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

WT/DS382

Closing Statement of the United States at the First Substantive Meeting of the Panel

July 16, 2010

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would once again like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with our written responses and our rebuttal submission.

2. As an initial matter, Brazil asserts its claims are not dependent upon whether zeroing had an effect on the calculations. We disagree. It is not sufficient to simply point to the presence of a zeroing line in a computer code. The zeroing line of programming language is itself conditional. It only operates when the requisite condition is satisfied. With respect to the investigation, Brazil has conceded that no comparison results were "zeroed." Thus, these dumping margins were calculated without using zeroing. While Brazil stated yesterday that it is only relying on the investigation as evidence as the "continued use" of zeroing, the investigation provides no such evidence. Because zeroing was not used in the calculation of these margins, Brazil's claim that there is any such "continued use" is not supported by the evidence.

3. With respect to the second administrative review determination, Brazil's position is equally incoherent. Brazil fails to explain how no antidumping duty for Fischer in the second administrative review determination is excessive under Article 9.3, or otherwise inconsistent with any other provision of the covered agreements. Likewise, Brazil did not explain how Commerce's determination to assess no duties on Fischer's entries during the period and to estimate that no antidumping duty would be due on Fischer's entries after the second administrative review determination could be inconsistent.

4. Turning to the issues of interpretation, Brazil argues that the term "margin of dumping" must always relate to the "product as a whole" regardless of the context in which the term is used. At the same time, Brazil also asserts, "The fact that the same word appears in two (or more) proximate treaty provisions does not mean that the word carries the same meaning in each provision . . . . a single word used in two provisions may have different meanings in each provision, depending upon the context." The United States agrees that context matters. As we have explained, the precise meaning of the term "margin of dumping" may be informed by the context in which the term is used. The terms "dumping" and "margin of dumping" are defined in relation to the term "product." The ordinary meaning of "product" may refer to a single

transaction, or multiple transactions, or both. For example, in Article II of the GATT 1994, the term "product" is used, including with respect to the imposition of an antidumping duty on a "product" "at the time of importation." Clearly, Article II is using "product" in the sense of an individual transaction and not in the sense of "product as a whole." No one has argued that tariffs on a product can exceed the bound rate for some transactions as long as they are below the bound rate in enough other transactions such that the average does not exceed the bound rate.

5. In particular, contrary to Brazil's assertion at paragraph 20 of its opening statement, the United States agrees that in the context of Article 5.8 the margin of dumping may refer to an aggregation of multiple transactions. Article 6.10 concerns the question of what information should be relied upon in calculating margins of dumping for exporters or producers. It ensures that each exporter or producer is assigned an antidumping duty based on its own pricing behavior, and not that of other exporters or producers, unless it is impracticable. In this context, this provision does not address whether the "margin of dumping" only has meaning in relation to the product as a whole (a term nowhere found in the text of the Antidumping Agreement) or individual transactions. With respect to Articles 6.10, 8.1, 9.1, 9.3, and 9.5, Brazil's interpretation relies solely on the use of the term "margin of dumping" in the singular as the basis for its interpretation. We, however, would agree with Brazil's observation in paragraph 13 of its opening statement that "the use of the singular is not decisive . . . ."

6. As detailed in our first written submission, Brazil's interpretation cannot be reconciled with the ordinary meaning of the terms with which dumping and margins of dumping are defined. Dumping is defined as occurring in the course of ordinary commercial transactions, where products are "introduced into the commerce" of the importing country transaction by transaction, not "as a whole." And, the prices of products are set in individual transactions, not "as a whole." Brazil's interpretation also cannot be reconciled with the Appellate Body's interpretation of the phrase "all comparable export transactions" in *US – Softwood Lumber Dumping*. Nor can it be reconciled with the exceptional provision in the second sentence of Article 2.4.2; or with the effective functioning of antidumping duties as a remedy for dumping.

7. In addition, Brazil's proposed obligation is contrary to the very concept of a prospective normal value system provided for in Article 9. As we explained yesterday, under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. The administration of such an assessment system cannot function as intended if the margin of dumping must relate exclusively to an aggregation of all transactions constituting the "product as a whole." As became apparent from Brazil's answers to the Panel's questions, Brazil's proffered understanding of how the prospective normal value systems should function is radically different from how Members operate these systems.

8. Under Brazil's interpretation, a prospective normal value assessment system necessarily requires retrospective reviews on the basis of the aggregation of transactions because the margin

of dumping for the "product as a whole" can never be known at the time of importation. Nothing in the text of Article 9, however, suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. Nor does Brazil attempt to explain why, if refund proceedings under Article 9.3 require aggregation of transactions for the "product as a whole", Article 9.3 fails to provide for any time frame over which the transactions would be aggregated.

9. In contrast, the United States has offered a harmonious and coherent interpretation that gives meaning to all provisions of the Antidumping Agreement and the GATT 1994. This interpretation has been endorsed by prior panels. Brazil would have you believe that none of these panels adopted an interpretation that is coherent, and that none of these panels had the interest of the dispute settlement system or the trading system at heart. But this interpretation, in contrast to Brazil's interpretation, is fully consistent with the text, context, and object and purpose of the covered agreements.

10. In its opening statement, Brazil categorically asserts that "the same legal questions must be resolved in the same way in subsequent disputes." On the contrary, the authority to adopt interpretations of the covered agreements rests exclusively with the Ministerial Conference and the General Council.[1] Therefore, while the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute.

11. Brazil would have this Panel merely follow Appellate Body reports without engaging in its own analysis. We disagree. To be clear, the United States is not asking the Panel blindly to follow the numerous panel reports that have found a general requirement to provide offsets does not exist in the Antidumping Agreement. Nor have we asked you to ignore Appellate Body reports finding zeroing to be WTO-inconsistent in certain circumstances.

12. What we have asked you to do, and are confident you will do, is to fulfill your function to make an objective assessment of the matter before you. As part of that, we have asked you to consider whether previous panel reports on this issue are persuasive; we believe they are. We have also asked you to consider whether previous Appellate Body reports on this issue are persuasive; we have explained they are not. Of course, the Panel must undertake its own consideration of these reports and determine their relevance to the issues here and their persuasiveness, as previous panels confronted with claims against "zeroing" have done.

13. Brazil would instead have the Panel abdicate its responsibility of making an objective

[1] Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization. See also,* United States' First Written Submission, n. 26.

assessment in the interest of "security and predictability". Security and predictability are provided by a dispute settlement system that does not add to or diminish the rights and obligations to which the Members agreed. This requires the proper application of customary rules of interpretation of public international law to the provisions of the covered agreements. Any obligation to provide offsets must be found in the text of the covered agreements. There is no textual basis for a general prohibition of zeroing. The only textual basis for an obligation to provide offsets arises in the limited context of average-to-average comparisons in investigations.

14. Brazil's proposed obligation to reduce antidumping duty assessments for negative comparison results treats non-dumped imports as a remedy for dumping that replace the application of antidumping duties. However, the application of antidumping duties is the remedy provided for in the covered agreements. The prior panels addressing this issue have consistently recognized the deficiencies inherent in Brazil's proposed interpretation (and in the Appellate Body reports upon which Brazil relies). The panels have found that the relevant text, the relevant context, and the well-established prior understanding of the terms "dumping" and "margin of dumping" demonstrate that these concepts are not devoid of meaning except in relation to the product as a whole.

15. Mr. Chairman, Members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these issues.