

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

Report of the Panel

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<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
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<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
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<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3
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<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009

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

GATT PANEL REPORTS

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

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I. INTRODUCTION

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

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

- (a) The anti-dumping duty investigation on certain orange juice from Brazil (the "Original Investigation").
- (b) The 2005-2007 anti-dumping duty administrative review on certain orange juice from Brazil (the "First Administrative Review").
- (c) The 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the "Second Administrative Review").
- (d) The continued use of the US "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil.³

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

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

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

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

¹ WT/DS382/1.

² WT/DS382/1/Add.1.

³ WT/DS382/4.

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

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

Chairman: Mr. Miguel Rodriguez Mendoza

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

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

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

II. FACTUAL ASPECTS

2.1 Brazil's complaint is focused on the alleged use by the United States Department of Commerce ("USDOC") of a particular methodology, known as "zeroing", when calculating the margin of dumping of investigated exporters in the anti-dumping proceedings conducted against certain orange juice products from Brazil (case No. A-351.840). In particular, Brazil challenges the alleged use of "simple zeroing" for the purpose of calculating the margins of dumping, cash deposit rates and relevant importer-specific assessment rates for two respondents, Sucocítrico Cutrale S.A. ("Cutrale") and Fischer S.A. Comércio, Indústria e Agricultura ("Fischer") in the First and Second Administrative Reviews.⁴ In addition, Brazil challenges the USDOC's alleged "continued use of zeroing" as "ongoing conduct" in successive anti-dumping proceedings, including in the original investigation resulting in the imposition of the anti-dumping duty order on certain orange juice products from Brazil⁵, and each of the first three administrative reviews related to that order.⁶

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

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

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

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

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comparison is then made between the annual weighted-average price of all export transactions and the annual weighted-average price of all domestic market transactions in the same group or model. Next, the multiple comparison results are aggregated and divided by the total value of all comparable export transactions for all groups or models to arrive at a weighted-average margin of dumping. In summing the comparison results by group or model, positive differences (i.e., where the weighted average price of export transactions is less than the weighted-average normal value of the model or group) are added to determine the total amount of dumping, but all comparison results showing negative results are disregarded or given a value of zero in the aggregation exercise. This practice of disregarding or counting as zero the negative results of weighted-average normal value to weighted-average export price comparisons ("W-W") is what Brazil describes as "model zeroing". Brazil notes that the USDOC ceased to apply "model zeroing" in February 2007⁷, after the results of the original investigation into exports of orange juice products from Brazil were issued.

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. BRAZIL

3.1 Brazil requests that the Panel find:

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

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

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

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B. THE UNITED STATES

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

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions, oral statements to the Panel and their answers to questions. Executive summaries of the parties' written submissions, and where provided oral statements⁹, are attached to this Report as annexes (see List of Annexes, pages iv and v).¹⁰

V. ARGUMENTS OF THE THIRD PARTIES

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

VI. INTERIM REVIEW

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

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

A. REVIEW REQUESTED BY BRAZIL

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

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

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

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

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

Paragraphs 7.51 and 7.52

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

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

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

Paragraph 7.77

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

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

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

Paragraph 7.86

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

Paragraphs 7.126, 7.127 and 8.1

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

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

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

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

B. REVIEW REQUESTED BY THE UNITED STATES

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

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

Paragraphs 7.26 and 7.28

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

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

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

Paragraph 7.80

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

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

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

Paragraph 7.81

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

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

Paragraph 7.106

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

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

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

Paragraph 7.184 and 7.185

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

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

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

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

VII. FINDINGS

A. UNITED STATES' REQUESTS FOR PRELIMINARY RULINGS

1. Second Administrative Review

(a) Arguments of the United States

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

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

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

(b) Arguments of Brazil

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

¹² United States, FWS, paras. 37, 46 and 48.

¹³ US, FWS, para. 47.

¹⁴ US, FWS, para. 39.

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

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

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

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

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

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

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

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

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

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

(c) Arguments of the Third Parties

(i) *European Union*

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

(ii) *Japan*

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

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

¹⁹ Brazil, Preliminary Rulings, para. 27.

²⁰ EU, Third Party Written Submission ("TPWS"), para. 5.

²¹ EU, TPWS, para. 8.

²² Appellate Body Report, *Brazil – Aircraft*, para. 131.

²³ Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States (Mexico – Corn Syrup (Article 21.5 – US))*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 54.

²⁴ Appellate Body, *Brazil – Aircraft*, para. 132 (Emphasis original).

²⁵ Appellate Body Report, *US – Upland Cotton*, para. 293.

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

(iii) *Korea*

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

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

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

(iv) *Mexico*

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

²⁶ Japan, Third Party Written Submission ("TPWS"), paras. 13-17.

²⁷ Korea, Third Party Written Submission ("TPWS"), paras. 8-10.

²⁸ Mexico, Third Party Written Submission ("TPWS"), para. 15, quoting from Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis original).

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

(d) Evaluation by the Panel

7.16 In general, a panel's terms of reference are found in the panel request³⁰, where pursuant to Article 6.2 of the DSU, a complaining Member must "indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The United States' request for a preliminary ruling concerning Brazil's complaint against the Second Administrative Review does not take issue with whether the measure being challenged, or the claims being made, are properly described in the Panel's terms of reference. Rather, the United States asks that we rule that Brazil's claims are outside of the terms of reference of this dispute because it alleges that the *final results* of the "2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')" did not exist at the time of Brazil's consultations request, and therefore they could not have been the subject of consultations.

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

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

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

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

²⁹ Mexico, TPWS, paras. 11-20.

³⁰ Article 7.1 DSU.

³¹ Appellate Body Report, *Brazil – Aircraft*, para. 131. A parallel process is envisaged under Articles 17.3 to 17.5 of the AD Agreement. See Appellate Body Report, *Guatemala – Cement I*, paras. 57-80.

³² Appellate Body Report, *US – Upland Cotton*, paras. 286-287.

³³ Appellate Body Report, *Brazil – Aircraft*, para. 132.

³⁴ Appellate Body Report, *US – Upland Cotton*, para. 293 (footnotes omitted).

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

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

7.20 The addendum to Brazil's original request for consultations is dated 22 May 2009 (circulated on 27 May 2009). This document states that Brazil and the United States held consultations on 16 January 2009 covering the First and Second Administrative Reviews "pursuant to the original request for consultations, which included among others: the First Administrative Review ... and, any on-going or future antidumping administrative reviews" under the orange juice anti-dumping duty order.³⁶ In other words, although not expressly mentioned in Brazil's original request for consultations, the Second Administrative Review appears to have been discussed during the 16 January 2009 consultations between the two parties. In this regard, we note that the Second Administrative Review was in progress at the time of the January 2009 consultations, with preliminary results being issued on 6 April 2009.³⁷ Reflecting this state of affairs, the addendum to Brazil's original consultations request explicitly identified the Second Administrative Review as one of the measures Brazil wished to consult about with the United States.³⁸

7.21 Brazil's request for establishment of a panel is dated 20 August 2009 (circulated 21 August 2009). This document recalls that by virtue of the addendum to its original request for consultations, Brazil had requested further consultations with the United States concerning "the use of 'zeroing' in the anti-dumping duty investigation and in the second administrative review related to case No A-351-840 ...".³⁹ The same document explains that a second round of consultations was held on 18 June 2009. It also identifies the *final results* of the Second Administrative Review, which had been issued on 11 August 2009⁴⁰, as one of the measures at issue in the following terms:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. "Continued Zeroing"

(a) Arguments of the United States

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

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

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

(b) Arguments of Brazil

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

⁴³ US, FWS, para. 51.

⁴⁴ US, FWS, para. 52.

⁴⁵ Brazil, Preliminary Rulings, para. 33, quoting Appellate Body Report, *US – Continued Zeroing*, para. 168.

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

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

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

(c) Arguments of the Third Parties

(i) *European Union*

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

⁴⁶ Brazil, Preliminary Rulings, para. 34, quoting Appellate Body Report, *US – Continued Zeroing*, para. 166.

⁴⁷ Brazil, Preliminary Rulings, para. 39.

⁴⁸ Brazil, Preliminary Rulings, paras. 40-41.

⁴⁹ Brazil, Preliminary Rulings, paras. 43-45, quoting from Appellate Body Report, para. 169.

⁵⁰ US, FWS, para. 52.

⁵¹ Brazil, Preliminary Rulings, para. 54.

⁵² Brazil, Preliminary Rulings, paras. 29-56.

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

(ii) *Japan*

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

(iii) *Korea*

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

(iv) *Mexico*

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

⁵³ EU, TPWS, para. 6, quoting from Appellate Body Report, *US – Continued Zeroing*, para. 169.

⁵⁴ EU, TPWS, para. 7, quoting from Appellate Body Report, *US – Continued Zeroing*, para. 181.

⁵⁵ EU, TPWS, para. 8.

⁵⁶ Request for the Establishment of a Panel by Brazil, WT/DS382/4, p. 3.

⁵⁷ Korea, TPWS, para. 12, quoting Appellate Body Report, *US – Continued Zeroing*, paras. 168 and 169.

⁵⁸ Korea, TPWS, paras. 14-16.

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

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

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

(d) Evaluation by the Panel

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

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

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

⁶¹ Mexico, TPWS, paras. 26-28.

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

⁶³ US, FWS, para. 52.

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7.39 Before turning to examine Brazil's panel request, we note that the first two of the arguments described above served as the basis for a similar request for a preliminary ruling made by the United States in *US – Continued Zeroing*. Although the panel in that dispute agreed with the United States⁶⁴, the Appellate Body reversed the panel's findings. In particular, the Appellate Body held that the United States could reasonably have been expected to understand, from reading the panel request as a whole, that the European Communities was challenging the use of "zeroing" in successive proceedings, as "ongoing conduct", in each of 18 separate anti-dumping cases. The Appellate Body saw confirmation of this in the fact that the European Communities was seeking a prospective remedy.⁶⁵ The Appellate Body also rejected the panel's view that "in order to successfully raise claims against a measure, the complaining Member must in the first place demonstrate the existence and the precise content of such measure, consistently with the requirements of Article 6.2 of the DSU".⁶⁶ In this regard, the Appellate Body made the following observation:

"... the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms.⁽¹⁾ Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, we reject the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure."⁶⁷

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

"Measures and claims

The measures at issue are the following:

...

- (d) The continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil

This measure concerns the continued use by the United States of "zeroing procedures" in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil (case No A-351-840), including the original investigation and any subsequent

⁶⁴ Panel Report, *US – Continued Zeroing*, para. 7.61.

⁶⁵ Appellate Body Report, *US – Continued Zeroing*, para. 171.

⁶⁶ Panel Report, *US – Continued Zeroing*, para. 7.50.

⁶⁷ Appellate Body Report, para. 169.

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

7.41 The language in Brazil's panel request explicitly identifies the measure at issue as "the continued use by the United States of 'zeroing procedures' in successive anti-dumping proceedings" under the orange juice anti-dumping duty order, "including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time". We note that this language reveals that Brazil's concern is focused on the "continued use" of "zeroing procedures" in "successive" proceedings "including the original investigation and any subsequent reviews". In other words, Brazil objects to the United States' alleged "continued use" of "zeroing procedures" over time, starting from the original investigation that resulted in the imposition of the orange juice anti-dumping duty order to any subsequent proceeding under the same order. In our view, it is reasonably clear from this description, when read in the light of the panel request as a whole⁶⁸, that the alleged measure Brazil challenges is the United States' "continued use" of "zeroing procedures" as "ongoing conduct".

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

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

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

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

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

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

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

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

"Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* are also relevant to the question of the types of measures that can be submitted to dispute settlement under the *Anti-Dumping Agreement*. Closely resembling Article 3.3 of the DSU, Article 17.3 provides that, '[i]f any Member considers that any benefit accruing to it, directly or indirectly, under [the *Anti-Dumping Agreement*] is being nullified or impaired ... by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question.'⁽¹⁾ Article 17.4 of the *Anti-Dumping Agreement* further specifies that a Member may refer a matter to the DSB if it considers that the consultations have failed to achieve a mutually agreed solution 'and if final action has been taken by the administering authorities of the importing Member to', *inter alia*, 'levy definitive anti-dumping duties'.⁷²"

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

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

"Important considerations underlie the restriction contained in Article 17.4. In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted.⁽¹⁾ In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation to cases in which a

⁷¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

⁷² Appellate Body Report, *US – Continued Zeroing*, para. 177.

⁷³ Appellate Body Report, *US – Continued Zeroing*, paras. 180-181.

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Member's request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure⁽¹⁾, Article 17.4 strikes a balance between these competing considerations.

Therefore, Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect a Member's right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such.

Moreover, as we have seen above, the GATT and WTO case law firmly establishes that dispute settlement proceedings may be brought based on the alleged inconsistency of a Member's legislation as such with that Member's obligations. We find nothing, and the United States has identified nothing, inherent in the nature of anti-dumping legislation that would rationally distinguish such legislation from other types of legislation for purposes of dispute settlement, or that would remove anti-dumping legislation from the ambit of the generally-accepted practice that a panel may examine legislation as such.⁷⁴

7.47 Thus, in the *US – 1916 Act* dispute, the Appellate Body found that the European Communities and Japan were entitled to bring a complaint against legislation they considered to be inconsistent with the AD Agreement before a panel, even though that legislation did not amount to a "final action" or a provisional measure within the meaning of Article 17.4 of the AD Agreement. In doing so, the Appellate Body described the relevance of Article 17.4 as being limited to complaints related to the conduct of investigating authorities in an anti-dumping investigation. However, in the present dispute, Brazil's challenge to the United States' alleged "continued use" of "zeroing" does not pertain to the conduct of the USDOC in one particular anti-dumping investigation. Rather, as we more fully explain below⁷⁵, Brazil's complaint is focused on the USDOC's alleged "use of zeroing" in multiple proceedings, under the orange juice anti-dumping duty order, as a single "*ongoing conduct*" measure. In our view, an "ongoing conduct" measure is broader than the type of conduct envisaged under Article 17.4 of the AD Agreement, and as such, falls outside of its scope of operation.

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

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

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

⁷⁵ See below, paras. 7.171-7.176.

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

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

1. Arguments of Brazil

7.50 Brazil claims that by allegedly calculating the margins of dumping, relied upon for the purpose of establishing the cash-deposit rates ("CDRs"), and the importer-specific assessment rates ("ISARs") for Cutrale and Fischer in the First and Second Administrative Reviews through the use of "simple zeroing", the USDOC acted inconsistently with its obligations under Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.⁷⁷

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

7.51 Brazil argues that Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 establish an obligation on Members not to impose an anti-dumping duty on any dumped product in an amount that is greater than the "margin of dumping" determined in respect of that product. Relying upon the findings of the Appellate Body in a series of disputes involving the USDOC's application of "simple zeroing" in administrative reviews⁷⁸, Brazil submits that a "margin of dumping" can only be calculated with respect to the product under consideration "as a whole", encompassing all export transactions of the product under consideration; and that it cannot be found to exist only for a type, model or category of that product. Brazil recalls that the Appellate Body has repeatedly found that Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 define "dumping" as a concept related to the product "as a whole". In addition, Brazil notes that the Appellate Body has previously indicated that "dumping" and "margin of dumping" relate to the pricing practices of individual exporters or foreign producers; and that this interpretation is supported by several other provisions of the AD Agreement, including Articles 2.2, 2.3, 5.8, 6.10, 8.1, 9.4 and 9.5. Furthermore, Brazil recalls that the Appellate Body has found that the AD Agreement and the GATT 1994 are not concerned with dumping *per se*, but with dumping that causes or threatens to cause material injury to the domestic industry, a condition that by the terms of Article 3.1 of the AD Agreement cannot be found to exist in relation to individual transactions, but only for the product as a whole.⁷⁹

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

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

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

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

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basis, Brazil argues that "dumping" must be determined for the "product as a whole" in accordance with Article 2.⁸⁰

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

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

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

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

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

⁸⁰ Brazil, FCOOS, paras. 47-51; Brazil, SWS, para. 5.

⁸¹ Brazil, FCOOS, paras. 52-58; Brazil, SWS, para. 5.

⁸² Brazil, FCOOS, paras. 2-4, 8-11.

⁸³ Brazil, FCOOS, para. 2; Brazil, SWS, para. 4.

⁸⁴ Brazil, FWS, para. 5; Brazil, FCOOS, paras. 66-75; Brazil, SWS, paras. 19, 35; Brazil, Answer to Panel Question 2.

⁸⁵ Brazil, Answer to Panel Question 2; Brazil, SWS, paras. 11-13, citing Panel Report, *US – Zeroing (Japan)(Article 21.5 – Japan)*, para. 7.162.

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

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

7.59 Brazil rejects the United States' view that CDRs do not amount to anti-dumping duties falling within the scope of Article 9.3 of the AD Agreement. In its view, CDRs have the essential characteristics of anti-dumping duties imposed under Article 9 of the AD Agreement, and not reasonable securities within the meaning of the Ad Note to Article VI:2 and VI:3 of the GATT 1994. Relying on various observations of the Appellate Body in the *US – Shrimp/Bond* dispute⁹¹, Brazil concludes that a reasonable security is "a response to a determination of a risk of non-payment of future anti-dumping duties that is commensurate with that risk"⁹² and that a CDR neither reflects nor is commensurate with the likely magnitude of the risk of non-payment by an importer. Indeed, Brazil submits that the characteristics of a CDR match those of an anti-dumping duty because: it is imposed on all imports from exporters found to be engaged in injurious dumping; it is imposed as a specific response to a dumping determination made in connection with a particular exporter; and it is fixed at the level of the individual margin of dumping determined by the USDOC for the exporter in question, and cannot exceed that margin. As such, Brazil argues a CDR is an anti-dumping duty.

7.60 That CDRs are anti-dumping duties subject to Article 9 of the AD Agreement is, Brazil argues, confirmed by the case-law concerning United States' administrative reviews. First, Brazil recalls that in *US – Shrimp/Bond*, the Appellate Body, despite holding that it did not have to rule on the issue, disagreed with the "reasoning" that led the panel in that case to find CDRs to be securities within the meaning of the Ad Note, and not anti-dumping duties subject to Article 9 of the AD Agreement. Moreover, Brazil submits that the Appellate Body in the same dispute emphasized that even under United States' law, the role of cash deposits differs from a security, and that they are fixed at the level of an exporter's margin of dumping. Second, Brazil argues that the Appellate Body has found several times that CDRs calculated through "zeroing" are inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.⁹³

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

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

⁸⁸ Brazil, Answer to Panel Question 2.

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

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

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

⁹² Brazil, Answer to Panel Question 3.

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

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

(b) Article 2.4 of the AD Agreement

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

2. Arguments of the United States

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

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

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

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

⁹⁴ Brazil, Answer to Panel Question 3.

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

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

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

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

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

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

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

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

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

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

¹⁰¹ US, FWS, paras. 73-81.

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

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

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

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

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

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

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

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

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

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

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

7.73 The United States also argues that Brazil errs in characterising CDRs as anti-dumping duties that are subject to the disciplines of Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. In its view, CDRs are a security for the payment of anti-dumping duties and are governed by the AD Note to paragraphs 2 and 3 of the GATT 1994.¹⁰⁸ The United States recalls that the Ad Note allows a Member to "require a reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization". According to the United States, the "determination of the facts" identified in the Ad Note refers to the "determination of final liability for payment of anti-dumping duties" described in Article 9.3.1 of the AD Agreement. Moreover, the United States explains that a CDR is only an estimate of future anti-dumping duties, based on past dumping, that serves as a security pending determination of final liability to pay anti-dumping duties. The United States disagrees with Brazil's characterization of the Appellate Body findings in *US – Stainless Steel (Mexico)* and *US – Continued Zeroing*, submitting that they did not reflect a conclusion that CDRs are anti-dumping duties, but rather a conclusion that the application of "zeroing" in administrative reviews was inconsistent with Article 9.3 of the AD Agreement because it "results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping".¹⁰⁹ Similarly, the United States argues that the other Reports mentioned by Brazil do not stand for the proposition that CDRs amount to anti-dumping duties.¹¹⁰

(b) Article 2.4 of the AD Agreement

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

¹⁰⁶ US, SWS, para. 80.

¹⁰⁷ US, FWS, para. 121; US, FCOOS, para. 35.

¹⁰⁸ US, FWS, footnote 8; US, Answer to Panel Question 5.

¹⁰⁹ US, Answer to Panel Question 5, referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133 and Appellate Body Report, *US – Continued Zeroing*, para. 315.

¹¹⁰ US, Answer to Panel Question 5.

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

3. Arguments of the Third Parties

(a) Argentina

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

(b) European Union

7.76 The European Union submits that the United States' view that the prohibition on zeroing found in Article 2.4.2 of the AD Agreement is limited to W-W comparisons in the context of original investigations should be rejected in its entirety. According to the European Union, when the language of this provision is correctly interpreted, following the rules of interpretation of the Vienna Convention, there can be no result other than a finding that Article 2.4.2 prohibits "zeroing" in all forms except targeted dumping¹¹⁴, and in all types of anti-dumping proceedings.¹¹⁵

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

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

¹¹¹ US, SWS, paras. 4-22; US, Second Confidential Opening Oral Statement ("SCOOS"), paras. 26-28.

¹¹² Argentina, Third Party Written Submission ("TPWS"), paras. 8-18.

¹¹³ Argentina, TPWS, paras. 21-22.

¹¹⁴ EU, TPWS, paras. 23-24, 163, 165 and 175.

¹¹⁵ EU, TPWS, paras. 22-159.

¹¹⁶ EU, TPWS, paras. 160-163.

¹¹⁷ EU, TPWS, para. 169.

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

(c) Japan

7.79 Japan submits that the legal principles governing the WTO-inconsistency of the "zeroing" procedures at issue in this dispute have been thoroughly canvassed by the Appellate Body in past WTO disputes, and are now well established. Japan recalls that the Appellate Body has, on numerous occasions, determined that Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994, when properly interpreted according to the Vienna Convention, define "dumping" on an exporter-specific basis for the "product as a whole". Japan notes that this definition applies throughout the AD Agreement, and is therefore relevant to all anti-dumping proceedings involving the determination of a margin of dumping, including duty assessment under Article 9.3 of the AD Agreement. Japan argues that the consequences of the USDOC's use of "zeroing" in the administrative reviews at issue in the present dispute are the same as those addressed in previous controversies. Japan asserts that by excluding all negative comparison results, the USDOC makes a "dumping" determination that disregards an entire category of the export transactions making up the "product" – namely, those transactions that generate the negative comparison results. Thus, Japan submits that the USDOC does not determine "dumping" for the "product" as defined by the investigating authority, but for a sub-part of that product. In conclusion, Japan argues that by applying "zeroing" in the measures at issue, the USDOC failed to comply with the definition of "dumping". Japan therefore urges the Panel to find that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.¹²⁰

(d) Korea

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

7.81 Thus, Korea urges the Panel to follow the Appellate Body's reasoning in previous cases, and find that Brazil has established that the United States has acted inconsistently with its obligations under the AD Agreement and the GATT 1994.¹²²

¹¹⁸ EU, TPWS, paras. 171-174.

¹¹⁹ EU, TPWS, paras. 175-176.

¹²⁰ Japan, TPWS, paras. 4-12, 24-53, 57-69 and 72.

¹²¹ Korea, TPWS, paras. 21-23, referring to and quoting Appellate Body Report, *US – Continued Zeroing (EC)*, paras. 285 and 287.

¹²² Korea, TPWS, paras. 23-24.

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(e) Mexico

7.82 Mexico asserts that Brazil's claims against the United States' "zeroing" methodology are substantially the same as those brought against the United States in previous disputes. Mexico notes that the WTO-inconsistency of this methodology has now been firmly established with the Appellate Body rulings in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel* and *US – Continued Zeroing*. According to Mexico, in responding to Brazil's claims, the United States has raised no new substantive arguments in defence of "zeroing" that have not already been fully addressed in these cases. Mexico urges the Panel follow the Appellate Body on this matter and find that Brazil has fully made out its claims. Mexico considers that the Panel should do this not only because the prior rulings are correct, but also because there are strong systemic reasons to adhere to the Appellate Body's consistent body of case-law. In this regard, Mexico recalls the point made by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, where it stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".¹²³ Thus, as the United States is, in Mexico's view, unable to identify any new substantive arguments not already rejected in previous WTO disputes, and as the substance of all of Brazil's legal claims have been considered and affirmed in a long line of consistent prior Appellate Body reports, Mexico asks the Panel to adopt the reasoning from those prior rulings and find "(yet again)" that the United States' "zeroing" methodology is inconsistent with the AD Agreement and the GATT 1994.¹²⁴

4. Evaluation by the Panel

(a) Relevant Facts

(i) *Administrative Reviews under United States' Law*

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

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

¹²⁴ Mexico, TPWS, paras. 1-10.

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

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

(ii) *Measures at Issue*

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

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

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

7.86 In addition to the support found in certain passages of the Issues and Decision Memoranda from the First and Second Administrative Reviews¹²⁹, the computer programme log and output

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

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

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

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

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

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

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

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

¹³¹ Exhibit BRA-21.

¹³² Exhibit BRA-22.

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

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

¹³⁵ See above, footnote 127.

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

(b) Introduction

7.88 As the parties recognize¹³⁷, Brazil's complaint against the United States' alleged use of "simple zeroing" in the relevant administrative reviews is, first and foremost, premised on the view that "dumping" is defined, as a general matter, in the AD Agreement and the GATT 1994 in relation to the "product as a whole". Thus, the fundamental question that lies at the heart of Brazil's claims is the following: how does the AD Agreement define the notion of "dumping"? Is Brazil correct in submitting that "dumping" is a concept that relates to an exporter's overall pricing behaviour that Members are only entitled to measure with respect to the "product as a whole"? Or does the AD Agreement, as the United States argues, permit both this and a transaction-specific conception of "dumping"?

(c) The definition of "dumping"

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

Article VI:1 of the GATT 1994

"The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*"

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

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

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Article 2.1 of the AD Agreement

"For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

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

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

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

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

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

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

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

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

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

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

7.92 Drawing from various findings of the Appellate Body in prior disputes¹⁴¹, Brazil argues that Articles 3, 5.8, 6.10, 8.1, 9.1, 9.3 and 9.5 of the AD Agreement all support the position that "dumping" must be understood in terms of the pricing behaviour of individual exporters or foreign producers determined through the calculation of a single margin of dumping with respect to the "product as a whole".¹⁴² In particular, Brazil highlights, *inter alia*, that pursuant to Article 5.8, there shall be "immediate termination" of an anti-dumping investigation against an exporter where the margin of dumping determined for that exporter is *de minimis*, recalling that the Appellate Body has said that the term "margin of dumping" in this provision "refers to a single margin established for each exporter by aggregation of its export transactions".¹⁴³ Similarly, Brazil points to: (i) Article 6.10, which it emphasizes requires that investigating authorities "shall, as a rule, determine an *individual* margin of dumping for each *known exporter or producer* concerned of *the product* under investigation"¹⁴⁴; (ii) Articles 6.10.2 and 9.5, which according to Brazil, contain similar language¹⁴⁵; (iii) Article 8.1, which Brazil submits provides that price undertakings must not be greater than necessary "to eliminate *the* margin of dumping"¹⁴⁶; and (iv) Articles 9.1 and 9.3, which Brazil notes stipulate that duties imposed and collected must be no greater than "*the* margin of dumping".¹⁴⁷ Brazil also asserts that the injurious effects of "dumped imports" are assessed under Article 3, not on a transaction-by-transaction basis, but rather by examining the effects of all imports of the exporter engaged in dumping. Brazil argues that a uniform interpretation of the term "dumping" ensures that transactions treated as "dumped" for purposes of a dumping determination are also treated as "dumped" for the purpose of injury, and *vice versa*.¹⁴⁸

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

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

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

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

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

¹⁴⁵ Brazil, FCOOS, para. 21.

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

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

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

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

7.94 The United States considers that Brazil's contextual arguments in support of its legal case are misplaced. Although agreeing with Brazil that the margin of dumping referred to in Article 5.8 of the AD Agreement may refer to an aggregation of multiple transactions, the United States considers that its relevance is limited to original investigations conducted under Article 5 of the AD Agreement, where an investigating authority must determine whether dumping exists above a 2 per cent *de minimis* threshold, and whether such dumping causes injury to the domestic industry. The United States argues that, in contrast, duty assessment under Article 9.3 of the AD Agreement is about the collection of duty, not the determination of the existence of dumping and injury. Thus, according to the United States, the differences between an Article 5 original investigation and duty assessment under Article 9.3 undermine Brazil's reliance on Article 5.8.¹⁵⁰

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

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

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

¹⁴⁹ Brazil, FCOOS, para. 26.

¹⁵⁰ US, SWS, paras. 30-37.

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

¹⁵² US, SWS, para. 43.

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

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

¹⁵⁵ US, FWS, paras. 87-92.

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

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

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

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

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

¹⁵⁶ See above, para. 7.90.

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

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

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

¹⁶⁰ Brazil, FCOOS, para. 23.

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

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

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

"[d]umping arises from the pricing practices of exporters as both normal value and export prices reflect their pricing strategies in home and foreign markets".¹⁶⁵

"Indeed, it is the exporter, not the importer that engages in practices that result in situations of dumping".¹⁶⁶

"The fact that 'dumping' and 'margin of dumping' are exporter-specific concepts under the Anti-Dumping Agreement is not altered by the fact that the export price may be the result of negotiation between the importer and the exporter. Nor is it altered by the fact that it is the importer that incurs the liability to pay anti-dumping duties".¹⁶⁷

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

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

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

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

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

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

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

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

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

¹⁶⁸ US, FWS, paras. 85-86.

¹⁶⁹ US, FWS, para. 85.

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

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

7.105 Brazil argues that the United States' reliance on Article VII:3 of the GATT 1994 misunderstands the role of context in treaty interpretation. According to Brazil, the fact that the same word appears in two (or more) proximate treaty provisions does not mean that the word carries the same meaning in each provision. Thus, Brazil submits that a single word used in two provisions may have different meanings in each provision, depending on the context. In its particular context, the word "product" appearing in Article VII:3 has a meaning that is relevant to what is regulated under that provision – customs valuation, which is necessarily undertaken on a transaction-specific basis. This is an entirely different context to Article VI:1, which is about dumping. Therefore, Brazil is of the view that the United States is wrong to assume that the same word, "product", must be given the same meaning in Article VI:1 and Article VII:3 of the GATT 1994.¹⁷²

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

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

¹⁷⁰ US, FWS, para. 79.

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

¹⁷² Brazil, FCOOS, paras. 39-43.

¹⁷³ Brazil, FCOOS, paras. 44-45.

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

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

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

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

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

7.110 The United States argues that the existence of prospective normal value systems of duty collection demonstrates that the notion of "dumping" cannot be exclusively understood to relate to the "product as a whole".¹⁷⁵ Drawing on descriptions found in previous panel reports¹⁷⁶, as well as

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

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

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information concerning how Canada administers its own prospective normal value system¹⁷⁷, the United States explains that under such systems, the amount of liability for payment of anti-dumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. Thus, according to the United States, duties will be payable only when the price of an imported product is below the prospective normal value, with the prices of all other transactions playing no part in this determination. The United States recalls that the transaction-specific nature of prospective normal value systems has led previous panels to find that a transaction-specific conception of "dumping" must also be permissible under the AD Agreement. For instance, the United States points to the following observation of the panel in *US – Zeroing (Japan)*:

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

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

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

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

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

¹⁷⁹ Brazil, SCOOS, paras. 14-16.

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

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

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

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

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

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

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

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

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

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

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

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

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(v) *Article 2.4.2 and "mathematical equivalence"*

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

7.116 The United States also argues that any interpretation of the AD Agreement and the GATT 1994 that gives rise to a general prohibition of "zeroing" – i.e., that establishes that "dumping" can only be defined with respect to the "product as a whole" – would render the second sentence of Article 2.4.2 redundant. In particular, the United States submits that the exceptional comparison methodology provided for in this sentence (the W-T methodology) would yield precisely the same result as a W-W comparison if, in both cases, "dumping" was determined for the "product as a whole". According to the United States, such an outcome would contradict a key rule of treaty interpretation, namely, that an "interpretation must give meaning and effect to all the terms of a treaty".¹⁹⁰ The United States recalls that previous panels have found this argument persuasive¹⁹¹, and urges the Panel in this dispute to do likewise.¹⁹²

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

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

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

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

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

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

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

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

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

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

7.119 In its answer to Panel Question 14, the United States explained in detail how it considered the third (W-T) methodology described in Article 2.4.2 operates, demonstrating how "mathematical equivalence" would result if "zeroing" was generally prohibited. Brazil, on the other hand, has pointed to various descriptions found in previous panel and Appellate Body reports of how other Members give effect to, or potentially give effect to, the W-T methodology set out in Article 2.4.2 without yielding "mathematical equivalence". It is apparent that Members have different views on how the W-T methodology in Article 2.4.2 should be implemented, and whether it will result in "mathematical equivalence". This is not surprising as when it comes to understanding the modalities for how it should be applied, the text of Article 2.4.2 provides little guidance for those seeking a detailed explanation of what may or may not be permissible. Were the approach advocated by the United States correct, a general prohibition on "zeroing" (i.e., a definition of "dumping" in relation to the "product as a whole") applicable to the entire AD Agreement would render the text describing the W-T methodology in Article 2.4.2 redundant. Obviously, such a result would be inconsistent with the principle of effective treaty interpretation. This would imply that no such general prohibition could exist, unless, as Brazil, two of the third parties¹⁹⁶ and the Appellate Body contend, the W-T methodology can be characterized as an "exception" to the otherwise generally applicable definition of "dumping". However, it could be argued that this point of view also has its weaknesses. First, the word "exception" does not appear in Article 2.4.2. Arguably, the fact that the first sentence of Article 2.4.2 directs Members to "normally" establish margins of dumping through the use of the W-W and T-T methodologies does not render the W-T methodology described in the following sentence an "exceptional" methodology, but rather one whose application is not *expected* to be the "norm".¹⁹⁷ Second, the fact that the definition of dumping contained in Article 2.1 of the AD Agreement is

¹⁹⁴ Appellate Body Report, *US – Softwood Lumber V*, para. 90.

¹⁹⁵ Appellate Body Report, *US – Softwood Lumber V*, para. 93.

¹⁹⁶ EU, TPWS, para. 175; and Japan, Answer to Panel Question 3 to the Third Parties.

¹⁹⁷ In our view, there may well be situations where a particular product or market is affected by "targeted" dumping to such an extent that an investigating authority will resort to the W-T methodology more often than the W-W or T-T methodologies. In such circumstances, the W-T methodology could effectively become the "norm" with respect to that particular product or market.

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

(vi) *Historical background*

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

7.121 In addition, the United States notes that two GATT 1947 panels asked to determine whether "zeroing" was prohibited under the provision of the Tokyo Round Anti-Dumping Code concluded that it was not, further reinforcing the validity of the Group of Experts' understanding of Article VI of the GATT 1947.²⁰¹ In this light, the United States finds it significant that Article VI of the GATT 1947 was incorporated into the GATT 1994 without revisions, notwithstanding the fact that the Uruguay Round negotiators had actively discussed whether the use of "zeroing" should be restricted. According to the United States, if the Uruguay Round negotiators had intended to make such a fundamental change to the notion of "dumping" they would have been clearer about it, and it would not have come to a surprise to the major users of dumping remedies, such as the EU and the United States, after the fact through dispute settlement.²⁰² In this regard, the United States advances evidence which it considers demonstrates that apart from the United States and the EU, at least two other major users of the anti-dumping remedy continued to calculate margins of dumping through the use of "zeroing" after the entry into force of the Uruguay Round Agreements.²⁰³

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

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

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

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

²⁰² US, FWS, paras. 69-72.

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

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

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

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

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

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

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

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

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

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

²⁰⁸ Emphasis added.

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

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

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

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

"... the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty.⁽¹⁾ The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the *Vienna Convention* if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions."²¹³

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

²⁰⁹ Emphasis added.

²¹⁰ See, e.g., Brazil, FCOOS, para. 31.

²¹¹ See above discussion concerning Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994, at paras. 7.89-7.91.

²¹² Appellate Body Report, *US – Continued Zeroing*, para. 305.

²¹³ Appellate Body Report, *US – Continued Zeroing*, para. 273 (footnote omitted).

²¹⁴ See, e.g., Brazil, FCOOS, paras. 6-11.

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

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

(viii) *Conclusion concerning the definition of "dumping"*

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

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

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

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

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

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

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7.132 Although adopted panel and Appellate Body reports do not bind WTO Members beyond parties to a particular dispute²¹⁹, the Appellate Body has expressed the view that ensuring "'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".²²⁰ Indeed, the Appellate Body has held that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".²²¹ The Appellate Body's role in the WTO dispute settlement system is defined in terms of hearing appeals from panel cases and "limited to issues of law covered in the panel report and legal interpretations developed by the panel".²²² Members are entitled to express their views on an Appellate Body report. However, unless the DSB decides not to adopt it, an Appellate Body report "shall be adopted by the DSB and unconditionally accepted by the parties to the dispute".²²³ Institutionally, the fact that all Appellate Body reports overturning panel findings on the question of "zeroing" have been adopted by the DSB implies acceptance by all WTO Members of their contents, and bestows upon them systemic legitimacy.

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

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

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

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

²²² Article 17.6, DSU.

²²³ Article 17.14, DSU.

²²⁴ Article 3.2, DSU.

²²⁵ Article 3.3, DSU.

²²⁶ Article 3.7, DSU.

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

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

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

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7.134 Given the objective lack of clarity in the current definition of "dumping" that is set forth in the AD Agreement (a conclusion which we believe is inescapable after almost a decade of unprecedented, and often conflicting, panel and Appellate Body opinions on the matter), we firmly believe that all Members have a strong systemic interest in seeing that a lasting resolution to the "zeroing" controversy is found sooner rather than later²³⁰.

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

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

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

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

7.138 Brazil submits that the first sentence of Article 2.4 contains an obligation that applies whenever an investigating authority calculates a margin of dumping in any anti-dumping proceeding.²³² According to Brazil, Article 2.4 is not only about "price comparability" but also "the nature of the comparison between export price and normal value", and therefore the "fairness of that comparison".²³³ Relying on previous findings of the Appellate Body, and one panel in an Article 21.5 implementation dispute²³⁴, Brazil argues that the calculation of a margin of dumping through the use

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

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

²³² Brazil, Answer to Panel Question 2.

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

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

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of "simple zeroing" results in an unfair comparison between export price and normal value and therefore infringes Article 2.4.²³⁵ On the other hand, the United States argues that the obligation to make a fair comparison under Article 2.4 is limited to adjustments needed to ensure price comparability. The United States finds support for this position not only in the statements made by panels and the Appellate Body in other disputes, but also the alleged negotiating history of the AD Agreement and Member practice. Moreover, the United States counters Brazil's reliance on the alleged panel and Appellate Body findings in previous "zeroing" disputes, arguing that there were either no such findings made in the relevant disputes, or that they related to claims that are factually and legally distinct from those Brazil is making in the present dispute.²³⁶

7.139 Article 2.4 of the AD Agreement reads:

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.⁽¹⁾ In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."²³⁷

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

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

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

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

²³⁷ Underline added, footnote omitted.

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"We consider that the requirement of a fair comparison set out in the first sentence of Article 2.4 is an independent legal obligation that is not defined exhaustively by the specific requirements set out in the remainder of Article 2.4 and is not limited in scope to the issue of adjustments to ensure price comparability. In this regard, we agree with the analysis of the panel in *US – Zeroing (EC)* regarding the scope of the "fair comparison" obligation. *First*, as stated by that panel, not to give independent meaning to the "fair comparison" requirement would render this provision inutile. *Second*, the structure of Article 2.4 suggests that the chapeau of Article 2.4 and its sub-paragraphs must be interpreted as a whole. *Third*, the "comparison" referred to in Articles 2.4.1 and 2.4.2 of the *AD Agreement* is the "comparison" in Article 2.4. *Fourth*, the "fair comparison" requirement explicitly applies also to the subject matter of Article 2.4.2 by virtue of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2.²³⁸

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

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

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

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

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

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

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

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

"We turn next to examine whether zeroing in periodic reviews and new shipper reviews is, as such, inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*.

If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a 'fair comparison' within the meaning of the first sentence of Article 2.4.⁽¹⁾ This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously.^{(1)»²⁴³}

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

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

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

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

BCI deleted, as indicated [[XX]]

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

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

"When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing."⁽¹⁾ Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."²⁴⁵

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

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

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

²⁴⁴ Appellate Body Report, *US – Zeroing (Japan)(Article 21.5 – Japan)*, para. 193 (underline added).

²⁴⁵ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

²⁴⁶ See discussion above, para. 7.119.

²⁴⁷ US, SCOOS, para. 26.

²⁴⁸ US, SWS, paras. 16-22; US, SCOOS, para. 28.

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

"[W]e believe that a claim based on a highly general and subjective test such as 'fair comparison' should be approached with caution by treaty interpreters. For this reason, any conception of 'fairness' should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally. As such, there must be a discernable standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been 'fair' or 'unfair'. Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard.⁽¹⁾ If, however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case."²⁴⁹

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

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

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

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

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

²⁴⁹ Panel Report, *US – Softwood Lumber V*, para. 5.74.

²⁵⁰ US, SWS, para. 22.

²⁵¹ See above, paras. 7.84-7.87.

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

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

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

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

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

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

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

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

²⁵⁴ See above, paras. 7.84-7.87.

²⁵⁵ See above, para. 7.86.

²⁵⁶ See above, para. 7.86.

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

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

7.160 We are unable to agree with the United States' submissions. As we have already explained²⁵⁹, the obligation under Article 2.4 is focused on the "comparison" between export price and normal value, not its impact. In other words, it is the nature of the "comparison" itself, and not the results of that comparison, that is disciplined under Article 2.4. Thus, in our view, it follows that a "comparison" between export price and normal value that involves "simple zeroing" will be "unfair" for the purpose of Article 2.4, irrespective of whether the final WAM or final ISAR actually imposed is 0%. Article 2.4 regulates the "comparison" that is made by an investigating authority; and it is this "comparison" (not its outcome) that falls within the scope of Article 2.4 of the AD Agreement.

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

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

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

C. BRAZIL'S CLAIMS CONCERNING "CONTINUED ZEROING"

1. Arguments of Brazil

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

7.164 Brazil characterizes the USDOC's alleged "continued use" of "zeroing" as "ongoing conduct" of virtually the same kind found to be inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by the Appellate Body in *US – Continued Zeroing*. Relying entirely upon the Appellate Body's reasoning in that dispute, and various pieces of evidence allegedly demonstrating the USDOC's use of "zeroing procedures" in the original investigation and First, Second and Third Administrative Reviews, Brazil asks the Panel to find that the USDOC's "continued use" of "zeroing" in successive proceedings under of the orange juice anti-dumping duty order, by which duties are applied to imports of orange juice from Brazil, amounts to "ongoing conduct" that is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.²⁶¹

²⁵⁸ US, SWS, para. 17, citing from Appellate Body Report, *US – Zeroing (Japan)*, para. 168.

²⁵⁹ See above, para. 7.156.

²⁶⁰ Brazil, FWS, para. 48.

²⁶¹ Brazil, FWS, paras. 98-117; Brazil, FCOOS, paras. 80-96; Brazil, SWS, paras. 27-46; Brazil, SCOOS, paras. 86-93.

2. Arguments of the United States

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

7.166 In any case, the United States submits that Brazil has failed to establish that the USDOC actually "zeroed", as a matter of fact, in "successive proceedings". The United States asserts that the computer programme evidence submitted by Brazil in Exhibits BRA-32 (BCI) and BRA-33 (BCI) does not demonstrate that the USDOC used "zeroing" in the original investigation. According to the United States, the various lines of the computer programme that Brazil focuses upon show that the "necessary condition for activating the 'zeroing' operation" was not satisfied, meaning that no comparison of export price and normal value resulted in a negative value. In other words, the United States asserts that Brazil's evidence shows that all comparison results were positive (i.e., all comparison results showed dumping).²⁶³ The United States also argues that the computer programme evidence submitted by Brazil in Exhibit BRA-33 (BCI) was generated by Brazil's consultant, not the USDOC, and only after the USDOC made the relevant final determinations.²⁶⁴ Moreover, the United States emphasizes that no CDR was applied to imports of Cutrale's products following the First Administrative Review, and no CDRs or ISARs were applied to Fischer's products as a result of the Second Administrative Review. Thus, the United States submits that whatever "zeroing" may have taken place in the calculation of Cutrale's or Fischer's margins of dumping, it did not result in a breach of the United States' obligation under Article 9.3 of the AD Agreement to ensure that any anti-dumping duty applied is not in excess of the margin of dumping established under Article 2.²⁶⁵

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

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

²⁶² US, FWS, paras. 52, 124 and 130-131; US, SWS, paras. 83-84.

²⁶³ US, FWS, para. 128; US, FCOOS, para. 38; US, SWS, para. 87; US, Answer to Panel Question 24.

²⁶⁴ US, Answer to Panel Question 24.

²⁶⁵ US, FWS, para. 127; US, FCOOS, para. 39.

²⁶⁶ US, FWS, paras. 132-133; US, SWS, para. 87; US, SCOOS, paras. 39-40.

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

3. Arguments of the Third Parties

(a) Japan

7.169 Japan argues that there is no substantial difference between the "continued zeroing" measure that Brazil challenges in the present dispute and the "continued zeroing" measure challenged by the European Communities in *US – Continued Zeroing*. Japan recalls that previous panels and the Appellate Body have found that "zeroing" is inconsistent with Article 2.4.2 (when performed in original investigations) and Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 (when performed for the purpose of duty assessment proceedings). Thus, Japan calls on the Panel to follow these findings and rule that the USDOC's "continued zeroing" in the orange juice anti-dumping proceedings is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.²⁶⁸

4. Evaluation by the Panel

(a) Introduction

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

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

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

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

²⁶⁷ US, FWS, paras. 134-135.

²⁶⁸ Japan, TPWS, paras. 18-22 and 72.

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

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

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

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"Thus, the measures at issue consist of neither the zeroing methodology as a rule or norm of general and prospective application, nor discrete applications of the zeroing methodology in particular determinations; rather, they are the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which duties are maintained over a period of time. We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order.⁽¹⁾ 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.⁽¹⁾ It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation. At the oral hearing, the European Communities confirmed that it is not seeking the revocation of the 18 anti-dumping orders but, rather, the cessation of the use of the zeroing methodology by which the duties are calculated and maintained in these 18 cases.⁽¹⁾ In our view, the European Communities, in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in these 18 cases, under the scrutiny of WTO dispute settlement."²⁷²

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

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

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

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

²⁷² Appellate Body Report, *US – Continued Zeroing*, para. 181 (footnotes omitted).

²⁷³ Brazil, Answer to Panel Question 2.

²⁷⁴ US, FWS, paras. 51 and 131.

²⁷⁵ US, SWS, para. 84.

²⁷⁶ US, SWS, para. 84.

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

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

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

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

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

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

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

²⁷⁷ Appellate Body Report, *US – Continued Zeroing*, para. 191 (emphasis added).

²⁷⁸ Appellate Body Report, *US – Continued Zeroing*, para. 191 (emphasis added).

²⁷⁹ Appellate Body Report, *US – Continued Zeroing*, para. 194.

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

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

(i) *Original Investigation*

7.181 Brazil asserts that the computer programme the USDOC applied in the original investigation²⁸¹ to calculate the respondents' margins of dumping "provided for the exclusion ... of negative comparison results where the weighted-average export price of any model exceeded normal value".²⁸² To substantiate this assertion, Brazil submits a copy of the relevant programme logs together with an explanation which identifies the "language to zero negative margins" appearing in each log.²⁸³

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

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

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

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

²⁸² Brazil, FWS, para. 102.

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

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

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"In Brazil's view, a challenge to the continued use of zeroing under a single anti-dumping order does not fit squarely into either the 'as applied' or the 'as such' category. Indeed, the claim shares elements of both 'as such' and 'as applied' claims.

With respect to similarities to an 'as such' claim, the claim contests the continued use of zeroing in a series of determinations under a specific anti-dumping order that applies prospectively to all subject imports; the claim is, therefore, not confined to 'specific instances in which the zeroing methodology was applied, such as a periodic review or sunset review determination'.⁽¹⁾ The evidence, as a whole, shows that, under the Orange Juice Order, the United States systematically uses the zeroing as part of its methodology for determining dumping and margins of dumping. Also similar to an 'as such' claim, the aim of the 'continued use' claim is to obtain 'the cessation of *the use of the zeroing methodology* by which the duties are calculated and maintained'.⁽¹⁾ Thus, the 'continued use' claim contests zeroing on a relatively generalized basis, aiming to terminate its use on that basis.

However, the claim is nonetheless different from an 'as such' claim with respect to the degree of generality of the claim. An 'as such' claim against the zeroing procedures as a rule or norm of general and prospective application would address the maintenance of zeroing for use in administrative (or other) reviews, under *all* anti-dumping orders. In contrast, Brazil's 'continued use' claim addresses the use of the zeroing in determinations under *one single* anti-dumping order, namely the Orange Juice Order. The claim is, therefore, 'narrower' than an 'as such' claim.⁽¹⁾²⁸⁵

"With respect to the 'continued use' measure, the conduct comprising this measure is the *use of zeroing* in determinations made under the Orange Juice Order, including in administrative reviews. As with an 'as such' claim against zeroing under all anti-dumping orders, the consistency of this measure, under Article 9.3 and Article VI:2, in the context of the Orange Juice Order, does not turn on the *outcome* of any specific determination resulting from the use of zeroing."²⁸⁶

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

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

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

²⁸⁵ Brazil, Answer to Panel Question 1 (footnotes omitted).

²⁸⁶ Brazil, Answer to Panel Question 2.

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

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

(ii) *Third Administrative Review*

7.187 Brazil asserts²⁸⁷ that the USDOC used "simple zeroing" in the Final Results of the Third Administrative Review to determine the following WAMs, CDRs and ISARs:

	<i>WAM</i> ²⁸⁸	<i>CDR</i> ²⁸⁸	<i>ISAR</i> ²⁸⁹
Third Administrative Review			
Cutrale	8.13%	8.13%	[[XX]]
Fischer	5.26%	5.26%	[[XX]]

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

7.189 The United States does not contest that the USDOC used "simple zeroing" when determining the above WAMs, CDRs and ISARs²⁹¹, but it argues that the Third Administrative Review is not within the Panel's terms of reference.²⁹² However, apart from referring to a discussion contained in its first written submission where it explains why the Second Administrative Review is outside of the Panel's terms of reference, the United States presents no separate argumentation concerning the Third Administrative Review.

7.190 In our view, the United States' position with respect to Brazil's reliance on the results of the Third Administrative Review is misplaced. Brazil does not *challenge* the results of the Third Administrative Review, but instead uses them as *evidence* of the "continued zeroing" measure. A panel's terms of reference need only contain a sufficiently clear explanation of the legal basis of a complainant's claims and a description of the challenged measures²⁹³; they are not required to also

²⁸⁷ Brazil, SWS, paras. 36-41.

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

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

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

²⁹¹ US, Answer to Panel Question 24.

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

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

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

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

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

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

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

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

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

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

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

BCI deleted, as indicated [[XX]]

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

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

8.1 As previously observed, the question at the centre of Brazil's complaint in this dispute has been well litigated in WTO dispute settlement. This core question concerns how the AD Agreement (and Article VI of the GATT 1994) defines the notion of "dumping": is it a concept that relates to an exporter's overall pricing behaviour that can only be measured with respect to the "product as a whole"; or can it also be conceived of and measured on a transaction-specific basis? Although fundamental and of critical importance to the operation of the AD Agreement, our evaluation of the parties' arguments and relevant jurisprudence has led us to conclude that there exists no *single* answer to this question. The objective lack of clarity on this issue, to some extent also recognized by the Appellate 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:

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

²⁹⁶ See above, paras. 7.132-7.135.

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

BCI deleted, as indicated [[XX]]

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

B. RECOMMENDATION

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

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