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

WT/DS382

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

September 7, 2010

I. Article 2.4 Does Not Impose Obligations with Respect to Zeroing

1. The obligation to make a "fair comparison" under Article 2.4 does not create an obligation to provide for offsets. Article 2.4 addresses only the required adjustments that must be made to export price and normal value in order to account for "differences which affect price comparability."

2. First, from the text of Article 2.4, it is clear that Article 2.4 establishes an obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences that affect price comparability. As the panel in *Egypt – Steel Rebar* explained: "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value."

3. A number of other Appellate Body and panel reports that have considered the question of price comparability have interpreted Article 2.4 to address pre-comparison price adjustments that affect the comparability of prices between markets. For example, as the Appellate Body stated in *US – Hot-Rolled Steel*, "an examination of whether USDOC acted consistently with Article 2.4 of the *Anti-Dumping Agreement* must focus on . . . whether there were 'differences', relevant under Article 2.4, which affected the comparability of export price and normal value." Thus, Brazil's proposed interpretation of Article 2.4 to encompass the *results* of comparisons between export price and normal value is erroneous. In short, there is no obligation in Article 2.4 to offset any negative differences between normal value and export price.

4. Second, the United States urges the Panel to reject Brazil's invitation to convert "fair comparison" into a broad-ranging mandate to determine whether any and all dumping calculations are "fair" or "unfair." As the panel report in *EC – Cotton Yarn*, which was adopted by the Tokyo Round Antidumping Committee, stated regarding the corresponding provision of the Tokyo Round Code: "The Panel was of the view that although the object and purpose of Article 2:6 is to effect a fair comparison, the wording of Article 2.6 '[i]n order to *effect* a fair comparison' made clear that if the requirements of that Article were met, any comparison thus undertaken was deemed to be 'fair.'" The *EC – Cotton Yarn* panel rejected Brazil's argument that the term "fair comparison" in Article 2.6 of the Tokyo Round Antidumping Code provided a basis to strike down the EC's zeroing practices. The panel interpreted Article 2.6 as relating solely to the "actual comparison of prices at the same level of trade and in respect of sales made as nearly as possible at the same time."

5. The term "fair comparison" originated in the 1967 Kennedy Round Antidumping Code. Article 2(f) specified that: "In order to effect a fair comparison between the export price and the domestic price in the exporting country . . . the two prices shall be compared at the same level of trade, normally at the ex factory level, and in respect of sales made as nearly as possible at the same time. Due allowance shall be made in each case, on its merits, for the differences in

conditions and terms of sale, for the differences in taxation, and for other differences affecting price comparability." This language was incorporated practically verbatim into Article 2.6 of the Tokyo Round Antidumping Code. The Uruguay Round AD Agreement adopted the original Kennedy and Tokyo Round language with minor modifications in Article 2.4.

6. Third, Brazil's claim of inconsistency with Article 2.4 does not rely on the text of Article 2.4. Instead it relies upon isolated statements from the Appellate Body reports in *US – Softwood Lumber (Article 21.5)*, *US – Corrosion-Resistant Steel Sunset Review*, and *US – Zeroing (Japan)*.

7. While the Appellate Body in *US – Zeroing (Japan)* found that the use of "zeroing" in assessment proceedings was inconsistent with Article 2.4, those findings flowed from its finding that the amount of the antidumping duty exceeded the margin of dumping under Article 9.3. Contrary to Brazil's argument, the Appellate Body stated that "[*i*]*f* antidumping *duties are assessed* on the basis of a methodology involving comparisons between the export price and the normal value *in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping* of the exporter or foreign producer, then this methodology cannot be viewed as involving a 'fair comparison' within the meaning of the first sentence of Article 2.4." But in the second administrative review with respect to orange juice (aside from the fact that, as explained in our first written submission, it is outside of the Panel's terms of reference), for example, Commerce determined that the weighted-average dumping margin for Fischer was zero and assessed no antidumping duties on Fischer's entries of orange juice. Under these facts, even under the Appellate Body's rationale relied upon by Brazil, there can be no inconsistency with either Article 9.3 or 2.4 of the AD Agreement.

8. In *US – Softwood Lumber (Article 21.5)*, the Appellate Body stated that "the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination more likely." The Appellate Body limited this statement to margins in investigations that violated Article 2.4.2 of the AD Agreement, while accepting the panel's conclusion that higher margins are "fair" as long as they are otherwise WTO consistent. Article 2.4.2 does not apply in the context of the assessment proceedings. Additionally, where, as here, the United States determined either zero or *de minimis* dumping margins for Cutrale and Fisher in the first and second administrative reviews, respectively, these margins cannot be characterized as "artificially inflate[d]" or "inherently unfair" even under the Appellate Body's rationale.

9. The Appellate Body's report in *US – Corrosion Resistant Steel Sunset Review*, concerned a sunset review, which is not at issue in this dispute. The Appellate Body declined to find an inconsistency with Article 2.4 of the AD Agreement, a salient fact that Brazil neglects to mention.

10. Moreover, any allegation of bias is based upon the assumption that a methodology "artificially" inflates the magnitude of dumping. It may be that a methodology always produces

higher margins of dumping, and that exporters or foreign producers may consider that to be biased and "unfair." However, it is then equally true that prohibiting the methodology always produces lower margins of dumping, and the domestic industry – an industry that must have been found to be injured by dumping before the measure is imposed – may consider that to be biased and "unfair." Higher or lower margins are not inherently fair or unfair.

11. As the panel in *US – Zeroing (Japan)* noted, the "precise meaning of" the fair comparison requirement "must be understood in light of the nature of the activity at issue." The panel concluded that "the 'fair comparison' requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context." Other panels have reached the same conclusion. In *US – Softwood Lumber Dumping (Article 21.5)*, the panel cautioned against the overly liberal use of the "fair comparison" language of Article 2.4: "the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard. If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case." In *US – Zeroing (EC)*, the panel similarly stated: "[C]aution . . . is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the *AD Agreement*."

12. Absent any principled basis for resolving such disputes, the Appellate Body and the panels would be required to apply a vague, subjective, and ill-defined legal standard to factual situations where "fairness" turns on the eye of the beholder. The Panel should reject an expansive interpretation of a "fair comparison" requirement that leads to a flood of antidumping disputes that are virtually impossible to resolve in any credible way.

II. The Text of Article VI:1 and Article VI:2 of the GATT and Article 2 of the AD Agreement Do Not Preclude Understanding of the Terms "Dumping" and "Margin of Dumping" in Relation to Individual Transactions

13. The term "product as a whole" is not found anywhere in the AD Agreement and the GATT 1994, and Brazil's so-called "textual" argument is devoid of any textual analysis of the relevant provisions.

14. First, the precise meaning of the terms "dumping" and "margin of dumping" may be informed by the context in which the term is used. These terms appear in many different provisions of the covered agreements, and, in each case, must be interpreted in light of the text, context, and of the object and purpose, of the provision at issue. 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. The fundamental problem with Brazil's interpretation is that it effectively denies the fact that the terms "dumping" and "margin of dumping" may apply in different contexts and the context matters.

15. 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." The drafters of the AD Agreement and the GATT 1994 wrote a *definition* of dumping and put into the *definition* the essential meaning of this fundamental, foundational concept. It defies logic to then redefine the terms "dumping" and "margin of dumping" by finding new additional components of its meaning hidden in other provisions of the AD Agreement that do not purport to define those terms.

16. Article 2.1 defines "dumping" in relation to the terms "export price" and "normal value." These fundamental concepts have flexible meaning because "normal value" and "export price" could relate to either an individual transaction or multiple transactions depending upon the context. Because the term "dumping" is defined in relation to the terms "normal value" and "export price," it would be illogical to conclude that the derivative term "dumping" may not have a similarly flexible definition.

17. Second, the United States agrees with Brazil that the AD Agreement establishes multilateral disciplines. However, contrary to what Brazil suggests, it does not follow that the terms "dumping" and "margin of dumping" must be construed only in terms of the "product as a whole." To the contrary, the fact that the Agreement expressly allows Members to maintain different systems for the assessment of antidumping duties and that Members assess duties differently demonstrates that the multilateral character of the Agreement does not mandate the definition Brazil seeks to impose.

18. Brazil also appears to suggest that there must always be the same result in determining "dumping" for the same set of export transactions, prices, products, and exporters regardless of the context. Brazil's interpretation is contrary to the text of the AD Agreement, which expressly recognizes different assessment systems and different ways to make comparisons between the normal value and export price. If the AD Agreement provides for different comparison methodologies that could result in different amounts of dumping for the same set of transactions, there is no reason to assume that calculations must always result in a single invariable number in different contexts – such as assessment proceedings and investigations – particularly when a Member uses different comparison methodologies in these two contexts.

19. Third, Brazil conflates distinct proceedings – investigations and assessment proceedings – which are subject to different requirements and serve different functions. While investigations are conducted to determine the existence and degree of dumping pursuant to Article 5.1 and the existence of material injury, assessment proceedings are conducted to determine the final liability for payment of antidumping duties or whether a refund of excess antidumping duties is owed pursuant to Article 9.3. Prior panels found that this contextual difference is significant. In *US – Zeroing (EC)*, for example, the panel explained: "In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in

respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5."

III. Brazil's Contextual Arguments under Articles 3, 5.8, 6.10, 8.1, 9.1, 9.3 and 9.5 Are Misplaced

20. Article 5.8 of the AD Agreement: Brazil argues that in the context of Article 5.8 the margin of dumping must refer to an aggregation of multiple transactions. The fundamental flaw of Brazil's contextual argument is that Brazil seeks to apply that understanding entirely removed from the context of Article 5. Article 9.3 assessment proceedings provide a very different context from Article 5 investigations. Article 2.4.2 sets forth the rules that govern the determination of the "existence" of margins of dumping for purposes of Article 5 investigations. The text of Article 2.4.2 expressly limits itself to an Article 5 investigation in two different ways. First, it expressly provides that it applies only in the "investigation phase." Second, it provides that its purpose is to establish the "existence" of dumping. There is only one investigation phase that requires a determination of the "existence" of dumping: the Article 5 investigation that follows the initiation of an anti-dumping investigation.

21. The Appellate Body and panels have found that the application of Article 2.4.2 is limited to Article 5 investigations. The Appellate Body in *EC – Bed Linen* found that there is no connection between Article 9.3 and Article 2.4.2. The panel in *Argentina – Poultry* found that "[i]f the drafters of the *AD Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that 'the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2'. This is not what Article 9.3 says."

22. Article 6.10 of the AD Agreement: Article 6.10 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. 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 AD Agreement) or individual transactions. This fact has been recognized by prior panels that examined this issue. In *US – Zeroing (Japan)*, for example, the panel explained that Article 6.10 does not mandate any particular methodologies for calculating the margin of dumping.

23. Further, if Article 6.10 is read in the manner suggested by Brazil, then prospective normal value systems cannot function in the manner that Members currently administering such systems are operating. The effect of the Appellate Body's and Brazil's reading of Article 6.10 would be to compel a Member using a prospective normal value system to calculate a margin based on all of the transactions for some particular period of time, rather than calculating a margin based on a particular transaction.

24. Brazil Overstates the Significance of the Use of the Singular in the Term "Margin of Dumping": With respect to Articles 6.10, 8.1, 9.1, 9.3, and 9.5, Brazil's interpretation relies on the use of the term "margin of dumping" in the singular. However, by Brazil's own admission,"the use of the singular is not decisive . . . ." A term that is used in the AD Agreement in the singular form may have "both singular and plural meanings."

25. Brazil Misinterprets Article VII:3 of the GATT 1994: Brazil argues that the United States is wrong to assume that the same word, "product," must be given the same meaning in two proximate treaty provisions, namely Article VI:1 and Article VIII:3 of the GATT 1994. Brazil misstates the U.S. argument. The United States argues that the term "product" may have either collective meaning or an individual meaning, depending upon the context. This term, used in a wide variety of contexts throughout the provisions of the GATT 1994 and the AD Agreement, incorporates a flexibility of meaning that derives from the fact that the term "product" ordinarily has a meaning that is either collective or transaction-specific.

26. Brazil attempts to draw contextual distinctions between Article VII:3 of the GATT 1994 and Article 9.3 of the AD Agreement. In describing the context of Article VII:3, for example, Brazil argues that "the customs authorities *assess* the value of particular goods that are listed in an import entry of an individual import transaction and, based on that valuation, impose duties on that specific entry." However, Article 9.3 of the AD Agreement also governs the *assessment* of the amount of the antidumping duty, and the antidumping duties are assessed on individual entries resulting from individual transactions. Therefore, the obligation set forth 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. In *US – Stainless Steel (Mexico)*, the panel properly recognized the transaction-specific character of Article 9.3 assessment proceedings: "We note that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability."

27. Brazil Misinterprets AD Article VI:1 of the GATT 1994: Brazil asserts that Ad Article VI:1 does not provide a definition of "dumping" or "margin of dumping" and does not state that margins may be transaction specific. However, contrary to Brazil's assertions, Ad Article VI:1 defines a particular form of dumping – "hidden dumping" – in relation to individual transactions. The use of the term "price invoiced" is particularly significant, because an invoice is normally issued with respect to an individual transaction, and not with respect to *all* transactions covered by the period of review. Thus, the text of Ad Article VI:1 provides that the "margin of dumping" may be calculated on the basis of a specific sale by a particular importer rather than on the basis of the "product as a whole."

28. Brazil Misinterprets Article 2.2 of the AD Agreement: Brazil disagrees that the term "margin of dumping" as used in Article 2.2 of the AD Agreement 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. Brazil argues

that the Appellate Body stated that an authority may subdivide the "product as a whole" in conducting "intermediate comparisons" on a model-specific basis and, thus, may assess whether the conditions in Article 2.2 are met on a model-specific basis, and subsequently aggregate all intermediate comparisons to determining dumping for the product as a whole.

29. This interpretation is incorrect. Under Article 2.2, a Member may calculate normal value based on constructed value. Many Members do so on a model- or transaction-specific basis. That is, if the home market sales of a particular model were not in the ordinary course of trade, the importing Member might resort to using a constructed normal value as a basis for normal value for that particular model; however, normal value for other models might still be based on home market sales. If, however, the "margin of dumping" must refer, regardless of context, to the "product as a whole," then, when the conditions of Article 2.2 have been met, an investigating authority would be required to use constructed value for the "product as a whole," not just for specific models or transactions of the product. This would be inconsistent with the principle that constructed normal value is to be used only in limited circumstances. 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."

30. Brazil's Interpretation Cannot Be Reconciled with the Effective Functioning of Antidumping Duties as a Remedy for Dumping: Brazil gives no answer to the fact that, if offsets must be provided, 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.

IV. Brazil's Proposed Obligation Is Contrary to the Concept of a Prospective Normal Value System Provided for in Article 9

31. Brazil's proposed obligation to provide offsets is contrary to the very concept of a prospective normal value system provided for in Article 9. 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."

32. Brazil argues that the amount of duties in the prospective normal value system is subject to review under Article 9.3.2 to ensure that the total amount of duties does not exceed the margin of dumping for "the product as a whole." However, nothing in the text of Article 9 suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. The United States is not aware of a single prospective normal value system that conforms with Brazil's assertion that a refund mechanism must recalculate a margin of dumping based on an aggregation of all export transactions. The character of the prospective normal value system has led multiple panels that have examined this issue to conclude that final liability for antidumping duties may be determined with respect to individual transactions rather than the "product as a whole." It is implausible to think that the negotiators would agree to provisions in

the AD Agreement providing explicitly for a prospective normal value system while simultaneously, and without making any textual provision whatsoever, requiring that such systems conduct retrospective assessment proceedings that aggregate all the transactions occurring over some unspecified period of time.

33. Another characteristic of the AD Agreement that supports the transaction-specific nature of the term "margin of dumping" in certain contexts, and not the aggregation of all transactions constituting "product as a whole", is the use of the term "importer" in Article 9.3.2. When an exporter or producer makes sales of the product subject to the antidumping duty, it is common for such sales to be made to multiple importers. If Importer A decides to request a refund of duty paid in excess of margin of dumping under Article 9.3.2, it would be concerned with its purchases and not the purchases of Importers B and C (or the "product as a whole"). Further, Importer A would not likely have access to the information relating to purchases by its competitors, Importers B and C. Therefore, Importer A would not be able to provide the necessary evidence to duly support a request for a refund if it was requesting a review for all Importers (i.e., for the "product as a whole").

V. Brazil's Arguments Regarding Mathematical Equivalency Are Wrong

34. The United States demonstrated in its first written submission that a general prohibition against the use of zeroing would reduce the second sentence of Article 2.4.2 to inutility because the result of a comparison under the second sentence would yield the same result as a weighted average to weighted average comparison under the first sentence of that article. Brazil argues that the Appellate Body has noted that a comparison under the second sentence may yield different mathematical results from comparisons under other provisions if only a subset of data is analyzed, *i.e.*, using only those export transactions that make up the pricing pattern envisioned by Article 2.4.2. However, this argument is not supported by the text of Article 2.4.2.

35. The second sentence of Article 2.4.2 describes the situation in which an asymmetrical methodology may be used. It does not establish a set of circumstances under which a Member may select a subset of export transactions. If the drafters had intended for Members to limit its analysis to a subset of export transactions, then presumably Article 2.4.2 would have said so. Instead, the text provides for an asymmetrical comparison methodology, using the same universe of export transactions as the other two methodologies.

36. Brazil's interpretation of the second sentence of Article 2.4.2 essentially requires that the Panel read words into that sentence that do not appear there. Moreover, inferring those words in that provision would allow that provision to be applied in a manner that is similar to other provisions explicitly provided in the AD Agreement, but without any of the safeguards or limitations that the drafters found appropriate when explicitly permitting the kind of analysis contemplated by Brazil. Consequently, Brazil's interpretation would be inconsistent with both the specific text of the second sentence of Article 2.4.2 and with the broader context provided by the AD Agreement.

VI. There Is No Violation When "Zeroing" Has No Impact

37. At the first substantive hearing, the United States explained that, even if Brazil were able to prove that a denial of offsets for non-dumped transactions was part of a particular dumping margin calculation, there could be no violation in the instances where there was no impact on the calculated dumping margin. Brazil argues that the "use" of zeroing is the violation, regardless of the impact. However, Brazil is wrong because when no duties are assessed, there can be no violation of any obligation not to assess duties in excess of the margin of dumping. Consequently, there can be no violation with respect to Fischer in the second administrative review (in which the dumping margin was zero).

38. It is worth noting in addition that, with respect to the perceived difference between the "use" and the "impact" of "zeroing," Brazil appears to suggest that all that matters for purposes of finding an inconsistency with the covered agreements is that the "zeroing" line appear in the relevant calculation program. However, the "zeroing" line does not operate where there are no non-dumped sales. In those circumstances – as in the orange juice investigation – the calculations and comparisons made are exactly those that would have been made even if the "zeroing" line were not there.

VII. Brazil's Claims With Respect to "Continued Use" Fail

39. The United States explained in its first written submission and in its oral statements at the first meeting with the Panel why Brazil's "continued use" claim is not a measure that may be subject to dispute settlement. Brazil's response to the U.S. request for preliminary rulings, and its statements at the first meeting with the Panel, demonstrate this point further. They underline that Brazil seeks to obtain adverse findings against specific measures that do not exist, based on evidence of past conduct that does not demonstrate a violation of any obligation.

40. It is worth noting in light of Brazil's comparison of its "continued use" measure to an "as such" measure that a challenge to an "as such" measure requires certain evidentiary showings that Brazil has not offered here. Instead, the challenge to this alleged "measure" ignores the fact that any "use" of "zeroing" can only occur in individual "as applied" measures and tries to include an indefinite number of future individual measures that do not and may never exist. The Panel cannot analyze such measures, because there are no facts about them to analyze. In addition, presumably, if Brazil is challenging the "continued use" as a measure, such measure would cease to exist if at any point "zeroing" is not used in a particular individual determination – but Brazil's argument requires the Panel to assume that it will be used. Any recommendation with respect to a future measure would need to be conditioned on the use of zeroing, but there would be no mechanism to determine if zeroing were in fact used in any individual proceeding. In addition, under Article 4.2 of the Dispute Settlement Understanding ("DSU") a measure must be "affecting" the operation of a covered agreement, and a measure that does not exist cannot be "affecting" the operation of an agreement.

41. Brazil relies heavily upon the Appellate Body's findings in *US – Continued Zeroing (EC) (AB)* in support of its arguments that the "continued use" of "zeroing" is a measure that is subject to dispute settlement and WTO-inconsistent. Even aside from the fact that "continued use" is not properly within the Panel's terms of reference, the reasoning in that report does not support a similar finding in this case because this case is more similar to the cases in which the Appellate Body declined to find a "continued use" violation.

42. Contrary to Brazil's claim, the United States does not suggest that the Appellate Body created a specific standard for finding a "continued use" violation. But in light of Brazil's insistence that the findings in that dispute supported its claim, we noted that the Appellate Body found an inconsistency only in circumstances that included the use of the zeroing methodology in the initial less than fair value investigation, the use of the zeroing methodology in four successive administrative reviews, and reliance in a sunset review upon rates determined using the zeroing methodology. We further explained that the Appellate Body declined to find a violation in 14 other cases that had facts more similar to this case. Brazil claims that the reason the Appellate Body declined to find a violation in most of the cases before it was that the evidence of zeroing was "fragmented" in those cases. However, continuity was only one aspect of the Appellate Body's analysis. In taking a cautious approach, the Appellate Body found a violation only 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." That is not the case here.

43. Brazil argues that, regardless of whether the zeroing methodology had any impact, its presence in the program is evidence of a violation. However, if the zeroing methodology has no impact, there can be no lesser dumping margin that could have been calculated and there could be no lesser duty assessed. It is not reasonable to find that a measure that is not itself WTO-inconsistent – for example, the original investigation in the orange juice case, in which Brazil's own evidence shows there were no non-dumped sales that could have been "zeroed" – can, nevertheless, be evidence of an ongoing and continuing violation. Even if Brazil's factual allegations were true and the zeroing line was present in each of the calculation programs at issue, Brazil has not shown the application of "zeroing" in "a string of determinations, made sequentially. . . over an extended period of time." At most it would have shown that "zeroing" applied to one company in one proceeding that is within this Panel's terms of reference, covering a one year period, *i.e.*, Fischer in the first administrative review.