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

(WT/DS382)

Answers of the United States of America
to Questions from the Panel to the Parties
in connection with the First Substantive Meeting of the Panel

August 31, 2010

Table of Reports

Short Form	Full Citation
US – Corrosion-Resistant Steel Sunset Review (AB)	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
US – Gasoline (AB)	Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.
US – Softwood Lumber Dumping (Article 21.5) (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada*, WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264
US – Stainless Steel (Panel)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R
US – Stainless Steel (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Zeroing (EC) (Panel)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
US – Zeroing (EC) (21.5) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
US – Continued Zeroing (EC) (Panel)	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified by the Appellate Body Report, WT/DS350/AB/R
US – Continued Zeroing (EC) (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009

US – Zeroing (Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Zeroing (Japan) (21.5) (Panel)	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

A. BRAZIL

1. Is Brazil making a claim that simple zeroing in administrative reviews is, as such, inconsistent with Article 9.3 of the AD Agreement, or any other provision of the AD Agreement or the GATT 1994? If so, please explain the details of this claim and please identify it in the Panel's terms of reference.

2. Does Brazil argue that the USDOC's use of zeroing in the First and Second Administrative Reviews to determine the margins of dumping of Cutrale and Fischer was inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 irrespective of the impact that use of zeroing had on the collection of any duties? If so, please explain how such a claim falls within the scope of the requirements of the two respective provisions.

3. Is Brazil claiming that the calculation of the cash deposit rate and the assessment rate by the USDOC in the relevant administrative reviews, allegedly on the basis of zeroing, is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994? If so, please explain how both these calculations fall within the scope of the requirements of the two respective provisions, and in doing so, please respond to the United States' submission that cash deposit rates are not anti-dumping duties, but rather a security for the payment of anti-dumping duty within the meaning of the Ad Note to Article VI:2 and VI:3 of the GATT 1994.

4. Brazil considers that "permissible" interpretations under Article 17.6(ii) cannot accommodate rival or conflicting interpretations. Please explain how Article 17.6(ii) would operate under such a view, and in doing so, please also comment on the United States view (expressed during the first substantive meeting) that there would be no disputes between WTO Members if the only "permissible" interpretations for the purpose of Article 17.6(ii) were non-conflicting interpretations?

B. UNITED STATES

5. At paragraphs 35 and 36 of its oral statement, Brazil submits that the DSB has ruled several times that cash deposit rates are inconsistent with Article 9.3, citing various disputes involving the United States. How does the United States respond to Brazil's submissions, in the light of the Appellate Body and Panel Reports referred to by Brazil in those paragraphs?

1. Contrary to Brazil's arguments, cash deposits are not a form of antidumping duties.

2. Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") provides: "The amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2." In an assessment proceeding (or administrative review), Commerce calculates both a final assessment rate, which applies retrospectively to imports entering in a specific period of time, and a cash deposit rate that applies to imports going forward. The cash deposit rates set forth in U.S. assessment proceedings are an estimate of future dumping duties based on past dumping. Upon entry, the amount of estimated duty is collected as a cash deposit, which is held as a security pending determination of the final antidumping duty to ensure that funds are available to pay the final antidumping duties. Estimated duties deposited upon entry of the merchandise are not themselves final antidumping duties.

3. Such securities are governed by separate provisions of the GATT 1994. The AD Note to paragraphs 2 and 3 of GATT Article VI allows a Member to "require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization." In a retrospective duty assessment system, the "determination of the facts" referenced in the Ad Note is the determination that is referred to in Article 9.3.1 as the "determination of final liability for payment of anti-dumping duties." The amount of the estimated duty (or the cash deposit being held as security for payment of the final antidumping duty) deposited for future imports as a result of an assessment review does not necessarily reflect the amount of the final antidumping duty for future imports, which will be determined later.

4. Two of the reports (*US – Zeroing (EC) (21.5) (AB)* and *US – Zeroing (Japan) (21.5)*) cited by Brazil were issued in proceedings under Article 21.5, in which the rulings related to whether the United States had complied with earlier recommendations and rulings. In the underlying proceedings, the Appellate Body had found that the United States acted inconsistently in specific administrative reviews. In those assessment proceedings, the United States determined both final assessment rates for imports entering in the period of review, as well as cash deposit rates that would apply to future entries. The arguments as to cash deposit rates in those disputes related to whether the United States had complied with the recommendations and rulings of the DSB with respect to the application of zeroing in specific reviews where the cash deposit rates calculated in those reviews were no longer in effect.

5. With respect to the quote from the Appellate Body report in *US – Zeroing (Japan)*, the United States does not agree that this reflects a conclusion that cash deposits are a "form" of anti-dumping duties that may be subject to, and are inconsistent with, Article 9.3. This statement is a portion of the Appellate Body's attempt to address the concern raised by the panel that, if an administering authority had to provide offsets, it might not be able to collect duties on dumped imports where there were above-normal-value transactions involving a completely different

importer.[1] In the other two cases (*US – Stainless Steel (AB)* and *US – Continued Zeroing (EC)(AB)*), the cited provisions reflect a conclusion that the application of zeroing in reviews was inconsistent with Article 9.3 because it "results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping."[2] As explained in our first written submission (and above), however, a cash deposit is not a final anti-dumping duty.[3]

6. Please explain why the United States applies a different comparison methodology to calculate the margin of dumping in an original investigation compared with the margin of dumping in an administrative review?

6. The use of different comparison methodologies in Article 5 investigations and Article 9 assessment proceedings reflects the fact that the inquiries at issue in these two types of proceedings differ from one another and are also subject to distinct obligations under separate provisions of the AD Agreement.

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[1] The Appellate Body continued to say:

> At the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales, including those occurring at above the normal value. However, in 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. The same "ceiling" applies in review proceedings under Article 9.3.2, because the introductory clause of Article 9.3 applies equally to prospective and retroactive duty assessment systems.

United States – Zeroing (Japan) (AB), para. 156.

[2] *United States – Continued Zeroing (EC) (AB)*, para. 315; *US – Stainless Steel (AB)*, para. 133. In these disputes, the Appellate Body reasoned,

> "[W]hen applying "simple zeroing" in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. Simple zeroing thus results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, as we have explained above, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter."

[3] Moreover, in the Article 21.5 proceeding in *United States – Zeroing (EC)(Article 21.5) (AB)*, paras. 160, 266 and 267, part of the Appellate Body's rationale was that in some circumstances a cash deposit rate may become an assessment rate. This is not a concern here because assessment proceedings were conducted for both Cutrale and Fischer and assessment rates were determined for entries made during the period of review. Thus, none of the cash deposit rates at issue determined for Cutrale or Fischer were applied as assessment rates.

7. The inquiry in an original investigation is to establish the "existence" of margins of dumping sufficient to justify the imposition of an antidumping duty order. This includes an analysis of: 1) whether dumping exists at a level beyond *de minimis* in the aggregate; 2) whether a domestic industry is being injured; and 3) whether there is a link between the dumping and the injury.

8. In contrast, the comparison methodologies described in Article 2.4.2, which are used to establish "the existence of margins of dumping during the investigation phase," do not apply to Article 9.3 assessment proceedings. Rather, assessment proceedings under Article 9 are concerned with determining the amount of duty assessed for each entry under review. Thus, Members have flexibility to conduct Article 9.3 assessment proceedings using any comparison methodology not otherwise prohibited by the covered agreements. This flexibility is reflected in the fact that Members use different methodologies and systems for assessment of duties.

9. Prior to the entry into force of the AD Agreement, the United States and other Members typically employed an average to transaction methodology in both original investigations and assessment proceedings. However, following the Uruguay Round agreements, the United States changed its practice with respect to original investigations.

7. Please explain how the margins of dumping calculated through the use of the computer programme applied by the USDOC in original investigations and administrative reviews are used and relied upon for the purpose of determining the margins of dumping that are issued in the USDOC's official findings to respondents in anti-dumping proceedings.

10. In each antidumping proceeding conducted by Commerce, the Assistant Secretary for Import Administration, or an official acting in that capacity, makes the final determination, which is subject to the possibility of judicial review for consistency with U.S. law. The final determinations in original investigations and assessment proceedings are published in the *Federal Register*. Such final determinations may rely on the results of computer calculations as a basis for the determination of the dumping margin. Or, they may rely on calculations performed by another means or by a combination of means. A determination by the Assistant Secretary in an assessment proceeding is the basis for the assessment of antidumping duties on entries of merchandise covered by the determination and for cash deposits as security for payment of antidumping duties on future entries of the merchandise.

11. A computer program is a tool for making calculations. Commerce is not required to use a computer program, let alone any particular computer software package, calculation program, or programming code. In any particular proceeding, Commerce may adapt a previously written calculation program, write a new calculation program, or use a calculation method other than a calculation program. The results of computer calculations may be useful for making a final determination.

12. It is important to understand, however, that program calculations are an intermediate step in the analysis and may be adjusted (if appropriate) before the final determination is made. For example, the Assistant Secretary may adjust the computer program results by subtracting a portion of a rate attributable to export subsidies countervailed in a companion countervailing duty case. In other instances, a computer program could calculate a result that is less than the U.S. *de minimis* threshold and above zero in an administrative review, but under U.S. law no "*de minimis*" level cash deposits would be collected as security for payment of actual duties.

8. The Panel understands that the United States considers that Article 17.6(ii) would have no effective purpose if the only interpretations of the AD Agreement that were "permissible" were non-conflicting interpretations? Please explain what the United States means by this line of argument.

13. Article 17.6(ii) expressly acknowledges that the provisions of the AD Agreement may "admit[] of more than one permissible interpretation." Article 17.6(ii) further requires that a panel find a measure to be in conformity with the AD Agreement if it rests on one of those permissible interpretations.

14. This provision must have some meaning.[4] If all of the permissible interpretations of the relevant provisions of the AD Agreement were harmonious, there would be no purpose in acknowledging that there may be more than one permissible interpretation, or in requiring a panel to uphold an authority's measure if it rests on one of those interpretations. If all of the permissible interpretations must yield harmonious interpretations, in effect, there is only one permissible interpretation.

15. Article 17.6(ii) is a standard of review that applies in the context of dispute settlement. By definition, the consistency of the responding Member's measure with the relevant provisions of the covered agreements is the heart of the disputed matter. Panels are generally faced with disputed interpretations of the covered agreements: one offered by the complaining Member that would render the measure inconsistent with WTO obligations, and one that would result in the measure being WTO-consistent. If an interpretation that a measure is consistent with the covered agreements can never be permitted in the face of a complaining party's contrary permissible interpretation that the measure is inconsistent, then Article 17.6(ii) can serve no purpose as a standard of review in dispute settlement.

16. Thus, it is incorrect to reason that a measure must necessarily be WTO-inconsistent solely because the complaining Member's interpretation is deemed to be "permissible." This result is the opposite of what the text of Article 17.6(ii) provides. In other words, if the only

[4] *See US – Gasoline (AB)*, p. 23 ("One of the corollaries of the 'general rules of interpretation' of the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy.").

circumstance in which two interpretations of the covered agreements can both be "permissible" is where both interpretations are in agreement as to the consistency of the measure, then there is no disputed interpretation for which to make reference to the Article 17.6(ii) standard of review.

9. The Panel understands from Brazil's interventions during the first substantive meeting that it is of the view that "foundational concepts" such as the definition of the "dumping" and the interpretation of "margin of dumping" cannot be subject to multiple "permissible" interpretations within the meaning of Article 17.6(ii) of the AD Agreement. How does the United States respond to this view?

17. Article 17.6(ii) refers to permissible interpretations of the "relevant provision of the Agreement." Article 17.6(ii) does not distinguish between "foundational" and other concepts, or refer to "concepts" at all. There is no basis in the text of the AD Agreement for assuming that the only "relevant provisions" are those that do not apply to "foundational concepts." Nor is there any basis in the agreement for categorizing provisions of the AD Agreement as "foundational" or "non-foundational."

18. The fact that Article 17.6(ii) calls for a permissible interpretation of the relevant provision (as opposed to "foundational concepts") of the AD Agreement to be upheld does not, as Brazil argues, undermine the disciplines of the Agreement. In its first written submission, the United States explained why the interpretation that dumping may be determined at the level of individual export transactions is a permissible interpretation of the AD Agreement and the GATT 1994 under the customary rules of interpretation of public international law. This interpretation is consistent with both: (1) the text of the AD Agreement – including its express recognition that Members may have retrospective or prospective systems; and (2) the history of the negotiation of the AD Agreement and the subsequent practice of WTO Members in determining the amount of dumping duties. A number of panels have agreed that this interpretation is permissible. Moreover, as explained in the U.S. second written submission, in the AD Agreement "dumping" is defined, using terms and phrases that have an ordinary meaning, such as "product," "price," and "introduced into the commerce", so as to apply in a variety of distinct contexts and accommodate varying assessment systems of WTO Members.[5]

10. How does the United States interpret the Issues and Decision Memorandum from the First Administrative Review, where the USDOC states that it "continued to deny offsets to dumping based on export transactions that exceed NV"[6] in the final results of this administrative review? Does the United States consider this statement to evidence that the USDOC used zeroing when calculating the margins of dumping of both Cutrale and Fischer in the First Administrative Review? If not, please explain why not, in the light of

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[5] *See* U.S. Second Written Submission, paras. 26-30.

[6] Exhibit BRA-28, p. 6.

the full discussion found in "Comment 1" of the memorandum and any other relevant evidence.

19. The United States does not consider the statement referenced in the Issues and Decision Memorandum to evidence that it used zeroing in calculating the margins of dumping of both Cutrale and Fischer in the first administrative review. The Issues and Decision Memorandum from the First Administrative Review is a discussion of the issues raised by interested parties during that proceeding. The Issues and Decision Memorandum states that Commerce would not provide offsets for non-dumped sales in its margin calculations for that review. However, there is no evidence within the document itself that Fischer's or Cutrale's sales presented Commerce with instances of non-dumped sales such that any denial of an offset for a non-dumped sale actually occurred. The document does not evidence that there were any dumped sales against which an offset might have been provided if the Department of Commerce had agreed with the legal arguments, or whether any denial of offsets had any impact on the calculated rates for Fischer or Cutrale.

20. In other words, the document does not evidence a WTO-inconsistent use of zeroing because the document does not demonstrate that Commerce's calculation methodology resulted in the assessment of duties in excess of the margin of dumping. As noted in our first written submission, the *US – Continued Zeroing (EC)* dispute demonstrates this point. In response to the panel's adverse finding concerning zeroing in four specific investigations in that dispute, Commerce recalculated the rates from those investigations without including the zeroing line in the program. In three of these four investigations, there was no difference between the recalculated rate and the original rate because either (i) there were no offsets to provide because all weighted-average to weighted-average comparisons demonstrated dumping, or (ii) the rates determined in the original determination were based upon facts available rates that did not involve zeroing. Thus, in those three cases, the zeroing methodology had no impact on the margins. Therefore, the discussion in the Issues and Decision Memorandum is an insufficient basis to assume that "zeroing" has taken place – there may in fact have been no "zeroing" at all.

11. Does the United States maintain its view, in the light of Brazil's comment at paragraph 64 of its First Oral Statement and Exhibit BRA-46, that the computer programme log contained in Exhibit BRA-25 (BCI) is not evidence of the USDOC's actual calculations for Fischer in the Third Administrative Review?

21. The United States does not dispute that the computer program log submitted by Brazil in Exhibit BRA-25 is the actual log for Fischer in the third administrative review, and we acknowledge its contents. However, as noted in paragraph 126 of our first written submission, the third administrative review is not within this Panel's terms of reference.

C. QUESTIONS TO BOTH PARTIES:

12. Brazil has noted that the Appellate Body has indicated that duty collection under a prospective normal value system is subject to the availability of duty refunds under the terms of Article 9.3.2 of the AD Agreement, whereby an investigating authority would be required to calculate a margin of dumping for the "product as a whole" and reimburse importers for any amounts paid in excess of the overall margin of dumping for the concerned exporter. What discretion, if any, do investigating authorities have in identifying the period of review for such refund proceedings?

22. Brazil argues, based on the Appellate Body's reasoning, that a dumping margin must exclusively be determined in relation to the "product as a whole," which is a phrase that appears nowhere in the AD Agreement. From this erroneous premise, Brazil concludes that a dumping margin determined in an assessment proceeding must exclusively relate to all export transactions during a particular period of time covered by the assessment proceeding.

23. However, Articles 9.3, 9.3.1, and 9.3.2 are silent as to the period of review for any such proceeding. These articles include no requirements with respect to whether an assessment proceeding must cover a time period of a certain length or even that assessment proceeding coverage be time-based at all. Nothing in these Articles indicates that Members have any obligations as to whether they conduct such assessment proceedings on an import-specific basis, on imports over an hourly, daily, weekly, monthly, yearly, or multi-year basis, or any period of time at all.

24. A Member's obligations should not differ in a significant, substantive fashion depending solely upon whether it elects to cover more or fewer entries, or more or less time, in conducting their assessment proceedings. Members are free to conduct assessment proceedings on any time period – from a time period that had a duration that covers only one import transaction to some longer time period. If the drafters of the AD Agreement had intended to adopt an obligation to provide an "offset" for non-dumped transactions, the adoption of an obligation for assessment proceedings to cover some established time period would have been essential. Thus, the interpretation of the AD Agreement that infers, without a textual basis, an obligation to grant offsets for non-dumped transactions carries with it the implication that the drafters neglected to provide at all for an essential element of the obligation, namely, the time period over which such an offset would be granted.[7] Such an interpretation should not be adopted by the Panel.

13. Has your investigating authority ever collected anti-dumping duties on the basis of a prospective normal value? If so, please identify whether any duty refund has ever been granted, and if so, please explain how this was calculated?

[7] It does not appear that even Brazil has suggested that offsets must be applied across established time periods.

25. No. The United States maintains a retrospective system and has never collected antidumping duties on the basis of prospective normal value. In effect, however, the U.S. system operates in a substantively similar manner to prospective normal value systems, which are expressly recognized by Article 9.4(ii) of the AD Agreement. The main difference is that the Members with prospective normal value systems generally establish normal value in the original investigation and apply this normal value prospectively.[8] In doing so, they determine a dumping margin by comparing the export prices of individual transactions from subsequent periods to that normal value (i.e., they generally make a comparison between a non-contemporaneous normal value and export price of an individual export transaction). In contrast, the United States determines normal value for the period of review on a retrospective basis and compares that contemporaneous normal value with export prices of individual transactions made during the same period.

26. Canada is an example of a Member that operates a "prospective normal value" system.[9] Under this system, after imposition of an antidumping measure, exporters are informed of the normal values for the products they export to Canada, as determined in an original investigation. If a sale is made at a price equal to or higher than the normal value, no duties are assessed on the importation of the merchandise sold in that transaction. Where the export price is below the normal value, the difference is payable as an antidumping duty on the entry of the merchandise sold at less than normal value in that transaction.[10] The United States is not aware of any instances where Canada accounted for non-dumped transactions by granting offsets to reduce the duty imposed on dumped entries.[11]

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[8] The prospective normal values are sometimes updated.

[9] Canada's system is provided as an example due to the relative transparency of its system.

[10] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as a whole, by aggregating the results of all comparisons, since there is only one comparison at issue.")

[11] Importers may request a "re-determination" after duties have been assessed and paid on a transaction for the purpose of obtaining a refund. A request for re-determination may cover, among other things, normal value and/or export price. *See* Exhibit US-6, Canada Border Services Agency; *Procedures for making a request for a Re-Determination or an Appeal under the Special Import Measures Act*: Memorandum D14-1-3 (October 1, 2008), para. 19. A request for redetermination is usually transaction-specific, although an importer may request re-determinations on more than one transaction through a stricter "blanket request procedure" if additional specific conditions are satisfied. *Id.* at paras. 34-44, 50–55. Even if a "blanket request" is made, a Compliance Unit Manager may refuse the request or restrict the number of transactions to be examined, if the blanket request could result in administrative difficulties or processing delays. *Id.* para. 53(b). In other words, it appears that Canadian authorities have discretion not to examine the "product as a whole", but to restrict their examination to a smaller number of transactions, even under the "blanket request" procedure.

27. Contrary to Brazil's arguments, the determination of the final liability for antidumping duties in the prospective normal value system is on a transaction-specific basis rather than for the "product as a whole." In *US – Stainless Steel (Mexico)*, the panel recognized that in prospective normal value systems the importer's liability is determined through the comparison of the price paid by the importer in an individual transaction with normal value regardless of prices in other transactions:

> Article 9.4(ii) clearly provides for a prospective normal value system. In a prospective normal value system, the importer's liability is determined through the comparison of the price paid by the importer in a given transaction and the prospective normal value. Under this system, prices paid in other export transactions have no bearing on this importer's liability.[12]

After examining how a prospective normal value system operates, the panel concluded that "[i]f the determination of liability for anti-dumping duties can be determined on a transaction-specific basis in a prospective normal value system, there is no reason why the same cannot be the case in the context of the retrospective duty assessment system under Article 9.3.2."[13]

14. Has your investigating authority ever used the third methodology described in Article 2.4.2 to calculate a margin of dumping? If so, please explain, with the aid of a numerical example, how your investigating authority performs the calculation. If not, please explain, with the aid of a numerical example, how your investigating authority considers the particular methodology should operate.

28. Yes, the United States has used the third methodology described in Article 2.4.2 to calculate a margin of dumping. In an original investigation, if Commerce determines that the criteria for using the third methodology are satisfied, i.e., that there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods, and that such differences cannot be taken into account appropriately by the use of weighted average-to-weighted average comparisons, Commerce proceeds with using the alternative methodology.

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[12] *US – Stainless Steel (Mexico) (Panel),* para. 7.131.

[13] *US – Stainless Steel (Mexico) (Panel),* para. 7.131. In *US – Continued Zeroing (EC)*, the panel also stated that it tended to "agree with the proposition that the recognition in the Agreement of a prospective normal value system reinforces the argument that dumping may be determined on the basis of individual export transactions, and note[d] that the panel in *US – Stainless Steel (Mexico)* also agreed with this point of view." *US – Continued Zeroing (EC) (Panel),* para. 7.166; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53; *US – Zeroing Japan (Panel)*, paras. 7.200-7.206; *US – Zeroing (EC) (Panel),* paras. 7.205-7.206.

29. First, Commerce calculates a weighted average of the normal values. So, for example, if the sales in the home-market of merchandise comparable to the sales being investigated are five units at $11, six units at $12, seven units at $13, and 8 units at $15, the weighted average normal value will be $13.[14]

30. Next, Commerce compares each export price to that weighted average normal value. If the normal value is greater than the export price, the transaction is dumped and the difference between the normal value and the export price is the margin of dumping. If the export price is greater than the normal value, the transaction is not dumped, and no amount of antidumping duty is determined for that transaction. So, if the export transactions are three units at $10, four units at $11, and five units at $14, the comparisons of export price and normal value reveal two dumped transactions at $9 and $8 of dumping, respectively, and one non-dumped transaction. This calculation, and the comparison results, are demonstrated in the following chart:

NV Transactions	**Export Price Transactions**			**Normal Value Greater Than Export Price?**	**Comparison Results**		
Weighted Average Normal Value	Units	Export Prices			Average-to-Transaction		
per unit		per unit			per unit	total	%
(a)	**(b)**	**(c)**			**(a-c)=(e)**	**(e*b)**	
	3	$ 10		Yes	$ 3	$ 9	
	4	$ 11		Yes	$ 2	$ 8	
$ 13	5	$ 14		No			
						$ 17	**11.81**

31. Consistent with Article 5.8, which provides that an investigation will be terminated if the level of dumping is *de minimis*, Commerce calculates an overall weighted average margin of dumping expressed as a percentage of the total value of exports for purposes of the *de minimis* test. This is done by summing the transaction-specific margins of dumping to arrive at a total absolute amount of dumping for all transactions. This amount is then expressed as a percentage of the total value of sales, i.e., the absolute amount of dumping is divided by the total sales value to calculate a percentage. This percentage is then compared to the *de minimis* threshold. Thus,

[14] By way of demonstration, this weighted average normal value was calculated as follows: [(5 x 11) + (6 x 12) + (7 x 13) + (8 x 15)] / (5 + 6 + 7 + 8) = 13.

in our example demonstrated in the chart above, the sum of the dumping margins is \$9 + \$8 = \$17, which, expressed as a percentage of the total sales value, is 11.81%.[15]

32. We note that if Commerce treated sales where the export price is greater than the normal value as "dumped" in a "negative" amount in its dumping calculation in this situation, then the results of this third methodology would be the same as the results under a weighted average-to-weighted average comparison methodology. The consequence of granting offsets would be to render the third methodology inutile. This is the mathematical equivalency problem described in our first written submission and is demonstrated in the chart below:

NV	**Export Price Transactions**				**Comparison Results**					
Weighted Average Normal Value	Units	Export Prices	Total Sales Value	Weighted Average Export Price	Average-to-Transaction			Average-to-Average		
per unit		per unit		per unit	per unit	total	%	per unit	total	%
(a)	**(b)**	**(c)**	**(x)**	**(d)**	**(a-c)=(e)**	**(e*b)=(f)**	**(f/x)**	**(a-d)**	**(*b)=(y)**	**(y/x)**
	3	\$ 10			\$ 3	\$ 9				
	4	\$ 11			\$ 2	\$ 8				
	5	\$ 14			\$ -1	\$ -5				
\$ 13			\$ 144	\$ 12						
	12				**\$ 1** [16]	**\$ 12**	**8.33**	**\$ 1**	**\$12**	**8.33**

15. Do the parties accept that the application of the rules of treaty interpretation of the VCLT could give rise to multiple conflicting interpretations of an international treaty, if the terms of that very same treaty explicitly stipulate that it could be interpreted in multiple conflicting ways (without ever specifying exactly what those conflicting interpretations were)? Please explain your answer.

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[15] By way of demonstration, this amount of total aggregated transactions expressed as a percentage of sales value was calculated as follows:
17 / [(3 x 10) + (4 x 11) + (5 x 14)] = 11.81.

[16] By way of demonstration, this weighted average of average-to-transaction results was calculated as follows:
[(3 x 3) + (4 x 2) + (5 x -1)] / (3 + 4 + 5) = 1.

33. Customary international law rules of treaty interpretation, reflected in Articles 31 through 33 of the Vienna Convention on the Law of Treaties, recognize that an examination in accordance with the general rule reflected in Article 31 may result in a meaning that is ambiguous, and that resort to the supplementary means of interpretation in Article 32 may be necessary. While such analysis will typically permit a determination of the meaning of the terms of the treaty, there is no guarantee that recourse to supplementary means of interpretation will always resolve that ambiguity.

34. Sometimes such ambiguity is deliberate. In some circumstances, reaching agreement on the terms of the covered agreements may have necessitated the use of constructive ambiguity in a provision of a covered agreement where the negotiators leave unresolved particular issues by ageing on language that does not resolve the issue and is capable of more than one interpretation. Constructive ambiguity can serve as a placeholder marking an area where negotiators accept that it may be appropriate to agree on disciplines but where further negotiation is necessary before those disciplines can be specified.

35. Ambiguity is determined from an examination of the text. A panel can determine whether the meaning of a text is ambiguous after applying the customary means of interpretation and in light of the evidence and arguments presented by the parties to the dispute. There is no separate requirement to establish the intent of or reason for the ambiguity.

16. Do the parties consider there to be any differences between the collection and assessment of anti-dumping duties envisaged under Articles 9.3.1 and 9.3.2 and the review of anti-dumping duties contemplated under Article 11.2 of the AD Agreement? If so, please explain.

36. Yes. Duty assessment proceedings under Article 9.3 are distinct from Article 11 reviews. Article 11 reviews address the duration and extent of antidumping measures or price undertakings, while Article 9 assessment proceedings govern the assessment and collection of antidumping duties for an individual company. Not surprisingly, the terms "amount of the anti-dumping duty" or "assessment" do not appear in Article 11. Article 11.1 provides that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." While Article 11 provides for specific types of reviews ("changed circumstances" reviews and five-year or "sunset" reviews) to review the entire measure and the need to counteract dumping, footnote 21 to Article 11.2 explicitly provides that an Article 9.3 determination does not constitute a review within the meaning of Article 11. Accordingly, a company-specific "refund" review would not be an appropriate basis for a decision in an Article 11 review that examines the entire measure. Similarly, footnote 22 to Article 11.3 explicitly refers to a proceeding conducted pursuant to Article 9.3.1 as an "assessment proceeding" and not as an investigation or a review.

37. The obligations under Articles 9 and 11 are different and should not be conflated. For example, Article 11.3 requires the investigating authority to determine the likelihood of continuation of dumping and injury for a measure by conducting a five-year review, while Article 9 does not contain a similar requirement for assessment proceedings.

38. However, Brazil in its oral submission does conflate these two very different articles of the AD Agreement. In particular, Brazil argues that "the existence of a right to counter 'dumping', the extent of that right, and the duration of that right, must be established according to a uniform definition of 'dumping' that applies equally in investigations, administrative reviews, new shipper reviews, changed circumstance reviews, and sunset reviews."[17] Brazil overlooks the fact that the "extent" and "duration" of the right to counter dumping is examined under Article 11 (and the specific obligations therein) and not in the assessment proceedings under Article 9. An Article 11 review examines the likelihood of continuation or recurrence of dumping and injury; in conducting an Article 11 review a Member is not required to determine either the existence of dumping or the amount of an antidumping duty. As the Appellate Body explained, there is "*no obligation under Article 11.3 to calculate or rely on dumping margins* in determining the likelihood of continuation and recurrence of dumping."[18] This supports the U.S. position that Article 11 reviews and Article 9 assessment proceedings (and Article 5 investigations) are distinct inquiries, not labels for the same essential inquiry such that the existence of dumping, the duration and extent of the dumping measure, and the amount of duty must all be examined in the context of an assessment proceeding.

39. While the focus of Article 9.3 is on the "amount of duty," Article 11 is not concerned with determining the "amount of duty." Article 11 focuses on the duration and extent of antidumping measures and price undertakings, not the amount of duty collected.[19] In contrast, Article 9.3 does not contemplate the examination of "injury" or "recurrence" or "continuation" or "termination" in the assessment proceedings. Article 9.3 assessment proceedings are concerned with determination of the "amount of duty." In short, Articles 11.2 and Article 9.3 are distinct provisions with distinct purposes. They should not be conflated.

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[17] Brazil's Opening Statement, para. 34.

[18] *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 127 (emphasis added).

[19] *See, e.g.*, Article 11.1 ("An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."); Article 11.2 ("The authorities shall review the need for "the continued imposition of the duty . . . provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty."); Article 11.3 ("[A]ny definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition . . . ."). In the context of these provisions, the term "duty" refers to a measure imposing a duty, and not an "amount of duty" collected. Additionally, Article 11.2 allows interested parties to request the authorities to conduct an examination of factors that relate to the duration or extent of a measure. Article 11.2 provides not only for determination of whether the continued imposition of the measure is necessary to offset dumping, but also for determination of "whether the injury would be likely to continue or recur if the duty were removed or varied, or both", and provides "[i]f as a result of the review . . . , the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately."

LIST OF EXHIBITS

US-6 Canada Border Services Agency; *Procedures for making a request for a Re-Determination or an Appeal under the Special Import Measures Act*: Memorandum D14-1-3 (October 1, 2008)