Non-Confidential Version

BEFORE THE WORLD TRADE ORGANIZATION

United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil (WT/DS382)

Second Written Submission of Brazil

31 August 2010

TABLE OF CONTENTS

Page

TABLE OF CASES

Short Title	Full Case Title and Citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
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
EC – Bed Linen (21.5)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667
U.S. – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
U.S. – 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
U.S. – Softwood Lumber V (21.5)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087
U.S. – Stainless Steel	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008

Short Title	Full Case Title and Citation
U.S. – 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
U.S. – 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

LIST OF ABBREVIATIONS

Abbreviation	Description
Answers	Answers to the Panel's questions following the Panel's first substantive meeting with the parties
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
CDR	Cash deposit rate(s)
Cutrale	Sucocítrico Cutrale S.A.
DSB	Dispute Settlement Body
EC	European Communities
EU	European Union
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
FWS	First Written Submission
GATT 1994	*General Agreement on Tariffs and Trade 1994*
ISAR	Importer-specific assessment rate(s)
Opening Statement	Opening statement at the Panel's first substantive meeting with the parties
Orange Juice Order	The anti-dumping duty order on certain orange juice from Brazil, USDOC case. No. A-351-840
PNV	Prospective normal value
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
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
U.S.	United States

Abbreviation	**Description**
USDOC	United States Department of Commerce

I. INTRODUCTION

1. This dispute has been characterized so far by a lack of originality. Brazil's claims and arguments regarding zeroing in administrative reviews, and also the continued use of zeroing, follow a well-trodden path that is well understood from previous cases. The United States' defense likewise follows a similarly well-trodden path. Moreover, the areas of disagreement between the two parties have already been well canvassed in the respective submissions to this Panel.[1] In this submission, Brazil, therefore, does not repeat the details of what has been said before. Instead, Brazil presents a summary of the key interpretive arguments, as well as select arguments on the three measures at issue, namely the First[2] and Second[3] Administrative Reviews and the continued use measure.

2. Before doing so, Brazil recalls that, following the First and Second Administrative Reviews, Cutrale and Fischer have so far incurred final anti-dumping duty liabilities of seven and a half million U.S. dollars under the Orange Juice Order.[4] The payment of these duties is a direct consequence of the USDOC's use of zeroing, because, if zeroing had not been used, the United States would have collected no anti-dumping duties under the Order. Equally, the use of zeroing prevents Cutrale and Fischer from developing a series of zero dumping margins in three consecutive administrative reviews, which would ordinarily lead to the revocation of the duties for these companies.[5]

II. SUMMARY OF KEY INTERPRETIVE ARGUMENTS

3. The crucial legal arguments in this dispute relate to the definition of "dumping" and "margin of dumping". The United States takes the view that these terms may bear multiple, conflicting meanings.[6] Brazil has explained, instead, that dumping and margin of dumping may only be defined in relation to the product as a whole. As required by Article 17.6(ii) of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*

[1] The United States has also requested a preliminary ruling that the Second Administrative Review and the continued use of zeroing under the Orange Juice Order fell outside the Panel's terms of reference. U.S. FWS, paras. 37 – 52. Brazil responded in Comments to the U.S. Request for a Preliminary Ruling, filed on 2 July 2010.
[2] 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.
[3] 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.
[4] The anti-dumping duty order on certain orange juice from Brazil, USDOC case. No. A-351-840.
[5] Exhibit BRA-47 (19 C.F.R. § 351.222(b)). *See* also Brazil's closing statement at the Panel's first substantive meeting with the parties, para. 8.
[6] *See, e.g.*, U.S. First Written Submission ("FWS"), paras. 23 – 27 and 60 – 92.

1994 ("*Anti-Dumping Agreement*"), this reading is derived from the relevant text, context, and object and purpose, interpreted in accordance with the *Vienna Convention on the Law of Treaties*. In particular, Brazil's reading, like the Appellate Body's,[7] is grounded in the text, context, object and purpose of the following provisions: Articles II:1, VI:1 and VI:2 of the GATT 1994; and Articles 2.1, 2.2, 2.3, 3.1, 3.2, 5.2(ii), 5.8, 6.1.1, 6.7, 6.10, 6.10.2, 7.2, 7.4, 8.1, 9.1, 9.3, 9.5, 10.6 and 11.1 of the *Anti-Dumping Agreement*. The Appellate Body has repeatedly confirmed that this is the sole permissible interpretation of the terms "dumping" and "margin of dumping", overturning numerous panels that held otherwise.[8] In *U.S. – Continued Zeroing*, the last Zeroing dispute to be brought to the Appellate Body, a concurring Member of the Division held:

> 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. The membership of the WTO is entitled to rely upon these outcomes.[9]

4. In reply, the United States simply repeats a series of arguments that were already rejected in previous disputes, and urges the Panel, on the basis of these same arguments, to prolong the Zeroing debate. To say the least, it is not clear what the WTO Membership gains from this endless debate, but the debate's consequences in terms of costs to parties and discredit to the multilateral trading system are very clear. In fact, the United States' position, if accepted, would undermine the integrity of the WTO dispute settlement, and would introduce uncertainty and unpredictability into the law. Brazil regrets this recalcitrant and unilateral attitude of the United States and urges the Panel to follow established precedent, thereby ensuring that all Members are treated equally in WTO dispute settlement.

5. As an interpretive matter, the United States argues that "dumping" and "margin of dumping" may be defined in diverse ways, at an importing Member's discretion, to encompass both transaction-specific and product-wide definitions of "dumping". Brazil notes that these two interpretations lie at opposing poles of the conceivable range of interpretations. In its Opening Statement at the first Panel meeting, Brazil responded to each

[7] *See* Appellate Body Report, *U.S. – Stainless Steel*, paras. 83 – 99.
[8] *See, e.g.*, Brazil's FWS, paras. 49 – 61; and Brazil's opening statement at the Panel's first substantive meeting with the parties ("Opening Statement"), paras. 6 – 37.
[9] Appellate Body Report, *U.S. – Continued Zeroing*, concurring opinion, para. 312.

of the United States' arguments in turn. Because the United States has not elaborated further on its position since that meeting, Brazil will simply summarize the arguments here:

- *First*, the United States contends that Article VII:3 of the *General Agreement on Tariffs and Trade* ("GATT") 1994 uses the word "product" to refer to the product in individual transactions, and it argues that, in consequence, the same interpretation of the word "product" in Article VI:1 is also permissible.[10] In short, the United States prefers to interpret the foundational concepts in the *Anti-Dumping Agreement* – "dumping" and "product" – using provisions that have nothing to do with anti-dumping. However, properly interpreted, the different contexts of the word "product" in Articles VI:1 and VII:3 of the GATT 1994 show that this word has different meanings in the two provisions.[11]

- *Second*, in advancing a transaction-specific definition of "dumping" and "margins of dumping", the United States also relies on *Ad* Article VI:1 of the GATT 1994. It contends that this provision "provides for importer-specific comparisons" and, as a result, "the term 'margin of dumping' cannot relate to aggregated results of all comparisons for the 'product as a whole'".[12] However, *Ad* Article VI:1 does not provide a definition of either "dumping" or "margins of dumping" that implicitly or otherwise infers that "margins" may be transaction-specific. Like Article 2.3 of the *Anti-Dumping Agreement*, *Ad* Article VI:1 simply permits an authority to use an importer's resale price to an independent buyer as the starting-point for determining the export price in circumstances where the importer is related to the exporter.[13]

- *Third*, the United States relies on Article 2.2 of the *Anti-Dumping Agreement*, arguing that a product-wide definition of dumping "would require the use of constructed [normal] value for the 'product as a whole'".[14] However, the Appellate Body has held that the conditions in Article 2.2 for the construction of normal value may be met on a model-specific basis, and model-specific intermediate comparisons may be made under Article 2.4.2, provided that the results of all intermediate comparisons are aggregated to determine "dumping" on a product-wide basis to meet the definition in Article 2.1.[15]

- *Fourth*, the United States contends that, because variable anti-dumping duties may be collected on a transaction-specific basis under a prospective normal value ("PNV") system, dumping can also be determined on a transaction-specific basis. However, the rules in Article 9 governing the imposition and collection of anti-dumping duties are "distinct and separate" from the rules in Article 2 governing the determination of dumping.[16] The rules on duty

[10] U.S. FWS, paras. 79 – 80.
[11] Brazil's Opening Statement, paras. 39 – 43.
[12] U.S. FWS, para. 83.
[13] *See* Brazil's Opening Statement, paras. 44 – 45.
[14] U.S. FWS, para. 83.
[15] Appellate Body Report, *U.S. – Softwood Lumber V (21.5)*, paras. 82 and 97. *See* Brazil's Opening Statement, para. 46.
[16] Appellate Body Report, *EC – Bed Linen (21.5)*, para. 124.

imposition in Article 9 neither govern nor alter the definition of "dumping" in Article 2. Thus, the mere fact that Article 9.4(ii) of the *Anti-Dumping Agreement* authorizes the collection of variable anti-dumping duties on a transaction-specific basis does not mean that Article 2 authorizes a determination of dumping on the same basis. To the contrary, although Article 9 permits variable anti-duties to be collected on a transaction-specific basis, "dumping" must be determined for the "product" as a whole.[17]

- *Fifth*, the United States argues that the "mathematical implication of a general prohibition on zeroing" is that the second sentence of Article 2.4.2 "would be reduced to inutility".[18] However, the interpretation of the exception in Article 2.4.2 – and whether it permits zeroing – cannot govern the interpretation of the general rule regarding the definition of "dumping". Further, the Appellate Body has noted that some Members have argued that the second sentence of Article 2.4.2 does not permit zeroing.[19] Moreover, the United States is mistaken in arguing that a prohibition on zeroing would reduce the second sentence of Article 2.4.2 to inutility. This argument only holds under a "under a specific set of assumptions" that do not always apply.[20]

6. The United States also argues that, assuming the use of zeroing gives rise to an inconsistency with WTO disciplines, to prove such an inconsistency Brazil must demonstrate that the use of zeroing had an impact on the outcome of the authority's determination. As Brazil will discuss in greater detail in Section III.A below, to establish a violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, a complainant need only prove the use, and not the impact, of zeroing.[21] Moreover, Brazil has noted that even accepting *arguendo* this legal standard proposed by the United States, zeroing had an impact in the First, Second and Third[22] Administrative Reviews under the Orange Juice Order. Therefore, the United States is wrong on the facts as well as the law for each of the challenged measures: the First Administrative Review, the Second Administrative Review, and the Continued Use of zeroing under the Orange Juice Order.[23]

[17] *See* Brazil's Opening Statement, paras. 47 – 51.
[18] U.S. FWS, para. 94. *See also* U.S. FWS, paras. 93 – 98.
[19] Appellate Body Report, *U.S. – Softwood Lumber V (21.5)*, para. 98.
[20] *See* Brazil's Opening Statement, paras. 52 – 58.
[21] *See* paras. 11 – 18 below; Brazil's Opening Statement, paras. 66 – 68 and 74; and Brazil's answers to the Panel's questions following the Panel's first substantive meeting with the parties ("Answers"), paras. 8 – 11 and 18 – 21.
[22] 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.
[23] *See* paras. 10, 19 - 21, 24 and 26 below; Brazil's FWS, paras. 77 – 97 (First and Second Review) and 98 – 117 (Continued Use); Brazil's Opening Statement, paras. 61 – 79 (First and Second Review) and 80 – 96 (Continued Use); and Brazil's Answers, paras. 7 – 21.

III. THE FIRST ADMINISTRATIVE REVIEW VIOLATES ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994

7. Brazil claims that the United States' use of zeroing in the First Administrative Review violates Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994.

8. Brazil has shown that, for the two Brazilian exporters at issue, Cutrale and Fischer, the USDOC used zeroing in the First Administrative Review under the Orange Juice Order to determine the "weighted average margins of dumping", the cash deposit rates ("CDR") and the importer-specific assessment rates ("ISAR").[24] The United States has not contested this fact. Instead, it argues that Brazil has not proven that the use of zeroing in this review had an *impact* on one of the two exporting companies, namely Cutrale.[25]

9. The United States' argument in this regard is misplaced for reasons of law and fact. *First*, as a matter of law, the United States is incorrect in asserting that, in order to prove that zeroing violated Articles 2.4, 9.3 and VI:2, Brazil must prove that zeroing had an "impact". *Second*, as a matter of fact, the United States is wrong that the use of zeroing did not have an impact for Cutrale in the First Administrative Review.

10. We address these issues in turn. Before doing so, Brazil emphasizes that the United States makes no such argument with respect to Fischer, and has contested neither the use nor the impact of zeroing in the First Administrative Review for that company. For Fischer in the First Administrative Review, the dumping margin and CDR were 4.81%, and the ISAR was [[xxxx]]%.[26] The arguments that follow do not, therefore, relate to the determination made for Fischer in the First Administrative Review.

[24] Brazil's FWS, paras. 77 – 85; and Brazil's Opening Statement, paras. 65 – 72. *See* also Exhibits BRA-31 (Ferrier Affidavit); BRA-28 (Issues and Decision Memorandum); BRA-29 and BRA-30 (computer program logs); and BRA-34 and BRA-35 (computer program outputs).
[25] U.S. FWS, paras. 119 – 121; and U.S. Opening Statement, para. 35. In the case of Fischer, the United States has argued that the computer program log submitted by Brazil had not been generated by the USDOC. Brazil responded to the U.S. argument, and submitted the log generated by the USDOC, with its Opening Statement, para. 61 – 63, and Exhibit BRA-45.
[26] Exhibit BRA-48.

A. As a matter of law, the use of zeroing in the First Administrative Review violated Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, regardless of the impact of zeroing on Cutrale

11. As set forth in the *chapeau* of Article 9.3 of the *Anti-Dumping Agreement*, a Member must establish a margin of dumping consistently with Article 2 of the *Anti-Dumping Agreement*. The obligation to comply with Article 2 in determining margins of dumping is not dependent on any other aspect of the anti-dumping proceeding or on the outcome of that proceeding in terms of duty collection. A failure to comply with Article 2 in determining the margin vitiates a determination made under Article 9.3, irrespective of the amount of duties that is ultimately collected.[27]

12. In *U.S. – Zeroing (Japan)(21.5)*, the United States argued that Japan had not proven the impact of zeroing in the challenged administrative reviews, and that therefore Japan's challenge had to fail. The panel rejected the U.S. argument:

> ... we note that the Appellate Body's findings in the original proceedings were not based on evidence that particular importers had sales with negative margins or that individual importer-specific assessment rates were affected by the application of zeroing procedures. We do not consider, therefore, that Japan must show that given importers had sales with negative margins under Reviews 4, 5, 6 and 9, or the effect of zeroing on the importer-specific assessment rates determined in those Reviews.[28]

13. The United States did not appeal this aspect of the panel's findings, and the Appellate Body upheld the panel's finding that the application of zeroing in these reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement*, as well as Article 2.4 of the same agreement and Article VI:2 of the GATT 1994.[29]

14. A showing of impact is also not necessary to prove a violation of Article 2.4 of the *Anti-Dumping Agreement*. Article 2.4 provides that, in the determination of dumping:

> A fair comparison shall be made between the export price and the normal value. …

---

[27] *See*, in particular, Panel Report, *U.S. – Zeroing (Japan) (21.5)*, para. 7.162.
[28] Panel Report, *U.S. – Zeroing (Japan) (21.5)*, para. 7.162.
[29] Appellate Body Report, *U.S. – Zeroing (Japan) (21.5)*, paras. 195 and 197.

15. The focus of Article 2.4 is firmly on the *comparison* between export price and normal value, which must be "fair". In *Egypt – Rebar,* for example, the panel held that the "fair comparison" requirement concerns "the *nature of the comparison* of export price and normal value".[30] In reaching this interpretation, the panel observed that the first sentence of Article 2.4 explicitly focuses on the "the *fairness* of the *comparison*"; the second sentence elaborates on considerations pertaining to the "*comparison*"; the third, fourth and fifth sentence address issues relating to "price *comparability*"; and the final sentence concerns information necessary to make a "fair *comparison*".[31] The panel also considered that the surrounding context in Articles 2.4.1 and 2.4.2 confirmed that Article 2.4 imposes obligations on the nature of the "comparison" itself.[32]

16. Accordingly, in assessing a claim under Article 2.4, a panel must assess "the *nature of the comparison*" made between export price and normal value to determine whether it was "fair". Because the obligation in Article 2.4 to provide a fair comparison concerns "the nature of the comparison" that is made by an anti-dumping authority, it applies independently of the amount of anti-dumping duties that are collected by an importing Member.

17. In terms of ordinary meaning, "[t]he term 'fair" [in Article 2.4] is generally understood to connote impartiality, even-handedness, or lack of bias."[33] The Appellate Body has held that there "is an inherent bias in a zeroing methodology".[34] Focusing on "the nature of the comparison", the Appellate Body has also said that, as a "*way of calculating*" margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased", because the comparison necessarily excludes any negative results.[35] A panel and the Appellate Body have, therefore, ruled that the maintenance and application of zeroing procedures in administrative reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[36]

---

[30] Panel Report, *Egypt – Rebar*, paras. 7.333 – 7.335 (emphasis added). *See also* Panel Report, *Argentina – Poultry*, para. 7.265; and Panel Report, *EC – Pipe Fittings*, para. 7.140.
[31] Panel Report, *Egypt – Rebar*, para. 7.333 (original emphasis).
[32] Panel Report, *Egypt – Rebar*, para. 7.334.
[33] Appellate Body Report, *U.S. – Softwood Lumber V (21.5)*, para. 138.
[34] Appellate Body Report, *U.S. – Corrosion-Resistant Steel Sunset Review*, para. 135.
[35] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *U.S. – Softwood Lumber V (21.5)*, para. 142.
[36] Panel Report, *U.S. – Zeroing (Japan)(21.5)*, paras. 7.168 and 8.1(b); Appellate Body Report, *U.S. – Zeroing (Japan)(21.5)*, paras. 195, 197 and 213(c); and Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 169, 176, 190(d) and 190(e).

18. In this dispute, by including zeroing in its methodology for determining margins of dumping in the administrative reviews at issue, the United States failed to conduct a "fair comparison". The United States has not contested Brazil's evidence that the USDOC did not "take fully into account the prices of all comparable export transactions" made by Cutrale in the First Administrative Review.[37] To recall, by using zeroing in the comparison, the USDOC excluded [[xxxx]]% by volume of the company's export transactions, and [[xxxx]]% by value.[38] The *nature of the comparison* was, therefore, distorted and unfair, because it favored, very heavily, a positive dumping determination.

B. As a matter of fact, the use of zeroing in the First Administrative Review had an impact on Cutrale's margin of dumping and on the anti-dumping duties due on imports from Cutrale

19. The United States is incorrect in arguing that the use of zeroing had no impact on Cutrale.[39] *First*, through the use of zeroing, the United States established a margin of dumping for Cutrale of 0.45%.[40] This plainly contradicts the U.S. statement that "Brazil cannot establish that the margin should have been any lower to be consistent with the covered agreements".[41] In fact, had the United States complied with its WTO obligations, this margin would have been zero.

20. *Second*, in the First Administrative Review, the USDOC determined that Cutrale's assessment rate for the review period was [[xxxx]]%.[42] This rate is above the *de minimis* threshold in U.S. law, [43] and the United States, therefore, collected anti-dumping duties on the relevant entries from Cutrale at the rate of [[xxxx]]%. The amount of these duties is approximately USD [[xxxx]]. No such duties would have been collected had the USDOC not used zeroing in calculating the assessment rate for Cutrale.

21. In conclusion, the United States' use of zeroing in making a dumping determination for Cutrale in the First Administrative Review had an impact on the company's margin of dumping and also on the amount of anti-dumping duties due on imports from that company.

---

[37] Appellate Body Report, *EC – Bed Linen*, para. 55.
[38] *See* Brazil's FWS, para. 84; and Exhibit BRA-34, last page, "Percentage of value with AD margins" and "Percentage of quantity with AD margins". *See* also Exhibit BRA-31, para. 38; and Exhibit BRA-29, p. 63.
[39] U.S. FWS, paras. 120 – 120; and U.S. Opening Statement, para. 35.
[40] Exhibit BRA-21, p. 46585, "Percent margin".
[41] U.S. Opening Statement, para. 35.
[42] Exhibit BRA-34, penultimate page, "Percent ad valorem assessment".
[43] Exhibit BRA-14 (19 C.F.R. § 351.106(c)). *See also* U.S. FWS, footnote 141.

IV. THE SECOND ADMINISTRATIVE REVIEW VIOLATES ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994

22. With respect to the Second Administrative Review, Brazil has also shown that the USDOC used zeroing, for both Cutrale and Fischer, in determining the margins of dumping, CDRs and ISARs,[44] and that this use of zeroing was inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

23. Again, the United States has not contested the use of zeroing for either Cutrale or Fischer. Instead, similar to the arguments made regarding Cutrale's determination in the First Administrative Review, the United States contends that zeroing did not have an impact on Fischer's determination in the Second Administrative Review, because the margin of dumping established for this company was *de minimis*, and the CDR and ISAR were both set at zero.[45]

24. Before responding to these arguments, Brazil emphasizes that the United States makes no such argument with respect to Cutrale's determination in the Second Administrative Review, and has contested neither the use nor impact of zeroing in that Review for that company. For Cutrale in the Second Administrative Review, the dumping margin and CDR were 2.17%, and the ISAR was [[xxxx]]%.[46] The arguments that follow do not, therefore, relate to the determination made for Cutrale in the First Administrative Review.

25. As explained at paragraphs 14 to 18 above,[47] the use of zeroing in an anti-dumping determination violates Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, regardless of its impact. In particular, with respect to the fairness of the comparison under Article 2.4, the uncontested evidence shows that the USDOC disregarded the comparison results for all of Fischer's export transactions whose price was greater than the normal value, which amounted to more than [[xxxx]]% of the total export transactions,

[44] Brazil's FWS, paras. 86 – 95; and Brazil's Opening Statement, paras. 73 – 79. *See* also Exhibits BRA-31 (Ferrier Affidavit); BRA-43 (Issues and Decision Memorandum); BRA-36 and BRA-38 (computer program logs); and BRA-37 and BRA-39 (computer program outputs).
[45] U.S. FWS, paras. 119 – 121; and U.S. Opening Statement, para. 35. The United States has also argued that the Second Administrative Review is outside the panel's terms of reference. Brazil responded to this argument in its Comments on the U.S. Request for a Preliminary Ruling, paras. 3 – 28.
[46] Exhibit BRA-48.
[47] *See* also Brazil's Opening Statement, paras. 66 – 68 and 74; and Brazil's Answers, paras. 8 – 11 and 18 – 21.

whether measured by volume or value.[48] In other words, the comparison took into account the prices of a tiny fraction of Fischer's exports, which renders the comparison unfair.

26. The United States is also wrong that the use of zeroing had no impact on the determination made for Fischer or, to borrow the United States' own words, that "Brazil cannot establish that the margin should have been any lower to be consistent with the covered agreements".[49] For Fischer in the Second Administrative Review, the United States calculated an overall weighted average margin of dumping of 0.002%.[50] Albeit small, this is a positive margin, determined using zeroing. Had the comparison taken fully into account the more than [[xxxx]]% transactions that were excluded, the margin would have been zero.

V. THE UNITED STATES' CONTINUED USE OF ZEROING VIOLATES ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994

27. In addition to challenging zeroing "as applied" in the First and Second Administrative Reviews, Brazil claims that the continued use of zeroing in a string of determinations under the Orange Juice Order violates Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994. Brazil's earlier arguments can be found in previous written and oral submissions.[51] Also, with regard to Article 2.4 of the *Anti-Dumping Agreement*, Brazil has developed interpretive arguments in this Submission and in its Opening Statement, and has explained why the use of zeroing violates that provision.[52] Those arguments are made also in respect of the United States' continued use of zeroing under the Orange Juice Order.

28. Here, Brazil will not repeat its earlier arguments. Instead, it focuses on U.S. arguments asserting that the evidence does not show the continued use of zeroing under the Orange Juice Order.

[48] *See* Brazil's FWS, para. 75; Brazil's Opening Statement, para. 75; Exhibit BRA-31, paras. 48 – 65; and Exhibit BRA-39, last page, "Percentage of value with AD margin".
[49] U.S. Opening Statement, para. 35.
[50] Exhibit BRA-39, right-most column, "Wt avg percent margin".
[51] *See* Brazil's FWS, paras. 98 – 117; Brazil's Opening Statement, paras. 80 – 96; and Brazil's Answers, paras. 3 – 6 and 9 – 20.
[52] *See* paras. 14 - 18 above; and Brazil's Opening Statement, paras. 67 – 72 and 74 – 79.

A. The legal standard for establishing the existence of the continued use of zeroing

29. The United States objects that Brazil has not proven the existence of the continued use measure.[53] Among others, it argues that the series of determinations under the Orange Juice Order is not sufficiently long to establish the continued use of zeroing under this Order.[54] Brazil disagrees. In *U.S. – Continued Zeroing*, the Appellate Body held that it was appropriate to find the continued use of zeroing where the facts show "the *use* of the zeroing methodology, *without interruption, in different types of proceedings over an extended period of time*."[55] The Appellate Body also held that:

> ... the repeated action by the USDOC in a string of determinations relating to [the anti-dumping orders at issue] confirm[ed] the use of the zeroing methodology as an ongoing conduct.[56]

30. Thus, the continued use of zeroing is established if there is a sufficient "*density of factual findings*",[57] that is *not* "*fragmented*" over time,[58] showing that zeroing has been used in successive proceedings under the same order.

B. The evidence before the Panel shows the continued use of zeroing under the Orange Juice Order

31. At the first meeting with the Panel, Brazil noted that its uncontested evidence of the continued use of zeroing under the Orange Juice Order is "dense", and not subject to any "fragmentation".[59] Brazil noted that zeroing has been used by the USDOC at *every available opportunity* under the Orange Juice Order in proceedings extending over five years from the original investigation, initiated in February 2005, through the First and Second Administrative Reviews, to the preliminary determination in the Third Administrative Review in April 2010. Therefore, Brazil asserted that the evidence of the continued use of zeroing under the Orange Juice Order was *perfectly consistent over an extended time*, with *no* "*fragmentation*" in the evidence.

---

[53] The United States also argues that the measure is outside the Panel's terms of reference. Brazil has responded to this argument in its Comments on the U.S. Request for a Preliminary Ruling, paras. 29 – 55.
[54] U.S. FWS, para. 131.
[55] Appellate Body Report, *U.S. – Continued Zeroing*, para. 195 (emphasis added).
[56] Appellate Body Report, *U.S. – Continued Zeroing*, para. 193.
[57] Appellate Body Report, *U.S. – Continued Zeroing*, para. 191.
[58] Appellate Body Report, *U.S. – Continued Zeroing*, para. 194.
[59] Brazil's Opening Statement, paras. 88 – 89.

1. Zeroing was used in the original investigation

32. With respect to the original investigation, the United States contends that zeroing was not used, because there were no negative comparison results.[60] It contends that the "lack of any negative comparison results means that "zeroing" had no impact on the dumping margin calculation".[61] In reply, Brazil has noted that the United States misunderstands the nature of the conduct, and hence measure, at issue, which is the continued *use*, and not impact, of zeroing;[62] in the Appellate Body's words, the measure at issue is "the *use* of the zeroing methodology as an ongoing conduct".[63] As Brazil has noted in its answers submitted today, a continued use measure is similar, in this sense, to an "as such" measure, because it focuses on the continuing *maintenance and use*, and *not the impact*, of zeroing.[64]

33. The United States unsuccessfully raised a similar objection in *U.S. – Continued Zeroing*. In that case, it argued that the continued use of zeroing under specific orders could not violate the *Anti-Dumping Agreement* because, in a given determination, there may be no negative comparison results. The Appellate Body disagreed. It said:

> ... even if zeroing may not manifest itself as a result of the particular factual circumstances of a case in which all export prices are below the normal value, this does not negate the fact that the repeated action by the USDOC in a string of determinations relating to these four cases confirms the use of the zeroing methodology as an ongoing conduct.[65]

Thus, irrespective of the impact of zeroing in a given determination, the continued use of zeroing is WTO-inconsistent.

2. Zeroing was used in the First and Second Administrative Reviews

34. With respect to the First and Second Administrative Reviews, the United States contends that zeroing did not have an impact for Cutrale in the First Administrative Review,[66] and for Fischer in the Second Administrative Review.[67] Again, for the reasons just

---

[60] U.S. FWS, para. 129.
[61] U.S. FWS, paras. 128 – 129.
[62] Brazil's Opening Statement, paras. 91 – 93.
[63] Appellate Body Report, *U.S. – Continued Zeroing*, para. 193 (emphasis added). *See* also Brazil's Answers, paras. 3 – 6 and 9 – 11.
[64] Brazil's Answers, paras. 4 and 9 – 11.
[65] Appellate Body Report, *U.S. – Continued Zeroing*, para. 193.
[66] U.S. FWS, para. 127.
[67] U.S. FWS, para. 127.

elaborated, this argument misapprehends the nature of the measure at issue, which is the continued use of zeroing. The U.S. arguments do not, therefore, show any "fragmentation" in the USDOC's decision to use zeroing as part of its margin calculation methodology. Indeed, in both reviews, the USDOC stated expressly in the respective Issues & Decisions Memoranda that it had decided to continue using zeroing despite objections from Brazil's exporters.[68]

35. Also, for the reasons given in paragraphs 19 – 21 and 26 above, the United States is incorrect in asserting that zeroing had no impact on the dumping determinations made for Cutrale in the First Administrative Review, and for Fischer in the Second Administrative Review. In both cases, the use of zeroing resulted in the exclusion in considerable numbers of negative comparison results, generating a positive margin of dumping that would otherwise have been zero. For Cutrale, as explained in paragraph 20 above, the USDOC's determination also led to the collection of anti-dumping duties that would not have been due, absent the use of zeroing.

3. Zeroing was used in the Third Administrative Review

36. As noted, at the first meeting with the Panel, Brazil emphasized that zeroing has been used with perfect consistency, at every available opportunity, under the Orange Juice Order. Since the Panel's first substantive meeting with the parties, the United States has seized yet another opportunity to use zeroing under the Order, in the Third Administrative Review, with predictable results. Although this determination is not itself challenged as a measure at issue in these proceedings, it serves as further evidence to show the continued use of zeroing under the Orange Juice Order.[69]

37. In April of 2009, the USDOC initiated the Third Administrative Review under the Orange Juice Order, covering entries from 1 March 2008 through 28 February 2009. The USDOC published its final results in this review on 18 August 2010.[70] In the Third Administrative Review, the USDOC again used zeroing. As it has before, the authority dismissed the exporters' pleas that it stop using zeroing, and it stated, again, that WTO

[68] Exhibits BRA-28, pp. 5 – 6; and BRA-43, pp. 4 – 6.
[69] *See* Brazil's Opening Statement, para. 95.
[70] Exhibit BRA-49. *See* also Brazil's FWS, para. 48, 98, 103 and footnote 53.

dispute settlement reports do not trump the exercise of the USDOC's discretion under U.S. law.[71]

38. The USDOC's computer logs and outputs, for both Cutrale and Fischer, confirm that the USDOC used zeroing in the Third Administrative Review to determine the margins of dumping, the CDRs, and the ISARs, as explained in Mr. Ferrier's second affidavit.[72] For Cutrale, the USDOC's final results differed from the preliminary results; for Fischer, the USDOC merely confirmed its findings in the preliminary results.[73]

39. As explained in Mr. Ferrier's second affidavit, the logs for both companies include programming language that instructs the computer to exclude all negative comparison results generated when the price of an individual export transaction exceeds the normal value.[74]

40. 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.[75] Cutrale's program output shows further that the USDOC based its determination on export transactions accounting for [[xxxx]]% in volume, and [[xxxx]]% in value, of all export transactions. In other words, the USDOC ignored the comparison results from [[xxxx]]% in volume, and [[xxxx]]% in value, of all export transactions.[76] For Cutrale, using zeroing, the CDR is 8.13%, and the ISAR is [[xxxx]]%.[77]

41. For Fischer, the log shows that [[xxxx]] out of [[xxxx]] export transactions ([[xxxx]]%) generated negative comparison results that were excluded.[78] The output further shows that the USDOC based its determination on export transactions accounting for [[xxxx]]% in volume, and [[xxxx]]% in value, of all export transactions. In other words, the

[71] Exhibit BRA-50, pp. 4 – 6. *See* also, for the earlier reviews: Exhibits BRA-28, pp. 5 – 6 and BRA-43, pp. 4 – 6.
[72] Exhibit BRA-51.
[73] The USDOC therefore did not transmit new logs and outputs to Fischer, but stated that the logs and outputs supporting the preliminary results remain valid for the final results. Exhibit BRA-53. Brazil had already submitted the computer log underlying the USDOC's preliminary results for Fischer in the Third Administrative Review as Exhibit BRA-25. Brazil's expert, Mr. Ferrier, has now included additional asterisks for the Panel's and the parties' ease of reference in this computer log. Therefore, Brazil now submits Exhibit BRA-56, which is identical to Exhibit BRA-25 but for these additional asterisks.
[74] *See* Exhibit BRA-51, pp. 3 – 6.
[75] Exhibit BRA-52, p. 32.
[76] Exhibit BRA-54, last page, "Percent of value with margins" and "Percent of quantity with margins".
[77] Exhibit BRA-54, penultimate and last page; and BRA-49, p. 51000.
[78] Exhibit BRA-56, p. 24.

USDOC ignored the comparison results from [[xxxx]]% in volume, and [[xxxx]]% in value, of all export transactions.[79] For Fischer, using zeroing, the CDR is 5.26% and the ISAR is [[xxxx]]%.[80]

42. Furthermore, in the Issues and Decision Memorandum in the Third Administrative Review, the United States affirmed its intention to continue using zeroing in administrative reviews, stating expressly that its zeroing policy in reviews remains unchanged despite WTO rulings.[81]

43. Thus, in the midst of these Panel proceedings, which are inquiring into the USDOC's continued use of zeroing under the Orange Juice Order, the United States has expressly confirmed that the use of zeroing continues to be part of the USDOC's calculation methodology for this Order. In these circumstances, the United States' arguments that the evidence before the Panel does not prove the continued use of zeroing ring hollow. Its actions outside these proceedings contradict its words in these proceedings.

44. Indeed, the United States' actions in using zeroing in the Third Administrative Review show precisely why Brazil challenges the continued use of zeroing. Brazil wishes to tackle the root of the problem under the Orange Juice Order, namely the United States' continued use of zeroing. It wishes to do so independent of the application of zeroing in individual determinations because, if Brazil's challenge were confined to such determinations, the challenged measures would be outdated before the Panel proceedings have even ended, with the dispute being prolonged by new measures that are not subject to the Panel's findings.

45. By challenging the continued use measure, Brazil seeks a ruling on a single measure involving the specific ongoing conduct that is the source of the dispute , namely, the continued use of zeroing under the Order. This measure is manifested by, and evidenced in, the string of individual determinations; yet its existence transcends those measures, and must be subject to a specific recommendation by the Dispute Settlement Body to ensure that the ongoing conduct ceases.

[79] Exhibit BRA-55, last page, "Percent of value with margins" and "Percent of quantity with margins".
[80] Exhibits BRA-55, penultimate and last page; and BRA-49, p. 51000.
[81] Exhibit BRA-50, pp. 4 – 6.

***

46. In sum, the United States has used zeroing with perfect consistency in every proceeding under the Orange Juice Order. Moreover, in rejecting exporters' requests for it to cease using zeroing, it has repeatedly affirmed its intent to persist in this conduct. The record before the Panel, therefore, shows that the continued use of zeroing as an ongoing conduct under the Orange Juice Order exists. For reasons that Brazil has stated elsewhere,[82] the continued use of zeroing is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, and the Panel should find accordingly.

VI. CONCLUSION

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

- The United States' use of the zeroing methodology in the First Administrative Review is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;
- The United States' use of the zeroing methodology in the Second Administrative Review is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994; and
- The United States' continued use of the zeroing methodology in successive proceedings under the Orange Juice Order is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

48. Pursuant to Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 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 these agreements.

[82] *See* Brazil's FWS, paras. 98 – 117; Brazil's Opening Statement, paras. 80 – 96; and Brazil's Answers, paras. 7 – 20.