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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 give consideration to that evidence in its totality, 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.