assessment rates.

29. In response to the US showing that cash deposits are a security, Brazil relies on the Appellate Body report in the *United States – Shrimp Bonding* dispute. That report, however, is inapposite to the issue in this dispute regarding cash deposits. In *Shrimp Bonding*, the Appellate Body analyzed the WTO-consistency, including the "reasonableness", of an extra bonding requirement that applied above cash deposits. The purpose of this extra requirement was to secure potential additional liability that might arise if the margin of dumping was determined to be greater than the cash deposit – that is, to address defaults on that portion of the duties that exceed the amount of cash deposited as a security. That is not an issue in this dispute, nor is it the standard for whether or not cash deposits are in fact a security.

V. BRAZIL'S ARGUMENTS REGARDING THE "USE" OF ZEROING HAVE NO BASIS IN THE TEXT

30. In the last meeting with the Panel, and in its second written submission, Brazil insists that the "use" of "zeroing" violates various provisions of the Antidumping Agreement and the GATT 1994, regardless of whether any duties were collected, and regardless of whether any transaction-specific comparisons were in fact "zeroed". To be clear, we have a defense to all of Brazil's claims as there is no basis in the text of the agreements for the obligations Brazil seeks to impose. However, in response to Brazil's claims on this point we would like to explain further how these assertions with respect to the "use" of "zeroing" are inconsistent with the text of the relevant provisions.

31. In this dispute, Brazil's allegations of WTO-inconsistency based on its "zeroing" theories extend to certain instances in which the United States in fact assessed no antidumping duties. As the United States has explained, where no antidumping duties have been assessed, there can be no breach of Article 9.3 of the Antidumping Agreement or Article VI:2 of the GATT.

32. In its second written submission, Brazil asserts that Article 9.3 and Article VI:2 – both of which expressly refer to the amount of the antidumping duty – can be violated "irrespective of the amount of duties that is ultimately collected". The United States fails to see how, as Brazil argues, it makes sense to find a violation of an obligation not to collect duties, when no duties are collected. Article VI:2 allows a Member to "levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping ...". Article 9.3 directs that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Finding a violation of these provisions where no antidumping duties are levied and the antidumping duty is zero would render meaningless the provisions' references to "levy ... an anti-dumping duty" and "[t]he amount of the anti-dumping duty".

33. Brazil's meaning of the term "use" is different from what was at issue in prior panel and Appellate Body reports. Brazil claims that "use" refers to the line in the computer program. Prior reports refer to the final duties assessed. Consequently, those earlier reports do not support Brazil.

BCI deleted, as indicated [[XX]]

34. Brazil does not address the fact that these provisions specifically address the amount of the duty. Instead, Brazil's only support for its argument that there could be a violation even when no duties are assessed is (i) a cite to the Appellate Body report in *Continued Zeroing* and (ii) an argument that the *chapeau* of Article 9.3 refers to Article 2.

35. With regard to the *Continued Zeroing* report, it is not pertinent to the issue in this dispute. In particular, it does not address the argument in this case that there can be no violation of Article 9.3 or GATT Article VI:2 where a Member assesses no duties. That dispute involved the issue of whether alleged "continued use" was outside of the terms of reference because it purported to capture future measures. However, the argument in this case is not only about what might happen in the future. In this dispute, Brazil's own evidence demonstrates that zeroing had no effect in certain of the proceedings at issue.

36. Brazil's argument as to the *chapeau* is based solely upon the fact that the *chapeau* mentions Article 2. However, Brazil fails to cite the actual text of the *chapeau*, which states that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The text is clear that the obligation is based upon "the amount of duty" not *exceeding* the margin of dumping. Where the United States has applied an assessment rate of zero, "the amount of duty" is zero, which cannot exceed the margin of dumping.

37. The United States fails to see how there can be a violation of an alleged obligation to provide offsets for non-dumped transactions when there are no non-dumped transactions. As just noted, unlike in the *Continued Zeroing* dispute, in this dispute we are not just presented with a request to find an inconsistency with respect to measures that do not exist even though we do not know whether there will be any non-dumped transactions. We are also presented with a request to base a finding of future inconsistency on a proceeding in which the evidence shows there actually were no non-dumped transactions. Zeroing is not and cannot be "used" in such circumstances. It is mathematically impossible. In such circumstances, the comparisons made, and the amount of duties collected, are exactly the same as they would have been if there were no "zeroing" line in the computer program. Brazil's own evidence indicates the United States calculated the dumping margins in the orange juice investigation on the basis of *all* comparable transactions.

VI. ASIDE FROM THE FACT THAT IT IS OUTSIDE THE TERMS OF REFERENCE, BRAZIL'S CLAIMS WITH RESPECT TO THE "CONTINUED USE" MEASURE FAIL

38. Even if Brazil's "continued use" claim were properly before this Panel, it must fail because there is no evidence that zeroing affected any margin in the investigation, nor certain rates in the assessment proceedings at issue. Brazil has relied heavily upon the Appellate Body's report in *Continued Zeroing*, and the United States has explained why that reliance is misplaced. We have demonstrated that the Appellate Body's analysis in *Continued Zeroing* does not apply here. In that dispute, the Appellate Body found an inconsistency only in circumstances that included zeroing in the initial less than fair value investigation, zeroing in four successive administrative reviews, and reliance in a sunset review upon rates determined using the zeroing methodology.

39. In response to the US arguments, Brazil attempts to distinguish the circumstances in the current dispute from the cases in which the Appellate Body declined to find a violation in *Continued Zeroing* by arguing that the evidence of zeroing was "fragmented" in those cases. However, in this dispute, Brazil's own evidence shows that there was no zeroing in the investigation, zeroing had no effect on certain rates in the assessment proceedings, and there has been no sunset review. This is not a case where, to quote the Appellate Body report in *Continued Zeroing*, "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time". Moreover, as explained earlier, there is no textual basis for

finding a violation where no duties are collected, or where there were no non-dumped transactions. Individual proceedings that are not inconsistent cannot be the basis of a finding of "ongoing" inconsistency stretching indefinitely into the future.

BCI deleted, as indicated [[XX]]

ANNEX G

REQUESTS FOR CONSULTATIONS AND THE ESTABLISHMENT OF A PANEL

BCI deleted, as indicated [[XX]]

ANNEX G-1

REQUEST FOR CONSULTATIONS BY BRAZIL

WORLD TRADE ORGANIZATION

WT/DS382/1
G/L/872
G/ADP/D75/1
1 December 2008

(08-5867)

Original: English

UNITED STATES – ANTI-DUMPING ADMINISTRATIVE REVIEWS AND OTHER MEASURES RELATED TO IMPORTS OF CERTAIN ORANGE JUICE FROM BRAZIL

Request for Consultations by Brazil

The following communication, dated 27 November 2008, from the delegation of Brazil to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

Upon instructions from my authorities, I hereby request consultations with the Government of the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Articles 17.2 and 17.3 of the *Agreement on Implementation of Article VI of GATT 1994* ("Anti-Dumping Agreement"), with regard to the matters listed hereunder:

The following determinations of the United States Department of Commerce (USDOC) concerning the imports of certain orange juice from Brazil, case nº A-351-840:

- the antidumping administrative review for the period from 24 August 2005 to 28 February 2007, and the final results thereof, in "*Certain Orange Juice from Brazil: Final results and Partial Rescission of Antidumping Duty Administrative Review*", published in 73 Fed. Reg. 46,584 (11 August 2008), as well as any assessment instructions and cash deposit requirements issued pursuant to them (the "Issues and Decision Memorandum", dated 5 August 2008, which discusses issues raised in this review, confirms that "zeroing" was applied by the USDOC in this review and specifically rejects the relevance of WTO Appellate Body precedents for administrative reviews conducted by the USDOC);

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- any on-going or future antidumping administrative reviews, and the final results thereof, related to the imports of certain orange juice from Brazil (case nº A-351-840), as well as any assessment instructions and cash deposit requirements issued pursuant to them.

Any actions taken by United States Customs and Border Protection (USCBP) to collect definitive anti-dumping duties at duty assessment rates established in periodic reviews covered by the preceding paragraph, including through the issuance of USCBP liquidations instructions and notices.

The following US laws, regulations, administrative procedures, practices and methodologies:

- the Tariff Act of 1930, as amended, (the "Act"), in particular sections 736, 751, 771(35)(A) and (B), and 777A(c) and (d);

- the US Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. I;

- the implementing regulations of USDOC, codified at Title 19 of the United States Code of Federal Regulations, 19 CFR Section 351, in particular sections 351.212(b), 351.414(c), and (e);

- the Import Administration Antidumping Manual (1997 edition), including the computer program(s) to which it refers;

- the general procedures and methodology employed by the United States to determine dumping margins in administrative reviews, whereby USDOC, in comparing weighted average normal value with transaction price of individual export transactions, treats as zero negative intermediate comparison results (i.e. situations in which the individual export price is greater than the weighted average normal value). Such methodology is commonly referred to as "simple zeroing" and/or the US "zeroing procedures."

Brazil is concerned that the laws, regulations, administrative procedures, practices and methodologies described above are as such, and as applied in the determinations and actions listed above, inconsistent with the obligations of the United States under the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement") and the Agreements annexed thereto. The provisions with which these measures appear to be inconsistent include, but are not limited to, the following:

- Articles II, VI:1 and VI:2 of the GATT 1994;

- Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 11.2 and 18.4 of the Anti-Dumping Agreement;

- And Article XVI:4 of the WTO Agreement.

Brazil reserves the right to raise additional claims and legal matters during the course of the consultations. It looks forward to receiving the United States Government's response and to setting a mutually convenient date for consultations.

Please accept, Excellency, the assurances of my highest consideration.

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ANNEX G-2

REQUEST FOR CONSULTATIONS BY BRAZIL – ADDENDUM

WORLD TRADE ORGANIZATION

WT/DS382/1/Add.1
G/L/872/Add.1
G/ADP/D75/1/Add.1
27 May 2009

(09-2552)

Original: English

UNITED STATES – ANTI-DUMPING ADMINISTRATIVE REVIEWS AND OTHER MEASURES RELATED TO IMPORTS OF CERTAIN ORANGE JUICE FROM BRAZIL

Request for Consultations by Brazil

Addendum

The following communication, dated 22 May 2009, from the delegation of Brazil to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

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1. This letter contains a request for consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of GATT 1994 (the "Anti-Dumping Agreement"). The present request complements, constitutes an addendum to, and must be read with, the original request for consultations presented on 27 November 2008 (Document WT/DS382/1, G/L/872, G/ADP/D75/1).

2. On 27 November 2008, the Government of Brazil requested consultations with the Government of the United States of America (the "United States") under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"); and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of GATT 1994 (the "Anti-Dumping Agreement"), with regard to the laws, regulations, administrative procedures, practices and methodologies for calculating dumping margins in administrative reviews, involving the use of "zeroing", and their application in antidumping duty administrative reviews regarding imports of certain orange juice from Brazil (case nº A-351-840).[1]

[1] WT/DS382/1, G/L/872, G/ADP/D75/1.

BCI deleted, as indicated [[XX]]

3. The consultations, held on 16 January 2009, covered the Antidumping Duty Administrative Review for the period from 24 August 2005 to 28 February 2007 (the "First Administrative Review") and the Antidumping Duty Administrative Review from 1 March 2007 to 29 February 2008 (the "Second Administrative Review"), pursuant to the original request for consultations, which included, among others: the First Administrative Review, the final results thereof, and any assessment instructions and cash deposit requirements issued pursuant thereto; and, any on-going or future antidumping administrative reviews related to the imports of certain orange juice from Brazil (case nº A-351-840), the final results thereof, and any assessment instructions and cash deposit requirements issued pursuant thereto.

4. In addition to the above matters, Brazil would like to consult with the United States with regard to the complementary matters listed hereunder:

(a) The Antidumping Duty Investigation on certain orange juice from Brazil (case nº A-351-840), for the period from 1 October 2003 to 30 September 2004, and the final results thereof, in "*Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil"*, published in 71 Fed. Reg. 2183 (13 January 2006); the corresponding antidumping order, entitled *"Antidumping Duty Order: Certain Orange Juice from Brazil"*, published in 71 Fed. Reg. 12183 (9 March 2006); as well as any cash deposit requirements issued pursuant to them. In this measure, the United States Department of Commerce (the "USDOC") employed a methodology whereby it aggregated intermediate comparison results between weighted average normal value and weighted average export price for sub-groups of products within the product under investigation ("averaging groups"), treating as zero negative intermediate comparison results (*i.e.*, situations in which the weighted average export price was greater than the weighted average normal value of an "averaging group"). Such methodology is commonly referred to as "model zeroing" and/or US zeroing procedures; and

(b) The continued use of the US zeroing procedures ("model" or "simple" zeroing) in successive antidumping proceedings, in relation to the antidumping order issued in respect of imports of certain orange juice from Brazil (case nº A-351-840), including the original investigation and subsequent administrative reviews, by which duties are imposed and maintained in place at a level in excess of the antidumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).

5. Furthermore Brazil would like to further consult with the United States with regard to the following matter:

(c) The Antidumping Duty Administrative Review from 1 March 2007 to 29 February 2008 (the "Second Administrative Review"), related to the imports of certain orange juice from Brazil (case nº A-351-840).

6. Brazil is concerned that these measures are inconsistent with the obligations of the United States under the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") and the Agreements annexed thereto. The provisions with which these measures appear to be inconsistent include, but are not limited to, the following:

- Articles II, VI:1 and VI:2 of the GATT 1994;
- Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 11.2 and 18.4 of the Anti-Dumping Agreement;
- And Article XVI:4 of the WTO Agreement.

BCI deleted, as indicated [[XX]]

7. Brazil reserves the right to raise additional claims and legal matters during the course of the consultations. It looks forward to receiving the United States Government's response and to setting a mutually convenient date for consultations.

BCI deleted, as indicated [[XX]]

ANNEX G-3

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY BRAZIL

WORLD TRADE ORGANIZATION

WT/DS382/4
21 August 2009

(09-3998)

Original: English

UNITED STATES – ANTI-DUMPING ADMINISTRATIVE REVIEWS AND OTHER MEASURES RELATED TO IMPORTS OF CERTAIN ORANGE JUICE FROM BRAZIL

Request for the Establishment of a Panel by Brazil

The following communication, dated 20 August 2009, from the delegation of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Upon instructions from my authorities, I hereby request the establishment of a panel pursuant to Articles 4.7 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXIII of the General Agreement on Tariffs and Trade of 1994 (the "GATT 1994") and Article 17.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (the "Anti-Dumping Agreement"), with regard to the matters listed hereunder:

Consultations

On 27 November 2008, the Government of Brazil ("Brazil") requested consultations with the Government of the United States of America (the "United States") under Articles 4 of the DSU, Article XXII:1 of the GATT 1994 and Articles 17.2 and 17.3 of the Anti-Dumping Agreement, with regard to the laws, regulations, administrative procedures, practices and methodologies for calculating dumping margins in administrative reviews, involving the use of "zeroing", and their application in anti-dumping duty administrative reviews regarding imports of certain orange juice from Brazil (case No A-351-840). On 22 May 2009, Brazil requested further consultations with the United States with regard to the use of "zeroing" in the anti-dumping duty investigation and in the second administrative review related to case No A-351-840 as well as to the continued use of the US "zeroing procedures" in successive anti-dumping proceedings regarding imports of certain orange juice from Brazil. The consultations were held on 16 January 2009 and 18 June 2009, respectively. They allowed a better understanding of the parties' positions but failed to resolve the dispute.

BCI deleted, as indicated [[XX]]

Measures and claims

The measures at issue are the following:

(a) The anti-dumping duty investigation on certain orange juice from Brazil (the "Original Investigation")

This anti-dumping proceeding concerns the imposition of anti-dumping duties on certain orange juice for transport and/or further manufacturing produced in two different forms: (1) Frozen orange juice in a highly concentrated form, sometimes referred to as frozen concentrated orange juice for further manufacturing (FCOJM); and (2) pasteurized single-strength orange juice which has not been concentrated, referred to as Not-From-Concentrate (NFC) (case No A-351-840). The final results of this Original Investigation were published in 71 Fed. Reg. 2183 on 13 January 2006 and the amended final results were published in 71 Fed. Reg. 8841 on 21 February 2006. The anti-dumping duty order was published in 71 Fed. Reg 12183 on 9 March 2006. The period of investigation is 1 October 2003 through 30 September 2004, and the amended rate of the *ad valorem* anti-dumping duty was 12.46% for Fischer S.A.Comércio, Indústria, e Agricultura ("Fischer") and 19.19% for Sucocítrico Cutrale S.A. ("Cutrale").

In this Original Investigation, the United States Department of Commerce (the "USDOC") employed a methodology whereby it aggregated intermediate comparison results between weighted average normal value and weighted average export price for sub-groups of products within the product under investigation ("averaging groups"), treating as zero negative intermediate comparison results (i.e., situations in which the weighted average export price was greater than the weighted average normal value of an "averaging group"). Brazil refers to such methodology as "model zeroing" and/or US "zeroing procedures".

(b) The 2005-2007 anti-dumping duty administrative review on certain orange juice from Brazil (the "First Administrative Review")

This anti-dumping proceeding concerns the administrative review of anti-dumping duties on certain orange juice from Brazil (case No A-351-840) for the period of 24 August 2005 through 28 February 2007. The final results of this First Administrative Review were published in 73 Fed. Reg. 46584 on 11 August 2008. The rate of the *ad valorem* anti-dumping duty was 4.81% for Fischer and 0.45% for Cutrale.

In this First Administrative Review, in order to assess the importers' final liability for payment of anti-dumping duties and the going-forward cash deposit rates, the USDOC employed a methodology whereby it aggregated intermediate comparison results between weighted average normal value for each "averaging group" with the transaction price of individual export transactions, treating as zero negative intermediate comparison results (i.e., situations in which the individual export price was greater than the weighted average normal value of an "averaging group"). Brazil refers to such methodology as "simple zeroing" and/or U.S. "zeroing procedures".

(c) The 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the "Second Administrative Review")

This anti-dumping proceeding concerns the administrative review of anti-dumping duties on certain orange juice from Brazil (case No A-351-840) for the period of 1 March 2007 through 29 February 2008. The final results of this Second Administrative Review were published in 74 Fed. Reg. 40167 on 11 August 2009. The rate of the *ad valorem* anti-dumping duty was 0% for Fischer and 2.17% for Cutrale.

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In this Second Administrative Review, the USDOC applied again "simple zeroing" and/or US "zeroing procedures".

The measures at issue also include any assessment instructions issued by the USDOC and cash deposit requirements imposed pursuant to the measures listed in items (a), (b) and (c) above, as well as any measures taken by the United States Customs and Border Protection (USCBP) to collect definitive anti-dumping duties at the duty assessment rates established in those measures, including through the issuance of USCBP liquidations instructions and notices.

(d) The continued use of the U.S. "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil

This measure concerns the continued use by the United States of "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil (case No A-351-840), including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time. In particular, the use of zeroing continues in the most recent administrative review, identified under item (c) above, by which duties are currently applied and maintained.

Claims

Brazil considers that the measures described above are inconsistent with the following provisions:

- Article 2.1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 because the United States did not determine a margin of dumping for the product as a whole;
- Article 2.4.2 of the Anti-Dumping Agreement because the United States' use of "zeroing procedures" precluded a determination for the product as a whole in the Original Investigation;
- Article 2.4 of the Anti-Dumping Agreement because the comparison of normal value and export price using "zeroing procedures" is unfair;
- Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement insofar as the imposition and collection of anti-dumping duties is made in excess of the margin of dumping properly determined pursuant to Article 2 of the Anti-Dumping Agreement;
- Article II:1(a) and II:1(b) of the GATT 1994 insofar as the United States subjects the importation of certain orange juice to duties in excess of the duties permitted by the United States' Schedule of Concessions; and
- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the Anti-Dumping Agreement insofar as the United States has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of GATT 1994 and the Anti-Dumping Agreement.

BCI deleted, as indicated [[XX]]

Request

Brazil hereby respectfully requests that a panel be established pursuant to Article XXIII of the GATT 1994, Articles 4.7 and 6 of the DSU and Article 17.4 of the Anti-Dumping Agreement, with standard terms of reference. Brazil asks that this request be placed on the agenda of the next meeting of the WTO Dispute Settlement Body that will take place on 31 August 2009.