BEFORE THE WORLD TRADE ORGANIZATION

US – Zeroing (Brazil)

(WT/DS382)

First Written Submission of Brazil

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LIST OF ABBREVIATIONS

Abbreviation	Description
AD order	Anti-dumping order
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
CDR	Cash deposit rate
CIT	U.S. Court of International Trade
CONNUMs	Control numbers
Cutrale	Sucocítrico Cutrale S.A.
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities (now European Union)
EMARGIN	Computer code for extended margin
FCOJM	Frozen concentrated orange juice for further manufacturing
First Administrative Review	The first administrative review of anti-dumping duties under the Orange Juice Order, covering entries during the period from August 24, 2005 to February 28, 2007
Fischer	Fischer S.A. Comércio, Indústria, e Agricultura
GATT 1994	General Agreement on Tariffs and Trade 1994
ISAR	Importer-specific assessment rate
NFC	Not-from concentrate orange juice
Orange Juice Order	The anti-dumping duty order on certain orange juice from Brazil
Review period	The period during which the import entries covered by an administrative review occurred

Abbreviation	**Description**
Second Administrative Review	The second administrative review of anti-dumping duties under the Orange Juice Order, covering entries during the period from March 1, 2007 to February 28, 2008
Tariff Act	Tariff Act of 1930, as amended by the Uruguay Round Agreements Act
Third Administrative Review	The third administrative review of anti-dumping duties under the Orange Juice Order, covering entries during the period from March 1, 2008 to February 28, 2009
T-to-T	Transaction to transaction
USCBP	United States Customs and Border Protection
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
W-to-T	Weighted average to transaction
W-to-W	Weighted average to weighted average

TABLE OF CASES

Short Title	Full Case Title and Citation
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
US – Anti-Dumping Measures on PET Bags	Panel Report, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, adopted 18 February 2010
US – Continued Zeroing (EC)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Shrimp Bond	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875

Short Title	Full Case Title and Citation
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3
	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, 97
US – Zeroing (Japan) (21.5)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009
	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW, adopted 31 August 2009, upheld by Appellate Body Report WT/DS322/AB/RW

TABLE OF EXHIBITS

Number	Description
BRA-1	Tariff Act § 751
BRA-2	19 C.F.R § 351.211 - 213
BRA-3	Anti-dumping duty order: certain orange juice from Brazil, 71 Fed. Reg. 12183 (March 9, 2006)
BRA-4	Tariff Act § 771(35) (19 U.S.C. § 1677(35)(A))
BRA-5	Tariff Act § 733
BRA-6	Tariff Act §§ 735 – 737
BRA-7	19 C.F.R. § 351.221
BRA-8	Tariff Act § 516A
BRA-9	28 U.S.C. § 2636(c)
BRA-10	Notice announcing USDOC would cease applying model zeroing in W-to-W comparisons in original investigations, 71 Fed. Reg. 77722 (December 27, 2006)
BRA-11	Notice of change in effective date of final modification, 72 Fed. Reg. 3783 (January 26, 2007)
BRA-12	19 C.F.R. § 351.414(d)
BRA-13	USDOC Antidumping Manual, Chapter 7
BRA-14	19 C.F.R. § 351.106
BRA-15	Tariff Act § 500(e)
BRA-16	19 C.F.R. § 159.9
BRA-17	Notice of initiation of the Original Investigation (February 11, 2005)
BRA-18	Final results of the Original Investigation, 71 Fed. Reg. 2183 (January 13, 2006)
BRA-19	Amended final results of the Original Investigation, 71 Fed. Reg. 8841 (February 21, 2006)
BRA-20	Overview of the use of zeroing in the Original Investigation and subsequent administrative reviews

Number	Description
BRA-21	Final results of the First Administrative Review, 73 Fed. Reg. 46584 (August 11, 2008)
BRA-22	Final results of the Second Administrative Review, 74. Fed. Reg. 40167 (August 11, 2009)
BRA-23	Preliminary results of the Third Administrative Review, 75 Fed. Reg. 18794 (April 13, 2010)
BRA-24	Computer program log containing the language applying zeroing in the Third Administrative Review, for Cutrale
BRA-25	Computer program log containing the language applying zeroing in the Third Administrative Review, for Fischer
BRA-26	Notice of Initiation of the First Administrative Review, 72 Fed. Reg. 20986 (April 27, 2007)
BRA-27	Preliminary results of the First Administrative Review, 73 Fed. Reg. 18773 (April 7, 2008)
BRA-28	Issues and Decision Memorandum in the First Administrative Review (August 5, 2008)
BRA-29	Computer program log containing the language applying zeroing in the First Administrative Review, for Cutrale
BRA-30	Computer program log containing the language applying zeroing in the First Administrative Review, for Fischer
BRA-31	Affidavit of Mr. Michael Ferrier
BRA-32	Computer program log containing the language applying zeroing in the Original Investigation, for Cutrale
BRA-33	Computer program log containing the language applying zeroing in the Original Investigation, for Fischer
BRA-34	Computer program output in the First Administrative Review, for Cutrale
BRA-35	Computer program output in the First Administrative Review, for Fischer
BRA-36	Computer program log containing the language applying zeroing in the Second Administrative Review, for Cutrale
BRA-37	Computer program output in the Second Administrative Review, for Cutrale
BRA-38	Computer program log containing the language applying zeroing in the Second Administrative Review, for Fischer

Number	Description
BRA-39	Computer program output in the Second Administrative Review, for Fischer
BRA-40	Preliminary results of the Original Investigation, 70 Fed. Reg. 49557 (Aug. 24, 2005)
BRA-41	Notice of Initiation of the Second Administrative Review, 73 Fed. Reg. 22337 (April 25, 2008)
BRA-42	Preliminary results of the Second Administrative Review, 74 Fed. Reg. 15438 (April 6, 2009)
BRA-43	Issues and Decision Memorandum in the Second Administrative Review (August 4, 2009)
BRA-44	19 C.F.R. § 351.102

I. INTRODUCTION

1. This dispute is yet another in a long line of WTO challenges concerning the United States' "zeroing procedures". Including the present one, there have now been eleven zeroing disputes brought against the United States by eight different WTO Members and, in each one so far decided, zeroing has been found to be WTO-inconsistent.[1] In fact, counting both original and compliance proceedings, U.S. anti-dumping measures have now been found to be WTO-inconsistent in eleven separate dispute settlement proceedings due to the use of zeroing.

2. This latest zeroing dispute concerns the United States Government's application of its zeroing procedures in the original anti-dumping investigation and administrative reviews[2] of the anti-dumping duty order on certain orange juice from Brazil ("Orange Juice Order").[3] In the original investigation, in calculating the margin of dumping for the product as a whole, the United States Department of Commerce ("USDOC") had in place a practice of "model zeroing", under which the amount by which any model's average export price exceeded the average normal value for that model was eliminated or, in effect, set at zero ("zeroed").

3. In two administrative reviews of anti-dumping duties conducted since the issuance of the Orange Juice Order, the USDOC applied its practice of "simple zeroing", under which the amount by which an individual export price exceeded normal value was ignored or zeroed. Individual export transactions with prices below normal value were treated under U.S. law as

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[1] The "zeroing" disputes brought against the United States, other than this dispute, are: *US – Softwood Lumber V* (DS264, brought by Canada) (original and compliance proceedings); *US – Zeroing (EC)* (DS294, brought by the European Communities ("EC")) (original and compliance proceedings); *US – Zeroing (Japan)* (DS322, brought by Japan) (original and compliance proceedings); *US – Shrimp (Ecuador)* (DS335, brought by Ecuador); *US – Shrimp Bond* (DS343, brought by Thailand); *US – Stainless Steel* (DS344, brought by Mexico); *US – Continued Zeroing (EC)* (DS350, brought by the EC); *US – Anti-Dumping Measures on PET Bags* (DS383, brought by Thailand); *US – Zeroing (Korea)* (DS402, brought by Korea); and *US – Shrimp (Viet Nam)* (DS404, brought by Viet Nam).

[2] The term "administrative reviews" is the term used by the US anti-dumping statute and the USDOC's regulations to refer to annual reviews by the USDOC of the amount of anti-dumping duties owing on imports following the publication of an anti-dumping duty order. *See* Title VII of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act, Section 751(a)(1) ("Tariff Act"), and 19 C.F.R §351.213. Exhibits BRA-1 and BRA-2. These reviews are also sometimes referred to as "periodic reviews" in U.S. legislation. The administrative review procedure is the procedure used by the USDOC to determine the amount of duty to be assessed on entries of merchandise subject to the order, and is the United States' procedure intended to implement Article 9 of the *Anti-Dumping Agreement.*

[3] 71 Fed. Reg. 12183 (March 9, 2006). Exhibit BRA-3.

having "dumping margins"[4] or, in WTO parlance, "positive comparison results" in the amount of the difference. On the other hand, the zeroing of the transactions with export prices above normal value means that the "negative comparison results" on these export sales are effectively disregarded. The model zeroing and simple zeroing procedures, which are described in more detail below,[5] are not distinct and separate practices. Rather, they constitute different aspects of the same methodology for calculating dumping margins,[6] which Brazil refers to as the U.S. "zeroing procedures", "zeroing methodology" or simply "zeroing".[7]

4. This dispute also concerns the USDOC's deliberate and continued use of its zeroing procedures in successive anti-dumping proceedings under the Orange Juice Order, including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time. This "ongoing conduct", which Brazil considers to be inconsistent with the United States' obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*"), continues to this day, as the USDOC is now imposing duties pursuant to the results of the second administrative review and is conducting its third administrative review of anti-dumping duties under the Orange Juice Order.

5. The application of zeroing in the two completed administrative reviews resulted in overall weighted average dumping margins for each exporter that were higher than would have been the case had all of the export transactions (including those whose export prices were greater than normal value) been included in the calculation of the weighted average dumping margin. In fact, had USDOC not applied zeroing in these two administrative reviews, both Brazilian exporters under review would have had weighted average dumping margins substantially lower than zero, resulting in no duties being collected on these exports

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[4] Tariff Act, Section 771(35)(A). Exhibit BRA-4. Brazil considers that this concept does not correspond to the term "margin of dumping" as used in, for example, Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*.
[5] *See* Section III.B below.
[6] *See* Panel Report, *US - Zeroing (Japan)*, footnote 688 ("[W]e consider that the terms 'model zeroing' and 'simple zeroing' used by Japan do not correspond to two different rules or norms but simply refer to different manifestations of a single rule or norm – not allowing non-dumped export sales to offset margins on export prices below the normal value.").
[7] For purposes of this submission, Brazil employs the expressions "zeroing procedures", "zeroing methodology" and "zeroing" interchangeably.

for either exporter in either review. Duty deposit rates for both companies would have been set at zero and would also continue to be zero today.

6. Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* use the term "margin of dumping" to define the maximum amount of duty that can be imposed to offset dumping. The ordinary meaning of this term in the context of other provisions of the GATT 1994 and the *Anti-Dumping Agreement* makes clear that the "margin of dumping" relates to the product under investigation as a whole as applied to a given exporter. Hence, this term means that the margin of dumping for a given exporter cannot exceed the total margin that would obtain for all export transactions, by that exporter, relating to the product as a whole. If an authority arrives at a determination in a periodic review that exceeds the overall margin of dumping for the exporter, because of the systematic exclusion of certain export transactions, the determination is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

7. The Appellate Body has, on numerous occasions, found that zeroing is inconsistent with the obligations of the GATT 1994 and the *Anti-Dumping Agreement*. Model zeroing in original investigations, as such and as applied, has been found to be inconsistent with the obligation under Article 2.4.2 of the *Anti-Dumping Agreement* in several disputes.[8] In addition, the Appellate Body has found that simple zeroing in administrative reviews, as such and as applied, is inconsistent with the GATT 1994 and the *Anti-Dumping Agreement* in at least five different appeals.[9]

8. In light of all these adverse findings, Brazil's claims in this dispute are simple and straightforward. Brazil asks this Panel to find that (i) the two administrative reviews completed to date in respect of imports subject to the Orange Juice Order are inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* due to the application of the zeroing procedures. Brazil also asks this Panel to rule that (ii) the continued use of the U.S. zeroing procedures in successive anti-dumping proceedings in

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[8] *See, e.g.*, Appellate Body Reports *EC - Bed Linen*, para. 66; *US - Softwood Lumber V*, para. 117; and *US - Zeroing (EC)*, para. 222. *See also* Panel Reports, *US - Zeroing (Japan)*, paras. 7.86 and 7.179; *US - Stainless Steel (Mexico)*, para. 7.63; *US - Continued Zeroing (EC)*, paras. 7.109 – 111; *US - Shrimp (Ecuador)*, paras. 7.38 – 7.43; and *US - Anti-Dumping Measures on PET Bags*, para. 7.25.

[9] *See* Appellate Body Reports, *US - Zeroing (EC)*, para. 135; *US - Zeroing (Japan)*, paras. 166 and 176; *US - Stainless Steel (Mexico)*, paras. 134 and 139; *US - Continued Zeroing (EC)*, para. 316; and *US - Zeroing (Japan) (21.5)*, paras. 195 and 197.

relation to the Orange Juice Order, including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time, is inconsistent with Article VI:2 of the GATT 1994 and Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*.

9. The United States must comply with its obligations under the rules of the GATT 1994 and the *Anti-Dumping Agreement*, as repeatedly and consistently enunciated by the Dispute Settlement Body ("DSB"). Brazil therefore requests, pursuant to Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), that this Panel recommend that the United States bring the measures at issue into conformity with its obligations under the covered agreements.

10. In this submission, Brazil will, first, summarize its claims; second, provide an overview of the U.S. calculation of dumping margins and subsequent collection of dumping duties; third, present the measures at issue; and fourth, provide the legal arguments in support of its claims.

II. SUMMARY OF BRAZIL'S CLAIMS

11. Brazil claims that two administrative reviews under the Orange Juice Order are inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* insofar as the margins of dumping were calculated inconsistently with Article 2 and, hence, Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, due to the U.S. use of zeroing procedures.

12. Brazil also claims that the continued use by the United States of its zeroing procedures in successive anti-dumping proceedings under the Orange Juice Order, including the original investigation and any subsequent administrative reviews, by which duties are applied and maintained over a period of time, violates:

- Article 2.4.2 of the *Anti-Dumping Agreement* because the U.S. use of zeroing procedures is inconsistent with making a determination for the product as a whole in the original investigation; and

- Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* insofar as the imposition and collection of anti-dumping duties are made in excess of

the margin of dumping properly determined pursuant to Article 2 of the *Anti-Dumping Agreement*.

III. OVERVIEW OF U.S. CALCULATION OF DUMPING MARGINS AND COLLECTION OF DUMPING DUTIES

13. In order to understand precisely the nature of the USDOC's application of its zeroing procedures and how this is inconsistent with, and results in duties that are inconsistent with, the GATT 1994 and the *Anti-Dumping Agreement*, it is necessary to understand how the USDOC administers the U.S. anti-dumping law to calculate and assess anti-dumping duties on merchandise. This section therefore (i) explains the process used by the USDOC to calculate dumping margins; (ii) describes how zeroing fits into that process; and (iii) explains how U.S. Customs and Border Protection ("USCBP") collects dumping duties based on the USDOC's determinations.

A. Overview of the Calculation of Dumping Margins by the USDOC

14. The USDOC's administration of an anti-dumping "proceeding" is divided into separate "phases":[10] an investigatory phase, in which the USDOC determines the existence of dumping for the first time; and, if requested, annual "administrative review" phases to determine the amount of duties actually owing on entries subject to the anti-dumping duty order, if any. Additionally, five years after publication of an anti-dumping duty order, and every five years thereafter if the order is not revoked, the USDOC and the U.S. International Trade Commission ("USITC"), respectively, review whether revocation of the order "would be likely to lead to continuation or recurrence of dumping (…) and of material injury".[11] We discuss the first two phases separately below, but do not consider further sunset reviews because they are not part of these original proceedings.

1. Original Investigation and Issuance of an Anti-Dumping Order

15. The USDOC conducts its original anti-dumping investigation on individual exporters from the country under investigation, covering these exporters' shipments in the four calendar quarters prior to the filing of the anti-dumping petition. It analyzes these sales on a model-specific basis, using defined model categories known as "control numbers", or CONNUMs. These CONNUMs differ from investigation to investigation. In the case of

[10] The term "phase" is used by the USDOC in its regulations, 19 C.F.R §351.211(a). Exhibit BRA-2.
[11] Tariff Act, Section 751(c)(1). Exhibit BRA-1.

certain orange juice from Brazil, for example, there were two CONNUMs, frozen concentrated orange juice for further manufacturing ("FCOJM") and not-from concentrate orange juice ("NFC").

16. If the USDOC finds that these exports have been sold at less than normal value, it issues preliminary dumping margins for each exporter covered in the investigation.[12] These margins may be revised in the final determination.[13] If the USDOC's final determination of dumping is followed by an affirmative injury determination by the USITC,[14] the USDOC publishes an anti-dumping duty order setting out the anti-dumping duty deposit rates that will be applied on future imports from each exporter; these rates are identical to those determined by the USDOC in the final determination.[15] The issuance of the order, according to the USDOC's regulations, "ends the *investigative phase*" of the overall anti-dumping proceeding.[16]

17. During the time period in which the anti-dumping investigation of certain orange juice from Brazil occurred, the USDOC's policy was first to determine the extent of less-than-normal value sales for each CONNUM under investigation, for each exporter. If a given exporter had average U.S. prices on any CONNUM that were higher than normal value, the "negative" comparison results on that CONNUM or model were eliminated – zeroed – before the overall weighted average dumping margin was determined for the exporter. The exporter's overall margin of dumping on the product under investigation was thus determined using model zeroing[17] – *i.e.*, using only those CONNUMs which had positive comparison results – divided by the exporter's total sales value on all sales to the United States. We examine the USDOC's calculation methodology and zeroing procedures in more detail in paragraphs 28 to 30 below.

18. The weighted average dumping margins determined for each exporter in the original investigation become the cash deposit rates applied on each importation that occurs after the

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[12] Tariff Act, Sections 733(b)(1), (c). Exhibit BRA-5.
[13] Tariff Act, Sections 735(a)(1) and (a)(2). Exhibit BRA-6.
[14] U.S. law complies with Article VI.1 of the GATT 1994 and Article 3 of the *Anti-Dumping Agreement* by requiring a determination of injury prior to the issuance of an antidumping duty order. The USITC is an independent U.S. government agency, which examines the question of injury separately from the USDOC's determination of dumping. Tariff Act, Section 735(b). Exhibit BRA-6.
[15] Tariff Act, Section 736(a); and 19 C.F.R §351.211(b)(2). Exhibits BRA-6 and BRA-2.
[16] 19 C.F.R. § 351.211(a). Exhibit BRA-2.
[17] The precise meanings of "model zeroing" in the USDOC's original investigations and "simple zeroing" in administrative reviews are explained in further detail in section B below.

publication of the dumping order.[18] For each import entry, the required amount of the cash deposit is calculated by multiplying the percentage margin of dumping determined in the original investigation (*i.e.*, the cash deposit rate) by the customs value of the merchandise being imported.

2. Administrative Reviews

19. At the end of a twelve-month period following the publication of an anti-dumping order, any exporter, importer, or domestic producer of the subject merchandise is entitled to request an administrative review of the anti-dumping liability, covering imports during the preceding twelve-month period (the "review period").[19] The USDOC conducts its administrative review of entries over a one-year to 18-month period, issuing a preliminary determination between 9 and 12 months after the initiation of the review.

20. An administrative review serves two purposes. First, the administrative review establishes an overall dumping margin for each exporter. This becomes the new cash deposit rate for entries made after the publication of the review determination, and continues to apply until the completion of the next administrative review. Second, the administrative review establishes an "importer-specific assessment rate" ("ISAR"). The ISAR is the rate at which the USCBP will assess, for the respective importers, the final amount of anti-dumping duties owed on imports that occurred during the review period. 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, then the importer is refunded the difference, 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 presented with a bill for the difference, plus interest.[20] If the ISAR results in an amount of duties that is equal to the cash deposits, the importer is notified of assessment at that rate.

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[18] Tariff Act, Section 736(a)(3). Exhibit BRA-6.
[19] 19 C.F.R §351.213(b). Exhibit BRA-2. For the first administrative review only, imports covered by the review are not limited to a 12-month period, but rather begin with imports on or after the *preliminary determination* of dumping in the original investigation, which occurs roughly six months before the order is issued. 19 C.F.R. § 351.213(e)(ii). Exhibit BRA-2. Thus, the first administrative review covers roughly 18 months of exports, while all subsequent reviews cover 12 months of exports.
[20] Tariff Act, Section 737(b); and 19 C.F.R. § 351.212(b). Exhibits BRA-6 and BRA-2.

21. The reason for this dual purpose of administrative reviews is that under U.S. law, "final liability for anti-dumping . . . duties is determined after merchandise is imported."[21] Therefore, while liability to pay dumping duties accrues upon entry of subject merchandise, the amount of duty due, if any, is not finally determined until the USDOC publishes its final results for the administrative review, and liquidation of these entries by USCBP is therefore "suspended" pending the final results.[22] If no review is requested, liquidation of entries is made at the rate of the cash deposits in effect at the time of entry of the merchandise.

22. In calculating each exporter's overall dumping margin (*i.e.*, cash deposit rate) and the ISARs, the price of each individual U.S. export transaction is compared to a weighted average normal value for the CONNUM for a contemporaneous month.[23] If the price of an individual export transaction is *higher than the weighted average normal value* in the comparison month, the "negative" comparison results are disregarded – zeroed – before the overall weighted average dumping margin is determined for the exporter. On the other hand, if an export price is *lower than the weighted average normal value*, the "positive" comparison result is included in the calculation. To calculate each exporter's overall dumping margin, the USDOC calculates a fraction, in which the numerator is the aggregate amount by which the exporter's prices in individual transactions are lower than normal value (*i.e.*, the sum of all positive comparison results), and the denominator is the total value of all export transactions.

[21] 19 C.F.R. § 351.212; *see* also Tariff Act, Section 751(a)(2). Exhibits BRA-2 and BRA-1.
[22] 19 C.F.R. § 351.212. Exhibit BRA-2. Liquidation of entries is suspended during the course of an anti-dumping review in accordance with Section 751(a)(2) of the Tariff Act. Exhibit BRA-1.
[23] The USDOC's computer program determines the most "contemporaneous" month in the following manner. First, if there are home-market sales of the identical product (CONNUM) in the same month as the export sale to the US, the USDOC calculates an average home market price for that CONNUM in that month. If there are no home-market sales of the identical product, it proceeds to the month before the month of export and calculates the weighted average price in that month. If there are no home market sales in that month, it proceeds in the same manner, up to three months prior to the month of export. If there are no home-market sales in the three months prior to the month of export, it examines home market sales in the month after the month of export, and then in the month that is two months after the month of export. If there are no home-market sales of identical merchandise in this entire six-month period, the program then searches for sales of "similar" merchandise, following the same temporal course (up to three months before and two months after the month of export).

23. To calculate the ISARs, the USDOC follows the same methodology but, for a given importer, includes in the calculation solely those transactions imported by that importer.[24]

24. We examine the USDOC's calculation methodology and zeroing procedures in more detail in paragraphs 28 to 30 below.

25. Within 30 days of the USDOC's publication of its results in the administrative review, a party may file a summons at the U.S. Court of International Trade ("CIT"), contesting the final results.[25] If the final results are challenged, one or more of the parties may obtain an injunction, which would continue the suspension of liquidation of the entries until a final decision is taken by the CIT or, if subject to further appeal, by the U.S. Court of Appeals for the Federal Circuit.[26]

B. Explanation of the Zeroing Procedures Used by the USDOC in Original Investigations and Administrative Reviews

26. In calculating dumping margins in any anti-dumping proceeding, the USDOC compares normal value and export price using one of three methods. The first method "involves a comparison of the weighted average of the normal values with the weighted average of the export prices ... for comparable merchandise"[27] ("W-to-W" comparison); the second method "involves a comparison of the normal values of individual transactions with the export prices ... of individual transactions for comparable merchandise"[28] ("T-to-T" comparison); and the third method "involves a comparison of the weighted average of the normal values to the export prices ... of individual transactions for comparable merchandise"[29] ("W-to-T" comparison).

27. In original investigations, the USDOC routinely calculates dumping margins using a W-to-W comparison.[30] Until February 22, 2007,[31] the USDOC's calculations using a W-to-

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[24] In other words, in administrative reviews, both the exporter's dumping margin and the ISAR are calculated using "simple zeroing". 19 C.F.R. § 351.221(b)(5). Exhibit BRA-7. The methodology involved in simple zeroing is explained in detail in paras. 31 to 33 below.
[25] The time frame for filing an appeal at the CIT is set forth at Section 516A(a)(2)(A) of the Tariff Act and 28 U.S.C. § 2636(c). Exhibits BRA-8 and BRA-9.
[26] *See* para. 43 below.
[27] 19 C.F.R. § 351.414(b)(1). Exhibit BRA-12.
[28] 19 C.F.R. § 351.414(b)(2). Exhibit BRA-12.
[29] 19 C.F.R. § 351.414(b)(3). Exhibit BRA-12.
[30] The T-to-T method was used by the United States in the investigation at issue in *U.S. - Softwood Lumber V (21.5)*. *See* Panel Report, *U.S. - Softwood Lumber V (21.5)*, para. 2.8.

W comparison included model zeroing. In administrative reviews, in order to assess retrospectively the amount of duty due, the United States routinely calculates dumping margins using a W-to-T comparison, including simple zeroing.

1. Model Zeroing in Original Investigations

28. In calculating a dumping margin on a W-to-W basis under the model zeroing procedures, which applied at the time of the original investigation into certain orange juice from Brazil, the United States would proceed in three steps. In the first step, the USDOC would sub-divide the product as a whole into a series of "averaging groups"[32] or "models." The USDOC refers to averaging groups as "CONNUMs", short for "control numbers".[33] An averaging group consists of goods that are identical or virtually identical in terms of certain key physical characteristics that are identified by the USDOC, after consultation with the parties, on an investigation-specific basis.[34] A W-to-W comparison between normal value and export price would be made within these models; that is, the USDOC would compare the annual weighted average price of all export transactions to the annual weighted average price of all home market transactions in the same model. There are three possible outcomes to these model-based comparisons. Normal value may exceed export price for a particular model, in which case there is a positive price difference for the model (what the USDOC commonly calls a "dumping margin"[35]); export price may exceed normal value, in which case the price difference for the model is negative; or, finally, normal value and export price may be equal, in which case the price difference is zero.

29. In the second step of the calculation procedures, the USDOC calculates both the numerator and denominator for the fraction from which the overall percentage is derived. The numerator is the aggregate amount of the multiple comparison results, and the denominator is the total value of all comparable export transactions. Under its model zeroing practice, in

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[31] 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). Exhibits BRA-10 and BRA-11.

[32] 19 C.F.R. § 351.414(d)(1). Exhibit BRA-12.

[33] 19 C.F.R. § 351.414(d)(1); and USDOC Antidumping Manual, Chapter 7, page 23. Exhibits BRA-12 and BRA-13.

[34] 19 C.F.R. § 351.414(d)(2). Exhibit BRA-12.

[35] Tariff Act, Section 771(35)(A). Exhibit BRA-4. As noted at footnote 4 above, Brazil considers that this concept does not correspond to the term "margin of dumping" as used in, for example, Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*.

summing the comparison results by model (CONNUM) to calculate the numerator, the USDOC would include solely the results for models with positive differences (that is, where the weighted average price of export transactions is less than the weighted average normal value of the model group). All comparisons with negative results would be disregarded in the calculation of the numerator. Thus, for models with negative comparison results, the USDOC would purposefully ignore the results of the comparison of normal value and export price. As a result, the sum of the total amount of dumping shown in the numerator would be inflated by an amount equal to the excluded negative comparison results. In calculating the denominator of the fraction, the USDOC would include the total value of all export transactions for all models.

30. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage overall margin of dumping, known in U.S. law as the "weighted average dumping margin".[36]

2. Simple Zeroing in Administrative Reviews

31. Simple zeroing is very similar to model zeroing. The key difference stems from the differences between the W-to-W comparison, on the one hand, and the W-to-T comparison, on the other. Whereas the W-to-W comparison is based on a comparison of export transactions grouped by model, the W-to-T method is based on comparisons of the prices of individual export transactions to a weighted average normal value for the model (CONNUM) during a contemporaneous month.

32. Thus, the USDOC calculates the difference between export price and weighted average normal value for each export transaction that occurred during the annual review period. Again, there are three possible outcomes to these comparisons. Normal value may exceed export price for a particular transaction, in which case the difference for the transaction is positive (what the United States calls a "dumping margin"[37]); export price may exceed normal value, in which case the difference for the transaction is negative; or, finally, normal value and export price may be equal, in which case the difference is zero.

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[36] Tariff Act, Section 771(35)(B). Exhibit BRA-4.
[37] *See* para. 28 and footnotes 4 and 35 above.

33. As in the W-to-W comparison, in step two, to derive a margin of dumping or an overall "weighted average dumping margin" for the product, the USDOC aggregates the comparison results for the export transactions and expresses the total as a fraction. Again, in calculating the numerator of the fraction, the USDOC sums the price differences exclusively for those comparisons for which there was a positive comparison result. All comparisons with negative results – *i.e.*, where the export price is higher than normal value – are disregarded in the calculation of the numerator of the fraction. Thus, where there is a negative difference, the USDOC purposefully ignores the results of the comparisons of export transactions and normal value. In other words, in the simple zeroing procedure, instead of zeroing by model, the USDOC zeroes by individual export transaction. As a result, the total amount of dumping shown in the numerator is inflated by an amount equal to the excluded negative differences. As with model zeroing, the USDOC retains the total sales value of all export transactions in the denominator. In the final step of the calculation procedures, the USDOC expresses the fraction as a percentage overall margin of dumping or "weighted average dumping margin".

34. The USDOC follows the same methodology in calculating ISARs. The USDOC undertakes a separate calculation for each importer, using the exporter's normal values and comparing them with the prices of the individual export transactions imported by the importer concerned.[38] The USDOC uses simple zeroing in undertaking these calculations. The purpose of these calculations is to allocate the "dumping" found in relation to the exporter among the importers who import that exporter's merchandise.

3. Computer Programs Used by the USDOC to Execute Model Zeroing and Simple Zeroing

35. To calculate dumping margins, the USDOC has in place standard computer programs that manipulate the extensive data submitted by exporters on their export prices, home-market prices, selling, movement and other expenses, and costs of production.

36. The standard computer programs contain computer code that executes every procedure and/or combination of procedures applicable to an anti-dumping proceeding. The computer programs are written in a programming language unique to the "SAS" software application used by the USDOC. The programs are divided into "sections" of programming

[38] *See* para. 31 above.

code, each of which executes a specific aspect of anti-dumping margin calculations. Within each section there are programming steps, arranged in a specific sequence, designed to execute particular calculation procedures. The structure and coding of the standard computer programs is not accidental, but is designed to ensure that dumping calculations are performed consistently with U.S. laws and policies. The standard programs serve as a model for use whenever the USDOC develops a specific computer program in a particular anti-dumping proceeding.

37. The USDOC's zeroing procedures – both model and simple – are implemented through computer programming language. In the margin calculation program, the computer code includes language that instructs the computer to undertake multiple comparisons of normal value and export price, whether it is using a W-to-W or a W-to-T comparison. The performance of these comparisons creates a pool of comparison results. These results are typically referred to as "EMARGIN" in the computer code, which means the "extended margin". As we have seen, some of these comparison results will be positive, some negative, and some zero.

38. In aggregating the comparison results to generate the numerator for the calculation, the code includes programming language that instructs the computer to disregard or zero any "EMARGIN" results that are less than zero. In other words, the computer code calls for negative comparison results to be disregarded or given a zero value in the aggregation of the multiple comparison results.

39. When the USDOC performs a margin calculation in an anti-dumping proceeding using the "SAS" computer programs, it generates two key computer programming documents. These are: (1) a computer program "log", which shows, on a line-by-line basis, the computer-coded instructions executed by the computer in performing the calculations for a given company; and (2) an "output", which shows the results of executing the computer code with a given company's dataset. Both of these documents provide documentary confirmation that the USDOC used zeroing to determine the exporter's margin (*i.e.*, the cash deposit rate) and the ISARs. As discussed below, Brazil submits copies of the relevant computer logs and outputs as evidence of the use of zeroing in this dispute.

C. The Collection of Definitive Anti-dumping Duties and Liquidation of Entries

40. If the USDOC's final results in a review are not challenged by a party, the USDOC will issue liquidation instructions to USCBP.[39] The instructions direct USCBP to assess (*i.e.*, collect) duties on each importer at the ISAR found in the review, and to refund duties or to request the payment of additional duty, plus interest, depending upon whether the amount deposited is greater or less than the amount found to be due. The USCBP is required to liquidate the entries, "to the greatest extent practicable", within 90 days of receiving the USDOC's liquidation instructions.[40]

41. Where the USDOC has determined any ISAR less than 0.5 percent *ad valorem*, it is required to instruct USCBP to liquidate all entries of subject merchandise of that importer during the relevant period of review "without regard" to anti-dumping liability.[41] This means that no anti-dumping duties are assessed on that importer's entries during the relevant period of review.

42. Following receipt of the USDOC's liquidation instructions, the USCBP issues its own liquidation instructions. To collect duties and effect liquidation, USCBP issues a notice to importers of the amount of definitive duties for each entry covered by the ISAR ("liquidation notice").[42] When the amount of the cash deposit paid at the time of importation equals the amount of definitive duties due, the importer receives only a liquidation notice from the USCBP. When the amount of the cash deposit exceeds the amount due at liquidation, a

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[39] "Liquidation" is the term used by the USDOC and USCBP to refer to the final assessment and collection of duties on imports. The USDOC often refers to liquidation instructions as "assessment instructions" in its final results.

[40] Section 751(a)(3)B) of the Tariff Act states: "Liquidation of entries: If the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof." Exhibit BRA-1. USCBP is directed by Section 500 of the Tariff Act and its regulations on how to proceed with liquidation. *See* Exhibit BRA-15.

[41] 19 CFR 351.106(c)(2) provides: "*Assessment of antidumping duties.* The Secretary will instruct the Customs Service to liquidate without regard to antidumping duties all entries of subject merchandise during the relevant period of review made by any person for which the Secretary calculates an assessment rate under §351.212(b)(1) that is less than 0.5 percent *ad valorem*, or the equivalent specific rate." Exhibit BRA-14.

[42] Notice of the liquidation is required to be given to the importer, its consignee, or agent in accordance with USCBP's regulations. Tariff Act, Section 500(e). This notice is made on a "bulletin notice of liquidation" – *i.e.*, Customs Form 4333 or 4335. 19 C.F.R. § 159.9(a). The entries covered by the bulletin notice are stamped "liquidated," which is deemed to be the legal evidence of liquidation. 19 C.F.R. § 159.9(c). The regulations also provide that the Customs Service will endeavor to provide importers or their agents with Customs Form 4333-A, which is also called a "Courtesy Notice." That notice "shall serve as an informal, courtesy notice and not as a direct, formal and decisive notice of liquidation." 19 C.F.R. § 159.9(d). Exhibits BRA-15 and BRA-16.

refund check accompanies the USCBP's liquidation notice. And when the amount of the cash deposit is less than the amount due at liquidation, USCBP issues a request for payment.

43. If a party challenges the final results of an administrative review at the CIT, the Court typically issues, at the request of one or more of the parties, an injunction preventing liquidation of the entries during the court proceedings.[43] If an injunction is issued by the Court before the USDOC sends liquidation instructions to USCBP (which is usually the case), the USDOC does not issue those instructions, and suspension of liquidation is continued, until a final decision by the CIT.[44] After the CIT renders its opinion and order, a party may take a further appeal to the U.S. Court of Appeals for the Federal Circuit.[45] Hence, in the case of multiple court appeals, the injunction against assessment of duties may continue for several years following the USDOC's publication of the final results of an administrative review.

IV. MEASURES AT ISSUE

44. The measures at issue in this dispute relate to the imposition by the United States of anti-dumping duties under the Orange Juice Order. The history of that Order is as follows. On February 11, 2005, the USDOC issued a notice initiating an anti-dumping duty investigation on certain orange juice from Brazil (case nº A-351-840).[46] On January 13, 2006, the USDOC issued its final determination of sales at less than fair value on the original investigation.[47] Following an affirmative determination of injury by the USITC, the USDOC issued its anti-dumping duty order in this case on March 9, 2006.[48] The USDOC final determination and the Order covered: all exports from Brazil of not-from-concentrate ("NFC") orange juice; and exports from Brazil of frozen-concentrated orange juice for further

[43] Tariff Act, Section 516A(c) and (e). Exhibit BRA-8. To obtain an order preventing liquidation, the appealing party or parties must request an injunction from the CIT; such requests are almost always granted.
[44] Section 516A(c)(2) of the Tariff Act provides that reimbursements or additional payments can be "stayed" by an importer, exporter, or by the domestic industry, by filing an appeal to the CIT and by filing a request for an injunction that prevents liquidation of the entries (assessment of duties) during the court appeal. Exhibit BRA-8.
[45] A party may also seek review of a decision of the U.S. Court of Appeals for the Federal Circuit by filing a petition for a writ of certiorari to the U.S. Supreme Court. However, this is not a common occurrence in trade remedy litigation.
[46] 70 Fed. Reg. 7233. Exhibit BRA-17.
[47] 71 Fed. Reg. 2183. Exhibit BRA-18. The final determination was amended one month later to correct certain ministerial errors found in the final determination, with a slight change in the dumping margins for two of the companies. 71 Fed. Reg. 8841 (February 21, 2006). These changes were not the result of any changes in the dumping methodology at issue in this dispute. Exhibit BRA-19.
[48] 71 Fed. Reg. 12183. Exhibit BRA-3.

manufacturing ("FCOJM") produced or exported by Sucocítrico Cutrale S.A. ("Cutrale"), Fischer S.A. Comércio, Indústria, e Agricultura ("Fischer"), Montecitrus Trading S.A., Cargill Citrus Limitada, and Coinbra-Frutesp S.A.[49] The USDOC calculated weighted average dumping margins for Cutrale and Fischer, and set out a dumping margin based on "adverse facts available" for Montecitrus Trading S.A. For the other companies covered by the Order, the USDOC set out an "All Others" rate based on the weighted average dumping margins calculated for Cutrale and Fischer.[50]

45. The measures at issue are the two administrative reviews made pursuant to the Orange Juice Order and the continued use of zeroing under the Order, as described in paras. 46 through 48 below. A comprehensive overview of the use of zeroing under the Order is provided in Exhibit BRA-20.

A. The 2005-2007 Anti-Dumping Duty Administrative Review on Certain Orange Juice from Brazil

46. The first administrative review of anti-dumping duties under the Orange Juice Order, which is the first measure at issue, covered entries during the period from August 24, 2005 to February 28, 2007 (the "First Administrative Review"). Its final results were published on August 11, 2008.[51] The cash deposit rate was 0.45% for Cutrale, which is *de minimis* (less than 0.5%), and 4.81% for Fischer. Since Cutrale had a single, affiliated importer, there was only a single ISAR for this company, which was [[xxxx]]. In the case of Fischer, there were two importers, with ISARs, respectively, of [[xxxx]] and [[xxxx]].

B. The 2007-2008 Anti-Dumping Duty Administrative Review on Certain Orange Juice from Brazil

47. The second administrative review of anti-dumping duties under the Orange Juice Order, which is the second measure at issue, covered entries during the period from March 1, 2007 to February 28, 2008 (the "Second Administrative Review"). Its final results were published on August 11, 2009.[52] The cash deposit rate was zero for Fischer and 2.17% for Cutrale. The ISAR for Fischer was [[xxxx]], providing that entries would be liquidated "without regard for antidumping liabilities". The ISAR for Cutrale was [[xxxx]].

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[49] 71 Fed. Reg. 2183, at page 2184; and 71 Fed. Reg. 12183, at page 12183. Exhibits BRA-18 and BRA-3.
[50] 71 Fed. Reg. 2183, at pages 2185 and 2187; and 71 Fed. Reg. 12183, at page 12184. Exhibits BRA-18 and BRA-3.
[51] 73 Fed. Reg. 46584. Exhibit BRA-21.
[52] 74 Fed. Reg. 40167. Exhibit BRA-22.

C. 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

48. The third measure at issue in this dispute concerns the 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. In particular, zeroing was used in the original investigation and the first two administrative reviews, including the second administrative review by which duties are currently imposed and maintained. Zeroing has also been used in the preliminary determination in the third administrative review, issued on April 13, 2010, covering entries for the period March 1, 2008 to February 28, 2009 ("Third Administrative Review").[53]

V. LEGAL ARGUMENTS

A. Zeroing Is Prohibited under the *Anti-Dumping Agreement* and the GATT 1994

1. Concepts of "Dumping" and "Margin of Dumping" under the *Anti-Dumping Agreement* and the GATT 1994

49. According to the Appellate Body, there are three key elements to the definition of the concepts of "dumping" and "margin of dumping".[54] First, these linked concepts are defined in terms of a "product"; second, dumping determinations for the "product" are made with respect to an exporter or foreign producer; and, third, the WTO agreements are not concerned with "dumping" *per se*, but with injurious dumping. We address these points in turn.

50. First, "dumping" is defined in Article VI:1 of the GATT 1994 as occurring when "*products* of one country are introduced into the commerce of another country at less than the normal value of the *products*".[55] Consistent with this definition, Article VI:2 provides for the levying of anti-dumping duties in respect of a "dumped product" in order to offset or prevent the injurious effects of dumping.

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[53] 75 Fed. Reg. 18794. The logs containing language applying zeroing for Cutrale and Fischer, respectively, are attached as Exhibits BRA-24 and BRA-25. For Cutrale, the zeroing language can be found at pages 46 (for the ISAR) and 47 (for the CDR) of the log. For Fischer, the zeroing language can be found at pages 24 (for the ISAR) and 25 (for the CDR) of the log. The final determination is scheduled for sometime in August of 2010. Preliminary results of the Third Administrative Review (75 Fed. Reg. 18794), at page 18800. Exhibit BRA-23.
[54] Appellate Body Report, *US - Zeroing (Japan)*, paras. 108 – 116.
[55] Emphasis added.

51. This definition of "dumping" is carried into the *Anti-Dumping Agreement* by Article 2.1, which states that "*a product* is to be considered as being *dumped* … if the export price of the *product* exported from one country to another is less than the comparable price … for the like *product* when destined for consumption in the exporting country".[56] Moreover, by virtue of the opening phrase of Article 2.1 – "[f]or the purpose of this Agreement" – the definition of "dumping" contained in Article 2.1 applies throughout the *Anti-Dumping Agreement*.[57]

52. The definition of "dumping" in Article VI:1 of the GATT 1994 is an important element of the context of Article VI:2, which refers to the "margin of dumping". Article VI:2 defines "margin of dumping" as the difference between the "export price" and the "normal value" determined in accordance with Article VI:1. Article VI:2 also clarifies, as mentioned above, that the "margin of dumping" is determined in respect of a dumped "product". Furthermore, Article VI:2 establishes a link between "dumping" and the "margin of dumping" because it provides that "[i]n order to offset or prevent *dumping*, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the *margin of dumping* in respect of such *product*".[58] Thus, the "margin of dumping" measures the "degree" or the "magnitude" of dumping; and the margin is also defined by reference to the "product".[59]

53. Second, "dumping" and a "margin of dumping" are determined in relation to an exporter or foreign producer. The elements of the definition of "dumping" in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* – 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 these provisions address the pricing practice of an exporter.[60]

54. The context found in various other provisions of the *Anti-Dumping Agreement* confirms that "dumping" and "margin of dumping" are exporter-related concepts. Article 2.2 of the *Agreement* indicates that, if sales of the like product in the domestic market of the

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[56] Emphasis added.
[57] *See* Appellate Body Report, *US - Softwood Lumber V*, para. 93. *See* also Appellate Body Reports, *US - Corrosion-Resistant Steel Sunset Review*, paras. 109 and 127; *US - Zeroing (EC)*, para. 125; *US - Stainless Steel (Mexico)*, para. 84; and *US - Zeroing (Japan)*, para. 109.
[58] Emphasis added.
[59] *See* Appellate Body Reports, *US - Softwood Lumber V*, para. 96; *US - Zeroing (EC)*, para. 125; *US - Zeroing (Japan)*, para. 110; and *US - Stainless Steel (Mexico)*, para. 85.
[60] Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 86. Original emphasis.

exporting country do not permit a proper comparison, a comparison may be made with the price at which the product is exported to an appropriate third country.[61] This provision highlights that a dumping determination focuses on the pricing behavior of an exporter, with normal value based on prices in its home market or a third country market. Article 2.3 allows the "export price" to be constructed in cases where it appears to the authorities that the export price is unreliable, again demonstrating that dumping concerns an exporter's export pricing behavior.[62]

55. Article 5.8 provides that there shall be "immediate termination" of an anti-dumping investigation against an *exporter* where the authorities determine that the margin of dumping of that exporter is *de minimis*. 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".[63] The same Article also provides that, if *the volume of exports*, originating from an *exporting country* is "negligible" according to the criteria stated therein, the anti-dumping investigation against that country must be terminated, again showing that dumping involves exports and exporters in exporting countries.

56. Article 6.10 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".[64] Article 8.1 refers to the "receipt of satisfactory voluntary undertakings from *any exporter* to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated".[65] Article 9.4 of the *Anti-Dumping Agreement* refers to situations where anti-dumping duties are applied to *exporters or foreign producers* not examined individually in an investigation, and provides that such duties shall not exceed the weighted average margin of dumping established with respect to the *selected exporters or producers*. Article 9.5 indicates that the purpose of new shipper reviews is to determine "individual margins of dumping for any *exporters or producers* in the *exporting* country in question who have not exported the product" and refers to a "determination of dumping in respect of such producers or exporters". These provisions establish that the *Anti-Dumping Agreement* focuses on the

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[61] Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 86. Original emphasis.
[62] Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 86.
[63] Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 87.
[64] Emphasis added.
[65] Emphasis added.

pricing behavior of individual exporters or foreign producers with a view to calculating a single margin for them with respect to the product as a whole.[66]

57. In sum, as the Appellate Body stated, "[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".[67] "Indeed, it is the exporter, not the importer, that engages in practices that result in situations of dumping".[68] "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".[69]

58. Third, the *Anti-Dumping Agreement* and the GATT 1994 are not concerned with dumping *per se*, but with dumping that causes or threatens to cause material injury to the domestic industry.[70] Article 3.1 stipulates that a determination of injury shall be based on an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products. Thus, it is evident that the volume of transactions matters. Injury cannot be found to exist in relation to an individual transaction, but only for the *product as whole*.

59. The Appellate Body summarized these three strands of analysis in the following terms:

> [I]t is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not

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[66] *See* Appellate Body Reports, *US - Stainless Steel (Mexico)*, para. 88; and *US - Zeroing (Japan)*, para. 112.
[67] Appellate Body Reports, *US - Stainless Steel (Mexico)*, para. 95; and *US - Zeroing (Japan)*, para. 156.
[68] Appellate Body Report, *US - Zeroing (EC)*, para. 129.
[69] Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 95.
[70] Appellate Body Reports, *US - Stainless Steel (Mexico)*, para. 92; and *US - Zeroing (Japan)*, para. 113.

> exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*. It must be stressed that, under the *Anti-Dumping Agreement*, the concepts of "dumping", "injury", and "margin of dumping" are interlinked and that, therefore, these terms should be considered and interpreted in a coherent and consistent manner for all parts of the *Anti-Dumping Agreement*".[71]

60. On this basis, the Appellate Body concluded that the concepts of "dumping" and "margin of dumping" are defined in relation to a product under investigation as a whole, encompassing all of the export transactions of the product pertaining to an investigated exporter, and they cannot be found to exist only for a type, model, or category of that product.[72]

61. Thus, although an investigating authority may undertake multiple comparisons using averaging groups or models, the results of the multiple comparisons at the sub-product level are not "margins of dumping". Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. It is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.[73]

2. Zeroing Is Prohibited under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994

62. Article 9.3 of the *Anti-Dumping Agreement* provides that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Confirming this cross-reference to the definitional provisions in Article 2, the opening phrase of Article 2.1 – "[f]or the purpose of this Agreement" – makes it clear that the term "dumping" has the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including administrative reviews under Article 9.3.[74]

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[71] Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 94. Original emphasis. *See also* Appellate Body Report, *US - Zeroing (Japan)*, paras. 114 and 151.
[72] Appellate Body Reports, *US - Zeroing (Japan)*, paras. 115; and *US - Softwood Lumber V*, paras. 93 and 96.
[73] Appellate Body Report, *US - Softwood Lumber V*, para. 97. *See* also Appellate Body Reports, *US - Zeroing (EC)*, para. 132; and *US - Zeroing (Japan)*, paras. 115 and 151.
[74] *See* Appellate Body Report, *US - Zeroing (Japan)*, para. 109.

63. As explained above, Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 require that "dumping" be established for the product as a whole and in respect of each exporter or foreign producer subject to the proceeding.

64. Pursuant to these provisions, "[i]n a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in all sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing".[75] In other words, "under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter".[76]

65. By disregarding or treating as zero the intermediate comparisons for export transactions whose export prices are greater than normal value, the USDOC's use of zeroing in administrative reviews necessarily results in dumping margins that are higher than they would be if all export transactions were taken into account – that is, higher than they would be for the product under investigation as a whole.

66. A simple hypothetical example illustrates why this is so. Assume an exporter has three export transactions of equal quantities to the United States at prices, respectively, of $5, $10 and $15 each. Assume further that the exporter sells three equal quantities of the identical product in the home market in the month of export at the same prices as the export prices ($5, $10, $15). The USDOC determines normal value using the average home market price, which is $10. Comparing individual U.S. prices against the average home-market price, the export transaction priced at $5 has a positive comparison result of $5; the export transaction priced at $10 generates a zero comparison result because it is equal to the normal value; and the export transaction priced at $15 has a negative comparison result of -$5, in that it is $5 above normal value. However, because the negative comparison result on the $15 export sale is disregarded (zeroed), the total margin for the exporter is a positive $5 (derived from the one sale below normal value). Thus, the total U.S. margin amount is $5, divided by

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[75] Appellate Body Report, *US - Zeroing (Japan)*, para. 156.
[76] Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 102. Original emphasis. *See* also Appellate Body Report, *US - Zeroing (EC)*, para. 130.

total U.S. sales value of $30 (5+10+15). This produces a dumping margin for the exporter of 16.67% ($5/$30), and the importer would have to pay a dumping duty to reflect that margin.

67. If all three transactions had been included in the numerator of the dumping margin calculation, the aggregate of the comparison results would have been zero (5+0+(-5) = 0), making clear that the product as a whole was not dumped. In effect, the negative comparison result of -$5 resulting from the third transaction would have reduced the positive result of $5 in the first transaction to zero. Yet, in this example, even though the exporter sold at exactly the same prices in both markets, it would receive a dumping margin of 16.67% due to the use of zeroing, and would have to pay a dumping duty.

68. The critical point of this example is that, by systematically excluding export transactions with prices above normal value, the USDOC's zeroing procedures result in margins that are greater than the margin determined on "the product under investigation as a whole", for any case where the exporter has any export sales above normal value. As a matter of simple arithmetic, the USDOC's practice of zeroing will necessarily produce higher margins every time a company's sales include any export transactions above normal value, because the negative comparison results on those sales will be zeroed and, therefore, cannot reduce the positive comparison results.

69. Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* explicitly provide that margins of dumping may not be greater than the margin of dumping for the product as a whole. Since zeroing systematically disregards negative comparison results, it necessarily results in dumping margins that are greater than the margins for the product as a whole (including all export transactions). Hence, the USDOC's use of zeroing in administrative reviews violates Article VI:2 of GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

70. The Appellate Body addressed exactly this situation in administrative reviews for the first time in *US – Zeroing (EC)*:

> [I]n the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to

> calculate the anti-dumping duties owed by each individual exporter. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage disregarded the result of this individual comparison. … Accordingly, the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[77]

71. In at least four subsequent determinations issued since its determination in *US – Zeroing (EC)*, the Appellate Body has specifically affirmed its ruling that the application of zeroing in administrative reviews to disregard or eliminate negative comparison results is inconsistent with the *Anti-Dumping Agreement* and the GATT 1994. In *US – Zeroing (Japan)*, the Appellate Body repeated its earlier conclusion that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the total amount of the dumping duties cannot exceed the margin of dumping established for the exporter. The Appellate Body found that, by systematically disregarding negative comparison results on export sales above normal value, the USDOC's practice of zeroing means that dumping margins for any given exporter would necessarily be higher than would be the case if all the comparison results for all the export transactions – both positive and negative – were included in the calculation. Therefore, the Appellate Body found for a second time that the USDOC's practice of zeroing in administrative reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[78]

72. The Appellate Body took up the issue of zeroing in administrative reviews a third time in 2008 in *U.S. – Stainless Steel (Mexico)*. In this case again the U.S. argument was that "individual transactions where the export price exceeds the normal value are 'non-dumped' transactions and 'can be disregarded'" in the calculation of dumping margins.[79] The Appellate Body soundly rejected that argument, citing not only Article 9.3, but also Articles 9.4 and 2.2.1 of the *Anti-Dumping Agreement*:

> We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparison where the export price exceeds the normal value when calculating the margin of dumping for an exporter.

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[77] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[78] Appellate Body Report, *US – Zeroing (Japan)*, para. 176.
[79] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 101.

> The Appellate Body has previously noted that other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters. For example, Article 9.4 of the *Anti-Dumping Agreement* explicitly directs investigating authorities to disregard "any zero and *de minimis* margins" under certain circumstances, when calculating the weighted average margin of dumping to be applied to exporters that have not been individually investigated. Similarly, Article 2.2.1, which deals with the calculation of normal value, sets forth the only circumstances under which sales of the like product in the exporting country can be disregarded. Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.[80]

73. Moreover, the Appellate Body added that allowing zeroing in administrative reviews "would allow WTO Members to circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*."[81] Therefore, the Appellate Body found that the use of zeroing by the USDOC in administrative reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[82]

74. Then, in February of 2009, the Appellate Body found, yet again, that the USDOC's practice of zeroing in administrative reviews is inconsistent with the GATT 1994 and the *Anti-Dumping Agreement*.[83] A separate concurring opinion by one member of the Division makes the point clear, while reflecting some weariness with the number of times that the Appellate Body has had to decide the issue the same way:

> In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. … Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both exporter-specific and transaction-specific. … One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than

[80] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 103.
[81] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109.
[82] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 139.
[83] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 316.

> further to pick over the entrails of battles past. With respect to zeroing, that time has come.[84]

75. Finally, as recently as August of 2009, the Appellate Body found yet again, in *US – Zeroing (Japan) (21.5)*, that the use of zeroing in administrative reviews is inconsistent with the GATT 1994 and the *Anti-Dumping Agreement*.[85]

76. In sum, in at least five separate decisions, the Appellate Body has now found that the USDOC's use of zeroing in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[86] In light of this long line of consistent decisions by the Appellate Body, there can no longer be any doubt that the USDOC's use of zeroing in administrative reviews is inconsistent with the GATT 1994 and the *Anti-Dumping Agreement*.

B. The United States Violated Its Obligations by Using Zeroing in Two Administrative Reviews

1. Use of Zeroing in Two Administrative Reviews as a Matter of Fact

(i) The First Administrative Review

77. In March of 2007, the anniversary month of the Orange Juice Order, both Cutrale and Fischer requested administrative reviews of their anti-dumping duty liability[87] on imports of orange juice, and the USDOC initiated a review pursuant to these requests.[88] This First Administrative Review covered export sales entering the United States beginning August 24, 2005, and ending February 28, 2007. It covered home market sales beginning as early as May 1, 2005 and ending as late as April 30, 2007.

78. In the preliminary results in this First Administrative Review,[89] the USDOC followed its usual practice for determining dumping margins in administrative reviews, in particular the use of zeroing. It compared the prices of individual export sales to the United States to

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[84] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 312.
[85] Appellate Body Report, *US – Zeroing (Japan) (21.5)*, paras. 195 and 197.
[86] Appellate Body Reports, *US – Zeroing (EC)*, para. 135; *US – Zeroing (Japan)*, para. 176; *US – Stainless Steel (Mexico)*, para. 139; *US – Continued Zeroing (EC)*, para. 316; and *US – Zeroing (Japan) (21.5)*, paras. 195 and 197.
[87] Fischer and Cutrale are the only companies to have exported merchandise from Brazil subject to the anti-dumping duty order.
[88] 72 Fed. Reg. 20986. Exhibit BRA-26.
[89] 73 Fed. Reg. 18773. Exhibit BRA-27.

normal value, with normal value calculated as the weighted average price of the product in the home market in a contemporaneous month. All comparison results for U.S. export transactions with prices below normal value were retained for inclusion in the numerator used to calculate the exporter's margin (*i.e.*, cash deposit rate) and the ISARs. However, negative comparison results generated for all U.S. export transactions with prices higher than normal value were disregarded in the aggregation of the comparison results, effectively giving them a zero value in the calculation. The details of simple zeroing have been described in paragraphs 31 to 34 above.

79. In briefs submitted to the USDOC following the preliminary results, both Cutrale and Fischer objected to the application of zeroing and asked the USDOC to abandon the practice. Both companies reminded the USDOC that the application of zeroing was inconsistent with the *Anti-Dumping Agreement* and GATT 1994.

80. In its Issues and Decision Memorandum, issued as part of its final results in the First Administrative Review, the USDOC acknowledged that in its preliminary results it "followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as zeroing)".[90] Relying on domestic law, the USDOC refused, however, to change its practice, despite the Appellate Body's decisions that zeroing is inconsistent with the *Anti-Dumping Agreement* and the GATT 1994. The USDOC Decision Memorandum stated specifically:

> …the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on export transactions that exceed NV in this review.[91]

81. Thus, the USDOC excluded negative comparison results, derived from export transactions with prices above normal value, in its calculation of the overall dumping margin for each exporter and the ISARs. By so doing, the USDOC systematically disregarded the intermediate comparison results for certain export transactions from investigated exporters that were properly part of the "product" during the review period. In other words, in

[90] Issues and Decision Memorandum, August 5, 2008, at page 3. Exhibit BRA-28.
[91] Issues and Decision Memorandum, August 5, 2008, at page 6. Exhibit BRA-28.

calculating the dumping margin for each exporter, the USDOC failed to include all of the exporter's export transactions.

82. The computer program logs for both companies confirm that the USDOC used simple zeroing to calculate the respective cash deposit rates and ISARs. The relevant logs have been provided as Exhibits BRA-29 and BRA-30, and the evidence of the use of zeroing in these logs has been explained in the affidavit prepared by Mr. Michael Ferrier, and is summarized in Exhibit BRA-20.[92]

83. In sum, the logs for both companies show that the USDOC used simple zeroing to calculate the respective cash deposit rates and ISARs. In each case, the programming code instructed the computer to include in the calculation only those comparison results for transactions in which the export price was lower than the normal value. In other words, the negative comparison results that were generated when the price of an individual export transaction exceeded the normal value were disregarded or, in effect, treated as having a zero value in the calculation. In the log for both companies in the First Administrative Review, the program even included a narrative description of the computer-coded instruction: "TO REMOVE ANY PERCENT EMARGINS THAT ARE LESS THAN OR EQUAL TO ZERO FROM THE CALCULATION….".[93]

84. Further, the log for Cutrale shows that [[xxxx]] out of [[xxxx]] export transactions ([[xxxx]]%) generated negative comparison results, which were excluded from the calculation of the dumping margin through the USDOC's programming language.[94] Cutrale's program output shows further that the export transactions generating negative comparison results amounted to [[xxxx]]% of all transactions by volume, and [[xxxx]]% by value. In other words, the USDOC ignored the comparison results from the vast majority of export transactions, choosing instead to rely on the results of export transactions accounting for just [[xxxx]]% by volume, and [[xxxx]]% by value.[95] For Cutrale, using zeroing, the

[92] Exhibit BRA-31.
[93] For Cutrale, Exhibit BRA-29, at page 63. For Fischer, Exhibit BRA-30, at page 64.
[94] Exhibit BRA-29, at page 63. *See* also Affidavit of Mr. Ferrier, para. 38. Exhibit BRA-31.
[95] Exhibit BRA-34, last page, "Percentage of value with AD margins" and "Percentage of quantity with AD margins".

exporter's margin (*i.e.*, cash deposit rate) was 0.45%, which is *de minimis* (less than 0.5%), and the ISAR was [[xxxx]]%.[96]

85. For Fischer, the story is similar. The log shows that [[xxxx]] out of [[xxxx]] export transactions ([[xxxx]]%) generated negative comparison results that were excluded.[97] The output demonstrates further that the export transactions generating negative comparison results amounted to [[xxxx]]% of all transactions by volume, and [[xxxx]]% by value. In other words, the USDOC also ignored the comparison results from the vast majority of export transactions, choosing instead to rely on the results of transactions accounting for just [[xxxx]]% by volume, and [[xxxx]]% by value.[98] For Fischer, using zeroing, the exporter's margin (cash deposit rate) was 4.81% and the ISARs for its two importers were, respectively, [[xxxx]]% and [[xxxx]]%.[99]

(ii) The Second Administrative Review

86. In March of 2008, both Cutrale and Fischer requested administrative reviews of their anti-dumping duty liability on subject imports of orange juice, and the USDOC initiated a review pursuant to these requests on April 25, 2008.[100] This Second Administrative Review covered the period March 1, 2007, through February 29, 2008. It covered home market sales beginning as early as December 1, 2006 and ending as late as April 30, 2008.

87. On April 6, 2009, the USDOC issued its preliminary results in the Second Administrative Review under the Orange Juice Order.[101] Again, the USDOC followed its usual margin calculation procedures, and applied simple zeroing, as described in paragraph 78 above.

88. As in the First Administrative Review, both Cutrale and Fischer filed comments with the USDOC objecting to the use of zeroing as inconsistent with the GATT 1994 and the *Anti-Dumping Agreement*, and asked the USDOC to abandon the practice.

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[96] Exhibits BRA-21 and BRA-34. *See* also the overview in Exhibit BRA-20.
[97] Exhibit BRA-30, at page 63. *See* also Affidavit of Mr. Ferrier, para. 39. Exhibit BRA-31.
[98] Exhibit BRA-35, last page, "Percentage of value with AD margins" and "Percentage of quantity with AD margins".
[99] Exhibits BRA-21 and BRA-35. *See* also the overview in Exhibit BRA-20.
[100] 72 Fed. Reg. 22337. Exhibit BRA-41. *See* footnote 87 above.
[101] 74 Fed. Reg. 15438. Exhibit BRA-42.

89. In its Issues and Decision Memorandum[102] issued as part of its final results in the review, the USDOC acknowledged the use of zeroing but rejected the request for zeroing to be abandoned:

> 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 export price (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.[103]

90. After citing Section 771(35)(A) and (B) of the Tariff Act, which define dumping margin and weighted-average dumping margin, the USDOC stated that:

> The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.[104]

91. Concerning Cutrale's and Fischer's citations to WTO panel and Appellate Body decisions finding the USDOC's practice of zeroing to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994, the Issues and Decision Memorandum stated that "Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute." The USDOC added specifically that "[w]ith respect to US Zeroing (Japan), US Zeroing (Mexico), US-Zeroing (ECII), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted average dumping margins in the instant administrative review". The USDOC then concluded that "[a]ccordingly, and consistent with the Department's interpretation of the Act described

[102] Issues and Decision Memorandum, August 4, 2009. Exhibit BRA-43.
[103] Issues and Decision Memorandum, August 4, 2009, at page 5. Exhibit BRA-43.
[104] Issues and Decision Memorandum, August 4, 2009, at page 5. Exhibit BRA-43.

above, the Department has continued to deny offsets to dumping based on CEP transactions that exceed NV in this review."[105]

92. The terms of the USDOC Issues and Decision Memorandum are confirmed by the computer program logs used to calculate the dumping margins for both Brazilian exporters covered by the administrative review at issue. The relevant logs have been provided as Exhibits BRA-36 and BRA-38 and the evidence of the use of zeroing in these logs has been explained in the affidavit prepared by Mr. Michael Ferrier, and is summarized in Exhibit BRA-20.[106]

93. The logs for both companies show that the USDOC used simple zeroing to calculate the respective cash deposit rates and ISARs. In the calculation of the ISARs, the programming code instructed the computer to exclude negative comparison results that were generated when the price of an individual export transaction exceeded the normal value; in the calculation of the cash deposit rates, the programming code instructed the computer to change all negative comparison results to a zero value.[107]

94. In detail, the log for Cutrale shows that [[xxxx]] out of [[xxxx]] export transactions ([[xxxx]]%) generated negative comparison results, which were zeroed through the USDOC's programming language.[108] Cutrale's program output shows further that the export transactions generating negative comparison results amounted to [[xxxx]]% of all transactions by volume, and [[xxxx]]% by value. In other words, the USDOC ignored the comparison results from a significant number of export transactions, choosing instead to rely on the results of export transactions accounting for just [[xxxx]]% by volume, and [[xxxx]]% by value.[109] For Cutrale, using zeroing, the exporter's margin (*i.e.*, cash deposit rate) was 2.17% and the ISAR was [[xxxx]]%.[110]

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[105] Issues and Decision Memorandum, August 4, 2009, at page 6. Exhibit BRA-43.
[106] Exhibit BRA-31.
[107] For Cutrale, Exhibit BRA-36, at pages 68 (for the CDR) and 72 (for the ISAR). For Fischer, Exhibit BRA-38, at pages 71 (for the CDR) and 76 (for the ISAR). *See* also Affidavit of Mr. Michael Ferrier, paras. 48 – 50 and 59 (for the CDRs), and 53 and 54 (for the ISARs). Exhibit BRA-31.
[108] Exhibit BRA-36, at page 72. *See* also Affidavit of Mr. Michael Ferrier, para. 55. Exhibit BRA-31.
[109] Exhibit BRA-37, last page, "Percentage of value with AD margins" and "Percentage of quantity with AD margins".
[110] Exhibits BRA-22 and BRA-37. *See* also the overview in Exhibit BRA-20.

95. For Fischer, the log shows that [[xxxx]] out of [[xxxx]] export transactions ([[xxxx]]%) generated negative comparison results that were zeroed.[111] The output demonstrates further that the export transactions generating negative comparison results amounted to [[xxxx]]% of all transactions by volume, and [[xxxx]]% by value. In other words, the USDOC ignored the comparison results from the vast majority of export transactions, choosing instead to rely on the results of transactions accounting for just [[xxxx]]% by volume, and [[xxxx]]% by value.[112] However, on this occasion, the positive comparisons were too small in number to generate a margin of dumping, and the cash deposit rate was zero, [[xxxx]] ISAR.[113]

(iii) Summary of the Use of Zeroing in Two Administrative Reviews

96. In sum, the evidence before the Panel shows that the United States used zeroing to establish the margins of dumping (cash deposit rate) for Cutrale and Fischer, and the ISARs determined for their respective importers, in the First and Second Administrative Reviews. In each case, the evidence comprises the USDOC Issues and Decisions Memoranda, which state that zeroing has been used;[114] the computer program logs, which include computer code implementing the zeroing procedures,[115] and the computer program outputs, as explained by Mr. Ferrier's affidavit.[116] Brazil has summarized the relevant evidence, pertaining to each measure and each company, in a table in Exhibit BRA-20.

2. The United States' Use of Zeroing in Two Administrative Reviews Violates Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994

97. In the previous Section V.B, Brazil has shown that, as a matter of fact, the USDOC used its zeroing procedures to determine the exporters' margins (*i.e.*, cash deposit rate) and the ISARs in the First and Second Administrative Reviews. For the reasons stated in Section V.A, and as the Appellate Body has said repeatedly, the USDOC's determinations of the cash deposit rates and ISARs in these two reviews are, therefore, inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 due to the use of zeroing.

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[111] Exhibit BRA-38, at page 76. *See* also Affidavit of Mr. Michael Ferrier, para. 56. Exhibit BRA-31.
[112] Exhibit BRA-39, last page, "Percentage of value with AD margins" and "Percentage of quantity with AD margins".
[113] Exhibits BRA-22 and BRA-39. *See* also the overview in Exhibit BRA-20.
[114] Exhibits BRA-28 and BRA-43.
[115] Exhibits BRA-29, BRA-30, BRA-36 and BRA-38.
[116] Exhibits BRA-34, BRA-35, BRA-37 and BRA-39.

C. The USDOC's Continued Use of Zeroing and Its Application of Duties Calculated Using Zeroing Is Inconsistent with the GATT 1994 and the *Anti-Dumping Agreement*.

98. The USDOC has, to date, used its zeroing procedures in the first three proceedings that have taken place in relation to imports of certain orange juice from Brazil, namely: (1) the original anti-dumping investigation; (2) the First Administrative Review; and (3) the Second Administrative Review. Together, these three determinations constitute "ongoing conduct", namely, "the use of the zeroing methodology in successive proceedings in [the case of certain orange juice from Brazil] whereby anti-dumping duties are maintained" on imports of these goods.[117] Based on the USDOC's consistent use of zeroing, and on its preliminary determination issued on April 13, 2010 in the Third Administrative Review,[118] and unless there is a change in U.S. policy in the near future, Brazil expects that the USDOC will apply zeroing in its calculation of dumping margins in the final determination in the Third Administrative Review, as well as in future administrative reviews.

99. Consistent with the Appellate Body's decision in *US - Continued Zeroing (EC)*, this "ongoing conduct" is a measure pursuant to, among others, Articles 3, 4, 6 and 7 of the DSU, and one that the Panel should determine is inconsistent with the GATT 1994 and the *Anti-Dumping Agreement*.

1. Continued Use of Zeroing and Application of Duties Calculated Using Zeroing under the Orange Juice Order as a Matter of Fact

100. Pursuant to the Orange Juice Order, Brazilian exporters have made cash deposits on entries occurring on or after March 9, 2006, of all NFC orange juice, and of FCOJM produced or exported by the companies covered by the Order. The amounts of these cash deposits were initially based on the dumping margins found by the USDOC in the original investigation.[119]

101. In the original investigation, the USDOC calculated the "dumping margin" using a comparison of weighted-average prices of each model sold in the United States to the weighted-average prices of the same model sold in the home market (*i.e.*, a W-to-W comparison). At the time when the final determination of dumping was made (January 13,

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[117] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 171. *See* also *id.*, paras. 180, 181, 183, 185 and 189.
[118] Exhibit BRA-23.
[119] *See* 71 Fed. Reg. 12183, at page 12184. Exhibit BRA-3.

2006), and when the original investigation was completed (March 9, 2006), the USDOC systematically applied model zeroing to its W-to-W comparisons, which Brazil has described in detail in paragraphs 28 to 30 above.[120]

102. Consistent with this practice, the USDOC included the zeroing in its dumping calculation methodology in the original investigation in the Orange Juice case. Specifically, the computer program used in the original investigation provided for the exclusion from the calculation of negative comparison results where the weighted-average export price of any model exceeded normal value.[121] The significance of the programming language used in the investigation is explained in the affidavit submitted by Mr. Ferrier,[122] and is summarized in Exhibit BRA-20.

103. As discussed in Section IV above, the original investigation has been followed by two completed administrative reviews to date. The Third Administrative Review, covering entries from March 1, 2008 until February 28, 2009 is currently in progress and has resulted in a preliminary determination, but no final determination as of the date of this submission. In both of the completed reviews, as explained in Section IV above, the USDOC applied zeroing, and the USDOC continues to use zeroing in the preliminary determination in the Third Administrative Review as well.[123]

104. Accordingly, the use of zeroing is common to all the successive stages of the case at issue, *i.e.*, starting with the original investigation, continuing with the two completed administrative reviews, and through the third, and ongoing, administrative review. That is, throughout this "string of connected and sequential determinations,"[124] the USDOC has disregarded or converted to zero the intermediate comparison results where the price of exports to the United States exceeded normal value. This string of determinations has provided a continuing basis for the United States to apply and maintain anti-dumping duties on import of certain orange juice from Brazil since March 9, 2006.

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[120] On December 27, 2006, the USDOC published a notice in the Federal Register (71 Fed. Reg. 77722) announcing that it would cease applying model zeroing in making W-to-W comparisons in original investigations in all current and future anti-dumping investigations after the effective date of modification. This modification entered into force on February 22, 2007 (72 Fed. Reg. 3783). Therefore, the change in policy only affected the investigations ongoing as of, or initiated after, February 22, 2007. Exhibits BRA-10 and BRA-11.
[121] Affidavit of Mr. Michael Ferrier, paras. 21 – 29. Exhibit BRA-31.
[122] Affidavit of Mr. Michael Ferrier, paras. 24, 26 and 28. Exhibit BRA-31.
[123] Exhibit BRA–23. The logs containing the language applying zeroing are attached as Exhibits BRA-24, for Cutrale, and BRA-25, for Fischer. *See* footnote 53 above.
[124] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 180.

2. A Member's "Ongoing Conduct" Constitutes a Measure That Is Reviewable by a Panel

105. In *US – Continued Zeroing (EC)*, the Appellate Body found that a Member's "ongoing conduct" constitutes a measure that is reviewable by a Panel. In that dispute, the Appellate Body ruled specifically on a challenge to the USDOC's conduct in using the zeroing methodology in anti-dumping investigations and successive administrative reviews by which anti-dumping duties were applied and maintained – a situation no different from the one at issue in the present dispute. The Appellate Body noted that "the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained."[125] The Appellate Body then concluded:

> We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order. The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation.[126]

106. Thus, the Appellate Body found that "the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."[127]

107. In reaching this conclusion that such "ongoing conduct" constitutes a "measure" subject to challenge in WTO dispute settlement, the Appellate Body recalled its observation from *US – Corrosion-Resistant Steel Sunset Review* that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[128] The Appellate Body also noted the relevance of Articles 17.3 and 17.4 of the *Anti-Dumping Agreement*:

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[125] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 171.
[126] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 181.
[127] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 185.
[128] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 176, quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

> 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." 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".[129]

3. The USDOC's Continued Use of Zeroing in Successive Determinations by Which Anti-Dumping Duties Are Applied and Maintained Constitutes an "Ongoing Conduct" That Is Appropriate for Review by This Panel

108. The Appellate Body's ruling in *US – Continued Zeroing (EC)* is important to this dispute not simply because it establishes that ongoing conduct may, in principle, constitute a measure for purposes of dispute settlement, but also because the ongoing conduct at issue in that dispute is virtually identical to the ongoing conduct at issue in this dispute. In particular, both disputes concern the continued use of the zeroing methodology in successive phases of an anti-dumping proceeding under a particular anti-dumping order (the original anti-dumping investigation and subsequent administrative reviews) whereby the USDOC applies and maintains anti-dumping duties.[130]

109. The Appellate Body held that the word "measure" encompasses ongoing conduct in the form of a calculation methodology used to determine anti-dumping duties applied under a single anti-dumping order, because of the extremely close relationship among the different phases of an order.

110. Under the U.S. anti-dumping system, the original investigation results in the establishment of "cash deposit rates" that are applied to entries made after the publication of the anti-dumping duty order. Final duty assessment then occurs after the conclusion of

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[129] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 177.
[130] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 171. *See* also *id.*, paras. 180, 181, 183, 185 and 189.

administrative reviews, which are conducted annually beginning on the anniversary month of the anti-dumping order.[131] Each administrative review determines the final duty rate to be assessed on the entries covered by that review, and establishes a new cash deposit rate for entries made after the publication of the final determination in that review.

111. Thus, the first administrative review flows directly from the original investigation, and each successive review flows from the review that preceded it. Indeed, under the USDOC regulations, there is one single "proceeding" beginning on the date the anti-dumping petition is filed and not ending until the anti-dumping duty order is revoked. The original investigation and all subsequent administrative reviews are defined by the USDOC's own regulations as "segments" of this single proceeding.[132]

112. Moreover, the fact that each administrative review sets a new deposit rate for specific exporters means that each review "serves as a place-holder" for the liability to be determined in the subsequent review. One panel has noted that this fact "demonstrates substantive continuity between the original and subsequent reviews."[133] The Appellate Body itself has described the "successive proceedings" stemming from a single anti-dumping duty order as "a string of connected and sequential determinations … by which … duties are maintained".[134]

113. Thus, just as in *US – Continued Zeroing (EC)*, the continued use of zeroing in the original investigation and subsequent administrative reviews under the Orange Juice Order "consist[s] of an ongoing conduct" that is challengeable under the DSU.[135] All the measures taken by the United States under this Order involve exactly the same product, the same exporters, the same country of exportation, and the imposition of the same type of duties. The three proceedings so far completed under the Orange Juice Order – the original investigation and the two completed reviews – involve the continued use of the zeroing methodology, which is the subject of Brazil's complaint. It is apparent, then, that these

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[131] Duties may be assessed on the basis of the cash deposit rates set forth in the original investigation if no interested party requests a review of the duties.
[132] 19 C.F.R. § 351.102(40) and (47). Exhibit BRA-44.
[133] Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.66. *See* also Appellate Body Report, *US – Zeroing (Japan) (21.5)*, para. 113 (referencing "the close connection among successive periodic reviews occurring under the same antidumping order in the United States' retrospective anti-dumping duty system").
[134] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 180.
[135] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 171.

"successive proceedings", in the words of the Appellate Body, "relate to what is fundamentally the same 'dispute'… [and] involve essentially the same practice."[136]

4. The Continued Use of Zeroing in Successive Anti-Dumping Proceedings by Which Duties Are Applied and Maintained Violates Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

114. The Appellate Body and WTO panels have found that the USDOC's model zeroing procedures, as used in the original investigation in this case, are inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[137] The United States has in fact changed its margin calculation methodology to eliminate model zeroing in original investigations. However, it did not implement this change until February 22, 2007,[138] after the conclusion of the original investigation in certain orange juice from Brazil. Hence, the zeroing methodology set forth in the computer program of the original investigation in this case was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

115. As we have set forth in Section V.A, the USDOC's simple zeroing procedures, which were applied in both completed administrative reviews, and the preliminary determination in the Third Administrative Review, have repeatedly been found to be inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

116. Therefore, the continued use of zeroing in these consecutive anti-dumping determinations, including the original investigation and subsequent administrative reviews, by which anti-dumping duties are applied and maintained, constitutes an ongoing conduct that violates Article VI:2 of the GATT 1994 and Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*. The Appellate Body reached a similar conclusion with respect to the four "cases" for which it was able to complete the analysis in *US – Continued Zeroing (EC)*.[139]

117. The United States' "ongoing conduct" continues to this day, with the imposition of duties under the Second Administrative Review and the conduct of the Third Administrative Review. This "ongoing conduct" violates Article VI:2 of the GATT 1994 and Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and cannot be allowed to continue. Brazil requests

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[136] Panel Report, *Brazil – Aircraft*, para. 7.11.
[137] *See, e.g.*, Appellate Body Reports, *EC - Bed Linen*, para. 66; *US - Softwood Lumber V*, para. 117; and *US - Zeroing (EC)*, para. 222. *See* also Panel Reports, *US - Zeroing (Japan)*, paras. 7.86 and 7.179; *US - Stainless Steel (Mexico)*, para. 7.63; and *US - Continued Zeroing (EC)*, para. 7.109 – 111.
[138] *See* footnote 31 above.
[139] Appellate Body Report, *US – Continued Zeroing (EC)*, para. 199.

that this Panel find that the USDOC's "ongoing conduct" in reviewing and applying anti-dumping duties on orange juice from Brazil is inconsistent with the stated provisions of the GATT 1994 and the *Anti-Dumping Agreement*, and that it direct the United States to bring its "ongoing conduct" into conformity with the requirements of those provisions.

VI. CONCLUSION

118. In light of the foregoing, Brazil asks the Panel to find that:

- the United States' two administrative reviews concerning imports of certain orange juice from Brazil are inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 due to the use of zeroing; and

- the continued use by the United States of zeroing procedures in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil, including the original investigation and subsequent administrative reviews, by which duties are applied and maintained over a period of time, is inconsistent with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

119. 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 *Anti-Dumping Agreement* and the GATT 1994, into conformity with its obligations under the covered agreements.