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ANNEX A

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

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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.

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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.

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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]

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[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).

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> [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.

BCI deleted, as indicated [[XX]]

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.