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

(WT/DS382)

EXECUTIVE SUMMARY OF FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

June 24, 2010

I. Introduction

1. In this dispute, Brazil asks this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for the obligation that Brazil proposes. This Panel should make an objective assessment of the matter before it and refrain from adopting Brazil's interpretation.

2. Brazil also challenges two "measures" that are not within the Panel's terms of reference. The United States requests that the Panel grant the requests for preliminary rulings with respect to these "measures."

II. General Principles

3. The burden of proving that an obligation has not been satisfied is on the complaining party. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) of the AD Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.

4. Article 11 of the Dispute Settlement Understanding ("DSU") requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.

5. Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the Dispute Settlement Body ("DSB"), cannot add to or diminish the rights and obligations provided in the covered agreements. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel is not bound to follow the reasoning set forth in any Appellate Body report. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements.

III. Requests for Preliminary Rulings

A. The Second Administrative Review

6. A Member may only file a panel request with respect to a measure upon which the consultations process has run its course. Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute." Article 4.4 of the DSU, in turn, provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal

basis for the complaint." These rules apply with equal force to disputes brought under the AD Agreement, which contains parallel requirements in Articles 17.3 through 17.5.

7. In this dispute, Brazil seeks the establishment of a panel with respect to "[t]he 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')". However, the final results of the second administrative review were issued after Brazil's request for consultations. As such, at the time of Brazil's consultations request, the second administrative review did not constitute a "measure" within the meaning of Article 4.4 of the DSU. As it was not, and could not have been, subject to consultations, the second administrative review is not within the Panel's terms of reference.

B. The "Continued Use of the U.S. 'Zeroing Procedures'"

8. Under Article 6.2 of the DSU, a panel request must identify the "*specific* measure at issue in the dispute," and a panel's terms of reference under Article 7.1 are limited to those specific measures. Brazil's identification of the "continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil" as a "measure" in its panel request fails to meet this requirement. A general reference to an indeterminate number of potential measures does not satisfy the requirement that a panel request identify the "*specific* measure at issue." Brazil is merely speculating as to what may happen in the future, and such speculation is not identification of a specific measure. There is no basis to conclude, for example, that the results of any future antidumping proceeding with respect to orange juice from Brazil would reflect "zeroing."

9. By including this purported measure in its panel request, Brazil appears to be challenging an indeterminate number of potential measures. However, measures that are not yet in existence at the time of panel establishment are not within a panel's terms of reference under the DSU. It is impossible for Members to consult on a measure that does not exist, and a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement.

10. Article 3.3 of the DSU provides that

> [t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

Accordingly, in *US – Upland Cotton*, the panel found that a measure that had not yet been adopted could not form part of its terms of reference, noting that such a "measure" could not have been impairing any benefits because it was not in existence at the time of the panel request. Similarly, in this case, indeterminate future measures that did not exist at the time of Brazil's

panel request, and may in fact never exist, could not be impairing any benefits accruing to Brazil.

IV. Brazil's Claims Regarding Assessment Proceedings Should Be Rejected

11. Brazil challenges the first and second administrative reviews as inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement. The U.S. Department of Commerce ("Commerce") reviewed two companies in each of these reviews: Fischer and Cutrale. Aside from the fact that the second administrative review is outside the Panel's terms of reference, Brazil's claims with respect to these reviews should be rejected for the reasons below.

12. The AD Agreement provides no general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body found that the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* . . . ." This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2. There is no textual basis for the additional obligations that Brazil would have this Panel impose.

13. Subsequent to *US – Softwood Lumber Dumping (AB)*, several panels examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that context. In making an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation. This Panel should likewise find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber Dumping* is applicable.

14. In *US – Softwood Lumber Dumping (AB),* the Appellate Body specifically recognized that the issue before it was whether so-called "zeroing" was prohibited under the average-to-average comparison methodology found in Article 2.4.2. Thus, the report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology." The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner." The obligation to provide offsets, therefore, was tied to text of the provision addressing the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices. An assertion by Brazil that there is a general prohibition of "zeroing," or one specifically applicable to the more particular context of assessment proceedings, cannot be reconciled with the interpretation

articulated in *US – Softwood Lumber Dumping (AB)*. If there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" in that dispute would be redundant of the general prohibition of zeroing.

15. The need to avoid such redundancy was recognized in *US – Zeroing (Japan)(AB)* when the Appellate Body changed its interpretation of this phrase. In *US – Softwood Lumber Dumping (AB)*, "margins of dumping" and "all comparable export transactions" were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, *i.e.* the product "as a whole." However, in *US – Zeroing (Japan)(AB)*, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation. In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber Dumping (AB)*.

16. In addition, a general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations would be inconsistent with the remaining text of Article 2.4.2, which provides for an exceptional methodology that may be used in certain circumstances. This methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. The mathematical implication of a general prohibition of zeroing, however, is that the exceptional clause would be reduced to inutility. That is because the exceptional methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In this respect, a general prohibition of zeroing would render the exception in Article 2.4.2 a nullity. Such an interpretation would be disfavored under a key tenet of customary rules of treaty interpretation, that an interpretation must give meaning and effect to all the terms of a treaty.

17. In *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the exceptional provision of Article 2.4.2 redundant. Brazil has not offered any explanation as to how this defect is avoided under its interpretation of the AD Agreement.

18. Despite the findings of the panels that the results of the exceptional methodology "will necessarily always yield a result identical to that of an average-to-average comparison," under a general prohibition of zeroing, the Appellate Body has found this concern to be "overstated." The Appellate Body has asserted that mathematical equivalence will occur only in "certain situations" and represents "a non-tested hypothesis." These objections, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not

represent methodologies consistent with the AD Agreement. The exceptional provision is rendered inutile if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement.

19. In *US – Zeroing (Japan)*, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the exceptional methodology to a subset of export transactions. The AD Agreement says nothing about selecting a subset of transactions when conducting an analysis under the second sentence of Article 2.4.2. The exception provides that, when certain conditions are met, Members are permitted to compare average normal values to transaction-specific export prices. If the Appellate Body is correct that dumping may only be determined for the product as a whole (which the United States does not concede), there is no textual basis for inferring that the comparison methodology in the second sentence of Article 2.4.2 is an exception to that provision (which, as Article 2.1 provides, applies throughout the AD Agreement). The second sentence of Article 2.4.2 simply provides an exception to the average-to-average or transaction-to-transaction comparison requirement of the first sentence of Article 2.4.2. Consequently, the use of a subset of export transactions as a means of avoiding mathematical equivalency would also appear to be inconsistent with the AD Agreement. The redundancy of the second sentence of Article 2.4.2 occurs as a consequence of any interpretation that results in a general prohibition of "zeroing."

20. Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that do not impose independent obligations. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define "dumping" and "margins of dumping" so as to require that export transactions be examined at an aggregate level. The definition of "dumping" in these provisions references "product . . . introduced into the commerce of another country at less than its normal value." This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.

21. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . " This definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something." In *US – Zeroing (Japan)*, the panel found that this definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level."

22. There is nothing in the GATT 1994 or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, the foreign producer or exporter itself exclusively enjoys the benefit of the extent to which the price of a non-dumped export transaction exceeds normal value.

23. In *US – Zeroing (Japan)*, the panel noted that "the record of past discussions in the

framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions." Well before the recent debate about "zeroing," a Group of Experts convened to consider issues with respect to the application of Article VI of the GATT 1947. The Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned." The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and found to be consistent with the Antidumping Code. In view of these findings, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted. The text of Article VI of the GATT 1947, however, did not change as a result of the Uruguay Round agreements. The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.

24. Brazil's claim ultimately depends on the reasoning set forth in Appellate Body reports that rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term "product" as being solely and exclusively synonymous with the concept of "product as a whole." It denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . ."

25. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole." Instead, "product" can have either a collective meaning or an individual meaning. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation requiring that margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole."

26. Likewise, examination of the term "margins of dumping" itself provides no support for Brazil's interpretation of the term as solely, and exclusively, relating to the "product as a whole." As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed:

> [T]here is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".

Thus, the panel saw "no reason why a Member may not . . . establish the 'margin of dumping' on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values."

27. Additionally, the term "margin of dumping," as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the "product as a whole." As used in the Note Ad Article VI:1, which provides for importer-specific price comparison, the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers. As used in Article 2.2 of the AD Agreement, the term "margin of dumping" would require the use of constructed value for the "product as a whole," even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US – Softwood Lumber Dumping (21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2."

28. Brazil argues that "'dumping and 'margin of dumping' are exporter-related concepts." However, individual transactions are exporter-specific; dumping may be both exporter-specific and transaction-specific at the same time. And, as explained above, the term "margin of dumping," as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the "product") is "introduced into the commerce of the importing country." Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Thus, the obligation in Article 9.3 to assess no more in antidumping duties than the margin of dumping is similarly applicable at the level of individual transactions.

29. In Brazil's view, a Member breaches Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by failing to provide offsets because Members are required to calculate margins of dumping on an exporter-specific basis for the product "*as a whole*" and, consequently, a Member is required to aggregate the results of "*all*" "*intermediate comparisons*," including those for which the export price exceeds the normal value. The terms upon which Brazil's interpretation rests are conspicuously absent from the text of both Articles 2.1 and 9.3 and Article VI:2. Brazil's interpretation is not mandated by the definition of dumping contained in Article 2.1, as described above.

30. The panel in *US – Zeroing (Japan)* correctly rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value . . . ." The panel explained that the importer- and import-specific obligation to pay an antidumping duty "lend[s] further support to

the view . . . that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, . . . entails a general prohibition of zeroing."

31. Although dumping involves differential pricing behavior of exporters or producers between its export market and its normal value, dumping nevertheless occurs at the level of individual transactions. Moreover, the remedy for dumping provided for in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, are applied at the level of individual entries for which importers incur the liability. This way, the importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If, instead, the amount of the duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if Brazil's interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping. If a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports.

32. Brazil's argument that "dumping" must cause or threaten injury does not preclude an interpretation that dumping can occur at the level of individual transactions in assessment proceedings. No Article 3 injury determination is required in Article 9.3 assessment proceedings. Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is distinct from the determination of injury or threat of injury that would have already been addressed in the affirmative in the investigation phrase.

33. Brazil's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole," is also inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value." And, as the panel in *US – Stainless Steel (Mexico)* found, if in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in a retrospective system.

34. The Appellate Body has disagreed, stating that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping within the meaning of Article 9.3 and noting such duty is subject to review under Article 9.3.2. But, to the extent that (as the Appellate Body suggests) Article 9.3 requires consideration of the "product as a whole," an importer seeking a refund in a prospective normal value system would have to provide evidence that relates to the "product as a whole," not just its own entries. This would make it difficult, if not impossible, for an importer to obtain a refund. Further, accepting Brazil's interpretation that a Member must aggregate the results of "*all*" comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account "*all*" of the exporters' transactions. This result is contrary to the very concept of the prospective normal value system.

35. For all of these reasons, because the conclusion that there is no general prohibition of "zeroing" in assessment proceedings is, at a minimum, a permissible interpretation of the covered agreements, the Panel should reject Brazil's claims.

36. Even under Brazil's interpretation of the scope of a Member's obligations, Brazil has not met its burden of proof as a factual matter. In the first administrative review, Commerce determined a *de minimis* margin of dumping for Cutrale. In the second administrative review, Commerce determined a zero margin of dumping and assessed no antidumping duties for Fischer. A zero or *de minimis* margin of dumping cannot exceed any "ceiling" Brazil argues is provided for in the covered agreements, and, where no duties are assessed, no duties are imposed in excess of the margin of dumping, even under Brazil's interpretation of the obligations of those agreements. Additionally, Brazil has failed to meet its burden of proof to show that "zeroing" was used in the first administrative review with respect to Fischer. Brazil provided a margin program log that was generated after the first administrative review had been completed, which must have been run by someone other than Commerce.

V. Brazil's Claims Regarding "Continued Use" Should Be Rejected

37. As noted above, the "continued use of 'zeroing'" is not a measure within the Panel's terms of reference under Article 6.2 of the DSU. Should the Panel conclude otherwise, however, Brazil's claims that such "continued use" violates Article VI:2 of the GATT and Articles 2.4.2 and 9.3 of the AD Agreement should be rejected for multiple reasons.

38. Brazil's claim with respect to this purported "measure" is premised on dumping margins calculated in the original investigation, final results of the first and second administrative review, and preliminary results of the third administrative review. Neither the second nor the third administrative review is within the Panel's terms of reference as they were not consulted upon, and, with respect to the third administrative review, the calculations Brazil references are merely preliminary results and do not constitute a "final action" that can be challenged.

39. Moreover, Brazil's evidence with respect to the investigation indicates that "zeroing" had no impact on the margin calculations in the investigation. In particular, this evidence shows that there were no negative comparison results, meaning that the necessary condition for activating the "zeroing" line of the program was not satisfied, and the "zeroing" operation was not applied. The margins calculated as a result could not and did not exceed the margins contemplated by the covered agreements, even under Brazil's interpretation. With respect to the reviews, as noted above, in the first administrative review, the margin of dumping for Cutrale was *de minimis*. With respect to the second administrative review, the margin of dumping and assessment rate for Fischer was zero. As such, like the investigation, they do not provide a basis for a claim that the United States has continuously acted inconsistently with its obligations by "inflating" the margins via "zeroing."

40. Brazil's assertion that the facts of this case are "virtually identical" to the facts of cases found to be WTO-inconsistent by the Appellate Body in the *US – Zeroing II (EC)* dispute is not accurate. In that dispute, the Appellate Body found that the record supported findings of inconsistency where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time." Here, in contrast, there have been no sunset reviews, and Brazil's own evidence fails to establish that "zeroing" was applied to, or had any impact on, any margin in the investigation or first administrative review, one of the two margins in the second administrative review, or one of the two margins in the preliminary results of the third administrative review. This does not constitute "a string of determinations, made sequentially . . . over an extended period of time" and does not provide a basis for concluding that "zeroing" would likely continue to be applied in successive proceedings.

41. Brazil's argument that the alleged "continued use of zeroing" is even a measure that can be challenged, as well as a violation of the covered agreements, is premised on its assertion that such "continued use" constitutes "ongoing conduct." Even were this a cognizable claim, as detailed above, the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue in the order that is at issue in this dispute.

42. In addition, with respect to Brazil's claim that the "continued use" violates Article 2.4.2 of the AD Agreement, the express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to assessment proceedings, or the amorphous "continued use" of "zeroing" in successive proceedings, would read out of the AD Agreement the express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should generally be given meaning wherever possible.

VI. Conclusion

43. The United States requests that the Panel grant the requests for preliminary rulings and reject Brazil's claims.