

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

8.1 As previously observed, the question at the centre of Brazil's complaint in this dispute has been well litigated in WTO dispute settlement. This core question concerns how the AD Agreement (and Article VI of the GATT 1994) defines the notion of "dumping": is it a concept that relates to an exporter's overall pricing behaviour that can only be measured with respect to the "product as a whole"; or can it also be conceived of and measured on a transaction-specific basis? Although fundamental and of critical importance to the operation of the AD Agreement, our evaluation of the parties' arguments and relevant jurisprudence has led us to conclude that there exists no *single* answer to this question. The objective lack of clarity on this issue, to some extent also recognized by the Appellate Body²⁹⁵, lends legitimacy to both parties' positions. However, the Appellate Body has consistently only found room for there to be one permissible interpretation of "dumping"; and for the important systemic reasons described above²⁹⁶, we have decided to follow this interpretation and come to the final conclusions expressed in this report. Nevertheless, we wish to once again emphasize that all Members have a strong systemic interest in seeing that a lasting resolution to the "zeroing" controversy is found sooner rather than later. In this regard, we note that Members have not only sought to resolve the issue of "zeroing" through WTO dispute settlement, but they are also trying to address it through negotiations in the Negotiating Group on Rules in the context of the Doha Development Agenda²⁹⁷.

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

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

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

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

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

²⁹⁶ See above, paras. 7.132-7.135.

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

BCI deleted, as indicated [[XX]]

B. RECOMMENDATION

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

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