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ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX D-1

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION

Mr. Chairman, distinguished Members of the Panel.

1. The European Union appreciates this opportunity to appear before you today. The European Union makes this third party oral statement because of its systemic interest in the *DSU*. This case also raises important substantive issues in relation to Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. However, none of the issues raised in this proceeding relating to anti-dumping are new. Brazil's claims appear to be supported by a consistent body of reasoning and findings, contained in all reports issued by panels and the Appellate Body, lastly in *US – Continued Zeroing*. Further, the United States has not raised anything new in its argumentation to defend its zeroing methodologies and practices.

2. The European Union's oral statement will therefore be brief. In its written submission the European Union set out at length the systemic reasons why in its view, this Panel should follow the findings and conclusions contained in previous panels and Appellate Body reports on zeroing. It is beyond dispute that the practice of zeroing in anti-dumping cases has been contested many times in WTO dispute settlement proceedings. The Appellate Body in particular has adjudicated on the issues raised in this case frequently, including in cases involving different variations of zeroing, both in original anti-dumping investigations and reviews, in different factual circumstances and between different parties.

3. The United States does not contest this, but argues that this Panel should not follow these Appellate Body reports. Further, the United States explicitly invites this Panel to re-apply findings and follow the reasoning contained in panel reports that have been rejected and overturned –in many cases more than once– by the Appellate Body, in reports which have subsequently been adopted by the DSB. The European Union submits that the suggestion by the United States that, according to Article 11 of the *DSU* this Panel should be free to depart from adopted Appellate Body reports on issues of law and legal interpretations relating to the covered agreements, is misguided. It is rather the opposite. The Appellate Body itself has addressed this very question in several cases, notably in *US – Stainless Steel from Mexico*, and thus the US proposition should be rejected.

4. On the substance, the European Union has set out its views in its written submission, and has only a few comments in this oral statement, on two specific aspects of the US written submission.

5. First, zeroing has nothing to do with "offsets" or "credits". The key issue, however, and the fundamental problem raised by this methodology is the selection of the relatively low priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation, regardless of whether or not they are clustered by purchaser, region or time. This was <u>not</u> the compromise achieved in the text of Article 2.4.2 of the *ADA*. It is clear that according to Article 2.4.2 of the *ADA* there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by purchaser, region or time. Thus, it is not permissible, and it is not fair, to pick up low priced export transactions clustered by model or *per se*, as the US zeroing methodology does. This is also clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the *ADA* and Article VI:1 of the *GATT 1994* in terms of the product as a whole; read together with the absence in the targeted

dumping provisions of any reference to a sub-category by model or *per se*. Thus, the relevant provisions, and particularly the normal rule and the exception, are read harmoniously, so as to give meaning – both legal and economic – to all the treaty terms.

6. Second, the United States continues to rely on the legally erroneous proposition that the disciplines of Article 2.4.2 of the *ADA* are excluded from retrospective assessment proceedings. In this respect, we believe that the Panel does not need to enter into this issue. Confronted with the same argument by the United States, the Appellate Body has repeatedly found that Article VI of the *GATT 1994* and Articles 2.1 and 9.3 of the *ADA* require that the dumping margin must be established on the basis of the product under investigation *as a whole.* In any event, should the Panel enter into this discussion, we invite the Panel to take into account the analysis set out in our written submission.

7. The European Union stands ready to participate further in the discussion and answer any questions that this Panel may have in writing. Thank you for your attention.

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ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF JAPAN

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

1. The United States argues that the Second Administrative Review is not properly within the Panel's terms of reference, because the final results of it had not been issued at the time of Brazil's request for consultations.[1] However, it is clear that, in reviewing Brazil's requests for consultations and panel establishment, the Second Administrative Review is included in the Panel's terms of reference.

2. Even though the final result of the Second Administrative Review had not been issued at the time of the request for consultations, the review had been initiated at the time and a final result had been expected to be issued in a certain period in light of the United States' anti-dumping system. In previous cases where a certain measure was subject to the dispute, certain amendments to that measure which took effective even after the consultation were also found as falling within the panel's terms of reference, for example, in *Chile – Price Band*, as not "*changing its essence*".[2]

3. In its panel request, Brazil mentioned the date and contents of the final result of the Second Administrative Review. From the description of the request for consultations and panel establishment, the Second Administrative Review shares the essential legal implication – the use of the zeroing methodology, as well as the same underlying antidumping duty order – with the Original Investigation and the First Administrative Review, and this shared point is exactly what Brazil is challenging in this dispute. Brazil does not raise any other issues than zeroing with regard to the review, therefore, the scope of the dispute has not been broadened. In this sense, the Second Administrative Review does not change the essence of the measure at issue. Brazil's requests for consultations and panel establishment thus provided an opportunity for the United States to define and delimit the scope of the dispute between them. With respect to US argument that the second administrative review "was not (and could not have been) subject to consultations"[3], the Appellate Body admitted "additional measures relate to the same duties identified in the consultations request"[4] being within the panel's terms of reference stating:[5]

> The proceedings listed in the consultations request and the panel request are therefore successive stages subsequent to the issuance of the same anti-dumping duty orders. More specifically, as regards the periodic reviews, the subsequent measures assessed actual duty liabilities and updated cash deposit rates that were imposed on the same products from the same countries as those listed in the consultations request. With respect to the sunset reviews, the subsequent measures related to the continued application of duties on the same products from the same countries as those listed in the consultations request. Moreover, in both its consultations request and panel request, the European Communities made clear that

[1] United States' First Written Submission, paras. 39-48.
[2] Appellate Body Report on *Chile – Price Band*, para. 139(emphasis in original).
[3] US First Written Submission, para. 48.
[4] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 228.
[5] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 228. (footnote omitted)

> it was challenging the specific administrative review and sunset review proceedings because of the use of the zeroing methodology. Specifically, both the consultations request and the panel request allege that the USDOC "systematically" applies the zeroing methodology in all types of review proceedings, which, the European Communities contends, is a methodology found to be inconsistent with the covered agreements.

4. In light of the above, Japan considers that the Panel should reject the United States' request for preliminary rulings with regard to the Second Administrative Review.

5. With respect to US argument that the continued use of the US Zeroing procedures in successive anti-dumping proceedings is not within the Panel's terms of reference, Japan notes that the Appellate Body of *US-Continued Zeroing (EU)* states regarding an ongoing conduct:

> As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. *The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future.* Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments.[6] (emphasis added)

Appellate Body also states:

> *We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement.* The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order.The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation.[7] (emphasis added)

6. Therefore, given this conclusion of the Appellate Body, Japan considers that the Panel should reject the United States' request for preliminary rulings with regard to the continued use of the US Zeroing procedures in successive anti-dumping proceedings.

II. ZEROING AS USED BY THE USDOC IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT

7. The legal principles governing the WTO-inconsistency of the zeroing procedures have been thoroughly canvassed by the Appellate Body in past WTO disputes, and are well established by now. Japan notes again that, as the result of the interpretation of the *Anti-Dumping Agreement* under the customary rules of interpretation of public international law, the Appellate Body held;

> ... "dumping" and "margins of dumping" can be found to exist only in relation to [the] product as defined by [the] authority. They cannot be found to exist for only a

[6] Appellate Body Report, *US – Continued Zeroing (EC)*, para.171.
[7] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 181(footnote omitted).

> type, model or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction.[8]

8. Then, with regard to Article 9.3 of the *Anti-Dumping Agreement*, the Appellate Body held that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".[9] The express reference to Article 2 in the *chapeau* of Article 9.3 of the *Anti-Dumping Agreement* includes, among others, Article 2.1 of the *Anti-Dumping Agreement*, which, as noted above, sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". In *US – Zeroing (EC)*, relying on these textual cross-references, the Appellate Body made an explicit interpretive connection between a "product as a whole" requirement of Article 2.1 and dumping determinations in periodic reviews under Article 9.3.[10]

9. Accordingly, if, in a periodic review, the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not permitted to take into account the results of only some of the multiple comparisons, while disregarding others. Thus, for purposes of these reviews, the investigating authority must aggregate all multiple comparisons to establish a margin of dumping for the "product" under investigation as a whole. It is required to compare the anti-dumping duties collected on all entries of the subject merchandise from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole, to ensure that the total amount of the former does not exceed the latter.[11]

10. When applying zeroing as used by the USDOC in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. In this way, zeroing as used by the USDOC results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, under Article 9.3 of the *Anti-Dumping Agreement*, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter.

11. The Appellate Body rejected the United States' argument that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer- or import-specific basis. In doing so, the Appellate Body relied in part on Article 6.10 of the *Anti-Dumping Agreement* as context, which precludes the calculation of a margin of dumping for each individual import transaction, and it also requires that margins be calculated for exporters and foreign producers, not importers.[12]

12. The United States objects to the Appellate Body's interpretation that margins of dumping are determined for foreign producers or exporters. However, as the Appellate Body previously explained, the United States' misgivings are misplaced. Although *margins of dumping* are established for foreign producers or exporters for a product as a whole, Members can assess anti-dumping *duties* on "a

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[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 115. (emphasis in original)

[9] Appellate Body Report, *US – Zeroing (EC)*, para. 130 (emphasis in original). *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

[10] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99.

[11] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

[12] Appellate Body Report, *US – Zeroing (EC)*, para. 128. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 112.

transaction- or importer-specific basis", "provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping".[13]

13. In light of the above, Japan submits that two administrative reviews concerning imports of certain orange juice from Brazil are inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 due to the use of zeroing.

14. Additionally, Japan notes the Appellate Body's findings in *US – Continued Zeroing (EC)* to address United States' argument concerning Article 17.6(ii) of the *Anti-dumping Agreement* as follows:

> In our analysis, we have been mindful of the provisions of Article 17.6(ii) of the *Anti-Dumping Agreement*. The analysis offered above, applying the customary rules of interpretation of public international law, does not allow for conflicting interpretations. We have found, by the application of those rules, that zeroing is inconsistent with Article 9.3. A holding that zeroing is also consistent with Article 9.3 would be flatly contradictory. Such contradiction would be repugnant to the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii). Consequently, it is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence.[14]

15. Finally, Japan notes the Appellate Body's findings in *US – Stainless Steel (Mexico)* concerning whether the panels should follow previous adopted Appellate Body reports addressing the same issues as follows:[15]

> The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.

16. To provide the security and predictability to Members, Japan strongly expects the Panel to keep consistency with the Appellate Body's stabled findings regarding zeroing as used by the USDOC in periodic reviews.

III. THE CONTINUED USE OF ZEROING IN SUCCESSIVE ANTI-DUMPING PROCEEDINGS BY WHICH DUTIES ARE APPLIED AND MAINTAINED IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

17. The Appellate Body concluded with respect to the four "cases" for which it was able to complete the analysis in *US – Continued Zeroing (EC)*:

> we conclude that the application and continued application of anti-dumping duties is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the

[13] Appellate Body Report, *US – Zeroing (EC)*, para. 131(footnote omitted).
[14] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 317.
[15] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

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> GATT 1994 to the extent that the duties are maintained at a level calculated through the use of the zeroing methodology in the periodic reviews in the following four cases…[16]

18. Again, Japan strongly expects the Panel to keep consistency with the Appellate Body's finding regarding the continued use of zeroing in the consecutive anti-dumping determinations, including the original investigation and subsequent administrative reviews.

[16] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 199.

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ANNEX D-3

THIRD PARTY ORAL STATEMENT OF KOREA

Mr. Chairman and Members of the Panel,

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party.

2. This dispute involves the practice, commonly referred to as "zeroing", by which the USDOC has treated transactions with negative dumping margins as having margins equal to zero in original investigations and administrative reviews. In Korea's view, this practice is plainly inconsistent with relevant provisions of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. This view has been upheld by the Appellate Body in numerous previous disputes addressing the USDOC's zeroing practice.

3. Absent particular reasons for distinguishing the case at hand, the Panel is obliged to follow the rulings of the Appellate Body. There is no reason for the Panel in the current dispute to disregard the Appellate Body's decisions in the long line of cases involving the zeroing methodology. In this respect, Korea urges this Panel to follow the well-established WTO jurisprudence and requests that the Panel find the United States zeroing methodology inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.

4. As in its Third Party Submission, Korea in this oral statement will present its views with regard to the preliminary ruling request by the United States and on the use of zeroing methodology in the USDOC's original investigations and periodic administrative reviews.

I. THE PANEL SHOULD DISMISS THE PRELIMINARY RULING REQUEST BY THE UNITED STATES

5. The United States has requested preliminary rulings with regard to two issues. The United States argues (1) that the final determination in the second administrative review of the antidumping order on Certain Orange Juice from Brazil is not within the Panel's terms of reference; and (2) that the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings" is not within the Panel's terms of reference due to lack of specificity.

A. THE PANEL SHOULD DISMISS THE UNITED STATES' CLAIM THAT THE SECOND ADMINISTRATIVE REVIEW IS NOT WITHIN THE PANEL'S TERMS OF REFERENCE

6. Contrary to the United States argument, the second administrative review is adequately described in Brazil's request for consultations. In the Addendum to Brazil's initial request for consultations, submitted 22 May 2009, Brazil specifically stated that "[t]he consultations, held on 16 January 2009, covered the … the Antidumping Duty Administrative Review from 1 March 2007 to 29 February 2008 (the "Second Administrative Review")".[1]

[1] WT/DS382/1/Add.1, para. 3.

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7. It should first be noted that it is beyond dispute that Brazil's request for establishment of a panel specifically identified the second administrative review as one of "the measures at issue".[2] However, the preliminary ruling request by the United States does not address the significance of this statement in Brazil's panel request. This silence suggests that the United States believes that the USDOC's second administrative review can only fall within the Panel's terms of reference if the *final determination* in that review was specifically referenced in the consultation request, as well as in the panel request itself. Yet, that interpretation is not consistent with the provisions of the relevant agreements.

8. Article 17.3 of the *Anti-Dumping Agreement* does not contain any language that might be read to suggest that a Member must wait to *request consultations* until a final determination has been issued. By contrast, the first sentence of Article 17.4 of the *Anti-Dumping Agreement*, which authorizes WTO Members to refer matters to the DSB for establishment of a panel, specifically requires complaining Members to wait until (1) consultations under Article 17.3 "have failed to achieve a mutually agreed solution", *and* (2) "final action has been taken by the administering authorities of the importing Member to levy anti-dumping duties…". If the administrative authorities have not yet taken "final action", the matter may not be referred to the DSB for establishment of a panel.

9. The clear implication is that *consultations* may be requested before "final action has been taken by the administering authorities". After all, if consultations could not be requested before such "final action", there would be no need to include a requirement of "final action" in the first sentence Article 17.4. Instead, if consultations could be requested only after "final action" by the administering authorities, then the provisions of the first sentence of Article 17.4 requiring that consultations be held (and "have failed") would embody a requirement of "final action" as well. Under such an interpretation, the language requiring "final action" in the first sentence of Article 17.4 would be redundant.

10. It is well established in WTO jurisprudence that "a treaty interpreter must give meaning and effect to all the terms used in a treaty provision and must avoid interpretations which render treaty terms redundant". In accordance with that principle, the provisions of Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* must be understood to indicate that consultations may be requested before "final action" by the administering authorities, while the establishment of a panel may not be requested until after that "final action" has occurred.

11. Korea is also unable to find the United States' reliance on the decision in *US – Certain EC Products* to be persuasive. In *US – Certain EC Products*, the EC's request for consultations made reference to a notice issued by the US Customs Service withholding liquidation (referred to as the "March 3rd Measure") but did not refer to the separate decision by the US Trade Representative (the "USTR") to impose 100 per cent duties on certain EC products (referred to as the "April 19th action"). The panel and Appellate Body held that the EC's failure to mention the April 19th action during the consultations meant that claims regarding that action were outside the panel's terms of reference.

12. The *US – Certain EC Products* decision can, therefore, be easily distinguished from the situation presented by Brazil's consultation request in this dispute. Unlike *US – Certain EC Products*, this is not a case in which the consultation request fails to mention the particular measure. Instead, as described above, the Addendum to Brazil's consultation request clearly refers to the second administrative review.

13. Moreover, the legal relationship between the March 3rd Measure and the April 19th action at issue in *US – Certain EC Products* is quite different from the legal relationship between the second

[2] WT/DS382/4.

administrative review described in the Addendum to Brazil's consultation request and the final determination mentioned in Brazil's panel request. In *US – Certain EC Products*, the Appellate Body focused on the fact that the March 3rd Measure and April 19th action involved two different government agencies acting separately pursuant to distinct statutory legal authority.[3] In particular, the United States Customs Service took its measure on March 3rd pursuant to Section 113.13 of the Code of Federal Regulations, Volume 19, while the USTR took its action on April 19th pursuant to Section 301 of the Trade Act of 1974.[4] In this case, the second administrative review was conducted by the same agency, the USDOC, that subsequently issued the final results of the review on 11 August 2009. In conducting the review and issuing the final results, the USDOC acted pursuant to the same statutory authority, Title VII of the Tariff Act of 1930, as amended, which establishes the framework for US antidumping proceedings.

14. The Appellate Body in *US – Certain EC Products* also noted that there was no "perceptible correlation" between the March 3rd Measure and the April 19th action. The situation in the present case is clearly different. It is difficult, if not impossible, to maintain that there is no perceptible correlation between the conduct of the second administrative review of the antidumping order on Certain Orange Juice from Brazil and final results of that review.

15. Consequently, there is no basis for the argument by the United States that Brazil's request for consultations with respect to the second administrative review before the USDOC issued its final determination in that review was somehow improper or invalid.

B. THE PANEL SHOULD FIND THAT THE "CONTINUED USE OF THE US 'ZEROING PROCEDURES'" AS IDENTIFIED IN BRAZIL'S PANEL REQUEST FALLS WITHIN THE PANEL'S TERMS OF REFERENCE

16. Korea is also of the view that the "continued use of the US 'zeroing procedures'" is within the Panel's terms of reference. The United States argues that the description of the measure in Brazil's panel request lacks specificity because the alleged measure did not exist at the time of the panel request.

17. As the Appellate Body has explained, the specificity requirement under Article 6.2 of the DSU is designed to ensure that a panel request "present[s] the problem clearly". The Appellate Body has also found that "the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures".

18. Korea notes that item (d) of Brazil's panel request identifies the anti-dumping duty order, case No A-350-840 and the original investigation and subsequent administrative reviews under such order. It appears to be sufficiently clear also in this dispute that the measure referred to is "a string of connected and sequential determinations" in which the United States uses the zeroing methodology by which duties are maintained over a period of time under the anti-dumping duty order.

19. In this regard, the Appellate Body in *US – Continued Zeroing* concluded that a Member's "ongoing conduct" constitutes a measure and is challengeable by another Member.[5] As Brazil notes in its first written submission, the ongoing conduct that was at issue in *US – Continued Zeroing* is virtually identical to the ongoing conduct at issue in this dispute. The zeroing practice by the USDOC maintained and applied in successive phases of the anti-dumping proceeding under the anti-dumping

[3] WT/DS165/AB/R, para. 75.
[4] WT/DS165/AB/R, para. 75.
[5] Appellate Body Report, *US – Continued Zeroing*, para. 180.

duty order on certain orange juice from Brazil is an ongoing conduct that is inconsistent with the *Anti-Dumping Agreement*.[6]

II. THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

20. The USDOC's utilization of its zeroing methodology in original investigations has been found to be inconsistent, as such and as applied, with Article 2.4.2 of the *Anti-Dumping Agreement* in numerous past disputes.[7] There no longer appears to be any dispute with respect to this issue.

21. In fact, the USDOC has stated that, effective 22 February 2007, it will no longer utilize the practice of zeroing in new and pending investigations.[8] However, this change in practice was not applied to the anti-dumping investigation that is the subject of the present dispute, because the final results and the amended final results of the original investigation of anti-dumping duties on certain orange juice from Brazil were published more than a year before the effective date of the USDOC's 22 February 2007 change in practice.

22. Therefore, Korea considers it imperative that the Panel find the practice of zeroing in the original investigation of anti-dumping duties on certain orange juice from Brazil inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

III. AS THE APPELLATE BODY HAS CONSISTENTLY FOUND, THE PANEL SHOULD FIND THAT THE PRACTICE OF "ZEROING" IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

23. The Appellate Body has repeatedly ruled that the practice of zeroing in periodic administrative reviews is inconsistent with the *Anti-Dumping Agreement* — and it has held that panels considering this issue should follow the Appellate Body's reasoning on this issue.[9] Nevertheless, the United States contends that, notwithstanding the rulings by the Appellate Body, the practice of zeroing in periodic "administrative reviews" should be found to be consistent with the *Anti-Dumping Agreement*. Korea considers the United States' arguments unconvincing and submits that the Panel should once again find that the United States' practice of zeroing in administrative reviews is inconsistent with the *Anti-Dumping Agreement*.

24. In ruling that the USDOC's practice of zeroing in periodic "administrative reviews" is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and GATT Article VI:2, the Appellate Body has explicitly rejected the United States' arguments that "dumping" and "margin of dumping" can be found to exist at the level of individual transactions.[10] Like the Appellate Body, Korea is unable to find "a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped", for purposes of determining the

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[6] Appellate Body Report, *US – Continued Zeroing*, para. 199.

[7] *See* Panel Report, *US – Anti-Dumping Measures on PET Bags (Thailand)*; Panel Report, *US – Shrimp (Thailand)*; Appellate Body Report, *EC – Bed Linen (India)*; Appellate Body Report, *US – Zeroing (Japan)*; Appellate Body Report, *US – Continued Zeroing (EC)*.

[8] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification*, 71 Fed. Reg. 77722 (27 December 2006); and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations: Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (26 January 2007).

[9] *See, e.g.*, Appellate Body Report, *United States – Mexican Stainless Steel*, para. 161 to 162.

[10] Appellate Body Report, *United States – Continued Zeroing (EC)*, para. 287.

existence and magnitude of dumping in the original investigation, and as "non-dumped", for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review".[11] Korea believes that the United States should bring its practice in periodic administrative reviews into conformity with requirements of the *Anti-Dumping Agreement* — as it already has with original investigations.

IV. CONCLUSION

25. Korea requests that the Panel find the United States' practice of zeroing as used in the original investigation and administrative reviews as well as its continued use in successive anti-dumping proceedings concerning imports from certain orange juice from Brazil to be inconsistent with the *Anti-Dumping Agreement*.

26. Korea appreciates this opportunity to participate in these proceedings and to present its views to the Panel.

[11] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 285.